

April 8, 2021

U.S. Supreme Court Upholds “Fair Use” of Copyrighted Software

In a closely watched decision with potentially far-reaching commercial repercussions, [Google LLC v. Oracle America, Inc.](#), the U.S. Supreme Court held by a 6-2 majority that Google’s copying of a portion of Oracle’s JAVA SE software constituted “fair use” and consequently did not infringe Oracle’s copyright.

The decision will give comfort to software developers, while its expanded interpretation of “fair use” may cause some concern for businesses heavily dependent on copyright protection. However, we consider the more [strident denunciations](#) of this decision to be unduly negative. Copyright law and the “fair use” exception in particular seek to balance competing interests: allowing creators to profit from their original works, while not stifling creativity and innovation. We believe it is likely that the Court’s opinion will be limited to the particular type of software at issue, “declaring” code, the component of application programming interfaces (or API) that allows software to call on prewritten computing functions (so-called “implementing” code) to facilitate interoperability between programming environments. As a general matter, copyright protects expression, not functionality, and in the case of declaring code, the boundary is unclear. While for purposes of its opinion the Court assumed the declaring code at issue was protected by copyright, the nature of the code clearly factored in the Court’s analysis. The historical circumstances of the alleged violation were also unusual: Google had begun using the JAVA code of Sun Microsystems before Oracle acquired Sun, and the evidence showed that Sun intended that the declaring code would be widely adopted by the programming community while Sun would maintain as proprietary its version of the implementing code. Also relevant to the analysis was Google’s transformative use of the JAVA declaring code in the creation of Google’s Android operating system, as a competitive alternative to Apple’s IOS platform. Given the massive Android industry that has developed, it is unsurprising that the Court decided not to find Google in violation and upend that fount of productive creativity.

The Court held that three of the four nonexclusive factors specified for consideration in the Copyright Act weighed in favor of a finding of fair use: (1) the purpose and character of the use (the Court noted that Google, at great cost and effort, wrote its own implementing code specifically to work on mobile devices for which Oracle’s original implementing code was not suited); (2) the nature of the copyrighted work; and (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole (the declaring code that Google copied constituted less than half of one percent of the JAVA code). The fourth factor—the effect of the use on the potential market for, or value of, the copyrighted work—may have favored Oracle’s position but was found not to override the other three considerations.

While the Supreme Court’s ruling here may not itself significantly impact M&A, [IP issues will only grow in importance in all deals](#), as code and data become more and more central in every aspect of the economy and all of our lives.

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