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"Fair" in the Future? Long-Term Limitations of the Supreme Court's Use of Incrementalism in Fair Use Jurisprudence

Jonathan Alexander Fisher*

April 2021 marked the most recent instance of the Supreme Court discussing copyright law, and more specifically fair use, in Google LLC v. Oracle America, Inc. *The April 2021 decision notably resolved the case solely on fair use grounds, avoiding a difficult question as to the copyrightability of computer code that generates software user interfaces. By resolving this specific case in this manner, the Supreme Court's actions seemingly confirm a pattern among fair use cases in which rulings made "narrowly" on the unique factual predicate often produce unclear applications within the "broader" context of fair use. Given the flexible, judge-made origins of the doctrine, each case acts as a guidepost within the "broader" doctrine.*

This Comment explores how the "narrow" rulings, likely made to account for the Court's institutional ideals, including incrementalism, may lead to these later fair use limitations. By exploring three fair use cases, this Comment aims to opine on the purported pattern of limitations by highlighting both the soundness of the rulings at their then-present decisions, and within more modern

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contexts. This Comment also proposes how a conscious shift in an opinion's scope to include more information on how to apply the then-present case as "broader" guideposts within fair use may solve the limitation issues. This Comment finally evaluates this expanding scope against other possible mechanisms of understanding both application of legal principles to novel scenarios and to other potential fair use solutions.

INTRODUCTION: THE SUPREME COURT, INCREMENTALISM, AND FAIR USE LIMITATIONS

In April 2021, the Supreme Court held in *Google LLC v. Oracle America, Inc*. that Google's copying of approximately 11,000 lines of application programming interface ("API") code from the Java programming language into its Android operating system qualified as fair use.[1] In doing so, the Supreme Court chose not to answer whether software user interfaces are copyrightable—a question presented for the Court's review.[2] Instead, the Court assumed the interfaces were copyrightable (thus avoiding the first question presented), partly because of "rapidly changing . . . circumstances" related to technology.[3] In dissent, Justices Thomas and Alito criticized the majority for its failure to address the copyrightability question and disagreed with the distinction used to resolve the fair use claim.[4]

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1 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021). *See also* Brent Kendal & Tripp Mickle, *Google Wins Multibillion Dollar Copyright Fight with Oracle in Supreme Court*, WALL. ST. J., https://www.wsj.com/articles/supreme-court-rules-for-google-in-multibillion-dollar-copyright-battle-with-oracle-11617632233 [https://perma.cc/M6WQ-3NAL] (Apr. 5, 2021, 5:14 PM).

2 *Oracle*, 141 S. Ct. at 1197.

3 *Id.*

4 *Id.* at 1212–14 (Thomas, J., dissenting).

As fair use is an affirmative defense,[5] the Court's ruling ended a long-standing lawsuit among the parties in Google's favor.[6]

The *Oracle* decision, alongside other fair use cases, seemingly contains a pattern whereby the Supreme Court's resolution of fair use cases offers limited guidance to the copyright doctrine of fair use as a whole. Copyright law aims to incentivize artists to create original works of authorship—providing economic benefits flowing from holding limited monopolies in their works.[7] Copyright is based both in statutes and judge-made law but has been amended by statute, both incrementally and revised on a larger scale.[8] Fair use is a judicial doctrine merely codified by statute, articulating a four factor test.[9] The Supreme Court's interpretations of the copyright statute[10] simultaneously provide lower courts with general principles for fair use analyses and flexibility for the fact-specific nature of the inquiry.[11]

On one hand, a pattern of limited guidance toward the doctrine at large is unsurprising given the Supreme Court's underlying institutional ideals, including the doctrine of *stare decisis* and only

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5 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

6 Kendal & Mickle, *supra* note 1. The Federal Circuit later acknowledged the suit's end, remanding the case to the district court to ultimately rule in Google's favor. Oracle Am., Inc. v. Google LLC, 847 F. App'x 931 (Fed. Cir. 2021). For more on Oracle's procedural history, see *infra* Part I.E.

7 For an in-depth discussion on copyright law's incentives, see *infra* Part I.B.

8 For an example of incrementalism by Congressional revision to copyright law, see Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified as amended in scattered sections of 17 U.S.C.) (establishing specialized Copyright Royalty judges in place of arbitration panels). For examples of Congressional rewrites, see the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified as amended in scattered sections of 17 U.S.C.) ("moderniz[ing] copyright law," per its synopsis, by revising music license statutory framework, among other things) and the Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No.116-260, § 212, 134 Stat. 1182, 2176 (2020) (codified as amended at 17 U.S.C. §§ 1501–1511) (revising copyright litigation options). For more information on the major revisions to copyright law, see *infra* Part I.A.

9 For more information, see *infra* I.C.

10 *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

11 For more information, see *infra* Part I.C.

resolving cases and controversies. Court commentators[12] and academics[13] discuss notable decisions as well as higher-level trends and patterns, such as those in the "Roberts Court."[14] In 2010, commentator Adam Liptak noted that the Roberts Court tends to issue longer, wordier, unanimous, and, perhaps, less clear opinions.[15] For example, a decision on a narrow issue totaled 47,000 words.[16] The Court has long viewed that its institutional task, as stated in *Marbury v. Madison*, is to "say what the law is."[17] *Marbury* established the Supreme Court's power of judicial review of legislative, executive, and lower court decisions before them.[18] As its word is virtually final,[19] the Court's decisions should balance both resolving the issue at hand and expounding overall guidance for later cases, regardless of whether the Court decides the issue "narrowly" or "broadly."[20] One difficulty in achieving this balance is the Court's constitutionally derived principle of avoiding advisory opinions.[21] As such, the Court can still invoke guidance gradually, using its discretion to change the law under the theory of incrementalism.[22]

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12 *See, e.g.*, Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), https://www.nytimes.com/2010/11/18/us/18rulings.html [https://perma.cc/T5SC-N9QC].

13 For examples of general legal academia referencing the "Roberts Court," see generally Lee Epstein, *Judicial Behavior of the Roberts Court*, 54 WASH. U. J.L. & POL'Y 1 (2017); Thomas M. Hardiman, *Judicial Independence and the Roberts Court*, 2019–2020 CATO SUP. CT. REV. 15 (2020); Slade Mendenhall & Brian Underwood, *To Sever or Not to Sever: Mixed Guidance from the Roberts Court*, 69 DRAKE L. REV. 273 (2021); Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021).

14 The Supreme Court is frequently referred to by the then-sitting Chief Justice's last name (e.g., "Rehnquist Court," "Roberts Court"). *See* Epstein, *supra* note 13, at 1 (citing Thomas W. Merill, *The Making of the Second Rehnquist Court*, 47 ST. LOUIS. U. L.J. 569, 569–70 (2003)).

15 Liptak, *supra* note 12.

16 *Id.*

17 Marbury v. Madison, 5 U.S. 137, 177 (1803).

18 *See The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/8FEK-MJNB].

19 *Id.*

20 For an academic discussion of "narrow" judicial decisions to contextualize precedent in the Roberts Court, see generally Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014).

21 *The Court and Constitutional Interpretation*, *supra* note 18.

22 Incrementalism is a public policy theory invoking gradual change by interacting and mutually adapting to significant changes over time through multiple, more minor, changes.

On the other hand, incremental concerns, and correspondingly narrow decisions, may insufficiently clarify the law, let alone facilitate its change. In *Oracle*, the Supreme Court subverted an opportunity to provide needed guidance and clarification on the question of copyrightability, instead focusing on fair use.[23] The Court left questions and concerns about the intersection of functionality and abstraction[24] unanswered. Complex areas of fair use, such as appropriate emphasis of transformative use and potential market harm,[25] receive potentially limited analyses. Accordingly, to preserve a consistent application of the legal doctrine, lower courts are less likely to apply the case to similar legal issues with distinguishable—yet relevant—facts.

Even with narrow fair use decisions and a flexible doctrine,[26] judicial opinions may lead to many "narrow" solutions—not "broad" unifying principles. Federal judges tasked with applying the Supreme Court's precedential guidance note that these extended, complex, near-unanimous opinions provide insufficient guidance for judges.[27] As the Court rarely grants *certiorari* on copyright disputes, it infrequently speaks on copyright law, including fair use.[28] Even when the Court speaks, its narrowing tendencies may appear

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See Michael T. Hayes, *Incrementalism*, ENCYC. BRITANNICA, https://www.britannica.com/topic/incrementalism [https://perma.cc/4K9U-P8D2]; Robert Longley, *What Is Incrementalism in Government? Definition and Examples*, THOUGHTCO., https://www.thoughtco.com/what-is-incrementalism-in-government-5082043 [https://perma.cc/X7YD-6SXH] (Oct. 14, 2020).

23 *See generally* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021).

24 For more information on the pre-*Oracle* background discussing these concerns, see *infra* Part I.D.

25 For more information on *Oracle*'s arguments and difficult analysis, see *infra* Parts I.E, II.C.

26 As discussed in *infra* Part I.C, fair use as a legal doctrine is afforded flexibility given its fact-specific nature.

27 *See* Liptak, *supra* note 12.

28 The four primary cases discussed in this Comment—Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021)—are all Supreme Court fair use cases from the last thirty years and represent a significant number of the Court's overall copyright cases heard in that period.

explicitly in the fair use context.[29] *Oracle* only begins the narrow decision point—the fair use analysis—in the latter half of the opinion.[30]

When addressing the fair use doctrine, discussing a case and its application more broadly would likely provide long-term, incremental guidance in concert with our legal system's reliance on precedent and *stare decisis*.[31] However, current fair use precedent leaves questions unanswered and inadequately balances narrow rulings with broad doctrine; as a result, there is incohesive case law that hinders the doctrine's goal—flexibility, equity, and sensitivity to unique factual applications.

This Comment analyzes the intersection of copyright's flexible fair use doctrine with the principles of incrementalism at the heart of the Supreme Court's writings. Specifically, this Comment posits that among the Supreme Court's fair use jurisprudence, the limitations of each decision, though rightly decided at the time, create unclear applications of the decisions' fair use principles through a modern lens. In doing so, a lack of clarity and guidance for future opinions may lead to negative long-term effects on the overall fair use doctrine. After analyzing this pattern, this Comment opines on using broader guidance as a potential solution, without devolving the opinion into one that is merely advisory in nature and evaluating its likelihood of success.

Part I of this Comment provides a general copyright primer, an explanation of the tension between copyright and software, and a summary of *Oracle*'s complex technical and legal history. Part II explores the posited pattern through *Sony Corporation of America v. Universal City Studios, Inc.*,[32] *Campbell v. Acuff-Rose Music, Inc.*,[33] and *Oracle*. It reviews these cases through a "present lens," discussing the logic, remaining questions, and limitations of the

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29 Two cases, *Sony* and *Oracle*, acknowledge the narrowness of their rulings. *See Sony*, 464 U.S. at 431 (discussing a need to be circumspect); *Oracle*, 141 S. Ct. at 1197 (Justice Breyer noting the Court will "not answer more than is necessary to resolve the parties' dispute.").

30 *Oracle*, 141 S. Ct. at 1201.

31 *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

32 464 U.S. 417 (1984).

33 510 U.S. 569 (1994).

Court's opinions. Part II also addresses the application of fair use principles and their limitations to modern technology and prior fair use cases through a "future lens." Part III opines on "future lens" of *Oracle* and how broader guidance, if even slight, may break this pattern and benefit the fair use doctrine as a whole. To explore this argument's limitations, it evaluates three views on resolving intellectual property questions—two specifically regarding fair use—against broader guidance, then provides a brief conclusion.

I. BACKGROUND: COPYRIGHT, FAIR USE, SOFTWARE, AND *ORACLE*

A. A Brief History of U.S. Copyright Statutes

U.S. copyright law derives from the Intellectual Property Clause ("IP Clause"), a Constitutional provision granting Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[34] The first Copyright Act became effective in 1790.[35] The law was revised many times in the eighteenth century,[36] while the first copyright decisions in the nineteenth century provided additional contours to the law.[37] For example, ideas were declared uncopyrightable in *Baker v. Selden*[38]—an important principle in the *Oracle* opinion and the greater software context.

