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In *Google LLC v. Oracle America Inc.*,[1] the United States Supreme Court addressed: (1) whether software code is copyrightable and if so (2) whether the fair use doctrine permits using the copyrightable software code.[2] The Court held that copying portions of Oracle's Java Standard Edition (SE) Application Programming Interface (API) software code, specifically the declaring code—simple lines of code that computer programmers use to call more complex code sections[3] is a permissible fair use under copyright law.[4] As a result of this decision, the Court reversed and remanded the Federal Circuit's holding.[5] Since the Court assumed the software code was copyrightable, it correctly reasoned that Google's use of the code was fair.[6] However, as Justice Thomas's dissent[7] correctly notes, the Court should have addressed the first issue, of whether the declaring code was

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1. Google LLC v. Oracle America Inc., No. 18-956, slip op. (U.S. Apr. 5, 2021). The parties are identified as "Google" and "Oracle" throughout the case note.

2. *Id.* at 1 (majority opinion).

3. KEVIN J. HICKEY, CONG. RSCH. SERV., LSB10543, COPYRIGHT IN CODE: SUPREME COURT HEARS LANDMARK SOFTWARE CASE IN GOOGLE V. ORACLE 2 (2020). Computer programmers use declaring code to run methods and functions. *Id.* For example, programmers could type a function name, "multiply" and subsequently declare that "multiply" exists in the code and can therefore be used throughout the code with appropriate syntax that calls to the implementing code which actually runs the function, "multiply." *Id.*

4. *Google*, slip op. at 1 (majority opinion). Instead of addressing the issue of whether copied lines of code can be copyrightable, the Court assumes for the purposes of the fair use analysis that software code is copyrightable. *Id.*

5. *Id.* at 35.

6. *Id.* at 1.

7. *Id.* at 1 (Thomas, J., dissenting).

copyrightable, and relied on that analysis when considering the four fair use factors, rather than relying on an assumption that the declaring code was copyrightable.[8] Furthermore, the majority looks closely at one of the four fair use factors: "The Purpose and Character of the Use"[9] and expands the factor to include transformative uses of copyrighted materials[10] that are for commercial purposes and may not have occurred in good faith.[11]

This Note argues that the Court in *Google* may have correctly assumed as a matter of law[12] that the Java API declaring code was copyrightable, without analyzing the copyrightability of the declaring code.[13] However, the Court ultimately erred in applying the fair use analysis because it did not analyze whether the declaring code was copyrightable.[14] As a result, the Court misapplied the four fair use factors.[15] Consequently, the Court established a new definition of transformative use for future fair use analyses, which ultimately allows for more fair use of copyrighted works and unfortunately reduces copyright holder's rights.[16]

I. THE CASE

Oracle currently owns the Java platform, which is software that allows computer programmers to write and run software programs using the Java programming language.[17] The Java platform also includes a Java API, which allows programmers[18] to create functions using pre-existing code rather than starting from "scratch."[19]

8. *Id.* at 1-2. The dissent claims the opinion incorrectly applied the fair use doctrine by not addressing whether software code is copyrightable, which distorts the fair use analysis.

9. *Id*. at 24 (majority opinion).

10. *See Id.* at 35 ("We do not overturn or modify our earlier cases involving fair use[.]").

11. *Id.* at 27-28.

12. *See infra* Section IV.A.

13. *See infra* Section IV.B.

14. *Google*, slip op. at 1-2 (Thomas, J., dissenting).

15. *See infra* Section IV.C.

16. *See infra* Section IV.D.

17. Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1186 (Fed. Cir. 2018) *rev'd* 141 S. Ct. 1183 (2021).

18. *Google*, slip op. at 2-3 (majority opinion). About six million computer programmers/developers used the Java language at the time of the initial lawsuit in 2012. *Id.* at 2. The developed programs ran on any desktop or laptop. *Id.* This incentivized programmers to choose Java over other coding languages because consumers of the programs could run the programs regardless of their desktop or laptop computer's hardware or operating system. *Id.* Since programmers using Java did not have to re-write code for each different hardware or operating system, this saved them time. *Id.* at 2-3.

19. Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1348-49 (Fed. Cir. 2014) *rev'd* 141 S. Ct. 1183 (2021). The Java platform came with already developed functions, called packages. *Id*. The packages are considered shortcuts for programmers because rather than re-writing the code needed to run a function, which could be multiple lines of code, each time a program needed to run the function, a programmer simply typed the name

Computer programmers who had free access to Oracle's Java Platform were only charged by Oracle when they embedded the Java software into devices that ran their developed software programs.[20] Not only did Oracle profit when users embedded the Java software into devices, but Oracle also profited by selling software licenses to businesses who wanted to customize the Java Platform for their own business needs.[21]

In 2005, Google began talking with Sun Microsystems,[22] the 2005 owner of the Java platform, about obtaining a Java license for Google's Android mobile device software platform.[23] Google and Sun Microsystems were unable to reach an agreement[24] and as a result halted their negotiations. Due to Sun Microsystems' and Google's inability to reach an agreement, Google opted to simply copy 11,500 lines of Sun Microsystem's Java API declaring code[25] and use it to create the first Android software platform for Android phones without an agreement with Sun Microsystems.[26]

Oracle (which bought Sun Microsystems in 2010) sued Google for copyright infringement in the United States District Court for the Northern District of California,[27] alleging the copying and use of the 11,500 lines of Java SE API code in Google's Android Platform was copyright infringement.[28] At trial, the jury decided that copyright infringement occurred; however, the court reversed the verdict and instead held as a matter of law that the Java SE API was not copyrightable.[29] After the verdict, Oracle appealed and the Court of Appeals reversed the decision and

of the function, and the platform would identify and correlate the required code with it and run the function as necessary. *Id.* at 1349.

20. *Oracle Am.*, 886 F.3d at 1187.

21. *Oracle Am.*, 750 F.3d at 1350. In return for payment, the business's platform modifications were kept secret rather than being released to the public which Oracle required from users who did not purchase licenses. *Id*.

22. *Oracle Am.*, 886 F.3d at 1186. Sun Microsystems was the original owner of the Java Platform. In 2010, Oracle purchased Sun Microsystems and transferred ownership of the Java Platform to Oracle. *Id*.

23. *Id.* at 1187. Google acquired Android in 2005. *Id.*

24. *Id.* The first Android phone utilizing the Java platform was released in 2008. *Id.*

25. *Id.* Neither party disputes that the copied code included 37 API packages, and the Structure, Sequence, and organization (SSO) of the Java API packages. The first Android phone utilizing the Java platform was released in 2008. *Id.*

26. *Id.* Google's Android Platform, unlike the Java Platform, was free and open for all to use to develop with. *Id*. Google's goal was to attract programmers to their platform and then have the programmers develop Android applications for Android smartphones. *Id.* Google hoped that smartphone users would then buy Android smartphones because the applications they wanted were on that specific smartphone type and not others. *Id.*

27. Oracle Am., Inc. v. Google Inc., 872 F.Supp. 2d 974, 975 (N.D. Cal. 2012).

28. *Oracle Am.*, 886 F.3d at 1185.

