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# Copyright Potpourri ALAI Canada

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# Cases

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- [Nintendo of America Inc. v. King of Windows Home Improvements Inc.](#), 2021 FC 291
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- [Google LLC v. Oracle America, Inc.](#) 593 U.S. (2021)

# York University, et al. v. Canadian Copyright Licensing Agency, SCC Docket 39222

**Appeal from:** [York University v. Canadian Copyright Licensing Agency](#), 2020 FCA 77

## **Supreme Court summary:**

- “Intellectual property - Copyright, Legislation - Intellectual property — Copyright — Fair Dealing — Legislation – Interpretation – Whether interim tariffs are mandatory — When determining whether copying in the educational context constitutes “fair dealing” (and thus not infringement) under ss. 29, 29.1 and 29.2 of the Copyright Act, R.S.C., 1985, c. C 42, should the analysis be conducted from the perspective of the ultimate users (students), or from the perspective of the educational institution they attend — When determining whether copying in the educational context constitutes “fair dealing” under ss. 29, 29.1 and 29.2 of the Copyright Act, the analysis should refrain from conflating factors — For institutional fair dealing guidelines to be “fair” for the purposes of ss. 29, 29.1 and 29.2 of the Copyright Act, is there an obligation for an educational institution to implement safeguards to ensure compliance with the guidelines themselves — Are tariffs approved by the Copyright Board under Part VII of the Copyright Act merely voluntary licence terms that users can “opt into,” or are they enforceable by a collective society against all users who copy works without lawful authority.’

## **Intervenors:**

- *For Access Copyright* : ACP, CPC, Writers Union; SOCAN; CCC, CMRRA, CRC, CONNECT Music Licensing, SGCDPPV; CMPA, AQPM; IFRRO, IAF, IPA; CDACI Chaire Wilson; Music Canada, AQLD, CIMA; COPIBEC.
- *For York*: Universities Canada; Colleges and Institutes Canada; Copyright Consortium of the Council of Ministers of Education, Canada; CAUT, CFS; CARL; Authors Alliance, Ariel Katz; CIPPIC; CALL.

# Teksavvy Solutions Inc. v. Bell Media Inc., et al Appeal Copyright Act, FCA A-440-19

- Appeal from [Bell Media Inc. v. GoldTV.Biz](#), 2019 FC 1432
- “This matter comes on for hearing on 24-MAR-2021 at Ottawa before The Honourable Mr. Justice Nadon The Honourable Mr. Justice Locke The Honourable Mr. Justice LeBlanc Appearances: Colin Baxter, Marion Sandiland and Julie Mouris for the appellant François Guay, Guillaume Lavoie Ste-Marie and Olivier Jean-Levesque for the respondent Jeremy de Beers and Bram Abraham for CIRA James Plotkin and Tamir Israel for CIPPIC Neil Abraham for the BCCLA Casey Chisick and Eric Mayzel for the Music Publishers Coalition Gavin Mackenzie and Brooke MacKenzie for FIAPF Barry Sookman, Stephen Mason, Dan Glover and Kendra Levasseur for International Publishers Association, et al. Language of Hearing: B Simultaneous translation provided Duration: on 24-MAR-2021 from 09:30 to 05:10 Courtroom : Federal Court of Appeal Courtroom - Ottawa Court Registrar Candice de Montigny-Williams on 25-MAR-2021 from 09:30 to 12:10 Courtroom : Federal Court of Appeal Courtroom - Ottawa Court Registrar Candice de Montigny-Williams Total duration: 1.5 days Before the Court: appeal Result: reserved.
- **Can the court grant blocking orders? Is the Act a complete code? Is there jurisdiction to make blocking orders? S.36 Telecommunications Act?**
- Should a court grant a blocking order: freedom of expression and *Charter of Rights*; RJR or different test?
- **Intervenors:**
  - *For Teksavvy*: CIRA/CIPPIC/BCCLA
  - *For the media companies*: Music, film, publisher and sports coalitions

