RESPONSE

A RIFF ON THE SUPREME COURT'S COPYRIGHT CASES COMPARED TO ITS PATENT CASES[†]

PAMELA SAMUELSON[*]

CONTENTS

[†] An invited Response to Paul Gugliuzza & Mark A. Lemley, *Myths and Reality of Patent Law at the Supreme Court*, 104 B.U. L. REV. 891 (2024).

[*] Richard M. Sherman Distinguished Professor of Law, Berkeley Law School. I wish to thank Paul Gugliuzza and Mark Lemley for helpful suggestions on this Response and Kathryn Hashimoto for excellent research support.

INTRODUCTION

Inspired by Paul Gugliuzza and Mark Lemley's study of the Supreme Court's patent cases between 1982 and 2021,[1] this Response offers a similar, if more condensed, review of the Court's copyright cases during an overlapping period. While there are no counterpart copyright myths to test against realities in the Court's copyright cases, we can discern some notable similarities and differences from the Court's patent cases.

Gugliuzza and Lemley adopted 1982 as the starting point for their study, as this was the year that the Court of Appeals for the Federal Circuit ("CAFC") began its work as the appellate court with exclusive appellate jurisdiction over patent cases.[2] A comparable marker for a study of the Court's copyright cases is the effective date of the Copyright Act of 1976 (the "1976 Act"): January 1, 1978 (although the Court did not decide its first copyright case in this period until 1984).[3] The 1976 Act significantly changed copyright law, broadening the categories of eligible subject matters, simplifying its exclusive rights, adjusting the durations of rights, and codifying fair use and numerous other exceptions and limitations, among other things.[4] This short study of the Court's copyright cases runs through 2023.[5]

The first noteworthy difference between the Court's copyright and patent cases is that the Justices heard far fewer copyright (30) than patent (62) cases during these time periods. This Response considers how circuit court decisions fared with the Court in the copyright cases, how clusters of the Court's copyright cases compare to those in the Gugliuzza-Lemley study, what eras might be found in the Court's copyright cases, how to assess the importance of the Court's copyright cases, and how well the Solicitor General did in copyright cases compared with patent cases.

I. HOW CIRCUIT COURT DECISIONS FARED

Although the CAFC may have been the Court's favorite punching bag in the patent cases,[6] the Ninth Circuit took over that role in the copyright cases. The

[1] Paul R. Gugliuzza & Mark A. Lemley, *Myths and Reality of Patent Law at the Supreme Court*, 104 B.U. L. REV. 891 (2024).

[2] *Id.* at 895-96.

[3] *See, e.g.*, Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 865-81 (1977). The Court's first copyright case after the effective date of the 1976 Act was *Sony Corp. America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[4] *See, e.g.*, Gorman, *supra* note 3, at 865, 868-81 (discussing novel features of the 1976 Act).

[5] For a more extensive discussion of the Court's copyright cases and the Solicitor General's role in them, see Pamela Samuelson, The Solicitor General's Mixed Record of Success in Supreme Court Copyright Cases (Mar. 7, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381579).

[6] Gugliuzza & Lemley, *supra* note 1, at 948-50 (discussing CAFC as punching bag). Only one of the Court's thirty copyright cases between 1978 and 2023 reviewed a CAFC decision. That case was *Google LLC v. Oracle America., Inc.*, 141 S. Ct. 1183 (2021), in which the

Court notably reversed all but one of that circuit's eleven rulings.[7] The outcomes of the Court's copyright decisions favored putative infringers in six of the ten decided cases from the Ninth Circuit.[8] The Second Circuit's copyright cases fared somewhat better than the Ninth's, as the Court reversed rulings in six of the eight copyright cases hailing from that appeals court.[9] Most of the Court's reversals of Second Circuit decisions favored copyright owners.[10] The other eleven cases came from seven circuit courts. Those courts collectively did much better with the Court, for it affirmed their rulings in eight cases and reversed in only three.[11] The outcomes in all but three of these cases favored putative infringers over copyright owner interests.[12]

Court reversed a CAFC ruling that Google had made an unfair use of certain parts of the Java application program interface ("API") in which Oracle owned intellectual property rights. Although *Google* originated in a district court within the Ninth Circuit, the CAFC had appellate jurisdiction over the case because Oracle's initial lawsuit included both patent and copyright infringement claims. *See* Oracle Am., Inc. v. Google Inc., 886 F.3d 1179, 1185, 1190 (Fed. Cir. 2018) (citing 28 U.S.C. § 1295(a)(1)), *rev'd & remanded*, 141 S. Ct. at 1209.

[7] *See infra* Table 1. The only Ninth Circuit ruling the Court affirmed was Stewart v. Abend, 495 U.S. 207, 211 (1990) (concerning ownership of copyright renewal term and derivative work rights). Although the Court technically affirmed the Ninth Circuit in *Costco Wholesale Corp. v. Omega S.A.*, 562 U.S. 40 (2010) (per curiam), because of a 4-4 split, the Court later reversed a Second Circuit ruling on the same issue in *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 528 (2013) [*Kirtsaeng I*], so *Costco* seems better understood as yet another reversal.

[8] *See infra* Table 1. Among the notable reversals were Quality King Distribs., Inc. v. L'Anza Rsch. Int'l, Inc., 523 U.S. 135, 153-54 (1998) (reversing Ninth Circuit ruling in favor of L'Anza's copyright infringement claim for importing bottles of shampoo bearing copyrighted labels); Fogerty v. Fantasy, Inc., 510 U.S. 517, 521 (1994) (reversing Ninth Circuit ruling denying attorney fees to defendant who prevailed in infringement litigation); *Sony*, 464 U.S. at 420-421 (1985) (reversing Ninth Circuit ruling that Sony was contributorily liable for infringement for selling video tape recorders enabling copying of television programs).