29. *Id.*

held that the code was copyrightable.[30] When remanded to the district court, the jury held that Google's fair use defense was appropriate.[31] Subsequently, Oracle appealed once again and the Court of Appeals reversed again, holding that Google's use of the 11,500 lines of code was not a fair use as a matter of law.[32] Ultimately, the Supreme Court granted certiorari to review the Court of Appeals findings on: (1) whether the code was copyrightable and (2) whether Google's fair use defense was applicable.[33]

Part II of this Note discusses the purpose of copyright law and Congress's ability to regulate it to guarantee that copyrights are efficiently protected.[34] Part II also delves into the fair use doctrine and how courts must rely on a mixed question of fact and law to determine if the fair use is a valid defense to alleged copyright infringement.[35] Additionally, Part II examines the four fair use factors and is applicability in a party's fair use defense.[36]

After focusing on the legal background of copyright law, the Part III of the Note discusses both the majority's reason for finding fair use[37] and Justice Thomas's dissent for not finding fair use when Google copied and used the 11,500 lines of Oracle's Java SE API code.[38]

Part IV explores the accuracy of the Court choosing to apply a mixed question of fact and law to the fair use analysis.[39] Part IV then claims the Court failed to analyze the copyrightability of the 11,500 lines of Java SE code resulting in the Court distancing itself from Congress's original intent of 17 U.S.C. §§ 109(b), which protects computer programs under copyright law.[40] As a result of not considering the copyrightability of computer programs, Part IV argues that the Court did not correctly apply the four fair use factors.[41] Finally, Part IV establishes that due to the Court's incorrect fair use analysis, the fair use defense was expanded, causing copyright owners to lose some of the exclusive rights guaranteed under copyright law.[42]

30. *Id*. The Court of Appeals reinstated the initial jury's decision and remanded to the District Court to decide on Google's fair use defense. *Id.* Simultaneously, Google filed a petition for certiorari to Supreme Court which was denied. *Id.*

31. *Id.*

32. *Id.* at 1186.

33. *Google*, slip op. at 1 (majority opinion).

34. See *infra* Section II.A.

35. *See infra* Section II.B.

36. See *infra* Section II.C.

37. *See infra* Section III.A.

38. *See infra* Section III.B.

39. *See infra* Section IV.A.

40. *See infra* Section IV.B.

41. *See infra* Section IV.C.

42. *See infra* Section IV.D.

II. LEGAL BACKGROUND

This section first discusses the purpose of copyright law and Congress's inherent power stemming from the Constitution to regulate copyrights as it sees fit to ensure efficient copyright protection.[43] Next, this section observes that the fair use analysis, which is used to determine if the use of a copyrighted work is allowable, is a mixed question of fact and law.[44] Lastly, this section delves into the fair use analysis and the four factors provided in 17 U.S.C. § 107: (1) the purpose and character of the use, (2) the nature of the work, (3) the proportion used in the copyrighted work, and (4) the effect of the use on the market.[45]

A. Purpose of Copyright Law

Under the U.S. Constitution, patents, copyrights, and Congress's power to regulate them exist "[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[.]"[46] For a work to gain copyright protection, the work must be a work of authorship, original, and "fixed in a tangible medium of expression."[47] Originality does not mandate the work be new, rather that the work is slightly creative and is not copied verbatim from another work.[48] Once achieving copyright protection, the copyright owner receives the benefit of exclusively producing the work for a period of time which prevents others from reproducing the work and potentially taking some of the copyright owner's profit.[49]

However, the benefit of copyright protection may harm the public by creating a monopoly for the author since he is the sole producer of the work and decides who else can produce it.[50] As a result, the Constitution grants Congress the power to

43. *See infra* Section II.A.

44. *See infra* Section II.B.

45. *See infra* Section II.C; 17 U.S.C. § 107.

46. U.S. CONST. art. I, § 8, cl. 8.

47. 17 U.S.C. § 102(a). *See also* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 53-54 (2d Cir. 1936) (comparing patents to copyrights where patents protect new and useful ideas and copyrights protect expressions, not ideas).

48. Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., Inc., 499 U.S. 340, 345 (1991). The Court found the dispute originated from Feist Publications using pages of Rural Telephone Services' printed phone directory to create a different directory covering a larger geographical area in northwest Kansas. *Id.* at 343. *See also* 17 U.S.C. § 102(a) (identifying categories of copyrightable original works).

49. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize…is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of the special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

50. *Id.*

regulate copyrights to protect the public from authors obtaining or creating a monopoly and then irresponsibly "exploiting" their copyrighted works.[51]

Through the Copyright Act, Congress dictates what types of work can be copyrighted and limits the exclusive right to produce copyrighted works to prevent the negative consequences that copyrights may create.[52] Specifically, the Copyright Act states copyright protection applies to "original works of authorship" including "literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, sound records, and architectural works[;]" it does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[53] Furthermore, in 1980, Congress added the definition of a "computer program"— "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result"—to the definitions list in the Copyright Act.[54] In doing so, Congress explicitly protected computer programs under copyright law.[55]

After achieving copyright protection for an original work, others can still reproduce the work only if their use of the reproduced work is fair.[56] Courts assist Congress by analyzing disputes between original authors and those that reproduce their works to decide if a reproduced work is a fair use, and therefore allowable under the Copyright Act.[57]

B. Fair Use Doctrine is a Mixed Question of Fact and Law

Upon review of whether a fair use of a copyrightable work exists, reviewing courts should respect the jury's findings of facts and then decide *de novo* whether the facts show a fair use.[58] Even though courts review the application of facts, the

51. *Id.* (describing Congress's difficult task of balancing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand and, society's competing interest in the free flow of ideas, information, and commerce on the other hand").

52. *Id.* at 431 ("Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.").

53. 17 U.S.C. § 102(a)-(b).

54. 17 U.S.C. § 101.

55. *Id. See also* 17 U.S.C. § 117 (defining the limitations of a copyright owner's exclusive right for copyrightable computer programs).

56. 17 U.S.C. § 107.

57. *See Harper & Row Publ'rs Inc.*, 471 U.S. at 549-50 (finding the 17 U.S.C. § 107 fair use analysis requires a case-by-case analysis).

58. *Id.* at 560. *See also* U.S. Bank N.A. v. Village at Lakeridge, LLC, No. 15-1509, slip op. at 2 (U.S. Mar. 5, 2018) ("Mixed questions are not all alike. Some require courts to expound on the law, and should typically be reviewed *de novo*. Others immerse courts in case-specific factual issues, and should usually be reviewed with deference. In short, the standard of review for a mixed question depends on whether answering it entails

Seventh Amendment is not violated because the jury is still the initial finder of facts.[59] After the jury determines the facts, the reviewing court looks at the facts, not to determine their accuracy, but to see if enough evidence exists to find as a question of law that the fair use defense applies.[60] Therefore, when applying a mixed question of fact and law to determine if a fair use defense exists, the trial court answers the question of fact, and the reviewing court determines if there is enough evidence present for the fair use defense.[61]

C. Fair Use Analysis Consists of Four Factors

Once the facts are determined, the reviewing court must consider the applicability of the facts against the four fair use factors to determine if the fair use defense for reproducing copyrightable works is appropriate.[62] The four fair use factors, identified in the Copyright Act § 107, consist of: (1) "purpose and character of the use, including whether such use is of a commercial or is for nonprofit educational purposes," (2) "nature of the copyrighted work," (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole[,]" and (4) "the effect of the use upon the potential market for or value of the copyrighted work." [63] The factors have varying levels of importance depending on the work in question.[64] As such, since the fair use defense is an affirmative defense,[65] the defendant can rely on the court to apply a case by case analysis of the four factors applicability.[66] The court will also consider each factor in relation to the other factors, rather than by itself.[67] However, it is key when analyzing the four factors that courts consider the purpose of copyrights per the U.S. Constitution, "[t]o promote the science and the arts."[68]

primarily legal or factual work"); FED. R. CIV. P. 50(b) (allowing judgements as a matter of law after the jury reaches a verdict).

