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ABSTRACT

The United States Supreme Court decision in Google LLC v Oracle America Inc. set a precedent with regards to the nature and exclusive use of computer programs in general and source code in particular. The decision also clarified the application of the defence of fair use for copyright infringement to computer programs and source code hence streamlining its application to the technology industry. The impact of this decision if adopted as the position of the Law in Uganda is analysed and consequently its compatibility with Ugandan copyright law.

1.0 INTRODUCTION

Over the years, there has been uncertainty about whether copying of source code to create new and transformative applications and software amounts to copyright infringement or is exempted by the defence of fair use. The United States Supreme Court by resolving the matter between Google LLC and Oracle America Inc. has provided clarity on the above.[1]

This is in light of the fact that big technology companies have always claimed that they enjoy a monopoly over any source code that they develop and no other technology company - especially start-up technology companies can utilize the

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1 *Google LLC v Oracle America Inc. 593 U.S.*

same even for use that is transformative to the technology sector - claiming that doing so amounts to copyright infringement.

At the heart of the dispute of *Google LLC v Oracle America Inc.* is a contestation as to whether Oracle America Inc. has monopoly over the source code that it developed, and whether any use of the same by any other technology company like Google LLC amounts to copyright infringement. The decision in this matter is fundamental to the technology industry and will have a significant impact given that many technological innovations are based on pre-existing technology and many innovators benchmark on already existing technology to come up with technological innovations.

Most of the stakeholders in the technology industry, especially start-ups, warmly received this decision because of the view that it would foster the growth of innovation and creativity in the technology industry. They reasoned that being prone to monopolization of ideas and concepts, especially by the big players at the expense of small players and start-ups which results in stifling innovation and invasion in the process, a decision curtailing monopolisation would be helpful.

This paper discusses the decision of the Court, its implication on the Ugandan technology industry, and its compatibility with Ugandan copyright law. Section 1.0 of this paper provides an introduction; section 2.0 discusses the decision of the Court and the final section discusses the implication of the Supreme Court's position Uganda. The decision is then juxtaposed with the Ugandan copyright law to analyse the compatibility of the former with the latter, following which a conclusion to this discussion ensues.

2.0 THE JOURNEY OF *GOOGLE LLC V ORACLE AMERICA INC.* TO THE SUPREME COURT

2.1 The Facts

The facts of this case are highlighted on pages 1 to 11 of the Supreme Court decision but are summarised as follows;

In 2005, Google LLC acquired Android Inc., a start-up firm that hoped to become involved in smartphone software. They sought, through Android Inc. to develop a software platform for mobile devices. Google envisioned an Android platform that was free and open, such that software developers could use the tools found there free of charge. Its idea was that more and more developers using its Android platform would develop more Android-based applications, all of which would make Google's Android-based smartphones more attractive to ultimate consumers.

This vision required attracting a sizable number of skilled programmers. At that time, many software developers understood and wrote programs using the Java programming language, invented by Sun Microsystems. About six million programmers had spent considerable time learning, and then using the Java language. Many of those programmers used Sun System's own popular Java Standard Edition (SE) platform to develop new programs primarily for use in desktop and laptop computers.

Google LLC, while creating its Android platform, wrote its own task implementing programs. For most of the packages in its new Application Programming Interface (API), Google wrote its own declaring code. For thirty-seven packages, however, Google copied the declaring code from the Sun Java API. In doing so, Google LLC copied that portion of the Sun Java API that allowed programmers with expertise in the Java programming language to use the task calling system that they had already learned.

2.2 ON FIRST INSTANCE IN THE DISTRICT COURT

In 2010, Oracle Corporation bought Sun Microsystems. Soon after, Oracle Inc. filed a suit in the United States District Court for the Northern District of California. Oracle contended that Google's copying of its source code amounted to copyright infringement. The issues for determination before the Court were;

(i) Whether the source code was copyrightable and thus protected by copyright law

(ii) Whether Google's copying of Oracle's source code amounted to copyright infringement.

