

## Supreme Court Sides with Google in Decade-Long Copyright Battle Against Oracle

April 8, 2021

On April 5, 2021, the U.S. Supreme Court issued a long-awaited decision in *Google LLC v. Oracle America, Inc.*,<sup>1</sup> holding that Google's copying of certain portions of Oracle's Java SE Application Programming Interface (API) code constituted fair use as a matter of law. While the Court noted that "in reaching this result, the Court does not overturn or modify its earlier cases involving fair use," the Court's decision nonetheless will have significant ramifications for the software industry and, potentially, for copyright holders more broadly.

The Court's decision ends a multibillion-dollar, decade-long legal battle between Google and Oracle over whether the portion of Oracle's API copied by Google was copyrightable and, if so, whether Google's copying was nonetheless a "fair use" of that material under copyright law. While the Court reversed the Federal Circuit's decision on fair use, the Court declined to decide the issue of copyrightability, instead assuming the code was copyrightable "for the sake of argument" in addressing the question of fair use. Although the ultimate ramifications of the Court's decision will not become fully apparent for some time, including until the Court's precedent is interpreted and applied by various lower courts, software developers, copyright holders and legal practitioners can already begin to consider some of the implications, or potential implications, of this highly anticipated decision:

- While the Court's decision may weaken the ability of software developers to fully control their ecosystems and prohibit certain uses of certain highly functional code (such as the declaring code in the Java SE API), it also strengthens the ability of the developer community to make use of that same code in certain contexts, without liability for copyright infringement, for the purpose of cross-platform software integration and the development of new programs and platforms. This result cuts both ways for the software industry and will need to be taken into consideration by participants when they are making development decisions and determining their business models.
- As the Court notes, "the fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world." However, given that context, a majority of the currently constituted Court appears willing to privilege the promotion of technological progress and public benefit over the monopoly rights granted to copyright holders where the balance of the equities arguably favor the former and deferring to the latter would risk "causing creativity-related harms to the public."
- Lastly, although the Court's decision will carry significant precedential weight, the Court made clear that its intention was not to alter its existing jurisprudence on fair use. Moreover, given that fair use is a mixed question of law and fact, stakeholders and practitioners should be careful about drawing any absolute or bright-line rules from the Court's decision. All questions of fair use should continue to be analyzed on a case-by-case basis, and stakeholders and practitioners should be cautious about extrapolating the Court's decision for broad application outside of the software context.

A more detailed discussion of the facts and holding of the *Google v. Oracle* decision is provided below.

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<sup>1</sup> *Google LLC v. Oracle America, Inc.*, 593 U.S. \_\_\_, No. 18-956, slip op. (April 5, 2021).

## Background

The dispute between Oracle and Google centers around the concept of an API, which the Federal Circuit has described as a tool that “allow[s] programmers to use . . . prewritten code to build certain functions into their own programs, rather than write their own code to perform those functions from scratch.”<sup>2</sup> Oracle is the owner of the Java programming language, virtual machine, libraries and associated APIs, having acquired its interest in connection with its 2010 acquisition of Sun Microsystems, Inc. (“Sun”). Java is one of the world’s most popular programming languages, especially for web applications, and is known for its “write once, run anywhere” capability. Google purchased Android, Inc. in 2005 and proceeded to develop its Android operating system, which is most notably now associated with Google smartphones. In 2007, Sun refused to license its Java Standard Edition (“SE”) libraries to Google for use in Android devices based on an interoperability dispute, alleging that Google was not committed to Sun’s open source objectives. In response, Google decided to write its own version of Java SE’s implementing code (i.e., code that actually instructs a machine to perform certain functions) but copied verbatim approximately 11,500 lines of declaring code (i.e., the naming conventions that identify a variable, element or function and allow computer programmers to call upon underlying implementing code to instruct a machine on the tasks to be performed) associated with 37 Java SE API packages. By using this declaring code, which represented only 0.4% of the 2.86 million lines of code in Java SE’s libraries and only about 0.1% of the Android platform’s total codebase, Google enabled “programmers, familiar with Java, to be able easily to work with its new Android platform.”<sup>3</sup>

In 2010, Oracle sued Google on various grounds, including copyright infringement. Over the course of protracted litigation, the lower courts considered (1) whether the copied lines of code from Java SE’s API were copyrightable and (2) if so, whether Google’s copying constituted a permissible “fair use” of that material, freeing Google from copyright liability. The Federal Circuit held that the copied lines of code are copyrightable, and, after a jury later found that Google’s use constituted fair use, the Federal Circuit reversed, concluding that Google’s copying was not fair use as a matter of law. The Supreme Court granted Google’s petition for certiorari to review the Federal Circuit’s determinations as to both copyrightability and fair use.

## Supreme Court Opinion

In a 6-2 decision authored by Justice Breyer,<sup>4</sup> the Court held that Google’s copying of the Java SE API code was fair use as a matter of law. Notably, the Court did not address the legal question of whether or not the copied code was copyrightable but merely assumed, “for argument’s sake, that the entire Sun Java API falls within the definition of that which can be copyrighted.”<sup>5</sup> Integral to the Court’s decision was its analysis of the Copyright Act’s four enumerated fair use factors (which, although not exclusive, are the lens through which courts typically analyze fair use): (1) the purpose and character of the use, (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.<sup>6</sup> On all four factors, the Court found in favor of Google.

