

The Supreme Court Continues to Take on Important Copyright Issues: A Look Back and a Look Forward

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Google v. Oracle: When is Copying a Fair Use?

At long last, after more than a decade of litigation and a deferral from the 2019-2020 term as a result of the COVID-19 pandemic, the United States Supreme Court finally concluded the multi-billion-dollar copyright dispute between Google LLC and Oracle America, Inc. Although this was the only copyright issue decided by the Supreme Court in the 2020-2021 term, the decision was one of the most significant in recent copyright law history.

The dispute between technology giants arose from Google's unlicensed use of Oracle's Application Programming Interfaces ("API") in early versions of its Android smartphone platform. Programmers have used Oracle's APIs to gain access to thousands of prewritten computing tasks through the use of simple commands for decades. Thus, when Google set out to develop a software platform for smartphones, Oracle's APIs were desirable—if Google could utilize Oracle's well-known commands, then programmers could avoid having to write their own code from scratch to accomplish the same computing functions. Ultimately, Google copied enough of Oracle's code to accomplish just that—by integrating approximately 11,500 lines of Oracle's declaring code, programmers could input Oracle's commands to access Google's proprietary computing functions.

Oracle sued Google, claiming that Google's copying infringed both its copyrights and patents. The case involved two key issues: (i) whether Oracle's APIs were subject to copyright protection; and (ii) whether Google's use of the APIs was a fair use. The Court dodged the copyrightability question, which had the potential to send shockwaves throughout the industry, and instead focused its analysis on the notoriously flexible, fact-specific fair use defense. The test considers: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (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."

The 6-2 majority (with Justice Barrett not participating), found for Google on each of these factors, as follows:

- **Purpose and Character of the Use:** The touchstone of this factor is, generally, whether the copier's use "adds something new" or "transforms" the use of the copyrighted material. Although the Court concluded that Google's use of the declaring code served the same function as Oracle's (i.e., to enable programmers to integrate methods from the APIs into their own programs), the Court nevertheless found this factor weighs in Google's favor. Specifically, the Court concluded that Google's use was "transformative" because it: (1) sought to create new products and (2) enabled programmers to access a new collection of computing tasks in a different computing environment (smartphones as opposed to computers).

- **Nature of the Work:** Here, the Court emphasized that the value of Oracle’s declaring code—which Google copied—is not derived from creativity, but rather from the number of programmers who learn to use it. Because copyright law seeks to protect creative expression, the Court concluded declaring code is farther from the core of copyright law’s protection.
- **Amount and Substantiality of the Portion Used:** The majority found this factor in favor of fair use because Google only copied a small *quantitative* amount of the APIs (approximately 11,500 lines of 2.8 million), which was not otherwise “substantial” because the taking was not intended to usurp creativity, but rather to promote it.
- **Effect on the Market:** Finally, the Court was unpersuaded that Oracle’s nine-billion-dollar damages claim rendered the market effects in Oracle’s favor. The Court stressed again that the value of Oracle’s software is derived from the time programmers have invested to learn it, which copyright law does not protect. Thus, the Court declined to attribute Google’s Android market success to the value of Oracle’s copyright. Moreover, the Court concluded that Oracle benefitted from Google’s expansion of Oracle’s software into the smartphone market. Taken together, the Court concluded all factors weighed in favor of fair use.

Among other things, the dissent opined that the majority’s novel application of the “transformative” analysis eviscerates copyright. Traditionally, courts have rejected a fair use defense where the copier merely creates a new product without altering the original with “new expression, meaning, or message.” Justice Thomas, joined by Justice Alito, found Google’s copying to be a far cry from that standard.

In fairness, the fair use test has long been a convoluted, inconsistently-applied, and murky area of copyright law. Unfortunately, the Court’s opinion failed to add much-needed clarity or certainty to its application. On the one hand, by only considering the fair use defense, the Court potentially limited the direct impact of its decision to the dispute at hand and software disputes like it. But, on the other hand, the Court’s broad application of the fair use test—and particularly the “transformative” analysis—indicates a deviation from precedent. Although the Court expressly stated it was *not* redefining fair use, the decision is still likely to spark greater and novel reliance on the defense in the software industry and beyond, including in the digital media industry.

Unicolors v. H&M: When is a Copyright Claim Dead on Arrival Due to Registration Errors?

Despite the lack of clarity to come out of the 2020-2021 term, the upcoming year promises to resolve a different question in the industry: whether an intent-to-defraud is necessary to invalidate a copyright registration obtained through an application with inaccurate information. Under Section 411(b) of the Copyright Act, even if a certificate of registration contains inaccurate information, it may be used to enforce a copyright *unless* “the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.” 17 U.S.C. § 411(b). Traditionally, the Ninth Circuit, among others, has declined to invalidate registrations unless the inaccuracy was a result of bad faith. However, recently, it changed tack and rejected such a requirement, arguably creating a circuit split on the issue.

On June 1, 2021, the Supreme Court granted certiorari to resolve this issue in the matter of *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.* during the 2021-2022 term. Regardless of the outcome, the Court’s decision will answer an important question for registrants and illuminate when their copyright registrations are vulnerable to invalidation on the basis of application errors. Because a registration certificate (or denial of one) is now required to pursue a U.S. copyright

claim, the outcome has potential to impact media companies both when defending and pursuing copyright litigation.