

A WORLD POST-*WARHOL*: WHAT IS FAIR USE IN COMPUTER CODE?

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INTRODUCTION

“Only one thing is impossible for God: To find any sense in any copyright law on the planet.”¹ Computer code is widely viewed as the problem child in intellectual property because it does not fit perfectly into the patent, trademark, or copyright systems. Despite this, computer code is most often associated with copyright protection because that is the closest fit.² In 1974, the Commission on New Technological Uses of Copyrighted Works (CONTU) was established to discuss potential changes to the copyright law and make recommendations to Congress about changing the law.³ Their recommendation to Congress was to amend the copyright law to include computer code because code is a set of words fixed in a tangible medium—the computer’s storage—just as copyright law requires.⁴ While computer code has both expressive and functional elements, copyright focuses on the expressive portion.⁵ The essence of copyrighting computer code, therefore, focuses on the code itself rather than what it does.⁶ The copyright covers the words and syntax used as it is written, similar to copyright for a book.⁷ However, this is not a great fit because the functional elements of the code are left unprotected by the copyright statutes.⁸ Thus, there are issues with utilizing copyright as the primary method of protecting computer code, but Congress determined this was the best fit of the options available.⁹

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¹ Albert Paine, *MARK TWAIN’S NOTEBOOK 380* (2006).

² Richard Stim, *Copyright Basics FAQ*, STAN. LIBR., <https://fairuse.stanford.edu/overview/faqs/copyright-basics/> [https://perma.cc/YD3P-ANR5].

³ Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 665 (1984) (citing Act of Dec. 31, 1974, Pub. L. No. 93-573, tit. II, 88 Stat. 1873, 1873-74).

⁴ FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, 21–22 (1978).

⁵ Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph For Copyright Protection of Network and Functional Features of Computer Software*, 31 HARV. J. L. & TECH. 305, 309 (2018).

⁶ *Id.*

⁷ *See id.*; Samuelson, *supra* note 3, at 704.

⁸ Menell, *supra* note 5, at 309; Samuelson, *supra* note 3, at 704.

⁹ *Id.*

Computer code can promote technology and development into horizons that once seemed impossible. The job market in the software development field is expected to grow by about 25% between 2022 and 2032, which the U.S. Bureau of Labor Statistics noted was “[m]uch faster than average.”¹⁰ Notably, learning how to code in different languages on the job is common, and new skills are learned and shared among developers.¹¹ In the industry, companies are adopting cultures and strategies to be on the cutting edge of technology and to get ahead of the competition.¹² Companies also leverage intellectual property rights to protect their technologies, and this promotes the innovation we see every day.¹³

The Copyright Act contains exceptions to the express rights given to the copyright owner; one exception is fair use.¹⁴ The primary goal of fair use is to “fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts’”¹⁵ Fair use creates a set of exceptions that permits unauthorized use of protected materials by acting as a defense against infringement claims by the intellectual property rights holder.¹⁶ The fair use doctrine was primarily developed in the copyright space, but a similar doctrine was also developed in trademark law.¹⁷ No such exception exists in patent law.¹⁸ The Copyright Act and the fair use doctrine intend to strike “a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”¹⁹ Fair use law dates back to 1841 when Justice Story laid out the four factors for fair use now codified in 17 U.S.C. § 107.²⁰ Courts weigh these

¹⁰ *Software Developers, Quality Assurance Analysts, and Testers*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm> (last modified Sept. 6, 2023).

¹¹ Kelsey Alpaio, *Career Crush: What is it Like to be a Software Engineer?*, HARV. BUS. REV. (July 21, 2021), <https://hbr.org/2021/07/career-crush-what-is-it-like-to-be-a-software-engineer> [<https://perma.cc/8G8T-BT3J>].

¹² Jim Highsmith & Alistair Cockburn, *AGILE SOFTWARE DEVELOPMENT: THE BUSINESS INNOVATION 120* (2001); Shayna Joubert, *Agile vs. Scrum: What’s the Difference?*, NE. UNIV. GRADUATE PROGRAMS (Mar. 21, 2021), <https://graduate.northeastern.edu/resources/agile-vs-scrum/> [<https://perma.cc/3PVC-WM59>].

¹³ Highsmith & Cockburn, *supra* note 12; Joubert, *supra* note 12; *see also* 17 U.S.C. §§ 101–07.

¹⁴ 17 U.S.C. §§ 101–06; 17 U.S.C. § 107.

¹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (citing U.S. CONST. art. I, § 8, cl. 8).

¹⁶ Stim, *supra* note 2.

¹⁷ *Fair Use of Trademarks (Intended for a Non-Legal Audience)*, INT’L TRADEMARK ASS’N, <https://www.inta.org/fact-sheets/fair-use-of-trademarks-intended-for-a-non-legal-audience/> [<https://perma.cc/XXX5-WUD2>].

¹⁸ Lv Xiao Chen, *Under the Shadow of a Pandemic: Fair Use in Patent Law*, N.Y.U. J. OF INTELL. PROP. & ENT. L. (Apr. 20, 2020), <https://jipel.law.nyu.edu/under-the-shadow-of-a-pandemic-fair-use-in-patent-law/> [<https://perma.cc/P8VD-434W>].

¹⁹ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 526 (2023) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

²⁰ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841); Bruce E. Boyden, *The Surprisingly Confused History*

factors to determine whether a use is “fair” or if the user infringed on someone else’s work and must be held liable for their infringement.²¹

In 2023, the Supreme Court decided *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, where the Court reviewed an infringement claim by a photographer against the Andy Warhol Foundation. The Andy Warhol Foundation claimed the use was fair.²² The Court, however, decided that the use was not fair and focused on the “transformative” nature of the work in their decision.²³ The Court held Warhol’s use of the work was not transformative enough to constitute fair use.²⁴ The Court noted that the intended uses by Warhol and the photographer were similar enough that they essentially had the same use but did not consider Warhol’s intent or the message his image conveyed in denying that his use was fair.²⁵

This Note argues that *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* has the potential to narrow the scope of fair use in computer code and that this change would not be suitable for innovation or the software development industry. Part II of this Note further explains the fair use doctrine as well as the statute that enumerates the four-factor test that the courts apply.

Part II also provides the background information and the decisions in *Google LLC v. Oracle America, Inc.* and *Warhol*.²⁶ This exposes how fair use has previously been viewed by the Court in a computer code context and shows that the Court, with its newer justices, has interpreted fair use in an artistic context. This part will focus on how the two cases utilized the fair use factors and how the two types of copyrighted materials affected the Court’s view on interpreting those factors, as well as the emphasis they placed on transformative use.

Part III of this Note discusses how the current interpretation of fair use affects computer code and the issues that it presents. This part will examine how the *Warhol* and *Google* cases play into the interpretation of fair use.²⁷ It also looks at how the two cases utilize the fair use factors differently and what the *Warhol* case means for balancing the factors.²⁸ The part concludes

of Fair Use: Is It a Limit or a Defense or Both?, MARQ. UNIV. L. SCH. (October 9, 2022), <https://law.marquette.edu/facultyblog/2022/10/the-surprisingly-confused-history-of-fair-use-is-it-a-limit-or-a-defense-or-both/>, [<https://perma.cc/V6GA-B6X2>].

²¹ *Warhol*, 598 U.S. at 526–27.

²² *Id.* at 525.

²³ *Id.* at 525–26.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 6 (2021).

²⁷ *Warhol*, 598 U.S. at 514; *Google*, 593 U.S. at 6.

²⁸ *Warhol*, 598 U.S. at 514; *Google*, 593 U.S. at 6.

by discussing how a narrow interpretation of the factors harms innovation and the software development industry.

Part IV of this Note suggests the acceptance of a broad fair use regime in computer code. This part will highlight the need for this broad view and elaborate on the detrimental effects that a narrow view of fair use will cause. It also examines how a narrow fair use regime will hurt software developers and the growth of learned skills in this industry. Part IV will also examine the importance of the “purpose and character” provision,²⁹ especially the transformative element, in creating a fair use regime that promotes research and innovation.

Finally, this Note concludes by discussing how *Google* laid out sound reasoning for maintaining a broad regime of fair use and the importance of allowing the usage of skills and knowledge gained by developers working throughout the industry.³⁰ The overall goal of this Note is to analyze the potential effects of the *Warhol* case on the intellectual property rights of computer code to encourage a regime of intellectual property rights that promotes research, development, innovation, and skill growth in the software development industry.³¹

II. BACKGROUND

Knowledge of the intellectual property rights held by the copyright owner is an important first step in comprehending the fair use doctrine. Also, explaining the fair use doctrine illustrates the limited exceptions to those rights. Then, an explanation of the rulings in each Supreme Court case helps show how courts interpret the scope of fair use. Finally, discussing the larger view on fair use and how these cases work into this view, especially in computer code, is imperative.

Intellectual property rights in the U.S. are akin to general property rights in that they are a “bundle of rights.”³² The bundle of rights given to copyright owners includes “the exclusive rights of reproduction, adaptation, publication, performance, and display.”³³ Importantly, the rights of reproduction, adaptation, and publication extend to all types of copyrighted works, whereas the rights of public performance and display are more limited.³⁴ The right of public performance is limited to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings,” and the right to display

²⁹ 17 U.S.C. § 107.

³⁰ See generally *Google*, 593 U.S. at 6.

³¹ See generally *Warhol*, 598 U.S. at 514.

