[US] Google v Oracle - when is it "fair use" to copy content?

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On 5 April 2021, the United States Supreme Court handed down its decision in *Google LLC v. Oracle America, Inc*. 593 U.S. ___ (2021), thereby concluding over ten years of protracted and intensely followed litigation. Google ultimately won what has been called the “copyright case of the century”, with a 6-2 majority (the Court’s newest justice, Amy Coney Barrett, did not participate). Much has been written about the case, which focused on the copyrightability of approximately 11,500 lines of software source code, first published by Oracle. This code was used by Google as the basis for its popular mobile phone operating system, Android.

On its face, *Google v Oracle* may not seem like a case that film studios, production companies, and copyright holders in creative content would be concerned about. However, this case was the first time in nearly 30 years that the United States’ highest court considered the doctrine of “fair use”, an exception under U.S. copyright law which frees a would-be infringer from copyright liability. In *Google v Oracle*, the Court’s key consideration was whether Google’s copying of Oracle’s code constituted a permissible “fair use” of that material.

Accordingly, and as one of the relatively rare copyright matters to come before the Supreme Court, this case serves as a helpful insight as to how fair use defences can succeed. This will be of importance to creators and proprietors of audiovisual intellectual property, who are increasingly confronted with derivatives of their copyrighted material. Under 17 USC § 107, to determine if a new work makes fair use of the original, a court will consider multiple factors, including:

> (1) the **purpose** and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

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When analysing the “purpose and character of the use” as set out in the first element, the court will consider the extent to which the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” In other words, the first element considers to what extent the new work is “transformative”. Case law makes clear that although transformative use is not always absolutely necessary for a fair use finding, transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright law.”

Interestingly for our purposes, all but one industry member of the Motion Picture Association of America (MPAA) filed legal arguments in support of Oracle in 2020. Universal Pictures, Paramount Pictures, Walt Disney Studios, Warner Bros. and Sony Pictures urged the Court to resist Google’s arguments that its use of Oracle’s code was transformative. Netflix did not join the MPAA’s brief, which stated:

“Unlike purely expressive works, software, by definition, has a functional component that makes it inherently different. Applying the concept of transformation to partially non-expressive works like software is like trying to put the proverbial square peg into a round hole. Transformation, with its focus on new expression, meaning, or message, assumes an effect on human thought or emotion; in contrast, software, in significant part, operates independently of such human thought and emotion.”

In the end, however, the Court’s majority disagreed. The opinion stated that “Google’s copying of the Java SE API, which included only those lines of code that were needed to allow programmers to put their accrued talents to work in a new and transformative program, was a fair use of that material as a matter of law” (emphasis added).

Two justices however dissented from this opinion. Worth noting in particular is Justice Thomas’s dissent, which argued that the majority’s interpretation “eviscerates copyright”. He went on to explain: “A movie studio that converts a book into a film without permission not only creates a new product (the film) but enables others to ‘create products’— film reviews, merchandise, YouTube highlight reels, late night television interviews, and the like. Nearly every computer program, once copied, can be used to create new products. Surely the majority would not say that an author can pirate the next version of Microsoft Word simply because they can use it to create new manuscripts.”

When copyright holders look at material which makes use of their content, they may consider, “to what extent do these derivative works constitute copyright violations?” Clearly, the principles and arguments set out in *Oracle v Google* are likely to be applied (or at least, referenced) in copyright lawsuits for years to come.

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Google LLC v. Oracle America, Inc. 593 U.S. ___ (2021)

https://www.supremecourt.gov/opinions/20pdf/18-956_d18f.pdf

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