

Supreme Court Rules Google Copying of Java API Declaring Code Was Fair Use

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On April 5, 2021, the US Supreme Court issued its [decision](#) in Google LLC v. Oracle America Inc., holding that Google's copying of the Java SE API was a fair use and therefore did not infringe Oracle's copyright.

The case arose from Google's use of certain portions of the Java API, without license, in developing its Android smartphone platform.

According to the Court, the Java API incorporates the following two sets of code:

- Implementing code, which instructs the computer to perform certain tasks.
- Declaring code, which provides a taxonomy and organizational structure for the tasks.

In developing Android, Google wrote its own implementing code, but copied the Java API declaring code.

Two questions were before the Court:

- Whether the functional nature of the Java API declaring code excludes it from copyright protection, which extends to creative expression but not processes and ideas.
- If the Java API declaring code is subject to copyright, was Google's copying a fair use, and therefore non-infringing.

Copyrightability

The Court declined to address whether the declaring code at issue is copyrightable, assuming for purposes of the fair use analysis, that the entirety of the Java API is protected by copyright.

Nevertheless, the functional nature of the declaring code was central to much of the fair use analysis, and, seemingly in an effort to rationalize its holding, the Court suggests that copyright protection in the declaring code would be thin at best.

Fair Use Analysis

The Copyright Act sets out four factors for courts to consider in evaluating fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion of the copyrighted work used; and (4) the effect on the market for the copyrighted work.

The Court found that all four factors supported a finding of fair use.

Second Factor: Nature of the Copyrighted Work

While the fair use analysis typically begins with the first factor, the Court notably began with the second -- with the functional nature of the declaring code -- which then set the tone for the rest of the analysis.

Recognizing that computer programs, as a general matter, are capable of copyright protection, the Court found the Java API declaring code to be more in the nature of a utility or process and less amenable to the protections intended to be afforded most computer programs through copyright. Such a bifurcation supported a finding of fair use. Key to its conclusion, the Court found that, in comparison with other code:

- The declaring code is inextricably bound together with its functional elements that are not subject to copyright protection.
- Its value derives substantially from the efforts of computer programmers to learn the API's system.

First Factor: Purpose and Character of the Use

This factor considers (1) whether the new work is “transformative” in that it adds something new and important, rather than being a substitute for the original work; and (2) whether the new work has a commercial purpose.

Here, the Court found Google's use transformative. The Court characterized the use as reimplementing a widely used interface in a new environment to enable computer programmers to put their skills to use without having to learn a new language. Whereas the Java SE platform is used for desktops and laptops, Android ports the declaring code into a smartphone context. This, in the Court's view, makes the use not a market substitute, but a furthering of new product development.

The Court further reasoned that Google's use of the declaring code to make its new Android platform readily useful for programmers is consistent with the creative progress that is the constitutional objective of copyright.

That Google's use of the declaring code was commercial was not in dispute. However, the Court summarily dismissed this fact as non-dispositive given the highly transformative nature of the use.

Third Factor: Substantiality of the Portion Used in Relation to the Whole

In finding this factor to support fair use, the Court noted that this will generally be the result where the copying is for a transformative purpose.

The Court could have defined the relevant copyrighted work to be either:

- The entirety of the Java API, of which the 11,500 lines Google copied represented a very small fraction (0.4%).
- The Java API's declaring code, virtually all of which was copied.

Although the Court's reasoning with respect to other factors relevant to fair use bifurcated the Java API between implementing and declaring code, its analysis with respect to substantiality and portion of use, chose the entirety of the Java API. In so doing, the Court reasoned:

- The declaring code is inherently bound to the implementing code, in that its purpose is to call them up.
- Google copied them not for their creative expression, but for their function – i.e., Google used them to attract programmers versed in Java to build the Android system.

The Court found that Google copied only those portions of the Java API needed for its transformative purpose.

Fourth Factor: Effect on the Market

In also finding this factor to weigh in favor of fair use, the Court balanced Oracle's potential loss of revenue against the public interest. Key to the Court's conclusion were:

- Testimony calling into question whether Oracle could compete in the smartphone market, regardless of the copying.
- Evidence that Android's profitability derives more from programmer's investments in learning the Java programs than Oracle's investment in creating the Java API.
- A concern that enforcement of Oracle's copyright would limit creativity of new programs, thereby creating a public harm.

Dissent

The dissenting opinion written by Justice Clarence Thomas and joined by Justice Samuel Alito took issue with nearly all of the majority's analysis, arguing that the declaring code is copyrightable and Google's copying was not a fair use.

The dissent argued that the failure to address copyrightability distorts the majority's fair use analysis, and that the majority's fair use analysis rests on the Court's distinction between declaring code and implementing code that does not exist in the Copyright Act. Turning to the four factors, the dissent found that:

- Nature of the Copyrighted Work: Only this factor, which considers the work's degree of creativity, might weigh in favor of fair use. However, it cannot on its own support a finding of fair use without eviscerating any copyright protection for declaring code, something Congress declined to do in the Copyright Act.
- Purpose and Character of Use: Google's use was overwhelmingly commercial and non-transformative. On the latter point, the dissent argued that the majority conflated transformative use with derivative use, finding Google's use to be derivative (a right reserved to the copyright owner).
- Amount and Substantiality of the Portion Used: The copying was substantial. In the dissent's view the analysis properly should have looked only at the declaring code, nearly all of which Google copied, because that is what attracted programmers and made Android a market substitute.
- Effect on the Market: By copying and releasing the declaring code in the Android platform, Google usurped Oracle's ability to license the code for smartphone market use.

Conclusion

The Court answered the question regarding Google's use of the Java API declaring code, but beyond that many questions remain.

The Court expressly distinguished the declaring code from other types of software and clarified that the decision does not modify or overturn earlier fair use decisions, likely narrowing the precedential value of its opinion.

Only time will tell how much influence this decision will have on expanding opportunities to use code developed by a third party, and remedies against such party for crossing a line. Exactly where that line is drawn remains to be seen. For now:

- With no decision on copyrightability, reuse of third-party software without a license remains subject to a highly fact-specific fair use analysis.
- Companies wishing to protect their proprietary software should evaluate their efforts to maintain secrecy and confidentiality of their products to avail themselves of trade secret and potential unfair competition claims.