³² H.R. REP. NO. 94-1476, at 61 (1976).

³³ *Id.*

³⁴ *Id.* at 61–63.

recordings publicly is limited to “literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works’, including the individual images of a motion picture or other audiovisual work.”³⁵

The rights granted to the owner of the copyright not only give them exclusive rights to reproduce, adapt, publish, perform, and display the work, but it also provides them the exclusive right to authorize these actions.³⁶ Congress’s intent in giving this right was to ensure that any party who engages in or contributes to infringement is held liable for their actions.³⁷

A. *The Fair Use Doctrine*

The fair use doctrine is a set of exceptions to the rights granted in copyrighted works.³⁸ Despite granting such broad rights under copyright law, Congress subjected these rights to certain exceptions enumerated in the sections following the grant.³⁹ The exception this Note focuses on is fair use.⁴⁰ This exception began as a court-made doctrine but was eventually codified.⁴¹ While not an exhaustive list of fair uses of copyrighted works, the statute lists a few purposes that the doctrine protects.⁴² The statute says that uses such as “criticism, comment, news reporting, teaching[,] . . . scholarship, or research, is not an infringement of copyright.”⁴³

In deciding not to specifically enumerate what constitutes fair use, Congress instead adopted the factors that evolved throughout the application of the fair use doctrine by the courts.⁴⁴ These factors are:

1. [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

³⁵ *Id.* at 62–63.

³⁶ *Id.* at 61.

³⁷ *Id.*

³⁸ *Id.* at 65.

³⁹ 17 U.S.C. § 106.

⁴⁰ 17 U.S.C. § 107.

⁴¹ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841); 17 U.S.C. § 107.

⁴² 17 U.S.C. § 107.

⁴³ *Id.*

⁴⁴ H.R. REP. NO. 94-1476, at 65.

4. the effect of the use upon the potential market for or value of the copyrighted work.⁴⁵

The statute concludes by noting that even unpublished works are subject to the fair use balancing test.⁴⁶ In adopting this test, Congress indicated that it wanted courts to remain free to adapt and apply the doctrine to each case rather than providing a rigid set of rules.⁴⁷ Congress also highlighted that the provision stating, “whether such use is of a commercial nature or is for nonprofit educational purposes,” signals that the commercial or non-profit nature of an activity should be considered among the factors in deciding fair use cases.⁴⁸ Congress clarified that their intention was not to alter the doctrine; instead, they wanted to codify the “purpose and general scope of the judicial doctrine of fair use.”⁴⁹

The fair use doctrine is considered “difficult and unpredictable” because there is little to no guidance on weighing the factors listed in the statute.⁵⁰ Interpretation and understanding of these factors, therefore, largely depends on caselaw and how courts have applied the factors to the facts at hand.⁵¹ The fair use statute provides the basic framework, however, there remains plenty of room for interpretation and application of the factors.⁵² Accordingly, the Supreme Court’s jurisprudence often guides litigants on approaching these factors, but guidance from the Supreme Court is typically limited and does not fill in the gray area left by the framework codified by Congress.⁵³

B. *Google LLC v. Oracle America, Inc.*

In 2021, the Supreme Court faced the question of the scope of the fair use defense in *Google LLC v. Oracle America, Inc.*⁵⁴ In that case, Google copied code from Oracle’s Java Standard Edition (Java SE) program and claimed fair use as its defense to Oracle’s challenge of the use.⁵⁵

Google acquired Android to start developing smartphone software in 2005.⁵⁶ Google’s goal was to create a platform where developers could come

⁴⁵ 17 U.S.C. § 107.

⁴⁶ *Id.*

⁴⁷ H.R. REP. NO. 94-1476, at 66.

⁴⁸ 17 U.S.C. § 107; H.R. REP. NO. 94-1476, at 66.

⁴⁹ H.R. REP. NO. 94-1476, at 66.

⁵⁰ JAY DRATLER, JR. & STEPHEN M. MCJOHN, *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* § 6.01 (3d ed. 2023).

⁵¹ *Id.*

⁵² 17 U.S.C. § 107; DRATLER & MCJOHN, *supra* note 50, § 6.01.

⁵³ DRATLER & MCJOHN, *supra* note 50, § 6.01.

⁵⁴ *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 6 (2021).

⁵⁵ *Id.* at 6.

⁵⁶ *Id.*

and easily utilize the tools they created.⁵⁷ Their ultimate goal was to garner support for the Android platform so that more applications would be available to consumers, and thus, they would choose Android over the other options.⁵⁸ However, such a lofty goal meant “attracting a sizeable number of skilled programmers.”⁵⁹ Oracle owns the Java SE platform, which is written in the Java programming language.⁶⁰ Java is a programming language that is widely known by many developers.⁶¹ This prompted Google to approach Sun Microsystems (Oracle’s predecessor) about licensing the Java platform for its smartphones.⁶²

However, Google and Sun could not agree on certain terms, so Google proceeded by building out their platform, which was tailored for smartphones, rather than desktop or laptop computers.⁶³ To do this, Google had to write millions of lines of code.⁶⁴ Despite Google creating a lot of their code, they copied approximately 11,500 lines of code from Java SE.⁶⁵ These lines of code were part of the Application Programming Interface (API) from Java SE.⁶⁶ Google argued that its use was fair because some of the code was fundamental to using the Java language and that copying the code allowed programmers to utilize their knowledge and skills.⁶⁷

An API is a tool that “allow[s] programmers to use . . . prewritten code to build certain functions into their own programs, rather than write their own code to perform those functions from scratch.”⁶⁸ When a user gives a computer an input to seek an answer, the computer receives that input as a “task.”⁶⁹ The function of the API is to take the incredible number of “tasks” a computer may complete and organize them in a certain way.⁷⁰ The API allows a programmer to select the “task” or “tasks” they need for their intended use.⁷¹ Tasks are grouped into “classes,” which are grouped into “packages.”⁷² “Implementing code” instructs the computer on how to perform certain tasks, while the computer selects which task to execute through “method calls.”⁷³ Method calls direct the computer to the appropriate

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 6–8.

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 8–9.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 13–15 (citing *Oracle Am., Inc. v. Google Inc.*, 872 F. Supp. 2d 974, 982 (N.D. Cal. 2012)).

⁶⁸ *Oracle Am., Inc. v. Google, Inc.*, 750 F. 3d 1339, 1349 (Fed. Cir. 2014).

⁶⁹ *Google*, 593 U.S. at 8–10.

⁷⁰ *Id.*

⁷¹ *Id.* at 9–10.

⁷² *Id.*

⁷³ *Id.* at 10.

program within the implementing code, ensuring the correct task is carried out.⁷⁴ Computers often complete many different tasks, and different method calls tell the computer which tasks to choose.⁷⁵ The Java language has many method calls that programmers are already familiar with, which allow them to perform many tasks.⁷⁶

The “method call[s] . . . locate and invoke the particular implementing code” to perform a specified task by utilizing “declaring code.”⁷⁷ The declaring code is part of the API, and it connects the method calls with the implementing code.⁷⁸ Thus, the declaring code operates as a shortcut in Java where the programmer can easily pick “task[s] without having to learn anything more than a simple command.”⁷⁹

In addition to this, the declaring code organizes the tasks within the Java system.⁸⁰ The commands are given to the computer, and then the method calls locate the correct implementing code and tell the computer what to do.⁸¹ A line of code ultimately uses the API to call a “task-implementing program” that performs the operation the programmer sought to complete, such as “determining the higher [of two] number[s].”⁸²

To perform the desired task the programmer writes the code, in the proper software (the API), and that software utilizes the included declaring code that links to the “method calls,” which links to the task-implementing program and the included implementing code that carries out the task.⁸³

Google wrote its own implementing code and task-implementing programs in this case.⁸⁴ It also wrote its own declaring code in many of the instances.⁸⁵ However, Google did copy the declaring code from 37 packages of the Sun Java API, including the names of the tasks, the names of the classes, and the names of the packages.⁸⁶ Google reasoned that these packages were useful for programmers working on applications for smartphones and “three of the packages . . . were fundamental to being able to use the Java language at all.”⁸⁷ This allowed programmers to use the method calls they were already accustomed to using to call up tasks, but the

⁷⁴ *Id.* at 10–11.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 10.

⁷⁸ *Id.* at 10–11.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Google*, 593 U.S. at 12.

⁸³ *Id.*

⁸⁴ *Id.* at 13.

⁸⁵ *Id.*

⁸⁶ *Id.* (citations omitted).

