FAIR USE DEVELOPMENTS: SUPREME COURT RULES FOR GOOGLE IN ORACLE COPYRIGHT DISPUTE

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Although it's only the first week of April, the Spring of 2021 has already dappled with three significant rulings on the concept of fair use of a third party's copyright. Fair use is a concept that exists in US copyright law, which allows third parties to use another's copyright-protected content without obtaining a license, asking for permission or consent, or paying a fee. Judge Pierre Leval, formerly of the Second Circuit, once described it in an article as a court-recognized doctrine that allowed unauthorized reproduction of copyrighted material that would not infringe the copyright holder's rights. The concept has shifted, expanded and contracted over the years, including in a case almost 30 years ago involving Roy Orbison's song *Pretty Woman* and a tweak on its lyrics and music by Luther Campbell and 2 Live Crew. Various other circuit and Supreme Court rulings have addressed fair use issues before and since. On April 5, 2021, the Supreme Court, in a 6-2 opinion written by Justice Stephen Breyer, made certain fair use issues and factors explicit in the *Google v. Oracle* case that started in the summer of 2010.

Copyright protection is a limited monopoly right, not a monopoly; there are, as Breyer wrote in the *Google v. Oracle* opinion, lawful bindings on the breadth of copyright protection. Within the doctrine of fair use, and without getting consent from a copyright holder, third parties can create parodies, use a work in educational or news reporting spheres, and even create transformative works – even if those follow-on works are commercial in nature, as Google's business is. Now, one additional concept can be added to that list: the public interest. In other words, copyright protection cannot harm the public interest, especially where the follow-on work "captures little of the material's creative expression" or the copier has "a valid purpose" for using another's content.

This has an immediate impact on certain kinds of software and technological content, especially where no patent or trade dress protection manifests around the senior work, as courts (and plaintiffs) "must take into account public benefits" that are a likely result of any copying. The copied work is an Application Programming Interface (API) that allows programmers to call upon pre-written computing tasks for use in their own programs, even if the API is copyrightable, the significant public interest benefit stemming from the follow-on use of the API brings fair use into play. While it's never practical to say something is always permitted under common law, as every situation has to be judged on its own merits, many commentators believe that the Supreme Court has made it difficult if not impossible to win a copyright infringement case if the only allegations involve copying less than one percent of an API. By opening the doors of fair use to certain kinds of follow-on works, including computer code and possibly other technological improvements, this case furthers "copyright's basic creativity objectives".

Scholars like Charles Duan of the R Street Institute believe that the concepts in this ruling will resonate far beyond software, as well. As Justice Breyer wrote, copyright's "exclusive rights can sometimes stand in the way of others exercising their own creative powers…" but now, fair use can be validly asserted beyond the

traditional realms of criticism, commentary, news reportage, teaching, scholarship and research – even where the follow-on work is commercial, if the purpose and character of the follow-on use is transformative.

Just before the Supreme Court issued its ruling in *Google v. Oracle,* the Second Circuit ruled in *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, No. 19-2420-cv, 2021 WL 1148826 (2d. Cir. March 26, 2021)* that Andy Warhol's use of a photograph by Lynn Goldsmith in his Prince Series was not fair use, holding that "the district court erred in its assessment and application of the fair-use factors and the works in question do not qualify as fair use." A different panel of Second Circuit jurists ruled in *Marano v. Metropolitan Museum of Art* that the Met had made "fair use" of a photo that Marano took of Eddie Van Halen by including it in an online catalog for its 2019 exhibition, "Play It Loud: Instruments of Rock & Roll" because that usage was to highlight "the unique design of [Van Halen's] Frankenstein guitar and its significance in the development of rock n' roll instruments."

Only time will tell whether the *Warhol* ruling is reconsidered, re-evaluated, or overturned in the aftermath of *Google v. Oracle*. Still, some commentators believe that it may not stand pursuant to the fair use analysis process and factors set forth in *Google v. Oracle*.

At Berger Singerman we are available to advise and consult on whether a prospective or planned use of a third party's copyright-protected expression may be fair use and assist when either alleging or defending against infringement charges.

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