59. U.S. CONST. amend. VII (Right to Jury Trial).

60. *See* Pacific and Southern Co. Inc. v. Duncan, 744 F.2d 1490, 1500 n. 8 (11th Cir. 1984) ("Fair use is probably best characterized as a mixed question of law and fact that can be decided by an appellate court if the trial court has found facts sufficient to evaluate each of the four statutory factors").

61. *Harper & Row Publ'rs Inc.*, 471 U.S. at 560.

62. 17 U.S.C. § 107.

63. *Id.*

64. *Harper & Row Publ'rs Inc.*, 471 U.S. at 560 (citing H. R. Rep. No. 94-1476, at 65 (1976) (finding the fair use analysis to be an "equitable doctrine" meaning each analysis varies depending on the work in question)).

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

66. *Id.* at 577.

67. *Id.* at 578.

68. *Id.* at 579; U.S. CONST. art. I § 8, cl. 8.

Google LLC v. Oracle America Inc.

i. The purpose and character of the use of the copyrighted work.

The first factor of the fair use defense analysis is the "purpose and character of the use" of the reproduced copyrighted work.[69] When analyzing the "purpose and character of the use," courts focus on whether the transformative nature of the new work promotes the science and the arts.[70] Specifically,

> *"The central purpose of this [transformative] investigation is to see. . .whether the new work merely 'supersede[s] the objects' of the original creation, (supplanting the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"*[71]

For example, in *Campbell v. Acuff-Rose Music, Inc.*, the Court held that a commercial parody of "Oh, Pretty Woman" by 2 Live Crew, a hip hop group, was a fair use because it commented on the song and critiqued society.[72] The Court stressed in *Campbell* that for a parody to be fair use there must be some "critical bearing on the substance or style of the original composition" because a parody must "mimic an original [song] to make its point."[73]

As a result, the parody at issue in *Campbell* was a fair use because the copied song lyrics had an overwhelming transformative nature in the new work since it commented on societal issues.[74] Hence, the primary consideration when analyzing the "purpose and character of the use" is the transformative nature of the new work compared to the copyrighted work.[75] Furthermore, as the transformative nature of the new work increases, the importance of the other three fair use factors decrease.[76]

69. 17 U.S.C. § 107.

70. *Campbell*, 510 U.S. at 579; U.S. CONST. art. I, § 8, cl. 8.

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

72. *Id*. at 580, 583. The Court in *Campbell* states 2 Live Crew's song parody "juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility" which critiques the original song for its "naivete" in society. *Id.*

73. *Id.* at 580-581.

74. *Id.* at 594.

75. *Id.* at 579.

76. *Id.* at 588 (finding a song parody commenting and criticizing the song "Pretty Woman" is a fair use even if the parody was commercial in nature and "excessively copied" the original song because the parody was highly transformative).

ii. The nature of the copyrighted work.

The second factor of the fair use defense is the "nature of the copyrighted work[.]"[77] This factor recognizes that some works are more protected than others under copyright law because they fulfill the purpose of copyrights, "to promote the sciences and the arts,"[78] more so than other copyrighted works.[79] As a result, if the "nature of the copyrighted work" tends to fulfill the goal of copyrights, then this factor weighs in favor of the applicability of the fair use defense.[80] To analyze a work under this factor, courts consider the creativeness and the originality of the original work.[81]

For example, in *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, the Court held that copying part of a telephone directory for purposes of a different telephone directory was fair because facts are unoriginal and do not express new ideas.[82] Rather, pure facts, such as information in a phone directory exist to help advance the sciences and the arts because such facts aim to spread knowledge so that others can then use the facts to create new ideas and expressions.[83] Essentially, this factor stems back to the three requirements for a work to be copyrighted from § 102(a): a work of authorship, original, and "fixed in a tangible medium of expression[.]"[84] So, pure facts may be a work of authorship, but they are not original, or an expression and hence not copyrightable.[85]

For the nature of the copyrighted work to be original and further promote the goal of copyrights per the U.S. Constitution, the work must be "representative[] of original intellectual conceptions of the author."[86] Specifically, a court should ask, "does [the work] embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution in securing its exclusive use or sale to its author[?]"[87] However, the "nature of the copyrighted work" is only one of the four factors and must be analyzed in relation to the other three factors.[88]

77. 17 U.S.C. § 107(2).

78. U.S. CONST. art. I, § 8, cl. 8.

79. *Campbell*, 510 U.S. at 586.

80. *Id.* (finding the more a work appears to be the reason for copyright protection, the harder it will be to show fair use).

81. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 344, 346 (finding that pure facts are not copyrightable).

82. *Id.* at 340.

83. *Id.* at 341.

84. 17 U.S.C. § 102(a); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 53-54 (2d Cir. 1936).

85. *But see Feist Publications, Inc.*, 499 U.S. at 340 (finding the "compiler's selection and arrangement" of facts may be copyrightable if it is an original expression).

86. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

87. *Id.* at 58-59.

88. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994).

iii. The amount and substantiality of the proportion used in the copyrighted work.

The third factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole[.]"[89] This factor relies on both the quantitative amount of the copyrighted work used in the reproduction, as well as the qualitative aspects of the portion copied.[90] Therefore, when courts look at the copyrighted work as a whole to the portion taken from the copyrighted work, they must also consider the content of the copied portion.[91] For example, if a quantitatively large portion of a copyrighted work is taken for a new reproduced work, this impacts the qualitative nature of the portion of copyrighted work for the reproduced new work.[92]

In *Harper and Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court found that Nation Enterprises may have only taken 13% of Harper and Row Publisher's unpublished manuscript, a small amount, but the publisher quoted what the Court deemed as the "heart of the book."[93] As a result, even though only a quantitively small portion of the book was copied, the portion was qualitatively important and therefore, the Court decided this factor did not favor fair use.[94] Hence, both qualitative and quantitative aspects of the portion of the copyrighted work must be considered together in determining if the "amount and substantiality of the portion" taken weighs in favor or against fair use, not separately.[95]

iv. The effect of the use of the copyrighted work on the market.

The fourth factor of the fair use defense is "the effect of the use upon the potential market for or value of the copyrighted work."[96] Copyright owners enjoy the exclusive right of producing their copyrighted work.[97] However, when an individual takes a copyrighted work, either part or in whole, and uses it elsewhere, that individual may take away profits and demand for the copyright owner's work,[98] which contradicts the purpose of copyrights. Copyrights exist "to promote the

89. 17 U.S.C. § 107(3).

90. Harper & Row Publ'rs Inc. v. Nation Enters., 471 U.S. 539, 564-65 (finding that the portion of the copyrighted work taken may have been quantitatively minimal, but the portion was qualitatively relevant since it was the "heart of the book").

91. *Id.* at 565.

92. *Id.*

93. *Id.* at 564-65.

94. *Id.*

95. 17 U.S.C. § 107(3).

96. 17 U.S.C. § 107(4).