⁸⁷ *Id.* 13–14 (citing *Oracle Am., Inc.*, 872 F. Supp. 2d at 982).

implementing code that Google wrote themselves performs the actual task.⁸⁸ Without directly copying this code, the programmers would need to learn an entirely new system that Google would need to create to call up those tasks.⁸⁹

The Federal Circuit decided that the API's declaring code and its organizational structure could be copyrighted.⁹⁰ The Federal Circuit also held that the taking of "a copyrighted work verbatim and using it for the same purpose and function as the original competing platform" was not fair use.⁹¹ After this, Google petitioned the Supreme Court for certiorari, which the Court granted.⁹²

The Supreme Court began its examination of the fair use provision by emphasizing that the list of factors is not exhaustive and "that some factors may prove more important in some contexts than others."⁹³ Rather than addressing the copyrightability of the code—which Google initially asked the Court to do because Google felt the API could fall under the statutory provision that "forbids copyrighting, e.g., 'process[es],' 'system[s],' and 'methods of operation'"⁹⁴—the Court instead presumed the API was copyrightable and focused on whether its use constituted fair use.⁹⁵

The analysis of the fair use claim began by discussing the difficulty of applying copyright and fair use to computer programs because of their expressive and functional features.⁹⁶ However, the Court acknowledged that Congress intended for computer code to be covered by copyright when they defined computer programs in 17 U.S.C. § 101.⁹⁷

The Court then analyzed the "nature of the copyrighted work" factor.⁹⁸ The Court discussed how the implementing code required the creativity of the developer to consider the speed of the device, the size of the memory of the device, as well as the other factors related to the device.⁹⁹ Whereas the declaring code was intended to attract programmers and be easy to remember so that they could easily invoke it.¹⁰⁰ The Court also emphasized that implementing code is closer to the core of fair use than declaring code, which means it is harder to establish a fair use of implementing code.¹⁰¹ Then, the Court explained that a significant portion of the value of the program comes

⁸⁸ *Id.*

⁸⁹ *Id.* at 14.

⁹⁰ *Oracle Am., Inc.*, 750 F.3d at 1354.

⁹¹ *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1210 (Fed. Cir. 2018).

⁹² *Google*, 593 U.S. at 16.

⁹³ *Id.* at 19 (citations omitted).

⁹⁴ *Google*, 593 U.S. at 19–20 (citation omitted).

⁹⁵ *Id.* at 20.

⁹⁶ *Id.* at 22.

⁹⁷ *Id.* at 23; 17 U.S.C. § 101.

⁹⁸ *Google*, 593 U.S. at 26.

⁹⁹ *Id.* at 27–28 (citations omitted).

¹⁰⁰ *Id.* at 28.

¹⁰¹ *Id.* at 29 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

from the time and effort the programmers spend learning the API's system and the efforts Sun expended to get the programmers to learn the system so they will use Sun's implementing programs, which Google did not copy.¹⁰² The Court's analysis of the "nature of the copyrighted work" factor weighed in favor of fair use.¹⁰³

The next factor the Court looked at was "[t]he [p]urpose and [c]haracter of the [u]se."¹⁰⁴ The Court discussed the consideration of "whether the copier's use 'adds something new, with a further purpose or different character, altering' the copyrighted work 'with new expression, meaning or message.'"¹⁰⁵ The Court then articulated that often the term "transformative"¹⁰⁶ is used to describe "a copying use that adds something new and important."¹⁰⁷ A use deemed transformative often tends to support a finding of fair use.¹⁰⁸

The Court further reasoned that while Google copied the exact code from the Java API, to determine whether a use is "transformative" requires examining the purpose and character of the work alleged to be infringing.¹⁰⁹ Then, the Court clarified that Google only used the Java API to the extent that the API was needed to incorporate tasks that were useful in smartphones, and Google's intent was limited to allowing programmers to call on the tasks in the programming language they knew.¹¹⁰ Because reimplementation involves the "'building of a system . . . that repurposes the same words and syntaxes' of an existing system," this use contributed to the enhancement of computer program development.¹¹¹ Additionally, Sun had even used pre-existing interfaces in creating Java and reusing APIs was common in the industry.¹¹² These facts, to the Court, tended to support that copying Google's code weighed in favor of fair use.¹¹³ The Court also declined to require good faith in the purpose and character of the use factor and noted that many fair uses may still be commercial in nature.¹¹⁴

The third factor the Court analyzed was "[t]he amount and substantiality of the portion used."¹¹⁵ The Court reasoned that while 11,500 lines of code is a large number—compared to the 2.86 million lines in the API—the 11,500

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citing 17 U.S.C. § 107).

¹⁰⁵ *Id.* (citing *Campbell*, 510 U.S. at 579).

¹⁰⁶ *Id.*

¹⁰⁷ *Google*, 593 U.S. at 29.

¹⁰⁸ *Id.* at 30.

¹⁰⁹ *Id.* (citing 17 U.S.C. § 107(1)).

¹¹⁰ *Id.* at 30–31 (citation omitted).

¹¹¹ *Id.* at 31.

¹¹² *Id.* (citation omitted).

¹¹³ *Id.* at 32.

¹¹⁴ *Id.* at 32–33.

¹¹⁵ *Id.* at 33 (citing 17 U.S.C. § 107).

lines were relatively small.¹¹⁶ The Court decided that it was better to look at the lines copied compared to the total number of lines, rather than looking at the copied lines in isolation because of the inseparability of the API to the task-implementing lines, the familiarity of the programmers with those lines, and the purpose of Google to create a different platform and to create a different system to build and popularize the Android system.¹¹⁷ The Court emphasized that Google could not use fewer lines than it did like the 170 Oracle suggested was necessary to use Java because their objective was not *just* to use Java, rather it was to allow programmers to bring their abilities over from using Java's API and apply it to making new programs for the Android platform.¹¹⁸ Thus, the Court concluded the "substantiality" factor weighed in favor of fair use.¹¹⁹

Finally, the Court analyzed the "'effect' of the copying in the 'market for or value of the copyrighted work.'"¹²⁰ The Court looked not only at the potential loss of revenue, "but also the source of the loss."¹²¹ Then, by examining "public benefits the copying will likely produce,"¹²² the Court proceeded to address the fact that these questions may not arise in other cases and are not the only ones a court may ask in their analysis, but they were the relevant ones here.¹²³ The justices considered the failed attempt by Sun to expand into the mobile phone market, the difference in the kinds of devices used, the markets they occupied, and the benefits Sun received from more programmers using Java.¹²⁴ As a result, they explained that the desire of Google to use the API had less to do with Java and more to do with the programmers and their understanding of the Java API.¹²⁵ The decision emphasized that allowing Oracle to enforce its copyright would "risk harm to the public" because it would stunt creativity and development to allow Oracle to enforce its rights over the API.¹²⁶ The Court ultimately decided that the "uncertain nature of Sun's ability to compete in Android's marketplace, the sources of its lost revenue, and the risk of creativity-related harms to the public, when taken together, convince that this fourth factor—market effects—also weighs in favor of fair use."¹²⁷

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 34.

¹¹⁸ *Google*, 593 U.S. at 34 (emphasis added).

¹¹⁹ *Id.* at 35 (citing 17 U.S.C. § 107).

¹²⁰ *Id.* (citing 17 U.S.C. § 107(4)).

¹²¹ *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994)).

¹²² *Id.* (citing *Campbell*, 510 U.S. at 591–92).

¹²³ *Id.* at 36.

¹²⁴ *Id.* at 36–37.

¹²⁵ *Id.* at 38.

¹²⁶ *Id.* at 39.

¹²⁷ *Id.* at 40.

The Court held that Google’s copying was a fair use of the Sun Java API as a matter of law.¹²⁸ The result of the *Google* case was a signal that fair use is applied broadly in computer code.¹²⁹ While the focus of the case was on the APIs and the declaring code, it appeared to many that this could be extended to the implementing code to an extent, but the exact bounds were unclear.¹³⁰ However, this was a win to many, especially those who favor a broad fair use doctrine in computer code, because it allowed for the interpretation of the factors in a manner that considered the use and application of the code.¹³¹ Also, it showed that the Court is willing to view fair use in code in a manner that promotes the advancement of technology, which required the Court to look at the use of the alleged infringer and how that use can be applied to the transformative use analysis.¹³²

C. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*

In *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, the Supreme Court faced a question of the scope of the fair use doctrine.¹³³ The Court weighed the fair use factors and decided, in a 7–2 split, that Andy Warhol’s use of a photograph to create new images of the musician Prince shared substantially the same purpose as the original photograph, and that purpose was commercial in nature, so his use did not constitute fair use.¹³⁴ This decision seemingly let artists know that mere “transformation” is not enough for fair use and signaled to all that each factor must be considered; no factor is dispositive.¹³⁵

Lynn Goldsmith is a photographer who made a career in rock-and-roll photography and took photographs of some of the most famous rock stars, including Prince.¹³⁶ Vanity Fair came to Goldsmith in 1984 seeking to license a photograph of Prince.¹³⁷ The photograph was licensed to Vanity Fair as an “artist reference” for a story on Prince, but the license was conditioned on the photo being used “‘one time’ only.”¹³⁸ Vanity Fair subsequently hired Andy Warhol to use that image as a reference for the image published in the

¹²⁸ *Id.*

¹²⁹ Dorothy Auth et al., *High Court Oracle Copyright Ruling Is a Boon for Innovation*, LAW360 (Apr. 8, 2021, 4:48 PM), <https://www.law360.com/articles/1372692/high-court-oracle-copyright-ruling-is-a-boon-for-innovation> [<https://perma.cc/55LD-CQCQ>].

¹³⁰ *Id.*

¹³¹ *Id.*; *Google*, 593 U.S. at 38–31.

¹³² Auth et al., *supra* note 129; *Google*, 593 U.S. at 40.

¹³³ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 525 (2023).

¹³⁴ *Id.* at 550–51.

¹³⁵ *Id.* at 526–27.

¹³⁶ *Id.* at 515.