# Entertainment Software Assoc. v. Society Composers, 2020 FCA

- “On the submissions made, this much can be said. Subsection 2.4(1.1) does not create a new exclusive right. The Board used a “deeming provision” to create a right which, simultaneously, was and was not part of the communication right. When the deeming provision is set aside, all that is left is what the Board itself described (at para. 117) as a “preparatory act”. This is consistent with Parliament’s use of the word “includes” in subsection 2.4(1.1). It would be contrary to the policy of the Act to establish a tariff on a preparatory step as this would constitute disaggregating rights for the purpose of adding an additional layer of royalties:”
- Presumption of conformance? “Properly seen, the presumption requires the Court and administrative decision-makers to take into account any relevant international law as part of the context surrounding the enactment of legislation, as explained above, unless the legislation is clear to the contrary: *B010 v. Canada (Citizenship and Immigration)*, [2015 SCC 58](#), [2015] 3 S.C.R. 704. But the presumption does not permit those interpreting domestic legislation to leap to the conclusion, without analysis, that its authentic meaning is the same as some international law. Nor does it permit them to twist or amend the authentic meaning of domestic law to make it accord with international law. These would be steps too far: something forbidden under our constitutional arrangements and fundamental orderings.”

# **SOCAN et al. v. Entertainment Software Association, et al. SCC Docket 39418**

## **Supreme Court summary:**

—“Intellectual property - Copyright - Intellectual property — Copyright — Right to communicate work to public by telecommunication — Making available — Communication to public by telecommunication defined as including making work or other subject matter available to public by telecommunication such that public may have access to it at place and time chosen by member of public — Copyright Board finding that “making available” provision expanded meaning of “communication” — Meaning of “making available” provision — Use of international law when interpreting statutory provision enacted to implement an international treaty obligation — Whether protection for on-demand activity is impermissible “layering of rights” — Whether meaning of “communication” expanded by “making available” to include making work available to public, regardless of how work is transmitted, if at all — Sensitive, respectful, robust, evaluation of administrative decisions on reasonableness review — Proper standard of review for a question of law subject to concurrent first instance jurisdiction — Proper standard of review for interpretation of provision intended to implement international treaty — Proper standard of review when both conditions are present.”

## **Warner Bros. Entertainment Inc. v. White (Beast IPTV) 2021 FC 53**

- “As I understand it, Mr. White sees in *ESA* a decision that somehow contradicts the Court of Appeal decision of barely two years ago in *Lackman* (*supra*). He seems to understand *ESA* as having decided something momentous “about the meaning of the so called “making available right” ”, something that “calls the currency of the *Lackman* decision into serious doubt” (written representations, paras 83 and 82). He concludes that “(i)t is impossible to see how, in light of the recent FCA decision in *ESA v SOCAN*, the act of hosting or distributing an add-on could give rise to the primary infringement in the communication to the public” (written representations, para 84), the conclusion reached by the Court of Appeal just two years earlier.
- With all due respect, it is impossible to agree with such a proposition. Although the technology used in *Lackman* (creation and operation of the TVAddons website) differs, the goal of the operation is the same as that contemplated in this case: offering, for a fee, a product to customers allowing access without authorization to copyrighted programming.”

- In fact, the *ESA* decision deals with a very different matter. The issue concerned a proposed tariff for the communication of musical works. The question was whether new [subsection 2.4\(1.1\)](#) of the *Copyright Act*, what the Court of Appeal calls the “making available provision”, was an event for which a tariff was payable. In my view, *ESA* provides no assistance to Mr. White in his attempt to escape the Court of Appeal jurisprudence in *Lackman* ...
- The Court of Appeal does not go any further than this: [subsection 2.4\(1.1\)](#) does not allow for two different fees to be charged. The effect of [subsection 2.4\(1.1\)](#) is not to create a new layer of royalties. *ESA* certainly cannot displace the precedential value of *Lackman* where the issues discussed are on all fours with the case under review here. Accordingly the *prima facie* case continues to be a strong *prima facie* case of copyright infringement. The *ESA* decision is of no assistance to the Defendant.”
- “These are theories of liability that were considered in *Lackman* by the Federal Court of Appeal (para 22). The defendants are alleged to be responsible for developing, operating, maintaining and promoting the Beast IPTV Service whose whole purpose is to make available unauthorized content to subscribers over the internet. As the *Lackman* Court found, “There is clearly a strong *prima facie* case that the respondent, by hosting and distributing infringing add-ons, is making the appellants’ programs and stations available to the public by telecommunication in a way that allows users to access them from a place and at a time of their choosing, thereby infringing [paragraph 2.4\(1.1\)](#) and [section 27](#) of the *Copyright Act*” (para 22). The causes of action plead by the Plaintiffs are clearly viable.”