Two particularly relevant statutory amendments are the Copyright Act of 1976,[39] and the Computer Software Copyright Act of 1980.[40] The Copyright Act established modern copyright law,

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34 U.S. CONST. art. 1, § 8, cl. 8.

35 *See* Eldred v. Ashcroft, 537 U.S. 186, 230–40 (2003) (Stevens, J., dissenting) (discussing history of Copyright Act amendments, albeit through the lens of duration).

36 *Id.*

37 *See Timeline: The 19th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_19th_century.html [https://perma.cc/C9HC-5AM6].

38 *See id.* (discussing *Baker v. Selden*). For more on the dichotomy established in the case, see discussion in *infra* notes 52–53 and accompanying text.

39 *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

40 Computer Software Copyright Act of 1980, Pub. L. No. 96-517, § 10(a), 94 Stat. 3015, 3028.

including codifying fair use as a defense in Section 107.[41] Although the Computer Software Copyright Act inserted "computer program" as a term in the Copyright Act,[42] its definition is not explicitly part of copyrightable subject matter defined in Section 102(a),[43] a key statutory provision for copyright protection.

B. Copyright Basic Requirements and Established Rights

Copyright protects original works of authorship fixed in tangible mediums of expression.[44] Originality is a low bar, merely requiring works contain a minimal degree of creativity—some "creative spark" the author independently conceived.[45] Section 102(a) enumerates eight copyrightable subject-matter categories—including literary, musical, and audiovisual works—to guide courts' applications of copyright law.[46] Computer code, for example, is a literary work[47] while also separately part of Section 101's "computer program" definition.[48] The fixation prong requires a work be fixed be for more than a transitory duration.[49] Section 102(b) notes that only creative expressions are protected; not ideas, processes, methods of operation, or concepts.[50] This idea-expression dichotomy led courts to establish the merger doctrine, whereby an expression is

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41 *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

42 *See* Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 260 (5th Cir. 1988) ("In 1980, Congress enacted the Computer Software Copyright Act which adopted the recommendations contained in the CONTU Report."); *see also* H.R. REP. NO. 96-1307, pt. 2, at 6506 ("Subsection 10(A) Adds a Definition of 'Computer Program' [sic] [to] Section 101 Of Title 17, United States Code").

43 *Compare* 17 U.S.C. § 101 (defining "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."), *with id.* § 102(a).

44 *Id.* § 102(a).

45 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

46 *See* 17 U.S.C. § 102(a).

47 *See id.* § 101 (defining literary work in part as works of "words, numbers or other verbal or numerical symbols or indicia").

48 *See id.* §§ 101, 102.

49 *Id.*

50 *Id*. § 102(b).

considered to have "merged" with the underlying idea, and thus no copyright protection applies.[51]

Those who comply with Section 102(a) become copyright owners of their works.[52] Before the provision's codification, additional requirements were necessary to receive copyright protection, such as placing the copyright symbol on a work.[53] Copyright owners receive a bundle of six exclusive rights, including the right to control reproductions, derivative works, and displays of a work.[54] Under the current Copyright Act, works receive protection for the author's life plus seventy years after death (though corporate owners may receive nearly double the time in certain circumstances).[55]

C. What Is Fair Use? A Brief History and an Example Analysis

Fair use is an affirmative defense under the Copyright Act.[56] Fair use originates in *Folsom v. Marsh*,[57] where Justice Story established factors that "look[] to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[58] As codified, the statutory

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[51] *See* Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967) (holding sweepstakes rules to be so straightforward and limited in variation that copyright would exhaust all variants and barring protection under the merger doctrine). Since the case of *Baker v. Selden*, the principle that only expression is copyrightable, not the ideas, has become a fundamental aspect of copyright law, rooted in the Intellectual Property Clause. Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1037–38 (9th Cir. 2015).

[52] Copyright may also vest in an employer under a work made for hire. *See* 17 U.S.C. § 201(b) (detailing the carve-out and vesting requirements for works made for hire). Copyright may also be licensed or assigned. *Id.* § 201(d).

[53] The 1976 revisions removed formalities previously required to vest copyright, such as visible copyright registration. *See* Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.). Registration remains required, however, for copyright infringement lawsuits. *See* 17 U.S.C. § 412 (requiring registration as a prerequisite), *id.* § 501 (noting only the valid owner may sue or infringement).

[54] *See* 17 U.S.C. § 106.

[55] *See* Peter B. Hirtle, *Copyright Term and the Public Domain in the Unites States*, CORNELL UNIV. LIBR. (Jan. 4, 2022), https://copyright.cornell.edu/publicdomain [https://perma.cc/C4KN-K5AF].

[56] Dr. Seuss Enters., LP v. ComicMix, LLC, 983 F.3d 443, 459 (9th Cir. 2020) (clarifying fair use applies as an affirmative defense).

[57] 9. F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

[58] *Id.* at 348; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

preamble notes that use of a work is not infringement if its purpose is educating, criticizing, commentating, or for research.[59] Using similar factors, the Section 107 fair use provision focuses on: (1) the purpose and character of use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the allegedly infringing work in relation to the copyrighted work as a whole; and (4) the effect of the allegedly infringing use on the copyrighted work's market.[60]

In the Copyright Act's legislative history, Congress emphasized that Section 107 merely codifies existing judicial doctrine, allowing the fair use determination to remain flexible and fact specific.[61] Courts interpret the factors as balancing an "equitable rule of reason."[62] As such, the fair use limitation acts as an affirmative defense in copyright infringement suits and can absolve an alleged infringer's conduct.[63]

Harper & Row Publishers, Inc. v. Nation Enterprises[64] exemplifies Congress' history of amending copyright law in response to judicial opinions. *Harper* concerned a news organization that leaked former President Gerald Ford's memoir, including a key passage discussing Ford's pardon of former President Richard Nixon.[65] The district court found that fair use did not apply, in part because the news organization copied the "heart" of the work.[66] However, the Second Circuit reversed, finding the news organization only minimally copied the memoir.[67] The Supreme Court reversed and remanded the Second Circuit's decision, finding no fair use for the leak and subsequent use in a news article.[68]

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59 17 U.S.C. § 107.

60 *Id.*

61 "[N]o generally applicable definition [of fair use] is possible, and each case raising the question must be decided on its own facts." H.R. REP. NO. 94-1476, at 65 (1976). "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." *Id.* at 66.

62 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984).

63 *See* 17 U.S.C. § 107; *see also* Dr. Seuss Enters., LP v. ComicMix, LLC, 983 F.3d 443, 459 (9th Cir. 2020) (clarifying fair use application as an affirmative defense).

64 471 U.S. 539 (1985).

65 *Id.* at 542–43.

66 *Id.* at 544.

67 *Id.* at 544–45.

68 *Id.* at 549, 569.

As to the first fair use factor, the Court found the news organization's purpose was to provide the news "scoop," but that its unauthorized first publication went beyond the scope of news reporting, weighing against fair use.[69] As to the second factor, the nature of the copyrighted work—an unpublished literary manuscript—was worthy of dissemination; however, even though the news organization provided factual snippets related to its news reporting function, doing so does not deprive the copyright owner's creative control over the first publication of the memoir.[70] The third factor also weighed against fair use—the quotes used in the news article (accounting for roughly thirteen percent of the article) represented the "heart" of the memoir, not merely an insubstantial section.[71] Finally, the plaintiff suffered sufficient market harm when, as a result of the leak, *Time Magazine* cancelled its contract to be the exclusive publisher of an excerpt from the memoir.[72] After *Harper*, Congress amended the Copyright Act in 1992 to state that unpublished works are not *per se* barred from fair use, but that publication creates a presumption against a finding of fair use.[73]

While fair use is an affirmative defense, it's application appears to be enormously misunderstood. For example, many people post copyrighted content on YouTube and other websites, merely noting credit alongside a statement of fair use—this process is improper.[74] Since fair use is a defense, a lawsuit (or copyright takedown notice) must be brought to court (or served on the content host) to invoke it.[75]

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69 *Id.* at 561–62.

70 *Id.* at 563–64.

71 *Id.* at 564–66.

72 *Id.* at 566–67.

73 H.R. REP. 102-836, at 9 (1992).

74 *See Frequently Asked Questions About Fair Use*, YOUTUBE HELP, https://support.google.com/youtube/answer/6396261?hl=en&ref_topic=2778546 [https://perma.cc/LJ79-EKVK] (discussing credit practices).

75 *See id.*; *see also Fair Use on YouTube*, YOUTUBE HELP, https://support.google.com/youtube/answer/9783148?hl=en&ref_topic=2778546#zippy=%2Cexamples-of-youtubes-fair-use-protection [https://perma.cc/2GES-GRB9] (noting fair use analysis is necessary prior to copyright takedown notice).

D. The Problem with Computer Software User Interfaces and Copyright

Though software functionally directs a computer to act, it is still considered a protected literary work.[76] Computer code's functional aspects could be viewed as "processes" or "ideas," rendering them uncopyrightable under the idea-expression dichotomy and merger doctrine.[77] *Oracle* was the latest case facing this tension, specifically for user interfaces.[78] The three following cases provide a foundation for the copyrightability question that *Oracle* ultimately left unanswered.

First, the Third Circuit's opinion in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc*.[79] controversially[80] held that a computer code's sequence, structure, and organization ("SSO") is copyrightable separate from the code itself.[81] Specifically, code that only addresses a high-level purpose or idea (e.g., the overarching management of a dental office) is not copyrightable due to the idea-expression dichotomy bar; however, all remaining expressions (including the SSO) are protected.[82] Notably, SSO is separate from

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[76] *Id.*; *see also supra* Part I.B.

[77] Copyright protects expressions of idea, but not the ideas themselves. 17 U.S.C. § 102(b). A computer can only read "machine code" (mentioned later in this section), also known as binary code. Binary code signals are electrical pulses which can represent operations to be performed by a computer. *See Binary Code*, ENCYC. BRITANNICA, https://www.britannica.com/technology/binary-code/ [https://perma.cc/VD39-SAD5]. As such, one can argue that since the code is directing the electrical signals that drive a computer, the code circuitously is functional or a process and then is not copyrightable. It would be circuitous, however, as the code itself is comprised of electrical signals. Given the presence of a "computer program" definition in 17 U.S.C. § 101, as discussed with text accompanying *supra* notes 47–48, it seems likely that Congress intends to look past any functional concerns toward its creative literary properties and provide protection.

[78] User Interfaces are pieces of software allowing a computer user to interact with a computer's operating system. *See User Interface*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/user%20interface [https://perma.cc/YB2G-YXRS].

[79] 797 F.2d 1222 (3d Cir. 1986).

[80] Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 705 (2d Cir. 1992). The Second Circuit noted that *Whelan*'s rule had a "mixed reception," especially in the academic community while offering one justification for affirming the district court below was for properly *not* applying the *Altai* rule to the case at bar. *Id.*

[81] *Whelan*, 797 F.2d at 1237–39.

[82] *Id.* at 1240.

both *source code*, written by the programmer, and the resulting *object code*, read by the computer—both source and object codes are already protected by copyright.[83] The fact that a program's SSO can be expressed in multiple ways for the same purpose also gave credence to protecting SSO like other copyrightable expressions.[84]

Next, in *Computer Associates International, Inc. v. Altai, Inc*., the Second Circuit rejected *Whelan*'s three-step test to determine which computer code is afforded copyright protection.[85] The first step instructs courts to dissect the code into modules at differing levels of abstraction, ranging from specific expressions to unprotectable high-level ideas.[86] Next, other non-original elements, such as code that is functional, subject to the merger doctrine, or currently unprotected by copyright, are filtered away.[87] Finally, the code is compared against the original work, including its SSO, for substantial similarity to support a copyright infringement claim.[88] The *Altai* court affirmed that there was no copyright infringement, noting the district court's test was similar to its own formulation.[89]

Third, the Court in *Oracle* referenced the First Circuit's holding in *Lotus Development Corporation v. Borland International, Inc.*[90] Like *Altai* and *Whealan*, the district court found defendant Borland liable for copying the protected SSO of the user interface in question.[91] The First Circuit reversed, holding that the software user interface code was an uncopyrightable "method of operation," similar to the button structure of a VCR, and thus barred by Section 102(b).[92] The Supreme Court affirmed by an equally divided court.[93] Concurring in the judgment, Circuit Judge Boudin raised two key points that reappeared in *Oracle*. First, Judge Boudin noted the

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83 *Id.* at 1233.

