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PERSPECTIVE

In *Google v Oracle*, tech giants battle, but consumer rights are at stake

By Joseph Gratz and Samuel Zeitlin

This week the U.S. Supreme Court will finally hear oral argument in *Google v. Oracle*, marking the end of a decade of litigation in the lower courts. Whether Google's Android mobile phone operating system infringes Oracle's copyrighted software is a multi-billion dollar question for the parties — but the real stakes in this case are for consumers. A victory for Oracle would outlaw devices and software used by millions every day, raise the price of product refills and replacement parts, and make new software harder to learn and use.

Google designed Android to make it easy for developers familiar with the popular Java programming language to code Android apps. To that end, Android accepts many of the same commands that Java programmers already know. At issue in the case is Oracle's contention that the names of those commands are copyrighted, and that by building a system that understood those commands, Google infringed that copyright. In a trial before Judge William Alsup in the Northern District of California, the jury held that there was no infringement, but the jury's verdict was reversed on appeal by the U.S. Court of Appeals for the Federal Circuit. The Supreme Court will hear argument on Wednesday.

Oracle is asking the Supreme Court to recognize copyright protection for software interfaces. A software interface is the point of connection between a computer program and something else — another program or a human being. In order to be understood by computers, the commands received across an interface must take a precise form, and the author of a piece of software dictates what that form will be. But that initial choice imposes restrictions on those who come after. Anyone using a computer system, either directly or through software of their own, must follow the rules of the interface.

Oracle's argument should fail because Section 102(b) of the Copyright Act prohibits copyright in any "system" or "method of operation," a phrase whose plain text clearly covers software interfaces. Google's copying of the names of the commands is permissible under the merger doctrine: When part of an uncopyrightable system (the interface) can only be expressed one way (the names of the commands), the expression "merges" with the system, and becomes uncopyrightable as well. Without the merger doctrine, copyright law would become a back door for companies to control systems and methods that they could never patent — an outcome the Supreme Court has called "a surprise and a fraud upon the public." But that is exactly what Oracle seeks to do here.

If Oracle succeeds in establishing copyright protection for software interfaces, the result will be disastrous for consumers. Software development has proceeded for decades on the assumption that interfaces are free for all to use. Today, the reuse of software interfaces is commonplace. A ruling that they are proprietary would have fast and far-reaching consequences.

The first casualty of a ruling for Oracle would be "universal" devices that work with many models or brands of product. One universal TV remote may incorporate the command codes for 300 different brands of TV. As with Android, to be compatible, the commands must be copied exactly. So anyone selling a universal TV remote would be infringing hundreds of interface copyrights held by competing companies. Other universal devices are less ubiquitous, but more crucial to their users. Apps designed for the blind help them navigate public touchscreen devices, like ATMs and subway ticketing machines. These apps read touchscreen menus via the camera, and use voice commands and inputs to guide blind users through the prompts. But the apps operate by storing the command structure of every touchscreen they work with. If software interfaces become copyrightable, every compatible device would become another count of copyright infringement.

Copyright protection for software interfaces wouldn't just limit what devices could be produced. It would also curtail how consumers can use products after purchasing them. Today, when developers fail to implement needed features, third parties can write software that interacts with the original product and customizes its functions. But if software interfaces are copyrightable, such after-market additions will become a thing of the past. As with universal devices, the burden will fall heaviest on those whose need is greatest. For example, when the manufacturers of glucose monitors failed to provide features to enable parents of diabetic children to monitor their glucose levels remotely, the nonprofit Nightscout Foundation produced a free software solution. But Nightscout's software by necessity incorporates the interfaces of the glucose monitors it talks to. If the Court adopts Oracle's position, Nightscout and its users will be infringers.

Copyright protection for software interfaces would also give product manufacturers total control over the market for refills and replacement parts, enabling them to raise prices. All the manufacturer has to do is place a microchip on the part and require the microchip to communicate with the main device through a copyrighted system of commands. Printer companies have tried this already in an attempt to lock out third-party printer cartridges — but current copyright law does not support them, and their lawsuit failed. A win for Oracle would resurrect it, and the same story will play out for batteries, chargers, car tires, and countless other products.

Finally, if Oracle wins, new software will become harder to learn. This is exactly the problem Google sought to avoid in the design of Android: it wanted Java developers to be able to write Android apps without having to learn a new set of commands. But the same story plays out in the world of consumer software. It's easy to switch between Microsoft Excel, Google Sheets, and Apple Numbers, because all use a set of common commands. And thousands of programs make use of now-universal interface commands like Control-c to copy, Control-v to paste, Control-s to save, Control-b for bold type, and so on. If the Supreme Court holds that interfaces are copyrightable expression, these kinds of informal conventions may become a thing of the past. Expect new software to become more frustrating to use, as copyright liability becomes a dominant concern in interface design.

What all these consequences have in common is that they shift power away from consumers and into the hands of corporations, who will use it to raise prices and cut corners. This result has nothing to do with an author's right to control their creative expression. Creating copyright protection for software interfaces would legitimize a new purpose for copyright: enabling anti- consumer and anticompetitive behavior by companies whose product happens to be or contain software. The Supreme Court has never allowed this before, and it should not start now. ■

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