- “ In order to achieve that purpose of transferring the control of the infrastructure of the Beast IPTV Service, the Defendants were ordered to:
- provide the independent supervising solicitors the identity of the registrar accounts with which certain domains and subdomains are registered; the Defendants were also to provide the independent solicitors with the login credentials for each account;
- provide the independent supervising solicitors the identity and location of the servers and hosting provider accounts for the servers associated with the Beast IPTV Service and with certain domains and subdomains; the Defendants were to provide the login credentials (or other credentials) necessary to access the highest available privilege level to the servers and accounts;
- disclose any other domain (and subdomain), registrar account, hosting provider account, and server associated with the development, hosting, operation and promotion of the Beast IPTV Service and sale of subscriptions to the Beast IPTV Service; the independent supervising solicitors are to be provided with the login credentials (or any other credentials) necessary to access the highest available privilege level for these.”
- For that same purpose, computer forensic experts were authorized: to log into the accounts and servers using the credentials thus obtained; to modify the login credentials for the accounts and servers; to deactivate any domain, subdomain, server or service associated with the accounts or servers; to transfer control over the accounts, domains, subdomains and servers to the independent supervising solicitors as custodians; the independent supervising solicitors, assisted by the computer forensic experts, are to act as custodian of the modified login credentials.”

# Making available and blocking internationally

- [Tunein Inc v Warner Music UK Ltd & Anor](#) [2021] EWCA Civ 441 (26 March 2021) (aggregating, categorising, curation, personalisation and providing search functionality and providing links to radio stations outside of the UK without consent infringes the making available right.)
- [VG Bild-Kunst v Stiftung Preußischer Kulturbesitz](#), ECLI:EU:C:2021:181 “the embedding, by means of the technique of framing, in a third party website page, of works... with the authorisation of the copyright holder on another website, where that embedding circumvents measures adopted or imposed by that copyright holder to provide protection from framing, constitutes a communication to the public within the meaning of that provision.”
- [SKY UK LIMITED AGAINST ALEX CHERRIE](#) [2021] ScotCS CSOH 36 (06 April 2021) “the defender...copied and made available to the public whole episodes of the pursuer's content on...YouTube... and on his still-running Subreddits.. This conduct constitutes a clear *prima facie* breach of the pursuer's copyright in the Broadcasts.”
- [Capitol Records & Ors v British Telecommunications Plc & Ors](#) [2021] EWHC 409 (Ch) (25 February 2021) (blocking order against Nitroflare cyberlocker which hosted and made links available for music downloading. Site operators liable for making available by transmitting downloads on demand. Uploading users also liable for communications to the public.)
- [Young Turks Recordings Ltd & Ors v British Telecommunications Plc & Ors](#) [2021] EWHC 410 (Ch) (25 February 2021) (blocking order against stream ripping operators; infringing sites that provided “conversion” services and provision of a downloader App that enabled users to convert files locally, liable for communication to the public).

# **TBV Productions, LLC v. Doe, 2021 FC 181**

- “A claim for damages for non-compliance with the notice-and-notice scheme is not identified as a proceeding that can be determined in a summary way by application or action ([Copyright Act](#), s 34(4)). The procedure for advancing a claim under the notice-and-notice regime is not specified in the Act (see s 41.26(3)). The general rule, therefore, that liability and damages should be decided by way of an action, applies here.
- I also agree with the ISPs that the effect of TBV’s position would be to allow a copyright holder to expose entities who are not even parties to an infringement action to substantial damages without their having recourse to the usual procedural protections available to defendants to an action, particularly the exchange of pleadings, an opportunity for discovery, and the presentation of evidence and testimony at trial. Some ISPs receive hundreds of thousands of notices from copyright holders every month. It would be unfair to permit substantial damage claims against them for alleged failures under the scheme to be prosecuted other than through the usual process of an action. The potential damages to which ISPs are liable under the regime will usually exceed those for which the actual infringers will be exposed. It makes little sense, therefore, not to afford ISPs the same procedural rights.
- I can see no basis, absent the special circumstances in *ME2*, for allowing a damages claim against ISPs under the notice-and-notice scheme to proceed by motion.”