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<sup>2</sup> *Oracle America, Inc. v. Google, Inc.*, 750 F. 3d 1339, 1349 (2014).

<sup>3</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 3.

<sup>4</sup> Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch and Kavanaugh joined the majority’s opinion. Justice Thomas filed a dissenting opinion in which Justice Alito joined. Justice Barrett took no part in the consideration or decision of the case.

<sup>5</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 15.

<sup>6</sup> See 17 U.S.C. § 107.

- Regarding the purpose and character of the use, the Court focused on whether or not Google's use of the declaring code was transformative and gave less weight to the commercial nature of the use. In the Court's judgment, the purpose of Google's use of the Java SE API declaring code was to create new products, expand the use and usefulness of Android-based smartphones, and offer programmers a highly creative and innovative tool for a smartphone environment. According to the Court, Google used the copied API code in order "to create a new platform that could be readily used by programmers," and "its use was consistent with that creative 'progress' that is the basic constitutional objective of copyright itself."<sup>7</sup> Given this and other facts from the underlying lower court proceedings, the Court found this factor weighed in favor of fair use.
- Regarding the nature of the copyrighted work, the Court focused on the distinction between declaring code and implementing code. Here, the Court noted, Google wrote its own implementing code and only copied declaring code from the Java API. The Court roughly analogized such declaring code to "file cabinets, drawers, and files" and viewed Google's implementing code as Google's "new creative expression." The Court avoided determining whether declaring code was itself copyrightable, instead noting that, despite declaring code being part of a computer program, which has been held to be copyrightable, "some works are closer to the core of copyright than others,"<sup>8</sup> and finding that the nature of the copyrighted work here pointed in the direction of fair use.
- Regarding the amount and substantiality of the portion used, the Court focused its attention on the several million lines of code that Google did *not* copy. The Court noted that the copied declaring code of the Java SE API is inseparably bound to task-implementing lines of code that Google did not copy but chose to rewrite (in a manner that did not constitute copyright infringement). Moreover, Google copied such lines of declaring code because of their functional purpose to call such implementing code, so that programmers could use their knowledge and experience with the Java SE API to write new programs for smartphones on the Android platform. The Court also noted that this copied code constituted only 0.4% of the total 2.86 million lines of code in the Java SE API and disagreed with the Federal Circuit's conclusion that Google could have achieved its Java-compatibility objective by copying only 170 lines of necessary code instead of 11,500 lines of code. Such a conclusion, in the Court's opinion, would view Google's "legitimate objectives too narrowly."<sup>9</sup> For these reasons, the Court found that the "substantiality" factor also weighed in favor of fair use.
- Lastly, regarding market impact, the Court noted that it considered Oracle's potential loss of revenue but also the public benefits the copying will likely produce. The Court noted evidence from the lower court trials in favor of Google that "Sun was poorly positioned to succeed in the mobile phone market"<sup>10</sup> regardless of Android's platform and that the Android and Java SE systems were two distinct markets, the former for smartphones and the latter for laptops and desktops. The Court also noted evidence from trial that Google's copying was highly profitable but expressed doubt as to Oracle's entitlement to such profits. Most notable was the Court's conclusion that "[g]iven programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public."<sup>11</sup> In summary, the Court

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<sup>7</sup> *Oracle*, 750 F. 3d, at 1354.

<sup>8</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 24 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>9</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 30.

<sup>10</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 31.

determined that “[t]he uncertain nature of Sun’s ability to compete in Android’s market place, the sources of its lost revenue, and the risk of creativity-related harms to the public, when taken together, convince that this fourth factor—market effects—also weighs in favor of fair use.”<sup>12</sup>

Justice Thomas (dissenting) disagreed with the majority on all four factors. First, Justice Thomas admonished the Court for not analyzing the copyrightability of the declaring code, which he claimed “tainted” the Court’s analysis of the nature of the copyrighted work. Second, Justice Thomas disagreed with the majority regarding Google’s purpose of use since Google directly copied the code for commercial purposes, and, in his view, the majority opinion conflates the concepts of “transformative use” with “derivative use.” Third, he argued that if the majority’s analysis separates declaring code from implementing code, then the analysis of the portion of the code used should be how much declaring code Google copied relative to the total amount of declaring code, not relative to the total amount of code in the Java SE API. Here, such copying, in his opinion, was both qualitatively and quantitatively substantial. Finally, as far as market effect, he argued that Oracle’s potential market for its code was effectively “ruined” by Google’s copying, as Oracle’s license value with each of Amazon and Samsung fell by 97.5%, and before Google’s copying, almost all mobile phones licensed the Java platform.

The Supreme Court’s opinion may be found [here](#).

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<sup>11</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 34.

<sup>12</sup> *Google LLC v. Oracle America, Inc.*, slip op. at 35.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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