97. U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 107.

98. *Harper & Row*, 471 U.S. at 567.

sciences and the arts" and so by denying the copyright owner's exclusive right to reproduce their copyrighted work, may discourage advancing the arts and sciences.[99]

When analyzing this factor, courts look to see if the reproduced work is commercial or noncommercial in nature.[100] If the reproduced work is commercial in nature, the work is presumed to be unfair.[101] Yet, if the reproduced work is noncommercial in nature, the copyright owner needs to show, by a preponderance of the evidence, that a future or actual harm exists.[102] However, the case that originally decided the presumption of unfairness for reproduced works, *Sony Corp. of America v. Universal City Studios, Inc.*, only applies to reproduced works that are identical to the copyrighted work and commercial in nature.[103] As a result, whether a portion of the copyrighted work was reproduced for commercial purposes does not necessarily have a presumption of unfairness and hence usually requires more analysis.[104] Analysis for commercial works that do not duplicate the entire copyrighted work require looking at the commercial nature of the work and also the "purpose and character of the use" factor, specifically the transformative nature of the work.[105] Depending on the transformative nature of the work, the commercial purposes of the work may be directed at a different market than the copyrighted work and therefore does not harm the exclusive right bestowed upon the copyright owner.[106] Therefore, a commercial work created from a copyrighted work may or may not affect the market in a way that is unfair to the copyright owner.[107] Consequently, commercial works created from a copyrighted work require further analysis such as pulling in the first factor, the purpose and character's transformative use analysis,[108] to determine whether the market effect factor weighs in favor of fair use.[109]

99. U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 107.

100. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) (finding that the noncommercial use of recording television for personal use at home is not harmful to the copyright owner).

101. *Id.* at 449.

102. *Id.* at 451.

103. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

104. *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (D. Mass. 1841)) ("[W]hen a commercial use amounts to mere duplication of the entirety of an original [work], it clearly 'supersede[s] the objects,' of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.).

105. *Id.*

106. *Id.* at 591-92 (distinguishing between a displacement of the copyrighted work and a derivative of the copyrighted work).

107. *Id.*

108. *See supra* Section II.C.i.

109. *Campbell*, 510 U.S. at 591.

III. THE COURT'S REASONING

Writing for the majority in a 6-2 decision, Justice Breyer held that the 11,500 lines of Oracle's Java SE API declaring code was copyrightable and that Google's copying of the 11,500 lines of code was fair use.[110] Therefore, the majority held that Google did not violate U.S. Copyright Law.[111] The majority assumed for "argument's sake" that the declaring code is copyrightable.[112] Rather than analyzing whether or not the declaring code was copyrightable under § 102(b) of the Copyright Act, the majority found that Congress defined "computer programs" in § 101 of the Copyright Act and hence Congress aimed to provide copyright protection for computer programs.[113] After assuming Oracle's declaring code was copyrightable,[114] the majority proceeded to decide whether Google's use of the declaring code was a fair use under the four factors described in § 107 of the Copyright Act.[115] Ultimately, the Court held that all four factors favored fair use and hence Google's use of Oracle's declaring code was a fair use and legal.[116]

A. The Majority Found All Four Fair Use Factors Favored Fair Use

Using the § 107 fair use factors, the majority found that Google's use of Oracle's declaring code to be fair and hence allowable under copyright law.[117] This section discusses the majority's analysis and findings for each of the four fair use factors: (1) the nature of the declaring code,[118] (2) the purpose and character of the use of the declaring code,[119] (3) the amount and substantiality of the declaring code,[120] and (4) the market effects of Google copying the declaring code.[121]

110. Google LLC. v. Oracle America Inc., No. 18-956, slip op. 1, 1 (U.S. Apr. 5, 2021) (majority opinion).

111. *Id.*

112. *Id.* at 18.

113. *Id.* at 18. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); 17 U.S.C. § 101 (defining a computer program and therefore bringing it into the scope of what is considered a copyrightable work).

114. *Google*, slip op. at 1 (majority opinion).

115. *Id.* at 18-35.

116. *Google*, slip op. at 3-4 (majority opinion).

117. *Id. at* 1; 17 U.S.C. § 107.

118. *See infra* Section III.A.i.

119. *See infra* Section III.A.ii.

120. *See infra* Section III.A.iii.

121. *See infra* Section III.A.iv.

i. The nature of Google's use of the declaring code favors fair use.

First, the Court decided that the "nature of the copyrighted work,"[122] the declaring code, favored fair use because Oracle wrote the declaring code such that it would attract computer programmers to use it and expand upon it.[123] Essentially, the Court felt the declaring code was valuable only if computer programmers, who do not own the copyright, use the code to generate creative programs.[124] Therefore, the majority found the declaring code's nature favored fair use because it allowed computer programmers to continue using the declaring code to easily develop programs for Google's Android platform.[125]

ii. The purpose and character of Google's use of the declaring code favors fair use.

Second, the Court decided the "purpose and character of the use"[126] of Oracle's declaring code by Google favored fair use because it furthered the purpose of copyright law by generating a new creative work for the public to use.[127] Specifically, the Court claimed Google's use was transformative in nature even though it copied the 11,500 lines of code since the use allowed computer programmers to develop new programs for Google's Android smartphone platform.[128] The Court also confirmed fair use is automatically shown if the copying is solely for noncommercial purposes.[129] Even though Google's copying was for commercial purposes, the Court still found that the transformative nature of how Google used the copied code ultimately showed fair use.[130] Since, the transformative nature of Google's use outweighed the commercial aspect of the "purpose and character of the use" analysis, the Court chose not to consider whether Google had bad faith or good faith in copying the code, which courts typically consider in the fair use analysis.[131] Therefore, the second factor, the "purpose and character of the use,"[132] was so transformative in nature that the majority found it favored fair use without considering whether Google copied the code in good or bad faith.[133]

122. 17 U.S.C. § 107(2).
123. Google LLC v. Oracle Am. Inc., slip op. at 23 (U.S. Apr. 5, 2021) (majority opinion).
124. *Id*.
125. *Id*. at 24.
126. 17 U.S.C. § 107(1).
127. *Google*, slip op. at 24 (majority opinion).
128. *Id.* at 25.
129. *Id.* at 27.
130. *Id.*
131. *Id.* at 27-28.
132. 17 U.S.C. § 107.
133. *Google*, slip op. at 27 (majority opinion).

iii. The amount and substantiality of the declaring code Google copied favors fair use.

Third, the Court decided the "amount and substantiality of the portion used" from Oracle's Java SE API also favored fair use.[134] The Court admits that 37 computer programming packages, consisting of 11,500 lines of code, is a large amount, yet when comparing the 11,500 lines of code to the 2.86 million lines of total Java SE API code that could have been copied, the 11,500 lines of code was minimal.[135] The Court stressed that Google could have copied so many more lines of code but did not because Google only needed the 11,500 lines to develop their different creative work—an Android smartphone platform—and nothing more from the 2.86 million lines of Java code.[136] The Court then pulled in the transformative nature of Google's work in that their new work, the Android platform, allows other computer programmers to use their pre-existing knowledge of the Java computer programming language to create new programs for Google's Android smartphone platform.[137] Therefore, the Court decided the amount of copied lines of code is not relevant in their fair use analysis because the substantial transformative nature[138] of Google's use of the declaring code in the Android smartphone platform weighed so heavily in favor of fair use.[139]

iv. The market effects of Google copying the declaring code favors fair use.

