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The Solicitor General's Mixed
Record of Success in the Supreme
Court's Copyright Cases

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**THE SOLICITOR GENERAL’S MIXED RECORD OF SUCCESS IN
THE SUPREME COURT’S COPYRIGHT CASES**

by PAMELA SAMUELSON*

*The Office of the Solicitor General (OSG) has historically been very influential with the Supreme Court, especially as an amicus curiae in private litigant cases with an average win rate overall of 75%, and more than 90% in the Court’s patent cases. This Article is the first to consider OSG’s record in the Court’s copyright cases. It reviews all thirty-one of the copyright cases on which the Court granted cert since 1984. It contrasts the rarity of OSG’s participation in the Court’s twentieth century copyright cases with its predominant role in the Court’s twenty-first century cases. OSG’s analyses have been very persuasive in the Court’s copyright procedure and constitutional challenge cases, but less persuasive in the Court’s copyright remedies and substantive interpretation cases. The Article drills down into these divergences between OSG’s and the Court’s views in substantive copyright cases, finding some were highly divergent, while others had convergent outcomes but divergent analyses. In only one of the Court’s ten substantive interpretation copyright cases, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, was OSG’s merits argument highly persuasive with a majority of the Court. The Article reflects on why OSG and the Court so often differ in their interpretations of U.S. copyright law. It concludes with offering suggestions on how OSG might better improve its record as amicus in the Court’s future copyright cases.*

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INTRODUCTION

An extensive literature has analyzed the influence of the Office of the Solicitor General (OSG) in Supreme Court cases,¹ as well as in its patent cases.² Empirical articles report that OSG has historically enjoyed a 75 percent success rate when participating filing amicus curie in cases before the Court,³ and an even higher rate when filing amicus briefs in patent cases.⁴ This Article is the first

¹ See, e.g., Margaret M. Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323 (2010); Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829 (2018); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Ronald Mann & Michael Fronk, *Assessing the Influence of Amici on Supreme Court Decision Making*, 18 J. EMPIRICAL LEGAL STUD. 700 (2021); Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183 (2013). See generally RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT* (2012); LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); REBECCA M. SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1994).

² See, e.g., Colleen V. Chien, *Patent Amicus Briefs: What the Court's Friends Can Teach Us About the Patent System*, 1 UC IRVINE L. REV. 395 (2011); John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518 (2010); John M. Golden, *The Supreme Court as a "Prime Percolator": A Prescription for Appellate Review of Questions of Patent Law*, 56 UCLA L. REV. 657 (2009); Paul R. Gugliuzza, *The Supreme Court Bar at the Bar of Patents*, 95 NOTRE DAME L. REV. 1233 (2020); Christa Laser, *Certiorari in Patent Cases*, 48 AIPLA Q. 569 (2020); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413 (2016); Tejas N. Narechania, *Defective Patent Deference*, 95 WASH. L. REV. 869 (2020).

³ See, e.g., Cordray & Cordray, *supra* note 1, at 1335 (reporting OSG overall win rate of 60-70%, 70-80% as amicus); Kearney & Merrill, *supra* note 1, at 773 (noting empirical study showing OSG had 75% successes between 1952-1982); Salokar, *supra* note 1, at 145-50 (OSG win rate of 72% between 1959-1986). OSG win rates as a litigant have declined in recent years. See, e.g., LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: TWO CENTURIES OF DATA, DECISIONS, AND DEVELOPMENTS* 698-703 (7th Ed. 2021) (OSG win rate of 72% as amicus, but less than 50% as a party in the 2010s); Mann & Fronk, *supra* note 1, at 717 (OSG won about half of cases in which it was a party and almost 75% as amicus in OT 2013-18).

⁴ See, e.g., Chien, *supra* note 2, at 400 (“[E]very single amicus brief authored by the U.S. in a Supreme Court patent case except one predicted the outcome” over a 20-year period). See also Paul R. Gugliuzza & Pyry Koivula, *Stepping Out of the Solicitor General's Shadow: The Federal Circuit and the Supreme Court in a New Era of Patent Law*, 64 B.C. L. REV. 459, 495 (2023) (reporting that OSG's amicus briefs persuaded the Court in more than 90% of patent cases in which it filed). Some commentators express concern about OSG's influence over patent policy because OSG lacks political accountability on these issues. See Narechania, *supra* note 2, at 874; Duffy, *supra* note 2, at 549-50. Others are more sanguine about OSG's influence on the interpretation of patent law. See Ben Picozzi, *The Government's Fire Dispatcher: The Solicitor General in Patent Law*, 33 YALE L. & POL'Y REV. 427, 429-30 (2015). OSG has, however, been somewhat less successful recently in patent cases, especially as a party. See Gugliuzza & Koivula, *supra* note 4, at 461-65. See also Dani Kass, *Justices Seem Less Receptive to SG's Take On IP Cases*, LAW360 (Nov. 10, 2022).

to consider OSG's influence with the Court in copyright cases decided since 1984.⁵ It demonstrates that OSG has had a more mixed record of success with the Court in these cases. The Solicitor General may well be the "tenth Justice" in the overwhelming majority of Supreme Court cases,⁶ but not when it comes to substantive interpretations of copyright law.

Part I provides an overview of the thirty-one copyright cases that the Supreme Court has heard in the past forty years.⁷ OSG participated in twenty of them, seventeen as an amicus curiae. Interestingly, OSG rarely filed as amicus in twentieth-century cases but has participated in all but two of the Court's twenty-first-century copyright cases. Part I reports that OSG's views on the merits and its reasoning were closely aligned with the Court's opinions in the copyright procedure and constitutional challenge cases, somewhat mixed in the remedies cases, and generally quite divergent in the substantive interpretation cases.⁸

Part II offers detailed analyses of the ten substantive interpretation cases. In nine of them, the Court's opinions differed, often significantly, from OSG's recommended analysis of substantive provisions of the Copyright Act of 1976 (1976 Act). It further shows that the Court generally took a more balanced and moderate approach to interpreting U.S. copyright law than OSG. The Court generally not only disagreed with OSG's analyses in these cases but also criticized or ignored OSG's analyses more often than it praised them.

Part III shows that OSG's amicus briefs have generally been more closely aligned with the views of major copyright industry groups who typically supported the same party as OSG. It explains that on most copyright issues, it is possible to identify a spectrum of interpretations along which some favor a broader scope of copyright protection (which this article calls a "higher protectionist" view) while others favor a narrower scope (or "lower protectionist" view). OSG has almost always supported higher protectionist positions than the Court has found persuasive, perhaps partly due to the considerable influence of Copyright Office lawyers in shaping the OSG's positions in twenty-first century copyright cases. It explains that the Court has typically paid more attention than OSG has to lower protectionist amicus briefs and to the larger public purposes of copyright. The Article concludes with some suggestions about rethinking OSG's amicus role in future copyright cases, especially those calling for substantive interpretations of the 1976 Act.

⁵ The Court began to be active in copyright cases in the early 1980s and decided its first substantive interpretation case in 1984.

⁶ Caplan, *supra* note 1.

⁷ See *infra* App., Table 1, for a complete list of the cases.

⁸ This Article uses the term "substantive interpretation cases" to refer to cases raising issues such as eligibility for copyright ownership, the scope of exclusive rights and limitations on rights, and secondary infringement claims.

I. OVERVIEW OF THE SUPREME COURT'S COPYRIGHT CASES SINCE 1984

The Court has granted certiorari petitions in thirty-one copyright cases in the past forty years.⁹ In two cases, the Court split 4-4, affirming lower court rulings without setting precedents.¹⁰ The decisional yield is thus twenty-nine cases. Eleven of these thirty-one cases hailed from the Ninth Circuit. The Court notably reversed that court's rulings in nine of ten cases decided on the merits.¹¹ Eight other cases came to the Court from the Second Circuit, which reversed its rulings in all but two cases.¹² The other twelve cases, which arrived at the Court from seven other circuits, fared better than the Ninth and the Second, for the Court affirmed eight of them, reversed in three, and split 4-4 in one.¹³

The Court identified circuit splits as a reason for hearing these cases in only twelve (41%) of the twenty-nine decided cases, which contrasts with the estimated 70 percent circuit split cases historically characteristic of the Court's docket.¹⁴

⁹ Excluded from the sample were two cases in which the Court granted cert petitions to vacate and remand for reconsideration (GVR). *See* *Raquel v. Educ. Mgmt. Corp.*, 531 U.S. 952 (2000) (interpreting subject matter jurisdiction over infringement claim); *Univ. of Hous. v. Chavez*, 517 U.S. 1184 (1996) (whether states enjoy sovereign immunity from money damage awards in copyright cases). Also excluded were two cases involving copyright industry litigants in which no copyright claims were before the Court. *See* *Dastar Corp. v. Twentieth Century Fox Films, Inc.*, 539 U.S. 23 (2003) (rejecting Fox's claim that Dastar's videos violated § 43(a) of the Lanham Act); *Broad. Music Corp. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (BMI's blanket license policy held not to violate antitrust laws). Since 1978, the Court has denied approximately three hundred copyright cert petitions, including twenty in which OSG was respondent.

¹⁰ The 4-4 split cases were *Costco Wholesale Corp. v. Omega S.A.*, 562 U.S. 40 (2010) (per curiam) (whether the first sale rule limits importation rights) and *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1996) (per curiam) (whether command hierarchy of software user interface was copyright-protectable). *Costco* and *Borland* are discussed in Part II-A.

¹¹ *See* Pamela Samuelson, *Reponse: A Riff on the Supreme Court's Copyright Cases*, 104 B.U. L. REV. 965, 966-67 (2024). The one Ninth Circuit ruling affirmed by the Court was *Stewart v. Abend*, 495 U.S. 207 (1990) (derivative work authorized during initial term of copyright infringed successor owner's renewal interest in underlying work). Although the 4-4 split in *Costco* resulted in affirmance of the Ninth Circuit decision, when the Court eventually resolved that split three years later, it rejected the Ninth Circuit's interpretation of the relevant statutory provision. 562 U.S. at 40; *see infra* Part II-A-2. So the Ninth Circuit has actually been 1 for 11 with the Supreme Court in copyright cases.

¹² Samuelson, *supra* note 11, at 966-67.

¹³ *Id.* at 967. For an accounting of these cases, *see id.* at 976-77 (Table 1). *See also infra* App., Table 2.

¹⁴ *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1948 (2016). These authors suggest that circuit splits are "fading in relevance today." *Id.* at 1949. There may have been fewer circuit splits in copyright cases due to the substantial influence of Second and Ninth Circuit copyright decisions on other circuits. *See* Table 1, *infra*, which designates cases in which the Court mentioned circuit splits.

Although the Court does not always explain its rationales for granting cert,¹⁵ it must have taken the other seventeen because they presented important federal questions or the decisions below were at odds with the Court's precedents.¹⁶

OSG participated in twenty of the Court's thirty-one copyright cases, three as respondent and seventeen as amicus.¹⁷ OSG's views about which litigant should prevail were upheld in thirteen decided cases (68%). At this level of generality, OSG's overall influence with the Court in copyright cases is not notably different from its historical record of influence with the Court.¹⁸ Yet, a closer look at the Court's copyright cases reveals some interesting differences.

One notable difference is that OSG's participation in the Court's copyright cases has changed significantly over time. It rarely participated in the Court's twentieth-century copyright cases, yet has almost always participated in the Court's twenty-first-century copyright cases. Another difference is that although the Court generally agreed with OSG in cases involving procedural issues or constitutional challenges to amendments to the 1976 Act, the Court was less often persuaded by OSG's interpretations of substantive and remedial provisions of copyright law.

A. *Comparing OSG Amicus Filings in the Court's Twentieth- and Twenty-First-Century Copyright Cases*

Prior to 2000, OSG participated as amicus curiae in only two of the eleven private litigant copyright cases before the Court. OSG's analysis did not persuade the Court in either case. In *Quality King Distributors, Inc. v. L'Anza Research Int'l, Inc.*, OSG, along with several major copyright industry groups, supported L'Anza's argument that Quality King infringed copyright by importing into the

¹⁵ See, e.g., Tejas Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022) (urging the Court to develop a jurisprudence of cert grants).

¹⁶ See SUP. CT. R. 10. Supreme Court Rule 10(a) identifies circuit splits as one "compelling reason" for granting cert. Rule 10(c) identifies important federal questions and conflicts with the Court's precedents as alternative rationales for cert grants. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021), presented an important federal question grant because whether reimplementing of program interfaces infringes copyrights was of critical importance to the software industry. The cert grant in *Warhol* was premised on conflicts with the Court's past rulings in *Google* and *Campbell v. Acuff-Rose Music Corp.*, 510 U.S. 569 (1994). See Petition for a Writ of Certiorari at 17-24, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869 (Dec. 9, 2021).

¹⁷ OSG's respondent cases were *Golan v. Holder*, 565 U.S. 302 (2012) (rejecting challenge to constitutionality of amendment to the 1976 Act to "restore" foreign copyrights that had been in the public domain for failure to comply with U.S. formality rules); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (rejecting challenge to constitutionality of retroactive copyright term extension); *Dowling v. United States*, 473 U.S. 207 (1985) (rejecting stolen goods charge against counterfeiter).

¹⁸ See *supra* note 3.

U.S. bottles of shampoo bearing its copyrighted labels.¹⁹ A unanimous Court reversed a lower court ruling in L'Anza's favor, holding that the first sale limitation on the scope of copyright's distribution right also applied to importations.²⁰ Because Quality King had purchased in the EU lawfully made bottles of L'Anza shampoo which it then imported to the U.S., it could not be held as an infringer. In *Community for Creative Nonviolence v. Reid*,²¹ the Court addressed a circuit split concerning the proper interpretation of copyright law's work-for-hire rule under which employers own copyrights in all original works created by their employees within the scope of their employment.²² CCNV argued that Reid was its employee because CCNV had the right to supervise and control the design of the sculpture and had actually supervised and controlled this design. OSG joined a Copyright Office amicus brief arguing only formal salaried employees should be considered "employees" within the meaning of this rule, relying heavily upon its understanding of the legislative history of the 1976 Act.²³ A unanimous Court decided that common law agency rules should govern determinations of employee status, in keeping with the Court's general rule to rely on common law principles when interpreting terms in federal statutes.

In both cases, OSG articulated a meaningful federal interest that justified its filings. In *Quality King*, the government asserted that it was bound by treaties negotiated with other countries committing the U.S. to giving copyright owners control over unauthorized importations. In *CCNV*, OSG claimed "a direct programmatic interest in the construction of the work-made-for-hire provisions" because of the Copyright Office's role in registering claims of copyright, which requires knowing to whom to issue registration certificates, and because of the Office's deep involvement in the drafting of the 1976 Act and the negotiations over the work-for-hire rule.

A third twentieth-century case in which OSG participated, this one as respondent, was *Dowling v. United States*.²⁴ Paul Dowling appealed from his

¹⁹ L'Anza's argument was based on what was then § 601(a), a grant to copyright owners of an exclusive right to control importations of copies of copyrighted works. For a discussion of *Quality King*, see *infra* Part II-A-2-a.

²⁰ 523 U.S. 135, 152-53 (1998), *rev'g* 98 F.3d 1109 (9th Cir. 1996). Under § 601(a), unauthorized importations were treated as infringements of the exclusive distribution right under § 106(3), which in turn, is subject to exceptions and limitations set forth in §§ 107 *et seq.*, including § 109(a) which limits copyright owner control over distributions after a first sale of a copy to the public. Hence, the Court concluded that § 601(a), like § 106(3), was subject to § 109(a).

²¹ 490 U.S. 730 (1989), *aff'g* 846 F.2d 1485 (D.C. Cir. 1988).

²² 17 U.S.C. § 201(a).

²³ For a discussion of *CCNV*, see *infra* Part II-C-1.

²⁴ 473 U.S. 207 (1985), *rev'g* 739 F.2d 1445 (9th Cir. 1984). Justice Blackmun wrote the opinion for 6-3 majority. Justice Powell dissented, joined by Chief Justice Burger and Justice White. *Id.* at 229-33 (Powell, J., dissenting). Because Dowling was convicted of copyright infringement and the Court's analysis of the stolen goods counts relied on

felony conviction for interstate transportation of stolen goods in violation of 18 U.S.C. § 2314 for having distributed counterfeit copies of Elvis songs, although not for his conviction on copyright charges. Dowling argued that the goods he shipped across state lines (i.e., vinyl records) were not stolen and the intangible recorded performances embodied in the records were not “goods, wares, [or] merchandise” within the meaning of § 2314.²⁵ OSG asked the Court to affirm Dowling’s § 2314 conviction, but the Court overturned it. The Recording Industry Association of America (RIAA) filed an amicus brief in support of the government’s position.

The Court agreed with Dowling that intangible infringing copies of copyrighted content were not “goods, wares, [or] merchandise” under § 2314.²⁶ That phrase certainly encompassed ordinary chattels. However, the Court considered copyright to be a “series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.”²⁷ An infringer “does not assume physical control over the copyright; nor does he wholly deprive its owner of its use,”²⁸ as thieves typically do. Because of this, “interference with copyright does not easily equate with theft, conversion, or fraud.”²⁹ The Court also considered the legislative history and purpose of § 2314, which Congress had enacted to address “an enforcement chasm created by limited state jurisdiction” to deal with the serious problem of interstate transport of stolen vehicles.³⁰ No comparable need existed for § 2314 to supplement remedies for copyright infringement.³¹ Under the government’s theory of § 2314, the Court observed that an infringer could be sentenced up to ten years in prison based on “the distribution of a sufficient quantity of *any* infringing goods simply because of the presence here of a factor—interstate transportation—not otherwise thought

interpretations of the 1976 Act, one of the Court’s copyright precedents, and copyright policy considerations, I decided to include *Dowling* in this sample.

²⁵ The National Stolen Property Act authorizes the imposition of criminal penalties upon any person who “transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.” 18 U.S.C. § 2314.

²⁶ *Dowling*, 473 U.S. at 214-16. The Court noted that penal statutes should be narrowly construed. *Id.* at 213. Eighteen years later, the Court took a similarly narrow view about the meaning of “goods.” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31-32 (2003) (holding that misrepresentations of the origin of goods was only actionable as to the physical substrate containing allegedly infringing programs, not as to the origin(ator) of their contents).

²⁷ *Dowling*, 473 U.S. at 216.

²⁸ *Id.* at 217.

²⁹ *Id.* See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450 n.33 (1984) (rejecting argument that consumers who made time-shift copies of broadcast programs with Sony’s VCR were thieves).

³⁰ *Dowling*, 473 U.S. at 218-21.

³¹ *Id.*

relevant to copyright law.”³² The Court noted the longstanding Congressional reluctance to impose felony penalties for such infringements.³³

OSG notably did not take part in four of the Court’s most significant and highly cited twentieth-century copyright decisions. One might have expected OSG to have participated in *Feist Publications, Inc. v. Rural Telephone Service Co.*, which endorsed a creativity-based originality standard for works of authorship to be eligible for copyright protection.³⁴ After all, the U.S. Copyright Office’s primary responsibility is to decide whether works of authorship are “original” enough to qualify for protection when issuing copyright registration certificates.³⁵ Nor did OSG participate in the three best-known and most highly cited twentieth-century fair use cases.³⁶ Three others of the Court’s copyright decisions from this period in which OSG did not participate concerned copyright remedies, and one concerned a copyright formality issue.³⁷

By contrast, OSG filed amicus briefs in all but two of the Court’s seventeen private litigant copyright cases since 2000.³⁸ These briefs typically articulated

³² *Id.* at 226.

³³ *Id.* at 225.

³⁴ 399 U.S. 340 (1991). As of December 31, 2023, there had been 4,522 law review citations to *Feist* in the Westlaw database, for an annual average of 137. See Samuelson, *supra* note 11, at 983 (Table 4).

³⁵ 17 U.S.C. § 701 *et seq.* (detailing Office responsibilities).

³⁶ *Sony*, 464 U.S. 417 (time-shift copying of television programs held fair use); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (quoting 300 words from unpublished memoir held unfair); *Campbell*, 510 U.S. 569 (transformative uses of copyrighted works such as parodies may be fair use). The perceived significance of these copyright cases is evident from the number of law review articles that have cited them: *Sony* is #1 (4,714 articles); *Harper & Row* #3 (3,803 articles); *Campbell* #4 (3,319 articles). See Samuelson, *supra* note 11, at 983 (Table 4). These three cases have also been heavily cited by courts: *Sony* (1,204); *Harper & Row* (1,476); *Campbell* (856) (Westlaw search as of Dec. 31, 2023).

³⁷ The three twentieth-century remedy decisions were *Feltner v. Columbia Television Pictures, Inc.*, 523 U.S. 340 (1998) (right to jury trial for awards of statutory damages); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (prevailing defendants in infringement litigations are eligible for attorney fee awards); and *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) (entitlement to royalties under contract after terminations of transfers). The copyright formality case was *Stewart v. Abend*, 495 U.S. 207 (1990) (renewal copyright owner could sue motion picture studio for infringing public performance of movie after expiration of initial copyright term).

³⁸ OSG did not file amicus briefs in *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001) (infringement to license freelancer copyrights to online database) and *Allen v. Cooper*, 589 U.S. 248 (2020). *Allen* reviewed the constitutionality of an amendment to the 1976 Act that would have allowed plaintiffs to sue a state-related entity for money damages, so one might have expected OSG to file as amicus, as it usually defends constitutional challenges to Congressional legislation. OSG may have decided against filing on stare decisis grounds given the Court’s earlier decision in *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (reversing decision upholding legislation authorizing patentees to recover money damages for a state-related entity infringement). The Court in

federal interests that justified these filings in only a general way, such as the government's interest in federal copyright policy. The Court followed OSG's recommendation about which party should prevail in twelve decided twenty-first-century cases, although sometimes for different reasons than OSG had proffered.³⁹ OSG's twenty-first-century copyright amicus briefs supported copyright owner plaintiffs, regardless of whether they were petitioners or respondents before the Court, in all but two of the private litigant cases.⁴⁰ Copyright industry briefs typically favored the same party as OSG.

Why did OSG so rarely participate in the late-twentieth-century copyright cases? One factor was surely that OSG had to be more selective about filing amicus briefs because the Court's docket then was considerably larger than it has been in recent decades.⁴¹ Amicus filings in the twentieth-century cases were also less common than they have become over time.⁴² Another consideration may have been that OSG has long conceived of its role as a representative of the Executive Branch of the government, but perhaps not subunits of the Congressional branch such as the Copyright Office.⁴³ OSG may also have decided against participation because interpreting U.S. copyright concepts, such as its originality standard and fair use, have long been left to the common law process, about which OSG has no particular expertise. Solicitors General may also have thought federal interest to be low in most private litigant copyright cases.⁴⁴ Interestingly, the Justices did not

Allen held that the case was controlled by *Fla. Prepaid. Allen*, 589 U.S. at 251. The Copyright Office's Annual Report for 2001 noted that the Office urged OSG to file an amicus brief in *Tasini*, but OSG chose not to do so.

³⁹ See *infra* Part II-B & II-C. See also *infra* App., Table 2.

⁴⁰ OSG supported a petitioner-defendant in *Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. 334 (2019) (recovery of costs by prevailing plaintiff includes only costs generally recoverable in federal court litigation) and a respondent-defendant in *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296 (2019) (registration of copyright claim must be effectuated before U.S. copyright owner can file infringement litigation).

⁴¹ See, e.g., Cordray & Cordray, *supra* note 1, at 1324, 1340-47 (discussing substantial changes in the size of the Court's docket).

⁴² All but one of the twentieth-century copyright cases attracted amicus briefs at the merits stage. The exception was *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) (contractual obligations to pay royalties to assignees still binding after author terminated a transfer of rights). A total of eighty-one amicus briefs were filed in the eleven decided twentieth-century cases (an average of seven per case). *Sony*, 464 U.S. 417, attracted the most (twenty-seven). All of the twenty-first-century copyright cases have attracted amicus briefs, for a grand total of 379 briefs (an average of twenty per case). Fourteen cases attracted ten or more amicus briefs. *Google v. Oracle* garnered the most (seventy briefs). See generally Larsen & Devins, *supra* note 14, at 1902 (noting large numbers of amicus briefs in recent years); Kearney & Merrill, *supra* note 1, at 753-54 (800% increase in amicus filings over 50 years).

⁴³ The Copyright Office is a unit within the Library of Congress, which as the name suggests, is part of the legislative branch of the U.S. government.

⁴⁴ See, e.g., Solimine, *supra* note 1, at 1198 (discussing federal interests when OSG files amicus briefs).

call for the views of the Solicitor General (CVSG) in any of the eleven private litigant cases from those years, seemingly comfortable with deciding copyright cases without OSG's input.⁴⁵

Why has OSG become much more active as amicus in the twenty-first-century copyright cases? One factor is undoubtedly that the Court's docket is much smaller now than in the 1980s and 1990s, so that OSG can participate as amicus in a higher proportion of the Court's cases. Another factor may be OSG's need to retain talented young assistants who depend on opportunities to participate in oral arguments before the Court.⁴⁶ Copyright law may have attained higher visibility within the Executive Branch due to the importance of U.S. copyright industries both domestically and internationally.⁴⁷ Executive Branch agencies and the White House may now perceive the U.S. as having substantial interests in copyright law and policy.⁴⁸ OSG has been increasingly receptive to having Copyright Office lawyers as signatories on OSG's briefs.⁴⁹ Yet, the Justices continued to be quite comfortable in deciding whether to grant cert without OSG's input in its twenty-first-century copyright cases, issuing CVSGs in only three of the Court's cases in this period and disagreeing with OSG's recommendation in two of the three.⁵⁰

⁴⁵ The Court issued CVSGs in two twentieth-century copyright cases and denied cert in both, as OSG recommended. *See Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 133 F.3d 1140 (9th Cir. 1998), *cert denied*, 525 U.S. 810 (1998) (copyright status of coding system); *Easter Seal Soc'y v Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert denied*, 485 U.S. 981 (1988) (work for hire doctrine).

⁴⁶ Three former OSG lawyers gave this as a reason for OSG's frequent participation as amicus in twenty-first-century cases. Prior to 2000, the Court's docket was much larger than it has been in the twenty-first-century cases and OSG was more often a party. *See, e.g., Cordray & Cordray, supra* note 1, at 1324. Moreover, OSG lawyers back then were often career civil servants. *See, e.g., Patricia A. Millett, "We're Your Government and We're Here to Help": Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRACTICE & PROCESS 209, 211 (2009). In that era, OSG had a narrower conception of federal interests that would justify amicus participation. *See infra* text accompanying notes 482-83.

⁴⁷ *See, e.g., ROBERT STONER & JESSICA DUTRA, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2020 REPORT* (2020), <https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf>.

⁴⁸ *See infra* text accompanying notes 436.

