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FAIR USE OF SOFTWARE APIs

Google LLC v. Oracle America, Inc., Case No. 18-956, U.S. Supreme Court

On April 5, 2021, the Supreme Court issued its long-awaited ruling on copyright infringement dispute between tech giants Google and Oracle regarding whether the copyright laws can be used to block a competitor from using a company's code in a software Application Programming Interface (API). APIs are widely used software tools that allow applications to more easily communicate with one another by drawing on prewritten instructions. In a 6-2 decision authored by Justice Breyer and focused on the doctrine of fair use, the Court held that Google's copying of the roughly 11,500 lines of code that forms part of an API for Oracle's Java SE computer platform and incorporation of the copied code into Google's Android platform was a fair use under US copyright law.

This case, which initially had been decided in Google's favor but was overturned on appeal by the Federal Circuit, presented two questions to the Court: (1) whether the copied lines of code could be copyrighted and, (2) if so, whether Google's copying of those lines of code was allowed as "fair use" of a copyrighted work. The Court declined to tackle the issue of whether the copied lines of code could be copyrighted, preferring "to decide no more than is necessary to resolve this case," and instead assumed that the copied lines were copyrightable and analyzed

whether Google's use of the copied code constitutes fair use. (Slip Op. at 2).

To guide its analysis, the Court examined each of the four factors for fair use as provided in the Copyright Act, 17 U.S.C. §107: (i) the purpose and character of the use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (iv) the effect of the use upon the potential market for or value of the copyrighted work.

1. First, the Court found that "the nature of the work at issue favors fair use." The Court noted that the copied API code was part of a user interface through which programmers could enter method calls that access prewritten software programs to perform certain tasks. Distinguishing the copied "declaring code" of an API from "implementing code" of a software program, which instructs the computer to actually execute a given task, the Court explained that the "declaring code" of an API, while functional in nature like other computer programs, differs from other types of code in that it combines aspects of both "uncopyrightable ideas (general task division and organization) and [copyrightable] new creative expression (Android's implementing code)". A

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further difference is that the APIs derive their value in large part from the many computer programmers who invest their own time and effort to learn to use the API, thereby encouraging the use of related implementing programs. On balance, the Court concluded that “the nature of the copyrighted work” factor weighs in the direction of fair use, because declaring code like APIs, which combine both functional and expressive aspects, are “further than are most computer programs (such as the implementing code) from the core of copyright” *Id.* at 2-3, 21-24.

2. Analysis of the “purpose and character of the use” depends largely on whether the use of the copied material is transformative, “whether it ‘adds something new, with a further purpose or different character.’” The Court found that Google’s copying of only the portion of code necessary to allow programmers to continue to use familiar method calls but in a different computing environment (smartphones) on a new platform (the Android platform) was transformative and therefore consistent with copyright law. *Id.* at 3, 24-28.

3. The Court also found that the “substantiality” factor favors fair use. The Court noted that the approximately 11,500 lines of declaring code copied represented merely 0.4% of the 2.86 million total lines of API code, and that the copied portion “should be viewed as one small part of the considerably greater whole.” Google copied the code not for its creativity or beauty, but because of programmers’ prior familiarity with the Java API system. The Court

explained that the “substantiality” factor generally favors fair use where, as here, “the amount of copying was tethered to a valid, and transformative, purpose.” *Id.* at 3, 28-30.

4. Finally, the Court also found that the “market effects” factor also favors fair use. The Court reasoned that Google’s new Android smartphone platform is not a market substitute for Java SE and the Java SE’s copyright holder would actually benefit from reimplementation of the API interface into a different market. *Id.* at 3-4, 30-35.

Although the Supreme Court’s ruling focused on the specific code at issue, one can expect an increase in fair use defenses pled by parties accused of copyright infringement. In particular, the copying of existing software code to allow compatibility for a new platform, which the Court saw as a transformative use, may have repercussions on how lower courts assess the “purpose and character of the use” factor. Some commentators are celebrating this decision for supporting the continued development of software that is compatible with other programs and for preventing code developers from extending their monopoly to aspects of the interface to their programs. On the other hand, critics of this ruling are decrying it as an unwarranted attack on the availability of copyright protection for software code. However, the particular facts of this case, which involves API software code that was in many respects a *de facto* industry standard, and the limited copying that was done to establish compatibility, would seem to limit the applicability of this ruling.