[9] *See infra* Table 1. The affirmances were *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1282-87 (2023) (holding commercial license of visual art based on a photograph was nontransformative and affirming ruling against fair use defense) and *New York Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (holding newspaper did not have the right to license freelance articles to database provider under § 201(c)'s collective work revision right).

[10] Notable reversals include Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 435 (2014) (reversing Second Circuit ruling that Aereo had not publicly performed broadcast television programs transmitted to subscribers); *Kirtsaeng I*, 568 U.S. at 533 (reversing Second Circuit ruling that unauthorized importation of books into the U.S. was unlawful); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 541 (1985) (reversing Second Circuit ruling that magazine had made fair use of expression from an unpublished memoir).

[11] *See infra* Table 1. One of the affirmances was the result of a 4-4 split vote in *Lotus Development Corp. v. Borland International*, Inc., 516 U.S. 233, 233 (1996) (per curiam).

[12] *See infra* Table 1. The three cases favoring copyright owners' interests were Star Athletica L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017) (affirming Sixth Circuit ruling that plaintiff's design of cheerleading uniforms was eligible for copyright protection); Golan v. Holder, 565 U.S. 302, 335-36 (2012) (affirming Tenth Circuit ruling that a

II. CLUSTERING COPYRIGHT CASES

The Court's copyright cases, like its patent cases in the Gugliuzza-Lemley study, can meaningfully be clustered in groups.[13] Nine were common law copyright cases.[14] Another nine interpreted substantive provisions of the 1976 Act.[15] In keeping with the Gugliuzza-Lemley terminology, the Court's common law and substantive statutory interpretation cases can aptly be characterized as "core" copyright cases.[16] Eight were procedure or remedy cases.[17] Four cases challenged the constitutionality of some aspects of the 1976 Act as amended.[18]

III. DIFFERENT "ERAS" OF COPYRIGHT CASES

The copyright cases, like the patent cases, can also be divided into eras,[19] albeit based on different criteria than in the Gugliuzza-Lemley study.[20] Because Justices John Paul Stevens and Sandra Day O'Connor were the most active authors of the Court's copyright decisions between 1978 and 2000 (with three majority opinions each),[21] it is fair to designate this period as the Stevens-

Congressional act restoring copyright to certain foreign works did not violate Constitution); Eldred v. Ashcroft, 537 U.S. 186, 194 (2003) (affirming D.C. Circuit and upholding as constitutional Congressional amendment to extend copyright term limits).

[13] *See* Gugliuzza & Lemley, *supra* note 1, at 895-96.

[14] *See infra* Table 2. In keeping with Gugliuzza and Lemley's terminology, I count copyright doctrines that rely primarily on a rich caselaw history as common law, even though they technically hinge on (sparse) statutes. *Cf.* Gugliuzza & Lemley, supra note 1, at 919-20. Five of these common law cases involved fair use defenses, two raised secondary liability rules (one of which also was a fair use case), one addressed copyright's originality standard, one considered copyrightable subject matter, and one focused on scope of protection issues.

[15] *See infra* Table 2. Three were first sale cases; one interpreted the public performance right; one addressed the standard for determining whether pictorial, graphic, or sculptural ("PGS") works are eligible for copyrights, one interpreted the work-for-hire rule under which employers are authors and owners of copyright of works prepared by employees within the scope of employment, and one assessed the collective work revision right. Two others called for interpretation of some highly technical provisions of the 1976 Act.

[16] Gugliuzza & Lemley, *supra* note 1, at 896.

[17] *See infra* Table 2. Three of the four procedure cases involved interpretations of copyright registration rules. A fourth concerned the viability of laches defenses to infringement claims. Two of the four remedies cases concerned the availability of attorney fees when defendants win infringement cases. One focused on recoverable costs and the fourth focused on criminal penalties.

[18] *See infra* Table 2. Three cases challenged the constitutionality of Congressional amendments to the 1976 Act, while the fourth ruled that copyright litigants have a constitutional right to a jury trial on statutory damage awards. I have omitted from this study three cases that involved copyright industry litigants that did not call for the interpretation of any provisions of the 1976 Act, which might have been "peripheral" in the Gugliuzza-Lemley lexicon. *See* Gugliuzza & Lemley, *supra* note 1, at 896.

[19] *See infra* Table 3.

[20] Gugliuzza & Lemley, *supra* note 1, at 900-01.

[21] Justice Stevens authored majority opinions in *Sony*, *Mills Music*, and *Quality King*. Justice O'Connor authored opinions for the Court in *Harper & Row*, *Stewart v. Abend*, and

O'Connor era. During that era, the Court granted cert in twelve cases and issued opinions in eleven.[22] All but two of the eleven opinions reversed lower court rulings. The outcomes in all but two of the Stevens-O'Connor era cases favored defendants.

Although Justices Stephen Breyer and Ruth Bader Ginsburg joined the Court in 1994, they did not become active as authors of copyright opinions until after 2000.[23] The Breyer-Ginsburg era commenced in 2001 and ended with the retirement of Justice Breyer in 2022.[24] During that era, the Court took eighteen cases and issued opinions in seventeen.[25] Justice Ginsburg authored five of the Court's majority opinions in this era and Justice Breyer authored four.[26] These two justices also filed numerous concurrences and dissents, sometimes agreeing with one another,[27] but more often disagreeing.[28] Nine of the Court's copyright decisions in the Breyer-Ginsburg era resulted in reversals and eight in affirmances. The outcomes of these decisions favored copyright owners more often than putative infringers.