⁴⁹ *See infra* Part III-B (discussing the prominent role of Copyright Office lawyers on OSG briefs in cases before the Court since 2005). The Copyright Office Annual Reports, both before and after 2005, often mention advising OSG on copyright cases.

⁵⁰ The Court granted cert, as OSG recommended, and agreed with OSG's merits recommendation in *Fourth Est.*, 586 U.S. 296 (2019) (copyright registration "has been made" when the Copyright Office issues certificate). The Court granted cert against OSG's recommendation in two other twenty-first-century copyright cases: *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021), and *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010). *See infra* Part II-A for discussions of *Google* and *Costco*. The Court issued CVSGs in four other twenty-first-century copyright cases in which the Court followed OSG's

B. OSG's Influence Varied in Different Types of Cases

Over the past forty years, OSG has been more persuasive on the merits in the Court's copyright procedure and constitutional challenge cases than in the Court's copyright remedies and substantive interpretation cases.

Four of the Court's copyright cases have addressed procedural issues. OSG participated as amicus curiae in all four, and the Court agreed with OSG's recommended outcome and generally with its analysis in these cases. The Court agreed with the government's views in three cases that called for close interpretations of registration-related provisions of the 1976 Act.⁵¹ The Court's acceptance of the government's views in these cases makes sense because the Copyright Office has substantial expertise in these issues, as one of its principal responsibilities is to register copyright claims.⁵² In a fourth procedure case, OSG recommended that the equitable doctrine of laches should not be a complete defense to copyright infringement claims, as this would undermine the ability of rights holders to recover some compensation for infringements that happened during the three-year statutory limitations period,⁵³ and a majority of the Court followed OSG's recommendation.⁵⁴

The Court relied considerably on OSG's analysis in two constitutional challenge cases in which OSG was the respondent. It persuaded the Court to defer to Congressional judgments about granting a twenty-year extension to the terms of existing copyrights and "restorations" of copyrights in foreign-authored works that had previously been in the public domain in the U.S. for failure to comply

recommendation against the grants. See *ML Genius Holdings LLC v. Google LLC*, No. 20-3113, 2022 WL 710744 (2d Cir. Mar. 10, 2022), *cert. denied*, 143 S.Ct. 2658 (2023) (No. 22-121) (whether copyright law preempted claim by song lyrics website alleging breach of browsewrap agreement); *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 2263 (2017) (whether copyright owners must consider fair use before sending takedown notices to online service providers); *Cable News Network, Inc. v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009) (whether providing cable television provider's time-shifting service with remote service DVR constituted direct infringement of copyrights); *Southern Bldg. Code Congress Int'l, Inc. v. Veeck*, 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003) (whether online posting of privately drafted code adopted as law constituted infringement).

⁵¹ See *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178 (2022) (concerning knowledge of inaccuracies in registration applications); *Fourth Est.*, 586 U.S. 296 (concerning when copyright registration "has been made"); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (whether unregistered rights holders can participate in class action settlements).

⁵² 17 U.S.C. §§ 408-410.

⁵³ Brief of the United States As Amicus Curiae in Support of Petitioner, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315 (2013).

⁵⁴ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014). The Court, like OSG, emphasized that laches had historically been a defense to equitable claims, and while laches could affect the availability of injunctive relief or profits disgorgement, it did not preclude damage awards within the statutory limitations period. *Id.* at 667-68.

with U.S. formalities.⁵⁵ OSG's briefs emphasized the historical precedents for extending copyright terms and granting rights in intellectual creations previously thought to be in the public domain and argued that Congress had acted rationally in amending copyright law to achieve its legitimate objectives.⁵⁶

Eight of the Court's thirty-one copyright cases involved remedies issues. OSG participated in four of these cases, and its views prevailed in two of them.⁵⁷ However, the Court disagreed with OSG in two other remedies cases, one involving criminal charges against a copyright infringer and the other concerning the appropriate standard for awarding attorney fees to prevailing defendants.⁵⁸

The Court heard oral arguments in eighteen of the thirty-one copyright cases that called for interpretations of substantive provisions of U.S. copyright law since 1978. OSG participated as amicus in ten of these cases which involved several types of issues. Three cases raised eligibility issues; three concerned the first sale limitation on copyright's exclusive rights; two analyzed fair use claims; and two others focused on infringement claims against disruptive technology developers. Part II discusses these ten cases at length and explains in what respects and why the Court's rulings diverged from OSG's recommendations. In only one of the substantive interpretation cases did the Court closely follow OSG's recommended analysis and ignore OSG's misconstruction of the lower courts' rulings and of the long-standing claims of both litigants.

⁵⁵ *Eldred*, 537 U.S. 186 (rejecting challenge to constitutionality of retroactive copyright term extension on First Amendment and Progress Clause grounds); *Golan*, 565 U.S. 302 (rejecting challenge to constitutionality of "restoration" of foreign copyrights long thought to be in the public domain in the U.S. for failing to comply with notice formalities). OSG did not file amicus briefs in two private litigant cases in which the Court addressed constitutional challenges to provisions of the 1976 Act. See *Allen*, 589 U.S. 248 (Congress failed to justify amendment to override state sovereign immunity from damage claims for copyright infringement); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 135 (1998) (Seventh Amendment right to jury trial overrode 1976 Act's treatment of statutory damage awards as equitable).

⁵⁶ See Brief for the Respondent, *Golan v. Holder*, No. 10-545 (2010); Brief for the Respondent, *Eldred v. Ashcroft*, No. 01-618 (2001).

⁵⁷ See *Warner Chappell Music, Inc. v. Nealy*, 144 S.Ct. 1135 (2024) (resolving circuit split on availability of damages for infringement beyond the three year statute of limitations period); *Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. 334 (2019) (recovery of costs of copyright infringement litigation limited to those generally available in federal cases). The four copyright remedies cases in which OSG did not participate were *Allen*, 589 U.S. 248 (copyright owner could not recover money damages from state-related infringer); *Feltner*, 523 U.S. 340 (defendants have a right to jury trial on statutory damage awards); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (prevailing defendants may qualify for attorney fee awards even if plaintiff's claims were not unreasonable); and *Mills Music*, 469 U.S. 153 (royalty payments due after terminations of transfer).

⁵⁸ *Dowling*, 473 U.S. 207, discussed *supra* text accompanying notes 24-33; *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016) (2016) [*Kirtsaeng II*]. In *Kirtsaeng II*, OSG recommended that the Court affirm a Second Circuit ruling against Kirtsaeng's attorney fee award request, but the Court reversed it.

C. *OSG's Arguments Have Been Less Influential in Copyright Than in Other Cases*

Before moving to Part II's discussion of the many divergences between OSG's and the Court's views in the substantive interpretation cases, it is worth examining at a higher level how influential OSG has been in copyright cases compared with its influence as an amicus generally and in patent cases. Of the seventeen copyright cases in which OSG participated as amicus since 1978, the Court has agreed with OSG's reasoning in seven (41%).⁵⁹ This contrasts with findings of empirical studies of OSG's influence in the 2010s that report that OSG's views prevailed in roughly three-quarters of the cases in which it filed as amicus.⁶⁰ These data are consistent with empirical findings about OSG's amicus success rates over several decades.⁶¹

As impressive as OSG's overall rate of amicus success has been, a recent empirical study of OSG's influence as amicus in the Court's patent cases reports a success rate of 92%.⁶² This success rate is consistent with findings of an earlier study showing that over a twenty-year period, "every single amicus brief authored by the United States in a Supreme Court patent case except one predicted the case outcome."⁶³ There was, moreover, an "impressive level of agreement" and a "high-level accord" between the Court and OSG in "high-level patent matters."⁶⁴

OSG's considerable influence as an amicus is generally attributed to OSG lawyers producing "high quality briefs" and having "earned a reputation for not overreaching and for furthering the principles of 'stability.'"⁶⁵ OSG lawyers have advantages as repeat players who "speak the same language" as the Justices.⁶⁶ Another OSG advantage lies in being able to choose in which cases to file amicus briefs, presumably choosing to support litigants with good chances of success.⁶⁷

⁵⁹ Part II discusses the nine substantive divergent cases. A tenth private litigant divergent case was *Kirtsaeng II* in which the Court reversed a ruling on attorney fee recovery that OSG advised should be affirmed.

⁶⁰ Mann & Fronk, *supra* note 1, at 717. The data for this study came from 386 cases from OT 2013-18, including 4,500 amicus filings and 22,000 citations in the Court's decisions. *Id.* at 700. Lee Epstein and co-authors provide data on OSG successes as amicus, year by year, and over ten years at 73%. EPSTEIN ET AL., *supra* note 3, at Table 7-12.

⁶¹ See, e.g., Cordray & Cordray, *supra* note 1, at 1335; Kearney & Merrill, *supra* note 1, at 760; Salokar, *supra* note 1, at 145-46.

⁶² Gugliuzza & Koivula, *supra* note 4, at 495.

⁶³ Chien, *supra* note 2, at 402; see also *id.* at 429.

⁶⁴ *Id.* at 429-30. See also Duffy, *supra* note 2, at 541 (Court's analysis close to OSG's in patent cases). But see Paul Gugliuzza & Mark A. Lemley, *Myths and Reality of Patent Law at the Supreme Court*, 104 B.U. L. REV. 891, 946 (2024) (suggesting that OSG has less influence in cases in which it is respondent).

⁶⁵ Larsen & Devins, *supra* note 14, at 1943.

⁶⁶ *Id.*

⁶⁷ Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RSCH. Q. 454, 462 (2013). OSG's support confers a significant advantage on that litigant. Salokar, *supra* note 1, at 141.

What, then, explains OSG's less impressive record in the substantive interpretation copyright cases (in nine of ten cases) in which OSG participated? In only one case did OSG persuade the Court to adopt its analysis of the issues, and in four cases, the Court even disagreed with OSG about which party should prevail.⁶⁸ The contrast with OSG's influence in patent cases is notable.

OSG's substantial influence in patent cases may be attributable to the Court's need for disinterested advice about patent law's highly specialized statutory provisions and doctrines, especially as applied in technically complicated disputes.⁶⁹ None of the Justices has a background in technology or patent law. The Justices seem to have less need for OSG's advice in copyright cases, which they may find more intuitively accessible.⁷⁰ Moreover, until recently, the Court has had at least two Justices with a special interest in copyright law.⁷¹

Another indicator of OSG's influence has been the frequency with which the Court cites its briefs or arguments. Empirical studies have shown that OSG's briefs are "significantly more likely to be cited" by the Court than amicus briefs filed by other entities.⁷² One study covering a fifty-year period in the mid- to late-twentieth century reported that the Court cited OSG briefs in just over 40% of cases in which OSG filed.⁷³

Citations to OSG's briefs or arguments in the Court's copyright cases are in keeping with this indicator of its influence. Of the nineteen decisions in which OSG participated, OSG's briefs or arguments were mentioned in about half,⁷⁴ although citations to OSG's briefs have been rarer in the substantive interpretation cases.⁷⁵ The Court has criticized OSG's arguments more often than it has praised

⁶⁸ See Part II.

⁶⁹ See, e.g., Chien, *supra* note 2, at 403; Kelly J. Lynch, *Best Friends? Supreme Court Clerks on Effective Amicus Briefs*, 20 J.L. & POL. 33, 41-42 (2004). Although *Google* was a very technically complex case, the Court was more influenced by the computer scientists' amicus brief, which explained the technology at issue better than OSG did. See *infra* text accompanying note 139.

⁷⁰ Several former OSG lawyers identified this as a reason why the Court may not rely on OSG in copyright cases.

⁷¹ Justices O'Connor and Stevens were active in the Court's copyright decisions in the late twentieth century, followed by Justices Breyer and Ginsburg in the twenty-first century. See Samuelson, *supra* note 11, at 968-70. Justices Kagan and Sotomayor may emerge as the most likely copyright mavens in the post-Breyer and post-Ginsburg era, as witnessed by their competing decisions in the *Warhol* case.

⁷² Mann & Fronk, *supra* note 1, at 723-24. The Court is also more likely to cite amicus briefs filed by academics and states. *Id.*

⁷³ Kearney & Merrill, *supra* note 1, at 773.

⁷⁴ OSG participated in a total of twenty of the Court's copyright cases, one of which was *Costco* that ended with a 4-4 split.

⁷⁵ See *infra* text accompanying notes 418-20.

them.⁷⁶ In only one case, *Eldred*, did the Court cite OSG's briefs repeatedly and in a positive manner.⁷⁷

II. DIVERGENT VIEWS OF OSG AND THE COURT IN SUBSTANTIVE COPYRIGHT CASES

Eighteen of the Supreme Court's thirty-one copyright cases since 1978 called for interpreting substantive provisions of U.S. copyright law.⁷⁸ OSG filed amicus briefs in ten of them.⁷⁹ Its views on the merits were notably different from the Court's in all but one of these ten cases.⁸⁰ Section A discusses five cases in which the Court's opinions strongly diverged from OSG's analyses, both as to OSG's recommended outcome and interpretations of the relevant substantive copyright rules. Section B examines two new technology cases in which the Court agreed with OSG about which litigant should prevail but significantly disagreed with OSG's interpretation of substantive provisions of copyright law. The Court's ruling in both cases was significantly narrower than OSG recommended. Section C reviews two other cases in which the Court's analysis on the merits diverged from OSG's. Section D considers the one substantive copyright case in which OSG's interpretation was highly persuasive to the Justices.

A. Highly Divergent Cases

This section reviews five copyright cases in which the Court's decision significantly diverged from OSG's recommended resolution about which litigant should prevail. One called for an interpretation of the scope of copyright protection in computer software and the role of fair use as a limit on copyright's scope. Three cases focused on whether copyright law's exclusive importation right applied to so-called gray market goods (that is, goods that were lawfully made and purchased outside the U.S. and thereafter imported into the U.S.). A fifth case interpreted the exclusion of government edicts from copyright protection.

⁷⁶ See *infra* text accompanying notes 421-26.

⁷⁷ *Eldred*, 537 U.S. at 205, 207, 215, 217.

⁷⁸ This total includes both 4-4 split cases. The Court decided seven other substantive interpretation cases without OSG's participation, six of which were twentieth-century cases. Although the Court was unable to muster a majority ruling in the *Lotus v. Borland* case, it is notable that almost sixty percent of the Court's thirty-one copyright cases called for interpretations of substantive provisions of the 1976 Act.

⁷⁹ This includes one of the 4-4 split cases.

⁸⁰ This contrasts with OSG's influence on substantive patent law issues as to which OSG has a nearly perfect record. See Gugliuzza & Lemley, *supra* note 64, at 945-46.

1. *Protectability of Computer Program Interfaces*

Controversies about the proper scope of copyright protection for computer programs date back to the mid-1980s.⁸¹ Some litigants have successfully argued that not only program code, but also the structure, sequence, and organization (“SSO”) of software is protectable by copyright law as long as the SSO is minimally creative and more than a few ways exist to structure those programs.⁸² Other litigants have successfully contended that certain types of structural elements of programs, such as command hierarchies and interfaces, are unprotectable by copyright law under various doctrines.⁸³ Circuit splits have existed on SSO-related issues since the mid-1990s.⁸⁴

To address these circuit splits, the Supreme Court twice granted cert petitions in cases challenging whether competitors’ appropriations of command structures that served as interfaces among programs were copyright infringements. *Lotus Development Corp. v. Borland Int’l, Inc.* was the first of these which the Court took (without asking for OSG’s views) in the mid-1990s.⁸⁵ Lotus asked the Court to overturn a First Circuit ruling that the command hierarchy of the Lotus 1-2-3 user interface was an unprotectable method of operating a program.⁸⁶ Although

⁸¹ See, e.g., Donald S. Chisum et al., *LaST Frontier Conference Report on Copyright Protection for Computer Software*, 30 JURIM. J. 15 (1989) (discussing various software copyright controversies). Prior to 1980, some doubts existed about whether copyright protection could be available to executable forms of programs on account of their functionality. See, e.g., Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663. These doubts ceased after Congress amended the 1976 Act to include computer program-related provisions, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (1980). See, e.g., *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) (upholding copyrightability of operating system programs).

⁸² See, e.g., *Whelan Assoc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1248 (3d Cir. 1986) (holding program SSO copyright-protectable); *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 67-68 (D. Mass. 1990) (user interface command structure held copyright-protectable).

⁸³ See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 536 (6th Cir. 2006) (relying on merger, scenes a faire, and fair use defenses to find code copying non-infringing when necessary to achieve compatibility); *Sega Enters. Ltd. v. Accolade Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (program interfaces as unprotectable procedures). See generally Mark S. Lemley & Pamela Samuelson, *Interfaces and Interoperability After Google v. Oracle*, 100 TEX. L. REV. 1, 11-26 (2021) (discussing various doctrines used to assess copyright claims for interfaces).

⁸⁴ See Pamela Samuelson & Catherine Crump, *Why 72 Intellectual Property Scholars Support Google’s Copyrightability Analysis in the Oracle Case*, 36 BERKELEY TECH. L.J. 413, 417-35 (2021).

⁸⁵ 49 F.3d 807 (1st Cir. 1995), cert. granted, 515 U.S. 1191 (1995).

⁸⁶ *Id.* at 810. Section 102(b) of the 1976 Act states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, *method of operation*, concept, principle or discovery regardless of the form in which it is ... embodied in such work” (emphasis added).

OSG had intended to file an amicus brief in support of Borland and participate in oral argument, substantive disagreements within the Executive Branch resulted in its nonparticipation.⁸⁷ The Court eventually split 4-4 in this case,⁸⁸ leaving the First Circuit's ruling in Borland's favor intact.

More than two decades later, the Court decided to review a second similar software copyright ruling in *Google LLC v. Oracle America, Inc.*⁸⁹ It raised very similar legal issues as *Lotus v. Borland*.⁹⁰ Oracle sued Google for infringement because Google incorporated 11,500 declarations of the Java Application Programming Interface (API) into its Android software platform. In 2014, the Court of Appeals for the Federal Circuit (CAFC) overturned a district court ruling that these interface elements were uncopyrightable.⁹¹ Google petitioned for Supreme Court review. In response to the Court's request to advise it about whether to grant this petition, OSG recommended against the grant, in part

⁸⁷ Documents revealing intra-executive branch exchanges about what should be the government's position in *Lotus v. Borland* were produced during Supreme Court confirmation hearings for Elena Kagan. See Lee Gesmer, *CopyrightX: Kagan White House File Shows an Administration Split in Lotus v. Borland*, MASS LAW BLOG (Feb. 25, 2016), <https://www.masslawblog.com/copyright/copyrightx-kagan-white-house-files-shows-administration-split-in-lotus-v-borland/>. This included a memo to Jack Quinn from Kathleen Wallman, Dec. 6, 1995, copy to Elena Kagan, at 1 (noting OSG's intent to file and to request participation in oral argument). The Kagan file includes OSG's draft brief in support of Borland and a memorandum from a USPTO official objecting to OSG's draft brief and suggesting that the government should instead support Lotus.

⁸⁸ 513 U.S. 233 (1996) (per curiam). Justice Stevens, a former antitrust lawyer who recused himself in *Borland* and wrote the technology-friendly opinion for the Court in *Sony*, would almost certainly have been the fifth vote to affirm the First Circuit.

⁸⁹ 593 U.S. 1 (2021).

⁹⁰ Lotus and Oracle both claimed infringement because the defendants copied command structures that served as interfaces to enable program-to-program compatibility. See Lemley & Samuelson, *supra* note 83, at 23-25, 27-29. Borland also raised a fair use defense, but the trial court ruled against it. *Borland*, 49 F.3d at 812. Although the First Circuit majority opinion did not address the fair use issue, one judge on the panel suggested that fair use might have been a plausible alternative basis for a ruling in Borland's favor. *Id.* at 822 (Boudin, J., concurring).

⁹¹ *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1356-69 (Fed. Cir. 2014).

because Google's fair use defense was unresolved.⁹² The Court followed this recommendation.⁹³

On remand, a jury ruled in favor of Google's fair use defense, and the trial court denied Oracle's motion for judgment as a matter of law. Oracle then appealed this denial to the CAFC in 2018. It agreed with Oracle that no reasonable jury could have found Google's copying of Oracle's "declaring code" was fair use.⁹⁴ Google then filed a second petition asking the Court to review both of CAFC's rulings in the *Oracle* cases.⁹⁵ The Court once again issued a CVSG, and OSG once again advised the Court to deny it.⁹⁶ But the Court granted Google's second petition on both the copyrightability and fair use issues.⁹⁷ OSG's merits brief urged the Court to affirm CAFC's holdings on both issues.⁹⁸

⁹² Brief for the United States as Amicus Curiae, *Google, Inc. v. Oracle Am., Inc.*, No. 14-410 (2014). No lawyer from the Copyright Office was a signatory on this brief. It differed in some important, if subtle, ways from OSG's later briefs in *Google*. The 2014 brief signaled that Google's concerns about compatibility and lock-in were "substantial and important," *id.* at 17, and suggested these concerns could be addressed through its fair use defense. OSG's 2014 brief was also more sympathetic than OSG's later briefs to Google's argument that its objective in reusing the declarations was "to make the Android platform more attractive to Java-fluent programmers," *id.* at 18, which was also relevant to Google's fair use defense. That brief criticized the CAFC's interpretation of *Lotus v. Borland* in the *Oracle* decision, *id.* at 21, the outcome of which OSG surmised could be justified under the merger doctrine, *id.* at 20. OSG's 2019 merits briefs did not mention *Lotus v. Borland*, took a narrower view of the merger doctrine, and offered no criticism of the CAFC's 2014 decision.

⁹³ 576 U.S. 1071 (2015).

⁹⁴ *Oracle Am., Inc. v. Google, Inc.*, 886 F.3d 1179, 1210 (Fed. Cir. 2018), *rev'd*, 593 U.S. 1 (2021). Oracle's lawyer invented the term "declaring code" to support its appellate claim that Google had literally infringed Oracle's copyright. At the trial court level, *Oracle v. Google* was a non-literal infringement case about Google's use of the SSO of the Java declarations. See *Oracle Am., Inc. v. Google, Inc.*, 872 F. Supp.2d 974, 978 (N.D. Cal. 2012). For an explanation about why "declaring code" was a made-up and misleading term, see Joshua Bloch & Pamela Samuelson, *Some Misconceptions About Software in the Copyright Case Law*, PROCEEDINGS OF THE SECOND ACM CONFERENCE ON COMPUTER SCIENCE & LAW §§ 2.1, 2.2 (2022). This Article uses the correct term "declarations" instead of "declaring code."

⁹⁵ See Petition for a Writ of Certiorari at 1, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (2019).

⁹⁶ Brief for the United States as Amicus Curiae, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (2019). No lawyer from the Copyright Office was a signatory on this brief.

⁹⁷ 140 S.Ct. 520 (2019).

⁹⁸ Brief for the United States as Amicus Curiae Supporting Respondent, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (2019) [hereinafter OSG *Google II* Brief]. Three lawyers from the Copyright Office and two from the Commerce Department were signatories on this brief.

The Court did not rule on Google's copyrightability defense.⁹⁹ But Justice Breyer, for a 6-2 majority, opined that Google had made fair use of parts of the Java API as a matter of law, ruling that every fair use factor favored Google's defense.¹⁰⁰ OSG, by contrast, thought the fair use factors weighed against Google's defense.¹⁰¹

Before comparing OSG's and the Court's views on the fair use issue in *Google v. Oracle*, a brief overview of the relevant statutory provision is necessary. Section 107 of the 1976 Act provides that fair uses of copyrighted works are not infringements and directs courts to consider four factors: 1) the purpose and character of the challenged use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the taking; and 4) effect of the challenged use on the market for or value of the copyrighted work.¹⁰² Also pertinent is whether the challenged use is for commercial or noncommercial purposes. Since 1994, when the Court decided *Campbell v. Acuff-Rose Music, Inc.*, which concerned whether a rap parody version of a popular Roy Orbison song was infringement or fair use, a significant consideration has been whether the challenged work has a "transformative" purpose or character, that is, whether the second work has a new meaning or message or otherwise "adds something new, with a further purpose or different character" than the first work.¹⁰³ When courts decide that the challenged work is transformative, courts tend to weigh other factors less heavily against fair use, as transformative works are less likely than non-transformative works to harm markets for the first work.¹⁰⁴ *Campbell* directed courts to consider all four factors and weigh them in relation to one another.¹⁰⁵

a. OSG's Fair Use Analysis

OSG agreed with the CAFC that no reasonable jury could have found Google's use of the 11,500 Java API declarations in the Android platform was fair use.¹⁰⁶ Like CAFC, OSG said that the purpose and character of Google's use

⁹⁹ The Court said it "assume[d], but purely for argument's sake, that the entire Sun Java API falls within the definition of that which can be copyrighted." *Google*, 593 U.S. at 20. *But see* Lemley & Samuelson, *supra* note 83, at 35-41 (explaining why the Court's opinion supports Google's copyrightability defense).

¹⁰⁰ *Google*, 593 U.S. at 40. Justice Barrett took no part in the case. Justice Thomas wrote a dissent, which Justice Alito joined. *Id.* at 43-60 (Thomas, J., dissenting). Justice Breyer had a longstanding interest in software and copyright law. His tenure article was skeptical of the case for extending copyright protection to computer programs. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

¹⁰¹ OSG *Google II* Brief, *supra* note 98, at 26-33.

¹⁰² 17 U.S.C. § 107.

¹⁰³ 510 U.S. 569, 579 (1994) (internal quotation marks omitted).

¹⁰⁴ *Id.* at 591-93.

¹⁰⁵ *Id.* at 578.

¹⁰⁶ OSG *Google II* Brief, *supra* note 98, at 26-33.

of the declarations weighed heavily against fair use because it was commercial and non-transformative, given that Google used the declarations in a commercial product for the same intrinsic purpose as Sun/Oracle.¹⁰⁷

OSG noted that the CAFC treated the nature factor as weighing in favor of Google's defense because of the functional nature of the copied elements.¹⁰⁸ But OSG's brief gave no weight to this factor.

In response to Google's argument that the reused declarations constituted only a small part of the Android platform, OSG quoted *Harper & Row Publishers, Inc. v. Nation Enterprises* that "no plagiarist can excuse the wrong by showing how much of [the plaintiff's] work he did not pirate."¹⁰⁹ Besides, OSG regarded copying of 11,500 lines of declaring code as substantial.¹¹⁰

Like CAFC, OSG said there was "overwhelming evidence" of harm to Oracle's market.¹¹¹ It noted that many firms had licensed rights to use the Java API in their products. According to OSG, Google had negotiated with Sun about a license, and when the deal fell through, Google just took what it wanted without paying.¹¹²

Two other considerations, in OSG's view, weighed against Google's fair use defense: Google had designed Android to be incompatible with other Java platforms, and it copied the declarations to take advantage of Java's success in the marketplace.¹¹³ OSG paid virtually no attention to the jury verdict in favor of Google's fair use defense. Nor did it acknowledge that the jury had heard conflicting evidence on numerous issues,¹¹⁴ including on market harm.

b. The Court's Fair Use Analysis

The Court's *Google* decision regarded every fair use factor as supporting Google's defense as a matter of law.¹¹⁵ Although the nature-of-the-work factor is

¹⁰⁷ *Id.* at 27-30.