¹³⁷ *Id.*

¹³⁸ *Id.*

magazine.¹³⁹ Goldsmith was credited for the “source photograph” and received \$400 from Vanity Fair.¹⁴⁰ The license agreement stated “that the illustration was ‘to be published in Vanity Fair’s November 1984 issue. It can appear one-time full page and one time under one-quarter page. No other usage right granted.’”¹⁴¹ However, Warhol subsequently made 15 additional works based on Goldsmith’s photograph.¹⁴² The Andy Warhol Foundation for the Visual Arts, Inc. (AWF) later licensed one of the works to Condé Nast, where AWF received \$10,000 and Goldsmith was not compensated.¹⁴³ Goldsmith went to AWF and let them know that their use of the photograph likely infringed on her copyright, and AWF subsequently sued her.¹⁴⁴ The district court granted Summary Judgment on AWF’s stance that the use constituted “fair use,”¹⁴⁵ however, the court of appeals reversed.¹⁴⁶

AWF maintains copyrights in the subsequent works created by Warhol, but they do not possess the works themselves.¹⁴⁷ They use their rights in the images to license the images.¹⁴⁸ Importantly, since licensing to Vanity Fair, Goldsmith has licensed the images to other entities, like Newsweek, People, Musician, and others.¹⁴⁹ People magazine even paid Goldsmith \$1,000 to license one of her images for their Prince tribute after his death.¹⁵⁰ Three other notable special edition Prince magazines were released after his death, with images of him on the cover and crediting the source of the photograph.¹⁵¹ Condé Nast, however, did not credit the photographer.¹⁵²

The question before the Supreme Court was “whether the first fair use factor, ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,’ § 107(1), weighs in favor of AWF’s recent commercial licensing to Condé Nast.”¹⁵³

After informing AWF of the alleged infringement, AWF sued Goldsmith in the Southern District of New York seeking a declaratory judgment of either noninfringement or fair use to which Goldsmith filed a counterclaim of infringement.¹⁵⁴ The district court ruled that three of the four factors

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citations omitted).

¹⁴¹ *Id.* at 516–17 (citation omitted).

¹⁴² *Id.* at 515.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (citing 17 U.S.C. § 107).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 519.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 520.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 520–21.

¹⁵² *Id.* at 521.

¹⁵³ *Id.* at 516 (citing 17 U.S.C. § 107(1)).

¹⁵⁴ *Id.* at 522.

weighed in favor of AWF and granted them Summary Judgment.¹⁵⁵ The only factor not weighing in AWF's favor was "the nature of the copyrighted work."¹⁵⁶

The court of appeals reversed the district court, holding that all four factors favored Goldsmith.¹⁵⁷ The Second Circuit noted that the "transformative purpose and character must, at the bare minimum, comprise something more than the imposition of another artist's style on the primary work."¹⁵⁸

The Supreme Court then granted certiorari.¹⁵⁹ The Court's analysis focused on the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,"¹⁶⁰ and whether the factor weighs in favor of Goldsmith.¹⁶¹ The Court began by declaring that "the first fair use factor instead focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism."¹⁶² The Court turned to the first factor's central question—it asked "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."¹⁶³ Sharing purpose or character of a work "is a matter of degree" and the factor "asks 'whether and to what extent' the use at issue has a purpose or character different from the original."¹⁶⁴ The Court also explained that "[a] use that has a further purpose or different character is said to be 'transformative.'"¹⁶⁵ To be "transformative" the "degree of transformation" has to go beyond merely being a "derivative transformation" that the copyright owner has the exclusive right to create.¹⁶⁶ Ultimately, the first factor looks to "whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of

¹⁵⁵ *Id.* at 522–23 (citing *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 316 (S.D.N.Y. 2019)).

¹⁵⁶ *Andy Warhol Found. for the Visual Arts, Inc.*, 382 F. Supp. 3d at 327.

¹⁵⁷ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 54 (2d Cir. 2021).

¹⁵⁸ *Id.* at 42.

¹⁵⁹ *Warhol*, 598 U.S. at 525 (citing *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2022)).

¹⁶⁰ *Id.* (citing 17 U.S.C. § 107(1)).

¹⁶¹ *Id.*

¹⁶² *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)) (In response to AWF's contention that the court of appeals erred in not considering that the new photograph was transformative, and the first factor weighs in their favor "because the works convey a different meaning or message than the photograph.").

¹⁶³ *Id.* at 528 (citing *Campbell*, 510 U.S. at 579) (internal quotation marks omitted).

¹⁶⁴ *Id.* at 529 (citing *Campbell*, 510 U.S. at 579).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

difference must be balanced against the commercial nature of the use.”¹⁶⁷ If the original and the secondary use “share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.”¹⁶⁸

In analyzing the first factor, the Court examined the “specific ‘use’” of the copyrighted work that was alleged to constitute “an infringement.”¹⁶⁹ The Court clarified that the use of the image licensed by Condé Nast served “substantially the same” purpose as Goldsmith’s photograph.¹⁷⁰ It also stated that the use was commercial in nature.¹⁷¹ Thus, the commercial character and the fact that the photographs served “substantially the same purpose” supported a finding against fair use.¹⁷² The Court then determined that derivative works may borrow heavily from an original but that the use here had too similar of a purpose and there had not been a “compelling justification” for the use offered.¹⁷³

The Court proceeded to review the contention by AWF that the image had a “new meaning or message” and, that the new meaning or message weighed in favor of fair use, especially since Warhol’s images “convey[] the dehumanizing nature of celebrity.”¹⁷⁴ The Court disagreed with this notion.¹⁷⁵

The Court then stated § 107(1) does not mean that “any use that adds some new expression, meaning or message” supports a finding of satisfying the first factor.¹⁷⁶ To find otherwise “would swallow the copyright owner’s exclusive right to prepare derivative works.”¹⁷⁷ It also noted that a film or musical adaptation of a book might alter the meaning of the original¹⁷⁸ or “add ‘important new expression,’”¹⁷⁹ but licensing may still be necessary.¹⁸⁰ A new meaning or message is not sufficient, instead, it is important to look at whether the new work “served a purpose distinct from the original, or instead superseded its objects.”¹⁸¹ Deciding “[w]hether the purpose and character of a use weighs in favor of fair use is . . . an objective inquiry into

¹⁶⁷ *Id.* at 532.

¹⁶⁸ *Id.* 532–33.

¹⁶⁹ *Id.* at 533 (citing 17 U.S.C. § 107).

¹⁷⁰ *Warhol*, 598 U.S. at 536 (citing 17 U.S.C. § 107).

¹⁷¹ *Id.* at 537 (citing 17 U.S.C. § 107(1)).

¹⁷² *Id.* at 537–38.

¹⁷³ *Id.* at 540.

¹⁷⁴ *Id.* (citation omitted).

¹⁷⁵ *Id.* at 541.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quotations omitted).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 542.

what use was made, i.e., what the user does with the original work.”¹⁸² Thus, the examining court will look objectively at what is done with the original work, which includes looking at the new expression, meaning, or message the author adds, to determine whether the purpose and character weigh in favor of fair use.¹⁸³

Therefore, even if the goals of the images are different, courts must look at the difference “in the context of the specific use at issue.”¹⁸⁴ In the end, both uses were to provide an image of Prince in a magazine about Prince.¹⁸⁵ This difference was not enough to find in favor of AWF on the first factor.¹⁸⁶ To hold otherwise, in the Court’s opinion, would authorize the copying of photographs for commercial purposes that are “substantially the same as those of the originals.”¹⁸⁷ The Court also stated that AWF did not offer a compelling justification “for copying the photograph, other than to convey a new meaning or message.”¹⁸⁸ This was not enough to support fair use under the first factor to the Court because the uses of the images were substantially the same in the eyes of the Court, and there was not enough of a “degree of difference” between the images to support a finding of fair use.¹⁸⁹

The Court further emphasized that the requirement for AWF to pay Goldsmith would not stifle creativity; rather, it would encourage artists to create works.¹⁹⁰ The Court dismissed the dissent’s concern that not allowing copying will hinder innovation and creativity because there is value in the original works, not just the copying ones.¹⁹¹ The majority felt that the exceptions given in the Copyright Act were sufficient to address any concerns about creativity and innovation.¹⁹² Finally, the Court decided that the original creators of works, like Goldsmith, deserve copyright protection and that copyright includes the right to make derivative works.¹⁹³ Since the two images serve “substantially the same purpose,” the use was commercial in nature, and AWF did not provide a reasonable justification for its use, the first factor weighed in favor of Goldsmith.¹⁹⁴ Thus, the Court affirmed the judgment.¹⁹⁵

¹⁸² *Id.* at 545.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Warhol*, 598 U.S. at 545.

¹⁸⁶ *Id.* at 545–46.

¹⁸⁷ *Id.* at 546.

¹⁸⁸ *Id.* at 547.

¹⁸⁹ *Id.* at 546.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 550.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 551 (citing *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 45–51 (2d Cir. 2021)).