Feist. *See infra* Table 3. Of these cases, Justices Stevens and O'Connor held opposing views on the merits of a copyright claim only once, in *Stewart v. Abend*, 495 U.S. 207 (1990).

[22] *See infra* Table 3, *infra*. The Court split 4-4 in *Lotus*. Justice Stevens did not take part in this case. 513 U.S. 233 (1996).

[23] An exception is Justice Ginsburg's short concurrence in *Quality King* interpreting the first sale limitation on copyright's exclusive importation right. Quality King Distribs., Inc. v. L'Anza Rsch. Int'l, Inc., 523 U.S. 135, 154 (1998) (Ginsburg, J., concurring).

[24] Sadly, Justice Ginsburg died in office in September 2020. For the sake of simplicity, I include *Warhol v. Goldsmith* in the Breyer-Ginsburg era as he was still on the Court when it granted cert in that case. Justices Sotomayor and Kagan may well take over the copyright mantle in the future, with Sotomayor as the Ginsburg-like copyright conservative and Kagan as the Breyer-like liberal.

[25] *See infra* Table 3. The Court split 4-4 in *Costco* (Justice Kagan did not take part).

[26] *See infra* Table 3. Justice Ginsburg authored opinions for the Court in *Tasini*, *Eldred*, *Golan*, *Petrella*, and *Fourth Estate*. Justice Breyer wrote majority opinions in *Kirtsaeng I*, *Aereo*, *Google v. Oracle*, and *Unicolors*.

[27] The Justices agreed with one another in Georgia v. PublicResource.Org., 140 S. Ct. 1498, 1522 (2020) (Ginsburg, J., dissenting); Allen v. Cooper, 140 S. Ct. 994, 1008 (2020) (Breyer, J., concurring in the judgment); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 171 (2010) (Ginsburg, J., concurring in the judgment). Justice Breyer joined Justice Ginsburg's dissent in *Georgia* and concurrence in the judgment in *Reed Elsevier*, and she joined his concurrence in the judgment in *Allen*.

[28] Both Justices concurred in Metro-Goldwyn-Mayer Studios Inc. v. Grokster concerning secondary liability for copyright infringement, although they expressed quite different views on MGM's contributory infringement claims. 545 U.S. 913, 942 (2005) (Ginsburg J., concurring); *id.* at 949 (Breyer, J., concurring). They disagreed in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 425 (2017) (Ginsburg, J., concurring in the judgment); *id.* at 439 (Breyer, J., dissenting). Justice Breyer dissented from Justice Ginsburg's majority opinions in *Petrella*, *Eldred*, and *Golan*; he also joined Justice Stevens' dissents to Justice Ginsburg's majority opinions in *Tasini* and *Eldred*. She dissented from his majority opinion in *Kirtsaeng I*. *See infra* Table 3.

It is remarkable that during both the Stevens-O'Connor and Breyer-Ginsburg eras, those Justices wrote at least half of the Court's copyright opinions (not counting the 4-4 split cases). None of the Justices compiled a similar record in the Court's patent cases.[29]

IV. CITATION METRICS

The Gugliuzza-Lemley study's metric for the relative importance of the Court's patent cases was citation counts in subsequent court decisions.[30] By that metric, the Court's most important copyright cases would be: *Fogerty v. Fantasy, Inc.*,[31] which held that defendants who prevail in infringement cases should be able to get attorney fee awards without showing bad faith by plaintiffs; *Feist v. Rural Publications, Inc.*,[32] which held that white pages listings of telephone directories were unprotectable by copyright law because they lacked a modicum of creative originality; *Reed Elsevier, Inc. v. Muchnick*,[33] which held that courts have subject matter jurisdiction over copyright claims of freelance writers who neglected to register their copyrights, but who nevertheless could participate in class action settlements; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,[34] which held that developers of peer-to-peer file-sharing technologies could be held liable for actively inducing infringement; and *Petrella v. Metro-Goldwyn-Mayer, Inc.*,[35] which held that laches is not a complete defense to infringement claims.

Feist and *Grokster* were common law copyright cases. *Fogerty* was a remedies case, *Reed Elsevier* a jurisdiction case (although it too affected available remedies),[36] and *Petrella* a procedure case (although the Court opined that laches might affect the availability of equitable remedies).[37] *Feist* and

[29] *See, e.g.*, Gugliuzza & Lemley, *supra* note 1, at 937, 961-62 app. B.

[30] *Id.* at 921.

[31] 510 U.S. 517 (1994) (4,708 total case citations; 157 average citations per year). I computed all case citation statistics using Westlaw's case citation count as of January 24, 2024, compiling case citation data through December 31, 2023. Additionally, because the Court took only half as many copyright as patent cases in roughly the same time frame, this study focuses on the top five cases rather than the top ten. *See* Gugliuzza & Lemley, *supra* note 1, at 933.

[32] 499 U.S. 340 (1991) (4,741 total case citations; 144 average citations per year).

[33] 559 U.S. 154 (2010) (1,293 total case citations; 92 average citations per year). Some of the Court's copyright cases were cited more than *Reed Elsevier*, but had lower average annual citations. Through 12/31/23, *Harper & Row* has been cited 1,476 times in subsequent court cases, but its annual average citation rate is 38; *CCNV* has been cited 1,379 times, but its annual average was 39; *Sony* was cited 1,204 times in subsequent cases, but its annual average is 31.