¹⁰⁸ *Id.* at 29.

¹⁰⁹ *Id.* at 29-30 (quoting *Harper & Row*, 471 U.S. at 565).

¹¹⁰ *Id.* at 30.

¹¹¹ *Id.* at 31. OSG pointed to the steep discount in license fees that Amazon had negotiated with Oracle using leverage of Google's use of the Java API without a license. *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 32-33. *See also id.* at 22-24.

¹¹⁴ In upholding the jury verdict, the district court gave numerous examples of disputed fact issues that the jury must have resolved in Google's favor. *See Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 5393938 (N.D. Cal. Sept. 27, 2016).

¹¹⁵ *Google*, 593 U.S. at 26-40. Seventy amicus briefs were filed in the *Google* case: twenty-six in support of Google, thirty-two in support of Oracle, and two in support of neither party. Although Oracle attracted a larger number of amici than Google, there was considerably more software industry support for Google. IBM, Microsoft, Developers Alliance, Python Software Foundation, Engine Advocacy, and Software Innovators, Startups and Investors were among the Google-side amici. Dolby Labs, SAS Institute, and Mathworks were the most visible software industry supporters of Oracle's position. Ten of

rarely significant in fair use cases, the Court regarded this factor as highly significant in the *Google* case, taking the unusual step of discussing it first.¹¹⁶ It characterized the Java API declarations as a “user interface” between Java programmers and the virtual machines (that is, program code) with which they were interacting.¹¹⁷ The declarations were, the Court declared, “inextricably bound up” with method calls by which Java programmers invoke a particular task (and in which Oracle did not claim copyright) and implementing code (which is unquestionably copyrightable but which Google did not copy).¹¹⁸ The value of these declarations “in significant part derives from the value that ... computer programmers[] invest of their own time and effort to learn the API’s system.”¹¹⁹ It regarded the declarations, if copyrightable at all, as further from the core of copyright than implementing code and hence more susceptible to Google’s fair use defense.¹²⁰

The Court next addressed the purpose factor. Unlike OSG, the Court regarded Google’s reuse of the declarations as transformative because it enabled the creation of many new works (i.e., apps developed for Android) and because Android itself was a “highly creative and innovative tool for a smartphone environment.”¹²¹ Thus, Google’s reuse of the declarations was “consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself.”¹²² Having regarded Google’s use of the declarations as transformative, the Court gave little weight to Google’s commercial purpose.¹²³

The substantiality factor also weighed in Google’s favor. Although 11,500 declarations might seem like a large number, they constituted only 0.4% of the Java API as a whole.¹²⁴ Moreover, Google copied the declarations “not because of their creativity, their beauty, or even (in a sense) because of their purpose,” but “because programmers had already learned to work with the Sun Java API’s system.”¹²⁵ Unlike the CAFC and OSG, the Court thought Google had good reasons to reuse these declarations because they pertained to tasks that all computing devices must be able to implement (e.g., comparing two numbers to

the Oracle-side amicus briefs were filed by copyright industry groups and lawyers urging the Court to affirm the CAFC’s restrictive interpretation of fair use.

¹¹⁶ *Id.* at 26-29.

¹¹⁷ *Id.* at 26.

¹¹⁸ *Id.* See also *id.* at 42, App. B (illustrating the Java API declarations as an interface between method calls and implementing code).

¹¹⁹ *Id.* at 28-29.

¹²⁰ *Id.* at 29.

¹²¹ *Id.* at 30.

¹²² *Id.*

¹²³ *Id.* at 32.

¹²⁴ *Id.* at 33.

¹²⁵ *Id.* at 34.

determine which was the larger).¹²⁶ The Court concluded that Google’s use “was tethered to a valid, and transformative, purpose.”¹²⁷ Google’s reuse of the declarations also facilitated some compatibility.¹²⁸

Whether a challenged use has caused market harm is often a key factor in fair use cases. In contrast to CAFC and OSG, the Court found Oracle’s market harm arguments—lost licensing revenues and Sun/Oracle’s inability to enter the smartphone market because of Google’s dominance—unpersuasive.¹²⁹ It noted that the negotiations with Sun had concerned more than the declarations it used in Android.¹³⁰ Unlike OSG, the Court did not view Android as a competing platform to Sun/Oracle’s, but rather as “part of a distinct (and more advanced) market than Java software.”¹³¹ The Court attributed the success of the Android platform as mainly due to programmers’ investments in learning and using the Java API declarations to make new programs.¹³² The market effects factor thus weighed in Google’s favor.¹³³

Unlike CAFC and OSG, the Court gave considerable attention to evidence supporting the jury’s verdict. For instance, it noted that the jury had heard that “shared interfaces are necessary for different programs to speak to each other,” that “the reimplementations of interfaces is necessary if programmers are to be able to use their acquired skills,” and that such reimplementations were common in the software industry.¹³⁴ Moreover, the jury could have found that reuse of the declarations was important to achieving Google’s objective to enable programmers to utilize their skills in writing programs for Android.¹³⁵ The Court also observed that the jury had heard conflicting evidence about market harms.¹³⁶ By rendering a verdict in Google’s favor, the jury must have believed Google’s

¹²⁶ Google did not reimplement Java declarations for tasks specific to laptop/desktop computers (e.g., how to manipulate mouse functionality). This is why programs written in Java to support laptop/desktop functionality are incompatible with the Android platform. But many Java programs work equally well on the Android and Java platforms. *See* Bloch & Samuelson, *supra* note 94, §§ 2.11, 2.12

¹²⁷ *Google*, 593 U.S. at 34.

¹²⁸ *Id.* at 34-35.

¹²⁹ *Id.* at 36-38. Justice Thomas faulted the Court for not heeding evidence of some actual and some potential market harms. *Id.* at 53-54 (Thomas, J., dissenting). Justice Thomas, like CAFC, gave no weight to the jury’s implicit findings on this issue.

¹³⁰ *Id.* at 8, 38.

¹³¹ *Id.* at 37. OSG *Google II* Brief, *supra* note 94, at 29 (characterizing Android as a competing product).

¹³² *Google*, 593 U.S. at 39.

¹³³ Courts should consider “the public benefits the copying will likely produce.” *Id.* at 35.

¹³⁴ *Id.* at 31.

¹³⁵ *Id.* at 34.

¹³⁶ *Id.* at 36-38. It emphasized that Sun’s former CEO testified that Sun’s lack of success in the smartphone market was not due to the success of Google’s Android platform. *Id.* at 36. By contrast, neither of OSG’s 2019 briefs expressed any deference to the jury verdict.

witnesses over Oracle's.¹³⁷ OSG's briefs, by contrast, ignored conflicting evidence and implicit jury findings.

The opinion concluded with a pithy synopsis of the holding: "[W]here 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."¹³⁸

The *Google* decision was also explicit about the influence of amicus curiae briefs in support of Google's defenses. It quoted from five Google-side amicus briefs,¹³⁹ each of which bolstered arguments the jury had heard about the benefits of allowing second comers to reimplement program interfaces.

OSG, by contrast, repeatedly cited and quoted approvingly CAFC's 2014 *Oracle* decision and analysis,¹⁴⁰ but not the amicus briefs. On no point was OSG critical of CAFC's 2014 or 2018 *Oracle* opinions. OSG perceived no societal benefit from Google's desire to attract programmers by reusing commands with which they were familiar. It regarded this familiarity as "directly attributable to the [Java API] Library's marketplace success," asserting that creators such as Oracle should be able to reap rewards "if their works *attract* a following."¹⁴¹ OSG also noted that Google copied Oracle's code "to make the Android platform more *appealing* to [Oracle's] *fans*."¹⁴² OSG opined that it would be "antithetical to sound copyright policy to treat the *popularity* of the Java platform among developers as a ground for deeming [Oracle's code] uncopyrightable,"¹⁴³ as if programming in Java was akin to popular entertainment.

The Court did not directly respond to OSG's implicit characterization of Google as a free-rider on the "popularity" of the Java declarations and of Java programmers as Oracle's "fans."¹⁴⁴ But its perspective on Google's reuse of the declarations was very different than OSG's. "Google's use of the Sun Java API seeks to create new products" and "to expand the use and usefulness of Android-based smartphones."¹⁴⁵ The Court perceived "no reason to believe that the Copyright Act seeks to protect third parties' investment in learning how to operate

¹³⁷ *Id.* at 36.

¹³⁸ *Id.* at 40. The Court cited favorably to the First Circuit's decision in *Lotus v. Borland*, 49 F.3d 807, four times, mostly to Judge Boudin's concurrence. *Google*, 593 U.S. at 21, 26, 39, 40.

¹³⁹ *Id.* at 31-32 (citing copyright scholars, Microsoft, 83 computer scientists, R St. et al., and American Antitrust Institute amicus briefs).

¹⁴⁰ *See, e.g.*, OSG *Google II* Brief, *supra* note 98, at 16-17. The only point on which the Court agreed with the CAFC was that fair use was more a matter of law (for judges to decide) than a matter of fact (for juries to decide). *Google*, 593 U.S. at 23-24.

¹⁴¹ OSG *Google II* Brief, *supra* note 98, at 12, 22 (emphasis added).

¹⁴² *Id.* at 30 (emphasis added).

¹⁴³ *Id.* at 26 (emphasis added).

¹⁴⁴ *Id.* at 30.

¹⁴⁵ *Google*, 593 U.S. at 30.

a created work.”¹⁴⁶ It recognized that a ruling for Oracle would be “a lock limiting the future creativity of new programs” to which “Oracle alone would hold the key.”¹⁴⁷ This would, the Court concluded, “interfere with, not further, copyright’s basic creativity objectives.”¹⁴⁸ The Court conceptualized fair use as “providing a context-based check that can help to keep a copyright monopoly within its lawful bounds.”¹⁴⁹

2. *The Scope of Copyright’s Exclusive Importation Right*

Over the course of fifteen years, the Court heard three cases on whether the unauthorized importation of copies of in-copyright works infringed the Act’s exclusive importation right or were sheltered by the Act’s first sale defense which exhausts the owners’ control over resales.¹⁵⁰ OSG’s briefs in all three cases argued that the first sale limitation did not apply to imported copies.¹⁵¹ The Court disagreed with OSG’s arguments in all three cases. It ruled in favor of first sale defenses in the first and third cases, reversing appellate court rulings in favor of copyright owners. The third case resolved the 4-4 split rendered in the second case.

a. *Quality King v. L’Anza*

At issue in *Quality King Distributors, Inc. v. L’Anza Research Int’l, Inc.*,¹⁵² was whether Quality King’s importation into the U.S. of bottles of L’Anza shampoo bearing copyrighted labels was an infringement under 17 U.S.C. § 602(a), as L’Anza claimed, or exempt from liability under 17 U.S.C. § 109(a), the statutory embodiment of the first sale limitation on copyright’s exclusive distribution right, as Quality King argued.

OSG’s amicus brief supporting L’Anza asserted that the United States had an interest in the Court’s resolution of this dispute because it “could have a

¹⁴⁶ *Id.* at 39.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 22.

¹⁵⁰ 17 U.S.C. §§ 602(a)(1) (importation right), 109(a) (limiting the § 106(3) exclusive distribution right after the copyright owner’s first sale of copies of a copyrighted work to the public). The Court has also reviewed first sale defenses in patent and trademark cases. *See, e.g.*, *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 581 U.S. 360 (2017) (patentee’s sale of printer cartridges exhausted its right to control sale of refurbished cartridges); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (unauthorized importation of foreign made goods bearing U.S. trademarks not infringement).

¹⁵¹ The Court granted cert in the first (*Quality King*) and third (*Kirtsaeng I*) cases without asking for or getting OSG’s advice. In the second (*Costco*) case, the Court issued a CVSG. The Court granted that cert petition despite OSG’s recommendation against it.

¹⁵² 523 U.S. 135, 140 (1998), *rev’g* *L’Anza Rsch. Int’l, Inc. v. Quality King Distribs., Inc.*, 98 F.3d 1109 (9th Cir. 1996). Justice Stevens wrote the opinion for a unanimous court. Justice Ginsburg wrote a one-paragraph concurrence, *id.* at 154 (Ginsburg, J., concurring).

substantial impact on the federal government's foreign trade and copyright relations."¹⁵³ OSG's brief added that "the United States has repeatedly endorsed the right of copyright owners to control the terms and conditions for importation and distribution of copies of their works in their own countries" in its international trade agreements and negotiations.¹⁵⁴

OSG argued that the § 602(a) importation right was a distinct exclusive right from the § 106(3) distribution right.¹⁵⁵ Moreover, "[i]mportation is neither a sale nor a disposal of a copy," as the distribution right contemplates; rather, "it is a distinct activity left unaffected by the first sale doctrine."¹⁵⁶ The importation right is codified in a different chapter of the 1976 Act than the § 106 exclusive rights and had its own built-in set of exceptions (e.g., importations for private uses and certain scholarly, educational, or religious purposes).¹⁵⁷

OSG pointed out that Congress had intentionally expanded the importation right in the 1976 Act. An earlier importation ban applied only to infringing copies, but under § 602(a), the ban applied to the unauthorized importation of lawfully made copies.¹⁵⁸ Adopting *Quality King's* interpretation of § 602(a), said OSG's brief, "would empty of practical significance Section 602(a)'s expansion to legitimately made copies."¹⁵⁹

OSG's policy argument was that an importation ban would encourage book publishers to make cheap editions of their works available in developing countries because it assured them that those books would not make their way back into the U.S. to compete with more highly priced domestic editions.¹⁶⁰ Allowing publishers to control unauthorized importations was the only way to accomplish this objective.

A unanimous Court reversed the Ninth Circuit's ruling in *L'Anza's* favor. It observed that § 602(a) stated unequivocally that unauthorized importations of copies of copyrighted works "is an infringement of the exclusive right to distribute copies" under § 106(3), which is "[s]ubject to" the first sale limit set forth in § 109(a) as long as the copies were "lawfully made."¹⁶¹ *L'Anza* had lawfully made those labels in the U.S., so *Quality King* had a right to resell bottles bearing

¹⁵³ See Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Quality King Distribs., Inc. v. L'Anza Rsch. Int'l, Inc.*, No. 96-1407 (1997) [hereinafter *OSG Quality King Brief*]. No one from the Copyright Office was a signatory on OSG's brief, although the brief referred to the Copyright Office's interest in the sound construction of U.S. copyright law. *Id.* at 1-2. Five other amicus briefs supported *L'Anza* (including one by RIAA and one by Swarovski). Three amicus briefs supported *Quality King* (including one by Costco).

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.* at 19-20.

¹⁵⁶ *Id.* at 5.

¹⁵⁷ *Id.* at 8-9, citing 17 U.S.C. § 602(a).

¹⁵⁸ *Id.* at 10-15

¹⁵⁹ *Id.* at 16.

¹⁶⁰ *Id.* at 25-26.

¹⁶¹ *Quality King*, 523 U.S. at 144-45.

those labels under § 109(a). OSG did not address this interaction among these provisions in its brief or during oral argument.

The Court noted that accepting L’Anza’s and OSG’s interpretation of the importation right would mean that none of the 1976 Act’s exceptions set forth in §§ 107-118 would apply to imported copies, even though all § 106 exclusive rights are “[s]ubject” to those exceptions. “Given the importance of the fair use defense to publishers of scholarly works, as well as to publishers of periodicals, it is difficult to believe that Congress intended to impose an absolute ban on the importation of all such works containing any copying of material protected by a U.S. copyright.”¹⁶² OSG did not discuss this implication of its position.

The Court found OSG’s interpretation of the 1976 Act “unpersuasive,” saying it was “at odds not only with § 602(a)’s more flexible treatment of unauthorized importation as an infringement of the distribution right” but also “with the necessarily broad reach of § 109(a),” the “whole point” of which was to exhaust the exclusive right to control distribution of copies “once the copyright owner places a copyrighted item in the stream of commerce by selling it.”¹⁶³

The Court was also unmoved by OSG’s foreign policy argument, noting that the Senate had not ratified the free trade agreements.¹⁶⁴ *Quality King* was, moreover, a bad vehicle for OSG’s arguments about importation bans aiding developing countries because L’Anza’s primary goal in suing *Quality King* was to “protect[] the integrity of its method of marketing the products to which the labels are affixed,” labels which had “only a limited creative component.”¹⁶⁵ The Court observed that the principal purpose of copyright is to protect original works, not “ordinary commercial products that use copyrighted material as a marketing aid.”¹⁶⁶

b. Costco v. Omega

Left open in *Quality King* was whether the Court might interpret §§ 109(a) and 601(a) differently if goods imported to the U.S. had been lawfully made

¹⁶² *Id.* at 151.

¹⁶³ *Id.* at 152. The Court cited *K-Mart*, 486 U.S. 281, which ruled that the unauthorized importation of foreign-made goods bearing U.S. trademarks (so-called “gray market goods”) was lawful. *Id.* at 153. OSG’s brief mentioned *K-Mart*, but distinguished it, saying there were fundamental differences between copyright and trademark rights. OSG *Quality King* Brief, *supra* note 153, at 28 n.17.

¹⁶⁴ *Quality King*, 523 U.S. at 153.

¹⁶⁵ *Id.* at 140. U.S. distributors of L’Anza’s shampoo were contractually bound to sell its products only to beauty salons and similar firms. L’Anza extensively advertised and promoted its products in the U.S. as high-end goods. Because it did not engage in any marketing of the shampoo outside the U.S., L’Anza allowed its shampoo to be sold for prices 35-40% lower than the U.S. prices. *Id.* at 138-40.

¹⁶⁶ *Id.* at 151.

abroad.¹⁶⁷ The Court had an opportunity to address this issue in *Costco Wholesale Corp. v. Omega S.A.*¹⁶⁸ Omega sued Costco for violating § 602(a)(1) by importing Swiss-made Omega watches into the U.S. which bore a copyrighted small globe design on their backs.¹⁶⁹ Costco sold the imported watches in its U.S. stores for lower prices than those charged by Omega's authorized U.S. dealers.

Although Costco's first sale defense prevailed at the trial court level, the Ninth Circuit reversed, holding that § 109(a) defenses are unavailable to foreign-made goods unless those goods had previously been sold in the U.S. with authorization by their copyright owners.¹⁷⁰ In response to a CVSG, OSG recommended denial, opining that the law was settled that copyrighted goods must have been lawfully made in the U.S. to be "lawfully made under this title" under § 109(a).¹⁷¹ The Court decided to hear Costco's appeal despite OSG's recommendation. Unsurprisingly, OSG filed a merits brief recommending affirmance.¹⁷² However, the Court was not persuaded by its argument.¹⁷³

As in *Quality King*, the facts seemed to favor Costco's first sale defense. Both plaintiffs had asserted copyright claims on incidental elements of otherwise uncopyrightable products (shampoo in *Quality King* and fancy watches in *Costco*) to stop unauthorized importations to protect their preferred method of marketing their products. It was implausible that authorial incentives to create and disseminate new works would be undermined by these importations. *Quality King* and *Costco* were, moreover, offering consumers beneficial price competition. Moreover, the same statutory argument that persuaded a unanimous Court to rule for *Quality King*—that unauthorized importations under § 602(a)(1) are

¹⁶⁷ In *Quality King*, Justice Ginsburg concurred in the judgment because the L'Anza labels had made a "round trip." That is, the labels had been lawfully made in the U.S. and shipped abroad before being shipped back into the U.S. *Id.* at 154 (Ginsburg, J., concurring). She signaled that she would rule differently if the goods had been made abroad and then imported into the U.S.

¹⁶⁸ Petition for a Writ of Certiorari, *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (2010).

¹⁶⁹ Omega placed the design on the backside of its watches to control their importation into the U.S.

¹⁷⁰ *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 983 (9th Cir. 2008).

¹⁷¹ Brief for the United States as Amicus Curiae at 5, *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (2010). Solicitor General Elena Kagan signed this brief. The Senate confirmed Kagan as a Justice while *Costco* was pending; she recused herself from that case.

¹⁷² Brief for the United States as Amicus Curiae Supporting Respondent, *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (2010) [OSG *Costco* Brief].

¹⁷³ 562 U.S. 40 (2010) (per curiam), *aff'g* 541 F.3d 982 (9th Cir. 2008). It is fair to include *Costco* in the divergent category because the Court found OSG's argument unpersuasive. Sixteen amicus briefs were filed in *Costco*: seven in support of Costco, including those filed by the Retail Industry Leader Ass'n et al., eBay et al., Intel and three public interest organizations; eight in support of Omega, including Association of American Publishers (AAP), Software & Information Industry Association (SIIA), and MPAA and RIAA; AIPLA filed in support of neither party.

infringements of the § 106(3) distribution right, which, in turn, is subject to the first sale rule under § 109(a)—would, if followed in *Costco*, have vindicated Costco’s defense.

During the *Costco* oral argument, the Justices struggled to reconcile conflicting conceptions of the meaning of the § 109(a) phrase “lawfully made under this title.”¹⁷⁴ Costco’s main argument was that the goods should be considered “lawfully made under this title” without regard to geography, yet its reply brief carved out an exception to allow U.S. copyright owners to block the importation of books lawfully made in the UK under grants that restricted their sales to the UK market.¹⁷⁵ Justice Sotomayor questioned whether this exception made sense and was consistent with the text of § 109(a).¹⁷⁶ Justice Ginsburg pressed Costco’s lawyer to explain which importations could be blocked under § 602(a)(1) if the Court agreed with his interpretation of that phrase, a question for which Costco’s lawyer lacked a good answer.¹⁷⁷ During oral argument, OSG’s lawyer admitted that under his conception of § 109(a), a statutory first sale defense could not succeed as to authorized importations of foreign-made goods.¹⁷⁸ He suggested that perhaps such importations might be justified under other provisions of the 1976 Act or a common law exhaustion defense.¹⁷⁹ Chief Justice Roberts found this answer unsatisfactory.¹⁸⁰

Given the difficulties the Justices perceived in lawyers’ arguments, it was unsurprising that the Court was unable to resolve the legal dispute in *Costco*.¹⁸¹ Although its 4-4 split left the Ninth Circuit’s infringement ruling intact, Costco eventually prevailed after the Court revisited the issue in *Kirtsaeng*.¹⁸²

c. Kirtsaeng v. Wiley

Three years after *Costco*, the Court had another opportunity to address the “lawfully made under this title” issue in *Kirtsaeng v. John Wiley & Sons, Inc.* (*Kirtsaeng I*).¹⁸³ The case arose because Kirtsaeng’s Thai-based family shipped

¹⁷⁴ Transcript of Oral Argument, *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1493 (2010) [hereinafter *Costco Oral Argument*].

¹⁷⁵ Reply Brief for the Petitioner at 19-20, *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) (No. 08-1423).

¹⁷⁶ *Costco Oral Argument*, *supra* note 174, at 5-7.

¹⁷⁷ *Id.* at 12-15.

¹⁷⁸ *Id.* at 42.

¹⁷⁹ *Id.* at 43-44.

¹⁸⁰ *Id.* at 43.

¹⁸¹ 562 U.S. 40 (2010) (per curiam).

¹⁸² On remand, the district court again granted summary judgment to Costco, this time finding copyright misuse by Omega; the Ninth Circuit affirmed based on the first sale doctrine, following *Kirtsaeng I*. See *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692 (9th Cir. 2015).

¹⁸³ 568 U.S. 519 (2013), *rev’g*, 654 F.3d 210 (2d Cir. 2011) [*Kirtsaeng I*]. Justice Breyer wrote the opinion for the 6-3 majority. Justice Kagan, who was Solicitor General on OSG’s

cheap editions of Wiley textbooks to the U.S. that Kirtsaeng sold on eBay to fund his education. When Wiley discovered these sales, it sued Kirtsaeng for infringement. A jury decided that Kirtsaeng had willfully infringed and awarded Wiley \$600,000 in statutory damages. The Second Circuit affirmed, holding that § 109(a) applied only to books lawfully made in the U.S.¹⁸⁴ The Supreme Court reversed, holding that the first sale rule protected Kirtsaeng's importations of the books.

As in *Costco*, OSG filed a merits brief in support of the respondent.¹⁸⁵ In its view, the exclusive importation right “was intended to facilitate market-segmentation measures of the sort at issue in this case.”¹⁸⁶ OSG noted that each book Kirtsaeng imported bore a notice that exporting or importing the books out of the authorized region would violate the publisher's rights.¹⁸⁷ Because U.S. copyright law only applies to works within the nation's boundaries, OSG concluded that only books printed in the U.S. are subject to and compliant with that law.¹⁸⁸ OSG regarded this interpretation as necessary to ensure that “Section 602(a)(1) retains meaningful operative force;” hence, “the phrase ‘lawfully made under this title’ in Section 109(a) should be construed to mean ‘made subject to and in compliance with Title 17.’”¹⁸⁹

OSG also observed that *Quality King* had distinguished between copies made under U.S. law and those made under foreign copyright laws.¹⁹⁰ It argued this supported Wiley's interpretation of the statute. Moreover, OSG pointed to leading copyright treatises as having opined that the first sale rule should apply only to copies made in the U.S.¹⁹¹

The Court in *Kirtseng I* invoked the same logic about the interrelationship of §§ 109(a), 106(3), and 602(a)(1) that Justice Stevens had invoked in *Quality King*.¹⁹² It emphasized that § 109(a) was not the only provision of the 1976 Act

Costco brief, wrote a concurring opinion, joined by Justice Alito. *Id.* at 554-57 (Kagan, J., concurring). Justice Ginsburg wrote a dissenting opinion, joined by Justice Kennedy and in part by Justice Scalia. *Id.* at 557-87 (Ginsburg, J., dissenting).

¹⁸⁴ *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 216-22 (2d Cir. 2011).

¹⁸⁵ Brief for the United States as Amicus Curiae Supporting Respondent, *Kirtseng v. John Wiley & Sons*, No. 11-697 (2012) [hereinafter OSG *Kirtseng I* Brief]. Eight other amicus briefs supported Wiley, including one by Omega S.A. Twelve amicus briefs supported Kirtsaeng. See *infra* text accompanying notes 197-200 for a discussion of Kirtsaeng-side amicus briefs.

¹⁸⁶ *Id.* at 5. OSG's brief noted that Congress had amended § 602(a) in 2008 to add a private right of action against importers of certain copyrighted materials. *Id.* at 2 n.1.