Fourth, the Court decided that the "market effects"[140] of Google using the copied lines of code favored fair use because Google was competing in a completely different market than Oracle at the time; Google was in the smartphone market, and Oracle was in the laptop and desktop markets.[141] Consequently, the Court found there was no negative market effects for Oracle when Google copied the declaring code to use in their Android smartphone platform because the two companies were not competing in the same market, the smartphone market, when Google copied the code.[142]

As shown, the majority held that all four factors of the § 107 fair use analysis favored fair use.[143] Hence, Google's use of the 11,500 lines of copied Oracle code

134. *Id.* at 30; 17 U.S.C. § 107(3).

135. *Id.* at 28. The 11,500 lines of code amounted to 0.4 percent of the entire Java API code. *Id.*

136. *Id.* at 29.

137. *Id.*

138. *Id.*

139. *Id.* at 30.

140. 17 U.S.C. § 107(4).

141. *Google*, slip op. at 2, 31, 35 (majority opinion).

142. *Id.* at 35.

143. *Id.*

was a fair use as a matter of law and subsequently, the Court reversed the lower court's[144] holding and found in favor of Google.[145]

B. The Dissent Does Not Assume the Declaring Code is Copyrightable and Subsequently Finds Google's Use Unfair

Unlike the majority, Justice Thomas's dissent did not assume the declaring code was copyrightable and instead analyzed the copyrightability of the declaring code using the Copyright Act.[146] After analyzing the copyrightability, Justice Thomas's dissent concluded, like the majority, that the declaring code was copyrightable.[147]

Per Justice Thomas's dissent, the declaring code is a literary work, which is protected under copyright law, because 17 U.S.C. § 101 states "literary works are works… expressed in words, numbers, or other verbal or numerical symbols…" and the declaring code is expressed in words and numbers.[148] Likewise, the declaring code is original in nature because it is a creative expression that allows the implementing code to run.[149] Justice Thomas's dissent further states declaring code is an expression of an idea,[150] where the idea is to create shortcuts that allow programmers to easily use implementing code, and the expression is the actual work or product that converts the idea into reality.[151]

Since the dissent found the declaring code to be copyrightable via analysis of the Copyright Act, it used that analysis and only found that one factor of the § 107 fair use factors[152] favored fair use—the nature of the copyrighted work. Justice Thomas's dissent analyzed each of the four fair use factors:[153] (1) nature of the

144. *Id.* at 35-36; The Federal Circuit found that three of the four factors, purpose and character of the use, amount and substantiality of the portion used, and the market effects did not favor fair use and that after balancing the four factors, fair use could not be found. Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1204, 1207, 1210 (9th Cir. 2018) *rev'd* 141 S. Ct. 1183 (2021).

145. *Google*, slip op. at 35 (majority opinion).

146. *Google*, slip op. at 4-5 (Thomas, J., dissenting).

147. *Id*.

148. *Google*, slip op. at 5 (Thomas, J., dissenting); 17 U.S.C. § 101 (defining literary works).

149. *Google*, slip op. at 5 (Thomas, J., dissenting). *See* Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., Inc., 499 U.S. 340, 345 (1991) (finding only a minimum amount of creativity is required for a work to be deemed original).

150. *Google*, slip op. at 7 (Thomas, J., dissenting).

151. *Id.* at 5 (citing Golan v. Holder, 565 U.S. 302, 328 (2012)). *See also Google,* slip op. at 5 (majority opinion). The Majority found declaring code to be functions that allow computer programmers to use shortcuts to run tasks written in the implementing code. *Id.*

152. *Google*, slip op. at 7 (Thomas, J., dissenting) ("The majority's application of fair use is far from ordinary.").

153. 17 U.S.C. § 107.

copyrighted work,[154] (2) market effects,[155] (3) purpose and character of the use,[156] and (4) amount and substantiality of the portion used[157] in light of his initial analysis of whether the declaring code is copyrightable.[158] Justice Thomas's dissent ultimately came to a different conclusion than the majority because the dissent found that Google did not use the declaring code fairly.[159]

i. The dissent found the nature of the declaring code favors fair use.

First, Justice Thomas's dissent agrees with the majority that the nature of the declaring code favors fair use, but also notes that computer programmers using the declaring code are typing it in order to run the implementing code; programmers do not see implementing code, they see the declaring code.[160] As a result, Justice Thomas's dissent makes a point to state that the declaring code is inherently important to computer programmers.[161] Furthermore, the dissent compares the Java SE API to a book, where the book is copyrightable even if it is composed of uncopyrightable ideas that create individual chapters.[162] Like a book, the declaring code is copyrightable and composed of uncopyrightable ideas; the uncopyrightable ideas are the different Java packages and Java classes that programmers call when they type code to develop computer programs.[163]

Justice Thomas's dissent's argument aligns with the result from *Burrow-Giles Lithographic Co. v. Sarony* test to determine if the nature of the work leans towards fair use.[164] The *Burrow-Giles Lithographic Co. v. Sarony* test asks: "[D]oes the [work] embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author[?]"[165] As Justice Thomas's dissent claims, the declaring code is copyrightable because declaring code is the type of work Congress wants to protect with the Copyright Act since declaring code is novel and original.[166] Therefore, the majority and dissent analyzed the nature of the work

154. *See infra* Section III.B.i.
155. *See infra* Section III.B.ii.
156. *See infra* Section III.B.iii.
157. *See infra* Section III.B.iv.
158. *Google*, slip op. at 18 (Thomas, J., dissenting).
159. *Id.* at 18-19.
160. *Id.* at 10.
161. *Id.*
162. *Id.*
163. *Id.*
164. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58-59 (1884).
165. *Id.*
166. *See supra* Section IV.B; *Google*, slip op. at 17 (Thomas, J., dissenting).

factor differently but ultimately came to the same conclusion and found that the nature of Google's use of Oracle's declaring code favored fair use.[167]

ii. The dissent disagreed with the majority and found the Market effects factor does not favor fair use.

Second, the majority and Justice Thomas's dissent agree that Google's use of the copied declaring code was for commercial purposes,[168] but differ on whether the copied code created a market substitute.[169] The majority found that the Android platform was in a different market than Oracle and hence no market substitution occurred.[170] Justice Thomas's dissent instead argues that Oracle could have licensed the Java SE API, with the declaring code, to customers in different markets,[171] but since Google copied the code, it took away Oracle's potential profits to license to others in different markets.[172] Therefore, Justice Thomas's dissent identified a severe market effect that Google's copying had towards Oracle's profits and consequently found the "market effects" factor did not favor fair use.[173]

iii. The dissent disagreed with the majority and instead finds the purpose and character of the use factor does not favor fair use.

Third, Justice Thomas's dissent argues the majority incorrectly applied the *Campbell* standard requiring transformative commercial works from copyrighted code to be a "new expression," not a mere substitution for the "purpose and character" fair use factor to weigh in favor of fair use.[174] Justice Thomas's dissent emphasizes Google's Android platform is a market substitution for Oracle because Google used the declaring code in the Android platform to create a platform that competes with Oracle.[175] As a result, Justice Thomas's dissent disagrees with the majority and instead finds the "purpose and character of use" factor does not favor

167. *Google*, slip op. at 24 (majority opinion); *Google*, slip op. at 9 (Thomas, J., dissenting).

168. *Id*. at 15 (Thomas, J., dissenting).

169. *Id*. at 13.

170. *Id*. 35.

171. *Id*. at 14. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (discussing copyright owners' ability to enter potential markets or license others to develop in different markets).