[34] 545 U.S. 913 (2005) (cited in subsequent court cases 1,069 times through 12/31/23, an average of 56 times per year).

[35] 572 U.S. 663 (2014) (cited in subsequent court cases 550 times through 12/31/23, an average of 55 times per year).

[36] 559 U.S. at 158 n.1.

[37] 572 U.S. at 686-88.

Fogerty were Stevens-O'Connor era decisions, while *Muchnick*, *Grokster*, and *Petrella* were Breyer-Ginsburg era cases.

Virtually all copyright scholars would agree that *Feist* and *Grokster* were among the Court's most important copyright decisions rendered between 1978 and 2023. Very few would likely regard *Fogerty*, *Reed Elsevier*, or *Petrella* as among the Court's most important copyright cases.[38]

An alternative—and to my mind, a more accurate—metric for gauging the importance of the Court's copyright cases is citation counts in law review articles. By that metric, *Feist* was the Court's most important copyright case.[39] The second most important would be *Sony Corp. of America v. Universal City Studios*, *Inc.*, which held that private noncommercial time-shift copying of broadcast programs was fair use and selling video tape recording devices was not contributory infringement because they had substantial non-infringing uses.[40] The third would be *Campbell v. Acuff-Rose Music, Inc.*, which held that Campbell's rap parody of a popular song could qualify as a fair use. [41] A fourth would be *Eldred v. Ashcroft*, which upheld the constitutionality of Congress' twenty-year extension of terms of existing copyrights.[42] The fifth would be *Harper & Row, Publishers, Inc. v. Nation Enterprises*, which reversed a Second Circuit ruling that a magazine's publication of some excerpts from a former President's unpublished memoir was fair use.[43] These law review citation counts match up quite well with what most copyright scholars would regard as the Court's most important copyright cases. After those five, the law review citation counts for the Court's copyright decisions fall off rather sharply.[44]

[38] It is understandable that *Fogerty* would be much cited, as courts are often faced with requests for attorney fee awards in copyright cases. The frequency of citations to *Reed Elsevier* is quite surprising, as it involves a highly technical subject matter jurisdiction issue which rarely arises in copyright cases. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[C] (2023) ("[I]t is hard to imagine that the direct results of *Reed Elsevier v. Muchnick* will reverberate widely.").

[39] Law review articles cited *Feist* 4,522 times, with an annual average of 137 citations. As with case citations, I computed all law review citation statistics using Westlaw's law review citation count as of January 23, 2024, compiling law review data through December 31, 2023. *See infra* Table 4.

[40] 464 U.S. 417 (1984) (cited in 4,714 law review articles for an annual average of 118 times as of 1/23/24).

[41] 510 U.S. 569 (1994) (cited in 3,319 law review articles for an annual average of 107 times as of 1/23/24).

[42] 537 U.S. 186 (2003) (cited in 2,351 law review articles for an annual average of 107 times as of 1/23/24).

[43] 471 U.S. 539 (1985) (cited in 3,803 law review articles for an annual average of 95 times as of 1/23/24).

[44] The next most frequently cited of the Court's copyright decisions in law reviews was *Grokster*, with a total of 1,635 citations and an annual average of 86 cites (through 12/31/23). Only two other cases, *CCNV* and *Stewart v. Abend*, garnered more than 1,000 total law review citations, but their average annual citations were 40 and 31, respectively (through 12/31/23). *See infra* Table 4.

The Court decided four of these five cases in the Stevens-O'Connor era, and all but *Eldred* were common law copyright cases. The Court's most recent common law fair use rulings, *Andy Warhol Foundation for the Visual Arts v. Goldsmith*[45] and *Google LLC v. Oracle America, Inc*.,[46] will likely soon join the pantheon of highly cited Supreme Court copyright opinions in coming years.

V. OSG'S ROLE IN THE COPYRIGHT CASES

The Office of the Solicitor General ("OSG") participated in the Court's copyright cases less often than in its patent cases,[47] especially during the Stevens-O'Connor era. During that era, the Court did not call for the views of the Solicitor General ("CVSG") in any of the copyright cases on which it granted cert.[48] OSG filed briefs in three of the Court's twelve copyright cases in that era. In one case, OSG represented the United States.[49] The Court granted cert in that case over OSG's opposition and then ruled against it on the merits.[50] The Court also rejected OSG's amicus brief recommendation that the Court affirm a holding that importing of bottles of shampoo bearing copyrighted labels constituted infringement.[51] In a third case, the Court agreed with OSG that it should affirm a D.C. Circuit ruling on copyright's work-for-hire doctrine,[52] although the Court disagreed with OSG's proposed standard for interpreting that doctrine.[53]

During the Breyer-Ginsburg era, the Court issued CVSG orders in three copyright cases, albeit twice as to one of them. OSG was most successful with the Court in the CVSG cases when asked to recommend whether the Court

[45] 143 S. Ct. 1258. In less than a year, the *Warhol* decision has been cited in 24 law review articles and 24 court decisions.

[46] 141 S.Ct. 1183. In less than three years, *Google* has been cited 172 times in law review articles and 80 times in court decisions.

[47] Gugliuzza & Lemley, *supra* note 1, at 943-44; *See infra* Table 5.