¹⁸⁷ *Id.* at 3. OSG asserted that this case “exemplifies one potential benefit of allowing [] market segmentation” by encouraging book publishers to offer cheaper editions in less developed countries. *Id.* at 26.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 5.

¹⁹⁰ *Id.* at 10-11 (citing *Quality King*, 523 U.S. at 147-48).

¹⁹¹ *Id.* at 13 n.3 (citing three copyright treatises).

¹⁹² *Kirtseng I*, 568 U.S. at 524-25 (citing *Quality King*, 523 U.S. at 145).

that used the phrase “lawfully made under this title.”¹⁹³ It regarded Wiley’s (and OSG’s) interpretation of that phrase as nonsensical as applied to the other provisions.¹⁹⁴ Besides, that phrase said nothing about geography. The Court concluded that the most logical interpretation was that copies of works at issue were lawfully made in accordance with the 1976 Act.¹⁹⁵ It also invoked the “impeccable historic pedigree” of the exhaustion doctrine.¹⁹⁶

As in *Google v. Oracle*, Justice Breyer’s opinion in *Kirtsaeng I* explicitly noted that amicus curiae briefs had influenced the Justices’ views.¹⁹⁷ Among them was the American Library Association’s brief concerning the potential impact of the Court’s ruling on libraries’ ability to continue lending an estimated 200 million foreign-published books in U.S. library collections.¹⁹⁸ A retail industry association amicus pointed to \$2.3 trillion of foreign-made goods imported to the U.S. each year, a large percentage of which have copyrighted labels; a ruling in Wiley’s favor would mean that rights holders could block resales of those goods.¹⁹⁹

The Court decided that “the practical problems that [Kirtsaeng] and his *amici* have described are too serious, too extensive, and too likely to come about for us to dismiss them as insignificant — particularly in light of the ever-growing importance of foreign trade to America.”²⁰⁰ These considerations weighed against a geographical interpretation of § 109(a).²⁰¹ OSG’s brief had downplayed the consequences likely to flow from a ruling in Wiley’s favor.²⁰²

¹⁹³ *Id.* at 536-38.

¹⁹⁴ *Id.* at 537. OSG dismissed this argument, saying that the same words do not have to mean the same thing in the same statute. The ordinary rule of statutory construction is “simply an interpretive guide, not an inflexible command.” OSG *Kirtsaeng I* Brief, *supra* note 185, at 5.

¹⁹⁵ *Kirtsaeng I*, 568 U.S. at 529-30.

¹⁹⁶ *Id.* at 538. In reviewing a case involving patent exhaustion rules, the Court later invoked *Kirtsaeng I* on the common law origins and purposes of the exhaustion doctrine. *See Impression Prods.*, 581 U.S. at 371, 378 (reversing CAFC ruling that Lexmark could avoid the exhaustion doctrine through mass-market contract restrictions).

¹⁹⁷ Joshua Rosenkranz, Kirtsaeng’s pro bono counsel, assembled an impressive array of amicus briefs that strengthened his case. *See Larsen & Devins*, *supra* note 14, at 1903-04 (discussing elite counsel’s frequent orchestration of amicus briefs in cases before the Court).

¹⁹⁸ *Kirtsaeng I*, 568 U.S. at 541. *But see* Alison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1791-92 (2014) (questioning the authoritativeness of ALA’s statement).

¹⁹⁹ *Kirtsaeng I*, 568 U.S. at 542-43. eBay filed an amicus brief expressing similar concerns.

²⁰⁰ *Id.* at 545.

²⁰¹ The Court was not persuaded by Wiley’s and OSG’s arguments that § 602(a)(1) would be “superfluous” unless Wiley prevailed. *Id.* at 547.

²⁰² OSG *Kirtsaeng I* Brief, *supra* note 185, at 25-26, 30 n.6. It is noteworthy that OSG made the same losing arguments in all three importation/first sale cases.

3. *The Scope of the Government Edicts Doctrine*

At issue in *Georgia v. Public.Resource.Org, Inc.* was whether the privately drafted annotations prepared under a state commission's supervision for the Official Code of Georgia Annotated (OCGA) were eligible for copyright protection or excluded from copyright under the long-standing common law government edicts doctrine.²⁰³ Georgia, which claimed copyright in the annotations under a work-for-hire arrangement with the annotations' developer, charged Public.Resource.Org (PRO) with copyright infringement for posting the OCGA on the Internet.

Because the annotations lacked the force of law, a trial court rejected PRO's argument that the annotations were uncopyrightable under the government edicts doctrine.²⁰⁴ The Eleventh Circuit reversed, ruling that the annotations were uncopyrightable because Georgia's legislature had created a commission to closely supervise preparation of the annotations, the annotations had an authoritative character, and the Georgia legislature voted its approval of the OCGA annually.²⁰⁵

Georgia's main argument before the Court was that the government edicts doctrine did not apply because the annotations did not have the force of law. Hence, they were entitled to copyright protection.²⁰⁶

Although OSG's amicus brief supported Georgia's position, it did not endorse the force-of-law argument.²⁰⁷ Its main point was that the government edicts doctrine precluded copyright protection in "materials drafted by legislators

²⁰³ 590 U.S. 255 (2020), *aff'g* 906 F.3d 1229 (11th Cir. 2018). Chief Justice Roberts wrote the opinion for a 5-4 majority, joined by Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh. The separate dissents of Justices Thomas and Ginsburg are discussed *infra* text accompanying notes 219-20.

²⁰⁴ Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp.3d 1350, 1356 (N.D. Ga. 2017).

²⁰⁵ Code Revision Comm'n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1254-55 (11th Cir. 2018).

²⁰⁶ Brief for Petitioner at 1, *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (2019). PRO also urged the Court to grant cert, albeit expressing a broader conception of the government edicts doctrine. Brief in Opposition at 9-13, *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (2019).

²⁰⁷ Brief for the United States as Amicus Curiae Supporting Petitioners, *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (2019) [hereinafter OSG *Georgia* Brief]. Four lawyers from the Copyright Office were signatories on OSG's brief, as were two lawyers from the USPTO. Six other amicus briefs supported Georgia, including ones filed by Arkansas on behalf of thirteen states and the District of Columbia, American Society for Testing & Materials (ASTM), the Copyright Alliance, and SIIA. Nineteen amicus briefs supported PRO, most of which were filed by civil society organizations (such as ALA and Center for Democracy and Technology (CDT)). A homebuilders association filed in support of neither party.

in their lawmaking capacity.”²⁰⁸ However, OSG thought that this doctrine did not apply to “materials drafted by others to explain or summarize the law,” and so Georgia’s annotations were copyrightable.”²⁰⁹

The main precedent on which OSG relied was *Callaghan v. Myers*, a late-nineteenth-century case in which the Court ruled that a court reporter could claim copyright in original materials, such as headnotes and summaries of litigants’ arguments, for volumes of court decisions.²¹⁰ OSG observed that “[j]ust as an official court reporter is the ‘author’ of annotations he prepares to accompany judicial opinions, so too is a state entity the ‘author’ of statutory annotations that the entity either prepares or has prepared for it as a work made for hire.”²¹¹ Under this standard, OSG concluded that Georgia’s claim of copyright in the annotations was sound and the Eleventh Circuit’s ruling should be reversed.

By a 5-4 majority, the Court ruled in favor of PRO’s government edicts defense.²¹² Although the Court agreed with the Eleventh Circuit’s conclusion, it endorsed a more “straightforward rule” for determining the applicability of the government edicts doctrine, which would “bar[] the officials responsible for creating the law from being considered the ‘author[s]’ of ‘whatever work they perform in their capacity’ as lawmakers.”²¹³

The Court regarded *Banks v. Manchester* as the most pertinent of its government edicts precedents. It held that “non-binding, explanatory legal materials,” such as syllabi for judicial decisions, were unprotectable by copyright law “when created *by judges* who possess the authority to make and interpret the law.”²¹⁴ Under “the same logic,” the doctrine should apply to “non-binding, explanatory legal materials created *by a legislative body* vested with the authority to make law.”²¹⁵ The Court regarded the commission as an arm of the Georgia

²⁰⁸ *Id.* at 18 (capitalization omitted). OSG regarded unenacted bills, committee reports, and other documents prepared by legislators in the course of their work as within the government edicts doctrine, even though they lack the force of law. *Id.* at 20-21.

²⁰⁹ *Id.* at 18. A similar government edicts case involved online posting of privately drafted standards adopted as laws by some governments. The D.C. Circuit upheld a ruling in favor of PRO’s fair use defense. *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262 (D.C. Cir. 2022).

²¹⁰ 128 U.S. 617, 650-51 (1888); OSG *Georgia* Brief, *supra* note 207, at 5-6 (discussing *Callaghan*). In *Callaghan*, it did not matter that the reporter was a state employee. OSG’s brief also discussed *Howell v. Miller*, 91 F. 129 (6th Cir. 1898) (reporter entitled to copyright in annotations to the official code of Michigan). OSG *Georgia* Brief, *supra* note 207, at 6-7, 22-23, 29. The Court did not discuss *Howell* in its opinion.

²¹¹ *Id.* at 14. OSG’s brief noted that the Copyright Office had opined that annotations can be copyrighted unless they have the force of law. *Id.* at 24 n.6 (citing U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.6(c)(2) (3d ed. 2017)).

²¹² *Georgia*, 590 U.S. at 263.

²¹³ *Id.* at 265-66 (quoting *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888)).

²¹⁴ *Id.* at 259.

²¹⁵ *Id.*

legislature charged with overseeing the preparation of the OCGA.²¹⁶ The ruling in PRO's favor flowed from the proposition that "no one can own the law."²¹⁷ Georgia's annotations were thus uncopyrightable.

Despite the textualist inclinations of several Justices,²¹⁸ the *Georgia* decision shows that the common law of copyright is still very much alive in the current era. *Georgia* relied heavily on *Banks*, one of its common law precedents, and emphasized that a logical extension of that ruling was to treat legislators' explanatory materials as government edicts.

Neither the majority opinion in *Georgia* nor the dissents of Justice Thomas and Justice Ginsburg mentioned OSG's brief or addressed its arguments. Justice Thomas agreed with *Georgia* that the annotations were copyrightable because they lacked the force of law, but he also suggested that it was up to Congress to decide what is and is not copyrightable.²¹⁹ Justice Ginsburg would have upheld *Georgia*'s copyright because the annotations were not created contemporaneously with enactment of the statutes; the annotations were descriptive, not prescriptive; and the annotations were explanatory and served as an aid to researchers.²²⁰

B. *Convergent Outcomes but Divergent Analyses*

This section focuses on two high-profile twenty-first-century cases involving disruptive digital technologies, in which the Court's analyses of the technology developers' liability for copyright infringement was significantly different than OSG's analyses, even though the Court ultimately agreed with OSG that the petitioners who were challenging those developers' conduct should prevail. One was *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*,²²¹ which considered whether developers of peer-to-peer (p2p) file-sharing technologies should be held indirectly liable for its users' file-sharing copyright infringements. The second was *American Broadcasting Corp. v. Aereo, Inc.*,²²² which considered a direct infringement claim against the maker of a technology that enabled subscribers to watch broadcast television programs on their computers or mobile devices.

²¹⁶ *Id.* at 267-68.

²¹⁷ *Id.* at 265.

²¹⁸ Given the common law character of the *Georgia*, *Kirtsaeng I*, and *Google* decisions, as well as *Grokster* and *Aereo* discussed *infra* Part II-B, I disagree with arguments that the common law era of copyright has been superseded by institutionalist analysis. See Shyamkrishna Balganesh, *The Institutional Turn in Copyright Jurisprudence*, 2021 SUP. CT. REV. 417 (2021).

²¹⁹ *Georgia*, 590 U.S. at 276-92 (Thomas, J., dissenting). This dissent, joined by Justice Alito and in part by Justice Breyer, took note of the twenty-five jurisdictions who have made similar work-for-hire arrangements with private firms to claim copyright in annotations to their statutes. *Id.* at 276.

²²⁰ *Id.* at 293-95 (Ginsburg, J., dissenting). Justice Breyer joined this dissent.

²²¹ 545 U.S. 913 (2005).

²²² 573 U.S. 431 (2014).

In both cases, amicus curiae briefs filed by major technology companies and public interest organizations warned the Court not to adopt the petitioners' (and OSG's) views about liability rules when copyright industry firms sue technology companies for direct or indirect infringement.²²³ In both cases, the Court heeded those warnings and issued narrower rulings than the petitioners sought and OSG recommended. Had the Court adopted the petitioners' and OSG's arguments in those cases, developers of many innovative technologies allowing users to access and enjoy digital content would have faced increased litigation risks.

Because the Court's 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.*, in which OSG did not participate, was a key precedent affecting both cases,²²⁴ a review of that ruling is necessary to understand the contending arguments in *Grokster* and *Aereo*.

1. *Sony v. Universal*

The main issue in *Sony* was whether Universal could hold a manufacturer of video tape recorders (VTRs) indirectly liable for the unauthorized (and, in Universal's eyes, infringing) copies of television programs that Sony knew that customers of its Betamax VTRs were making.²²⁵ The Court's ruling on that issue turned on whether Sony's customers who made private noncommercial time-shift copies of television programs, including Universal's movies, were fair users or infringers.²²⁶ OSG did not file an amicus brief in *Sony*. This is perhaps surprising given the very high profile of the case and the fact that the Court heard oral argument twice and might have wanted OSG's views on the merits.²²⁷

²²³ A total of 55 amicus briefs were filed in *Grokster*. Nineteen supported *Grokster*, including ones by ACLU, Consumer Electronics Association et al., Consumers Federation of Am., Intel Corp., and the Distributed Computing Industry Association. Of the eighteen amicus briefs in support of neither party, several were filed by technology industry groups, including Business Software Alliance (BSA), Digital Media Association, Emerging Technology Companies, and National Venture Capital Association. Among the ten amicus curiae supporting *Aereo* were briefs filed by the Computer & Communications Industry Association (CCIA), Consumers Federation of Am., and the American Cable Association.

²²⁴ 464 U.S. 417 (1984), *rev'g* 659 F.2d 963 (9th Cir. 1981). Justice Stevens authored the Court's opinion for a 5-4 majority. Justice Blackmun dissented, joined by Justices Marshall, Powell, and Rehnquist. *Id.* at 457. Although amicus briefs in Supreme Court cases were much less common in the 1980s, *Sony* attracted twenty-seven, eleven in support of Universal (mostly by copyright industry groups), thirteen in support of Sony (mostly by technology industry groups), and three in support of neither party (two state attorney general briefs). Justice Stevens' majority opinion and Justice Blackmun's dissent made general references to the parties' amici.

²²⁵ *Sony*, 464 U.S. at 420.

²²⁶ *Id.* at 442. The Court also recognized that some copyright owners did not object to time-shift copying. *Id.* at 443-47.

²²⁷ Perhaps there was an intragovernmental split over what position the U.S. should take. The Copyright Office might have supported the Ninth Circuit's ruling, but the Antitrust Division might have had different views.

The private and noncommercial nature of home copiers' time-shifting practices with VTR was arguably the most significant factor in the Court's decision on the fair use issue,²²⁸ for the Court opined that private noncommercial copies should be presumed fair.²²⁹ Although Betamax users copied whole programs, which would generally cut against fair use, the Court noted that Universal had chosen to make its movies available to the public via broadcast television for free, and time-shift copies simply improved public access to the programs.²³⁰ Also important was that Universal stipulated that it had suffered no harm to date and its evidence of future harm claims were too speculative to overcome the presumption that home time-shift copies were fair uses.²³¹

Because Betamax machines had and were capable of substantial non-infringing uses (namely, time-shift copying), Universal's claim of indirect copyright infringement failed.²³² Although the 1976 Act has no indirect liability provision, the Court drew upon common law indirect liability principles and borrowed the staple article of commerce rule from U.S. patent law.²³³ Under this rule, manufacturers are free to sell technologies having substantial non-infringing uses, even if they know that some customers will use the technologies to infringe, as long as they do not encourage infringing uses.²³⁴ The Court's treatment of indirect liability doctrines and copyright's fair use doctrine were both classic common law interpretations.²³⁵

²²⁸ *Id.* at 449. Although the Court's discussion of the harm factor was more extensive than its discussion of the private noncommercial nature of the copying, the presumption of fairness was predicated on the first factor. In Justice Blackmun's view, copying the entirety of copyrighted programs for the purpose of consuming its content was unfair. *Id.* at 480 (Blackmun, J., dissenting). Justice Blackmun's opinion was originally for the Court, but Justice O'Connor was persuaded to reconsider her vote and ultimately joined Justice Stevens' opinion for the Court. See Jessica Litman, *The Sony Paradox*, 55 CASE WES. RES. L. REV. 917 (2005).

²²⁹ *Sony*, 464 U.S. at 449.

²³⁰ *Id.* at 454.

²³¹ *Id.* at 451-54. See generally Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. (forthcoming 2024) (discussing *Sony* and other disruptive technology copyright cases).

²³² *Sony*, 464 U.S. at 456. Universal's lawsuit was not a class action, but rather a lawsuit by it and Disney who, the Court observed, had no legal right to invoke the interests of other copyright owners. *Id.* at 434. Although Universal pointed to broad copyright industry group amicus support for its claims, those briefs were not in evidence and had no influence on the court's decision. *Id.* at 434 n.16.

²³³ *Id.* at 434-35.

²³⁴ *Id.* at 439-42, referring to 35 U.S.C. § 271(c).

²³⁵ Although the Court repeatedly emphasized that defining the contours of copyright protections was for Congress, *id.* at 429-32, 456, it barely mentioned the 1976 Act and its fair use provision. Universal's lawsuit was filed before the effective date of the 1976 Act.

2. *MGM v. Grokster*

Under its very broad view of the *Sony* safe harbor for technologies capable of substantial non-infringing uses, Grokster developed a p2p file-sharing software that enabled the creation of a network through which its users could share copies of popular sound recordings and movies, among other things, over the Internet.²³⁶ Grokster earned revenues by serving ads to millions of people who used its software to search for digital files of popular music and movies. Unlike Napster, whose liability for contributory infringement was based on having a centralized index of available files of popular music,²³⁷ Grokster's software enabled the creation of indexes of available files in a decentralized way. Grokster admittedly knew that its software was widely used to infringe copyrights but believed its technology had and was capable of enough non-infringing uses to qualify for the *Sony* safe harbor.²³⁸

Metro-Goldwyn-Mayer (MGM), among others, sued Grokster for contributory and vicarious copyright infringement.²³⁹ When MGM and Grokster filed cross-motions for summary judgment, they agreed on at least one thing: no material facts were in dispute.²⁴⁰ The district court granted Grokster's motion and denied MGM's.²⁴¹ It held that Grokster qualified for the *Sony* safe harbor from contributory liability because it had produced evidence that its technology had and was capable of substantial non-infringing uses.²⁴² It also ruled against MGM's vicarious claim because Grokster had no control over users of its software.²⁴³ The Ninth Circuit affirmed, noting that MGM had not proffered evidence to counter Grokster's proof that its software had and was capable of substantial non-infringing uses.²⁴⁴

MGM and its amici sought to persuade the Court to abandon the *Sony* safe harbor in favor of alternative standards for imposing liability on this file-sharing

²³⁶ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-23 (2005) (setting forth relevant facts). Justice Souter wrote the opinion for a unanimous Court. Concurrences by Justices Ginsburg and Breyer are discussed *infra* text accompanying notes 266-68.

²³⁷ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The Ninth Circuit held that Napster materially contributed to users' infringements by providing the sites and facilities that enabled infringements. *Id.* at 1019-23.

²³⁸ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp.2d 1029, 1037 (C.D. Cal. 2003).

²³⁹ The plaintiffs included most major motion picture studios, sound recording companies and a class of composers and music publishers.

²⁴⁰ *Id.* at 1031.

²⁴¹ *Id.* at 1031.

²⁴² *Id.* at 1035-42.

²⁴³ *Id.* at 1045.

²⁴⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 380 F.3d 1154, 1161-62 (9th Cir. 2004). The court opined that these uses made Grokster "commercially viable." *Id.* at 1162.

service.²⁴⁵ MGM's main argument was that Grokster should be held liable as a contributory infringer because more than 90% of the files that Grokster users shared through its network were infringing movies, sound recordings, and other copyrighted materials.²⁴⁶ It contended that Sony won the earlier case because the predominant use of its VTRs was for time-shifting purposes, which meant that Sony's technology had commercially significant non-infringing uses.

By contrast, the predominant use of Grokster's software was to engage in infringements—and intentionally so. MGM emphasized that Grokster's business model and revenue streams were deliberately based upon high volumes of infringing materials, infringement was a draw to its service with a technical design optimized to facilitate infringement, and Grokster failed to modify its software to give it greater control over its users so it could prevent infringements, such as failing to install filtering software, so it was a vicarious infringer too.²⁴⁷

OSG's brief strongly supported MGM's contributory infringement claim.²⁴⁸ It urged the Court to interpret *Sony* as providing a safe harbor only to technologies whose business model was “substantially unrelated” to copyright infringement.²⁴⁹ This interpretation required evidence that the defendant could build a viable business on commercially significant non-infringing uses.²⁵⁰ Sony may have been able to do this, but OSG agreed with MGM that Grokster had built its business on an “enormous volume” of infringement.²⁵¹ OSG asserted that Grokster had produced “mere anecdotal evidence of relatively trivial non-infringing uses.”²⁵²

OSG urged the Court to adopt a tripartite standard for assessing contributory infringement claims in technology developer cases.²⁵³ Under it, technology developers would enjoy a safe harbor if non-infringing uses of their systems

²⁴⁵ See, e.g., Brief for Motion Picture Studio and Recording Company Petitioners, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., No. 04-480 (2005). Eleven amicus curiae briefs, mostly by copyright industry groups, supported MGM's petition. At the merits stage, twenty amicus briefs supported MGM. Twenty-six amicus briefs supported Grokster.

²⁴⁶ *Id.* at 17-19.

²⁴⁷ *Id.* at 1-7, 11-12, 17-19.

²⁴⁸ Brief for the United States as Amicus Curiae Supporting Petitioners, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., No. 04-480. (2005) [hereinafter OSG *Grokster* Brief]. OSG did not support MGM's theory of vicarious liability because “[t]he imposition of an independent obligation to arrange one's product or relations in a way to permit the seller to retain control would have the undesirable effect of chilling technological innovation and constraining the product development options of developers of software and other digital technologies.” *Id.* at 19-20 n.3, 30 n.6. One lawyer from the Copyright Office and two from the USPTO joined the OSG brief.

²⁴⁹ *Id.* at 2-5. OSG drew the “substantially unrelated” terminology from *Sony*, 464 U.S. at 442.

²⁵⁰ OSG *Grokster* Brief, *supra* note 248, at 5.

²⁵¹ *Id.* at 6.

²⁵² *Id.* at 9.

²⁵³ *Id.* at 17.

predominated (50% or more).²⁵⁴ However, “if the defendant’s product is overwhelmingly used for infringing purposes and the viability of the defendant’s business depends on the revenue and consumer interest generated by such infringement, such evidence suffices to support [contributory infringement] liability under *Sony*.”²⁵⁵ As for more intermediate cases (i.e., when over half of a technology’s uses were infringing), OSG suggested that courts should weigh how the technology was marketed, the efficiency of the technology for non-infringing uses, and the developer’s efforts to discourage infringements when deciding whether to hold the developer indirectly liable for its users’ infringements.²⁵⁶

Only briefly at the end of OSG’s brief did it address an alternative theory of liability, namely, whether Grokster had actively induced user infringements.²⁵⁷ OSG emphasized that Grokster had used infringement as a draw to its system and argued that it had designed the software to be optimally suitable for engaging in infringement, relying on copyright and trademark precedents.²⁵⁸ It asserted that Grokster had been willfully blind to infringement and had intentionally structured its business to avoid secondary liability.²⁵⁹

A unanimous Supreme Court ruled that MGM could hold Grokster indirectly liable for user infringements because the record contained substantial evidence that Grokster had actively induced those infringements.²⁶⁰ The Court invoked the

²⁵⁴ *Id.* During oral argument, several Justices were skeptical of MGM’s and OSG’s arguments for broadening the contributory infringement standard. Transcript of Oral Argument at 3-17, *Metro-Goldwyn-Mayer, Inc. v. Grokster Ltd.*, No. 04-480 (2005) [hereinafter *Grokster* Oral Argument].

²⁵⁵ OSG *Grokster* Brief, *supra* note 248, at 17.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 27-30.

²⁵⁸ *Id.* at 29. Unlike the Court, OSG’s brief did not cite to patent law’s provisions and case law on inducement.

²⁵⁹ *Id.* at 29-30.

²⁶⁰ *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937-40 (2005), *vacating and remanding* 380 F.3d 1154 (9th Cir. 2004). The Court endorsed the Second Circuit’s articulation of contributory infringement in *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”). *MGM*, 545 U.S. at 930 (emphasis added). Although *Gershwin* treated inducement as a subset of contributory infringement, the elements of an inducement claim are different from those for contributory infringement, as is evident from this statement from *MGM*: “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement.” *Id.* at 936-37. Contributory infringement claims require a showing that the defendant knew that it was materially contributing to the infringing acts of another. *Napster*, 239 F.3d at 1020-22. During oral argument, MGM’s counsel told the Justices that an inducement standard would not adequately protect copyrighted works on the internet. *Grokster* Oral Argument, *supra* note 254, at 50-52. For an explanation of why MGM did not want to win on an active

active inducement of infringement rule from patent law, saying that it was also “a sensible one for copyright law.”²⁶¹ The Court declined MGM’s (and OSG’s) requests to revisit the *Sony* safe harbor or quantify how substantial a technology’s non-infringing uses had to be to qualify for it.²⁶²

The Court explained that the only conceivable basis for imposing indirect liability on Sony was its distribution of a technology with constructive knowledge that some purchasers would use it to make infringing copies of copyrighted programs.²⁶³ The staple article of commerce rule, which allows manufacturers to distribute technologies having substantial non-infringing uses, “absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused. It leaves breathing room for innovation and vigorous commerce.”²⁶⁴

Although *Sony* rejected the idea of imputing knowledge of infringement based on Sony’s distribution of a product that enabled infringing uses, the Court in *Grokster* observed that “nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence,” such as *Grokster*’s active encouragement of its users’ infringing conduct.²⁶⁵

Justice Ginsburg’s concurrence, joined by Chief Justice Rehnquist and Justice Kennedy, was receptive to MGM’s argument that *Grokster* may have contributorily infringed copyrights based on the overwhelming evidence of infringing uses of *Grokster*’s technology.²⁶⁶ Justice Breyer, whose concurring opinion was joined by Justices Stevens and O’Connor, regarded the non-infringing uses of *Grokster*’s software as substantial as the 9% of authorized uses

inducement theory, see Pamela Samuelson, *Three Reactions to MGM v. Grokster*, 13 MICH. TELECOM. & TECH. L. REV. 177 (2006).