# **Druide Informatique inc. vs. Éditions Québec Amérique inc., 2020 QCCA 1197**

- “The perpetual contract should not be confused with the contract of indefinite duration, that is to say the contract for which “the parties have not fixed any extinctive term for their obligations”. Like a fixed-term or unlimited-term contract, an indefinite contract is irrevocable. This is a consequence of its binding implies respect by the parties of its duration, as codified in [Section 1439 C.cQ .\[89\]](#) . The Supreme Court has recognized that this principle also applies to contracts of indefinite duration. However, copyright recognizes an exception to this principle by recognizing that a license granted free of charge may be unilaterally revocable, while a license for consideration is only revocable if the parties have so agreed. \_
- The principle of irrevocability does not mean, however, that the indefinite contract is binding “eternally” since each contracting party can be released from it by giving sufficient notice.”...
- “In the absence of an agreement limiting the duration of the agreement entered into with the edition of Antidote HD or providing for an extinctive term or even providing for an unlimited duration, it must be concluded that the parties were bound by a permanent contract.
- QA could not, in these circumstances, terminate this contract without giving reasonable notice to Druid, in order to allow him ‘to benefit from a period necessary to reorient his commercial activities’ ”.

## **Wiseau Studio, LLC et al. v. Harper et al,** **2020 ONSC 2504.**

- “the purpose of the documentary and its use of the plaintiffs’ material are to provide review, critique and information about *The Room*, the phenomenon it has created, and the maker of the film, Tommy Wiseau.”
- “ This factor addresses how the copyrighted material is dealt with by the user. In doing so it may be relevant to consider the “custom or practice” in the particular trade or industry to determine whether the character of dealing is fair: *CCH*, at para. [50](#). In this case, the copyrighted material was almost invariably accompanied by commentary illustrating or supporting points made by the narrator or interviewees. This is a common technique in documentaries and in providing review ”
- “While the documentary’s use of footage from *The Room* is not trivial, it is also not excessive. *Room Full of Spoons*, which is 109 minutes long, uses 7 minutes of footage in 69 short clips from *The Room*, which is itself 99 minutes in length. This is less than 7% of the source work and an even smaller percentage of the documentary. The longest clip is 21 seconds.”
- “ There is no alternative to the copyrighted material to make the points that are made.”
- “ In my view, *Room Full of Spoons* is not an alternative to *The Room* and does not replicate or replace the unique experience of attending a showing of the original work, where people dress up as characters in the film, throw footballs around, throw spoons, and shout at the screen. ”

# **Trimble Solutions Corporation v. Quantum Dynamics Inc., 2021 FC 63**

- “ While it is, from a practical perspective, impossible to know who was using the devices at the precise times indicated in each incident report, there is more than sufficient identifying information to connect these devices with the individual and corporate Defendants. This includes the hostnames and usernames, as well as the e-mail addresses associated with these events, together with the geolocation evidence that connects the Wi-Fi locations for these events to the addresses of the individual and corporate Defendants. There is no doubt that the devices used for the infringing activities were under the control of the Defendants and located at their premises. That is sufficient (*CCH* at para 38).
- I find that the evidence establishes that devices owned or used by Quantum Dynamics and/or Sharbel Tannus were repeatedly used to execute and open Version 20.1 of the Tekla Structures software although neither Defendant had a proper licence for its use. The e-mail from Mr. Tannus to the ITCA confirms this. I further find that each of these unauthorized use incidents constitute a breach of Trimble’s copyright in that program, because every time the unlicensed software was opened a copy of it was made on the Defendants’ device.”

## **Patterned Concrete Mississauga Inc. v. Bomanite Toronto Ltd. 2021 FC 314**

- “ In my view, *P.S. Knight (FCA)* does not establish a rule that section 53 of the *Copyright Act* will only apply if a certificate of registration was obtained in the ordinary course of business, and not in contemplation of litigation. In that case, the Federal Court of Appeal held (reversing the Federal Court’s finding on this point) that the certificate of registration in question was, in fact, obtained in the ordinary course of business, and the plaintiff was entitled to rely on it as evidence of ownership under subsection 53(2) of the *Copyright Act*. Thus, the Federal Court of Appeal did not need to decide whether section 53 only applies to certificates of registration obtained in the ordinary course of business. There was no analysis of the language of that section, and while “ordinary course of business” and “in contemplation of litigation” are terms that have legal meaning, those terms do not appear in the *Copyright Act*. In my view, *P.S. Knight (FCA)* did not set down a general rule as Bomanite asserts.”
- “As another example, in *CCH Canada Ltd. v Law Society of Upper Canada*, 2002 FCA 187 at paragraph 63 the Federal Court of Appeal held that certificates seemingly obtained in contemplation of litigation may support a finding that copyright subsists in the works described on the certificates, but may have diminished persuasiveness and may not constitute particularly compelling evidence.”

