

Google v. Oracle: Fair Use and the Seventh Amendment

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On August 7, 2020, Google and Oracle submitted their final written arguments to the Supreme Court regarding their decade-long copyright battle over the source code animating the Android platform. Now, we focus on the second question presented to the Supreme Court: whether Google’s copying of Oracle’s Java source code is a non-infringing fair use.

Recall that in [December 2019](#) we introduced “the copyright lawsuit of the decade.” In [March 2020](#), we covered the first of two questions presented to the Supreme Court: whether Java software interfaces are protected by copyright. Before we could address the second question presented, however, the Supreme Court delayed oral arguments on the matter to the October 2020 term due to the COVID-19 pandemic. The Supreme Court also requested that Google and Oracle submit supplemental briefs addressing the standard of review relating to the fair use defense—i.e., whether the Federal Circuit gave the proper deference to the jury’s finding of fair use when it reviewed it *de novo* and reversed it.

Below, we untangle the substantive and procedural issues that make this second question presented as important as the first.

Background

Fair use is a defense to copyright infringement. It recognizes that because certain uses of copyright-protected works are beneficial to society, copyright owners’ rights should give way to such beneficial uses. Classic fair use examples are uses of copyrighted materials for educational purposes, news reporting, criticism, or those that transform the work and build upon it to create something new.

Here, the question going to fair use relates to Google's copying of "declaring code" from Oracle's popular Java programming language. As detailed in our earlier posts, declaring code is a short snippet of code that a programmer can use to call upon implementing code, which in turn performs a specified function. This allows programmers to bypass the need to program each function from scratch. When designing Android, Google developed its own implementing code, but paired it with declaring code that it copied verbatim from Oracle. As such, when a developer uses Oracle's declaring code in Android, Android performs the function mandated by that code, but uses Google's own implementing code to do so.

In 2016, a 10-person jury in the Northern District of California found that Google's use of declaring code was a fair use. Unhappy with the verdict, Oracle appealed the decision to the Federal Circuit. In 2018, reviewing the jury's finding *de novo*, the Federal Circuit found that, as a matter of law, the fair use defense did not shield Google's use of Oracle's declaring code and overturned the jury verdict and remanded the case. Google petitioned the Supreme Court, which granted *certiorari* in November 2019.

In an unusual move, the Supreme Court on May 4, 2020, asked Google and Oracle to submit supplemental letter briefs addressing the standard of review appropriate for the fair use issue. This suggests that the Supreme Court may decide that by reviewing the jury's finding of fair use *de novo*, the Federal Circuit applied the incorrect standard of review.

Google's Fair Use Defense

Fair use is a statutory defense to copyright infringement. 17 U.S.C. § 107 provides four non-exclusive factors to be considered for a fair use defense: (1) the purpose and character of the use, including whether the use is commercial and/or transformative; (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 on the potential market for or value of the copyrighted work. It is undisputed that Google copied the relevant portions of Oracle's source code verbatim, and did so to create Android, a commercial product. The jury and trial court nonetheless found that Google's use of declaring code in Android was transformative, minimal, and ultimately, a non-infringing fair use. But on appeal, the Federal Circuit determined that Google's use was non-transformative and substantial, and thus did not constitute fair use. Notwithstanding the Federal Circuit's reversal, the jury's arguably surprising determination that such copying was a fair use warrants a close look at the factors relevant to fair use.

As to factor one—the purpose and character of Google's use—the parties agree that Google's use of the declaring code is commercial. Google, however, argues that its use was transformative because Java's declaring code was previously confined to computers. Google also points out that there are non-commercial benefits to its use, such as promoting software innovation by allowing "millions of developers, and more than a billion customers" to use the open-source Android platform. Oracle counters that the declaring code is identical in Java and on Android and even if Google provided new behind the scenes implementing code, they did nothing to change the expression,

meaning, or message of the declaring code that was copied. Oracle also notes that Java was previously in use in certain predecessors to smartphones. Although the jury sided with Google, the Federal Circuit found the use commercial and non-transformative. In particular, the Federal Circuit noted that Google copied the declaring code verbatim and is using it in Android for the same purpose it serves in Java. Further, the fact that Google drafted its own implementing code does nothing to change the analysis: “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”

As to factor two—the nature of Oracle’s work—the parties agree that the declaring code serves a function of calling upon implementing code. Google argues that the content of the declaring code is dictated by constraints of the Java language and is therefore, at best, minimally expressive. Oracle responds that the content of each declaring code was specifically chosen by Oracle to communicate to developers the purpose of the declaring code and to make the code memorable. Oracle stresses that whether working in Java or in Android, developers do not care about the implementing code; they care about the declaring code returning a specific result or performing a function. Oracle argues that the Copyright Act is surely intended to provide greater protection to the portion of Java that communicates directly with developers as compared with the implementing code that developers never see. Although the Federal Circuit found that this factor slightly favors Google, it discounted this factor, finding that the declaring code is functional, while noting that all software is functional to some degree. Accordingly, letting this factor control the outcome of the fair use analysis would undermine years of precedent recognizing the copyrightability of software.