²⁶¹ *Grokster*, 545 U.S. at 936. The opinion discussed the case law interpreting the patent inducement standard. *Id.* at 932.

²⁶² *Id.* at 933-34. The Court’s invocation of the patent inducement case law and its strict requirements about the kinds of evidence necessary to support a finding of specific intent to induce infringement distinguishes it from OSG’s endorsement of active inducement as an alternative theory of liability. OSG’s brief emphasized *Grokster*’s intentional design of its technology, its use of infringements as a draw, and its willful blindness to infringement. OSG *Grokster* Brief, *supra* note 248, at 29-30. OSG did not invoke any of the patent inducement cases.

²⁶³ The Court observed that “[a]lthough Sony’s ads urged consumers to buy the VCR to ‘record favorite shows’ or ‘build a library’ of recorded programs, neither of these uses was necessarily infringing.” *Id.* at 931 (citations omitted). This was significant because in 1984 only five Justices agreed that time-shifting was fair use. By 2005, the Court was seemingly unanimous that time-shifting was lawful and maybe library-building also.

²⁶⁴ *Id.* at 932-33.

²⁶⁵ *Id.* at 934-35.

²⁶⁶ *Id.* at 946-47 (Ginsburg, J., concurring). Like OSG, Justice Ginsburg regarded *Grokster*’s evidence of non-infringing uses as “anecdotal.” *Id.* at 946. Although she suggested that the lower courts on remand should revisit the contributory infringement claim, she thought there was a triable issue of fact on that claim. *Id.* at 942.

of VTRs that the Court in *Sony* had regarded as sufficient to qualify for the staple article safe harbor.²⁶⁷ Justice Breyer praised the *Sony* safe harbor as providing a clear and forward-looking rule that had fostered a wide range of beneficial technologies.²⁶⁸

Grokster was another of the Court's copyright decisions influenced by amicus briefs.²⁶⁹ Justice Souter's opinion acknowledged that MGM and its amici were critical of the Ninth Circuit's ruling as upsetting balance in the copyright regime; yet, those concerns were "offset" by Grokster-side amici expressing concern about the impacts of modifying the *Sony* safe harbor.²⁷⁰ Justice Breyer's concurrence cited several amicus briefs in discussing his reasons for supporting a broad conception of the *Sony* safe harbor.²⁷¹ None cited OSG's brief or engaged with its proposed tripartite test for contributory infringement.

3. *ABC v. Aereo*

Nearly a decade after *Grokster*, the Court confronted another high-profile disruptive technology copyright case in *American Broadcasting Co. v. Aereo, Inc.*²⁷² *Sony* played a more modest, but still significant role in that case. As in *Sony*, *Aereo* involved copyright industry challenges to a technology that provided ordinary consumers with choices about watching broadcast television programs.

²⁶⁷ *Id.* at 950-51 (Breyer, J., concurring). Justice Breyer pointed out that *Sony* said the authorized uses were substantial enough to create a viable market for Betamax machines for these non-infringing uses. *Id.* at 951 (citing *Sony*, 464 U.S. at 447 n.28).

²⁶⁸ *Grokster*, 545 U.S. at 957-58. Breyer's concurrence explained that *Sony* was "mindful of the limitations facing judges where matters of technology are concerned." *Id.* at 957-58 (emphasis in the original). Modifying the *Sony* safe harbor would undermine the benefits of this rule without, in his view, clear evidence that the stronger protection for copyright industries would outweigh the losses for technologists. *Id.* at 959-60.

²⁶⁹ See *supra* note 245 on amicus briefs filed in *Grokster*.

²⁷⁰ *Id.* at 928-29, citing Brief Amicus Curiae of Emerging Technology Companies and Brief Amicus Curiae of Intel Corp. Both briefs urged the Court to preserve the *Sony* safe harbor. Justice Souter also cited the Brief Amicus Curiae of Sovereign Artists, which supported *Grokster*, *id.* at 929 n.8, along with several law review articles about technology developer liability issues. *Id.* at 928-29.

²⁷¹ *Id.* at 958 (citing Brief Amicus Curiae of Audible, Inc. and Brief Amicus Curiae of Hal Abelson et al.). Justice Breyer also cited the Brief Amicus Curiae of Distributed Computing Industry Ass'n on the benefits of having a forward-looking view about the potential for non-infringing uses. *Id.* at 954.

²⁷² 573 U.S. 431 (2014), *rev'g* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013). Justice Breyer wrote the opinion for the 6-3 majority. Justice Scalia wrote a dissenting opinion, which Justices Thomas and Alito joined. *Id.* at 451-63 (Scalia, J., dissenting). Of the twenty-nine amicus briefs filed in *Aereo*, seventeen supported ABC, ten supported Aereo, and two supported neither party. Copyright industry groups were the main ABC-side amicus briefs. The Aereo-side amicus briefs were more mixed in character. Some technology companies and technology industry organizations filed, but three of the ten were law professor briefs, two were civil society organizations, and one was for small and independent broadcasters.

Subscribers to Aereo's service could use its app to select programs to watch via the Internet on their computing devices. When a subscriber selected a program she wanted to watch, Aereo's system would automatically assign a very small antenna to that subscriber for the duration of the program. That antenna would be tuned to receive broadcast signals for the selected program, which, with a slight delay, would be transmitted to the subscriber's device.²⁷³

Aereo launched its service believing that enabling private viewing of user-selected programs was akin to enabling private copying of broadcast programs in *Sony*.²⁷⁴ In Aereo's view, it was merely supplying equipment through which people could watch broadcast television programs they had been invited to watch for free, as in *Sony*.²⁷⁵ It likened each copy of each program Aereo's technology transmitted to each subscriber to the private noncommercial time-shift copying that the Court had ruled was fair use in *Sony*.²⁷⁶

Aereo's legal theory also rested on a Second Circuit ruling in *Cartoon Network LP v. CSC Holdings, Inc.* (commonly referred to as *Cablevision*),²⁷⁷ which held that Cablevision had not publicly performed Cartoon Network's programs when it transmitted to subscribers programs they had selected for later viewing through its Remote Storage DVR system.²⁷⁸ Although persuaded that Cablevision did "perform" the programs when transmitting signals to its customers,²⁷⁹ the Second Circuit characterized these performances as private because each was transmitted only to the specific individual who had selected the program.²⁸⁰

ABC claimed that Aereo directly infringed the network's exclusive rights to control public performances of its programs and sought a preliminary injunction

²⁷³ See *Aereo*, 573 U.S. at 436-37 (describing Aereo's technology).

²⁷⁴ Brief of Respondent at 2, 8-9, *Am. Broad. Co. v. Aereo, Inc.*, No. 13-461 (2014).

²⁷⁵ *Id.* at 9.

²⁷⁶ *Id.* at 10-11.

²⁷⁷ 536 F.3d 121 (2d Cir. 2008). As in *Aereo*, the *Cablevision* plaintiffs claimed that the defendant was a direct infringer of the public performance right because its system transmitted programs to subscribers for later viewing. *Id.* at 131-33.

²⁷⁸ *Id.* at 134-40.

²⁷⁹ *Id.* at 134-35.

²⁸⁰ *Id.* at 135-38. Accepting Cartoon Network's theory would have eliminated the possibility of private performances of digital content, which the court did not believe Congress intended. *Id.* In response to Cartoon Network's cert petition, the Court issued a CVSG to advise it whether to grant the petition. See Brief for the United States as Amicus Curiae at 1, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (2009) [hereinafter OSG *Cablevision* Brief]. The brief recommended against granting cert for three reasons: 1) no conflict existed between the Second Circuit's and any other circuit's or Supreme Court holding; 2) the litigants' stipulations about contributory liability and fair use made it an unsuitable vehicle for review; and 3) the Second Circuit's ruling was reasonable and closely tied to the facts. *Id.* at 6. The Court followed this recommendation and denied cert. *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

to stop Aereo from providing this service.²⁸¹ A district court denied the injunction because Aereo's technology was materially indistinguishable from that held lawful in *Cablevision*.²⁸² The Second Circuit, in a split decision, affirmed, agreeing that the Aereo system was on all fours with *Cablevision*.²⁸³

After the Court granted ABC's cert petition, OSG filed an amicus curiae brief supporting ABC.²⁸⁴ OSG took a systems design approach in its analysis of who was "performing" the programs through the Aereo system, observing that Aereo "both owns and actively controls the individual antennas, centralized servers, and software that operate to receive broadcast signals and transmit copyrighted content to the public."²⁸⁵ This "integrated system depends substantially on physical equipment that is used in common by [Aereo's] subscribers."²⁸⁶ Because Aereo's technology was transmitting the programs, OSG argued that Aereo was performing the programs.²⁸⁷ And because the "essence of [Aereo's] business model is its promise to transmit broadcast programming to any member of the public who is willing to pay a monthly fee," Aereo was also "publicly" performing them.²⁸⁸ OSG argued that affirming the Second Circuit's ruling in *Aereo* "would afford talismanic significance to precisely the sort of technical minutiae that Congress intended to treat as irrelevant in crafting the 1976 Act."²⁸⁹

OSG's brief also characterized Aereo's system as the "functional equivalent" of a cable system,²⁹⁰ and emphasized that Congress had explicitly intended in the 1976 Act to overturn the Court's earlier decisions that cable systems did not publicly perform broadcast programs when passively retransmitting them to

²⁸¹ ABC also claimed direct infringement of the reproduction right and indirect liability, but sought a preliminary injunction only on the public performance claim. *Am. Broad. Co. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 376 (S.D.N.Y. 2012).

²⁸² *Id.* at 405.

²⁸³ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013). The Second Circuit denied ABC's motion for a rehearing en banc. *Aereo*, 722 F.3d 500 (2d Cir. 2013) over two dissents.

²⁸⁴ Brief for the United States as Amicus Curiae Supporting Petitioners, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (2014) [hereinafter OSG *Aereo* Brief]. Four lawyers from the Copyright Office were signatories on OSG's brief.

²⁸⁵ *Id.* at 12.

²⁸⁶ *Id.* at 12-13. OSG's brief observed that the individual antennas Aereo claims to be "assigned" to each subscriber have "no apparent operational purposes" and were reassigned to different customers after the previous subscriber's program ended. *Id.* at 20.

²⁸⁷ 17 U.S.C. § 101 defines "publicly" in relation to performances as including "to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times."

²⁸⁸ OSG *Aereo* Brief, *supra* note 284, at 28.

²⁸⁹ *Id.* at 29.

²⁹⁰ *Id.* at 13.

subscribers.²⁹¹ OSG's brief strongly disagreed with the Second Circuit's interpretation of the public performance right in *Cablevision*.²⁹²

A ruling in ABC's favor, OSG said, posed no threat to the cloud computing industry insofar as the firms stored lawfully acquired copies of copyrighted materials in the cloud for customers who then streamed the copies to themselves. It opined that this would either be a private performance or a fair use.²⁹³

Justice Breyer's opinion agreed with ABC and OSG that Aereo was not "simply an equipment provider."²⁹⁴ It also agreed that Aereo's transmissions of broadcast programs to its subscribers were "performances" under the 1976 Act.²⁹⁵ It further agreed that Congress in 1976 had legislatively overturned the Court's previous rulings that cable retransmissions of broadcast programs were not public performances.²⁹⁶ It concluded that Congress had intended to treat "cable companies and their equivalents" as public performers of protected works.²⁹⁷ Because of the "overwhelming likeness" of Aereo's service "to the cable companies targeted by the 1976 Act," the Court concluded that under the specific facts of that case, Aereo's performance was "to the public."²⁹⁸

Yet, the Court took a much narrower view of the public performance right than had OSG. For one thing, the Court did not endorse the integrated systems (i.e., technical design) approach to assessing who should be responsible for transmitting (and hence performing) digital content. Second, it ignored the defendant's business model as a consideration. Third, unlike OSG, it did not take issue with the Second Circuit's interpretation of the public performance right in *Cablevision*.²⁹⁹ Fourth, as a way of narrowing future interpretations of the public

²⁹¹ *Id.* at 29-30. See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 410-15 (1974) (cable system's retransmission of broadcast television programs were not "public performance[s]" within the meaning of the Copyright Act of 1909); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968) (same).

²⁹² OSG *Aereo* Brief, *supra* note 284, at 25-27. It did not mention OSG's amicus brief recommending against granting cert because the *Cablevision* decision was a reasonable interpretation of the public performance right. See OSG *Cablevision* Brief, *supra* note 280, at 20-22.

²⁹³ OSG *Aereo* Brief, *supra* note 284, at 31-32. OSG thought that Congress could consider novel issues about cloud computing as needed. *Id.* at 34.

²⁹⁴ *Aereo*, 573 U.S. at 442.

²⁹⁵ *Id.* at 443. Unlike OSG, the Court did not think the statutory language provided clear guidance about which entities should be regarded as performers. *Id.* at 438-39.

²⁹⁶ *Id.* at 439-42.

²⁹⁷ *Id.* at 439-43.

²⁹⁸ *Id.* at 443-46.

²⁹⁹ During oral argument, several Justices pressed the lawyers about their views of *Cablevision*. Justice Kennedy, for instance, asked them to assume that it was binding precedent. ABC's lawyer said he strongly disagreed with that decision, but distinguished it because *Cablevision* had licensed the right to disseminate the programs. Transcript of Oral Argument at 14-17, 26-27, *Am. Broad. Co. v. Aereo, Inc.*, No. 13-461 (2014). The factual distinction between the cases may be sound, but ABC's lawyer failed to address the

performance right, it endorsed another Second Circuit ruling that digital downloads are not public performances because the downloads were not contemporaneously visible to anyone.³⁰⁰ Fifth, the Court asserted that in cases involving different technologies or services, “a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider [or the user] performs within the meaning of the Act.”³⁰¹ Sixth, it declined to speculate how the transmit clause would be interpreted in cases involving technologies not before the Court.³⁰² Seventh, it agreed with *Aereo* and its amici that Congress had not intended “to discourage or control the emergence or use of different types of technologies” and expressed confidence that the Court’s “limited holding” in *Aereo* would not “have that effect.”³⁰³ *Aereo* only held that that firm’s transmissions of broadcast programs were too similar to cable retransmissions that Congress had decided to treat as public performances.³⁰⁴

As in *Grokster*, the Justices were influenced by amicus curiae briefs supporting the respondent’s position.³⁰⁵ Although Justice Breyer’s opinion did not single out any particular brief, it noted concerns that *Aereo* and its amici raised about the chilling effect on innovation that would result from an overbroad interpretation of the public performance right.³⁰⁶

Justice Scalia’s dissent cited approvingly to an amicus brief of thirty-six intellectual property professors that focused on numerous court decisions that had rejected direct infringement claims against Internet service and technology developers and required human volitional conduct.³⁰⁷ Those courts regarded secondary infringement claims against developers to be more plausible. Under those precedents, Justice Scalia believed that *Aereo* had not performed any programs because “it does not make the choice of content.”³⁰⁸

The Scalia dissent also cited a BSA Software Alliance amicus brief suggesting that “a decision in the Networks’ favor will stifle technological innovation and imperil billions of dollars of investments in cloud-storage

Second Circuit’s statutory interpretation of the transmit clause. The Court’s *Aereo* opinion made no mention of *Cablevision*.

³⁰⁰ *Aereo*, 573 U.S. at 444-45 (citing *U.S. v. ASCAP*, 627 F.3d 64, 73 (2d Cir. 2010)).

³⁰¹ *Id.* at 433.

³⁰² *Id.* at 450-51, citing and quoting OSG *Aereo* Brief, *supra* note 284, at 31, 34.

³⁰³ *Id.* at 449.

³⁰⁴ *Id.* at 451.

³⁰⁵ See generally *supra* note 272. *Aereo*-side amici included CCIA, Mozilla Corp., Dish, the American Cable Association, and a group of small and independent broadcasters.

³⁰⁶ *Aereo*, 573 U.S. at 449.

³⁰⁷ *Id.* at 452-55 (Scalia, J., dissenting). The Scalia dissent also criticized the majority opinion for “disrupt[ing] settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work.” *Id.* at 459.

³⁰⁸ *Id.* at 457.

services.”³⁰⁹ It commended the majority for “sensibly avoid[ing]” OSG’s integrated system approach to assessing who is a public performer of content “because it would sweep in Internet service providers and a host of other entities that quite obviously do not perform.”³¹⁰

C. Other Divergent Analyses of Statutory Provisions

Notable differences existed between OSG’s and the Court’s interpretation of substantive provisions of U.S. copyright law in two other of the Court’s copyright cases. Both addressed circuit splits concerning copyright eligibility rules.³¹¹ Although the Court agreed with OSG about which litigant should prevail, its reasoning was quite different in reaching those outcomes. In one of the cases, the Court criticized OSG’s arguments, while in the other, the Court seems to have thought so little of OSG’s argument that it consigned its response to that argument to a footnote.

1. *CCNV v. Reid*

Community for Creative Non-Violence v. Reid addressed who, as between two claimants, was the “author” (and hence, the copyright owner) of a sculptural work.³¹² CCNV had commissioned Reid to create a sculpture of a homeless family on a steam grate for a Christmastime pageant.³¹³ Both CCNV and Reid claimed copyright in the sculpture. The Court granted cert in *CCNV* to resolve a circuit split about the standard for determining whether someone who had been paid to create a copyrighted work was an “employee” within the meaning of the 1976 Act’s “work for hire” rule.³¹⁴ Under that rule, the employer is, as a matter of law, deemed the author of works created by employees within the scope of their employment.³¹⁵

Lower courts had articulated four standards for determining employee status under copyright’s work-for-hire rule. “Employee” was variously said to be: 1) a person over whose creation the hiring party had the right to control; 2) a person

³⁰⁹ *Id.* at 462-63.

³¹⁰ *Id.* at 461.

³¹¹ See *supra* text accompanying notes 14-16.

³¹² 490 U.S. 730 (1989), *aff’g* 846 F.2d 1485 (D.C. Cir. 1988). Justice Marshall wrote the opinion for a unanimous Court.

³¹³ *Id.* at 733.

³¹⁴ The Court issued a CVSG on this question a year prior to *CCNV*’s petition. See Brief of United States as Amicus Curiae, *Easter Seal Soc’y for Crippled Children v. Playboy Enters., Inc.*, No. 87-482 (1987), <https://www.justice.gov/sites/default/files/osg/briefs/1987/01/01/sg870189.txt>. OSG acknowledged the circuit split, but regarded *Easter Seal* as an unsuitable vehicle for resolving it. *Id.* at 6.

³¹⁵ *CCNV*, 490 U.S. at 733, citing 17 U.S.C. §§ 101 (definition of “work for hire”), 201(b) (establishing ownership in the employer); *id.* at 736 (noting circuit split).

over whose creation the hiring party had exercised actual control; 3) someone who was an employee under common law agency rules; and 4) a formal salaried employee.³¹⁶

The D.C. Circuit adopted the common-law agency standard under which Reid was the sculpture's author.³¹⁷ CCNV urged the Court to adopt one of the control standards under which it would own the copyright; its director had the right to supervise and had actually supervised Reid's work. Reid urged the Court to adopt the formal salaried employee standard,³¹⁸ as did an amicus brief filed by the Copyright Office joined by OSG.³¹⁹

The Copyright Office-OSG brief observed that courts had consistently interpreted the work-for-hire provision of the Copyright Act of 1909 as applicable only to regular salaried employees, a rule which it said Congress intended to codify in the 1976 Act.³²⁰ It emphasized that the statute's reference to "scope of employment" implied an ongoing relationship between an employer and its workers, not "contracts to execute a discrete project."³²¹

Yet the Copyright Office-OSG brief conceded that a string of Second Circuit decisions between 1966 and 1972 had applied the 1909 Act's work-for-hire rule to commissioned works. The brief urged the Court to ignore those cases because "the relevant statutory provisions were fully negotiated by the parties by about 1965," so Congressional intent was fixed then.³²² As a policy matter, the brief argued against CCNV's control-based standard because "it would inject unnecessary uncertainty" into determining ownership of copyright in a commissioned work.³²³

The Office conceded in a footnote that it had sent letters to Congress in 1985 and 1986 expressing support for the Second Circuit's actual-control standard and had issued a Circular consistent with that decision's interpretation.³²⁴ The brief claimed that this endorsement had been a "tentative view,"³²⁵ and the Office changed its position after a more thorough review of the legislative history.³²⁶

³¹⁶ *Id.* at 738-39 (citing cases).

³¹⁷ *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir. 1988).

³¹⁸ *CCNV*, 490 U.S. at 739 (noting Reid's support). While *CCNV* was pending before the Court, the Ninth Circuit endorsed the formal salaried employee standard in *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989).

³¹⁹ Brief of the Register of Copyright Supporting Respondent, *Community for Creative Non-Violence v. Reid*, No. 88-293 (1989) [hereinafter Copyright Office-OSG Brief]. Three OSG lawyers were on this brief, one of whom participated in oral argument.

³²⁰ *Id.* at 13-14.

³²¹ *Id.* at 12.

³²² *Id.* at 23-24.

³²³ *Id.* at 9, 26-28. The Copyright Office-OSG brief did not discuss the D.C. Circuit's common law agency standard; indeed, it did not even cite that court's decision.

³²⁴ *Id.* at 9 n.5.

³²⁵ *Id.*

³²⁶ *Id.*

During oral argument, CCNV's lawyer pointed out that the Copyright Office-OSG brief was its first endorsement of the formal salaried employee standard.³²⁷

A unanimous Supreme Court upheld the D.C. Circuit's common law agency approach to determining who was an employee under the work-for-hire rules. Reid was thus an independent contractor, not CCNV's employee.³²⁸ The decision observed that historically "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine."³²⁹

The Court took issue with CCNV's arguments in favor of control-based standards as inconsistent with the text and structure of the 1976 Act's work-for-hire provisions. "The structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors" who have been specially commissioned to create certain types of works.³³⁰ Both litigants conceded that the sculpture was not a specially commissioned work under § 101(2).³³¹ So CCNV could only succeed with its ownership claim if Reid was its employee under § 101(1). The Court reviewed the lengthy negotiations about the 1976 Act's work-for-hire rules and the historic compromise that resulted in the bifurcated structure of § 101's definition of the term.³³² Adopting the actual or right of control standard "would unravel the 'carefully worked out compromise aimed at balancing legitimate interests on both sides.'"³³³

Except for noting the Office's support for Reid's position, the *CCNV* opinion ignored the Copyright Office-OSG amicus brief and its argument for the formal salaried employee standard.³³⁴

Although the Court was unpersuaded by the Office's argument, in most work-for-hire cases, it may not matter whether someone was an "employee" under common law agency rules or a formal salaried employee standard.³³⁵

³²⁷ Transcript of Oral Argument at 10, *Community for Creative Non-Violence v. Reid*, No. 88-293 (1989); *see also id.* at 45 (OSG attorney acknowledging that the Copyright Office had disavowed its previous position).

³²⁸ *CCNV*, 490 U.S. at 736, 749, 751-52.

³²⁹ *Id.* at 739-40.

³³⁰ *Id.* at 742-43.

³³¹ *Id.* at 738. Sculpture is not one of the nine types of works eligible for § 101(2) treatment. Nor was there a signed writing to memorialize an agreement to have the work's copyright be owned by the commissioning party, as § 101(2) requires.

³³² *Id.* at 743-49.

³³³ *Id.* at 748, citing H.R. Rep. No. 94-1476.

³³⁴ *CCNV*, 490 U.S. at 742 n.8 (responding to the formal salaried employee standard and citing Reid's brief in support of it, the oral argument transcript, and another amicus brief, but not the government's brief).

³³⁵ *But see JustMed, Inc. v. Byce*, 600 F.3d 1118 (9th Cir. 2010) (holding that the programmer was an employee despite informal arrangement).

2. *Star Athletica v. Varsity Brands*

In *Star Athletica, LLC v. Varsity Brands, Inc.*, the Court addressed the standard for determining whether graphic designs featuring colorful stripes and chevrons for cheerleader uniforms could qualify for copyrights as “pictorial, graphic, or sculptural” (PGS) works.³³⁶ Although the Court affirmed a Sixth Circuit ruling that the designs at issue were eligible PGS works,³³⁷ as OSG recommended,³³⁸ the Court disagreed with OSG’s analyses on some key issues.

The most significant difference between OSG’s and the Court’s analyses in *Star Athletica* lay in their respective conceptions of the nature of the works in which Varsity claimed copyright and the statutory bases on which to analyze their eligibility for copyrights.

OSG regarded Varsity as claiming copyright in the drawings and photographs Varsity registered with the Office.³³⁹ In OSG’s view, the scope of those copyrights extended to the surface decorations depicted therein, which Varsity applied to useful articles, namely, cheerleader uniforms. OSG’s brief invoked § 113(a) as the relevant provision with which to judge the scope of Varsity’s copyrights, under which an author has an exclusive right “to reproduce the work in or on any kind of article, whether useful or not.”³⁴⁰ OSG’s brief distinguished two-dimensional decorations for cheerleader uniforms (copyrightable) and three-dimensional uniforms (uncopyrightable as useful articles lacking separable artistic expression).³⁴¹ OSG conceived of Varsity’s uniforms as a medium of

³³⁶ 580 U.S. 405 (2017), *aff’g* 799 F.3d 468 (6th Cir. 2015). *Star Athletica* addressed a longstanding circuit split about how to distinguish unprotectable useful articles from protectable PGS works under 17 U.S.C. § 101. *Id.* at 409. Justice Thomas wrote the majority opinion. Justice Ginsburg concurred in the judgment. *Id.* at 425-38 (Ginsburg, J., concurring). Justice Breyer, joined by Justice Kennedy, dissented, perceiving the PGS works at issue to be designs for cheerleader uniforms, not simply surface decorations for them. *Id.* at 439-49 (Breyer, J., dissenting).

³³⁷ *Id.* at 424.

³³⁸ Brief of the United States as Amicus Curiae Supporting Respondent, *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866 (2016) [hereinafter OSG *Star* Brief]. Three Copyright Office lawyers were signatories to this brief.

³³⁹ *Id.* at 14-15, 25-26. Varsity argued that it was unnecessary to engage in separability analysis because its two-dimensional drawings and photographs were inherently separable. The Court rejected this argument as inconsistent with the text of the statute. *Star Athletica*, 580 U.S. at 412. During oral argument, camouflage was an example of a two-dimensional PGS work that might flunk the separability test, at least as applied to military uniforms or hunting gear. Transcript of Oral Argument at 4, 27, 45-47, *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866 (2016).