The District Court held that source code was not copyrightable and thus not protected by copyright law since it was a "system or method of operation", which copyright law specifically states cannot be copyrighted.[2] Having resolved the first issue in the negative, the Court did not go ahead to resolve the second issue on infringement but went ahead to state, albeit obiter, that Google's actions would amount to fair use.

2.3 The Position of the Federal Circuit Court

In a consequent appeal to the Federal Circuit, the position of the District Court was reversed. In the resolution of the issue as to whether source code was copyrightable, the position was that it indeed was. As to whether Google's copying of Oracle's source code amounted to copyright infringement, the Federal Circuit held that Google's copying of Oracle's source code did amount to copyright infringement and it did not qualify as fair use. The Court was firm in holding that there is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform, hence the appeal to the Supreme Court.

3.0 ARRIVAL AT THE SUPREME COURT

3.1 Google and Oracle's Averments

Oracle Inc. alleged that Google LLC infringed its copyright by copying, for the thirty-seven packages, both the literal declaring code and the non-literal organizational structure of the API.[3] Google LLC claimed that the declaration code and organizational structure of the API in question were not subject to copyright law protection and that in the alternative if it was indeed subject to copyright protection its actions amounted to fair use.[4]

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2 Copyrights Act 1976, S.102(b)
3 *supra*, (n.1), p.9
4 *supra*, (n.1, p.14

Before the Supreme Court, the issues for determination by the Court were:

(i) Whether the declaration code was subject to copyright law protection.

(ii) Whether the copying of the declaration code amounted to fair use.[5]

3.2 Decision of the Court

3.2.1 Majority's Decision

The majority of the Justices of the Supreme Court declined to discuss and resolve the first issue on grounds that given the rapidly changing technological, economic, and business related circumstances, they believed that the Court should not answer more than is necessary to resolve the parties' dispute.[6] The majority went on to discuss and resolve the second issue in favour of Google LLC. The Supreme Court declared that the copying of 11,000 lines of code that were needed to allow programmers to put their accrued talents to work in a new and transformative programme, as a matter of law, was fair use of that material.[7] The majority's failure to resolve the first issue and postponing its resolution to future disputes left the question of the source code being copyrightable as unsettled law.

The outcome then became legal uncertainty and unnecessary future disputes on the same, which could have been prevented by the Court's pronouncement, and rendering the issue settled law.

3.2.2 Deciphering the Law on Fair Use

The majority's analysis of the factors that determine whether a copyright infringement amounts to fair use was as follows:

a. The nature of the copyrighted work

The majority observed that the code that Google copied was bound with the main source code of the Java API but had a distinct and unique function from the rest of the source code.[8] Having been copied for the unique function of fostering interoperability and the promotion of innovation and invention, Google's

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5 *ibid*

6 *supra*, (n.1), p. 15

7 *ibid*

8 *supra*, (n.1), p.22

infringement actions weighed more towards being deemed fair use, as observed by the court. It was also reasoned that since most of the players in the technology industry aim at achieving interoperability of various software, platforms, and functionality of the same, the dispute ought to be resolved that way.

b. The purpose and character of the use

Google argued that it complied with industry customs and believed that it could copy the declaring code and SSO as long as it wrote its own implementing code. The Court observed that the purpose and character of Google's use of the copied material were for transformative purposes as Google only copied lines of code that would enable Java programmers efficiently develop applications on the Android platform by interacting with code that they are already familiar with without the need to retrain or reorient them. [9] By so holding, the decision was a demonstration of consistency with the Supreme Court's precedent that describes what amounts to transformative use.[10]

c. The amount and substantiality of the portion used

Concerning the substantiality of what was copied by Google, the Court observed that Google only copied thirty-seven packages totalling to approximately 11,500 lines of code out of 2.86 million lines of code that comprised the entire Java API.[11] In the Court's view, what was copied was a substantially little amount.[12]