D. Reconciling Warhol and Google

The Supreme Court has now interpreted the “transformative use” element of the first factor in different ways, which has led to a potentially harmful view of the fair use doctrine.¹⁹⁶ Thus, the standard to be applied by the lower courts is now more unclear than ever. While, previously, the courts had a lot of discretion in interpreting the facts of the case, now it is not precisely clear how they are supposed to interpret the issues they are faced with.¹⁹⁷ The different forms of the works in question only further questions inquire of how the standard is applied.¹⁹⁸ While *Warhol* does not definitively overrule the standard set in *Google*, it does seem to conflict with the analysis of the “purpose and character” factor that *Google* set out.¹⁹⁹ This leads to much uncertainty on how relevant the *Google* decision now is because the scope of transformative uses in fair use appears to have been immensely narrowed by *Warhol*.²⁰⁰

III. THE EVOLUTION OF THE FAIR USE DOCTRINE

The fair use doctrine evolves with each case the Supreme Court hears, and this causes problems with how previous cases will be viewed by the lower courts when they are faced with new cases. The notable issue that arises, which is the focus of this Note, is how the interpretation of fair use—especially transformative use—in computer code is affected by the *Warhol* case.²⁰¹ In both *Google* and *Warhol*, the Supreme Court interpreted the fair use doctrine and its first factor,²⁰² the “purpose and character of the use,”²⁰³ and the Court specifically looked at the “transformative” nature of the works in each case.²⁰⁴

Section A compares how the interpretation of the transformative use element of the fair use doctrine has changed because of the two cases.²⁰⁵ Section B then looks at how the shift interpretation from *Google* to *Warhol*

¹⁹⁶ *Id.*; *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 31 (2021).

¹⁹⁷ Gary Myers, *Muddy Waters: Fair Use Implications of Google LLC v. Oracle America, Inc.*, 19 NW. J. TECH. & INTELL. PROP. 1, 35–36 (2022); *see also Google*, 593 U.S. at 40.

¹⁹⁸ *Google*, 593 U.S. at 31; *Warhol*, 598 U.S. at 516–18 (*Google* dealt with fair use in computer code, whereas *Warhol* was a case involving artistic works).

¹⁹⁹ *Google*, 593 U.S. at 28–32; *Warhol*, 598 U.S. at 550–51.

²⁰⁰ *Google*, 593 U.S. at 28–32; *Warhol*, 598 U.S. at 550–51.

²⁰¹ *Warhol*, 598 U.S. at 550–51.

²⁰² *Id.* at 515–16 (citing 17 U.S.C. § 107(1)); *Google*, 593 U.S. at 30 (citing 17 U.S.C. § 107(1)).

²⁰³ 17 U.S.C. § 107(1).

²⁰⁴ *Warhol*, 598 U.S. at 529; *Google*, 593 U.S. at 30 (citing 17 U.S.C. § 107(1)).

²⁰⁵ *Google*, 593 U.S. at 28–32; *Warhol*, 598 U.S. at 550–51.

will affect transformative use and the first factor in computer code and software development.²⁰⁶

A. *The Fair Use Doctrine: Then Versus Now*

Prior to *Warhol*, the fair use doctrine had achieved regard as a broad doctrine, especially in the realm of computer code.²⁰⁷ The Court set out a highly interpretive definition of “transformation,” which was beneficial to not only software developers but also other people seeking to use the fair use defense.²⁰⁸ Now, there is a standard that is unclear and runs counter to Congress’s intent.²⁰⁹ This seems to point to a desire of the Court to constrict the doctrine, but this is a goal that runs counter to the purpose of the doctrine itself.²¹⁰ The standard created by the Court here will create a lot of problems for accomplishing the primary goals of the fair use doctrine because of the inconsistency.²¹¹

In enacting the fair use doctrine, Congress intended to codify an exception to copyright infringement that the courts had already recognized.²¹² Congress even noted that an express definition of the fair use doctrine had not been accepted; instead, the factors codified were used on the facts of each case to decide whether a use is fair.²¹³ Congress did not intend to enclose the scope of fair use; instead, they were trying to show support for the doctrine by stating: “The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”²¹⁴ As courts have developed the fair use doctrine, an essential question in evaluating “the purpose and character of the use”²¹⁵ became “whether and to what extent the new work is ‘transformative.’”²¹⁶

The Court in *Google* thus evaluated “the purpose and character of the use,”²¹⁷ and in their analysis, they looked at the transformative nature of the code.²¹⁸ The Court stated that to “determin[e] whether a use is

²⁰⁶ *Google*, 593 U.S. at 39–40; *Warhol*, 598 U.S. at 549–50; see also 17 U.S.C. § 107.

²⁰⁷ See generally *Google*, 593 U.S. 1.

²⁰⁸ *Google*, 593 U.S. at 30.

²⁰⁹ *Warhol*, 598 U.S. at 550–51; 17 U.S.C. § 107; H.R. REP. NO. 94-1476, at 65.

²¹⁰ *Google*, 593 U.S. at 40; *Warhol*, 598 U.S. at 550–51; 17 U.S.C. § 107.

²¹¹ *Warhol*, 598 U.S. at 550–51; 17 U.S.C. § 107; U.S. CONST., art. I, § 8, cl. 8.

²¹² H.R. REP. NO. 94-1476, at 65.

²¹³ *Id.*

²¹⁴ *Id.* at 66.

²¹⁵ 17 U.S.C. § 107(1).

²¹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)); see also *Google*, 593 U.S. at 3 (citing *Campbell*, 510 U.S. at 579).

²¹⁷ 17 U.S.C. § 107(1).

²¹⁸ *Google*, 593 U.S. at 3.

‘transformative,’ we must go further and examine the copying’s more specifically described ‘purpose[s]’ and ‘character.’”²¹⁹ The Court noted that by creating Android, Google “provided a new collection of tasks operating in a distinct and different computing environment.”²²⁰ They also noted that Google had “‘repurpose[d] the same words and syntaxes’ of an existing system”²²¹ but that this was necessary for the programmers “to use their acquired skills.”²²²

The Court’s analysis also focused on the way technology works and how it requires them to look at the creation and dissemination of the work in analyzing fair use.²²³ The Court placed emphasis on the use by Google to create new products, not to replicate the same products Oracle makes.²²⁴ Finally, the Court utilized the widespread reuse of APIs in the software development industry and the fact that Sun felt that widespread use of Java would benefit them, to determine that the first factor weighed in favor of fair use, and a transformative use, by Google.²²⁵

Meanwhile, *Warhol*’s interpretation of transformative appears to conflict with the legislative goals of the fair use doctrine.²²⁶ The Court reasoned that the commercial nature of a work is not dispositive—using *Google* as a source²²⁷—but went further to state that a shared purpose of a copyrighted work is likely a substitute, rather than a transformative use, and thus, “undermines the goal of copyright.”²²⁸ The *Warhol* Court determined that since both the original picture by Goldsmith and the Warhol image “shared the [same] objectives, even if the two were not perfect substitutes”²²⁹ and that the use “is of a commercial nature,”²³⁰ the use was not a fair use.²³¹

Additionally, the Court held that adding some new expression, meaning, or message is not enough to constitute fair use because this would swallow the derivative use rights given to the copyright owner.²³² The Court stated that the “new expression, meaning or message . . . does not itself dispense with the need for licensing.”²³³ Thus, the Court concluded that because the

²¹⁹ *Id.* at 30 (citing 17 U.S.C. § 107(1)).

²²⁰ *Id.* at 31.

²²¹ *Id.* (citation omitted).

²²² *Id.* (citation omitted).

²²³ *Id.* at 23.

²²⁴ *Id.* at 30.

²²⁵ *Id.* at 31 (citations omitted).

²²⁶ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 531–32 (2023); H.R. REP. NO. 94-1476, at 65.

²²⁷ *Id.* at 531 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)); *Google*, 593 U.S. at 31.

²²⁸ *Warhol*, 598 U.S. at 531 (citations omitted).

²²⁹ *Id.* at 536 (citing *Campbell*, 510 U.S. at 579).

²³⁰ *Id.* at 537 (citing 17 U.S.C. § 107(1)).

²³¹ *Id.* at 550–51.

²³² *Id.* at 541.

²³³ *Id.*

original photograph and the Warhol image were to be used to “depict Prince in magazine stories about Prince,”²³⁴ they “shared substantially the same purpose, and the use is of a commercial nature.”²³⁵ Importantly, the Court clarified the key difference lies in Warhol’s image portraying Prince “somewhat differently from Goldsmith’s photograph (yet has no critical bearing on her photograph), and that degree of difference is not enough for the first factor to favor AWF, given the specific context of the use.”²³⁶

This interpretation by the Court seems to stray from *Google’s* interpretation because the Court almost exclusively focused its analysis on where the alleged infringing work would be used compared to the original without paying much attention, if any, to the substantial change of the alleged infringing work compared to the original.²³⁷ Additionally, the Court looked at the use broadly and did not look at how the changes made would alter the potential uses and users.²³⁸ This interpretation seems more aligned with Justice Thomas’s dissent in *Google*, potentially even taking it further, rather than the majority in that case.²³⁹

Justice Thomas’s dissent noted that the “declaring code” was central to Oracle’s business and that Microsoft and Apple wrote their own declaring code, but Google decided to copy Oracle’s.²⁴⁰ Then, Justice Thomas noted that declaring code is copyrightable.²⁴¹ He further stated that the idea of declaring code is not copyrightable, but the specific declaring code written by Oracle is copyrightable.²⁴² Justice Thomas stated that the distinction between the declaring code and the implementing code the majority made was not proper under the Copyright Act.²⁴³ Justice Thomas then noted that the “Copyright Act protects code that operates ‘in a computer in order to bring about a certain result’ both ‘directly’ (implementing code) and ‘indirectly’ (declaring code).”²⁴⁴ Justice Thomas was not satisfied with the majority’s distinction that the code was associated with uncopyrightable material because copyrightable ideas are often associated with uncopyrightable ones.²⁴⁵ He then added that the implementing code and the declaring code have the same value.²⁴⁶

²³⁴ *Id.* at 526.

