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### Decoded: The Supreme Court Rules on Fair Use in Landmark Software Copyright Case

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On April 5, 2021, the Supreme Court issued its decision in *Google LLC v. Oracle America, Inc.* Oracle had accused Google of infringing Oracle's copyright in portions of Java source code for use in Google's Android smartphones. Google argued: (1) that those portions of the source code were not copyrightable; and (2) if the code was copyrightable, Google's use of that code was fair use. The Court ruled in a 6-2 decision that it need not address the issue of whether the code was copyrightable because even if it were, Google's use of pieces of Java's source code was fair use. In a statement important to the information technology and programming sectors, the Court stated that "fair use can play an important role in determining the lawful scope of a computer program copyright" because it allows courts to: (1) distinguish among technologies; (2) distinguish between expressive and functional features of computer code; and (3) can balance the need for incentives to create with the free ability to do so. Perhaps most significantly for copyright law as a whole, the Court clarified that, while a court is bound to accept a jury's findings of underlying facts, the ultimate question of whether those facts reflect a "fair use" is a legal question for judges to decide.

Central to the Court's ruling was the nature of the code at issue. The Court explained that the code at issue was "declaring code," which related to the programmer's user interface, rather than "implementing code," which instructed the computer how to execute a task. Declaring code allows programmers to use what are effectively shortcut commands, which call upon prewritten implementing code. Google had written its own implementing code. The Court ruled that, as part of the interface, this declaring code was inextricably bound together with both (1) the general organization of the system and its grouping of tasks, which no one claimed to be a proper subject of copyright; and (2) the implementing code of the Android platform, which is copyrightable, but was newly written by Google. The Court also suggested, but did not decide, that such declaring code may not be copyrightable at all.

The Court also considered the purpose and character of Google's use of the Java source code. The Court found that Google wanted to make their Android platform attractive to programmers who were already familiar with the Java programming language. Google had copied the Java declaring code to enable programmers to use code they already knew to call up implementing programs that would accomplish particular tasks. The purpose of Google's copying, therefore, was to allow programmers to use certain commands from a familiar programming language rather than having to learn a new one. The Court ruled that such usage of the Java source code weighed in favor of fair use.

The Court then considered the amount and substantiality of Java source code copied by Google. The Court found that, even though Google copied approximately 11,500 lines of code, that amount was only 0.4 percent of the entire interface code at issue. The Court also found that Google's copying was tethered to its valid purpose of attracting programmers to build its Android platform.

Finally, the Court considered the market effect of Google's copying and use of the Java source code. The Court found particularly relevant the facts that: (1) Oracle's failure to build a smartphone, or smartphone platform, was not attributable to Google's development of Android; and (2) Android was not a market substitute for Java's software. The Court also noted that, given the investment by programmers to learn the Java programming language, as well as the costs of developing program interfaces, enforcing Oracle's copyright would limit the creation of new programs and, thereby, risk public harm.

### **PRACTICE NOTE:**

It has been 25 years since the Supreme Court issued an opinion regarding the fair use doctrine. The Court's decision has confirmed that fair use is an appropriate inquiry in the realm of coding and software development. The decision has also made clear that the issue of fair use is to be addressed as a matter of law, rather than a fact for a jury to determine. Please contact your Vorys attorney if you have any questions about the impact that this decision may have on your copyrights or copyright litigation strategy.