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9 *supra*, (n.1), p. 25

10 In *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569, members of the rap music group 2 Live Crew composed a song which was a parody of an already pre-existing song with a similar but not the same title. The group's manager requested the Respondent to grant them a license to the pre-existing song, which grant the Respondent, refused. 2 Live Crew went ahead to produce and release the parody. The Respondent sued 2 Live Group for copyright infringement. The issue before Court was whether 2 Live Crew's commercial parody amounted to a fair use. The Supreme Court while analysing the factors that make a copying amount to fair use observed that transformative use refers to a copying use that adds something new and important and that a parody can be transformative because it comments on the original or criticises it, because a parody needs to mimic an original to make its point.

11 *supra*, (n.1), p. 28

12 *ibid*

In its arrival at this position, the Court relied on its previous decisions on the law. [13]

d. Market effects

In the Court's view, the effect of Google's copying was not adverse to the market for Oracle's Java platform given that the Java platform was mainly used for desktop computers and not smartphones for which Google's Android platform was similarly used.[14] The Court also observed that Google's financial gain from the copying, given the current profitability of the Android operating system (it being the leading and most used smartphone operating system) was not prejudiced against Google given the transformative use of the copying that fostered innovation.

In the Court's view, commercial benefit did not necessarily connote non-fair use.[15] The Court also noted that granting Oracle copyright protection would be tantamount to allowing it to have a monopoly over source code which would stifle creativity and innovation which would interfere rather than further copyright's basic creative objectives.[16] Applying the "harm to the public" factor, Justice Breyer found that enforcing Oracle's copyright would interfere with "creative improvements, new applications, and new uses developed by users who have learned to work with that interface."

Analytically, this reasoning from the majority is sound, given that Google's Android platform is predominantly a smartphone platform and Oracle's Java platform is predominantly a desktop computer platform, and as such, Google's

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13 In *Harper & Row v Nation Enterprises*, 471 U.S. 539, the Nation Enterprises had quoted substantially from President Gerald Ford's memoir his decision to pardon former president Richard Nixon. Harper & Row who held the rights to the memoir sued for copyright infringement. The issue before Court was whether Nation Enterprises copying amounted to fair use. The Supreme Court, while analysing the factors that make a copying amount to fair use observed that even a small amount of copying may fall outside the scope of fair use where the excerpt copied consists of the "heart" of the original work's creative expression and that on the other hand, copying a large amount of material can fall within the scope of fair use where the material copied captures little of the material's creative expression or is central to a copier's valid purpose.

14 *supra*, (n.1), p.31

15 *supra*, (n.1), p.30

16 *supra*, (n.1), p. 34

copyright infringement had no effect on Oracle's Java platform. Equally, copyright infringement almost often than not leads to financial benefit therefore credence should be sought to the effect of the financial benefit of the party that is infringing a copyright and the market share of the author of the copyright.

3.2.3 Dissenting Opinion

The dissenting Justices, unlike the majority, went on to hold that declaring code was copyrightable. In their view, the Copyright Act 1976 expressly provides that computer code is copyrightable. This law recognizes that a computer program is copyrightable.[17] A computer program is defined as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.[18] The definition of a computer program under this law clearly covers declaring code, which is a set of statements that indirectly perform computer functions by triggering prewritten implementing code.[19]

The dissenting Justices further go on to observe that if the Act didn't expressly state that Source Code is copyrightable, there are other provisions in the act that if interpreted in light of the nature of source code, it would mean that it is copyrightable.

Copyright protection subsists in original works of authorship fixed in a tangible medium of expression.[20] Works of authorship include literary works, which are works expressed in words, numbers, or other verbal or numerical symbols.[21] A work is rendered original if it is independently created by the author and possesses at least some minimal degree of creativity.[22]

In their view, the lines of declaring code in the Java platform readily satisfy this extremely low threshold. First, they are expressed in words, numbers, or other

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17 Sections 109 (b), 117 and 506 (a), Copyright Act 1976
18 Section 101, Copyright Act 1976
19 Section 101, Copyright Act 1976
20 Section 102 (a), Copyrights Act 1976
21 Sections 101 and 102(a), Copyrights Act 1976
22 *supra*, (n.1), p. 5

verbal or numerical symbols and are thus works of authorship.[23] Second, the lines of declaring code are original.[24] They therefore concluded that computer code is indeed copyrightable given its nature and holding otherwise would be depriving computer programmers of protection for their efforts and hard work which copyright law aims to achieve.