## **Lickerish, Ltd. v. airG Inc., 2020 FC 1128**

- “Section 53 makes no reference to foreign certificates of registration and the Plaintiff has provided the Court with no case law which supports its assertion that foreign certificates of registration are treated in the same manner as Canadian certificates of registration under section 53. As there is no evidence before the Court of any Canadian registration, I find that the Plaintiff cannot benefit from section 53 of the *Act* to establish that Mr. Loiseau is the owner of the copyright in the Photographs.”
- “Even if the screen captures were admissible, I am not satisfied that the Plaintiff has demonstrated a “real and substantial connection” between the Defendant’s website and the jurisdiction of Canada [see *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004 SCC 45 \(CanLII\)](#), [2004] 2 SCR 427; *Miguna v Walmart Canada et al*, [2015 ONSC 5744](#), aff’d [2016 ONCA 174](#)]. There is no evidence before the Court that the [www.buzz.airg.com](#) website is controlled by the Defendant, that the website is hosted on a server in Canada or that ImageRights International or anyone else accessed the Defendant’s website from within Canada.”



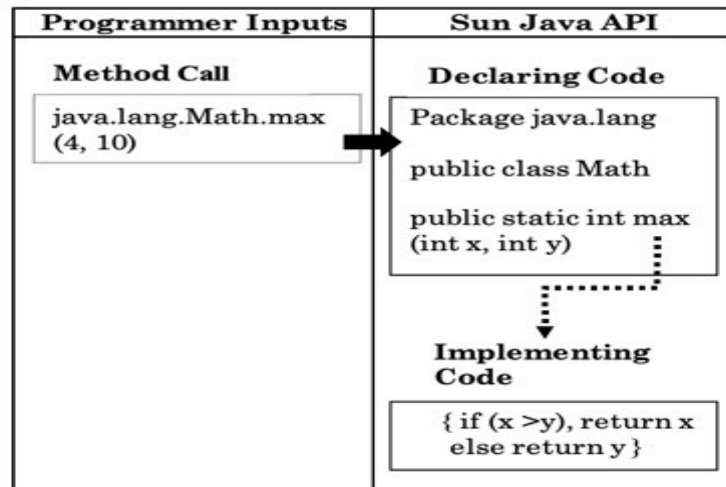
## Bjørnsen v. Sharpe, 2020 BCCRT 1425

- “The copyright information displayed on the artworks in the applicant’s book, suggests that “ulfheimr.no” holds the copyright in the subject illustrations. Based on the evidence filed, I find that “ulfheimr.no” is a domain name for a website dedicated to the book, and that the applicant is the registered owner of the “ulfheimr.no” domain. While I find that a domain name is not a person or legal entity that can hold a copyright, marking the artworks with this name and the phrase “all rights reserved” provides notice of existing copyright in the works.” **s34 presumption met?**
- “I find the watermarks, logos, and copyright information on the artworks could have been removed by anyone and posted “clean” on Pinterest or any other website. This does not mean the applicant’s illustrations are “in the public domain” and free for all to use. However, I accept Mr. Sharpe’s submission that he did not in any way alter either of the applicant’s artworks himself or remove the copyright information before posting them on his Facebook page.”
- “While I find Mr. Sharpe was not responsible for the primary copyright infringement, I must still consider whether his use of the applicant’s artworks constitute secondary infringement under section 27(2) of the CA... I find that Mr. Sharpe was unaware that copyright existed in the 2 illustrations he posted or that the “clean” versions of the illustrations he used were themselves the product of copyright infringement. Therefore, I find the applicant has not proven Mr. Sharpe’s posts constitute secondary infringement of the applicant’s copyright.” **why not primary infringement?**