[48] There was one case in the Stevens-O'Connor era in which Court asked OSG to advise it about whether to grant cert in a copyright work-for-hire case. Brief for the United States as Amicus Curiae, Easter Seal Soc'y for Crippled Child. & Adult of La., Inc. v. Playboy Enters., Inc., 484 U.S. 941 (1987) (No. 87-482). OSG acknowledged the existence of a circuit split, but recommended against cert grant, regarding *Easter Seal* as an unsuitable vehicle for resolving the conflict. *Id.* at 8. Soon thereafter the Court granted cert in *CCNV* which presented the same question. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) [CCNV].

[49] Dowling v. United States, 473 U.S. 207 (1985).

[50] *Id.* OSG had urged the Court not to grant Dowling's petition. *Id.* at 228 n.21. The Court overturned Dowling's conviction for interstate transport of stolen goods because that law didn't apply when the offense was copyright infringement. *Id.* at 214-17; *see* Samuelson, *supra* note 5, at 24-26.

[51] Quality King Distribs., Inc. v. L'Anza Rsch. Int'l, Inc., 523 U.S. 135 (1998); *see also* Samuelson, *supra* note 5, at 16-18.

[52] 17 U.S.C. § 201(b) (deeming employers the authors of works created by employees within the scope of their employment).

[53] *CCNV*, 490 U.S. at 739-40 (1989); *see also* Samuelson, *supra* note 5, at 37-39.

should grant a petition calling for an interpretation of copyright registration rules. It first persuaded the Court to grant cert in that case and then to adopt OSG's interpretation of the registration rules.[54] Although the Court initially followed OSG's recommendation in denying a software developer's cert petition, it later granted the developer's second petition, despite OSG's recommendation against the grant.[55] This included granting cert on the issue on which it had initially denied cert.[56] On the merits, the Court rejected OSG's interpretation of the developer's fair use defense based on its reimplementation of computer program interfaces.[57] In a third case, the Court granted a petition concerning copyright's exclusive importation right despite OSG's contrary recommendation.[58] OSG's merits brief supported a watch manufacturer that produced and sold watches bearing a copyrighted design in markets outside of the United States; however, the Court was not able to resolve the issue in this case and split 4-4.[59]

During the Breyer-Ginsburg era, OSG filed briefs on the merits in all but two of the eighteen copyright cases on the Court's docket.[60] OSG had a perfect record as an amicus in the Court's four procedure and jurisdiction cases in that era and in the two constitutional cases in which it was a party.[61] OSG had, however, a mixed record in two remedies cases in that era, as well as in eight "core" copyright cases.[62] Even when the Court followed OSG's recommendation as to which litigant should prevail, the Court's rulings were generally narrower than that for which OSG had argued, or the Court disagreed with OSG's analysis.[63]

---

[54] Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 886-87 (2019) (holding registration has not been "made" until a registration certificate issues).

[55] Brief for the United States as Amicus Curiae at 1, 8, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956); *see also* Samuelson, *supra* note 5, at 10 (discussing the two CVSGs in the *Google* case).

[56] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1195 (2021).

[57] *See* Samuelson, *supra* note 5, at 11-15 (comparing OSG's and the Court's analyses).

[58] Costco Wholesale Corp. v. Omega S.A., 562 U.S. 40 (2010); Samuelson, *supra* note 5, at 18-19.

[59] *Costco*, 562 U.S. at 40; Samuelson, *supra* note 5, at 18-19.

[60] *See infra* Table 5. The two cases in which OSG did not file an amicus brief were *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) and *Allen v. Cooper*, 140 S. Ct. 994 (2020).

[61] *See infra* Table 5. The four procedure/jurisdiction cases were *Reed Elsevier*, *Petrella*, *Fourth Estate*, and *Unicolors*; the two constitutional cases were *Eldred* and *Golan*. *See infra* Table 2.

[62] *See infra* Table 5. The two remedies cases were *Kirtsaeng II* and *Rimini Street* (Court disagreed with OSG in one). The "core" copyright cases in the Breyer-Ginsburg era were *Grokster*, *Costco*, *Kirtsaeng I*, *Aereo*, *Star Athletica*, *Georgia*, *Google*, and *Warhol* (Court disagreed with OSG in four). *See infra* Tables 2-3. I include *Costco* in the disagreement category because OSG recommended affirmance and the Court did not follow OSG's recommendation because of a 4-4 split. Samuelson, *supra* note 5, at 18-19; *see also* discussion *supra* note 7.

[63] *See* Samuelson, *supra* note 5, at 39-42, 48-49.

In the Gugliuzza-Lemley study, OSG had a nearly perfect record on core patent issues and less success as a party.[64] OSG prevailed in two of the three copyright cases in which it was a party,[65] but OSG's overall record on core copyright issues was decidedly mixed. The Court agreed with OSG about which litigant should win in five cases, albeit for different reasons in four of them, and disagreed with OSG on the merits in five others.[66] This suggests the Justices defer less to OSG in copyright than in patent cases, although no firm conclusions can be drawn given that the number of copyright cases in which OSG participated was smaller than its participation in patent cases. The relative rarity of CVSGs in copyright cases compared to the Court's patent cases further suggests that the Justices regard copyright issues as more accessible than patent issues.