4.0 COMPATIBILTY OF THE DECISION WITH UGANDAN COPYRIGHT LAW

4.1 'Copyrightability' of Source Code

Uganda's Copyright and Neighbouring Rights Act 2006 provides that computer programs are copyrightable works.[25] A computer program is defined as;

> *"A set of instructions expressed in any language, code or notation, intended to cause the device having an information processing capacity to indicate, perform or achieve a particular function, task or result."*[26]

Clearly, this definition of a computer program is in tandem with the definition of a computer program in the legislation before the United States Supreme Court.

In *Zeenode Ltd v The Attorney General and 2 Others,* the Commercial Court of Uganda stated that according to Section 5(1) (e) of The Copyright and Neighbouring Rights Act 2006, computer programs are part of works that are eligible for copyright.[27] A computer program was further defined in accordance with Section 2 of the same. A reading of the copyright law in Uganda leads to a conclusion that source code is copyrightable under Ugandan law which position is in tandem with the dissenting opinion of the United States Supreme Court decision in the case under discussion.[28]

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23 Section 101, Copyrights Act 1976
24 *supra*, (n.1), p.5
25 Section 5(1) (e), Copyright and Neighbouring Rights Act, 2006
26 Section 2, Copyright and Neighbouring Rights Act, 2006
27 *Zeenode Ltd v The Attorney General and 2 Others* [2021] UGCommC 18
28 Kakungulu-Mayambala, Ronald. 'Uganda'. In International Encyclopaedia of Laws: Cyber Law, Edited by Jos Dumortier, Pieter Gryffroy, Ruben Roex & YungShin Van der Sype. Alphen aan den Rijn, NL: Kluwer Law International, 2021 at Page 68, Available at <https://pubkit.newgen.co/auth_token_login> (Accessed May 24 , 2022)

4.2 Fair Use Defence

Fair use as a defence to copyright infringement is provided for under section 15(1) of the Copyright and Neighbouring Rights Act 2006.[29] It provides for factors to be considered to determine whether a copyright infringement amounts to fair use. Section 107 of the Copyrights Act of the United States of America, which was the subject of discussion in this case, is similar in substance to Section 15(2) of Uganda's law.

In *Angela Katatumba v The Anti-Corruption Coalition of Uganda*,[30] the Commercial Court had the occasion to discuss the defence of fair use for copyright infringement under Ugandan law. The Court analysed Section 15(2) of Uganda's Copyright and Neighbouring Rights Act 2006 in light of the law on fair use in the United States of America and observed that;

> *"The principles spelt out under section 15 (2) of the Copyright and Neighbouring Rights Act are similar to those under exhibit D5 on fair use that was printed from YouTube. The first principle in exhibit D5 is that the four factors to be considered include the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. It is almost word for word with section 15 (2) (a) of the Copyright and Neighbouring Rights Act. Secondly, the Courts consider the nature of the copyrighted work. This is word for word with section 15 (2) (b) of the Copyright and Neighbouring Rights Act. The third principle is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The principle is word for word with section 15 (2) (c) of the Copyright and Neighbouring Rights Act. Lastly, the last principle is the effect of the use upon the potential market for, or value of, the copyrighted work. Again the fourth principle is the same as stipulated by section 15 (2) (d) of the Copyright and Neighbouring Rights Act. Exhibit D5 which the defendant relied on primarily dealt with the United States of America and the judicial approach of the defence of fair use. While it was not authority for understanding the provisions of section 15(2) of the Ugandan law in question, it was useful for comparative purposes."*[31]

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29 Section 15(1).