84 *See id.* at 1238.

85 *Computer Assocs. Int'l, Inc*., 982 F.2d at 705–11.

86 *Id.* at 706–07.

87 *Id.* at 707–10.

88 *Id.* at 710–11.

89 *Id.* at 715.

90 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198, 1201, 1208 (2021) (citing Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995)).

91 *Lotus*, 49 F.3d at 810–11.

92 *See id.* at 816.

93 Lotus Dev. Corp. v. Borland Int'l, Inc., 516 U.S. 233, 233 (1996).

challenging intersection of copyright and software.[94] Second, he raised a concern that finding infringement brings about a "lock-in" cost, as programmers must re-learn new software instead of interoperating among platforms.[95] He also argued for "privileged" copying in these types of cases to account for compatibility with prior programs' user interfaces and the time and effort to learn and apply other programs.[96]

E. Oracle *in Detail: Factual and Procedural Posture*

In 1995, Sun Microsystems publicly released Java's source code for non-commercial use.[97] The release aimed to promote interoperability across technology devices using a marketing tagline, "write once, run everywhere."[98] The release included various APIs, which allow third-party programmers to integrate existing language functions and data into their codes.[99]

Specifically, an API's specification and documentation provides programmers with existing code, including the "method" or "call," to have the language run the task alongside the acceptable inputs and corresponding outputs.[100] In other words, an API shows how a programming language processes inputs for each method (or multiple-method subroutine)[101] when the "call" to insert the code is run; the programmer simply types the "call," like a keyboard shortcut, rather

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94 *See Lotus*, 49 F.3d at 819–20 (Boudin, J., concurring).

95 *Id.* at 821.

96 *See id.*

97 *See What Is Java Technology and Why Do I Need It?*, JAVA, https://www.java.com/en/download/help/whatis_java.html [https://perma.cc/HLX8-RT7A]; *see also* Oracle Am., Inc. v. Google, Inc., 750 F.3d 1339, 1350 (Fed. Cir. 2014) (discussing non-commercial release).

98 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1190 (2021).

99 *See id.* at 1191; *see also* Kin Lane, *Intro to APIs: What Is an API?*, POSTMAN (Oct. 5, 2020), https://blog.postman.com/intro-to-apis-what-is-an-api/ [https://perma.cc/4ZHM-D6BU] (noting API's share data among systems and devices, integrating systems together, and speeding up software development).

100 *Oracle*, 141 S. Ct. at 1191. *See also What is API: Definition, Types, Specifications, Documentation*, ALTEXSOFT (July 28, 2021), https://www.altexsoft.com/blog/engineering/what-is-api-definition-types-specifications-documentation/ [https://perma.cc/VA6J-NWWE]; Oracle Am., Inc. v. Google, Inc., 750 F.3d 1339, 1349 (Fed. Cir. 2014) (noting Java's term for API function is "method").

101 *See* Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974, 979–80 (N.D. Cal. 2012), *rev'd and remanded*, 750 F.3d 1339 (Fed. Cir. 2014).

than the underlying code.[102] Inserting the call into source code includes the complete method code when compiling and executing.[103]

For example, *Oracle*'s written opinion,[104] briefs,[105] and oral argument questions[106] use the example "Java.lang.Math.max" to illustrate an API's structural components. The programming language contains millions of lines of code (e.g., "Java"),[107] organized by "packages" (e.g., "lang") of code that contain "classes" (e.g., "Math") of methods (e.g., "max").[108] Together, this is "declaring code," akin to a filing or organization system.[109] The code attached to Java.lang.Math.max is the implementing code, and the API explains to programmers how the function checks inputs, returns the greater value, and uses instructions within their codes.[110] Finally, the computer runs the actual implementing code, not the declaring code.[111] By typing the "call" of Java.lang.Math.max and any other information detailed by the API, the computer will run the implementing code with those inputs.[112]

Between 2006 and 2010, Google approached Sun (predecessor to Oracle) to use Java's method calls in its Android mobile operating system.[113] After four attempts to license the declaring code, Google crafted a new, mobile-device-focused implementing code and copied *verbatim* roughly 11,000 lines of Java declaring code.[114] Specifically, these were the "Core Java Libraries" essential to running the

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102 *Oracle*, 872 F. Supp. 2d at 980.

103 *See* Firouzeh Hejazi, *How to Call a Method in Java*, JAVACODEGEEKS (Dec. 26, 2019), https://examples.javacodegeeks.com/how-to-call-a-method-in-java/ [https://perma.cc/9KJX-Z5QD].

104 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1193 (2021).

105 Brief for Petitioners at 5–6, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

106 Transcript of Oral Argument at 14–16, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

107 *Oracle*, 141 S. Ct. at 1191–93.

108 *Id.* at 1193.

109 *Id.*

110 *See id.* at 1193–94.

111 *See id.* at 1210.

112 *See* Hejazi, *supra* note 103.

113 *Oracle*, 141 S. Ct. at 1190.

114 *Id*. at 1212 (Thomas, J., dissenting).

program and accepting pre-existing Java method calls.[115] The case first went to trial in 2012,[116] resulting in a jury verdict finding Google liable for copyright infringement but deadlocked on the fair use issue.[117] In a post-trial order, trial judge William Alsup implicitly overruled the jury by holding the code in question functional, just like *Borland*.[118] Citing the SSO approaches of *Whelan* and *Altai*, the Federal Circuit reversed the copyright infringement finding and remanded for a new trial focused on fair use.[119] Before the second trial began, the Supreme Court denied Google's first petition for *certiorari*.[120]

At the second trial, the jury found that Google's copying was fair use;[121] however, the Federal Circuit reversed.[122] There, the Circuit panel found that every fair use factor weighed against Google and rejected arguments of transformative use and interoperability discussed *infra*.[123] The Supreme Court granted Google's second writ of *certiorari* in November 2019,[124] heard arguments in October 2020,[125] and issued its opinion in April 2021.[126]

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115 *Id.*

116 Judge Alsup divided the complex case into copyright claims, patent claims, and damages for ease of the judge and jury. Oracle Am., Inc. v. Google, Inc, 872 F. Supp. 2d 974, 975 (N.D. Cal. 2012), *rev'd and remanded*, 750 F.3d 1339 (Fed. Cir. 2014).

117 *Id.* at 976.

118 *See id*. at 1002 (holding no copyright for code, given factual elements of the case).

119 *Oracle*, 750 F.3d at 1348, 1378–79 (noting in the reversal that further factfinding is necessary).

120 Google, Inc. v. Oracle Am., Inc., 576 U.S. 1071 (2015).

121 *See generally* Oracle Am., Inc. v. Google, Inc., No. C 10-03561, 2016 WL 3181206 (N.D. Cal. June 8, 2016), *rev'd and remanded sub nom*., Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018), *rev'd and remanded*, 141 S. Ct. 1183 (2021), *and vacated in part*, 847 F. App'x 931 (Fed. Cir. 2021).

122 *See* Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1186 (Fed. Cir. 2018), *rev'd and remanded*, 141 S. Ct. 1183 (2021), *and vacated in part*, 847 F. App'x 931 (Fed. Cir. 2021).

123 *See id.* at 1196–210.

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

125 *See* Ronald Mann, *Case Preview: Justices to Weigh in on Landmark Copyright Battle Between Google and Oracle*, SCOTUS BLOG (Oct. 5, 2020, 3:03 PM), https://www.scotusblog.com/2020/10/case-preview-justices-to-weigh-in-on-landmark-copyright-battle-between-google-and-oracle/ [https://perma.cc/D4MY-MNV9].

126 Kendal & Mickle, *supra* note 1.

In their Supreme Court briefs, the parties agreed that Google could use the method call without implicating copyright issues.[127] However, the parties disagreed about whether copyright extended to the declaring code.[128] Google argued that reuse of the SSO/declaring code was necessary for interoperability reasons.[129] As such, the existing, copied declaring code, with new Android implementing code, resulted in new programming possibilities without learning a new method call for Android.[130] Google also argued that Java's reuse of prior programming constituted fair use under similar circumstances.[131] Finally, Google asserted that the merger doctrine should apply given there is only one way a computer responds to a method.[132]

Oracle disagreed, arguing that the organization of the code into classes and packages was a creative choice worthy of protection.[133] Oracle also argued that the numerous possibilities for writing the methods themselves are sufficiently creative to receive copyright protection.[134] Oracle claimed Google's merger doctrine argument was misplaced, as it was concerned only with choices upon creation, not copying.[135] Finally, Oracle claimed Google's commercial intent to make money and supersede Java in the software market rebutted any transformative notion of fair use.[136] While *Whelan*, *Altai*, and *Borland* could have informed the majority on potential resolutions to the copyrightability question presented in *Oracle*, the Supreme Court opted to focus its attention on the fair use issue.[137]

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127 *See* Brief for Petitioners at 22, 25–26, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

128 *Id.*

129 *Id.* at 38–39 (arguing good faith reliability of reuse for interoperability); *id.* at 45 (arguing transformative use).

130 *Id.*

131 *Id.* at 44–45.

132 *Id.* at 13, 18, 22–23 (discussing the merger doctrine).

133 *See* Brief for Respondents at 5–7, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

134 *Id.*

135 *Id.* at 28–30.

136 *Id.* at 39–43.

137 *See* Eileen McDermott, *Justices Look for Reassurance That the Sky Won't Fall When They Rule in* Google v. Oracle, IP WATCHDOG (Oct. 7, 2020), https://

II. THE INTERSECTION OF FAIR USE AND INCREMENTALISM: ANALYZING LAW AND A POTENTIAL PATTERN

This Comment has introduced the underlying principles of incrementalism as a critical role in the thought process of the Supreme Court and as a likely source of narrow decisions.[138] Part I provided the copyright and technological background to understand the fair use cases discussed herein.[139] This Comment now turns to the argument posited at its outset: among the Supreme Court's fair use jurisprudence lies a pattern of narrow decision-making, presenting limitations that may negatively affect a complete understanding and applicability of the doctrine.

Part II.A discusses *Sony Corporation of America v. Universal City Studios, Inc.*,[140] one of the first cases to focus on the intersection of technology and fair use. Part II.A.1 offers the "present-day" lens, noting how the decision turned on importing a patent law doctrine to copyright and congressional silence. Part II.A.2. extends the principles to modern concerns of recording technology and the vague limitations inherent in applying the principles. It also raises a related case, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd*.,[141] and its attempts to clarify *Sony*'s standard.

Part II.B discusses *Campbell v. Acuff-Rose Music, Inc.*,[142] a notable fair use case focused on music—unlike *Sony* and *Oracle*'s focus on technology—and its intersection with parody. Part II.B.1 provides the "present-day" lens to unpack new fair use principles key to the doctrine. Part II.B.2 raises concerns, again, in the parody context, but with a novel technological innovation. Part II.B.2 also highlights additional integration issues with *Sony*.

Finally, Part II.C delves into *Oracle*'s "present-day" lens. Part II.C.1 evaluates the fair use arguments raised by Justice Breyer for the majority, including an unusual analysis order. Part II.C.2

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www.ipwatchdog.com/2020/10/07/justices-look-reassurance-sky-wont-fall-google-v-oracle/id=126052/ [https://perma.cc/7FGX-TZYV]; *see also supra* Part I.D.