# **Patterned Concrete Mississauga Inc. v. Bomanite Toronto Ltd. 2021 FC 314**

- “ I agree with Bomanite that section 38.1(1)(a) uses different words—all infringements involved in the proceedings, each work—and on a plain reading provides a remedy of statutory damages that is calculated by multiplying a dollar amount within the monetary range by the number of works, not the number of infringements. In my view, case law establishing that each infringement stands as a cause of action does not compel a different interpretation. As noted above, Patterned Concrete did not point to any case where a court has calculated statutory damages by multiplying a number within the monetary range of section 38.1 by the number of infringements, and I was unable to find such a case. The “per work” nature of statutory damages was recently confirmed by Justice Kane in *Young v Thakur*, 2019 FC 835”
- “Section 38.1(3) grants the discretion to award, with respect to each work, a lower amount than \$500 or \$200 per work where there is more than one work in a single medium and the awarding of the minimum under section 38.1(1) would result in a total award that is grossly out of proportion to the infringement. Relying on *Trader v CarGurus*, 2017 ONSC 1841 at paragraph 57 [*Trader*], Bomanite asserts that photocopies of the forms at issue in the present case were made within a single medium. I am not satisfied that I should award an amount lower than \$500 per work. First, I disagree with Bomanite’s interpretation of the *Trader* case. It is the works, not the copies, that must be in a single medium in order for section 38.1(3) to apply. Second, I am not satisfied that a minimum award under section 38.1(1) of \$1,500 for the three Works at issue would be grossly out of proportion to the infringement in this case.”
- Also: [Rallysport Direct LLC v. 2424508 Ontario Ltd.](#), 2020 FC 794 (\$357,500, \$250 per each of the 1430 works infringed); [Biofert Manufacturing Inc. v. Agrisol Manufacturing Inc.](#), 2020 FC 379 (\$500 per infringement for each of the two copyrighted works for a total of \$1,000); [Nintendo of America Inc. v. King of Windows Home Improvements Inc.](#), 2021 FC 291, (20k per work infringed).

# Google LLC v. Oracle America, Inc. 593 U.S. \_\_\_\_ (2021)



This image depicts the connection between the three parts of the Sun Java API technology at issue, using the District Court’s example. *Oracle*, 872 F. Supp. 2d, at 980–981. The programmer enters a method call to invoke a task from within the API (the solid arrow). The precise symbols in the method call correspond to a single task, which is located within a particular class. That class is located within a particular package. All of the lines of code that provide that organization and name the methods, classes, and packages are “declaring code.” For each method, the declaring code is associated with particular lines of implementing code (the dotted arrow). It is that implementing code

- “Copyright statutes and case law have made clear that copyright has practical objectives. It grants an author an exclusive right to produce his work (sometimes for a hundred years or more), not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply. At the same time, copyright has negative features. Protection can raise prices to consumers. It can impose special costs, such as the cost of contacting owners to obtain reproduction permission. And the exclusive rights it awards can sometimes stand in the way of others exercising their own creative powers.”
- “Macaulay once said that the principle of copyright is a "tax on readers for the purpose of giving a bounty to writers." T. Macaulay, *Speeches on Copyright* 25 (E. Miller ed. 1913). Congress, weighing advantages and disadvantages, will determine the more specific nature of the tax, its boundaries and conditions, the existence of exceptions and exemptions, all by exercising its own constitutional power to write a copyright statute.”

- “We have described the "fair use" doctrine, originating in the courts, as an "equitable rule of reason" that "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.””
- “The upshot, in our view, is that fair use can play an important role in determining the lawful scope of a computer program copyright, such as the copyright at issue here. It can help to distinguish among technologies. It can distinguish between expressive and functional features of computer code where those features are mixed. It can focus on the legitimate need to provide incentives to produce copyrighted material while examining the extent to which yet further protection creates unrelated or illegitimate harms in other markets or to the development of other products. In a word, it can carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds. See H. R. Rep. No. 94-1476, pp. 65-66 (1976) (explaining that courts are to "adapt the doctrine [of fair use] to particular situations on a case-by-case basis" and in light of "rapid technological change"); see, e.g., [Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F. 3d 522, 543-545 \(CA6 2004\)](#) (discussing fair use in the context of copying to preserve compatibility); [Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F. 3d 596, 603-608 \(CA9 2000\)](#) (applying fair use to intermediate copying necessary to reverse engineer access to unprotected functional elements within a program); [Sega Enterprises Ltd. v. Accolade, Inc., 977 F. 2d 1510, 1521-1527 \(CA9 1992\)](#) (holding that wholesale copying of copyrighted code as a preliminary step to develop a competing product was a fair use).”