172. *Google*, slip op. at 14 (Thomas, J., dissenting) ("If these effects on Oracle's potential market favor Google, something is very wrong with our fair use analysis.").

173. *Id*. at 11-14.

174. *Id*. at 16; *Campbell*, 510 U.S. at 579.

175. *Google*, slip op. at 16 (Thomas. J., dissenting) (confirming the Federal Court holding that "[t]here is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform").

fair use because Google's commercial use was a market substitution to Oracle's products.[176]

iv. The dissent disagreed with the majority and found the amount and substantiality of the portion used of the copyrightable work does not favor fair use.

Fourth, Justice Thomas's dissent uses *Harper and Row Publishers Inc.*[177] to argue that Google took the "heart" of Oracle's Java SE API, when it copied and used the declaring code.[178] As the majority and Justice Thomas's dissent emphasize, computer programmers knew and enjoyed using the Java declaring code and hence Google wanted to use the declaring code in its Android platform to attract computer programmers to it.[179] Therefore, Justice Thomas's dissent argues the declaring code was the heart of the Java SE API and Google's copying of it was qualitatively substantial.[180] Furthermore, Justice Thomas's dissent notes that Google copying 11,500 lines of code shows that the amount of code was quantitatively significant because it was all of Java SE API's declaring code, not just a portion of the declaring code.[181] Therefore, Justice Thomas's dissent argues the majority incorrectly used their finding of Google's Android platform to be so transformative in nature to overcome the qualitative and quantitative nature of the 11,500 copied code lines does not follow the standard set in *Harper and Row Publishers Inc*.[182] As a result, Justice Thomas's dissent relied on its finding that the Android Platform was not a transformative use of the copied code and hence the amount and substantiality of the portion used factor does not favor fair use.[183]

Consequently, since Justice Thomas's dissent chose to analyze the issue of whether the declaring code was copyrightable rather than assume it, his dissent considered the four fair use factors under different light then the majority did. [184] As a result, Justice Thomas's dissent found three of the four factors did not favor fair use and hence Google's use of the declaring code was not fair use.[185]

176. *Id*. at 15.
177. Harper & Row Publ'rs Inc. v. Nation Enters., 471 U.S. 539, 564-65 (1985).
178. *Google*, slip op. at 18 (Thomas, J., dissenting).
179. *Id.* 30 (majority opinion).
180. *Id.* at 18 (Thomas, J., dissenting).
181. *Id.*
182. *Id.* at 29-30 (majority opinion).
183. *Id.* at 18 (Thomas, J., dissenting).
184. *Id*. at 1-2; 17 U.S.C. § 107.
185. *Google*, slip op. at 18 (Thomas, J., dissenting).

IV. Analysis

In *Google LLC v. Oracle America Inc.*, the Supreme Court held that Google's copying and use of the Java SE API declaring code was a fair use because copying the code allowed computer programmers to use their knowledge and skill to create new and transformative computer programs.[186] The Court correctly decided the case using the *de novo* standard; the Court accepted the jury's findings of fact and then the Justices decided as a matter law whether the facts showed fair use.[187] However, the majority's holding is inconsistent with legislative intent because Congress through 17 U.S.C. §§ 109(b) explicitly recognizes computer programs to be copyrightable.[188] As a result, the majority did not consider the copyrightability of computer programs, specifically the declaring code at issue, and hence failed to apply the fair use factors from 17 U.S.C. § 107 correctly.[189] Therefore, the holding creates a new application of one of the fair use factors, the "purpose and character of the use," by expanding the definition of transformative, resulting in negative implications for future fair use analysis.[190]

A. The Court Correctly Held That the Fair Use Analysis is a Mixed Question of Fact and Law, Which Does not Violate the Seventh Amendment

The Court correctly agreed with the Federal Circuit and decided the case using the *de novo* standard;[191] the Court accepted the jury's findings of fact and then decided as a matter law whether the facts show fair use.[192] The quantity of questions for juries and judges in fair use analysis varies depending on the work and use at issue.[193] So, each fair use analysis must be decided based on case specific facts.[194] Specifically, the fair use analysis relies heavily on judges when the work in question is a computer program since computer programs differ greatly from typical copyrighted works.[195] As a result, the Court correctly disagreed with Google's claim that fair use is purely for the jury and that the Seventh Amendment

186. *Id*. at 35 (majority opinion).

187. *See infra* Section IV.A.

188. *See infra* Section IV.B.

189. *See infra* Section IV.C.

190. *See infra* Section IV.D.

191. *Google*, slip op. at 19 (majority opinion).

192. *Google*, slip op. at 2. *See also Google*, slip op. at 8 (Thomas, J., dissenting) (agreeing with the majority that fair use is a mix question of fact and law).

193. *Id.* at 15 (majority opinion). "The concept [of fair use] is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its application may well vary depending upon context." *Id.*

194. Harper & Row, Publ'rs. Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (citing H. R. Rep. No. 94-1476, at 65 (1976)).

195. *Google*, slip op. at 16 (majority opinion) (comparing literary works to computer programs).

would be violated if more than the jury partook in the fair use analysis.[196] Yet, the Court held that since the Justices are not re-evaluating the jury's factual findings, the Seventh Amendment is not violated and the mixed question of fact and law for fair use analysis is constitutional.[197]

B. The Majority's Holding is Inconsistent with Legislative Intent Because It Fails to Analyze the Copyrightability of the Declaring Code

Congress through 17 U.S.C. §§ 109(b) and § 117 of the Copyright Act explicitly contend that computer programs are protected under Copyright law.[198] The majority goes no further in analyzing whether the computer code, specifically the declaring code presently in question, is copyrightable, but rather assumes the declaring code is copyrightable.[199] Justice Thomas's dissent on the other hand correctly continues the analysis using Congress's Copyright Act while the majority refused to do so.[200]

Justice Thomas's dissent correctly found the declaring code to be a literary work and a function for purposes of the Copyright Act.[201] The declaring code is a literary work because per 17 U.S.C. § 101, "literary works are works… expressed in words, numbers, or other verbal or numerical symbols[.]" and the declaring code is expressed in words and numbers.[202] Likewise, the declaring code is original in nature because it is a creative expression that allows the implementing code to run.[203]

Justice Thomas's dissent, unlike the majority further analyzes the declaring code and its copyrightable nature by quelching Google's argument[204] that the declaring code is disqualified from copyright protection per 17 U.S.C. § 102(b).[205] Section

196. *Google*, slip op. at 8 n.3 (Thomas, J., dissenting).

197. *Id*. *See also Id.* at 18-19 (majority opinion) (holding that the judges are not questioning the facts, but instead deciding if enough evidence exist to find fair use).

198. *Google*, slip op. at 12 (Thomas, J., dissenting). *See* also 17 U.S.C. § 117 (stating that it is not a copyright infringement if an owner of a computer program copy makes another copy if the new copy is essential to use a machine or for purposes of archiving the code); 17 U.S.C. §§ 109(b) (stating that an owner of copied computer program may not use the copy for commercial purposes without the copyright owner's authorization).

199. *Google*, slip op. at 1 (majority opinion).

200. *Google*, slip op. at 4-7 (Thomas, J., dissenting).

201. *Id*. at 5 (citing Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

202. *Id*. *See* 17 U.S.C. § 101 (defining literary works).

203. *Id*. *See* Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., Inc., 499 U.S. 340, 345 (1991) (finding only a minimum amount of creativity is required for a work to be deemed original).