138 *See supra* Introduction.

139 *See supra* Part I.

140 464 U.S. 417 (1984).

141 545 U.S. 913 (2005).

142 510 U.S. 569 (1994).

highlights the concerns raised by Justice Thomas in his dissent (joined by Justice Alito). Together, these sections demystify the Roberts Court's view of fair use, especially in the challenging context of software. Part III will address the pattern posited here, *Oracle*'s future implications, and potential fair use concerns.

A. Sony v. Universal*: Time-Shifting, Fair Use, and Piracy*

Sony Corporation of America v. Universal City Studios, Inc. involved contributory liability for consumers' use of video recording technology in an allegedly infringing manner;[143] however, the subsidiary question of fair use resolved the case.[144] Consumers used Sony's device in part for "time-shifting" purposes—the practice of recording, watching, and later erasing television content.[145] First, this Part will analyze the decision for open questions and implications of the fair use considerations. Then, it will apply these thoughts to the technological evolution of recording content and *Grokster*, the Court's 2005 decision attempting to clarifying *Sony*.

1. *Sony* at "Present": From Staple Articles to Fair Use Factors and Congressional Silence

In *Sony*, Justice Stevens wrote for the majority without formally analyzing all four Section 107 factors.[146] Specifically, the Court found that watching a program later than it airs for a personal, non-commercial purpose and then erasing it, was presumed fair use.[147] The Court focused on there being no evidence of market harm.[148] Some private creators, including Fred Rogers of the television show *Mr. Rogers' Neighborhood*, supported time-shifting because it

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143 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984).

144 *Id.* at 447. For more information on the resolution, see *infra* Part II.A.

145 *Id.* at 421–23 (time-shifting). Note that time-shifting for religious, sports, and education programming are "authorized" uses per the opinion, but the "unauthorized" discussion is more pertinent to the fair use analysis. *See id.* at 443–47 (discussing authorized time-shifting); *id.* at 447–56 (discussing unauthorized time-shifting).

146 *Id.* at 455–56.

147 *Id.* at 451. Note that the Court overruled non-commercial use presumably fair in *Campbell*. For more information, see Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 583–85 (1994) as discussed on text accompanying *infra* note 182.

148 *Sony*, 464 U.S. at 451–53.

increased programming viewership.[149] These two factors pointed the Court to conclude that time-shifting constitutes fair use.[150] Additionally, the Court looked to patent law's staple article of commerce doctrine, holding that the recording devices at bar were capable of substantial non-infringing uses and, thus, supported a finding of fair use.[151] Given the use was fair, Sony was not contributorily liable.[152] The majority emphasized congressional deference, stating, "[i]n a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment . . . ," referring to the specific "calculus of interests" of fair use and contributory liability.[153]

Justice Blackmun, for the dissent, raised two key points. First, he asserted that applying patent law's staple article of commerce doctrine to time-shifting stretches the parameters of potentially non-infringing uses.[154] Because the majority held such conduct presumptively fair, content creators would lose control of copyright protection once Sony sold their time-shifting product.[155] Second, Justice Blackmun asserted that Congress considered and ultimately rejected the personal, non-commercial use presumption established by the majority.[156] The statute's silence on such a distinction evinces a clear congressional intent not to have such a separation.[157]

Stepping away from the text of the opinion itself, one could argue that the majority's approach aligns with the Court's desire for incrementalism. Starting with the "circumspect" notion of its ruling, the Court signaled that it was aiming for a "narrow," fact-specific decision, without clear guidance from the copyright statute. For

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149 *See id.* at 494 n.45 (Blackmun, J., dissenting) (noting Fred Rogers was the sole non-objector to unauthorized time-shifting). The majority opinion's reference to Fred Rogers occurs in the unauthorized time-shifting section and was focused on "authorized" programming, such as religious content, but his testimony was no objection to non-commercial use in general. *Id.* at 445.

150 *Id.* at 455–56.

151 *Id.* at 456. Patent law removes contributory infringement where there is (or can be) substantial non-infringing use of a "staple article of commerce." 35 U.S.C. § 271(c).

152 *Sony*, 464 U.S. at 456.

153 *Id.* at 431.

154 *Id.* at 480–81 (Blackmun, J., dissenting).

155 *Id.*

156 *Id.* at 481.

157 *Id.*

example, the majority's fair use analysis turns on the staple article doctrine borrowed from patent law.[158] In the patent context, a staple article must meet a "substantial," not "majority," standard for non-infringement.[159] While the "majority" standard requires over fifty percent of instances be non-infringing, the "substantial" standard only requires some large amount, but not necessarily the same majority threshold.[160] In doing so, the Court appears to have left the door open, as one would expect in an incremental decision, to perhaps later adjust the applicable standard for fair use as a defense to contributory liability claims, to that of the "majority" threshold, or potentially an even-lower standard. The Court seems to use its narrow, incremental viewpoint to resolve fair use questions related to contributory liability in new technologies—a distinct and limited context compared to all cases involving fair use and new technology. By contrast, the dissent's issue of prior congressional debate seems to indicate that even framing such a change as incremental is counter to the purpose of exchanging and iterating ideas for the better. Without a form of cabining, the exception could swallow the rule—the opposite of incremental change.

Returning to the opinion, the Court limitedly considered fair use. While the majority guided lower courts to use substantial non-infringing use, the fair use analysis is not the traditional four-factor test from the statute, nor is it reflective of the doctrine's historical development. The majority analyzed two traditional fair use factors but focused on justifying the implementation of a patent law requirement into the analysis.[161] The dissent similarly shifted from a traditional statutory analysis to merely putting forth a contrary presumption that substantial noninfringement is fair use.[162] Justice Blackmun even noted the difficulty in lacking guiding standards beyond a list of factors for such an important doctrine.[163] In the only significant

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158 *See id.* 480–81 (Blackmun, J., dissenting).

159 *See id.* at 475–77, 480–81 (Blackmun, J., dissenting).

160 *Compare Majority*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting "majority" is fifty percent or greater), *with Substantial*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting "substantial" is large, not necessarily fifty percent or more).

161 *See Sony*, 464 U.S. at 447–56 (discussing unauthorized time-shifting while integrating factors one and four into the analysis).

162 *See id*. at 475–86 (Blackmun, J., dissenting).

163 *Id.* at 475–77.

doctrinal shift proposed by the dissent, Justice Blackmun argued that if the majority's presumption was correct, the threshold to satisfy the fourth factor is lowered to merely requiring a potential of market harm rather than actual market harm.[164] Interestingly, *Campbell* implicitly overruled this view roughly one decade later.[165]

2. *Sony* in the Future: The Evolution of Home Entertainment and Piracy Concerns as Long-Term Limitations

The prior discussion illustrates the tension among the Court on how to best apply fair use to new technologies and the degree to which Congress should intervene. The majority's opinion does not address how technological evolution would square with substantial non-infringing uses nor the dissent's concern that such an exception would swallow the rule. The foregoing discussion identifies the unanswered questions when applying fair use to evolving recording technologies.

On a general level, Sony's then-novel videotape recording technology gave way to the modern DVD and Blu-Ray systems for home entertainment.[166] Applying *Sony*'s fair use principles, any new recording technology for home recordings is likely fair use, so long as most of its uses are substantially non-infringing. Since *Sony*, Congress amended the Copyright Act to focus on new technologies but never explicitly disagreed with *Sony*.[167] However, the dissent's concerns regarding levels of abstraction illustrate the difficulty of applying *Sony* beyond the initial generation of a technology. For example, Blu-ray discs are not always re-recordable like tapes used for time-shifting.[168] Applying *Sony* to this evolved recording

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[164] *Id.* at 482 (discussing the non-commercial presumption as unproductive use).

[165] Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 572–74 (1994); *see also* text accompanying *infra* note 178.

[166] *See The History of Home Movie Entertainment*, REEL RUNDOWN, https://reelrundown.com/film-industry/The-History-Of-Home-Movie-Entertainment [https://perma.cc/43QZ-YDYV] (Mar. 30, 2022).

[167] *See, e.g.*, Computer Software Copyright Act of 1980, Pub. L. No. 96-517, § 10(a), 94 Stat. 3015, 3018 (1980) (codified at 17 U.S.C. § 101) (adding a computer program to account for technology).

[168] *See Blu-Ray Disc Recordable Erasable (BD-RE)*, TECHOPEDIA, https://www.techopedia.com/definition/10434/blu-ray-disc-recordable-erasable-bd-re [https://perma.cc/K2KM-ZBB2].

technology poses several questions. First, questions arise as to how a limited-recording capability affects this rule. If consumers do not use re-recordable formats like many Blu-Ray discs, would this affect a determination of substantial-non-infringing use? In other words, perhaps part of why the narrow *Sony* rule works is its focus on erasable material like a videotape. While some evolutions, such as that from DVD to Blu-Ray, may offer advantages, the market's inclusion of once-recordable, yet evolved, media makes *Sony* harder to apply broadly. Second, should *Sony* be read to focus exclusively on television content? For example, could one record a radio broadcast for time-shifted listening in the evening? The rule offers little clarity, though the Supreme Court later spoke on time-shifting in the modern age of streaming.[169]

On a more specific level, neither Congress nor the Court could have predicted that online piracy—defined in the copyright context as unauthorized copying and distribution of copyrighted material[170]—would become so problematic. Content providers such as The Walt Disney Company and the plaintiff in *Sony* have long taken action to thwart online piracy.[171] In *Grokster*, the Supreme Court reviewed the *Sony* standard and unanimously held Grokster contributorily liable for spreading copyrighted material.[172] The majority's opinion merely held that the Ninth Circuit erred in applying *Sony* too broadly such that *any* substantially lawful use absolves liability.[173] The two concurrences seem to indicate the Court's confusion on the specific application of *Sony.* Justice Ginsburg's three-Justice concurrence argued there was no fair use under *Sony* and asserted

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169 The Court in *Am. Broad. Cos., Inc. v. Aereo, Inc*., 573 U.S. 431, 436 (2014), discussed this question in the streaming television context, ruling that the transmission capture company was liable for copyright infringement. The Court also merely raised from *Sony* that fair use can assist in deciding the limits of a transmit clause claim, without further discussion, and noted its limitation to only the technology before it. *See id.* at 449.

170 *See Copyright Piracy*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/copyright-piracy [https://perma.cc/3G3A-4RBN].

171 *See, e.g.*, Luke Bouma, *Disney Wants to Crack Down on Piracy Following the Launch of Disney+*, CORD CUTTERS NEWS (Nov. 17, 2019), https://www.cordcuttersnews.com/disney-wants-to-crack-down-on-piracy-following-the-launch-of-disney/ [https://perma.cc/3RFT-LUC2] (noting a Piracy Intelligence team and active responses as of 2019).

172 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005).

173 *Id.* at 933–34.

that the Ninth Circuit erred by relying on hearsay.[174] Justice Breyer's three-Justice concurrence believed *Sony* was clear and correctly applied based, in part, on similar time-shifting.[175]

Grokster's application of *Sony*'s principles to a similar context resulted in elusive guidance, and arguably two possible ways to view *Sony* in light of *Grokster*. On one hand, the limited guidance without congressional clarification continues from *Sony*; Justice Breyer's "rapidly changing . . . circumstances" comment from *Oracle*[176] seems to be a continuation of this idea. On the other hand, the Court could have justified its decision in 1984 more clearly—why import patent law, create a fairness presumption, and obliquely discuss two fair use factors to resolve these kinds of cases? The Court did provide guidance, even noting its limitations due to the Constitution's IP Clause and Congress' silence.[177]

These unanswered questions highlight how the Court's guidance from the 1980s insufficiently applies in the 2020s. Viewing *Sony* as a future-oriented opinion, additional advice outside the then-novel recording technology could have established appropriate contours to the flexible, open-ended future of the doctrine. Viewing *Sony* as a historically-based opinion of the era, the precedent appears limited to then-relevant video-recording technology, providing short-sighted guidance for evolving technologies.