³⁴⁰ 17 U.S.C. § 113(a). Justice Ginsburg’s concurrence adopted OSG’s conception of the relevant work and statutory ground for assessing the copyrightability of Varsity’s designs, although without citing OSG’s brief. *See Star Athletica*, 580 U.S. at 425-27 (Ginsburg, J., concurring).

³⁴¹ OSG *Star* Brief, *supra* note 338, at 9.

expression on which the copyrightable surface decorations were secondarily fixed.³⁴²

The Court disagreed with OSG's assertions about the nature of the work and the relevance of § 113(a) in no small part because the litigants had not raised, let alone addressed, these issues in their pleadings or briefs. The Court "decline[d] to depart from our usual practice" of not "entertain[ing] arguments" that the parties had neither raised in their pleadings or briefs below nor "advanced in this Court."³⁴³

The works at issue, in the Court's view, were designs of useful articles, namely, cheerleader uniforms.³⁴⁴ The Court cited the statutory definition of PGS works in § 101, which states in relevant part that "the design of a useful article ... shall be considered a pictorial, graphic, or sculptural work only if, and to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."³⁴⁵

Drawing upon that definition, the Court articulated a two-step test for judging whether PGS features of a useful article's design were eligible for copyright protection.³⁴⁶

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.³⁴⁷

The Court believed that satisfying the first step was "not onerous," but that the second step would be "ordinarily more difficult to satisfy."³⁴⁸

The Court then applied this test to Varsity's designs. It identified the PGS elements of the uniforms as the patterns of stripes and chevrons.³⁴⁹ To assess the separability and independent existence step, the Court imagined the same design

³⁴² The designs would have first been fixed in drawings.

³⁴³ *Star Athletica*, 580 U.S. at 413. *But see id.* at 427 n.4 (Ginsburg, J., concurring) (asserting that the § 113(a) issue had been addressed below).

³⁴⁴ *Id.* at 417. Justice Breyer's dissent also understood Varsity to be claiming copyright in designs of useful articles, namely, cheerleader uniforms, though in his view, those pictorial elements were inseparable from their useful elements. *Id.* at 447-48 (Breyer, J., dissenting).

³⁴⁵ 17 U.S.C. § 101.

³⁴⁶ The Court did not hold that the Varsity designs were original enough to satisfy this or any other prerequisite for copyright protection. *Star Athletica*, 580 U.S. at 418 n.1; *see also id.* at 425 n.2 (Ginsburg, J., concurring).

³⁴⁷ *Id.* at 409.

³⁴⁸ *Id.* at 414.

³⁴⁹ *Id.* at 417.

patterns as though embodied in a different medium.³⁵⁰ Imaginatively extracting those PGS elements would not, the Court concluded, replicate the uniform.³⁵¹

The Court also disagreed with OSG's argument that a PGS work would be eligible for copyright if useful articles embodying a PGS design would be similarly useful without the artistic elements.³⁵² This exercise was unnecessary because "[t]he focus of the separability inquiry is on the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction."³⁵³ The Court also rejected OSG's distinction between physical and conceptual separability.³⁵⁴

D. Convergence in *Warhol*

Had OSG decided not to file an amicus brief in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,³⁵⁵ the Court might well have issued a very different ruling. OSG's intervention profoundly changed and considerably narrowed the issue to be resolved.³⁵⁶ Until OSG filed its amicus brief, the Foundation and Goldsmith, as well as the thirty-four other amici, had been disagreeing about whether the 1984 creation of a series of artworks based on a photograph was fair use or infringement.³⁵⁷ OSG decided that the only issue before the Court was the fairness (or not) of a license the Foundation granted to Condé Nast to use one of Warhol's images on the cover of a magazine.³⁵⁸ The

³⁵⁰ *Id.*

³⁵¹ *Id.* The Court cautioned that its test would not enable anyone to obtain copyright protection in a useful article "merely by creating a replica of that article in some other medium—for example, a cardboard model of a car." *Id.* at 415. The model might be copyrightable, but not the car design. Justice Breyer's dissent pointed out that even if one imagined Varsity's designs on a canvas, they would still look like cheerleader uniforms, not works of art. The "neckline, waist, skirt, sleeves, and overall cut of each uniform" were "inextricable parts" of the uniforms. *Id.* at 448-49 (Breyer, J., dissenting).

³⁵² *Id.* at 420. OSG illustrated the point with pictures of two cheerleader uniform designs, one with and one without a Varsity design. OSG *Star* Brief, *supra* note 338, at 22. OSG questioned whether removing the PGS elements from the garments would "meaningfully impair or eliminate any of the garment's relative functionality." *Id.* at 30.

³⁵³ *Star Athletica*, 580 U.S. at 420.

³⁵⁴ *Id.* at 421-22. *See* OSG *Star* Brief, *supra* note 338, at 29 (arguing legislative history endorsed that distinction).

³⁵⁵ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), *aff'g* 11 F.4th 26, 32 (2d Cir. 2021).

³⁵⁶ For a detailed explanation of this profound change, see Pamela Samuelson, *Did the Solicitor General Hijack the Warhol Case?*, 47 COLUM. J.L. & ARTS 353 (2024).

³⁵⁷ *See id.*

³⁵⁸ Brief for the United States as Amicus Curiae Supporting Respondents at 10, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) [hereinafter OSG *Warhol* Brief].

Court agreed with OSG that this commercial license was an unfair use of Goldsmith's photograph.³⁵⁹

1. *Origins of the Dispute*

This dispute commenced in 2017 when Lynn Goldsmith approached the Foundation to accuse it of having infringed her derivative work rights in a photograph she took of the rock musician Prince in 1981.³⁶⁰ She made this claim after seeing an Andy Warhol artwork (known as *Orange Prince*) on the cover of a commemorative magazine published by Condé Nast in 2016, which she recognized as deriving from one of her 1981 photographs. She surmised that the Foundation had licensed the use of this artwork to Condé Nast for the magazine cover.

Orange Prince was, as it happens, part of a series of sixteen images (known as the *Prince Series*) that Warhol created under a commission from Vanity Fair in 1984. The magazine sought to have a Warhol artwork accompany an article it intended to publish on the musician's rise to fame. Vanity Fair had obtained from Goldsmith's licensing agent an artist reference license to use Goldsmith's photograph of Prince for this purpose.³⁶¹ There is no evidence in the record indicating that Vanity Fair apprised Warhol about the terms of the license.³⁶²

The Foundation was so confident that the *Prince Series* did not infringe Goldsmith's copyright that it filed a declaratory judgment action asking the court to hold that the *Prince Series* works were not substantially similar to Goldsmith's

³⁵⁹ *Warhol*, 598 U.S. at 526.

³⁶⁰ The key facts are set forth in *Warhol*, 382 F. Supp. 3d at 318-21.

³⁶¹ The invoice issued by Goldsmith's agent indicated that use of Goldsmith's photograph was a one-time-use license. That would not necessarily mean that only one work of art could be created. Warhol may have created the sixteen works to give Vanity Fair a choice about which one it wanted to accompany its article on Prince's rise to fame. See Tyler Ochoa, *U.S. Supreme Court Vindicates Photographer, but Destabilizes Fair Use*, TECH. & MKTG. L. BLOG (June 20, 2023), <https://blog.ericgoldman.org/archives/2023/06/u-s-supreme-court-vindicates-photographer-but-destabilizes-fair-use-andy-warhol-foundation-v-goldsmith-guest-blog-post.htm> (surmising Warhol created the sixteen works to give *Vanity Fair* some choices). For a discussion of "artist references," see Jessica Silbey & Eva Subotnik, *What the Warhol Court Got Wrong: Use as an Artist Reference and the Derivative Work Doctrine*, 47 COLUM. J.L. & ARTS 353 (2024) (suggesting that artist reference arrangements are generally understood in the art world as authorizing the creation of derivative works free from the first creator's copyright).

³⁶² For an explanation about why Warhol's ignorance about the terms may be pertinent, see Pamela Samuelson & Mark P. Gergen, *What's Wrong and What's Missing in the SG's Amicus Brief in Andy Warhol Foundation v. Goldsmith*, VOLOKH CONSPIRACY (Sept. 6, 2022), <https://reason.com/volokh/2022/09/06/whats-wrong-and-whats-missing-in-the-sgs-amicus-brief-in-andy-warhol-foundation-v-goldsmith/>.

photograph or, alternatively, were fair uses of that photograph.³⁶³ Goldsmith counterclaimed, alleging that the *Prince Series* works were infringing derivatives in which the Foundation could claim no copyright.³⁶⁴

2. Lower Court Rulings and the Foundation's Cert Petition

The Foundation and Goldsmith cross-moved for summary judgment, which the trial court granted to the Foundation on the fair use issue and denied to Goldsmith.³⁶⁵ It regarded Warhol's purpose in creating the *Prince Series* to have been transformative because the works added something new, had a different purpose and character than her photograph, and conveyed a different meaning or message in keeping with the definition of transformativeness in *Campbell*.³⁶⁶ Her photograph portrayed Prince as a vulnerable young man, whereas Warhol's depiction made Prince into a larger-than-life icon.³⁶⁷ Although Goldsmith's photograph was creative and unpublished, the trial court gave this factor little weight because of the artist reference license under which Warhol created the *Prince Series*. It perceived Warhol to have removed most of the expressive elements of Goldsmith's photograph; hence, the amount taken did not cut against fair use. Finally, the *Prince Series* operated in a very different market segment than Goldsmith's photograph and was unlikely to affect markets for her work.³⁶⁸ The trial court decided it was unnecessary to rule on the Foundation's non-substantial-similarity claim, as the fair use ruling resolved the case.³⁶⁹

The Second Circuit's ruling could not have been more different.³⁷⁰ Most significantly, the court concluded that the purpose of the *Prince Series* was not

³⁶³ Complaint, ¶¶ 64-69, *Andy Warhol Found. for the Visual Arts*, 382 F. Supp. 3d (No. 17-cv-02532). The complaint also asserted that Goldsmith's potential copyright claims were barred by the statute of limitations and laches. *Id.* ¶¶ 70-82.

³⁶⁴ Amended Answer of Defendants, Amended Counterclaim of Lynn Goldsmith for Copyright Infringement and Jury Demand at 1, 26, *Andy Warhol Found. for the Visual Arts*, 382 F. Supp. 3d (No. 17-cv-02532-JGK).

³⁶⁵ *Warhol*, 382 F. Supp. 3d at 331. For the court's discussion of the fair use factors, *see id.* at 324-331. The trial court also stated that Goldsmith's claim as to the 1984 creation of the *Prince Series* was barred by the statute of limitations. *Id.* at 324. But the court's fair use analysis focused almost entirely on the 1984 creation of the *Prince Series*.

³⁶⁶ *Id.* at 325-26, citing *Campbell*, 510 U.S. at 579 (defining transformative fair use purposes).

³⁶⁷ *Id.* at 329.

³⁶⁸ *Id.* at 330-31. The court noted that she had not commercially exploited that photograph, *id.* at 331, except by the 1984 license to Vanity Fair for which she was paid \$400. *Id.* at 318.

³⁶⁹ *Id.* at 324.

³⁷⁰ The Second Circuit issued its initial *Warhol* opinion in March 2021. 992 F.3d 99 (2d Cir. 2021). The Foundation petitioned the Second Circuit to rehear the case. *See infra* text accompanying notes 376-80. The court granted the petition, withdrew its earlier opinion, and issued an amended opinion in August 2021. 11 F.4th 26, 32 n.1 (2021). The most

transformative because those works had the same “overarching purpose and function” as Goldsmith’s photograph not only as works of visual art but also as portraits of the same person.³⁷¹ It rejected the Foundation’s arguments about the new meanings or messages in the *Prince Series*, for it declared that judges were not competent to decide the meanings or messages of artworks.³⁷² Nor should judges give weight to what an artist-defendant might have been trying to convey or how art critics perceived works’ meaning. Although not opining that the *Prince Series* were necessarily infringing derivative works, the Second Circuit said they were much closer to that status than to being transformative fair uses.³⁷³ It regarded the other fair use factors as weighing against fair use, especially the market effects factor, given that her photograph and the *Prince Series* competed in the market for commercial licensing to magazines.³⁷⁴ Although the trial court had not addressed the Foundation’s claim that the *Prince Series* works were not substantially similar to Goldsmith’s photograph, the Second Circuit addressed that issue as well and opined that the *Prince Series* works were substantially similar to Goldsmith’s photograph as a matter of law.³⁷⁵

Disappointed by the Second Circuit’s ruling, yet hopeful that the panel might reconsider, the Foundation filed a petition for rehearing or rehearing en banc, which principally argued that the panel’s ruling was inconsistent with the Supreme Court’s recently issued decision in *Google v. Oracle*, as well as with *Campbell*,³⁷⁶ both of which had defined transformativeness to include works that have new meanings or messages.³⁷⁷ The petition also raised the specter that a ruling in Goldsmith’s favor might result in the invalidation of the Foundation’s copyrights in the *Prince Series* because of § 103(a) of the 1976 Act, which provides that copyright protection is unavailable to any part of a derivative work that used the source material unlawfully.³⁷⁸ A ruling for Goldsmith also threatened to deprive museums and galleries of their rights to publicly display the Warhol works they owned.³⁷⁹ The petition asserted that the Second Circuit’s narrow interpretation of fair use “threatens to render *unlawful* large swaths of contemporary art that incorporates and reframes copyrighted material to convey

substantive difference is that the amended opinion states its reasons for believing that its fair use analysis was compatible with the Court’s *Google* opinion. 11 F.4th at 51-52.

³⁷¹ 11 F.4th at 42-43.

³⁷² *Id.* at 41-42.

³⁷³ *Id.* at 43.

³⁷⁴ *Id.* at 48-50.

³⁷⁵ *Id.* at 52-54.

³⁷⁶ Petition for Panel Rehearing and Rehearing En Banc at 7-13, 16-17, *Andy Warhol Found. for the Visual Arts, Inc.*, 11 F.4th 26 (No. 19-2420-cv).

³⁷⁷ *Id.* at 1-3, 7-13 (discussing *Campbell* and *Google*).

³⁷⁸ *Id.* at 18 (citing 17 U.S.C. § 103(a)).

³⁷⁹ *Id.* at 17-18. This was because the first sale limitation on the exclusive public display right applies only to “lawfully made copies.” 17 U.S.C. § 109(c).

a new and different message—effectively outlawing a genre widely viewed as ‘one of the great artistic innovations of the modern era.’³⁸⁰

After the Second Circuit declined to revisit its fair use analysis, the Foundation made the strategic decision to petition the Supreme Court to review that court’s ruling only as to the transformative nature of Warhol’s uses of Goldsmith’s photograph in 1984, not on that court’s full fair use analysis.³⁸¹ The Foundation must have been confident that the Court would recognize that the Second Circuit had erred in characterizing Warhol’s uses of the Goldsmith photograph to create the *Prince Series* as “not transformative.”³⁸² The cert petition, like the rehearing petition, argued that the Second Circuit’s ruling directly conflicted with Court precedent in *Campbell* and *Google v. Oracle*,³⁸³ which had defined “transformative” as encompassing secondary works that have new meanings and convey different messages than the original.³⁸⁴ Like the rehearing petition, it warned of chilling effects on artistic expression and possible dire consequences for institutions and private collectors.³⁸⁵ The Foundation must also have expected that if the Court reversed the Second Circuit on the transformative purpose issue, that court would have to reassess its analysis of the other fair use factors, as courts in the post-*Campbell* case law tend to weigh the other fair use factors differently once they decide that a secondary use of an earlier work was transformative.³⁸⁶

Goldsmith urged the Court to deny cert because she thought the Second Circuit had correctly ruled that Warhol’s use of Goldsmith’s photograph to create the *Prince Series* silkscreens was nontransformative and unfair.³⁸⁷ The Court granted cert to resolve the dispute over the transformativeness (or not) of the 1984 creation of the *Prince Series*.³⁸⁸

³⁸⁰ *Id.* at 17 (quoting Blake Gopnik, *Warhol a Lame Copier? The Judges Who Said So Are Sadly Mistaken*, N.Y. Times (Apr. 5, 2021)).

³⁸¹ Petition for a Writ of Certiorari, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) [hereinafter *Foundation Cert Petition*]. This was the issue on which the Foundation thought the sharpest conflict existed with the Court’s precedents.

³⁸² *Id.* at 3.

³⁸³ *Id.* at 17-24.

³⁸⁴ *Campbell*, 510 U.S. at 579; *Google*, 593 U.S. at 29.

³⁸⁵ *Foundation Cert Petition*, *supra* note 381, at 32-38.

³⁸⁶ See, e.g., *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (defendant’s transformative purpose in using images had spillover effects on the court’s analysis of other fair use factors). See generally Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905 (2020).

³⁸⁷ Brief in Opposition at 1-2, 17, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869).

³⁸⁸ 142 S.Ct. 1412 (2022).

3. *OSG's Brief in Support of Goldsmith*

The linchpin of OSG's analysis of the *Warhol* case was that courts must judge fair use on a use-by-use basis.³⁸⁹ This interpretation posits that even if a second comer's initial use of another's work was fair use, that does not mean that later uses of that secondary work will necessarily be fair. There must be a fair-use justification for every subsequent use of the secondary work.³⁹⁰

Thus, whatever the legal status of the *Prince Series* might have been at the time of its initial creation,³⁹¹ the Foundation's 2016 grant of a commercial license to use *Orange Prince* as a magazine cover would have to be separately justified as a fair use.³⁹² Because that work had the same purpose as Goldsmith's photograph in being available for magazine licensing, OSG agreed with the Second Circuit that the commercial license to Condé Nast was nontransformative.³⁹³ And because the nontransformative commercial license of *Orange Prince* to Condé Nast operated in the same magazine licensing market as Goldsmith's photograph, it was a plausible substitute for her work in that market.³⁹⁴ Other uses of the *Orange Prince* might qualify as fair uses,³⁹⁵ but the commercial license to Condé Nast did not.

4. *The Warhol Ruling*

Justice Sotomayor's decision for the Court embraced the core of OSG's analysis.³⁹⁶ It endorsed the idea that fair use must be determined on a use-by-use basis.³⁹⁷ Like OSG, the court concluded that the Foundation's grant of the 2016

³⁸⁹ OSG *Warhol* Brief, *supra* note 358, at 13-14. In support of this novel proposition, OSG cited only dicta from *Sony* and *Campbell*. *Id.* at 14. Neither the lower court opinions, nor the litigants' briefs, addressed the use-by-use issue. OSG's brief to the Court was alone in making this point.

³⁹⁰ *Id.* at 13-15.

³⁹¹ Toward the end of OSG's brief, it observed "it is not clear that the creation [of *Orange Prince*] infringed Goldsmith's copyright at all—Warhol may have created the other *Prince Series* images for his own edification or as part of his artistic process for creating the licensed Vanity Fair illustration." *Id.* at 32.

³⁹² *Id.* at 14. The term "commercial licensing" appeared ten times in OSG's brief. The "justif" words (justified, unjustified, justification) appeared a dozen times.

³⁹³ *Id.* at 18.

³⁹⁴ *Id.* at 29-31.

³⁹⁵ OSG *Warhol* Brief, *supra* note 358, at 32-33. The brief suggested that museums and galleries that own Warhol originals could raise fair use defenses because their uses would be unlikely to fulfill demand for the original. *Id.* It further suggested that other appropriation art might have better fair use defenses than the Foundation. *Id.*

³⁹⁶ Justice Kagan wrote a dissenting opinion, joined by Chief Justice Roberts. *Warhol*, 598 U.S. at 558-93 (Kagan, J., dissenting). That opinion gave numerous examples of artworks that drew upon images from prior works. It focused on the fairness of the 1984 creation, an issue which the majority did not address.

³⁹⁷ *Id.* at 533-34.

license did not have a transformative purpose because it was for the same commercial purpose as Goldsmith's photograph—as portraits of Prince available for magazine licensing—and could serve as a substitute for her work.³⁹⁸ Like OSG, it offered examples of uses that the Foundation could make of *Orange Prince* that might qualify as fair uses.³⁹⁹ Even more than OSG, the Court emphasized the need for a putative fair user to justify their use of others' works to qualify as fair uses, which could often be satisfied if the second work targeted the first work for purposes of criticism or comment.⁴⁰⁰

As OSG recommended, the Court affirmed the Second Circuit's unfair use ruling, noting that the Foundation had not asked the Court to review the Second Circuit's ruling on the other fair use factors.⁴⁰¹ In a footnote, the Court ruled that it was unnecessary to address the 1984 creation issue because Goldsmith had "abandoned all claims to relief other than her claim as to the 2016 Condé Nast license."⁴⁰² The *Warhol* case was later settled without further litigation on Goldsmith's claim.⁴⁰³

5. *Some Reflections on Warhol*

OSG's arguments in *Warhol* are noteworthy for several reasons.

For one thing, OSG's brief overlooked that commercial licensing, as such, does not directly infringe any of Goldsmith's exclusive rights for which the Foundation would need to mount a fair use defense.⁴⁰⁴ The Foundation certainly authorized Condé Nast to make and distribute copies of *Orange Prince*, which could indirectly infringe her rights,⁴⁰⁵ but that was not how Goldsmith litigated the case. The acts of direct infringement in *Warhol* for which Goldsmith had been seeking relief and to which the Foundation raised a fair use claim had always

³⁹⁸ *Id.* at 536-38.

³⁹⁹ *Id.* at 534-36, nn.10 & 12 (use for teaching or for a magazine article about Warhol). OSG *Warhol* Brief, *supra* note 358, at 33 (fair use if *Orange Prince* used to illustrate silkscreen techniques).

⁴⁰⁰ The "justif" words (i.e., justified, unjustified, justification) appear twenty-five times in the majority opinion. It also used "target" words in connection with justifications eleven times. *See, e.g., id.* at 532, 539-40, 546-47.

⁴⁰¹ *Warhol*, 598 U.S. at 551.

⁴⁰² *Id.* at 534 n.9. Elsewhere, I have questioned this assertion. Samuelson, *supra* note 356, at 516, 549.

⁴⁰³ *See, e.g.,* Adam Schrader, *Andy Warhol Foundation Settles with Artist Lynn Goldsmith After Landmark Ruling*, ARTNET (Mar. 18, 2024), <https://news.artnet.com/art-world/andy-warhol-foundation-settles-with-artist-lynn-goldsmith-after-landmark-ruling-2454120>.

⁴⁰⁴ A tip of the hat to Peter Karol for his keen observation of this point. *See* Peter J. Karol, *What's the Use? The Structural Flaw Undermining Warhol v Goldsmith*, 70 J. COPYRIGHT SOC'Y, 117 (Nov. 2024) ("[C]ommerical licensing is neither a copyright use, nor an act of infringement"). The Court did not recognize this point.

⁴⁰⁵ 17 U.S.C. § 106 grants authors rights "to do or to authorize" certain types of exploitations. "To authorize" is understood to be the basis for indirect infringement claims. *See, e.g.,* Karol, *supra* note 404, Part IV.

concerned the 1984 creation of the *Prince Series*.⁴⁰⁶ OSG's brief did not observe that if anyone directly infringed Goldsmith's copyright by making and distributing copies of *Orange Prince*, it was Condé Nast, against whom, so far as we know, Goldsmith never made a claim.

OSG's argument that the Court need not consider whether Warhol's initial creation of the *Prince Series* was fair or unfair was grounded in its assertion that both lower courts had ruled only on the fairness of the Foundation's grant of the 2016 commercial license to Condé Nast.⁴⁰⁷ However, both courts' fair use analyses were overwhelmingly focused on the initial creation of the *Prince Series*,⁴⁰⁸ even if the 2016 license was a pertinent consideration in assessing the market effects factor. The Court took OSG's assurances on this point to heart, but maybe the Justices should have read the lower court opinions themselves.

By focusing only on the 2016 license, OSG avoided consideration of the implications of the "artist reference license" under which Vanity Fair had obtained authorization to commission someone (it chose Warhol) to create artwork based on Goldsmith's photograph.⁴⁰⁹ As the Foundation stated in its merits brief, "[t]here is no record evidence of any written engagement between *Vanity Fair* and Warhol, or that *Vanity Fair* communicated to Warhol the terms of its license from Goldsmith."⁴¹⁰ If Warhol was not a party to that license and was not aware of its terms, perhaps any restrictions it contained could not bind him, even if they could bind Vanity Fair.⁴¹¹ Perhaps that license meant that the *Prince Series* works were authorized derivatives, which would have implications for Goldsmith's challenge to the Foundation's copyrights.

OSG's zeroing in on the 2016 license and deflecting attention away from the 1984 creation issue was something of a boon for the Foundation because it avoided consideration of whether § 103(a) would, as the Foundation feared, nullify its copyrights in the *Prince Series* if, on remand, Goldsmith prevailed on her counterclaim.⁴¹² The Court would also be less likely to make general statements about the legality of appropriation art,⁴¹³ which might further affect

⁴⁰⁶ See Samuelson, *supra* note 356, Part I.

⁴⁰⁷ OSG *Warhol* Brief, *supra* note 358, at 14. Judge Jacobs' concurrence seems to have construed the panel opinion as if only the 2016 license was at issue. *Warhol*, 11 F.4th at 54-55.

⁴⁰⁸ For a detailed explanation of OSG's misconstruction of the lower court decisions, see Samuelson, *supra* note 356, at 527-30.

⁴⁰⁹ See Silbey & Subotnik, *supra* note 361 (describing general understanding of artist reference arrangements).

⁴¹⁰ Brief for Petitioner at 18, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869).

⁴¹¹ See Samuelson & Gergen, *supra* note 362 (suggesting that Warhol and the Foundation could not be bound by the license between Vanity Fair and Goldsmith's agent).

⁴¹² See *supra* text accompanying note 378 (explaining the § 103(a) risk in *Warhol*).

⁴¹³ See OSG *Warhol* Brief, *supra* note 358, at 34 (urging the Court to reject a blanket rule against appropriation art).

some of the Foundation's other copyrights since appropriation art is what Warhol so famously did.

Interestingly, *Warhol* was the only substantive interpretation case in which OSG offered a more moderate interpretation of copyright law than some conventional copyright industry organizations who supported Goldsmith.⁴¹⁴ A higher protectionist view among Goldsmith's supporters was that Andy Warhol had not made transformative fair uses of Goldsmith's photograph of Prince when creating a series of prints and drawings based on her photograph in 1984.⁴¹⁵

Finally, it is noteworthy that of the ten substantive copyright cases in which OSG participated as amicus, only *Warhol* ended with the Court closely following OSG's recommended analysis and conclusion.⁴¹⁶

E. *The Court's Reactions to OSG's Arguments in the Substantive Interpretation Cases*

Although the Court's *Warhol* decision followed OSG's analysis very closely, Justice Sotomayor cited OSG's brief only once in a footnote for an incidental point.⁴¹⁷ In several substantive interpretation cases, the Court made no mention of OSG's arguments, including the *Google, Georgia*, and *Grokster* opinions.⁴¹⁸ Positive citations to OSG's amicus arguments have generally been infrequent in the Court's copyright opinions and tended to support minor points,⁴¹⁹ although

⁴¹⁴ See, e.g., Brief Amicus Curiae of the Recording Indus. Assoc. of Am. and Nat'l Music Publishers Ass'n, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) (critical of judicial overemphasis on transformative purpose). The Copyright Alliance and the MPA briefs were filed in support of neither party, but both briefs were similarly highly critical of expansive interpretations of fair use for undermining copyright's derivative work right.