204. *Google*, slip op. at 7 (Thomas, J., dissenting). Google also argues that the merger doctrine applies. *Id.* The merger doctrine prevents copyright protection for works that can only be created one way. *Id.* However, as the dissent points out Apple and Microsoft were able to write their own declaring code, showing that more than one declaring code exists. *Id.*

205. *Id*. at 5 (Thomas, J., dissenting) (referencing 17 U.S.C. § 102(b)).

102(b) states that "copyright protection for an original work of authorship [does not extend] to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or illustrated, or embodied in such work."[206] Yet, as stated previously, declaring code is an expression of an idea,[207] where the idea is to create shortcuts that allow computer programmers to easily use implementing code, and the expression is the actual work or product that converts the idea into reality.[208] Since Justice Thomas's dissent analyzes and finds declaring code to be copyrightable rather than assuming it,[209] he properly follows Congress's intentions with their Copyright Act. By assuming the declaring code is copyrightable because it is a computer program,[210] the majority skips an important aspect of deciding why the portion of the computer program is copyrightable which Congress desires Courts to look at when they codified computer programs as copyrightable in the Copyright Act.[211]

C. The Court Incorrectly Applied the Fair Use Factors

Since the majority failed to consider the question of whether declaring code is copyrightable, the majority also failed to correctly apply the § 107 fair use factors.[212] First, the majority may have come to the correct conclusion that the nature of the declaring code favors fair use but should have analyzed it while considering the purpose of copyright law like Justice Thomas's dissent did.[213] Second, the majority did not appropriately consider the market effects of Google copying Oracle's declaring code and should not have found the market effects factor to favor fair use.[214] Third, the majority incorrectly found the purpose and character of Google's use of the copied declaring code to favor fair use, and hence expanded the fair use analysis.[215] Fourth, the majority correctly found the amount and substantiality of the portion copied to favor fair use and in combination with the other fair use factors found Google's use to be fair.[216] Consequently, the majority incorrectly found Google's use of the declaring code to be fair use because they found the

206. 17 U.S.C. § 102(b).

207. *Google*, slip op. at 5 (Thomas, J., dissenting).

208. *I*d. at 6 (Thomas, J., dissenting). *Id.* at 5 (majority opinion) (finding declaring code to be functions that allow programmers to use shortcuts to run tasks written in the implementing code).

209. *Id.* at 4-7 (Thomas, J., dissenting).

210. *Id.* at 1 (majority opinion).

211. *See supra* Section II.A.

212. *Google*, slip op. at 7 (Thomas, J., dissenting).

213. *See infra* Section IV.C.i.

214. *See infra* Section IV.C.ii.

215. *See infra* Section IV.C.iii.

216. *See infra* Section IV.C.iv.

market effects and purpose and character of the work favored fair use, when in actuality, the factors do not favor fair use.[217]

i. The Court correctly found the nature of the copyrighted work favors fair use.

First, by assuming rather than analyzing whether the declaring code is copyrightable,[218] the majority decided the declaring code had a lower standard of copyright protection because it requires implementing code to produce the desired output.[219] Alternatively, Justice Thomas's dissent, who agrees with the majority that the nature of the work factor favors fair use, analyzed the factor in light of the purpose of copyright law. Therefore, Justice Thomas's dissent correctly finds that the declaring code is inherently important to computer programmers;[220] essentially, because the declaring code embodies the intellectual goal of its author, Oracle, by being novel, inventive, and original, and so the declaring code is protected under copyright law.[221] Justice Thomas's finding that the declaring code is copyrightable is backed by Congress's intent to protect specific works under the Copyright Act.[222] Hence, the majority, may have found the nature of the declaring code favored fair use by applying its assumption that the declaring code was copyrightable, but Justice Thomas's dissent correctly chose to analyze the factor under more scrutiny by relying on their initial finding of copyrightability.[223]

ii. The Court incorrectly found the market effects favors fair use.

Second, the majority incorrectly applied *Campbell's* holding and found that the market effects factor favored fair use.[224] The majority and Justice Thomas's dissent agree that Google's use of the copied code was for commercial purposes,[225] but differ on whether the copied code created a market substitute.[226] The majority found that the Android platform was in a different market than Oracle, who was in the laptop and desktop market, and hence no substitution occurred when Android took the declaring code and used it to create a new product.[227] Yet, Justice Thomas's dissent correctly identified that Oracle could have licensed the Java SE API, with the

217. *Google*, slip op. at 14 and 17 (Thomas, J., dissenting).
218. *See supra* Section IV.B.
219. Google, slip op. at 10 (Thomas, J., dissenting).
220. *Id.*
221. *Id.*
222. *See supra* Section IV.B.
223. *Google*, slip op. at 9-11 (Thomas, J., dissenting).
224. *Google*, slip op. at 30 (Thomas, J., dissenting).
225. *Id.; Id.* at 11 (Thomas, J., dissenting).
226. *Id.* at 18 (Thomas, J., dissenting).
227. *Id.* at 31, 35 (majority opinion).

declaring code, to others in different markets,[228] but since Google copied the code they took away Oracle's potential profits to license to others in different markets, including the smartphone market.[229] Therefore, the majority incorrectly found the market effects factor to favor fair use, while Justice Thomas's dissent correctly identified the severe market effects Google's copying had towards Oracle's potential profits.[230]

iii. The Court incorrectly found the purpose and character of the use to favor fair use.

Third, the majority incorrectly found the "purpose and character of use" factor favored fair use.[231] The majority incorrectly applied the *Campbell* standard requiring transformative commercial works from copyrighted code to be a "new expression" not a "mere substitution" for the purpose and character factor to weigh in favor of fair use and subsequently incorrectly expanded the definition of transformative for purposes of the fair use analysis.[232] As a result, the majority incorrectly found the "purpose and character of use" factor to favor fair use and subsequently expanded the definition of transformative in the fair use analysis.[233]

According to *Harper and Row Publishers, Inc*., there is a presumption of unfairness when a party uses copyrighted material for commercial purposes.[234] At present, Google's Android smartphone platform is clearly for commercial purposes as seen through the "market and effects" factor because Google was using the declaring code to market itself and make money in the smartphone industry.[235] Furthermore, unlike *Campbell's* parody, which mimics "Oh, Pretty Woman" and criticizes society,[236] Google's use of the Oracle's declaring code in the Android smartphone platform is not so transformative to overcome the commercial nature of the smartphone because Google's use of the declaring code supersedes Oracle's licensing methodology.[237] Google's decision to copy the declaring code and use it for profitability is more similar to the defendant in *Harper and Row Publishers, Inc*., who copied contents from a book for the purposes of publishing an article and

228. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592; *Google*, slip op at 12 (Thomas, J., dissenting).

229. *Google*, slip op. at 14 (Thomas, J., dissenting).

230. *Id*.

231. *Id.* at 27 (majority opinion).

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

233. *Google*, slip op. at 17 (Thomas, J., dissenting).

234. Harper & Row, Publ'rs. Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 417, 451 (1984)).

235. *Google*, slip op. at 31, 35 (majority opinion).

236. *Campbell*, 510 U.S. at 580-581.