B. Campbell v. Acuff Rose*: Transformativeness (and Parody) Questions*

Ten years after *Sony*, the Supreme Court decided *Campbell v. Acuff-Rose Music, Inc.*, which revolved around a rap group's use of musical and lyrical material from Roy Orbison's song, "Oh, Pretty Woman."[178] Specifically, the music (an opening bass riff) and lyrics ("pretty woman") were integrated directly into the parody song in question.[179] The Court held the song as a parody and sufficiently

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174 *Id.* at 945–46 (Ginsburg, J., concurring).

175 *Id.* at 952–55 (Breyer, J., concurring). To quote Sony's own language, the technology was more than capable of the substantially non-infringing use. *Id.*

176 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021).

177 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440–42 (1984).

178 510 U.S. 569, 572–74 (1994).

179 *Id.*

transformative for fair use.[180] First, the foregoing discussion analyzes the unanimous opinion[181] and identifies aspects of the fair use analysis that leave questions unanswered. It then discusses *Campbell*'s implications on the fair use doctrine and uses the recent "deepfake" technological phenomenon to illustrate *Campbell*'s limitations when applied to modern fair use cases.

1. *Campbell* at "Present"

Campbell's fair use analysis focused on the first, third, and fourth fair use factors. As to the first factor, the Court overruled *Sony*'s non-commercial presumption[182] and emphasized how the rap group transformed Orbison's song, both lyrically and musically, into a new work of commentary.[183] The Court found the first factor to weigh in favor of fair use.[184]

Arguably, there are two connected propositions regarding transformative use here. First, the Court noted a general transformative use definition: "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[185] Second, the Court established a parody-specific proposition that others courts have since applied beyond the parody context: "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[186] One way to interpret

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[180] *Id.* at 582–83 (discussing parody); *id.* at 594 (reversing and remanding, implying as fair use).

[181] Justice Kennedy's concurrence warns against emphasizing commerciality in developing the parody distinction discussed herein. *See id*. at 596–600 (Kennedy, J., concurring). This warning helps clear up the newly established parody distinction and how it fits into the first statutory factor but does not offer insight into viewing *Campbell* as a forward-looking opinion under this Comment's argument. Thus, the concurrence is not analyzed here.

[182] *Id*. at 583–85.

[183] *Id.* at 589 (discussing transformative qualities).

[184] *Id.*

[185] *Id.* at 579.

[186] *Id.* The importance of transformative use is generally attributable to Judge Leval, and *Campbell* thereafter. *See generally* Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (establishing transformative use principles); Pierre N. Leval, Campbell *as Fair Use Blueprint?*, 90 WASH. L. REV. 597 (2015) (Judge Leval commenting

these propositions is to view the transformation itself, and the transformation of a parody, with slightly different lenses for the purpose and character of use analysis. The transformation would need to sufficiently bring about new purpose to conclude fair use, but for parodies specifically, such transformation would need to provide new purpose or meaning as to the original.

As to the third factor, parodies inherently require copying enough of the original work to allow a listener to understand that the parody is commenting on the original.[187] In *Campbell*, the "heart" of Orbison's song was essential to the rap group's parodic commentary; this weighed in favor of fair use.[188] As to the fourth factor, the lower court did not account for any market harm to the original work resulting from critiques that could hinder, but not wholly usurp, the market for the original work.[189] The Court remanded to reevaluate this "evidentiary hole."[190]

The Court narrowly tailored the ruling to the song at hand—focusing specifically on parody songs and copyright. The transformative use analysis determined how parodies, specifically, can be transformative; courts today cite the same transformative use elements in non-parody/satire contexts.[191] Given this apparent shift, transformative use under *Campbell* can be read broadly to apply to all songs, or narrowly to apply to parodic songs (with contextual flexibility).

This tension extends to other factors as well. *Campbell*'s third-factor analysis focused on whether the "heart" of the work was copied and whether the "heart" was necessary to understand the parodic value; however, it did not formally determine the threshold between

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on his transformative use analysis as part of *Campbell*'s holding); *see also* Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After* Campbell v. Acuff-Rose Music, 12 DUKE L. & TECH. REV. 92 (2014) (noting the importance of transformative use).

187 *See* Campbell v. Acuff-Rose Music, 510 U.S. 560, 580–81 (1994) (establishing distinction); *id.* at 587–89 (applying parody in factor three).

188 *Id.* at 580–81.

189 *Id.* at 590–94.

190 *Id.* at 594.

191 *See, e.g.*, Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 37–38 (2d Cir. 2021) (discussing both propositions as part of transformative use).

fair and unfair uses.[192] Like *Sony*, questions of substantial use versus majority use applied here—the copied bass riff and lyrics ("pretty woman") appeared throughout the original Orbison song.[193] Just how much taking crosses the line, and how does this tie into a parody versus satire analysis? The Court did not provide an answer. Similarly, because the lower court was silent as to the fourth factor (market harm), the Supreme Court remanded on this issue and provided no guidance for determining market depression and market usurping.[194] The Court only noted that the potential market harm *should* be analyzed, but did not say *how*.[195] One possibility is to apply Justice Blackmun's *Sony* dissent, suggesting a distinction between criticism that is either fair and healthy or instead cannibalistic of the original work's derivative market.[196] However, the question remains: which derivative markets? The ambiguity discussed here highlights the need for more precise guidance, especially when these principles remain nondescript for novel technologies.

2. *Campbell* in the Future

Nearly thirty years after *Campbell*, the "deepfake" phenomenon raises fair use questions, especially regarding transformative use boundaries. The term "deepfake" was coined in 2017 by a Reddit user who used artificial intelligence software to swap celebrities' faces with those of women in pornography.[197] Today, deepfakes are defined as "an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said."[198] By training artificial

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192 *See Campbell*, 510 U.S. at 580–89.

193 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 480–81 (1984) (Blackmun, J., dissenting).

194 *Campbell*, 510 U.S. at 590–94.

195 *Id.*

196 *See Sony*, 464 U.S. at 465–66 (Blackmun, J., dissenting).

197 *See* Sally Adee, *What Are Deepfakes and How Are They Created?*, IEEE SPECTRUM (Apr. 29, 2020), https://spectrum.ieee.org/what-is-deepfake [https://perma.cc/5N3N-7Y92].

198 *Deepfake*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/deepfake [https://perma.cc/46Z9-ABQS]. While deepfakes originated in a pornographic context, public figures have used the technology in other manners, such as illustrating the ease of spreading misinformation. *See* James Vincent, *Watch Jordan Peele Use AI to Make Barack Obama Deliver a PSA About Fake News*, VERGE (April 17, 2018, 1:14 PM),

intelligence with existing copyrighted material, the creator can generate and refine new content, often without the copyright holder's permission or involvement.[199] Ultimately, deepfakes consist of both old and new copyrighted material—the old material derived from one or more existing copyrighted sources, and the new generated by the computer and the deepfake creator.[200] This raises the possibility of a fair use defense, with most of the traditional four factors facing difficult-to-answer considerations.

First, the same issues as to the purpose and character of use previously discussed reappear—namely, what constitutes sufficiently "transformative purpose or character" to render the use presumptively fair?[201] If the deepfake is a parody and adds sufficiently new meaning, likely through the newly generated material, then it follows from *Campbell* that this should be presumably fair.[202] Given that deepfake victims—pornographic or otherwise—are typically celebrities, one might also turn to the preamble of Section 107, looking to "commentary" or "criticism" as justifications for fair use.[203]

The question of a deepfake's transformative character remains untested in courts.[204] Even without judicial review of the question, there are concerns with merely turning to *Campbell* as instructive.

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https://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peele-buzzfeed [https://perma.cc/2HMX-8WQY].

199 *See* Adee, *supra* note 197; *see also* Katrina Geddes, *Ocularcentrism and Deepfakes: Should Seeing Be Believing?*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1042 (2021) (exploring, among other things, the intersection of deepfakes and copyright law); *see also* Tiffany C. Li, *Kim Kardashian vs. Deepfakes*, SLATE (June 18, 2019, 8:34 PM), https://slate.com/technology/2019/06/deepfake-kim-kardashian-copyright-law-fair-use.html [https://perma.cc/6LXS-AAED] (raising the issue of deepfakes and fair use).

200 Any question as to the copyrightability of deepfake-generated material would be an open question, but outside the scope of this Comment except to the extent it intersects with fair use as discussed here.

201 *See* Campbell v. Acuff-Rose Music, 510 U.S. 560, 580–89 (1994); *Sony*, 464 U.S. at 480–81 (Blackmun, J., dissenting).

202 *Id.*

203 17 U.S.C. § 107.

204 The author's research of cases mentioning "deepfake" (or deep fake) and fair use produced two cases from 2019 and 2020 respectively. These cases, *In re S.K.*, 215 A.3d 300 (Md. 2019) and *U.S. v. Streett*, 434 F. Supp. 3d 1125 (D.N.M. 2020), are criminal cases regarding sexually explicit conduct, not copyright claims. Scholars in both formal scholarship and informal writings to the media have discussed the possibility of fair use absolving deepfake creators of liability. *See Campbell*, 510 U.S. at 582–83, 594.

Taken as a broad principle, one could easily use a combination of transformative character merely by generating new content, alongside an intent to comment or criticize, to find every deepfake fair (or, at least presumably fair given its transformative character and purpose) and thus (likely) non-infringing. Such an argument would be strained, given that the Court could not have predicted deepfakes as an evolved parody, nor could expect to apply an evolved analysis derived from *Campbell.* Unlike *Sony*, which later received limited clarification in *Grokster*, no similar case exists for evolved parody using novel technology.[205] As such, relying on *Campbell*'s key teaching for the first factor as guidance to a contemporary issue is not the best application of the case today.

A similar issue of applicable scope, imprecise contours, and difficult questions also applies to the third and fourth factors to provide some, though perhaps muddled, guidance to lower courts.

Second, the third traditional fair use factor—the amount and substantiality of the copied work compared to the original work—will similarly turn on a parody-specific determination to decide what is fair use. Parody, defined as using mimicry for comedic or embarrassing effects, is broader than satire, defined as using humor to expose a weakness or poor quality.[206] Based on these definitions, one could make an argument that a deepfake is parodic, satirical, neither, or both of the two, depending on the perception of the newly generated content.

For example, suppose the scenario of a real life deepfake which replaced the face of Alden Ehrenreich, playing a young Han Solo in *Solo: A Star Wars Story*, with the face of Harrison Ford, who originated the character.[207] There are a few ways to interpret this scenario

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[205] For more information on the evolution of recording technology, see *Campbell*, 510 U.S. at 582–83, 594. For more information on *Sony* as applied to newer recording technology, see the discussion of Grokster *supra* Part II.A.2.

[206] *See Parody*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/parody [https://perma.cc/C6N2-G5GD]; *cf. Satire*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/satire [https://perma.cc/L8KU-Z45G]. Merriam-Webster also notes that satires are typically literary works, while parodies can be literary or musical works. *Parody*, *supra*; *Satire*, *supra*.

[207] Chaim Gartenberg, *Deepfake Edits Have Put Harrison Ford into Solo: A Star Wars Story, for Better or for Worse*, VERGE (Oct. 17, 2018, 3:37 PM), https://

to determine if it is a parody, satire, both, or neither. The deepfake could be viewed as a commentary or parody of Ehrenreich's performance by merging the "old" (Ehrenreich's performance) with the "new" (digitally generated mapping of Ford's face onto Ehrenreich's voice and body.) By including Ford's face (somewhat crudely) digitally, this new deepfake performance illustrates the mixed, near-satirical effect of "de-aging" technology in films, accomplished here by using Ford as a stand-in for other performances.[208] By making a deepfake of the character Han Solo, this may sufficiently comment on the Solo character or the Star Wars Franchise, so as to qualify as fair use, but not parody or satire. Finally, a deepfake could be used to refine artificial intelligence or test coding skills; this could point against fair use given no real preamble purpose or transformation.

