IP Alert | Supreme Court Hears Arguments in "Copyright Case of the Century"

By Ross Dannenberg and Shawn O'Dowd [1]

Oral arguments were held at the U.S. Supreme Court on Oct. 7, 2020 in Google LLC v. Oracle America Inc., what some commentators have billed as the "Copyright Case of the Century."

Oracle originally sued Google for copyright infringement over 10 years ago concerning Oracle's Java programming language.[2] The suit alleges that Google's popular Android platform for mobile phones infringes copyrightable aspects of Oracle's Java 2SE 5.0 Platform. There have been two trials and two appeals to the U.S. Court of Appeals for the Federal Circuit as the case has wound its way up and down the courts. In the first trial, the jury returned a verdict finding copyright infringement. Judge William Alsup of the U.S. District Court for the Northern District of California granted Google's motion for a judgment as a matter of law (JMOL), but the Federal Circuit reversed and remanded for a trial on Google's fair use defense. In the second trial, the jury returned a verdict finding Google's infringement was fair use. Judge Alsup denied Oracle's JMOL motion, but the Federal Circuit reversed by applying a de novo standard of review giving deference to the jury's findings concerning "historical facts." Google's petition for writ of certiorari was granted by the Supreme Court in 2019. Oral arguments, originally scheduled for spring 2020, were delayed in view of the pandemic, and were instead conducted Oct. 7 by telephone.

Oracle's Java 2SE platform comprises over 30,000 methods that are organized into a collection of over 3,000 classes. 166 Application Program Interface (API) packages group related classes together. Each method includes "declaring code" (e.g., package java.lang; public class Math {; public static int max(int a, int b) {) followed by "implementing code" that actually performs the method described by the declaring code. The parties agree that Google wrote its own implementing code, but copied 11,330 lines of declaring code in creating its own Android platform. Oracle claims copyright protection not only in the declaring code, but also in the organization of the methods (i.e., how the methods are grouped into classes (and classes into API packages), and the relationships and interdependencies between classes).

Two issues were initially presented to the Supreme Court: First, whether the declaring code and its organization that were copied by Google are subject to copyright protection under 17 U.S.C. 102; and second, whether Google's copying should be considered a fair use under 17 U.S.C. 107. After briefing was complete, the Supreme Court asked the parties to

submit additional briefing on the appropriate standard of review for the second question presented above (e.g., a "reasonable jury" standard of review or a "de novo" standard of review except for "historical facts" found by the jury).

Approximately 60 amici briefs have been filed in the case—approximately half supporting each side of the case. The United States government provided its own brief in support of Oracle and also participated in the oral arguments.

During oral arguments, there did not seem to be consensus among the Justices as to whether the declaring code and organization of the methods in the Java 2SE platform are protectable under 17 U.S.C. 102 or whether Google's use is a fair use. Much of the discussion centered on the merger doctrine, which states that when there are only one or a few ways to express a particular idea, none of the expression is protectable because the idea merges with the expression. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan seemed to favor Google's position that the "idea" for the merger doctrine is how to interface with Java's 2SE platform (i.e., the declaring code and calls (by programmers) to the declaring code is dictated by the platform), analogizing the declaring code to an application programming interface (API). Other justices, including Justices Clarence Thomas, Samuel Alito, Jr., and Brett Kavanaugh, seemed to favor Oracle's position that the platform itself, which includes the declaring code and its organization, is all subject to copyright protection and that there are other ways to create the platform as evidenced by work done by Apple and Microsoft (irrespective of the fact that Apple and Microsoft write their code in different programming languages).

Many of the justices questioned the parties about the potential ramifications of a ruling in favor of either party in this dispute. Indeed, many of the amici briefs expressed similar concerns. Justice Neil Gorsuch, as well as Justices Thomas and Alito, also raised various questions about the standard of review for the jury's finding of fair use in favor of Google. Because the Court currently comprises only eight justices, there might not be a consensus at this point for a broad-reaching decision on the substantive copyright issues raised in the case. Rather, and in view of the fact that the standard of review issue was raised sua sponte by the Court after initial briefing was completed, there is a very real possibility that the case will be remanded to the Federal Circuit to reconsider the fair use decision of the jury using a different standard of review.

The opinion of the Supreme Court is expected later this term, which runs through June 2021. However, if not remanded and there is a 4-4 split on the copyright issues, it is also possible that the Court could schedule the case for re-argument after a ninth justice is confirmed to the seat vacated by the late Justice Ruth Bader Ginsburg, which could delay a decision even further.

For more information about the content in this alert or if you have questions about the business and legal implications of this case, please contact a Banner Witcoff attorney.

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[1] Rachel Bender provided research assistance with this article. She is a third-year law student at The Washington University School of Law and participated in Banner Witcoff's 2020 summer associate program.

[2] Oracle also asserted that Google infringed a number of Oracle's patents. The subject matter of the patents is not related to the copyright issues of the case, and the jury's finding of no infringement was not appealed.

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