# Nature of the copyright work (Breyer)

"Here Google's use of the Sun Java API seeks to create new products. It seeks to expand the use and usefulness of Android-based smartphones. Its new product offers programmers a highly creative and innovative tool for a smartphone environment. To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers, its use was consistent with that creative "progress" that is the basic constitutional objective of copyright itself. Cf. Feist, 499 U. S., at 349–350 ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts'" (quoting U. S. Const., Art. I, §8, cl. 8))."...

These and related facts convince us that the "purpose and character" of Google's copying was transformative — to the point where this factor too weighs in favor of fair use.

# Nature of the copyright work (Thomas)

- “Declaring code, in contrast, is user facing. It must be designed and organized in a way that is intuitive and understandable to developers so that they can invoke it.”
- “Similarly, it makes no difference that the value of declaring code depends on how much time third parties invest in learning it. Many other copyrighted works depend on the same. A Broadway musical script needs actors and singers to invest time learning and rehearsing it. But a theater cannot copy a script—the rights to which are held by a smaller theater—simply because it wants to entice actors to switch theaters and because copying the script is more efficient than requiring the actors to learn a new one.”

# Purpose and character of the work (Thomas)

“Commercial use sometimes can be overcome by use that is sufficiently “transformative.” [\*Campbell\*, 510 U. S., at 579](#). But “we cannot ignore [Google’s] *intended purpose* of supplanting [Oracle’s] commercially valuable” platform with its own. [\*Harper\*, 471 U. S., at 562](#) (emphasis in original). Even if we could, we have never found fair use for copying that reaches into the tens of billions of dollars and wrecks the copyright holder’s market.”

“Google did not use Oracle’s code to teach or reverse engineer a system to ensure compatibility. Instead, to “avoid the drudgery in working up something fresh,” *id.*, at 580, Google used the declaring code for the same exact purpose Oracle did. As the Federal Circuit correctly determined, “[t]here is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.” 886 F. 3d, at 1210.”..

“Now, we are told, “transformative” simply means—at least for computer code—a use that will help others “create new products.” *Ibid*; accord, *ante*, at 26 (Google’s copying “can further the development of computer programs”).

That new definition eviscerates copyright. A movie studio that converts a book into a film without permission not only creates a new product (the film) but enables others to “create products”—film reviews, merchandise, YouTube highlight reels, late night television interviews, and the like. Nearly every computer program, once copied, can be used to create new products. Surely the majority would not say that an author can pirate the next version of Microsoft Word simply because he can use it to create new manuscripts.<sup>[11]</sup>

Ultimately, the majority wrongly conflates transformative use with derivative use. To be transformative, a work must do something fundamentally different from the original. A work that simply serves the same purpose in a new context—which the majority concedes is true here—is derivative, not transformative. ”



# Purpose and character of the work (Breyer)

- “Here Google's use of the Sun Java API seeks to create new products. It seeks to expand the use and usefulness of Android-based smartphones. Its new product offers programmers a highly creative and innovative tool for a smartphone environment. To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers, its use was consistent with that creative "progress" that is the basic constitutional objective of copyright itself.”
- “( “[A]llowing reasonable fair use of functional code enables innovation that creates new opportunities for the whole market to grow” )”
- “These and related facts convince us that the "purpose and character" of Google's copying was transformative—to the point where this factor too weighs in favor of fair use.”

# Amount and substantiality of the use (Breyer)

- “The question here is whether those 11,500 lines of code should be viewed in isolation or as one part of the considerably greater whole. We have said that even a small amount of copying may fall outside of the scope of fair use where the excerpt copied consists of the “heart” of the original work’s creative expression. [\*Harper & Row\*, 471 U. S., at 564-565](#). On the other hand, copying a larger amount of material can fall within the scope of fair use where the material copied captures little of the material’s creative expression or is central to a copier’s valid purpose.”
- “Several features of Google’s copying suggest that the better way to look at the numbers is to take into account the several million lines that Google did not copy. For one thing, the Sun Java API is inseparably bound to those task implementing lines. Its purpose is to call them up. For another, Google copied those lines not because of their creativity, their beauty, or even (in a sense) because of their purpose. It copied them because programmers had already learned to work with the Sun Java API’s system, and it would have been difficult, perhaps prohibitively so, to attract programmers to build its Android smartphone system without them. Further, Google’s basic purpose was to create a different task-related system for a different computing environment (smartphones) and to create a platform—the Android platform—that would help achieve and popularize that objective. The “substantiality” factor will generally weigh in favor of fair use where, as here, the amount of copying was tethered to a valid, and transformative, purpose. *Supra*, at 25-26; see [\*Campbell\*, 510 U. S., at 586-587](#) (explaining that the factor three “enquiry will harken back to the first of the statutory factors, for . . . the extent of permissible copying varies with the purpose and character of the use”).”