²³⁵ *Id.* at 550.

²³⁶ *Id.* at 545–46.

²³⁷ *Id.* at 538.

²³⁸ *Id.*; *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 31 (2021).

²³⁹ *Warhol*, 598 U.S. at 538; *see Google*, 593 U.S. at 43 (Thomas, J., dissenting).

²⁴⁰ *Google*, 593 U.S. at 44–45 (Thomas, J., dissenting).

²⁴¹ *Id.* at 46–47.

²⁴² *Id.* at 47.

²⁴³ *Id.* at 48.

²⁴⁴ *Id.* at 51 (citing 17 U.S.C. § 101).

²⁴⁵ *Id.* at 51–52.

²⁴⁶ *Id.* at 52.

Justice Thomas also analyzed the “purpose and character of the use.”²⁴⁷ Justice Thomas explained that the nature is “overwhelmingly commercial.”²⁴⁸ In addition to the commercial nature, because Google’s use of the code was the same as Oracle’s, in Justice Thomas’s view, Google’s code did not qualify as a “transformative” use.²⁴⁹ He dismissed that a use that helps others “create new products” is enough to satisfy the definition of “transformative.”²⁵⁰ He called this an “eviscerat[ion] [of] copyright.”²⁵¹ He contended that rather than being a “transformative” use, this is a “derivative use,” which is a right reserved to Oracle, not Google.²⁵² Thus, to Justice Thomas, this factor weighed towards Oracle.²⁵³

Justice Thomas’s focus was on the use of the code by Google and Oracle, which is much like the analysis used by the Court in *Warhol*.²⁵⁴ Justice Thomas shows little interest in examining how the use of the code had changed or whether Google may have transformed it because, to him, it could not be transformative if the end use of the code was the same for both the alleged infringing and original code.²⁵⁵

Justice Thomas’s dissent draws parallels to the rationale of the majority decision in *Warhol*, which was a decision in which Justice Thomas was involved.²⁵⁶ Most notably, in the *Google* dissent, Justice Thomas focused on the end use of the code, much like the majority in *Warhol* focused on the end use of the pictures.²⁵⁷ Neither Thomas’s dissent nor the majority were interested in the transformation of the alleged infringing object from the original because the end use was more important to their rationale.²⁵⁸ Thus, Justice Thomas’s dissent seems more in line with the majority in *Warhol* and may have, at least implicitly, partially motivated the narrowing of the fair use doctrine in *Warhol*.²⁵⁹

B. What This Means for Code

A narrow interpretation of transformation in the fair use analysis has the potential to create many problems for the software industry and the precedent

²⁴⁷ *Id.* at 56 (citing 17 U.S.C. § 106).

²⁴⁸ *Id.* (Thomas, J., dissenting).

²⁴⁹ *Id.* at 57–58.

²⁵⁰ *Id.* at 58.

²⁵¹ *Id.*

²⁵² *Id.* (citing 17 U.S.C. § 106(2)).

²⁵³ *Id.*

²⁵⁴ *Id.*; Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 596 U.S. 508, 537 (2023) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

²⁵⁵ *Google*, 593 U.S. at 58 (Thomas, J., dissenting).

²⁵⁶ *Id.*; *Warhol*, 598 U.S. at 549–51.

²⁵⁷ *Google*, 593 U.S. at 58 (Thomas, J., dissenting); *Warhol*, 598 U.S. at 549–51.

²⁵⁸ *Google*, 593 U.S. at 58 (Thomas, J., dissenting); *Warhol*, 598 U.S. at 549–51.

²⁵⁹ *Google*, 593 U.S. at 58 (Thomas, J., dissenting); *Warhol*, 598 U.S. at 549–51.

set out by *Google*. This narrow view opens the door for massive regression in the development of software and creates a concern for litigation over many uses that otherwise would have been considered “fair” by *Google*.²⁶⁰ Not only does the decision here bring up a lot of questions on how fair use is interpreted in code, but it also brings up questions on how to interpret it in the “traditional” copyright mediums, such as paintings and other artistic works.²⁶¹ With code already struggling to be interpreted under the copyright law, this seems to spell out a grim future for how the Court might interpret fair use in computer code in the future.

Justice Kagan’s dissent in *Warhol* helps to highlight the promise and good that could come from a broad interpretation of the transformative use element, rather than the narrow one the majority selected.²⁶² The Justice’s dissent points out that prior to the decision in *Warhol*, the first factor boiled down to asking, “[d]oes the work ‘add[] something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message’?”²⁶³ And when it did add something new, “to a significant degree,” the work would be deemed “‘transformative’ and [the Court would hold] that the fair-use test’s first factor favored the copier (though other factors could outweigh that one).”²⁶⁴

One of the important points the dissent makes, which shows just how seismic of an impact the majority’s decision could have, is that the majority does not care “how much ‘new expression, meaning, or message’ [Warhol] added . . . [a]ll that matters is that Warhol and the publisher entered into a licensing transaction, similar to one Goldsmith might have done.”²⁶⁵ The Justice is making the point of how fair use has evolved to protect exactly this type of use as fair, but the majority, wrongly, decided that looking at both uses in a broad manner results in infringement, rather than fair use.²⁶⁶ The Justice also notes that the majority has decided that since “Warhol licensed

²⁶⁰ *Google*, 593 U.S. at 39–40; Blake Brittain, *US Supreme Court’s Andy Warhol Decision Keeps ‘Fair Use’ Questions Alive*, REUTERS (May 22, 2023, 10:34 AM), <https://www.reuters.com/legal/litigation/us-supreme-courts-andy-warhol-decision-keeps-fair-use-questions-alive-2023-05-22/>; Benjamin Stern & Anuj Khetarpal, *How High Court May Tackle Fair Use in Warhol Case*, LAW360 (June 17, 2022, 5:38 PM), <https://www.law360.com/articles/1503362/how-high-court-may-tackle-fair-use-in-warhol-case> [<https://perma.cc/S7JD-TCUD>].

²⁶¹ Brittain, *supra* note 260; Benjamin Stern & Anuj Khetarpal, *How High Court May Tackle Fair Use in Warhol Case*, LAW360 (June 17, 2022, 5:38 PM), <https://www.law360.com/articles/1503362/how-high-court-may-tackle-fair-use-in-warhol-case> [<https://perma.cc/S7JD-TCUD>].

²⁶² *Warhol*, 598 U.S. at 559 (Kagan, J., dissenting).

²⁶³ *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Google*, 593 U.S. at 29–30).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 560.

²⁶⁶ *Id.*

his work to a magazine—as Goldsmith sometimes also did—the first factor goes against him.”²⁶⁷

This decision drives Justice Kagan to dive deeper into how this new expression by Warhol renders the two images “fundamentally different.”²⁶⁸ Important in showing that the images are different, the Justice points out that the magazine had their choice between Goldsmith’s image and Warhol’s portrait, and “they wanted the portrait.”²⁶⁹ Thus, to Justice Kagan, the marketplace has decided which one it wants, which proves the difference.²⁷⁰ Further, the Justice notes that a primary issue with relying on gaining licenses in all circumstances is that copyright owners can “charge out-of-range price[s] for licenses. And other times they just say no.”²⁷¹ In that vein, the Justice expounded that the potential for the loss of “‘creative progress’ is what lay behind the Court’s inquiry into transformativeness”²⁷² This points to a primary issue of relying solely on licenses: it will inevitably hurt progress and creativity.²⁷³

Justice Kagan then goes on to say that the majority does not seem to care about the “transformation or narrative of the work,” and that “[t]hey do not even acknowledge that a narrative exists.”²⁷⁴ Justice Kagan contends that the majority oversimplifies the question at hand to the commerciality of the use and whether the use is for a reason other than to critique the original work.²⁷⁵ To her, this is unsupported by § 107(1), and the “emphasis on commercialism would ‘swallow’” the uses that are “often thought fair.”²⁷⁶ Ultimately, in her view, the result of narrowing the scope of fair use “will ‘frustrate the very ends sought to be attained’ by copyright law.”²⁷⁷ Justice Kagan concluded that “[ruling in this way] will make our world poorer.”²⁷⁸

With the *Warhol* Court signaling that the commercial nature of the two images was important, as well as the goal of licensing being a goal for both Warhol and Goldsmith, this seems to point to a bleak future for how fair use of computer code will be looked at by the Court.²⁷⁹ Justice Kagan highlights this point in her dissent.²⁸⁰ She reasons that both Google and Sun

²⁶⁷ *Warhol*, 598 U.S. at 559 (Kagan, J., dissenting) (citing *Campbell*, 510 U.S. at 579; *Google*, 593 U.S. at 29–30).

²⁶⁸ *Id.* at 567.

²⁶⁹ *Id.*

²⁷⁰ *Warhol*, 598 U.S. at 567.

²⁷¹ *Id.* at 572.

²⁷² *Id.* at 573 (citing *Google*, 593 U.S. at 30–31; *Campbell*, 510 U.S. at 579).

²⁷³ *Id.*

²⁷⁴ *Id.* at 574.

²⁷⁵ *Id.* at 586.

²⁷⁶ *Id.* at 578 (citing *Campbell*, 510 U.S. at 584).

²⁷⁷ *Id.* at 593 (citing *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 549 (1985)).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 545–46 (majority opinion).

²⁸⁰ *Id.* at 567 (Kagan, J., dissenting).