These arguments, much like the first factor analysis, have not been addressed in court. One significant consideration hindering answering these questions affirmatively is that courts tend to avoid making subjective opinions as to whether a work is sufficiently creative or original to be protected by copyright.[209] Given this, it may be difficult for a court to affirmatively decide that a work meets *Campbell*'s distinctions. As deepfakes and other novel technologies raise fair use questions, *Campbell* may still provide helpful guidance to evaluate transformativeness—particularly when determining parody or satire status.

Finally, *Campbell*'s fourth factor analysis of market harm ostensibly defines the proper market of potential harm,[210] but the

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www.theverge.com/2018/10/17/17990162/deepfake-edits-harrison-ford-han-solo-a-star-wars-story-alden-ehrenreich (last visited Mar. 25, 2022).

[208] *See The De-Aging of Hollywood: How Deepfakes Are Keeping Us Young*, FOUNDRY: INSIGHTS HUB (Jan. 27, 2020), https://www.foundry.com/insights/film-tv/deepfakes-de-aging [https://perma.cc/98FX-MDY2]. Lucasfilm, the creator of Star Wars content including *Solo: A Star Wars Story*, even used deepfakes to perfect a character, taking lengths to ensure such technology remains used in non-malicious ways. *See Disney Gallery: Star Wars: The Mandalorian: Making of the Season 2 Finale* (Lucasfilm television broadcast Aug. 25, 2021).

[209] "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[210] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 560, 590–94 (1994).

relatively narrow language proves unhelpful in the deepfake context. The analysis seems to use Justice Blackmun's *Sony* dissent, evaluating the distinction between criticism (that may consequentially affect the market) and cannibalization (that swallows the market entirely), as its starting point.[211] Returning now to the same Han Solo illustration: analysis highlights how unclear the third factor is when applied to this future-focused context.

Like the parody distinction which generated numerous perspectives on a single scenario, there are numerous potential derivative markets. First, the market for the celebrity themselves may be harmed—is a parodic deepfake hurting the market for an actor based on their (virtual) performance grafted onto another, or the market for the actor for whom part of their performance is lost? Second, the presence of a deepfake market itself may lead to harming the underlying content market, such as that of Star Wars. Third, determining an underlying market harm under the first scenario raises two related questions—should a court analyze the market for the actor's services, or the market for the overall work? Finally, the potential viral nature of deepfakes in the vast realm of social media brings about its own issues in defining market harm.[212] The Court's guidance makes sense for a song where the market can be easily defined based on a rap version. As the Court's guidance becomes more contextual to other technologically evolved scenarios, existing guidance becomes much more difficult to apply.

Much like *Sony* ten years earlier, the Court in *Campbell* once again provided new guidance with the parody-satire distinction, while leaving questions unanswered as to its application. Deepfakes, for example, highlight how the distinction, looking at technological evolution post-*Campbell*, has already blurred the line. Such an application, as well as courts' overall silence on the matter, seems to indicate that this and other new technologies may not fit well under *Campbell*. As previously illustrated, *Sony*'s principles may also be

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[211] *See* Sony Corp. of Am. v. Universal City Studios, Inc, 464 U.S. 417, 465–66 (Blackmun, J., dissenting); *Campbell*, 510 U.S. at 590–94.

[212] *See, e.g.*, Bianca Britton, *Deepfake Videos of Tom Cruise Went Viral. Their Creator Hopes They Boost Awareness.*, NBC NEWS, https://www.nbcnews.com/tech/tech-news/creator-viral-tom-cruise-deepfakes-speaks-rcna356 [https://perma.cc/M8Y3-DE66] (Mar. 5, 2021, 10:02 AM).

limitedly applicable to the same technological evolutions.[213] Similarly, *Campbell*'s principles may have a limited shelf-life to guide the technology underlying these and future cases. The pattern initiated by *Sony* and *Campbell* appears to be confirmed in *Oracle*, the most recent case incrementally changing the fair use doctrine.

C. Google v. Oracle*: Predicting a Limited Future for Fair Use*

Google LLC v. Oracle America, Inc.'s dispute gave the Court the opportunity to clarify the intersection of copyright and software.[214] Much like its predecessors, the Roberts Court's opinion addressed the intersection of fair use and technology but provided much fodder about fair use.[215] The foregoing discussion analyzes the six-justice majority[216] and the two-justice dissent, illuminating the Court's patterned reasoning and other concerns for the fair use doctrine.

1. The Majority Opinion

Early in the *Oracle* majority opinion's text, Justice Breyer struck a parallel to *Sony*, stating the Court did not want to "answer more than [was] necessary to resolve the parties' dispute."[217] The "subsidiary" question of fair use was dispositive and the Court did not address the primary question of copyrightability.[218] Under the narrow focus, questions foundational to the intersection of copyright and technology, like those from *Altai*, *Borland*, and *Whelan*, were not resolved.[219]

Instead of starting with the first or fourth factors as usual, Justice Breyer instead began his discussion with the second fair use

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213 *See supra* Part II.B. The principles of *Sony* were ultimately instructive to a degree in *Grokster*, but again limitedly. *Id.*

214 *See* McDermott, *supra* note 137.

215 *See generally* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

216 Justice Barrett was not part of the Court at argument and thus did not participate in the case. *Id.* at 1209.

217 *Id.* at 1197.

218 *Id.* at 1200.

219 *See supra* Part I.D. Fair use acting as an affirmative defense would be analyzed after a showing of similarity sufficient for infringement.

factor.[220] The Court noted the second factor favored Google since Google copied declaring code (functional code, not at the "core" of copyright protection) instead of the implementing code (closer to a literary work at the "core" of protection).[221] However, courts typically discount this factor significantly.[222] The declaring-implementing distinction carried into the third factor's analysis, where the Court concluded that copying less than one percent of the entire API code (and all declarations) was fair.[223] The Court explained that the transformative purpose of the mobile operating systems and using calls for interoperability weighed in favor of Google.[224]

One way to view these considerations is that declaring code, a special hybrid of protected code and functionality, is subject to a "privilege."[225] Since the interoperable considerations of using existing languages to make programming easier led to marketplace innovations, it seems that declaring codes' interoperable nature—as opposed to more creative implementing codes—is fair to copy so many people can easily use the codes. In a way, this distinction parallels the substantial non-infringing uses of *Sony*—people were not videotaping to harm the market but to view the content on their own time.[226]

The majority then relied on *Campbell*'s interpretation of the first and fourth factors. As to the first factor, three aspects apply. First, the Court clarified that *Campbell*'s discussion of transformative use with parodies applied only to works commenting or critiquing the

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220 *See* Kevin Madigan, *The One Saving Grace of* Google v. Oracle *Might Be Its Limited Applicability*, COPYRIGHT ALL. (Apr. 13, 2021), https://copyrightalliance.org/google-oracle-one-saving-grace/ [https://perma.cc/SQ6M-9WAY].

221 *See Oracle*, 141 S. Ct. at 1201–02, 1204–05.

222 *Compare id.* at 1201–02 (discussing the second fair use factor), *with Campbell v. Acuff-Rose Music. Inc.*, 510 U.S. 560, 586 (1994). *See also* Mark Sableman, *Fair Use Isn't Arithmetic*, THOMPSON COBURN LLP: IN FOCUS BLOG (Oct. 25, 2018), https://www.thompsoncoburn.com/insights/blogs/in-focus/post/2018-10-25/fair-use-isn-t-arithmetic [https://perma.cc/A6ZB-3HE4] (discussing the discounting phenomenon).

223 *Oracle*, 141 S. Ct. at 1204–06.

224 *Id.* at 1205–06.

225 Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 821 (1st Cir. 1995) (Boudin, J., concurring), *aff'd*, 516 U.S. 233 (1996).

226 *See supra* Part II.A.1.

original.[227] Second, including new code to allow Android's Java to be used in mobile devices necessarily gave the copied code a new purpose and character.[228] Finally, the Court indicated its skepticism that bad faith affects the commerciality.[229] As to the fourth factor, the Court highlighted testimony that Java was not a market substitute, Java's failure was not due to Android broadening the number of Java-trained programmer benefits the public, and the interoperability concerns that could arise if Google entered the market.[230] The Court noted that over time, programmers would become familiar with the API in question; further, the Court emphasized that finding harm merely because Oracle's predecessor entered the mobile market would be circular reasoning.[231] The potential of "lack of competition" if Oracle controlled Java, the likelihood that competition would affect Sun's ability to compete with Google, and the creative interoperability benefits all favored Google.[232]

Justice Breyer applied fair use precedent with a sense of pragmatism in the majority opinion. For example, the second factor's distinction between declaring and implementing code allows for a distinction among the different levels of functionality and creativity without leaning on *Whelan*, *Altai*, or *Borland*. Instead, the Court seemed to signal that the functionality inherent in declaring code cannot fully deny copyright protection given it is also inherently creative. The Court implied that the declaring code may instead be more easily reused given it is further from the purpose of incentivizing artists to make wholly creative works, such as visual art, as compared to works with some functionality. This distinction drives the remainder of the opinion: even if Google did copy the code verbatim, it was a significantly low percentage of the overall creative work, and such copying should ultimately come back to help the public. While this creates a judicial distinction among code separate from Congress' inclusion of a "computer program" under the

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227 *Oracle*, 141 S. Ct. at 1203 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994)).

228 *Id.* at 1204 (citing *Campbell*, 510 U.S. at 585 n.18).

229 *Id.*

230 *Id.* at 1206–08.

231 *Id.*

232 *Id.*

Copyright Act,[233] the court was able to avoid what judges already deemed a challenging intersection between copyright and software.[234] Acknowledging the fact that this is a unique holding resulting from the complex intersection of copyright and software helps to clarify precedent, even though larger questions remain unanswered.[235]

2. The Dissenting Opinion: Copyrightable, Not Distinct

Justice Thomas' dissent summarizes at the outset why he and Justice Alito disagree—they believe Oracle's code was copyrightable and improperly attained, and that the declaring code distinction conflicts with the traditional fair use analysis.[236] This Section analyzes the dissent as applied to both *Oracle* specifically and fair use generally.[237]

The dissent first argued that the distinction between declaring and implementing code is nonsensical. While books are close to copyright's core, they also contain uncopyrightable ideas, just like declaring code.[238] Similarly, the dissenters argued that implementing code is bound to functionality and unlikely copyrightable.[239] The

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[233] See text accompanying *supra* notes 49–50, 53 for more information on the computer program definition in copyright law.

[234] *See supra* Part I.D.

[235] As examples of clarifying prior guidance, the limitation of transformative use to parodies limits online piracy as transformation and a broader transformation principle to that of parodic nature. For more information on the prior guidance limited by this clarification, see *supra* Parts II.A.2, B.2.

[236] *See Oracle*, 141 S. Ct. at 1211 (Thomas, J., dissenting).

[237] Justice Thomas begins with some initial technical concerns regarding code as a definition, and the presence of numerous forms of declaring code among its competitors. *Id.* at 1211–12. While short words are not copyrightable, their organization, much like SSO, is copyrightable. U.S. COPYRIGHT OFF., CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT 2–3 (Mar. 2020), https://www.copyright.gov/circs/circ33.pdf [https://perma.cc/5HNB-J98Z] (stating that short names are not copyrightable); *see Oracle*, 141 S. Ct. at 1196 (noting copyrightability of organization). Additionally, Justice Thomas may be assuming the syntax of Java and other competing declaring code is the same, but the different structure of the language would mean otherwise. *See Difference Between Java and Swift*, GEEKSFORGEEKS, https://www.geeksforgeeks.org/difference-between-java-and-swift/ [https://perma.cc/88WM-SBUV] (July 12, 2021) (noting that differences in syntax, object creation, and constructors affect methods).

[238] *Oracle*, 141 S. Ct. at 1215–16 (Thomas, J., dissenting).

