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SUPREME COURT

Google's high court copyright win means 'more claims of fair use,' attorneys say

By Patrick H.J. Hughes

Leading copyright attorneys say the U.S. Supreme Court avoided a potentially difficult question about the copyrightability of computer code when it let Google off the hook for accusations that its use of Oracle's intellectual property violated federal copyright law.

Google LLC v. Oracle America Inc., No. 18-956, 141 S. Ct. 1183 (U.S. Apr. 5, 2021).

In a 6-2 decision, the justices on April 5 declared Google's copying of roughly 11,500 lines of code to be a fair use, but disagreed with Google about how to resolve a question over a fair use defense.

Google had argued that the fact-based nature of the fair use doctrine meant the question should go before a jury, but Justice Stephen Breyer, who wrote for the majority, said the question is a mix of facts and law that, in this case, "primarily involves legal work."

The majority also disagreed with Google about the copyrightability of the code, assuming "purely for argument's sake" that the code "falls within the definition of that which can be copyrighted."



REUTERS/Clay McLachlan

But Google persuaded the justices to find that its use of Oracle's Java source code to create the Android smartphone operating system was fair.

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EXPERT INTERVIEW

Q&A: Art law expert Megan Noh on Andy Warhol's fight over Prince pics

Thomson Reuters interviewed Pryor Cashman LLP partner and Art Law Group Co-Chair Megan Noh to get some insight into how the fair use defense applies to copyright infringement allegations involving visual artworks.

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ATTORNEY REACTIONS

Attorneys not involved in the dispute commented on the effects the decision could have on the software industry.

J. Michael Keyes of Dorsey & Whitney LLP said it was "hard to overstate the significance of this decision."

"We will see more copying, more cases and more claims of fair use," Dorsey & Whitney LLP attorney J. Michael Keyes said.



"The court's decision wiped away a massive claim for damages (many billions) against Google," he said. But that was not the only reason for calling it "the biggest copyright decision in a generation."

It also "will unlock many future arguments and claims regarding the application of fair use to software-related claims," he said.

Keyes predicts an impact from the justices' ruling on how to review fair use questions. "The ultimate question of whether the facts rise to the level of fair use is reviewed de novo," he said. "This means that there will always be room to argue on appeal that the jury or trial judge got it 'wrong.'"

"We will see more copying, more cases and more claims of fair use," he said.

Jason Bloom of Haynes and Boone LLP said, "By avoiding the thorny copyrightability question and focusing on the fair use defense, which is fact-intensive by nature, the court effectively minimized the impact of the decision."

"The court also explicitly stated that it was not modifying its existing fair use precedent," he said. "That being said, I think the opinion will have the effect of making fair use a more viable defense in the software context going forward, especially as applied to declaring code."

'STRONG COPYRIGHT PROTECTION ... WOULD STIFLE INNOVATION'

The Supreme Court explained that Oracle's source code included both declaring code and implementing code, but Google copied only the declaring code — the structure and sequence of the computer language — of the application programming interfaces, or APIs.

Susan Okin Goldsmith of McCarter & English LLP explained that the copying of APIs is so integral to the interoperability of software that the court had to recognize that "giving very strong copyright protection to APIs would stifle innovation."

Jason Bloom of Haynes and Boone LLP said, "I think the opinion will have the effect of making fair use a more viable defense in the software context."



"However, this ruling is also cautionary in that Oracle was in many ways the victim of its own success by making a system that was so widely known as to become a de facto standard available to programmers working on a different class of devices," she said.

Brian Michalek of Saul Ewing Arnstein & Lehr LLP said the court's ruling "potentially paves a path for programmers to have more leeway to borrow portions of other third-party code under appropriate circumstances through the reliance of fair use."

"Programmers have used other entities' APIs in their projects for years before," he said. "This ruling will certainly protect that status quo and serve to likely increase such practices."

Bryan Mechell of Robins Kaplan LLP said the decision could signify a "heightened risk of software license disputes in the industry."

"Oracle was in many ways the victim of its own success," Susan Okin Goldsmith of McCarter & English LLP said.



"Although this ruling appears specific to the API 'declaring code' at issue in the case and 'does not overturn or modify ... earlier cases involving fair use,' it may well inspire increased reliance on fair use arguments in software copyright infringement disputes involving other types of code."

FAIR USE FACTORS

Justice Breyer's opinion recounted the dispute's "complex and lengthy history" going back to 2005, when Google acquired Android Inc. with plans to develop smartphone software.

After unsuccessfully seeking a license to use Java code, Google copied 37 API packages anyway. When confronted during litigation over the issue, Google offered several explanations, including that the code was not copyright protected and, even if it had been, the copying was a fair use.

In evaluating Google's fair use argument, the justices reviewed each of the four "fair use factors" from Section 107 of the Copyright Act, 17 U.S.C.A. § 107.