Microsystems “meant to market software platforms facilitating the same tasks—just as (in the majority’s refrain) Warhol and Goldsmith both wanted to market images depicting the same subject.”²⁸¹

This creates a massive problem for code. Now, code may be viewed through a narrow lens, and the commercial nature alone may cause the fair use of code to no longer exist. Prior to *Warhol*, a work being “transformative” of the original seemed to be enough to satisfy this requirement.²⁸² Even *Google* broadened the scope of “transformation” to not just mean transforming the literal work but also the application of the work and what results from the application of the work.²⁸³ This definition appears to signal that the Supreme Court was supporting a regime of fair use that promoted the flow of ideas, especially when skills were widely known and utilized in a field.²⁸⁴

While *Google* looked at the nature of declaring code and the weaker copyright protection it receives,²⁸⁵ the rationale used to determine whether a use is transformative and for allowing for fair uses is not a stretch from this case to other cases involving implementing code, as long as the fair use factors are appropriately applied to the facts of the new case.²⁸⁶ However, because implementing code is much more creative than declaring code, any copying of implementing code would have a much tougher time than declaring code to satisfy the fair use factors.²⁸⁷ While it is harder to establish fair use in implementing code, it was not deemed impossible by *Google*.²⁸⁸ The framework in *Google* can readily be applied to implementing code, and if the code is transformative under the *Google* standard, the other factors should be considered in light of this finding.²⁸⁹ The skills of the developers and the widespread use of Java were important in the Court’s analysis to determine whether the use was fair.²⁹⁰ This analysis is readily applicable to implementing code and is aligned with the majority in *Google*.²⁹¹

The majority in *Google* also acknowledged that the change of platforms from standard computers to mobile phones was important in their analysis.²⁹² However, the interpretation by the *Warhol* Court seemed to suggest this may no longer matter.²⁹³ Now, instead of looking at the “‘highly creative’ use

²⁸¹ *Id.* at 580 (citing *Google*, 593 U.S. at 31).

²⁸² *Google*, 593 U.S. at 8–10.

²⁸³ *Id.* at 8–12.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 29.

²⁸⁶ *Id.* at 29–32; *Id.* at 40.

²⁸⁷ *Id.* at 26–27.

²⁸⁸ *Id.* at 29 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 29–33.

²⁹¹ *Id.*

²⁹² *Id.* at 8.

²⁹³ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 596 U.S. 508, 545–46 (2023).

. . . made of the copied code,”²⁹⁴ the Court emphasized that the commercial usage of the original work and the newly created work, as long as the new work is not a parody, would be sufficient to deem the works to have the same objective and would not pass as a fair use.²⁹⁵

The *Google* precedent now seems to be in danger because of the *Warhol* decision.²⁹⁶ The goal of both Oracle and Google is to license their software.²⁹⁷ If a goal to license a work to similar groups is enough to have a shared objective, then it seems that the *Google* case could go the opposite direction today.²⁹⁸ While the Court in *Google* did acknowledge that the change from the typical computer platform to the mobile phone platform did help Google,²⁹⁹ it seems that the Court today could now completely ignore that.³⁰⁰ Since they focused on the goal of both of the users in such a broad manner, it seems that this may turn uses, like Google’s, from fair under the *Google* decision³⁰¹ to infringement under the *Warhol* decision.³⁰²

One of the biggest issues with this change in view is it fails to understand how easily it presents problems for code. Generally, the entire goal of writing code or creating apps is to ultimately license it.³⁰³ The technology developed may be useful for different purposes, or another party may desire to build upon it. But what if the code inspires another party? Must they obtain a license if they will make “transformative” use of the code?³⁰⁴

The essence of the code is what it does; code is written to serve a purpose.³⁰⁵ Whether for entertainment, like the game Flappy Bird, the maps app to tell you where to go, or the underlying code to make the screens all around us display the desired images on demand, the code serves a purpose. While code may be very similar, the function can be very different.³⁰⁶ Ultimately, code—in a lot of instances—is designed to take a user input and perform a task based on that input.³⁰⁷ The input is tapping on a screen, but nobody is going to argue that Flappy Bird and a maps app are the same. There may be features to an interactive game or social media app that the developer of a GPS app might find useful but wants to alter to better fit their use case. Surely, they could seek to obtain a license, but there is no guarantee that they

²⁹⁴ *Id.* at 581 (Kagan, J., dissenting).

²⁹⁵ *Id.* at 545–48.

²⁹⁶ See generally *Google*, 593 U.S. 1; see also *Warhol*, 598 U.S. 508.

²⁹⁷ *Google*, 593 U.S. at 8–10.

²⁹⁸ *Id.*; *Warhol*, 598 U.S. at 550–51.

²⁹⁹ *Google*, 593 U.S. at 8–9.

³⁰⁰ *Warhol*, 598 U.S. at 545–46, 549–51.

³⁰¹ *Google*, 593 U.S. at 39.

³⁰² *Warhol*, 598 U.S. at 545–46, 549–51.

³⁰³ *Google*, 593 U.S. at 39.

³⁰⁴ *Id.* at 29 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

³⁰⁵ Menell, *supra* note 5, at 309.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

would get it. Or there may not even be a need to do so. If the GPS app’s use and implementation are significantly different from the original’s to a point where the new developer “transform[s]”³⁰⁸ it, why should they be forced to license the technology?³⁰⁹ Just because they used the idea as a seed to develop their own technology and sought to get their technology into the hands of end users or to license the technology to other technology companies, should not be enough to force a company to obtain a license.³¹⁰ Thus, there may be similarities in the works, but the function may be so different that the work is “transformative”³¹¹ and, therefore, removes the need for a license.³¹²

This is not to suggest that direct infringement of code is acceptable; rather, it highlights that it is relatively easy for code to serve “substantially the same purpose” in the eyes of the *Warhol* Court.³¹³ This creates a problem for future interpretations of fair and transformative use of code and could be detrimental to creativity and progress in the technology industry.

IV. RESOLUTION

The *Google* majority decision gives the best interpretation of fair use and the transformative use element to ensure copyright holders can still protect their interests while allowing for innovation.³¹⁴ The Pre-*Warhol* interpretation of transformative use, especially the one in *Google*, was more efficient for upholding Congress’s intent to support research, innovation, and other ideals put forth in § 107.³¹⁵ Justice Thomas’s dissent and the majority in *Warhol* have strayed too far from the principles that led to the development of the fair use doctrine, specifically the transformative use element, and are giving copyright holders overbroad protection, which will harm research and innovation.³¹⁶

The narrow interpretation of the fair use doctrine, and specifically the narrowing of what constitutes a “transformative” use by *Warhol*,³¹⁷ is not suitable for the advancement of technology or software developers because it will restrain developers from utilizing their skills in different contexts and situations, which likely means less movement to other industries and roles. Other forms of intellectual property and the rights granted already do enough

³⁰⁸ *Google*, 593 U.S. at 29–30 (citing *Campbell*, 510 U.S. at 579).

³⁰⁹ 17 U.S.C. § 107.

³¹⁰ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 549–51 (2023).

³¹¹ *Google*, 593 U.S. at 29–30 (citing *Campbell*, 510 U.S. at 579).

³¹² 17 U.S.C. § 107.

³¹³ *Warhol*, 598 U.S. at 550.

³¹⁴ *Google*, 593 U.S. at 38–39.

³¹⁵ *Id.*; 17 U.S.C. § 107; U.S. CONST. art. I, § 8, cl. 8.

³¹⁶ *Google*, 593 U.S. at 57–58 (Thomas, J., dissenting); *Warhol*, 598 U.S. at 550–51.

³¹⁷ *Warhol*, 598 U.S. at 550–51.

to protect the companies,³¹⁸ but this would be an unnecessary restraint on the people and the skills they have developed.

Google aligns with Congress's intent because the Court, in evaluating "the purpose and character,"³¹⁹ analyzed the transformative nature of the code.³²⁰ The Court held that some factors may be more important based on the facts, so the factors should be considered and given weight in light of the case at hand,³²¹ just as Congress intended.³²²

Copyright intends to promote creative progress, which the Court in *Google* acknowledged. The Court went further to say that "Google's purpose was therefore consistent with that creative progress that is the basic constitutional objective of copyright itself."³²³ This was because of the transformative nature of Google's code and how it could "further the development of computer programs."³²⁴ Thus, *Google* sought to uphold the principle of fair use, which the courts and Congress have acknowledged is necessary because to rule otherwise "stifle[s] the very creativity [the copyright] law is designed to foster."³²⁵

Meanwhile, the interpretation of fair use, specifically the transformative use analysis, from both Thomas's dissent in *Google* and by the Court in *Warhol*, is severely limiting and should not be utilized in cases related to computer code.³²⁶ This analysis of fair use harms creativity and runs counter to the goals of copyright law.³²⁷

As questions fly about how fair use will be interpreted, the Supreme Court should use the next fair use case to come out and declare that computer code will continue to be interpreted in a similar manner to *Google*.³²⁸ This likely does not even require an exception to *Warhol* because the Court can rely on the imprecise fit of computer code into the copyright statutes to allow the cases to coexist.³²⁹ The Court can use this imprecise fit to say that transformative uses of computer code will still be viewed under the standard set forth in *Google* while allowing the other traditional forms of

³¹⁸ 17 U.S.C. § 107.

³¹⁹ 17 U.S.C. § 107(1).

³²⁰ *Google*, 593 U.S. at 2–3.