CONCLUDING THOUGHTS

Consistent with the conclusion of the Gugliuzza-Lemley study of the Court's patent cases, this Response offers no grand unified theory that explains the Court's interventions in copyright cases. About a third of the Court's copyright cases during the 1978-2023 period sought to resolve circuit splits,[67] but this certainly doesn't explain all of the Court's copyright cases. The common law copyright cases have been more impactful than its other copyright cases. Five of them analyzed copyright's fair use doctrine, while others have assessed standards for technology developer liability for their users' infringements. The most influential of all—*Feist*—interpreted copyright's originality standard. Now that the lions of copyright are no longer on the Court, it will be interesting to see which of the Justices assumes the mantle in future copyright cases[68] and

[64] Gugliuzza & Lemley, *supra* note 1, at 945-46. Gugliuzza and Lemley also discuss OSG's success rate in light of the U.S. Patent and Trademark Office's ("PTO") participation as signatories on OSG briefs in patent cases. *See id.* at 945 n.313. The U.S. Copyright Office, the copyright counterpart to PTO, joined one OSG brief (in *CCNV*) and authored its own brief once (in *Stewart*) during the Stevens-O'Connor era; it signed on to nine briefs filed by OSG during the Breyer-Ginsburg era. *See* Samuelson, *supra* note 5, at 49-51 (discussing the Copyright Office's influence on OSG copyright briefs, but to a lesser extent on the Court).

[65] *See infra* Table 5. The United States was the respondent in *Dowling*, *Eldred*, and *Golan*.

[66] *See infra* Table 5. In addition to the eight "core" cases from the Breyer-Ginsburg era listed in note 62, *supra*, two more "core" copyright cases in the Stevens-O'Connor era were *CCNV* and *Quality King*, for a total of ten cases. The four cases in which the Court disagreed with OSG's analysis while agreeing on outcome were *CCNV*, *Grokster*, *Aereo*, and *Star Athletica*.

[67] The Court identified *Dowling*, *CCNV*, *Stewart*, *Fogerty*, *Quality King*, *Kirtsaeng I* and *II*, *Petrella*, *Star Athletica*, *Fourth Estate*, and *Rimini Street* as circuit split cases. *See* Samuelson, *supra* note 5, at 3-4 nn.10-12.

[68] In the October 2023 Term, the Court has granted cert in one copyright case and is presently considering another; both are similar cases involving procedure/jurisdiction and remedies. Warner Chappell Music, Inc. v. Nealy, No. 22-1078 (U.S. argued Feb. 21, 2024) (considering whether, under the discovery accrual rule, a copyright plaintiff can recover damages more than three years prior to filing a lawsuit); Hearst Newspapers, L.L.C. v.

whether OSG will become more influential in the Court's core copyright cases. Current legal battles regarding trained generative AI models and AI-generated works, for example, may very well work their way up to the Court sooner rather than later.[69]

Martinelli, No. 23-474 (U.S. petition for cert. filed Nov. 2, 2023) (considering whether the discovery rule is applicable under the Copyright Act's statute of limitations).

[69] For a range of views on the copyright claims which will almost certainly get to appellate courts in coming years, see, for example, Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. (forthcoming 2024); Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743 (2021); Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295 (2023); Benjamin L.W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45 (2017); Katherine Lee, A. Feder Cooper & James Grimmelmann, *Talkin' 'Bout AI Generation: Copyright and the Generative-AI Supply Chain*, J. COPYRIGHT SOC'Y (forthcoming 2024) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4523551).

APPENDIX

Table 1. By Circuit.

Case	Circuit	SCOTUS Outcome	Favored Party/ Interest
Sony v. Universal (1984)	9th	Reversed	Accused infringer
Dowling v. United States (1985)	9th	Reversed	Accused infringer
Stewart v. Abend (1990)	9th	Affirmed	Copyright owner
Fogerty v. Fantasy (1994)	9th	Reversed	Accused infringer
Quality King v. L'Anza (1998)	9th	Reversed	Accused infringer
Feltner v. Columbia (1998)	9th	Reversed, remanded	Accused infringer
MGM v. Grokster (2005)	9th	Vacated, remanded	Copyright owner
Costco v. Omega (2010)	9th	(4-4)	Copyright owner**
Petrella v. MGM (2014)	9th	Reversed, remanded	Copyright owner
Rimini Street v. Oracle (2019)	9th	Reversed, remanded	Accused infringer
Unicolors v. H&M (2022)	9th	Vacated, remanded	Copyright owner
Mills Music v. Snyder (1985)	2d	Reversed	Accused infringer
Harper & Row v. Nation (1985)	2d	Reversed, remanded	Copyright owner
NY Times v. Tasini (2001)	2d	Affirmed	Copyright owner
Reed Elsevier v. Muchnick (2010)	2d	Reversed, remanded	Mixed
Kirtsaeng v. John Wiley I (2013)	2d	Vacated, remanded	Accused infringer
ABC v. Aereo (2014)	2d	Reversed, remanded	Copyright owner
Kirtsaeng v. John Wiley II (2016)	2d	Reversed, remanded	Mixed

** Issue ultimately resolved (in *Kirtsaeng I*) in favor of Accused Infringer. *See* discussion *supra*, note 7.

Case	Circuit	SCOTUS Outcome	Favored Party/ Interest
Andy Warhol Found. v. Goldsmith (2023)	2d	Affirmed	Copyright owner
Lotus v. Borland (1996)	1st	(4-4)	Accused infringer
Allen v. Cooper (2020)	4th	Affirmed	Accused infringer
Campbell v. Acuff-Rose (1994)	6th	Reversed, remanded	Accused infringer
Star Athletica v. Varsity Brands (2017)	6th	Affirmed	Copyright owner
Feist v. Rural (1991)	10th	Reversed	Accused infringer
Golan v. Holder (2012)	10th	Affirmed	Copyright owner
Fourth Estate v. Wall-Street.com (2019)	11th	Affirmed	Accused infringer
Georgia v. Public. Resource.Org (2020)	11th	Affirmed	Accused infringer
CCNV v. Reid (1989)	D.C.	Affirmed	Accused infringer
Eldred v. Ashcroft (2003)	D.C.	Affirmed	Copyright owner
Google v. Oracle (2021)	Fed.	Reversed, remanded	Accused infringer

Table 2. By Type.