30 *Angela Katatumba v The Anti-Corruption Coalition of Uganda* [2014] UGCOMMC 107

31 *ibid* at p.32

In the *Katatumba* decision, it was observed that the actions of the defendant amounted to copyright infringement because the defendant's acquisition of funds to maintain the adverts where the plaintiff's song was used amounted to commercial use. Additionally, the defendant used the plaintiff's entire song in their adverts, which amounted to a substantial use, and the defendant's use of the plaintiff's song greatly affected its value and worth on the market.

Following this analysis, we arrive at a convergence of the position of the law in the majority's decision in *Google LLC v Oracle America Inc.* and Ugandan copyright law. The analysis therein is largely in line with the detailed interpretation of Section 15(2) of Uganda's Copyright and Neighbouring Rights Act.

5.0 IMPACT OF THE DECISION IN UGANDA

As a persuasive authority in the technology sector with respect to copyrightable works in the space of computer programming, if applied, this decision can birth precedent on the aspects of interoperability and licensing which would be positive outcomes for start-ups.

5.1 Impact on Interoperability

Uganda's technology ecosystem, especially the application and software branch is growing as more people continue to develop new ways of using technology to solve contemporary problems. Application and software developers and programmers usually rely on APIs to create interoperability and compatibility between computer programs.[32]

To the extent to which this decision would be applied in Ugandan courts, it can encourage application and software developers to ably utilize APIs to create interoperability and compatibility between computer programs hence creating applications that are more user friendly and with better functionality. This would

[32] Bonita Mulelengi , IP Article : World IP Day 2021 , Available via <https://ktaadvocates> [Accessed 24 May 2022]

be crucial in improving the user experience. The Supreme Court's ruling on this point enables software developers in the future to proceed somewhat more confidently, knowing that they can copy aspects of code that are necessary for interoperability, particularly the declaring code without the possibility of litigation premised on infringement claims.

5.2 Impact on Licensing

Existing technology companies in Uganda are majorly start-ups. These in most cases cannot afford to acquire licenses for pre-existing technology due to the high costs of licensing fees. They will be in position to forego licensing altogether and build transformative technology based on pre-existing technology at no cost.

5.3 Impact on Start-ups

Uganda's start-up industry, especially in the technology sector, is growing. A number of fintechs and e-commerce platforms have come up.[33] Financial technology (fintech) refers to products and companies that employ newly developed digital and online technologies in the banking and financial services industry.[34]

This decision, if applied in Uganda, will promote the further growth of the start-up industry as many players will be in position to utilize existing technology and software to start up their own provided their utilization of existing software and technology amounts to fair use.

5.4 Impact on Copyright Enforcement

Uganda's copyright enforcement is faced with a number of challenges, ranging from ignorance about copyright law and rights as well as lack of technical expertise, to mention but a few. This decision if applied to Uganda may further complicate the enforcement of copyright in the technology industry as majority

33 Case in point is Xente, Chipper Cash, Ezee money and Easy pay among many others.

34 Merriam Webster Dictionary , Available at <https://www.merriamwebster.com> , [Accessed 27 May 2022]

copyright infringement that involves creating transformative technology may be deemed fair use.

6.0 CONCLUSION

Contrary to the views of the dissenting Justices of the United States Supreme Court, this decision is a blessing to the technology industry, as it will foster innovation and growth in the industry. Start-ups and other stakeholders in the technology industry will be in position to develop new technology while benchmarking or improving on the already existing ideas and concepts without having to worry about liability due to copyright infringement which practice is highly characteristic of the technology industry.

The issues in contention in the case between Google LLC and Oracle America Inc. are similar to the issues in contention in the main suit in *Zeenode Limited v Attorney General and Others*[35] currently before the Commercial Division of the High Court. It is hoped that Ugandan Courts will not only be persuaded by this decision, but also apply it to Uganda's jurisprudence.

[35] *Zeenode Limited v Attorney General and Others* Civil Suit Number 0148 of 2021

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