³²¹ *Id.* at 19–20 (citations omitted).

³²² H.R. REP. NO. 94-1476, at 65.

³²³ *Google*, 593 U.S. at 3 (citations omitted).

³²⁴ *Id.*

³²⁵ *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found. v. ABC*, 621 F.2d 57, 60 (2d Cir. 1980)).

³²⁶ *Google*, 593 U.S. at 57–58 (Thomas, J., dissenting); *Stewart*, 495 U.S. at 236 (quoting *Iowa State Univ. Research Found.*, 621 F.2d at 60).

³²⁷ *Google*, 593 U.S. at 57–58 (Thomas, J., dissenting); *Stewart*, 495 U.S. at 236 (quoting *Iowa State Univ. Research Found.*, 621 F.2d at 60).

³²⁸ *Google*, 593 U.S. at 28–32.

³²⁹ Menell, *supra* note 5, at 309; Samuelson, *supra* note 3, at 704; 17 U.S.C. §§ 101–07.

copyrightable material to be viewed under the *Warhol* standard.³³⁰ This will, at the very least, solidify the status of computer code as unique under copyright laws and ensure that progress and creativity are rewarded, not hindered.³³¹

While *Google*, admittedly does not give absolute guideposts and leaves interpretation up to the court based on the facts presented, this is the intent behind the fair use doctrine³³² and the development of the “transformative use” element.³³³ The copyright law was not intended to be stagnant; instead, it was intended to adapt to the facts and cases and to allow judges to continue developing the doctrine while ensuring that the basic principles were codified.³³⁴ Thus, the *Google* precedent is in line with the ideals of the doctrine and is best suited to continue being the precedent that dictates how fair use in computer code will be viewed.³³⁵

Importantly, *Google* sought to protect the software developers by espousing its fair use standard.³³⁶ The skills learned in developing software are unique to each software developer, and the attractiveness of the ability to code in some languages is something many employers look for.³³⁷ A narrow interpretation of fair use could lead to concerns that any sort of knowledge or skill gained in developing code at an earlier time could be considered an infringement of the code they learned the skills and knowledge from developing.³³⁸ Meanwhile, *Google* stands for the idea that the desire for the language to be widely accepted and used by developers everywhere lends itself to the developers’ continued use of the language and code as a fair use.³³⁹

The software development industry is booming and is anticipated to keep growing, so the decisions by courts today will have lasting impacts on the industry for the foreseeable future.³⁴⁰ If the courts continue to narrow the scope of fair use, the implications on the software development industry could render the industry desolate. Software developers are learning skills and transferring ideas on the job constantly.³⁴¹ If the courts adopt a narrow

³³⁰ Menell, *supra* note 5, at 309; Samuelson, *supra* note 3, at 704; *see also Warhol*, 598 U.S. at 550–51; *Google*, 593 U.S. at 40.

³³¹ *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

³³² H.R. REP. NO. 94-1476, at 65.

³³³ *Google*, 593 U.S. at 29–30 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

³³⁴ H.R. REP. NO. 94-1476, at 65.

³³⁵ *Google*, 593 U.S. at 28–32.

³³⁶ *Id.* at 6–7.

³³⁷ *Id.*

³³⁸ 17 U.S.C. § 107; *Google*, 593 U.S. at 6–8.

³³⁹ *Google*, 593 U.S. at 6–8.

³⁴⁰ *Software Developers, Quality Assurance Analysts, and Testers*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm> (last modified Sept. 6, 2023).

³⁴¹ Alpaio, *supra* note 11.

fair use doctrine, it will make it easy for large companies to attack the software developers utilizing that knowledge in new roles.

The threat of a lawsuit alone could deter software developers from leaving their current employment or remaining in the software development industry. Potentially, employees could feel like they are stuck in their roles because they are not sure where the line between their skills and company intellectual property is. Also, companies could enforce their provisions in such a forceful way that employees must choose between remaining employed at a place they no longer want to be, or risk leaving and facing expensive litigation to determine what the company's intellectual property is and what the employee's skills are. This can also result in a former employee being completely barred from an industry based on the intellectual property created without the employee having a noncompetition clause in their contract. This has the potential to act as an overly restrictive noncompetition clause that was not bargained for because the threat of losing their livelihood could be too great for some software developers, so they will decide to stay in the role they no longer want to be in. Further, with the Federal Trade Commission's decision to ban noncompetition clauses, this could be a method to utilize the principles of a noncompetition clause through alternative means.³⁴² The intention of banning noncompetition clauses is to help innovation and increase the earnings of workers, among other things.³⁴³ Narrowing fair use would allow a company to use intellectual property as a shield to prevent employees from leaving, despite the noncompetition clause ban.³⁴⁴ All the company must do when an employee attempts to leave is threaten litigation again, and the employee will feel the need to fall back in line or face being completely out of the job market in the software development industry.

The purpose of fair use is to promote the advancement of science and the arts.³⁴⁵ There will not be an advancement of technology, especially not at the rate and in the form that Congress intended, if software developers are forced to stay in their jobs or leave the industry altogether.³⁴⁶ The exodus of skilled software developers would have unwanted effects on the industry, and likely society, especially because our society is so reliant on computer code-based technology and a shortage of software developers already exists.³⁴⁷ This

³⁴² *FTC Announces Rule Banning Noncompetes*, FEDERAL TRADE COMMISSION, (Apr. 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> [<https://perma.cc/X4ES-H3VR>].

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (citing U.S. CONST. art. I, § 8, cl. 8).

³⁴⁶ *Id.*

³⁴⁷ Thanh Pham, *Analyzing the Software Engineer Shortage*, FORBES (April 13, 2021 7:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/04/13/analyzing-the-software-engineer-shortage/?sh=74c379e7321c> [<https://perma.cc/4WA4-92FH>].

would effectively rob society of some of the most skilled software developers and greatly reduce technology's growth because there will not be the free flow of ideas and skills that are necessary for developers to grow and for software to advance.

It is important to note that there are still protections against theft of information and ideas and that the fair use doctrine will *never* condone this.³⁴⁸ There is a line between corporate espionage and utilizing the skills learned by programmers. The fair use factors, as well as antitrust and contract laws, will be able to sniff these issues out and condemn them as wrongful, as they should be viewed.³⁴⁹ This Note stands for the idea that transformative uses are positive for the development of ideas and technology, not for the outright theft of code.³⁵⁰

Whitewater West Industries v. Alleshouse, a Federal Circuit case, while not a one-to-one example of the importance of a broad fair use doctrine, still provides some guidance on the positives of a broader fair use doctrine.³⁵¹ The case focused on the assignment of intellectual property rights by an employee to their employer.³⁵² The Federal Circuit applied California law and determined that the contractual provision significantly impaired the former employee's ability to pursue their profession, trade, or business.³⁵³ The important takeaway from this case is that companies attempt to use their intellectual property rights to prevent former employees from taking on any roles that simply utilize the skills learned in a previous job.³⁵⁴ Cases like this will only continue to come up, and a broad fair use doctrine protects not only the employees but also society and the gaining of new knowledge and technology. The *Whitewater* case stands to show that there is a significant risk of former employees being unable to pursue a career in an industry if a company deems their intellectual property prevents them from practicing in the field.³⁵⁵ A broad fair use doctrine reassures employees that the skills and knowledge they gained will be protected, while copyright law provides the employer the assurance that they retain intellectual property rights to the code created.³⁵⁶

The additional creativity required to develop new programs and create new code should be rewarded and celebrated as a win for society, and to show that the copyright laws are working, not punished and put under a microscope because some other code was used as a baseline to develop this new idea.

³⁴⁸ 17 U.S.C. §§ 101-107; U.S. CONST., art. I, § 8, cl. 8; H.R. REP. NO. 94-1476, at 65.

³⁴⁹ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 550-51 (2023).

³⁵⁰ 17 U.S.C. §§ 101-107; U.S. CONST. art. I, § 8, cl. 8; H.R. REP. NO. 94-1476, at 65.

³⁵¹ *Whitewater W. Indus. v. Alleshouse*, 981 F.3d 1045, 1059 (Fed. Cir. 2020).

³⁵² *Id.* at 1048.

³⁵³ *Id.* at 1052.

³⁵⁴ *Id.* at 1058-59.

³⁵⁵ *Id.*

³⁵⁶ *Id.*; 17 U.S.C. §§ 101-07.

The use of computer code and its further development is imperative to the advancement of technology. Allowing for a continued broad fair use doctrine in computer code condones uses “consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself.”³⁵⁷ To declare any narrower fair use rule related to computer code would, as Justice Kagan put it, “[M]ake our world poorer.”³⁵⁸

V. CONCLUSION

A narrow fair use doctrine in computer code is plainly against the ideals that the doctrine was developed to protect. The copyright laws of the United States were developed to promote creativity and society’s advancement by creating an incentive to innovate. The *Google* case set a precedent that let software developers know that they are free to innovate and use existing code to develop transformative works.³⁵⁹ The case still maintains the copyrights of the original author and ensures that theft is not permissible.³⁶⁰ The Supreme Court reaffirming this decision will signal to all that the advancement and improvement of computer code is encouraged, not punished, in the United States.³⁶¹

³⁵⁷ *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 30 (2021).

³⁵⁸ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 593 (2023) (Kagan, J., dissenting).

³⁵⁹ *Google*, 593 U.S. at 40.

³⁶⁰ *Id.*

³⁶¹ *Id.*