Common Law Copyright	Harper & Row v. Nation (1985): fair use
	Campbell v. Acuff-Rose (1994): fair use
	Google v. Oracle (2021): fair use
	Andy Warhol Found. v. Goldsmith (2023): fair use
	Feist v. Rural (1991): originality
	Lotus v. Borland (1996): scope of protection
	Sony v. Universal (1984): secondary liability/fair use
	MGM v. Grokster (2005): secondary liability
	Georgia v. Public.Resource.Org (2020): subject matter
Statutory Interpretation	ABC v. Aereo (2014): public performance right
	Quality King v. L'Anza (1998): first sale
	Costco v. Omega (2010): first sale
	Kirtsaeng v. John Wiley I (2013): first sale
	NY Times v. Tasini (2001): revisions in collective works
	Stewart v. Abend (1990): renewal interest
	Star Athletica v. Varsity Brands (2017): PGS works
	Mills Music v. Snyder (1985): termination of transfer
	CCNV v. Reid (1989): work for hire
Constitutional	Feltner v. Columbia (1998): right to jury trial
	Eldred v. Ashcroft (2003): Congressional amendment
	Golan v. Holder (2012): Congressional amendment
	Allen v. Cooper (2020): Congressional amendment
Remedies	Dowling v. U.S. (1985): criminal penalties
	Fogerty v. Fantasy (1994): attorney fees
	Kirtsaeng v. John Wiley II (2016): attorney fees
	Rimini Street v. Oracle (2019): recoverable costs
Procedure/ Jurisdiction	Reed Elsevier v. Muchnick (2010): registration/jurisdiction
	Petrella v. MGM (2014): laches defenses
	Fourth Estate v. Wall-Street.com (2019): registration
	Unicolors v. H&M (2022): registration

Table 3. By Era.

	Case	Majority Opinion	Separate Opinion	Affirm or Reverse	Favor Owner or User
Stevens/O' Connor	Sony v. Universal (1984)	Stevens	Blackmun (dissent)	Reversed	User
	Mills Music v. Snyder (1985)	Stevens	White (dissent)	Reversed	User
	Harper & Row v. Nation (1985)	O'Connor	Brennan (dissent)	Reversed	Owner
	Dowling v. U.S. (1985)	Blackmun	Powell (dissent)	Reversed	User
	CCNV v. Reid (1989)	Marshall		Affirmed	User
	Stewart v. Abend (1990)	O'Connor	White (concur in judgment); Stevens (dissent)	Affirmed	Owner
	Feist v. Rural (1991)	O'Connor	Blackmun (concur in judgment)	Reversed	User
	Fogerty v. Fantasy (1994)	Rehnquist	Thomas (concur in judgment)	Reversed	User
	Campbell v. Acuff-Rose (1994)	Souter	Kennedy (concur)	Reversed	User
	Lotus v. Borland (1996)	Per curiam		4-4	User

	Case	Majority Opinion	Separate Opinion	Affirm or Reverse	Favor Owner or User
	Quality King v. L'Anza (1998)	Stevens	Ginsburg (concur)	Reversed	User
	Feltner v. Columbia (1998)	Thomas	Scalia (concur in judgment)	Reversed	User
Breyer/Ginsburg	N.Y. Times v. Tasini (2001)	Ginsburg	Stevens (dissent)	Affirmed	Owner
	Eldred v. Ashcroft (2003)	Ginsburg	Stevens (dissent)	Affirmed	Owner
	MGM v. Grokster (2005)	Souter	Ginsburg (concur); Breyer (concur)	Reversed	Owner
	Reed Elsevier v. Muchnick (2010)	Thomas	Ginsburg (concur in part, concur in judgment)	Reversed	Mixed
	Costco v. Omega (2010)	per curiam		4-4	[Owner][**]
	Golan v. Holder (2012)	Ginsburg	Breyer (dissent)	Affirmed	Owner

[**] Issue ultimately resolved (in Kirtsaeng I) in favor of User.

	Case	Majority Opinion	Separate Opinion	Affirm or Reverse	Favor Owner or User
	Kirtsaeng v. John Wiley I (2013)	Breyer	Kagan (concur); Ginsburg (dissent)	Reversed	User
	Petrella v. MGM (2014)	Ginsburg	Breyer (dissent)	Reversed	Owner
	ABC v. Aereo (2014)	Breyer	Scalia (dissent)	Reversed	Owner
	Kirtsaeng v. John Wiley II (2016)	Kagan		Reversed	Mixed
	Star Athletica v. Varsity Brands (2017)	Thomas	Ginsburg (concur in judgment); Breyer (dissent)	Affirmed	Owner
	Fourth Estate v. Wall-Street.com (2019)	Ginsburg		Affirmed	User
	Rimini Street v. Oracle (2019)	Kavanaugh		Reversed	User
	Allen v. Cooper (2020)	Kagan	Thomas (concur in part, concur in judgment); Breyer (concur in judgment)	Affirmed	User