As to factor three—the amount of Oracle’s work Google copied—the parties disagree as to whether the copied portion is substantial and whether the copied portion is significant. Google argues that (a) the declaring code it used is less than 0.5% of the total Java API, (b) the declaring code comprises small snippets of code scattered throughout Java, and (c) Google only used the declaring code necessary to allow downstream developers to use their Java skills in Android. Oracle retorts that Google copied over 11,000 lines of code and that the declaring code is the important, central part of the Java API because it is the part with which developers are familiar. The Federal Circuit adopted Oracle’s framing, focusing on the 11,000 number rather than the 0.5% figure, and found that Google copied the important parts of Java, noting that “no reasonable jury could conclude that what was copied was qualitatively insignificant, particularly when the material copied was important to the creation of the Android platform.” The Federal Circuit found this factor favored Oracle or was, at best, neutral.

As to factor four—the effect of Google’s use on Oracle’s market—the parties dispute whether they are direct competitors and the extent to which Google’s conduct harmed Oracle’s licensing of Java. More imaginatively, Google also argues that its use of Java in Android actually benefits Oracle. Per Google, developers who become familiar with Java declaring code through Android can transfer those skills to Oracle’s computer-based systems. Oracle, however, equates this with a filmmaker copying a book; it is well settled that the filmmaker cannot do so even if the film increases interest in the book. Oracle also relies on its practice of licensing the declaring code to third parties like IBM, arguing

that if Google's use of the declaring code is viewed as "fair" then Java will lose value because anyone in the industry could implement Java's declaring code for free. The Federal Circuit found Oracle's evidence of actual and potential harm "overwhelming." This factor, according to the Federal Circuit, heavily favors Oracle.

With factors one and four weighing heavily in favor of Oracle, factor two weighing slightly in favor of Google, and factor three being, at best, neutral, the Federal Circuit found that Google's use of Oracle's declaring code "was not fair as a matter of law."

Standard of Review

Beyond the substantive issues laid out above, the fair use question before the Supreme Court is significant because of its procedural background—i.e., the Federal Circuit's *de novo* review, and reversal, of the jury's finding of fair use. As just one illustration of how foundational the issues raised by this dispute are, when in May 2020 the Supreme Court asked for supplemental briefing on the standard of review, it specifically asked the parties to consider "the implications of the Seventh Amendment."

The dispute over the appropriate standard of review boils down to whether fair use is primarily legal or factual in nature. Notably, the Federal Circuit acknowledged some ambiguity as to which standard should apply, but found *de novo* review appropriate in light of the mixed questions of fact and law presented by the fair use analysis. But Google argues that because fair use is primarily a factual question, the proper standard of review is instead the substantial evidence standard, under which the Federal Circuit should have asked whether the evidence was sufficient to allow a rational trier of fact to reach the jury's verdict. Oracle responds that the Federal Circuit was correct to apply *de novo* review because fair use is a primarily legal question based on judge-made factors codified in the Copyright Act and elucidated by legal principles derived from case law. Likely seeking to head off further procedural wrangling, Oracle adds that whether fair use is determined *de novo* makes no difference to the outcome because a party is always entitled to judgment as a matter of law if, under the controlling law, no reasonable jury could find as it did.

Notably, the Supreme Court's instruction that the parties address the Seventh Amendment in their supplemental briefing suggests that it is troubled by Oracle's argument. The Seventh Amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved." The Seventh Amendment also provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In 1935, the Supreme Court interpreted the Seventh Amendment to preserve the right to a jury trial in cases that would have been tried by jury according to the common law of England prior to 1791 when the Seventh Amendment was ratified. This in turn spurred briefing addressing the history of fair abridgment—an eighteenth century precursor to fair use—with both sides gamely insisting that the sparse historical record interpreting this doctrine mandates their preferred result.

If you didn't expect a copyright dispute concerning source code for smartphones to

invoke pre-1791 legal concepts, you're not alone. Though their twists and turns are outside our scope here, the parties' supplemental briefs are worthwhile reading for anyone interested in the history of copyright law, the Seventh Amendment, and a fresh reminder of just how esoteric copyright law can be.

What the Amici Are Saying

Of the 61 amici who have weighed in on this case, 39 address the fair use issue. Of that 39, two are in support of neither party, 16 are in support of Google, and 21 are in support of Oracle. Google is supported by private companies, such as Microsoft Corporation and Python Software Foundation, et al., as well as legal scholars and organizations such as The American Library Association, et al. and Copyright Scholars. Oracle is similarly supported by private companies, legal scholars, and organizations, such as Synopsys, Inc., the Motion Picture Association, former register of copyrights Ralph Oman, and the United States.

Each of the amici briefs were submitted before the Supreme Court asked for supplemental briefing on the standard of review; nonetheless some of the amici address the issue. An amicus brief from Civ Pro, IP, & Legal History Professors is entirely devoted to the standard of review that applies to the fair use defense. It notes how rare it is for an appellate court to reverse a jury verdict on fair use and argues that doing so violates the Seventh Amendment.

Conclusion

The Supreme Court is finally set to resolve important questions regarding the scope of copyright protection and the fair use doctrine that could have huge ramifications for the software industry ... or is it? As detailed above, the Supreme Court may lean on the standard of review applied by the Federal Circuit to delay further comment on whether Google's copying constituted fair use. We will update you again after oral argument, which is scheduled for October 7, 2020.