A2P2 ISSUE BRIEF: FAIR USE 2021: TWO CASES TO KNOW

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ABOUT *GOOGLE V. ORACLE*

Earlier this month, the Supreme Court issued its long-awaited decision in *Google v. Oracle*, a case that has been percolating in the lower courts for years, which concerned the question of whether Google's unauthorized use of computer code to which Oracle held the copyright constituted fair use. In the case, Google was appealing a ruling by the U.S. Court of Appeals for the Federal Circuit, which had held that Google's use of APIs (also referred to as "declaring code") was not fair use. Google appealed to the Supreme Court on the question of whether APIs are protected by copyright at all and, if so, whether Google's use of the code was fair.

In a decision by Justice Breyer, the Court skirted the question of whether APIs are copyrightable, but overturned the Federal Circuit's finding of infringement, holding that Google's use of the APIs was fair use. To come to this determination, the Court considered the four factors involved in fair use determinations. It found that declaring code was functional in nature: unlike the more creative "implementing code" involved in designing Android (and written by Google), the Court viewed the declaring code as equivalent to "building blocks."

The Court also found that Google's use was transformative in purpose and character because it used Oracle's declaring code, as well as its own computer code, to create a new platform offering "a new collection of tasks operating in a distinct and different computing environment." The Court stated that this was sufficiently transformative to overcome the commercial nature of Google's endeavor—the creation of the massively popular Android operating system. The Court further found that Google used a small quantity of Oracle's code relative to the total code it used to create Android, overcoming arguments that the 11,500 lines of Oracle's code that Google used *was* quite a substantial amount. Finally, the Court considered whether Google's Android usurped a market Oracle could have otherwise profited from, and decided that Oracle was not well-positioned to develop a mobile platform at the time and that Google had not usurped its market.

Read More: *Google v. Oracle*, No. 18-956, 593 U.S. (Apr. 5, 2021)
Ronald Mann, *Justices Validate Google's Use of Java Platform in Android Software Code*, SCOTUSBlog, Apr. 6, 2021
Tucker Higgins, *Supreme Court rules in Google's Favor in Copyright Dispute with Oracle Over Android Software*, CNBC, Apr. 5, 2021

WHAT DOES THE CASE MEAN FOR AUTHORS?

The holding in *Google v. Oracle* is likely to be a relatively narrow one in terms of its influence on other fair use issues outside of the realm of software. For authors of other types of literary works who care about the widespread dissemination of their works and contributing to the commons of knowledge, Google's fair use victory may seem a hopeful sign. But it is not clear that it even applies to all *software* copyright issues, let alone issues involving other forms of literary works. The decision—and importance of details such as the number of lines of code that were actually copied—shows how fact-sensitive fair use is. The Court's vision of transformativeness in the context of computer code is not an easy fit for other contexts, creating uncertainty as to whether and how the case will affect authors and creators in the future.

ABOUT *WARHOL FOUNDATION V. GOLDSTEIN*

In late March, the Second Circuit Court of Appeals issued its opinion in *The Andy Warhol Foundation v. Goldsmith*, a case concerning a series of screenprinted images created by artist Andy Warhol depicting the late musical artist (formerly known as) Prince, referred to as the Prince series. The first image of Prince that Warhol created was commissioned by *Vanity Fair*, and was based on a photograph taken by plaintiff Lynn Goldsmith, a renowned celebrity photographer. All of this was authorized pursuant to agreements between Goldsmith and *Vanity Fair* and between Warhol and *Vanity Fair*. The Warhol image that appeared in Vanity Fair included credit lines for both Warhol— the artist—and Goldsmith—the photographer of the work upon which Warhol's was based. But Warhol did not stop there—he created fourteen additional works in the same style, comprising the Prince series that was the subject of the litigation.

In the case, Goldsmith sued the Warhol Foundation for infringement in the Southern District of New York, alleging that the Prince series infringed on her copyright in the photograph of Prince. The district court found for the Warhol Foundation on fair use grounds, focusing on the transformative nature of Warhol's silkscreen prints, which it believed "transformed Prince from a vulnerable, uncomfortable person," as he was presented in Goldsmith's photograph, "to an iconic, larger-than-life figure[.]" Warhol's works also changed the image of Prince from a black and white, three-dimensional representation to two dimensional, colorful representations. Goldsmith appealed the ruling to the Second Circuit, which overturned the district court's finding of fair use.

The Second Circuit disagreed with the district court that Warhol's images were transformative. In its view, the district court improperly took on "the role of art critic," making an *artistic* determination that Warhol's works were transformative, rather than comparing the elements of the images and their purposes and characters. Under this approach, the Second Circuit concluded that the work retained "essential elements" of Goldsmith's photograph, and was functionally the same work with a new aesthetic.

Read More: *The Andy Warhol Foundation* for the Visual Arts *v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021)
The Andy Warhol Foundation for the Visual Arts v. Goldsmith, 382 F.Supp.3d 312 (S.D.N.Y. 2020) (district court decision)
Marketplace, *What Does Warhol Fair Use Ruling Mean for Artists and Copyrights?*, Apr. 9, 2021
Logan Murr, *Second Circuit Delivers Blow for Fair Use in Warhol's Prince Photograph Case*, IPWatchdog, Apr. 1, 2021

WHAT DOES THE CASE MEAN FOR AUTHORS?

Unlike the *Google* case, the narrow reading of transformativeness in *Warhol v. Goldsmith* can more readily be applied in other contexts where other creative works could be broken down into their elements and compared objectively. The *Warhol* court was not the only one in recent months to constrain the so-called "transformative use test," and courts are increasingly moving away from considering transformativeness subjectively, and towards examining elements of the two works more objectively. Yet, as discussed, the *Google* decision took a broader approach to fair use, and one which, as a Supreme Court case, will be more influential to courts across the country. Moreover, the Warhol Foundation has filed a petition for *en banc* review in the Second Circuit, which, if granted, could change the outcome of the *Warhol v. Goldsmith* case. The variations in treatment of fair use in general, and transformativeness specifically, between these two cases show how fair use is a context-specific determination.