⁴¹⁵ See, e.g., Brief of Professors Peter S. Menell, Shyamkrishna Balganes, & Jane C. Ginsburg as *Amici Curiae* in Support of Respondents at 30-34, *Andy Warhol Found. for the Visual Arts, Inc.*, No. 21-869 (2022).

⁴¹⁶ I have elsewhere suggested that OSG hijacked the *Warhol* case by dramatically recharacterizing and narrowing the question presented for the Court to address. See Samuelson, *supra* note 356, at 515, 526-27.

⁴¹⁷ *Warhol*, 598 U.S. at 536 n.12 (citing OSG as saying fair use analysis might be different if *Orange Prince* was published in a magazine article about Warhol).

⁴¹⁸ The Court did not cite to OSG's briefs or arguments in *Reed Elsevier, Golan, Rimini, Unicors*, and *Warner Chappell*.

⁴¹⁹ In *Aereo*, 573 U.S. at 450-51, the Court agreed with OSG that a ruling in ABC's favor should not implicate cloud computing. In *Petrella*, 572 U.S. at 687-88, the Court agreed with OSG that a long delay in initiating litigation might affect the availability of equitable remedies. Some Justices have cited OSG briefs in concurrences or dissents. See, e.g., *Kirtsaeng I*, 568 U.S. at 555 n.1 (Kagan, J., concurring); at 575-76 n.15, 583 n.22, 586 n.27 (Ginsburg, J., dissenting).

one can sometimes find traces of OSG's influence even when the Court did not cite OSG's briefs for key propositions in procedure or remedies cases.⁴²⁰

In three of the substantive interpretation decisions, the Court explicitly criticized OSG. The Court in *Quality King*, for instance, opined that OSG had offered "a cramped reading" of the statute and characterized its policy arguments as "irrelevant."⁴²¹ In *Kirtsaeng I*, the Court said that OSG's statutory argument was "not defensible"⁴²² and chided OSG for not taking seriously the likely negative impacts of a ruling in Wiley's favor.⁴²³ The Court also found fault with OSG's arguments in *Star Athletica*.⁴²⁴ It criticized OSG for violating a norm about considering arguments not raised by the parties and disagreed with OSG about the statutory basis for upholding Varsity's claim of copyright and its conceptualization of the work of authorship at issue.⁴²⁵ A unanimous Court in *CCNV* thought so little of OSG's argument in favor of the formal-salaried-employee standard for determining whether a work was for-hire that it relegated discussion of that standard to a footnote, citing another amicus brief favoring that standard but not the government's brief.⁴²⁶

Notably, the Court has criticized OSG's amicus arguments in copyright cases more often than it has praised them. The next Part suggests some reasons why OSG's arguments have had less influence on the Justices in the Court's copyright cases.

⁴²⁰ The Court's opinion in *Fourth Estate* was, for example, very similar to OSG's analysis of the registration issue, although it mentioned OSG's brief only once in a footnote about a factual issue. *Fourth Estate*, 586 U.S. at 300 n.2. The Court in *Kirtsaeng II* agreed with OSG's arguments about administrative difficulties likely to attend the attorney fee standard for which *Kirtsaeng* was arguing, but it cited only OSG's participation in oral argument on a factual issue. *Kirtsaeng II*, 579 U.S. at 208 n.3.

⁴²¹ *Quality King*, 523 U.S. at 152-53; see also *id.* at 146 (noting "several flaws" in OSG's arguments).

⁴²² *Kirtsaeng*, 568 U.S. at 544-45. Justice Ginsburg's dissent had a more favorable view of OSG's position on the proper scope of the § 602(a)(1) importation right. *Id.* at 576 n.15 (Ginsburg, J., dissenting).

⁴²³ During *Costco* oral argument, Chief Justice Roberts was plainly unsatisfied with OSG's argument that authorized importations of lawfully made foreign-made goods lay outside the protections of § 109(a) and with OSG's suggestion that such importations might be lawful under a common law exhaustion rule or some other doctrine. See *supra* note 180 and accompanying text. Recall that Justice Scalia's dissent in *Aereo* was highly critical of OSG's integrated system argument and praised the majority for not embracing it. *Aereo*, 573 U.S. at 461.

⁴²⁴ See *supra* Part II-C-2.

⁴²⁵ See *supra* text accompanying note 343.

⁴²⁶ *CCNV* mentioned OSG's brief only once to indicate its support for Reid. *CCNV*, 490 U.S. at 739.

III. REFLECTIONS ON THE COURT'S AND OSG'S INTERPRETATIONS OF COPYRIGHT LAW

The small number of cases in which OSG and the Court had divergent interpretations of U.S. copyright law—eleven of twenty cases in which OSG participated⁴²⁷—makes it difficult to draw firm conclusions about the significance of these divergences. Even so, the differences are stark enough to be noteworthy, particularly when compared with OSG's 100% success rate in the copyright procedure and constitutional challenge cases and OSG's historically high win rate as an amicus. The following four sections aim to elucidate and contextualize differences between OSG's and the Court's approaches to interpreting U.S. copyright law.

A. OSG Typically Supports Higher Protectionist Views of Copyright's Scope

On most copyright issues that call for courts to interpret this law's provisions, one can construct a spectrum along which it is possible to identify legal views that represent higher to lower protectionist interpretations of copyright law. In nine of the eleven cases in which OSG's and the Court's interpretations diverged, OSG adopted higher protectionist views, while the Court's interpretation was, comparatively speaking, a lower protectionist view.⁴²⁸ It is, moreover, noteworthy that in all but two of the twenty copyright cases in which OSG participated, OSG's interpretations favored the higher protectionist position.⁴²⁹

One generally reliable indicator of which interpretation is the higher protectionist view is the presence of copyright industry amicus briefs, which typically align with OSG's views.⁴³⁰ In *Dowling v. United States*, for instance, OSG supported an interpretation of the federal stolen goods statute that would impose felony penalties on a copyright counterfeiter, even though criminal violations of copyright law were only misdemeanors when Dowling made the

⁴²⁷ This includes the nine divergent substantive interpretation cases and two remedies cases (*Dowling* and *Kirtsaeng II*).

⁴²⁸ In *Star Athletica*, OSG and the majority both supported higher protectionist interpretations of the copyrightability of the designs at issue, even though their statutory interpretations differed; only Justice Breyer's dissent supported a lower protectionist view. 580 U.S. at 420 (majority op.), 439 (Breyer, J., dissenting). In *CCNV*, it was unclear which was the higher protectionist view on the work-for-hire rule, as there was copyright owner support for both litigants.

⁴²⁹ OSG supported comparatively lower protectionist interpretations in *Fourth Estate* (a procedure case) and *Rimini* (a remedies case) despite Copyright Alliance and other copyright industry amicus briefs supporting higher protectionist interpretations.

⁴³⁰ RIAA, MPAA, AAP, and the Copyright Alliance are among the repeat players who support higher protectionist positions in the Court's copyright cases. Repeat players who tend to support lower protectionist positions include ALA, ACLU, Electronic Frontier Foundation (EFF), Public Knowledge, and CDT. Academic amicus briefs sometimes support higher protectionist positions, but more often support lower protectionist positions.

counterfeits.⁴³¹ The Recording Industry Association of America (RIAA) filed an amicus brief supporting arguments made in OSG's briefs. Despite this, the Court disagreed with their views.

In *Quality King*, *Costco*, and *Kirtsaeng I*, OSG repeatedly urged the Court to interpret copyright's exclusive importation right as authorizing copyright owners to block imports of lawfully made copyright-protected products. RIAA's amicus briefs, like OSG's, supported L'Anza's copyright claim to stop Quality King from importing L'Anza's shampoo products into the American market. The Motion Picture Association of America (MPAA) and the Association of American Publishers (AAP), like OSG, filed briefs supporting Omega's effort to block Costco's importation of European-made watches and Wiley's effort to stop the unauthorized importation of books from Thailand. The Court, however, decided that the first sale limitation on copyright's exclusive rights privileged those importations. In *Kirtsaeng II*, the Copyright Alliance (of which AAP and RIAA are members), like OSG, supported a higher protectionist interpretation of copyright rules concerning attorney fee awards for prevailing defendants, but the Court rejected that view.

In *Georgia*, OSG urged the Court to rule that the official annotations to Georgia's statutes were copyright-protectable, as did an amicus brief filed by the Copyright Alliance. Despite copyright industry support, the Copyright Office's official position, and OSG's recommendation, the Court decided that the annotations did not qualify for copyright protection under the government edicts doctrine.

Because virtually all major motion picture and recording industry firms were plaintiffs in *Grokster*, neither RIAA nor MPAA filed amicus briefs supporting MGM. Still, several other copyright industry groups and OSG filed amicus curiae briefs supporting MGM's contributory infringement theory. OSG and the Copyright Alliance also filed amicus curiae briefs supporting ABC in *Aereo*, as did several copyright industry firms (e.g., Viacom, Time Warner, and Warner Brothers). Yet, the Court's decisions in both cases were far narrower victories for the petitioners than OSG and the copyright industry groups had supported.

Although computer software copyright issues are not usually on their legal and policy agenda, the Copyright Alliance, RIAA, AAP, and the Motion Picture Association (MPA), like OSG, filed amicus curiae briefs supporting Oracle in the *Google* case. Those industry briefs supported CAFC's narrow interpretation of fair use. Despite strong copyright industry and OSG support for Oracle's interpretation of the fair use doctrine, the Court overturned CAFC's ruling. It upheld Google's fair use defense as a matter of law, reaffirming *Campbell*'s broad conception of transformativeness as a key factor in fair use cases.

Perhaps the Justices defer less often to OSG's amicus arguments in substantive interpretation copyright cases because they view those arguments as too predictably aligned with major copyright industries' positions and copyright exceptionalist reasoning. Such a view was most apparent in the trio of first

⁴³¹ *Dowling*, 207 U.S. at 225-26.

sale/importation cases in which OSG repeatedly urged the Court to hold that the first sale rule was inapplicable to imported copies because, in its view, Congress intended to allow rights holders to assert copyright protections to segment markets and the government had represented this as the U.S. position in international forums, ignoring other rulings that allowed gray market goods to enter U.S. markets. OSG also devised a copyright exceptionalist test for contributory infringement in *Grokster*, even though inducement liability sufficed to hold the defendants liable for wrongs for which they were responsible. In *Aereo*, OSG argued for an extremely broad conception of the public performance right under which virtually every digital transmission would trigger potential liability. In *Google*, OSG gave no weight to Java programmer investments in learning how to code with the Java API declarations, instead likening programmers to fans of popular entertainment. Unlike the Court, OSG failed to understand the legitimacy of Google's reasons for using the declarations at issue, taking Oracle's incompatibility claim at face value.

B. The Growing Influence of Copyright Office Lawyers on OSG's Copyright Briefs

Prior to 2005, it was rare for the Copyright Office to participate in OSG amicus briefs.⁴³² Since 2005 (when the *Grokster* case was pending before the Court), Copyright Office lawyers have been signatories on ten of OSG's fifteen amicus briefs in copyright cases. Six of the ten called for a substantive interpretation of provisions of the 1976 Act,⁴³³ and all six endorsed higher protectionist interpretations. Patent and Trademark Office (PTO) lawyers, by contrast, have been signatories on only two of OSG's copyright amicus briefs (*Grokster* and *Georgia*). This disparity suggests that the PTO has less influence with OSG in copyright cases than the Copyright Office.

Yet, OSG also endorsed comparatively higher protectionist positions as amicus in five other copyright cases since 2005 without Copyright Office signatories.⁴³⁴ OSG filed higher protectionist amicus briefs in *Costco* and

⁴³² In 2003, Copyright Office lawyers were signatories on OSG's brief opposing the grant of cert in *Verizon v. Recording Industry of America*, 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 543 U.S. 924 (2004) (concerning RIAA subpoena to identify potential infringer). In *CCNV*, OSG joined a Copyright Office brief in support of the formal salaried employee theory of the work-for-hire doctrine. See *supra* Part II-C-1. The Office filed its own amicus brief without OSG in *Stewart v. Abend*, 495 U.S. 207 (1990), urging the Court to affirm a Ninth Circuit ruling that Abend owned the renewal copyright in a short story on which a popular movie was based. *Stewart* cited approvingly to the Office's brief in its affirmance of Abend's victory. *Id.* at 217, 221.

⁴³³ The six were *Grokster*, *Aereo*, *Star Athletica*, *Georgia*, *Google*, and *Warhol*. Office lawyers were also signatories on OSG's amicus briefs in *Warner Chappell*, *Unicolors*, *Fourth Estate*, and *Rimini*.

⁴³⁴ The five post-2005 OSG briefs sans Copyright Office signatories were *Reed Elsevier*, *Petrella*, *Costco*, *Kirtsaeng I*, and *Kirtsaeng II*. A former Solicitor General whom I interviewed said that it was fair to infer that OSG may have disagreed with the Office if no

Kirtsaeng I without Copyright Office signatories, although the Office's Annual Reports indicated that Office lawyers provided input to OSG in those cases.⁴³⁵ Indeed, since 2000, the Copyright Office's annual reports have regularly noted their assistance to OSG in copyright cases before the Court.

Of course, the Copyright Office is not the only agency OSG consults about copyright cases. OSG "solicits the views of all interested agencies and supervises the formulation of the government's position through a series of memoranda and meetings."⁴³⁶ Several executive branch agencies, particularly the Department of Commerce, which has a copyright policy office within the PTO, the Office of the U.S. Trade Representative (USTR), and the Intellectual Property Enforcement Coordinator (IPEC), have strong interests in IP policy issues and provide input to OSG for amicus curiae filings.⁴³⁷ Although OSG has consulted other agencies having different views,⁴³⁸ those agency lawyers have had less influence than agencies with authority over and expertise in U.S. IP policy.

Given the increased frequency with which Copyright Office lawyers are signatories on OSG amicus briefs in copyright cases, it is apparent that the Office's views have become influential with OSG. Office lawyers generally favor higher protectionist positions on substantive interpretation copyright issues. Unsurprisingly, in substantive interpretation copyright cases, OSG's briefs with Office lawyer signatories have endorsed higher protectionist views on the merits of copyright owner claims against putative infringers.

Only in *Georgia* did the Court explicitly consider whether to defer to the Copyright Office's views on substantive interpretation of copyright issues, and in

lawyer from the agency was on its brief; yet, other former OSG lawyers suggested other reasons why Office lawyers may not have been signatories on some briefs.

⁴³⁵ The only copyright-related case in which there is documentation that OSG took a different position than the Office recommended is *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). The Office favored an interpretation of 15 U.S.C. § 1125(a) to allow lawsuits for failure to attribute authorship of protected works. See Copyright Office Annual Report (2002) (advising OSG to support Fox's attribution claim). OSG did not do so. Brief for the United States as Amicus Curiae Supporting Petitioner, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No. 02-428 (2003). Some interviewees reported that OSG disagreed with the Office about *Reed Elsevier* and *Cablevision* and about whether to support the Authors Guild's petition to review the Second Circuit's ruling in *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (fair use to digitize in-copyright books for indexing and snippets).

⁴³⁶ See, e.g., Ginger Anders, *Calls for the Views of the Solicitor General: An Obscure but Important Part of Supreme Court Practice* at 9, ABA: TRENDS (July 1, 2017).

⁴³⁷ Signatories on OSG's copyright amicus briefs have sometimes included lawyers from the Department of Commerce (*Aereo*) or Justice Department (e.g., *Quality King*, *Costco*, *Kirtsaeng I* and *Google*).

⁴³⁸ For instance, a former lawyer with the Office of Science and Technology Policy (OSTP) said it was more supportive of Google's defense in the *Oracle* case than were the Copyright Office lawyers.

that case, it declined to do so.⁴³⁹ The state of Georgia argued that the Court should defer to the Copyright Office's position that annotations to state laws are copyrightable unless they have the force of law. The Court responded that the Office's views were at most entitled to *Skidmore* deference, under which courts follow an agency's interpretation if persuasive. In *Georgia*, its views did not persuade the Court.⁴⁴⁰

C. *The Supreme Court Takes a Broader View Than OSG About the Implications of Its Copyright Rulings for the Public*

Dowling is an early example of the Court's recognition of the broader implications of its rulings than OSG contemplated. The Court observed that the government's theory about the applicability of § 2314 had implications for another copyright litigant whose case it had recently reviewed: Victor Navasky, whose magazine *The Nation* had quoted 300 words from Gerald Ford's unpublished memoirs.⁴⁴¹ Although the Court decided that this taking constituted infringement,⁴⁴² it could not in *Dowling* accept that OSG's interpretation would put Navasky at risk of felony prosecution for shipping magazines with infringing contents to out-of-state subscribers.⁴⁴³

Dowling further recognized, as OSG had not, that adopting the government's theory would have "broad consequences" for "kindred fields of intellectual property law."⁴⁴⁴ The Court noted that Congress had not authorized criminal liability for patent infringement. Yet, under the government's theory, patent infringers could go to prison for violating § 2314 if infringing goods crossed state lines.⁴⁴⁵ The text of § 2314 contained no language that would limit that law's

⁴³⁹ In one pre-1976 Act case, the Office's views were highly influential with the Court. See *Mazer v. Stein*, 347 U.S. 201 (1954), which upheld a copyright in a statuette despite the intent to mass-produce it as a lamp base. OSG joined the Office's brief, but a private lawyer participated in oral argument supporting the Office's position on the copyrightability of the statuette. *Id.* at 201. The Court discussed the Office's standard for registering claims in works of artistic craftsmanship at some length. *Id.* at 211-14. The Court also cited approvingly to the Office's amicus brief in *Stewart*. See generally *supra* note 432.

⁴⁴⁰ *Georgia*, 590 U.S. at 271 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940)). Nor did the Court defer to the Office's views in *CCNV* or *Star Athletica*, even though both cases pertained to its registration decisions.

⁴⁴¹ *Harper & Row*, 471 U.S. 539.

⁴⁴² *Id.* at 542.

⁴⁴³ *Dowling*, 473 U.S. at 226. The Court characterized the book from which Navasky obtained the infringing quotes as "purloined" (that is, stolen). *Harper & Row*, 471 U.S. at 542. Justice Blackmun supported the infringement claim in *Harper & Row*, but not the implication of OSG's position in *Dowling*.

⁴⁴⁴ *Dowling*, 473 U.S. at 226.

⁴⁴⁵ *Id.*

scope to counterfeiters and bootleggers.⁴⁴⁶ OSG's lawyer had no answers to the Court's questions about the ramifications of OSG's position during oral argument.

In *Quality King*, the Court took a broader view than OSG about the likely adverse effects of upholding copyright owners' claims against defendants who imported lawfully made goods into the U.S. Under L'Anza's and OSG's interpretation of § 602(a), the Court noted that neither fair use nor any other copyright exception would apply to importations and expressed doubts that Congress could have intended that result. It regarded the "whole point" of § 109(a) as intended to exhaust copyright owners' rights to control further distribution of lawfully made copies.⁴⁴⁷ Moreover, L'Anza was asserting a copyright claim against *Quality King* not because it would have too little incentive to create new works of authorship but to reinforce its preferred method of marketing shampoo.

Amicus curiae briefs in *Kirtsaeng I* helped to tip the scale toward a non-geographic interpretation of "lawfully made under this title" in § 109(a).⁴⁴⁸ Upholding Wiley's claim would have put at risk library lending of foreign-made books and museum displays of foreign art. Importing products bearing copyrighted labels could interfere with \$2.3 trillion of international trade. Even reselling a car embedded with foreign-made software could be risky if Wiley prevailed. The Court decided that the practical problems that *Kirtsaeng* and its amici had identified were "too serious, too extensive, and too likely to come about" to ignore.⁴⁴⁹

Amicus curiae briefs also alerted the Court to the implications of its decisions for innovation and competition in technology industries and for the public in *Grokster*, *Aereo*, and *Google*.⁴⁵⁰ *Grokster* reaffirmed the broad *Sony* safe harbor, which protected public access to technologies with substantial non-infringing uses. The Court acknowledged that *Grokster*-side amicus briefs had offset arguments raised in the MGM-side briefs. Justice Breyer's concurring opinion

⁴⁴⁶ *Id.*

⁴⁴⁷ See *supra* note 163 and accompanying text.

⁴⁴⁸ Elite members of the Supreme Court bar often coordinate amicus support. See Larsen & Devins, *supra* note 14, at 1904-06. This "alters the role of the Solicitor General and disperses the advantage this office has long held to a broader group of people." *Id.* at 1908. *Kirtsaeng*'s lawyer, Joshua Rosenkranz, a frequent Supreme Court advocate, would have realized that amicus support from libraries, museums, and industry groups could counterbalance OSG's influence by showing the potentially disruptive impacts of a ruling in Wiley's favor. See *supra* note 197.

⁴⁴⁹ *Kirtsaeng I*, 568 U.S. at 545.

⁴⁵⁰ See, e.g., Mann & Fronk, *supra* note 1, at 724 (amici more influential if they offer relevant information); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 692 (2008) (amicus briefs useful if explain impacts). But see Larsen, *supra* note 198, at 1763 (raising substantive and process concerns about amicus briefs that contribute information outside of the adversarial process).

offered a spirited defense of a broad reading of the *Sony* safe harbor, also invoking amicus briefs.

In *Aereo*, the Court rejected copyright liability claims predicated on technology-design decisions, in keeping with its previous rulings in *Grokster* and *Sony*. The Court decided in ABC's favor only because Aereo's system was too much like cable television retransmissions that Congress had chosen to treat as public performances in the 1976 Act. It heeded concerns expressed in several amicus briefs that the broad ruling for which ABC and OSG argued would likely have debilitating consequences for competition and innovation in the technology industry and for the public.

Although Oracle attracted more amicus curiae briefs to uphold the CAFC than Google to reverse,⁴⁵¹ including OSG's, there was far stronger software industry support for Google's arguments. Google's defenses were supported not only by IBM and Microsoft but also by the Developers Alliance, a group of small, medium, and open-source developers, and the Computer & Communications Industry Association, among others. These briefs persuaded the Court that reimplementing program interfaces was a common practice in the software industry and critically important to ongoing competition and innovation. Several civil society organizations, including the Center for Democracy and Technology and the Electronic Frontier Foundation, explained why a ruling in Oracle's favor would harm the public. Justice Breyer's *Google* opinion credited several amici briefs with providing helpful information and perspectives about the broader implications of the Court's ruling. These briefs effectively countered OSG's arguments.

In this era in which the Court is less focused on simply resolving disputes and addressing circuit splits and more interested in declaring what the law is, almost as a super-legislature,⁴⁵² the Court is at least taking more seriously than OSG the impacts of its rulings beyond the litigants before it.

D. The Court Likes Its Own Copyright Precedents

One reason for the considerable consistency in the Supreme Court's copyright decisions, at least so far, is that the Court often draws heavily on its own past decisions,⁴⁵³ even some handed down long ago. While this Article could give

⁴⁵¹ See *supra* note 115. Litigants who attract the most amicus briefs are not more likely to prevail. See, e.g., Kearney & Merrill, *supra* note 1, at 749. Indeed, the larger the number of amicus briefs filed, the greater the risk that valuable ones will get lost. Larsen & Devins, *supra* note 14, at 1907.

⁴⁵² See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 590 (2009).

⁴⁵³ See, e.g., Seth P. Waxman, *May You Live in Interesting Times: Patent Law in the Supreme Court*, 17 CHI-KENT J. INTELL. PROP. 214, 222 (2017) ("Overwhelmingly, what matters to the Court are its own cases and the express statutory text."). Empirical evidence supports the claim that the Court likes its precedents. See Mann & Fronk, *supra* note 1, at 730.

many examples of the Court's attention to its precedents from all twenty-nine decisions in this sample,⁴⁵⁴ this section concentrates on five examples from the divergent interpretation decisions.⁴⁵⁵

Consider, for example, the *Georgia* opinion in which the Court relied almost entirely on a trio of its nineteenth-century government edicts precedents.⁴⁵⁶ Most pertinent, in the Court's view, was *Banks v. Manchester*, which held that judges could not claim copyright in the headnotes and syllabi they prepared for their opinions because the government edicts doctrine applies to "whatever work [judges] perform in their capacity as judges."⁴⁵⁷ The same rule, it reasoned, should apply to "whatever work legislators perform in their capacity as legislators," including "explanatory and procedural materials legislators create in the discharge of their legislative duties," such as "floor statements, committee reports, and proposed bills."⁴⁵⁸ These materials are "part of the 'whole work done by [legislators],' so they must be 'free for publication to all.'"⁴⁵⁹ The Court expressly declined to defer to the Copyright Office's judgment that the annotations were copyrightable.⁴⁶⁰ It emphasized that Georgia (and implicitly OSG) "undersells their practical significance," for under that view, ordinary people would only get "economy-class" access to Georgia law, while those who paid for "first-class" service could learn, for example, that the Georgia Supreme Court had subsequently held certain provisions unconstitutional.⁴⁶¹

The first of the Court's importation/first sale decisions, *Quality King*, relied heavily on the Court's 1908 decision in *Bobbs-Merrill Co. v. Straus*, which held that a publisher's exclusive right to vend copies of its books was exhausted after

⁴⁵⁴ For example, the Court has cited *Eldred* sixteen times, *Harper & Row* eight times, and *Feist* six times in the copyright cases.

⁴⁵⁵ All of the divergent decisions cited to the Court's precedents. *CCNV* relied on decisions interpreting the word "employee"; *Dowling* was influenced by *Harper & Row*; *Kirtsaeng II* relied on *Fogerty*; *Aereo* cited two pre-1976 Act precedents interpreting copyright's public performance right while acknowledging that Congress had legislatively overruled them; *Star Athletica* discussed *Mazer v. Stein*, 347 U.S. 210 (1954).

⁴⁵⁶ *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888); *Wheaton v. Peters*, 33 U.S. 591 (1834).