	Case	**Majority Opinion**	**Separate Opinion**	**Affirm or Reverse**	**Favor Owner or User**
	Georgia v. Public. Resource. Org (2020)	Roberts	Thomas (dissent); Ginsburg (dissent)	Affirmed	User
	Google v. Oracle (2021)	Breyer	Thomas (dissent)	Reversed	User
	Unicolors v. H&M (2022)	Breyer	Thomas (dissent)	Reversed	Owner
	Andy Warhol Found. v. Goldsmith (2023)	Sotomayor	Gorsuch (concur); Kagan (dissent)	Affirmed	Owner

Table 4. Cited by Law Review Articles (on Westlaw, through 12/31/2023)

Case	Total	Average per Year
Feist v. Rural (1991)	4522	137
Sony v. Universal (1984)	4714	118
Campbell v. Acuff-Rose (1994)	3319	107
Eldred v. Ashcroft (2003)	2351	107
Harper & Row v. Nation (1985)	3803	95
MGM v. Grokster (2005)	1635	86
Google v. Oracle (2021)	172	57
Golan v. Holder (2012)	524	40
CCNV v. Reid (1989)	1406	40
Star Athletica v. Varsity (2017)	264	38
Kirtsaeng v. John Wiley I (2013)	390	35
Stewart v. Abend (1990)	1056	31
ABC v. Aereo (2014)	300	30
Allen v. Cooper (2020)	98	25
Andy Warhol Found. v. Goldsmith (2023)	24	24
Fourth Estate v. Wall-Street.com (2018)	113	23
N.Y. Times v. Tasini (2001)	505	22
Reed Elsevier v. Muchnick (2010)	268	19
Fogerty v. Fantasy (1994)	570	19
Petrella v. MGM (2014)	187	19
Georgia v. Public.Re-source.Org (2020)	69	17
Quality King v. L'anza (1998)	403	16
Lotus v. Borland (1996)	394	14
Feltner v. Columbia (1998)	338	13
Dowling v. U.S. (1985)	363	9
Rimini St. v. Oracle (2019)	45	9
Kirtsaeng v. John Wiley II (2016)	67	8
Costco v. Omega (2010)	105	8
Unicolors v. H&M (2022)	15	8
Mills Music v. Snyder (1985)	188	5

Table 5. Participation of Solicitor General's Office ("OSG")

		Petition stage			Merits stage		Notes
		CVSG	**OSG position**	**SCOTUS outcome**	**OSG position**	**SCOTUS outcome**	
Stevens/O'Connor	Sony v. Universal (1984)		—	—	—	—	
	Mills Music v. Snyder (1985)		—	—	—	—	
	Harper & Row v. Nation (1985)		—	—	—	—	
	Dowling v. U.S. (1985)		Opp'n	Granted	Affirm	Reversed	U.S. Respondent
	CCNV v. Reid (1989)		—	—	Affirm	Affirmed	Disagreed with OSG analysis
	Stewart v. Abend (1990)		—	—	—	—	
	Feist v. Rural (1991)		—	—	—	—	
	Fogerty v. Fantasy (1994)		—	—	—	—	
	Campbell v. Acuff-Rose (1994)		—	—	—	—	

		Petition stage			Merits stage		Notes
		CVSG	**OSG position**	**SCOTUS outcome**	**OSG position**	**SCOTUS outcome**	
	Lotus v. Borland (1996)		—	—	—	—	
	Quality King v. L'Anza (1998)		—	—	Affirm	Reversed	
	Feltner v. Columbia (1998)		—	—	—	—	
Breyer/Ginsburg	NY Times v. Tasini (2001)		—	—	—	—	
	Eldred v. Ashcroft (2003)		Opp'n	Granted	Affirm	Affirmed	U.S. Respondent
	MGM v. Grokster (2005)		—	—	Reverse	Vacated	Disagreed with OSG analysis
	Reed Elsevier v. Muchnick (2010)		—	—	Vacate	Reversed	
	Costco v. Omega (2010)	✓	Deny	Granted	Affirm	4-4	
	Golan v. Holder (2012)		Opp'n	Granted	Affirm	Affirmed	U.S. Respondent
	Kirtsaeng v. John Wiley I (2013)		—	—	Affirm	Reversed	

		Petition stage			Merits stage		Notes
		CVSG	**OSG position**	**SCOTUS outcome**	**OSG position**	**SCOTUS outcome**	
	Petrella v. MGM (2014)		—	—	Reverse	Reversed	
	ABC v. Aereo (2014)		—	—	Reverse	Reversed	Disagreed with OSG analysis
	Kirtsaeng v. John Wiley II (2016)		—	—	Affirm	Vacated	
	Star Athletica v. Varsity Brands (2017)		—	—	Affirm	Affirmed	Disagreed with OSG analysis
	Fourth Estate v. Wall-Street.com (2019)	✓	Grant	Granted	Affirm	Affirmed	
	Rimini Street v. Oracle (2019)		—	—	Reverse	Reversed	
	Allen v. Cooper (2020)		—	—	—	—	
	Georgia v. Public. Resource. Org (2020)		—	—	Reverse	Affirmed	
	Google v. Oracle (2021)	✓	Deny	Granted	Affirm	Reversed	Also CVSG in 2015
	Unicolors v. H&M (2022)		—	—	Vacate	Vacated	

		Petition stage			Merits stage		Notes
		CVSG	**OSG position**	**SCOTUS outcome**	**OSG position**	**SCOTUS outcome**	
	Andy Warhol Found. v. Goldsmith (2023)		—	—	Affirm	Affirmed	