[239] *Id.*

dissent noted that Congress included declaring code as part of protected computer programs generally, and that the majority agreed with the contention that without this distinction, no special treatment was to be provided for computer code and fair use.[240]

As to the market harm—the fourth factor—the dissenting Justices believed the commercial use of Android's free operating system to bolster Google's advertising would usurp the market's demand for Java on mobile devices.[241] The Justices believed that granting Google's fair use defense would allow Google to rely on its existing market power to usurp the market for mobile devices, unfairly using the code developed by others without facing copyright liability.[242] Given that Google took the core APIs to run Java, Justices Thomas and Alito believed the majority incorrectly analyzed the first and third factors.[243] The dissenting Justices also noted that the commercial nature of Android,[244] the lack of new purpose beyond creating new products,[245] and the Federal Circuit's determination that Google copied the "heart" of Java's code all cut against fair use.[246]

The dissent raised a "levels of abstraction" problem when deciphering between the declaring code's ideas and expressions;[247] this paralleled the SSO "levels of abstraction" concerns in the cases previously discussed.[248] Literary works can receive copyright protection even when they include functional headings, for example.[249] Here, the code was akin to a digitized book—albeit one of a more fragmented fashion. While the dissent contended the integration of uncopyrightable material should not be fair, broadly applying this

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240 *Id.* at 1212–13.
241 *Id.* at 1216–18.
242 *Id.* at 1219–20.
243 *Id.* at 1218–20.
244 *Id.* at 1218.
245 *Id*. at 1219.
246 *Id.* at 1220.
247 *Id.* at 1215–16.
248 *See supra* Part I.D.
249 *Oracle*, 141 S. Ct. at 1215–16 (Thomas, J., dissenting).

idea would limit many books' copyrightability—a result exactly opposing copyright's purpose.[250]

Similarly, the dissent's emphasis on commerciality is a rightfully placed, but weak argument. Google has become a prominent player in the mobile software space, partially because Android is free to consumers.[251] Yet, the technology community is concerned with software usurpation and its effects on derivative markets. For example, the term "Sherlocking" is used by the tech community to describe when Apple incorporates existing software into its own systems to the detriment of the original entrant. However, what some consider "usurping," others consider "market expansion."[252] With over 1.65 billion Apple devices used globally,[253] a harmful and usurping action could reach and be used by a broader set of consumers. In this manner, not many users would be harmed and, outside potential losses to the initial creators, this may be better for the larger public. The potential benefits in expanding technology to a broader market could outweigh the harm to such derivative markets (and original creators), potentially prompting a fair use determination.

Looking at both opinions comprising *Oracle*, both the majority and dissent generally agree that fair use is flexible.[254] They also appear to agree on the appropriate standards from precedent to guide

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[250] Recall from *supra* Part I that copyright law aims to incentivize artists to create original works of authorship. *See supra* Part I.B.

[251] In fact, Android appears to hold a worldwide majority market share of approximately seventy percent as of January 2022. *See Mobile Operating Systems' Market Share Worldwide from January 2012 to January 2022*, STATISTA (Feb. 7, 2022), https://www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009/ [https://perma.cc/43KX-3C77].

[252] *See* William Gallagher, *Apple Strikes Again: Which Developers Got 'Sherlocked' at WWDC*, APPLEINSIDER (June 8, 2021), https://appleinsider.com/articles/21/06/08/apple-strikes-again-which-developers-got-sherlocked-at-wwdc [https://perma.cc/4TBZ-8GW4]. Potentially as an unfair business practice, Apple has been known to speak with developers as market research prior to "Sherlocking." William Gallagher, *Developers Talk About Being 'Sherlocked' as Apple Uses Them 'For Market Research,'* APPLEINSIDER (June 6, 2019), https://appleinsider.com/articles/19/06/06/developers-talk-about-being-sherlocked-as-apple-uses-them-for-market-research [https://perma.cc/TE3J-36NK].

[253] Jacob Kastrenakes, *Apple Says There Are Now More Than 1 Billion Active iPhones*, VERGE (Jan. 27, 2021, 5:59 PM), https://www.theverge.com/2021/1/27/22253162/iphone-users-total-number-billion-apple-tim-cook-q1-2021 [https://perma.cc/8QAX-W36N].

[254] *Oracle*, 141 S. Ct. at 1214 (Thomas, J., dissenting).

their analyses.[255] However, questions remain: how does *Oracle* apply beyond the software context? Can courts apply its principles more broadly? Is this cabined solely to software user interfaces, or to all code? How will evolving technology affect the outcome? These questions and more are discussed below. The following Part begins by discussing *Oracle*'s implications. It then turns to the overall pattern of Supreme Court practice and fair use jurisprudence and concludes by evaluating a potential solution.

III. PATTERNS OF INCREMENTALISM, RESTRICTIVELY BROAD GUIDANCE: LOOKING PAST *ORACLE* TO THE FUTURE OF FAIR USE

Throughout Part II, congressional inaction and distinctions from the Supreme Court drove the resolution of fair use factors across *Sony*, *Campbell*, and *Oracle*. This Part looks specifically at *Oracle*'s distinction of code, other tensions, and how the case completes the posited pattern. It then proposes and evaluates a solution for broader fair use guidance without losing the doctrine's fact-driven flexibility.

A. Beyond Oracle*: Tension, Patterns, and Unclear Guidance*

Part II discussed how the majority's distinction among declaring code and implementing code now protects some aspects of functionality.[256] Divorced from the opinion, drawing the line between what code is protectable, based in part on functionality, appears to be a slippery slope. The idea-expression dichotomy protects the ultimate expression, and patent law similarly protects the embodiment of inventions, not ideas.[257] If we allow copyrighted works to contain some uncopyrighted material (such as in declaring code post-*Oracle*), then almost everything could be protected, and the distinction would certainly disappear.

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255 *Id.*

256 *See supra* Part II.C.1.

257 *See General Information Concerning Patents*, USPTO, https://www.uspto.gov/patents/basics/general-information-patents [https://perma.cc/B3AV-JFE9] (noting patents generally do not protect ideas, but their embodiments; also noting ideas can be protected, but in limited fashion).

Suppose that as user interfaces become more functional, the copyrightability distinction becomes more blurred; this is compounded as the interfaces' corresponding technology becomes more integrated and entrenched into daily life. Pushed one step further, declaring code's organizational function does not absolve protection of its overall creativity. If implementing code—which is necessarily original and creative—was to contain any functional aspect like its declaring code counterpart, then one could theoretically extend the *Oracle* decision to conclude copyright protects essentially everything, instead of just the purely non-functional creative works as intended. This would be quite a contrast from the incremental nature of prior fair use cases and far from the Court's intended "narrow" rulings. The newly established copyrightability line would likely disappear, and there would be little left for future courts to interpret or clarify.

Second, *Oracle* hints that technologies that subsequently transform the market upon entry are likely fair—similar to that of Google, helping reshape the smartphone software marketplace.[258] This could stretch further than anticipated, as any new entrant to the market could take market share from competitors by simply using those competitors' existing copyrightable material. If the practice continues, fair use could inadvertently swallow a market competitors' ability to protect their copyrights, as almost all code would eventually be considered fair. A question then arises: where should the courts and Congress draw the line between acceptable market gain and a level of usurping significant control? Such an answer would provide necessary guidance as to how courts should consistently apply considerations of market size, potential market losses, and risk of limiting creativity with control.[259] Without the guidance, lower courts may continue to lack clear mechanisms to consistently decide the contours of practices which are (or are not) fair use. Copyright law is intended to incentivize and protect creators, not perpetuate potentially anti-competitive (or other unfair) practices.[260]

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[258] *See* text accompanying notes 287–89; *see also* Liptak, *supra* note 12. *See generally supra* Parts II.B.2, C.2, III.A.

[259] *See Oracle*, 141 S. Ct. at 1206–08.

[260] *See generally supra* Part I.A.

Even constricting transformative use to a narrow understanding, say, only for interoperability purposes, some of the same concerns around slippery slopes and vague answers may continue to present themselves. For example, reusing declaring code is substantially non-infringing and not a creative use like in implementing code.[261] Prior to *Oracle*, the mobile-specific nature of the operating system in question may have been sufficiently transformative for a new purpose.[262] Unlike *Harper*, this is not the theoretical "heart" of the copied work when viewing the code as a whole.[263] Even in this narrow scenario of one factor being instructive for the future, there are too many questions left unanswered: can programmers transform code merely with the purpose of interoperability? Does writing entirely new implementing code play a role in the analysis, and if so, must it be with an entirely new purpose? Does transforming specifically the declaring code beyond the initial copying help prove that the purpose and character of use is fair? What if that transformation harms the market, or hinders interoperability? These and other questions illustrate *Oracle*'s limitations. While the Court settled fair use in this limited, fact-bound circumstance, many questions remain about fair use's application in the technology industry.

While the Court noted its ruling did not overturn prior decisions in existing fair use jurisprudence,[264] there is confusion about whether the decision should be cabined. The Second Circuit has since decided two fair use cases after *Oracle*: *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*[265] and *Marano v. Metropolitan Museum of Art*.[266] In March 2021, the Circuit panel ruled that Andy Warhol's artwork of late artist Prince, derived from photos by Goldsmith, was not fair use.[267] Post-*Oracle*, the Second Circuit amended its decision, but preserved its ruling, after the Andy Warhol Foundation argued that the *Oracle* precedent stated

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261 *See generally supra* Part II.A.

262 *See generally supra* Parts I.E, II.B.

263 *See Oracle*, 141 S. Ct. at 1218.

264 *Id.* at 1208–09.

265 Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021).

266 Marano v. Metro. Museum of Art, 844 F. App'x 436 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 213 (2021).

267 *Goldsmith*, 11 F.4th at 32.

otherwise.[268] In the amended August 2021 decision, the court held that *Oracle* was limited to the world of software—in line with Justice Breyer's ending contention.[269] As a result, the court held that Warhol's work was not subject to the fair use affirmative defense.[270] However, in *Marano*, the court held transforming a copyrighted photograph as part of a museum exhibit website was sufficiently transformative, without referencing *Oracle* at all.[271] While this is a limited pair of cases, it illustrates the possibility that fair use may wildly diverge within the same jurisdiction under similar factual predicates.

The Supreme Court does not encounter every fair use scenario, nor do even lower federal courts. When these cases do come before the Supreme Court, the statute's silence has led the Court to use patent law, dictionary and commonplace definitions, and dissected computer code to resolve cases.[272] Relying on these non-statutory resources allows courts to expand upon foundational precedent while distinguishing new lines of reasoning for fair use determinations. This can occasionally lead to unclear implications, as previously illustrated.[273] Across fair use precedent, there is a pattern of narrow rules working in the moment and maintaining flexibility. At the same time, this pattern also illustrates that applying precedent in future cases may be more difficult; a court can reject a principle to arrive at an intended result, then subsequently arrive at the opposite

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268 *Id.* at 51–52.

269 *Id.* Just prior to the publication of this Comment, the Supreme Court granted *certiorari* for *Goldsmith* to be heard in the October 2022 Term, bringing the Court's attention to transformative use again post-*Oracle* and in non-technology-focused context. Andy Warhol Found. Inc. v. Goldsmith, No. 21-869, 2022 WL 892102 (2022); *see also* Ashley Cullins, *Andy Warhol Foundation Asks Supreme Court to Review Prince Pop Art Dispute*, HOLLYWOOD REP. (Dec. 9, 2021, 3:34 PM), https://www.hollywoodreporter.com/business/business-news/andy-warhol-prince-supreme-court-1235060223/ [https://perma.cc/KA4G-DD9F] (discussing the now-accepted petition's emphasis on transformative use).

270 *Goldsmith*, 11 F.4th at 32.

271 *See Marano*, 472 F. Supp. 3d at 80–81, *reconsideration denied*, No. 19-CV-8606, 2020 WL 4735117 (S.D.N.Y. Aug. 14, 2020), *aff'd*, 844 F. App'x 436 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 213 (2021).

