



ARE Copyright Alert: Supreme Court Holds Google's Use of Oracle's Java API Packages Constitutes Fair Use Under 17 U.S.C. § 107

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On April 5, 2021, the U.S. Supreme Court finally addressed the longstanding dispute between Google and Oracle over Google's alleged copyright infringement of JAVA's declaring code, which is a type of software code.

In a 6-2 split decision in which Justice Barrett did not participate, the Court (per Justice Breyer) found that Google's literal copying of 11,500 lines of Oracle's code was fair use. The Court declined to address the question as to whether declaring code is capable of copyright protection, although there were numerous statements in the majority opinion to suggest that it does not fit neatly under traditional copyright protection.

Majority Opinion

The majority applied the traditional four factors in its fair use analysis, including "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. However, it considered the factors in non-numerical order.

Starting with the second factor, the nature of the copyrighted work, the Court drew a distinction between the "declaring code" at issue here, which essentially is a set of programming shortcuts, and other more familiar types of code, such as "implementing code" not at issue here. The Court opined that "declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright." *Google LLC v. Oracle America, Inc.*, No. 18-956, slip op. at 24 (U.S. Apr. 5, 2021). That said, the majority declined to analyze whether the declaring code was copyrightable, but just "assumed" that it was.

With this in mind, the Court turned to the first factor and found that Google's use of Oracle's declaring code was transformative, even though it was commercial, since its use of the code created a "different task-related system for a different computing environment (smartphones)." *Id.* at 29. In short, "the 'purpose and character' of Google's copying was transformative—to the point where this factor too weighs in favor of fair use." *Id.* at 27.

The third factor also favored Google, the Court thought, because even though 11,500 lines of code is substantial, "if one considers the entire set of software material in the [] Java API [—i.e.,



2.86 million lines], the quantitative amount copied was small.” Id. at 28.

The fourth and final factor of the fair use analysis examines the effect on the potential market. Under this factor, the Court pointed to evidence of record showing that “Android [is] not a market substitute for Java’s software” and that Oracle would “benefit from the broader use of the Java programming language in a new platform like Android, as it would further expand the network of Java-trained programmers.” Id. at 32.

Given that all four fair use factors favored Google, the Court found that Google’s use of Oracle’s JAVA declaring code was excused from infringement.

Dissent

A sharp dissent by Justice Thomas, joined by Justice Alito, argued that Oracle’s software code was indeed copyrightable and that there was in fact no fair use. In particular, Justice Thomas argued that “[t]he Court wrongly sidesteps the principal question that we were asked to answer: Is declaring code protected by copyright? I would hold that it is.” Id., dissenting slip op. at 4.

Because he would find declaring code to be copyrightable, he thought that the second factor should favor Oracle.

Turning to the fourth factor, Justice Thomas argued that Google’s use was economically devastating to Oracle, since Google’s inclusion of Oracle’s code in its Android operating system, which was provided for free to device manufacturers, directly undercut Oracle’s efforts to license Java to those same device manufacturers.

The third factor also favored Oracle, he argued, since although it is true that Google only copied a small portion of the Java API considered as a whole, it copied substantially all of the declaring code, which is what attracted programmers to Java in the first place, and “made Android a ‘market substitute’ for ‘potentially licensed derivatives’ of Oracle’s Java platform.” Id. at 18.

The only factor that might favor Google, in Justice Thomas’ view, was the first, since commercial uses sometimes are transformative. That said, he argued that “Google’s repurposing of Java code from larger computers to smaller computers” should not be considered transformative. Id. at 16. This alters “the definition of ‘transformative’ and “eviscerates copyright” in the context of declaring code. Id. at 16-17.

Conclusion

Although the long-running dispute between Google and Oracle may soon be ending, its impact on copyright law is likely to be long lasting. In this decision, which purports not to determine the copyrightability of declaring code, the Court set forth an analysis that will feed legal debate and likely be the subject of extensive legal briefing in the years to come. For now, what is crystal



clear is that Google has successfully taken Oracle's code under a theory of fair use.

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