TEMPLARS

FAIR USE OR INFRINGEMENT? AN ANALYSIS OF GOOGLE V. ORACLE AND WHAT IT MEANS FOR THE NIGERIAN TECH ECOSYSTEM.

Introduction

The United States Supreme Court (the "**Supreme Court**") recently decided that Google LLC ("**Google**") did not breach Oracle America Inc's ("**Oracle**") copyright, despite Google admitting it copied several thousand lines of codes from Oracle's Application Programming Interface ("**API**"), on the grounds that the use of the codes qualified as fair use as a matter of law.

As a preliminary point, it is important to note that copyright vest the legal rights of a work in the creator of that work. Specifically, copyright gives authors, content creators, etc., the legal freedom to create works without fear that their work may be stolen without any legal remedy. In a world that is constantly evolving from traditional modes of creation (books, music, etc.) and incorporating technological modes of creation (programming, coding, etc.), copyright remains a vital tool in protecting creative rights.

Accordingly, where a landmark decision grants an entity the license to use the creative work of another in the tech space, on the grounds of "fair use", it is necessary to consider its implications for the tech ecosystem.

Contacts

Dayo Okusami
Partner
dayo.okusami@templars-law.com

Olufemi Oyewole
Associate
Femi.Oyewole@templars-law.com

Okabonye Chukwuani
Associate
okabonye.chukwuani@templars-law.com

Background

Google and Oracle are two of the most recognizable names in tech: Google is, well, *Google*, while Oracle is the second largest software company by revenue and market capitalization in the world. Oracle owns a copyright in Java SE, a platform that uses the extremely popular Java programming language.

In 2005, Google bought Android (a mobile operating system) which is designed primarily for touch screen mobile devices like smartphones and tablets. Google envisioned an Android platform that that software developers could use the tools found there free of charge. The idea was that more and more developers using its Android platform would develop ever more Android-based applications, all of which would make Google's Android-based smartphones more attractive to consumers.

Prior to buying Android, Google had initiated talks with Sun Microsystems (Oracle's predecessor) about the possibility of licensing the entire Java platform for its new smartphone technology, but negotiations broke down. Google thereafter built its own platform but in order to allow millions of programmers (who were

to the Java programming language) to work with the Android platform, Google copied about 11,500 lines of code from the Java SE program. Specifically, the copied code lines are part of the Java SE API. Google copied the declaring code from the Sun Java API that its programmers were accustomed to (but wrote its own task-implementing programs) because without copying, programmers would need to learn an entirely new system to call up the same tasks.

Oracle, as one would expect, sued Google for copyright infringement, while Google's defence was that its copying of the code constituted "fair use" and as such, was not an infringement.

The Decision – Google Copied Oracle's API for Fair Use

The jury in the United States' lower courts held in favour of Google on fair use, but this was reversed when Oracle appealed to the Federal Circuit court. Google then further appealed to the Supreme Court which went against the Federal Circuit's decision and held (via majority of 6-2) in favour of Google.

The Supreme Court majority assumed and did not delve into the fact that the Oracle API was protected by copyright. It centered its decision on the doctrine of "fair use", which is an exception to copyright protection in the United States.

Specifically, under the United States Copy rights law, a copyright holder cannot prevent another person from making "fair use" of a copyrighted work. Four guiding factors for "fair use" were considered by the Supreme Court in assessing Google's actions: (1) the purpose and character of the use; (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.

In the Supreme Court's majority view, Google only copied part of the Oracle API to give other developers and programmers the ability to tap into the API, in order to create their own new expressions and tasks for a different computing environment (Android smartphones). The amount and substantiality of the copied API were also measured (the 11,500 lines of code made up only 0.4% of the entire Oracle API). Google just took what was needed from the API and the programmers gave it a transformative value by adding new and original implementing code in the Android interface.

> ***"[Google] copied the API (which Sun created for use in desktop and laptop computers) only insofar as needed to include tasks that would be useful in smartphone programs. And it did so only insofar as needed to allow programmers to call upon those tasks without discarding a portion of a familiar programming language and learning a new one."***
>
> *Google v Oracle, Supreme Court, majority opinion, p. 26*

An important technical point to note is that the Supreme Court carefully examined the nature of the API that Google copied.
Google copied part of the "declaring code" from Oracle's Java API, but Google did not copy any of the task-implementing programs or "implementing code". This distinction is important because it illustrates the Supreme Court's majority view on how Google copied only certain code packages required for programmers to fundamentally use the Java programming language with the Android software.