272 *See supra* Part II.A.1 (discussing patent law and dictionary definitions to resolve *Sony*); *supra* Part II.C (using dissection of computer code as method of resolving *Oracle*).

273 *See generally supra* Part II.

result without even mentioning the original principle. So, how can the judicial system—particularly the Supreme Court—combat this pattern while maintaining flexibility?

B. A Proposed Resolution: "Broader" Opinions Preventing Inconsistent Patterns

The Supreme Court says what the law is, and in doing so, must avoid creating advisory opinions.[274] In the context of fair use, the four factors are flexibly applied to the facts of a case to reach a determination; this is not an issue. But as this Comment highlights, fair use necessitates broader guidance beyond what has been provided. This Section illustrates how slightly expanding the scope of decisions to consistently ground precedent in a broader context and carefully balancing the scope to prevent the opinion from becoming merely advisory may help answer fair use's open questions while maintaining the Court's incremental process.

The Supreme Court is often the final authority to speak on a law's interpretation, and that includes fair use. While it cannot advise without a resolution, a broader opinion that also includes writings about the overall context offers an opportunity to comment on the principles as it works to a resolution, offering guideposts for future analyses. Similar fact patterns, such as the potential fair use of a photo, may arrive at wholly different decisions under the same law in the same jurisdiction.[275] While facts drive the decisions, the law as applied to the facts resolves the issues.[276] By using a broader scope, the Supreme Court can maintain unanimous opinions[277] which rule narrowly on the issue—preventing unidentified limits from getting lost in the ether—in line with the principle of incremental rulings. At the same time, the presence of broader guidance allows lower courts to review prior precedent both for the narrow factual predicates and broader guideposts, applying the decision "narrowly" to the facts or "broadly" on the principles as needed. In that manner, the Court can prevent confusion which has historically

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274 *See supra* notes 18–22 and accompanying text.

275 *See generally supra* Part III.A (discussing the Second Circuit post-*Oracle*).

276 *See generally supra* Part I.C (discussing the fair use analysis generally).

277 *See, e.g.*, Liptak, *supra* note 12 (discussing a push for unanimous decisions, among other things).

appeared with the recent trends for longer, muddier, and more unanimous opinions.[278]

To illustrate, compare the fair use principles articulated from a combination of *Sony* and *Grokster*[279] to those articulated in *Oracle* and other software user interface cases.[280] *Sony*'s holding left ambiguous how to determine "substantially non-infringing uses" in future technologies; later, these questions were ostensibly answered in *Grokster*.[281] The novelty of technology, among other factors, made sense for a ruling on narrow factual predicates in *Sony*.[282] Roughly two decades later, a broader application logically flowed from the underlying rule and its interim applications (alongside questions to be answered in the future).[283] *Oracle* resolved its issue on narrow factual predicates again, raising some points about prior fair use cases which can be seen as broad guideposts (but avoiding others beyond the fair use context).[284] A broad, guidepost-heavy copyrightability ruling could have left software creators unable to recoup the value of their investments, the economic underpinning of the law.[285] Instead, the Court noted advancements in technology,[286] and the dissent provided potential insight into the larger ruling.[287] The opinion clarified some fair use principles from past decisions, which may help decide a relatively novel legal issue regarding deepfakes.[288] If *stare decisis* and precedent led courts to rule solely on the narrow factual predicate, those initially decided cases would be limited in further helpful application unless entirely instructive or a clever analogy extends the argument. In fair use, this is more difficult with unique factual backgrounds. By looking more broadly at the fair use inquiry for doctrinal guideposts, courts can provide guidance and clarity.

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278 *Id.*
279 *See supra* Part II.A.
280 *See supra* Parts I.D, II.C, III.A.
281 *See generally supra* Part II.A.
282 *Id.*
283 *Id.*
284 *See generally supra* Parts I–II.
285 *See generally supra* Introduction & Parts I.A, II, III.A.
286 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021).
287 *See generally supra* Part II.C.2.
288 *See generally supra* Parts II.B.2, III.A.

Admittedly, such a "solution" is nebulous at best. The Supreme Court may always choose to issue a "broader" decision that still leads to confusion.[289] In the context of fair use, courts seem to look toward precedential *analyses*, and not specific *holdings*, to interpret the fair use factors. In that sense, fair use is inherently incremental—each factual scenario shifts and shapes the overall principle over time, acting as their own guideposts. One long-standing legal rule is qualifying an argument as *obiter dictum* (or dicta).[290] Declaring an opinion excerpt as dicta discounts prior guidance to an incidental remark; again, a more incremental view of the law.[291]

Stated simply, when precedent exists but is not factually on point, courts should use the broader principles to shape the legal analyses. To the extent the analyses are too fact-specific, any principles deduced from the opinion should instead be dicta. The doctrine of *stare decisis* would continue to apply normally.

In doing so, the fair use doctrine can maintain a sense of long-term uniformity, changing incrementally as necessary. At the same time, lower courts receive the flexibility to focus on the facts before them. This Comment previously illustrated how "narrow" fair use holdings (based on unique factual predicates) may leave open questions, some of which need to be answered. Had the initial opinion contained guidance for the fair use doctrine as a whole (but dicta to resolve the factual dispute), a later court could at least derive relevant principles from the case. Applying such principles in the future, courts can provide guidance without shifting the opinion away from its main purpose: resolving the case at issue. Thus, uniformity among fair use principles may change over time, but the individual cases can still be resolved effectively.

In addition to being admittedly broad, the examples discussed herein are Supreme Court copyright-focused cases, which are rarely granted *certiorari*.[292] One could argue that broadening fair use guidance—by the Supreme Court or otherwise—will curb the pattern of

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289 Liptak, *supra* note 12. *See also supra* Part III.A (noting issues in Post-*Oracle* decisions of precedent).

290 *Obiter dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

291 *Id.*

292 *See* text accompanying *supra* notes 28, 30.

unanswered questions and problematic longer-term effects. Finally, Congress may choose to interject and incrementally revise copyright law, similar to post-*Harper* revisions.[293] Broadening existing cases is just one potential solution to break the pattern posited herein, but one worth evaluating.

C. Testing a Broad Future

This Section evaluates the above proposal to clarify the fair use doctrine against three intellectual property arguments. In sum, the proposed solution may offer a unique perspective from other analytical approaches, but not without its own qualifications.

First, Judge Easterbrook urged the application of pre-existing, unifying principles to newly developing areas of intellectual property law in his 1996 article "Cyberspace and the Law of the Horse."[294] This Comment makes a similar proposal, to integrate existing case law as a guide while individual doctrinal contours develop through individual cases. Judge Easterbrook also points out how much attention falls on narrow applications, such as the "Law of the Horse."[295] Given its unique flexibility, one could view fair use as copyright's "Law of the Horse"—a specialized defense whose flexibility does not easily extrapolate into a general unifying principle. Additionally, the application requires some subjective abstraction as to what should apply.[296] Even acknowledging some subjectivity in deciding if an opinion is *obiter dictum*, courts usually do not rely on such factors when discussing copyright law.[297] As such, focusing on broadening perspectives can initiate change, but may be futile if the doctrine is perceived as too narrow and specialized.

Second, Tim Wu's article, "Tolerated Use" offers an alternative to fair use that similarly absolves legal liability by defining a "tolerated use" where a copyright owner, likely aware of infringement,

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293 *See generally* H.R. REP. NO. 102-836 (1992).

294 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208 (1996).

295 *Id.* at 207–08.

296 For more information on subjectivity and copyright, see text accompanying *supra* note 229; Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1204 (2021) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n.18 (1994)).

297 *See* Easterbrook, *supra* note 294, at 207–08.

takes no action.[298] For example, using copyrighted material on a television "wiki" website would be an infringing but tolerated use since it may increase demand for the underlying series.[299] Wu views such tolerated use as alternative exploitations of the fair use doctrine, essentially presuming fair use, rather than using it as an affirmative defense in a lawsuit.[300] As another example, Wu proposes a "no action" policy preventing copyright lawsuits for fan artwork as alternative exploitation of fair use under the tolerated use structure.[301] Tolerated use seems more applicable to everyday uses than to broadening legal guidance. However, Wu also points out that many tolerated uses could still effectively assert a fair use affirmative defense.[302] But under the tolerated use regime, nobody files a lawsuit and raises the fair use defense, so courts cannot rule on what is not before them.[303]

On the one hand, a tolerated use could function as *per se* fair use. As these cases infrequently appear in court, the lack of opportunity to discuss tolerated uses means that these uses may not functionally assist the fair use analysis. However, the broad construction of Section 107 demands a certain degree of toleration by the copyright owner, evident by the fair use analysis.[304] Given the inaction, mandated toleration may be presumptively fair, as no claim of infringement is filed in court.[305]

On the other hand, non-enforcement lacks clarity for the same reason—no court has ultimately found this to apply as fair. A no-action policy merely sidesteps the analysis, likely to prevent costs for those involved. Additionally, broadening guidance may help shape a no-action policy. If courts ruled a large category of works as presumptively fair, such a rule would likely become part of governing use policies. The alleged infringers would be absolved of actual liability or argue fair use in defense. Overall, both fair use and

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298 Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008).
299 *Id.*
300 *Id.* at 620.
301 *Id.* at 628.
302 *Id.* at 620.
303 *Id.*
304 For more information on 17 U.S.C. § 107, see *supra* Part I.C.
305 *See supra* Parts I.B, C.

tolerated use provide evidence that opinions with broader guideposts would be helpful to resolve their claims. However, any inaction that is treated as tolerated use is likely to be subsumed by both broader court guidance and informal policies by copyright owners.

Third, Edward Lee proposed a form of "technological fair use" aimed to absolve liability for technology that creates new purposes or new value regarding the existing technology or one of its applications.[306] Using speech technology as the base of his argument, Lee tailors each fair use factor toward this goal, including the value of the technology in the "purpose and character of use" factor.[307]

On one hand, Lee's argument to tailor fair use aligns with existing copyright norms, as we now account for functionality of technology.[308] Additionally, a technology-specific analysis would ensure every technology-focused case follows the same analytical framework, yet still maintains the flexibility of fair use to develop the law incrementally as needed within this unique sector. On the other hand, a technology-focused analysis risks creating a new subset of narrow rulings. Further, it is possible that a narrow subset of rulings would develop the "Law of Technological Fair Use" as its discrete analysis separate from "traditional" fair use. Offering a broader scope within the technology landscape, compared to creating a new fair use category, may allow the existing law to co-exist with a technology-specific viewpoint. In doing so, one could draw on, and distinguish from, the specific technology cases as needed, using the broader, principal-level guidance as a gap-filler.

CONCLUSION

Although *Oracle* concluded a ten-year-long court battle, [309] the question of user interface software copyrightability remains unresolved. At the same time, the opinion falls into a pattern of limiting fair use opinions that craft an incremental approach. While these institutional limitations produce valid results in the short term, their

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306 Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 810–11 (2010).

307 *See id.* at 797–98 (announcing speech technology as an example); *id.* at 833–45 (explaining shifts in fair use to account for technological fair use).

308 *See supra* Parts II.C, III.A.

309 Kendal & Mickle, *supra* note 1; *see also supra* Part I.E.

future applications raise more questions, including whether a decision should be cabined to a narrow context or applied to the doctrine at large. While fair use decisions are malleable, they are also not wholly determined in a vacuum. By re-evaluating existing precedent and aiming to establish new precedent with a broader approach, perhaps inapplicable, or overly narrow and historic approaches will be eliminated. Of course, this approach has limitations but appears as successful as other academic viewpoints in fair use discourse. For now, it appears *Oracle* narrowly prevented the sky from falling; [310] but it may become crucial in establishing fair use's future.

[310] Discussion of "the sky falling" was used concerning the potential for disrupting the technology industry depending on the ruling. *See* McDermott, *supra* note 137.