237. *See supra* Section III.C.iii.

profiting from it, and in *Harper and Row Publishers, Inc.*, the Court did not find fair use.[238]

Therefore, the Court's incorrect finding that the "purpose and character of the use" factor favored fair use, ultimately creates an idea that copying work for commercial purposes is allowable under copyright law if a party can show their new use is transformative.[239] According to the majority, for a work to be transformative, the work must allow others to use it to make new works regardless of whether or not the transformative work supplants the original work.[240] Right now, this new definition of transformative is limited to computer programs, but eventually more parties will attempt to find transformative uses in other types of works and ultimately expand the transformative nature resulting in the disintegration of the "purpose and character of the use" factor in the fair use analysis, meaning more copyright owners will lose exclusive rights, and copyrights itself will lose value.[241]

iv. The Court correctly found the amount and substantiality of portion used favors fair use.

Fourth, the majority correctly found the "amount and substantiality of the portion used" factor favored fair use because the majority focused on the substantiality of Android Platform's relying on its transformative nature rather than the amount of code copied.[242] As the majority admits, since computer programmers knew and enjoyed using the Java declaring code, Google wanted to use the declaring code in its Android platform to attract computer programmers.[243] So, the declaring code was the heart of the Java SE API and Google's copying of it was qualitatively substantial.[244] However, the majority correctly notes that Google copied only 11,500 lines of code out of the possible 2.86 million lines of code which is a very small amount and quantitively less amount than Justice Thomas's dissent wants to admit.[245] Therefore, the majority correctly used its finding of Google's Android platform to be transformative in nature to overcome the qualitative nature of the 11,500 copied code lines, and found the amount and substantiality factor to favor fair use.[246]

Therefore, since Justice Thomas's dissent chose to analyze the issue of whether the declaring code was copyrightable rather than assume it, Justice Thomas's

238. *Harper & Row,* 471 U.S. at 562.

239. *Google,* slip op. at 25 (majority opinion).

240. *Id.*

241. 17 U.S.C. § 107; *Google*, slip op. at 17 (Thomas, J., dissenting).

242. *Google*, slip op. at 29-30 (majority opinion).

243. *Id.* at 30.

244. *Id.* at 18 (Thomas, J., dissenting).

245. *Id.* at 28 (majority opinion).

246. *Id*. at 28 and 30.

dissent considered the four fair use factors[247] under a different, more appropriate light, than the majority did. However, even under different light, the majority still agreed with some of Justice Thomas's dissent's findings and yet the majority incorrectly found Google's use of Oracle's declaring code to be fair use.[248]

D. The New Application of the Transformative Factor Results in a More Expansive Fair Use Defense

Since the majority assumed rather than analyzed whether the declaring code in the Java SE API was copyrightable,[249] the majority's analysis of the four factors[250] incorrectly expanded the definition of transformative[251] used in the "purpose and character of use" factor[252] which ultimately affects all four fair use factors. The majority incorrectly considers only a portion of the transformative definition in *Campbell*—"'adds something new, with a further purpose or different character, altering the copy' the copyrighted work 'with new expression, meaning, or message.'"[253] Justice Thomas's dissent used the entire definition of "transformative" and asked whether Google's work "supersede[s]" the original work and found that it did because Google created a derivative work, the Android platform, from the Java declaring code,[254] which ultimately took away Oracles' ability to compete in the smartphone industry.[255]

Furthermore, as Justice Thomas's dissent correctly notes,[256] § 107 provides examples of fair use purposes, "criticism, comment, news reporting, teaching…, scholarship, or research"[257] and that creating a derivate work for commercial purposes is not listed out. Yes, the list of fair use examples is non-exhaustive, however a derivative work for commercial purposes is very different from a work that criticizes, comments, reports, teaches, and etc.[258] Also, the majority's finding

247. 17 U.S.C. § 107.

248. *Google*, slip op. at 17 (Thomas, J., dissenting).

249. *Id*. at 1 (majority opinion).

250. 17 U.S.C. § 107.

251. Francelina M. Perdomo*, An Overview of Transformative Works and Fair Use*, 31 A.B.A., LITIG. SEC. 12, 12 (2021) (discussing lack of transformative in 17 U.S.C. § 107 because the Court coined it not Congress).

252. *Google*, slip op. at 2 (majority opinion).

253. *Id.* at 24 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

254. *Id.* at 16-17 (Thomas, J., dissenting).

255. *Id.* at 14.

256. *Id.* at 17.

257. 17 U.S.C. § 107.

258. *Id*. (starting the list of fair use examples with "including such use[,]" which results in a non-exhaustive list). *See Campbell*, 510 U.S. at 594 (finding a song parody to be fair use because it comments on a copyrighted song); Harper & Row Publ'rs Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (declining to extend fair use to include copying and using 300 words from an unpublished manuscript about President Ford for a news article because the use was not commenting, reporting, or for news purposes).

of Google's Android Platform to be transformative was enough to sway in favor of Google on all four fair use factors.[259]

Instead of expanding the "transformative" definition, the Court should have solely relied on past precedent. Justice Thomas's dissent correctly refused to expand the "transformative" definition and in the process correctly applied past precedent to the fair use analysis, meaning Justice Thomas's dissent correctly did not find fair use.[260] Justice Thomas's dissent correctly used the entire definition of "transformative."[261] With the expansion of the "transformative" definition in the fair use analysis for copyrighted works, it is unknown exactly how this will impact future litigation over replicating portions or all of copyrighted works to create a derivative commercial work. Since the majority has shortened the definition of "transformative," the majority is allowing works that are not only derivative works of copyrighted works but also works that encompass copyrighted works, essentially taking away a copyright owner's exclusive rights[262] granted to them from the U.S. Constitution.[263] However, Justice Thomas's dissent hopes the majority's expansive transformative fair use analysis will only apply to declaring code and not extend to other works that would otherwise be protected under the Copyright Act.[264]

CONCLUSION

In *Google LLC v. Oracle America, Inc.*, the Supreme Court held that the Java SE API declaring code is copyrightable and that Google's use of the code qualified as fair use.[265] The Court correctly held that fair use is a mixed question of fact and law which does not violate the Seventh Amendment's right to a jury.[266] Yet, the majority's holding is inconsistent with legislative intentions because it failed to analyze the copyrightability of the declaring code.[267] Since Justice Thomas's dissent did analyze the issue of whether the declaring code was copyrightable, rather than assume it like the majority, the dissent found three of the four factors did not favor fair use and as a result Google's use of the declaring code was not fair use.[268] Furthermore, the dissent correctly notes the new expansive definition of

259. *Google*, slip op. at 27, 30, 35 (majority opinion) (finding three factors: (1) Purpose and Character of the Use, (2) Market Effects, and (3) Amount and Substantiality of the use, favored fair use because of Google's transformative use of the declaring code).

260. *See supra* Section III.B (discussing the dissent's application of the fair use factors).

261. *Google*, slip op. at 18 (Thomas, J., dissenting) (finding three factors: (1) Purpose and Character of the Use, (2) Market Effects, and (3) Amount and Substantiality of the use, did not favor fair use).

262. 17 U.S.C. § 106.

263. U.S. CONST. art. I, § 8, cl. 8.

264. *Id.* at 17 n.11 (Thomas, J., dissenting).

265. *Id.* at 1 (majority opinion).

266. *See supra* Section IV.A.

267. *See supra* Section IV.B.

268. *See supra* Section IV.C.

transformative in the "purpose and character" fair use factor may result in an increase in the applicability of the fair use defense, which goes against Congress's intentions set forth in the Copyright Act which provides exclusive rights to copyright owners.[269]

269. *See supra* Section IV.D.

Google LLC v. Oracle America Inc.