# **Google v Oracle:** The Evisceration of Copyright?

**Emma Johnsen,** Senior Associate at Marque Lawyers, discusses the US Supreme Court's Google v Oracle decision

Back in April 2021, the Supreme Court of the United States sided with Google in its long running dispute with Oracle which centred around Google using Oracle's source code without permission, ending a decade-long multibillion dollar legal battle.

The decision won't have any direct effect on copyright law here in Australia, however, it has been labelled by some as a huge victory for computer programmers and users, at the same time being slated as a decision that eviscerates copyright in the US.

The two central issues in the fight between the two tech industry heavy weights were

a. whether Oracle can claim a copyright on Java APIs; and
b. if so, whether Google had infringed these copyrights.

The first point didn't arise in the Supreme Court decision, and instead, which dealt only with the latter.

## Background

The Goliath and Goliath fight stretches back to 2005, when Google included some 11,500 lines of code from an Application Programming Interface (API) in its mobile Android operating system. For those of us who don't speak programming jargon fluently, APIs are specifications that allow different programs to communicate with each other. For example, when you read an article on a news website, and click on the "Share to LinkedIn" icon to share that article to LinkedIn, you will be using a LinkedIn API that the news site's developer obtained from LinkedIn directly.

When Google implemented the Android operating system, Google wrote and developed its own version of Java, however, to allow developers to write their own programs for Android, Google's implementation used the same names and functionality as the Java APIs.

The API at the centre of this dispute had been developed by Sun Microsystems, which Oracle purchased in 2010. The argument put forth by Google was that it needed to use these lines of code to allow programmers that are familiar with the Java programming language to work with Google's Android platform. Google used the API to make a whole new, and now and much more popular, mobile operating system.

In 2010, Oracle sued Google, seeking close to $9 billion in damages. Google fought back, stating that the use was covered by fair use.

The dispute, previously known as Oracle v Google, has a long procedural history, however the short version is as follows. Initially, two District Court trials found in Google's favour, namely that there was no copyright in the APIs and that Google's use was fair use. Following this, the Federal Circuit court reversed these decisions. Google then petitioned to the Supreme Court and in April 2021, the Supreme Court ruled in a 6–2 decision that Google's use of the Java APIs fell within the four factors of fair use, bypassing the question on the copyrightability of the APIs.

## Fair Use and Fair Dealing

One of the key legal issues in the case was the doctrine of Fair Use, which exists in the US. Essentially this means that copyright infringement will not be found if the respondent can make out that the use was "fair" by reference to a number of factors. In the USA, one of the factors in assessing whether the use is fair a consideration of '*the effect of the use upon the potential market for or value of the copyrighted work*.' This was the element that got Google over the line.

By contrast, here in Australia, the *Copyright Act* provides for 'fair dealing' defences. The fair dealing provisions of the *Copyright Act* allow a limited number of exceptions to copyright infringement, including that a copyright work can be used for the purposes of 'research or study' or 'criticism and review'. The fair dealing exceptions are narrow in scope, and if the usage falls outside that scope, the fair dealing exceptions will not apply.

The US doctrine of Fair Use is much more flexible than the Australian fair dealing exceptions. Prior to 2015, Fair Use had been traditionally characterised by the US Supreme Court as a positive defence, however, following the "dancing baby case" *(Lenz v Universal Music Corp*) the U.S. Court of Appeals for the Ninth Circuit concluded that fair use was an express right and therefore an exception to the exclusive rights held by the owner of the copyright.

The concepts of fair use and fair dealing are quite different, and because of this, an outcome such as the one that prevailed in the *Google v Oracle* case would be unlikely to occur here in Australia due to the limited scope of the fair dealing exceptions, however, the decision is likely to have a flow on effect for the broader computer programming industry.

## What happened?

The ruling means copyright holders for software can't maintain a monopoly over critical interface aspects. The problem is, where a company has as much market power as Google, the strength of a claim of Fair Use based on the "effect of the use upon the potential market" test is much greater than an equivalent claim made by a small developer.

In this controversial decision, which some programmers see as a win for innovation, and others see as a degradation of copyright, the Court wrote that fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."

Notably, Justice Clarence Thomas, in dissent, opined (and rightly so) that the majority transforms the definition of transformative use into nothing more than "a use that will help others 'create new products'" which is, simply put, a new definition that eviscerates copyright. Justice Stephen Breyer, who was in the majority of the 6-2 decision, stated that it is difficult to apply traditional copyright concepts in that technological world. Stating the words that every copyright lawyer mutters on most days.