The Supreme Court also discussed the intent of copyright under the US Constitution, which, according to the Supreme Court, is not to unduly restrict creativity and development of works but is an equitable rule of reason that permits courts to avoid rigid application of the copyright statute when it would stifle the very creativity which, on occasion, that law is designed to foster.

The market effect of the copying was also important in determining "fair use", given that the Supreme Court determined that Google's Android platform is not a substitute or competitor with Java SE – in fact, Oracle would financially benefit from Google implementing its API interface into a different market. Another key concern the Supreme Court flagged was that Oracle could potentially have restricted the development of the tech and programming market if entities like Google were not allowed to make "fair use" of its API.

Flowing from all of the above, the Supreme Court's majority view was that Google's actions constituted "fair use" and were beneficial for the market in the long-term because it allowed the developers to create and transform the code into something new and innovative (the Android platform) which Oracle also benefitted

The Dissent[5]

It is important to note that two Justices of the Supreme Court disagreed with the majority decision and in their dissent, found that the Oracle API was protected by copyright and Google's copying of the Oracle API did not constitute "fair use".

In the view of the two Justices, Google, when unable to reach an agreement with Oracle 2005 for a licence to use its code, simply copied part of Oracle's API and advertised it to its Android developers. A distinction was drawn between Google's actions and that of Apple or Microsoft, who created their own declaring code rather than copying Oracle's.[6]

The dissent disagreed with the majority's distinction between "declaring code" and "implementing code" and considered them intrinsically linked. This caused the majority decision, in the view of the dissenting Justices, to overlook the implications of this conclusion and this tainted the Supreme Court's entire analysis.[7] The dissent also disagreed with the positive "market" analysis of the majority, stating that the negative financial consequences on Oracle after Google released Android were largely ignored by the Supreme Court.[8]

Furthermore, the two justices criticized the insinuation that Oracle may have speculatively controlled the market or harmed programmers by preventing them free access to their code. Rather, it was noted that several actions revealed that Google is the dominant market force, rather than Oracle, and Google had allegedly decimated Oracle's market by creating a mobile system now in over 2.5 billion devices.

Another notable point of the dissent is that the categorizing of Google's usage of the API as "transformative" decimates the idea of copyright. The two Justices pointed out that Google copied the declaring code exactly the same way Oracle used it, and that the majority confused "transformative" use with "derivative" use. They noted that it is not transformative merely to copy a code just because doing so would lead to development of new products and as such, Google's actions cannot constitute fair use.

Based on the above summarized reasons, the dissenting opinion held that Google did not satisfy the requirements for fair use.

> ***"... Surely the majority would not say that an author can pirate the next version of Microsoft Word simply because he can use it to create new manuscripts."***
>
> *Google v Oracle, Supreme Court, , dissenting opinion, p. 17.*

Implications of the Decision under Nigerian Law

Nigerian courts are not obliged to follow or adhere to decisions of the courts in the United States. However, where landmark decisions are made on very novel issues of law in foreign jurisdictions, they could serve as a useful guidance for courts in other jurisdictions, including Nigerian Courts.[10]

With specific reference to Nigeria, the defence of "fair use" is not provided for in Nigerian copyright law – rather, "fair dealing" (a very similar concept inherited from English law) is mentioned in the Nigerian Copyright Act. Unfortunately, the Copyright Act does not define "fair dealing" thus making the term ambiguous.

Relatedly, English courts in copyright cases have recognized the extreme difficulty in defining what "fair dealing" is[12] and have decided that there is no 'one size fits all' definition – rather, it is determined on a case-by-case basis.[13] The factors for "fair dealing" used by English courts are similar to those used by the US Supreme may cause more harm than good.

The factors for "fair dealing" used by English courts are similar to those used by the US Supreme Court: (1) the amount of work copied; (2) the type of use involved; (3) the effect of the use on the original work; and (4) the amount of users' labour involved.