⁴⁵⁷ *Banks*, 128 U.S. at 253, quoted in *Georgia*, 590 U.S. at 266 (alterations in original). OSG's brief, by contrast, relied on *Callaghan*, which upheld a claim of copyright in a judicial reporter's headnotes. OSG *Georgia* Brief, *supra* note 207, at 5-6. OSG thought that under *Callaghan*, Georgia's annotations were copyrightable. *Id.*

⁴⁵⁸ *Georgia*, 590 U.S. at 266.

⁴⁵⁹ *Id.*, quoting *Banks*, 128 U.S. at 253 (alterations in original).

⁴⁶⁰ *Id.* at 271-72. The Court noted that "the Compendium is a non-binding administrative manual that at most merits deference under [*Skidmore*]. That means we must follow it only to the extent it has the 'power to persuade.' Because our precedents answer the question before us, we find any competing guidance in the Compendium unpersuasive." *Id.* at 271 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁴⁶¹ *Id.* at 1512. OSG did not consider this implication of its position.

a first sale of the books to the public.⁴⁶² *Quality King* also noted a parallel between its ruling and the “gray market” goods issue addressed in *K-Mart Corp. v. Cartier, Inc.* on the lawfulness of importing goods bearing a U.S.-protected trademark without permission from the trademark owner.⁴⁶³

In *Kirtsaeng I*, the principal precedent on which the Court drew was, of course, *Quality King*, whose statutory link among §§ 601(a), 106(3), and 109(a) supported a ruling that the first sale rule applied to copies of works manufactured abroad, not just those manufactured in the U.S., shipped abroad, and imported back into the U.S.⁴⁶⁴ *Kirtsaeng I* also cited approvingly to *Bobbs-Merrill*, noting the “impeccable historic pedigree” of the first sale doctrine.⁴⁶⁵

Despite MGM’s and OSG’s vigorous efforts in *Grokster* to persuade the Court to overturn or significantly curtail the reach of the *Sony* safe harbor, the Court reaffirmed a broad understanding of the *Sony* safe harbor for technologies capable of substantial non-infringing uses.⁴⁶⁶ The Court also declined to quantify how substantial non-infringing uses must be to qualify for the *Sony* safe harbor.

As in *Sony*, the Court in *Grokster* drew upon a useful patent law doctrine, this time, its active inducement of infringement rule. In keeping with *Sony* and some patent precedents, *Grokster* opined that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.”⁴⁶⁷ Nor should inducement liability apply to “ordinary acts incident to product distribution, such as offering customers technical support or product updates.”⁴⁶⁸ Only when a defendant engaged in “purposeful, culpable expression and conduct” inducing others to infringe should liability be imposed.⁴⁶⁹ The Court offered assurance that this rule would not “compromise legitimate commerce or discourage innovation having a lawful promise.”⁴⁷⁰

The principal precedent on which the Court relied in *Google* was *Campbell*, which it cited and quoted multiple times.⁴⁷¹ Although both Oracle and OSG characterized Google’s use of the Java API as non-transformative because the

⁴⁶² 210 U.S. 339, 349-50 (1908), discussed in *Quality King*, 523 U.S. at 140-44. OSG gave *Bobbs-Merrill* only a “see also” citation. OSG *Quality King* brief, *supra* note 153, at 3.

⁴⁶³ 486 U.S. 281, 285-86 (1988), cited in *Quality King*, 523 U.S. at 153. OSG mentioned *K-Mart* but suggested that copyright and trademark law were too different for *K-Mart* to be pertinent. OSG *Quality King* Brief, *supra* note 153, at 28 n.17.

⁴⁶⁴ *Kirtsaeng*, 568 U.S. at 524-25.

⁴⁶⁵ *Id.* at 538.

⁴⁶⁶ See *supra* text accompanying notes 260-62.

⁴⁶⁷ *Id.* at 937. The Court cited several patent inducement decisions. *Id.* at 936-37.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* OSG’s brief devoted only three pages to inducement as an alternative liability theory, citing only copyright and trademark cases. OSG *Grokster* Brief, *supra* note 248, at 27-30.

⁴⁷¹ 510 U.S. 569 (1994), cited in *Google*, 593 U.S. at 29-30 (discussing transformativeness), at 35 (discussing types of harms cognizable in copyright cases). *Google* also cited or quoted from seven other of the Court’s copyright decisions.

declarations were being used for the same intrinsic purpose as the original,⁴⁷² the Court concluded that Google's use was transformative because of the creativity it had enabled, which was "consistent with that creative 'progress,' that is the basic constitutional objective of copyright itself."⁴⁷³ The Court also quoted *Feist* for the proposition that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"⁴⁷⁴

Stare decisis may be "in peril" in some cases before the Court,⁴⁷⁵ but so far, the Court has adhered to this principle in its copyright decisions. It remains to be seen whether this will continue to be true now that Justices Breyer and Ginsburg are no longer sitting on the Court and the six conservatives are charting a new course for the Court's jurisprudence.

IV. CONCLUDING THOUGHTS

One can conceptualize the Solicitor General's role in relation to the Court in three ways. The institutional view assumes that "the Solicitor General's responsibility is to the federal government as an institution, not to the President or the Administration that he serves."⁴⁷⁶ The administrative view regards the Solicitor General as a high-level official in the Executive Branch who does and should carry out the President's agenda.⁴⁷⁷ A third view is that the Solicitor General is a "tenth Justice" and posits that the Solicitor General "should simply take the position that reflects his best judgment of what the law is, just as he would if he were literally the tenth Justice."⁴⁷⁸

Based on OSG's participation in the substantive interpretation copyright cases thus far,⁴⁷⁹ OSG would seem to be carrying out a generally high protectionist copyright agenda.

⁴⁷² OSG *Google II* Brief, *supra* note 98, at 28.

⁴⁷³ *Google*, 593 U.S. at 30.

⁴⁷⁴ *Id.* (quoting *Feist*, 499 U.S. at 349-50 (quoting U.S. CONST. art. I, § 8, cl.8)). *Feist* in turn cited *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), which in turn, cited *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) for this proposition.

⁴⁷⁵ See, e.g., Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 40 (2022).

⁴⁷⁶ David R. Strauss, *The Solicitor General and the Interests of the United States*, 61 L. CONTEMP. PROBS. 165, 166 (1998).

⁴⁷⁷ *Id.* at 167.

⁴⁷⁸ *Id.* at 168. Strauss thinks that the administrative view is correct in principle, but the institutional view should be followed in practice. *Id.* at 170. OSG risks losing credibility with the Justices if they view OSG as pushing the Administration's political agenda. *Id.* at 173.

⁴⁷⁹ Some commentators have speculated that OSG has less influence now than in the past, in part because of the rise of the elite Supreme Court bar which has lessened OSG's advantage, Epstein & Posner, *supra* note 1, at 834-35, or because the Justices are now more skeptical of and less deferential to executive branch officials, Gugliuzza & Koivula, *supra* note 4, at 467, 506.

To take a more institutional view of the role, the Solicitor General should consider consulting more broadly within the government when copyright issues are before the Court. It is understandable that OSG lawyers would listen closely to and heed the views expressed by lawyers from the Copyright Office with deep expertise in copyright law. However, perhaps OSG should consider giving less weight to those views, given that the Court has so often rejected them in substantive interpretation cases. Depending on the kind of case before the Court, lawyers or officials from the Federal Trade Commission, Federal Communications Commission, the Antitrust Division, the Office of Science and Technology Policy, the Council of Economic Advisors, the National Telecommunications and Information Administration, the National Institutes of Health, the Department of Education, the Institute of Museum and Library Services, the Smithsonian museums, and the Librarian of Congress, among others, may have different perspectives than the Copyright Office, the USPTO, USTR, and IPEC. While OSG routinely solicits views from multiple agencies, perhaps it should make more concerted efforts to understand how the Court's resolution of copyright disputes will affect the broader public served by various agencies, not just IP agencies' views.

If the Solicitor General wants to be more like a tenth Justice, she might consider taking into account a more comprehensive range of perspectives about the likely impacts of the Court's copyright rulings. For example, OSG could pay more attention to and address concerns raised in amicus briefs supporting lower protection positions.⁴⁸⁰ OSG might also reflect on the Court's frequent invocations of the constitutional purposes of copyright as intended to promote the public good.

OSG should also consider limiting its amicus filings to copyright cases in which the government has a direct and meaningful federal interest.⁴⁸¹ OSG has, in the past, had a narrower conception of federal interests justifying amicus filings. Rex Lee, a Reagan-era Solicitor General, thought the government should generally not file as amicus except in cases in which the Court's resolution of private litigant disputes would affect the government's enforcement of federal statutes (such as employment discrimination laws).⁴⁸² As recently as the mid-

⁴⁸⁰ For example, the overwhelming majority of software industry amici supported Google, not Oracle, because a ruling in Oracle's favor would harm competition and ongoing innovation. Yet, OSG's briefs ignored widespread industry concerns.

⁴⁸¹ 28 U.S.C. § 518(a) authorizes the Solicitor General to participate in cases before the Court to represent the federal government's interests.

⁴⁸² See, e.g., Rex E. Lee, *Lawyering for the Government: Politics, Polemics, & Principle*, 47 OHIO ST. L.J. 595, 599 (1986). Lee thought it would be a mistake for the government to file too many amicus briefs. *Id.* See also Lincoln Caplan, Response, *The SG's Indefensible Advantage: A Comment on The Loudest Voice at the Supreme Court*, 74 VAND. L. REV. EN BANC 97, 124 (2021) (expressing concern about OSG participation in absence of meaningful federal interest at stake); Solimine, *supra* note 1, at 1205-06 (explaining why OSG should limit amicus filings to cases in which the U.S. has a meaningful federal interest).

2000s, one empirical study reported that OSG had confined amicus filings to cases in which the United States had a direct and important interest.⁴⁸³ More recently, OSG has tended to file amicus briefs whenever the case calls for interpreting a federal statute.⁴⁸⁴ OSG now participates in a very high percentage of cases before the Court.⁴⁸⁵ But what interests does the federal government actually have in private litigant copyright cases?

OSG amicus filings are certainly justified when the government has a direct interest in how the Court resolves a copyright question, as in *Fourth Estate*, *Star Athletica*, and *CCNV*, which involved Copyright Office registration standards and procedures.⁴⁸⁶ OSG's amicus involvement is also appropriate when the Court's resolution of a copyright issue has implications for U.S. foreign relations or enforcement actions by federal agencies (such as border and customs officials),⁴⁸⁷ as OSG asserted in *Quality King* and *Kirtsaeng I*.⁴⁸⁸ In addition, OSG may want to defend the constitutionality of 1976 Act provisions when private litigants challenge them.⁴⁸⁹ Of course, OSG should file amicus briefs when the Court calls for OSG's views, as it did in *Costco* and *Google*.⁴⁹⁰

The interests of the United States are, however, more attenuated, ambiguous, indirect, or possibly nonexistent in most private litigant copyright cases calling for interpretation of substantive provisions of the 1976 Act, as in *Warhol*, *Aereo*, and *Grokster*, and remedial cases, such as *Kirtsaeng II*.⁴⁹¹ As Professor Solimine

⁴⁸³ Cordray & Cordray, *supra* note 1, at 1371.

⁴⁸⁴ Interview with Jeffrey Wall, November 3, 2022 (expressing his impression).

⁴⁸⁵ Gugliuzza & Koivula, *supra* note 4, at 464 (estimated at 80%). See also Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 684 (2021) (over the past 20 years, OSG participated in 69-88% of cases before the Court). OSG has participated in oral argument in 89% of the Court's copyright cases since 2000 and all but one since 2005.

⁴⁸⁶ Even though *CCNV* and *Star Athletica* involved issues administered by the Copyright Office, the Court did not defer to OSG's views. Nor did it defer to OSG in *Georgia* despite the Office's interpretation of the government edicts doctrine in its Compendium.

⁴⁸⁷ Solimine, *supra* note 1, at 1217-19 (discussing implications of a Court ruling on foreign relations as a justification for OSG to file an amicus brief).

⁴⁸⁸ The Court was unpersuaded by OSG's federal interest arguments despite the cases having implications for foreign relations and border control agencies.

⁴⁸⁹ OSG did not, however, file an amicus brief in *Allen* (Eleventh Amendment challenge to an amendment of the 1976 Act), nor in *Feltner* (Seventh Amendment right to jury trial for statutory damage awards).

⁴⁹⁰ Anders, *supra* note 436, at 9 (OSG always files a brief when the Court calls for its views). The Court has, however, issued CVSGs in only three of the twenty-eight private litigant copyright cases that it has heard since the 1980s, although it issued CVSGs in a few cases that the Court chose not to hear. See *supra* notes 45 and 50.

⁴⁹¹ Two other examples are *Rimini*, 586 U.S. 334 (recovery of "full costs" of litigation) and *Petrella*, 572 U.S. 663 (laches defenses to infringement claims). The lack of a meaningful federal interest may explain why OSG did not file in *Tasini*, 533 U.S. 483 (database republication of articles infringed freelancer copyrights). But the Copyright

observed, “[i]t may be unfair to the disfavored litigant for the Solicitor General to weigh in as amicus unless the interests of the United States are directly implicated.”⁴⁹² The government’s endorsement of one litigant’s position may be an unfair thumb on the scale, aiding one litigant and disadvantaging the other.

It is equally—or perhaps even more—unfair for OSG to participate so regularly in oral arguments in private litigant cases. One recent commentary observed that OSG oral arguments in such cases “distorts the adversarial process by taking argument time from one of the parties and allocating it elsewhere.”⁴⁹³ This participation may, moreover, “undermine or even derail” arguments made by the party OSG supports, as well as harm the due process rights of the other party who may not have an opportunity to respond to OSG’s arguments.⁴⁹⁴ Perhaps the Court should apply the same standards when considering OSG’s motions to participate as amicus in oral arguments as it would to other amici seeking this privilege.⁴⁹⁵ While OSG has an interest as an employer in providing opportunities for its lawyers to argue before the Court,⁴⁹⁶ this should not come at the expense of due process rights and fairness principles to the parties whose cases the Court has decided to hear.

Insofar as the Justices perceive an imbalance in OSG’s arguments or consider OSG to lack particular expertise in common law interpretations of copyright issues, they may defer less to OSG’s views on substantive interpretations of copyright law in private litigant cases.⁴⁹⁷ Given that OSG’s participation in substantive interpretation copyright cases has met with mixed success, OSG should perhaps consider being more selective about whether to file amicus briefs when the interests of the United States are unclear, attenuated, or frankly nonexistent.⁴⁹⁸

Office had wanted OSG to file an amicus brief in that case. *See Regulatory Activities, Policy Assistance & Litigation*, 104 COPYRIGHT OFF. ANN. REP. (2001).

⁴⁹² *See Solimine, supra* note 1, at 1188. *See also* Cordray & Cordray, *supra* note 1, at 1370.

⁴⁹³ Covert & Wang, *supra* note 485, at 684.

⁴⁹⁴ *Id.* at 737. *Warhol* is a case in point. The litigants were fighting about whether Warhol’s silkscreens of Prince created in 1984 were transformative, but OSG’s brief asserted that the only issue before the Court was whether a magazine’s use of a Warhol print in 2017 was transformative. OSG *Warhol* Brief, *supra* note 358, at (I).

⁴⁹⁵ Covert & Wang, *supra* note 485, at 686-88.

⁴⁹⁶ *Id.* at 721. Former OSG lawyers whom I interviewed emphasized that providing assistants with opportunities to argue before the Court is important to that Office’s ability to retain them.

⁴⁹⁷ Solimine, *supra* note 1, at 1210 (linking the degree of judicial deference with OSG’s articulation of federal interests at stake).

⁴⁹⁸ *Id.* at 1206 (proposing a rebuttable presumption against OSG filings when federal interests are unclear or mixed).

APPENDIX

Table 1: U.S. Supreme Court Copyright Cases, 1/1/78 to 6/30/24

		Opinion issued	Circuit split	OSG party	Private litigation	CVSG	OSG amicus	CO amicus
1	Sony v. Universal 1984	x			x			
2	Mills Music v. Snyder 1985	x			x			
3	Harper & Row v. Nation 1985	x			x			
4	Dowling v. U.S. 1985	x	x	x				
5	CCNV v. Reid 1989	x	x		x		x	x
6	Stewart v. Abend 1990	x	x		x			x
7	Feist v. Rural 1991	x			x			
8	Fogerty v. Fantasy 1994	x	x		x			
9	Campbell v. Acuff-Rose 1994	x			x			
10	Lotus v. Borland 1996	4-4 per curiam			x			
11	Quality King v. L'Anza 1998	x	x		x		x	
12	Feltner v. Columbia 1998	x			x			
13	NY Times v. Tasini 2001	x			x			
14	Eldred v. Ashcroft 2003	x		x				
15	MGM v. Grokster 2005	x			x		x	
16	Reed Elsevier v. Muchnick 2010	x			x		x	
17	Costco v. Omega 2010	4-4 per curiam			x	x	x*	
18	Golan v. Holder 2012	x		x				
19	Kirtsaeng v. John Wiley I 2013	x	x		x		x	
20	Petrella v. MGM 2014	x	x		x		x	
21	ABC v. Aereo 2014	x			x		x	
22	Kirtsaeng v. John Wiley II 2016	x	x		x		x	
23	Star Athletica v. Varsity Brands 2017	x	x		x		x	

Table 1 (continued): U.S. Supreme Court Copyright Cases, 1/1/78 to 6/30/24

		Opinion issued	Circuit split	OSG party	Private litigation	CVSG	OSG amicus	CO amicus
24	Fourth Estate v. Wall-Street.com 2019	x	x		x	x	x	
25	Rimini Street v. Oracle 2019	x	x		x		x	
26	Allen v. Cooper 2020	x			x			
27	Georgia v. Public.Resource.Org 2020	x			x		x	
28	Google v. Oracle 2021	x			x	xx**	xx**	
29	Unicolors v. H&M 2022	x			x		x	
30	AWF v. Goldsmith 2023	x			x		x	
31	Warner Chappell v. Nealy 2024	x	x		x		x	

* Submitted amicus brief at petition for certiorari stage only

** Includes Google's first petition for certiorari, which the Court denied (2015)

Table 2: U.S. Supreme Court Copyright Case Outcomes, 1/1/78 to 6/30/2024

		Lower court	SCOTUS Outcome	OSG recom'd/argued
1	Sony v. Universal 1984	9th Cir.	reversed	--
2	Mills Music v. Snyder 1985	2d Cir.	reversed	--
3	Harper & Row v. Nation 1985	2d Cir.	reversed, remanded	--
4	Dowling v. U.S. 1985 [US Respondent]	9th Cir.	reversed	affirm
5	CCNV v. Reid 1989	D.C. Cir.	affirmed	affirm
6	Stewart v. Abend 1990	9th Cir.	affirmed	--*
7	Feist v. Rural 1991	10th Cir.	reversed	--
8	Fogerty v. Fantasy 1994	9th Cir.	reversed, remanded	--
9	Campbell v. Acuff-Rose 1994	6th Cir.	reversed, remanded	--
10	Lotus v. Borland 1996	1st Cir.	affirmed [per curiam]	--
11	Quality King v. L'Anza 1998	9th Cir.	reversed	affirm
12	Feltner v. Columbia 1998	9th Cir.	reversed, remanded	--
13	NY Times v. Tasini 2001	2d Cir.	affirmed	--
14	Eldred v. Ashcroft 2003 [US Respondent]	D.C. Cir.	affirmed	affirm
15	MGM v. Grokster 2005	9th Cir.	vacated, remanded	reverse, remand
16	Reed Elsevier v. Muchnick 2010	2d Cir.	reversed, remanded	vacate, remand
17	Costco v. Omega 2010	9th Cir.	affirmed [per curiam]	affirm
18	Golan v. Holder 2012 [US Respondent]	10th Cir.	affirmed	affirm
19	Kirtsaeng v. John Wiley I 2013	2d Cir.	reversed, remanded	affirm
20	Petrella v. MGM 2014	9th Cir.	reversed, remanded	reverse
21	ABC v. Aereo 2014	2d Cir.	reversed, remanded	reverse
22	Kirtsaeng v. John Wiley II 2016	2d Cir.	vacated, remanded	affirm
23	Star Athletica v. Varsity Brands 2017	6th Cir.	affirmed	affirm
24	Fourth Estate v. Wall-Street.com 2019	11th Cir.	affirmed	affirm
25	Rimini Street v. Oracle 2019	9th Cir.	reversed, remanded	reverse, remand

Table 2 (continued): U.S. Supreme Court Copyright Case Outcomes,
1/1/78 to 6/30/2024

		Lower court	SCOTUS Outcome	OSG recom'd/argued
26	Allen v. Cooper 2020	4th Cir.	affirmed	--
27	Georgia v. Public.Resource.Org 2020	11th Cir.	affirmed	reverse
28	Google v. Oracle 2021	Fed. Cir.	reversed, remanded	affirm
29	Unicolors v. H&M 2022	9th Cir.	vacated, remanded	vacate, remand
30	AWF v. Goldsmith 2023	2d Cir.	affirmed	affirm
31	Warner Chappell v. Nealy 2024	11th Cir.	affirmed	affirm

* The Copyright Office filed an amicus brief, which OSG did not join, urging affirmance.

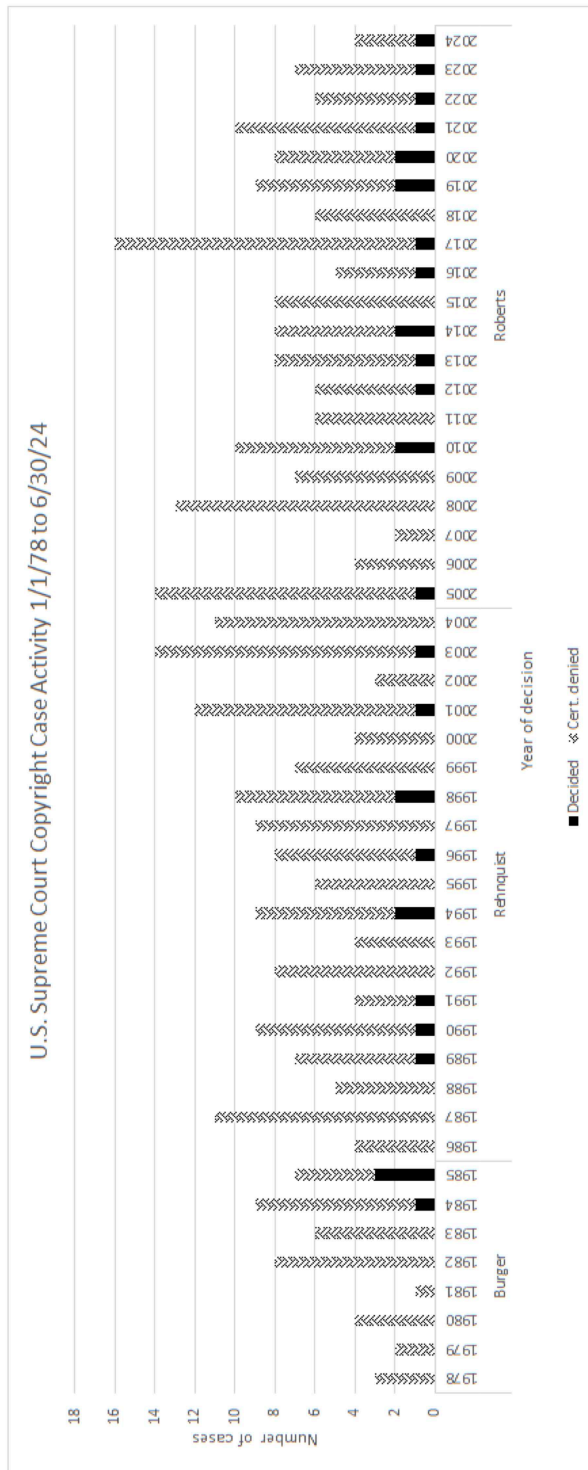


Fig. 1

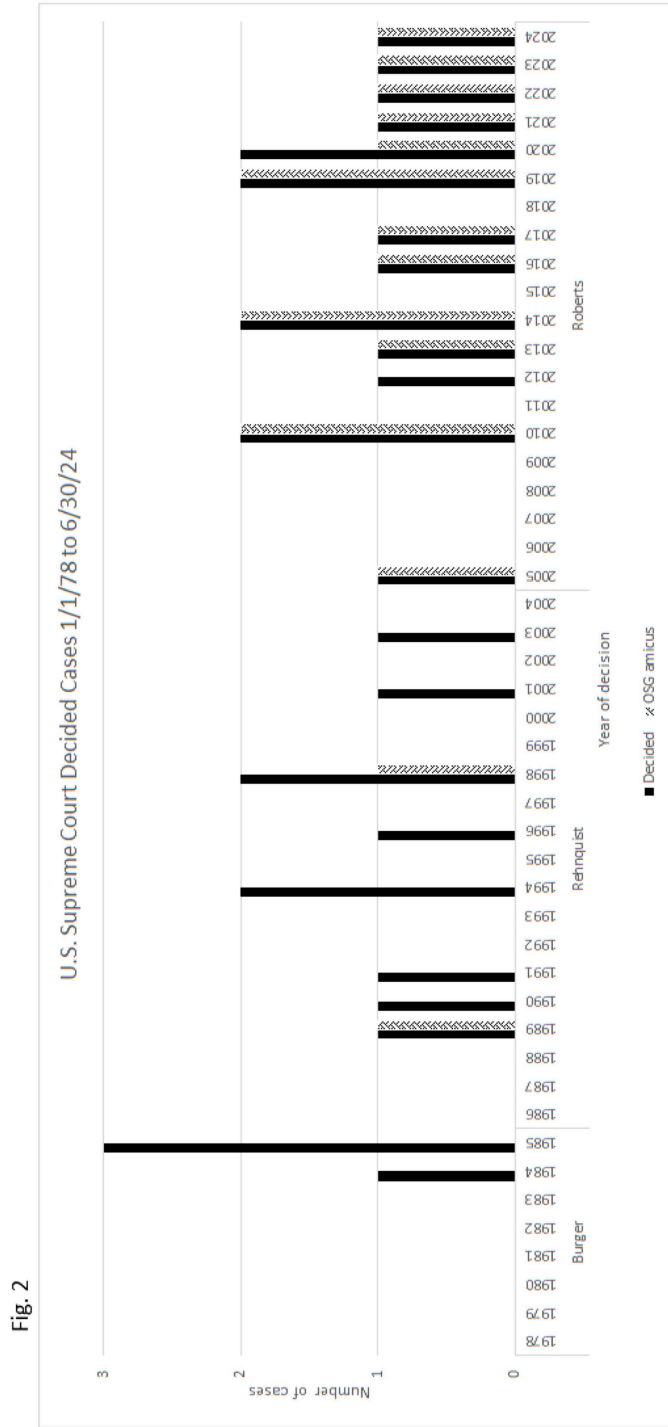


Fig. 2