# Amount and substantiality of the use (Thomas)

“Even if Google's use were transformative, the majority is wrong to conclude that Google copied only a small portion of the original work. The majority points out that the 11,500 lines of declaring code—enough to fill about 600 pages in an appendix, Tr. of Oral Arg. 57—were just a fraction of the code in the Java platform. But the proper denominator is *declaring code*, not all code. A copied work is quantitatively substantial if it could "serve as a market substitute for the original" work or "potentially licensed derivatives" of that work. [\*Campbell\*, 510 U. S., at 587](#). The declaring code is what attracted programmers. And it is what made Android a "market substitute" for "potentially licensed derivatives" of Oracle's Java platform. Google's copying was both qualitatively and quantitatively substantial.”

# Market effects (Breyer)

- “Further, we must take into account the public benefits the copying will likely produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression? Are they comparatively important, or unimportant, when compared with dollar amounts likely lost (taking into account as well the nature of the source of the loss)? Cf. [\*MCA, INC. v. Wilson\*, 677 F. 2d 180, 183 \(CA2 1981\)](#) (calling for a balancing of public benefits and losses to copyright owner under this factor).”
- “ When a new interface, like an API or a spreadsheet program, first comes on the market, it may attract new users because of its expressive qualities, such as a better visual screen or because of its superior functionality. As time passes, however, it may be valuable for a different reason, namely, because users, including programmers, are just used to it. They have already learned how to work with it. See [\*Lotus Development Corp.\*, 49 F. 3d, at 821 \(Boudin, J., concurring\)](#).”
- ” Finally, given programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public. Given the costs and difficulties of producing alternative APIs with similar appeal to programmers, allowing enforcement here would make of the Sun Java API's declaring code a lock limiting the future creativity of new programs. Oracle alone would hold the key. The result could well prove highly profitable to Oracle (or other firms holding a copyright in computer interfaces). But those profits could well flow from creative improvements, new applications, and new uses developed by users who have learned to work with that interface. To that extent, the lock would interfere with, not further, copyright's basic creativity objectives.”

# Market effects (Thomas)

- “[U]ndoubtedly the single most important element of fair use” is the effect of Google’s copying “upon the potential market for or value of [Oracle’s] copyrighted work.” [\*Harper & Row, Publishers, Inc. v. Nation Enterprises\*, 471 U. S. 539, 566 \(1985\)](#). As the Federal Circuit correctly determined, “evidence of actual and potential harm stemming from Google’s copying was ‘overwhelming.’” 886 F. 3d 1179, 1209 (2018). By copying Oracle’s code to develop and release Android, Google ruined Oracle’s potential market in at least two ways.”
- “And if companies may now freely copy libraries of declaring code whenever it is more convenient than writing their own, others will likely hesitate to spend the resources Oracle did to create intuitive, well-organized libraries that attract programmers and could compete with Android. If the majority is worried about monopolization, it ought to consider whether Google is the greater threat.
- By copying Oracle’s work, Google decimated Oracle’s market and created a mobile operating system now in over 2.5 billion actively used devices, earning tens of billions of dollars every year. If these effects on Oracle’s potential market *favor* Google, something is very wrong with our fair use analysis.”

# Conclusions (Breyer)

- “The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world. See [Lotus Development Corp., 49 F. 3d, at 820 \(Boudin, J., concurring\)](#). In doing so here, we have not changed the nature of those concepts. We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve “knockoff” products, journalistic writings, and parodies. Rather, we here recognize that application of a copyright doctrine such as fair use has long proved a cooperative effort of Legislatures and courts, and that Congress, in our view, intended that it so continue. As such, we have looked to the principles set forth in the fair use statute, § 107, and set forth in our earlier cases, and applied them to this different kind of copyrighted work.
- We reach the conclusion that in this case, where Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's copying of the Sun Java API was a fair use of that material as a matter of law. The Federal Circuit's contrary judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion.”

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