Due to the dearth of decided cases by Nigerian courts on the issue, should a "fair use" case come up in Nigerian courts, the courts are likely to rely on persuasive decisions by foreign courts

> ***"…. Foreign decisions will continue to be useful in the expansion of the frontiers of our jurisprudence,*** *but this court cannot invoke such decisions where it thinks they are contrary to the judgments of the court which are correctly decided".*
>
> *- Niki Tobi, JSC (as he then was).*

Thus, while the US Supreme Court's decision in Google v. Oracle cannot bind any Nigerian court, it may be an indicator of the direction the court may go when presented with a "fair use" or "fair dealing" copyright dispute, particularly one that involves code or programming language.

Given that it is such a major decision involving global entities, Nigerian courts would certainly be interested in hearing undrestanding the reasoning and logic behind the US Supreme Court's decision. Whether that reasoning would make Nigerian courts agree or disagree with the decision cannot be said, because as we have analysed earlier, while the Supreme Court majority gave cogent and detailed reasons for their justification of Google's "fair use", the dissenting opinion also proffered powerful rebuttals in favour of Oracle's copyright in the Java SE API.

In summary, given the likely controversy to stem from such disputes and decisions in the future, Nigerian lawmakers may consider getting ahead of the curve and amend the Nigerian Copyright Act to define "fair dealing" in anticipation of similar disagreements. This would have to be done carefully, as a vague definition may cause more harm than good.

Implications for the Nigerian Tech Sector

Stakeholders in the tech sector may have probably skimmed through this reportage thinking ***"So, long story short… are you saying I can copy someone else's code and get away with it?". Absolutely not!!!***

The US Supreme Court's decision must be viewed within the context of the facts between Google and Oracle in the United States of America and cannot be used to cover copyright and "fair use" of API or other code in a global sense. If such a dispute were to arise in Nigeria, there is no guarantee that Nigerian courts would reach the same decision, and it is very possible that such an act may be deemed to be copyright infringement, given the state of our copyright laws.

However, there are important takeaways from the Google and Oracle decision for the Nigerian tech ecosystem, namely:

1. **Safeguard codes:** It is important to document and safeguard original codes to the extent possible. Codes should be kept encrypted and as protected as they can be, because the legal copyright in such codes may not be guaranteed.

2. **Use and be aware of intellectual property clauses in contracts:** While Google and Oracle did not have any contract between them, parties usually enter into contractual arrangements for licensing the usage

of each other's software. It is critical for such parties to carefully review (and obtain legal advice on) the intellectual property or copyright clauses in such contracts in order to ensure their interests and creative works are properly protected. Such intellectual property right licensing clauses should be kept limited to the purpose or project for which the licensee represents the intellectual property will be used for.

3. **Review the impact of the decision on US holding companies**: A number of Nigerian tech companies have their holding companies incorporated in the United States – such holding companies usually hold the copyright in the tech work, coding libraries, applications, etc of their subsidiaries. The Google v. Oracle decision may directly impact upon such companies, especially when onboarding or integrating APIs with other entities. US legal advice may be required to be sought to determine the exact effect the

[1]An API is essentially a prewritten computer code which specifies different possible interactions or instructions with a piece of software. Put simply, APIs are what enable different people operating on different platforms to integrate with each other (for example, if you were on a travel application or website trying to book a flight, that travel website or app is likely to be integrated with the APIs of different airline websites, thus allowing you to seamlessly book and purchase a flight ticket from any number of airlines without going directly to any particular airline's website).
[2]According to Forbes as of 2020. See: https://www.forbes.com/global2000/#522acfb6335d
[3]Barret, J., took no part in the consideration or decision of the case as she was not at the Supreme Court during the hearing.
[4]For a detailed description of the Supreme Court's analysis, see Google v Oracle pp. 7-8.
[5]A dissenting opinion is useful to note for legal purposes but does not change or alter the majority decision of the court.
[6]***Google v Oracle***, Thomas J., Dissenting, p. 7.
[7]***Ibid***, p. 11.
[8]The dissent refers to how the release of Android allowed Amazon to negotiate a 97.5% discount on its licence fee with Oracle and how right after the release of Android, Samsung's contract with Oracle dropped from $40m to around $1m.
[9]Google v Oracle, Thomas J., Dissenting, p. 16-17.
[10]***Araka v. Egbue*** (2003) 17 NWLR (PT.848).
[11]Second Schedule, Copyright Act, Cap T 13, Laws of the Federation of Nigeria 2004.
[12]***Hubbard v. Vosper*** (1972) 2 Q.B. 84.
[13]***Dodsley v. Kinnersley*** (1761) 27 Eng. Rep. 270 (Ch.).