NEWS FROM THE BENCH

SUPREME COURT

In ***Google LLC v. Oracle America, Inc. (No. 18-956)***, the Supreme Court ruled 6-2 that Google's copying lines of code from the Java SE Application Programming Interface (API) was fair use resulting in new and transformative work.

The case revolves around 11,500 lines of code from the Java API. Google copied the code in 2005 to allow programmers familiar with Java to easily write programs for their Android Operating System (OS).

An API acts as a bridge between systems, programming languages, and/or hardware. APIs simplify software development by allowing for code reuse and the leveraging of developers' existing skills onto new platforms.

After acquiring Java in 2010, Oracle sued Google for having distributed a new implementation of the Java APIs as part of the Android OS. In the initial case, Judge William Alsup ruled in favor of Google, determining that APIs could not be copyrighted under US law.

In 2014, the US Court of Appeals for the Federal Circuit overturned the original verdict, but left the question of fair use open.

When the matter was again brought before him in the US District Court in 2016, Judge Alsup ruled Google's copying of the Java APIs constituted fair use.

Oracle appealed again and Alsup's ruling was again overturned by the US Court of Appeals for the Federal Circuit in 2018. Google then appealed to the Supreme Court.

Justice Stephen Breyer wrote the opinion for the Court, stating that the purpose of copyright law is to both protect new products and innovations yet also "stimulate creativity for public illumination."

Breyer wrote that the use Google made of the API code from Java was "consistent with the creative 'progress' that is the basic constitutional objective of copyright itself."

One factor the Court considered when making their fair use determination was the amount of code copied, roughly 0.4% of the 2.86 million lines of code comprising the Java API.

They also considered the nature of the code that was copied. Google used the familiar declaratory structure of Java, with the intention of making it easy for programmers and developers to write for their platform.

The Court noted that the API code Google copied was pervaded with uncopyrightable ideas, such as general task division and organization. They also acknowledged that Android was a new creative expression.

The Court also found that the Android OS did not harm the actual or potential markets for Java SE, as the smartphone market is distinct from the personal desktop and laptop computer market serving as Java's primary market.

When Sun's former CEO was asked directly if Sun's failure to build a smartphone resulted from Google's development of Android, he answered that it did not.

Matt Tait, chief operating officer of Corellium, said, "The decision means a lot for software compatibility. I can write platform software that other peoples' programs can run on, without worrying."

Brandon Howell wrote on *Internet and Social Media* that while the Supreme Court's "opinion allows for wide use of APIs and declaring code in other applications . . . to enable the transfer of long learned skills to a new environment and reuse of old code," questions remain around the fair use of copying APIs generally. For instance, it remains untested if this ruling would apply to a closed API or only to open and freely usable APIs like Java.

Justices Clarence Thomas and Samuel Alito dissented. Justice Amy Coney Barrett did not participate in the case as she had not been sworn in when the case was argued in October 2020.

Reported in: *The Hill*, April 5, 2021; NPR, April 5, 2021; *CNET*, May 9, 2014; *Ars Technica*, May 26, 2016; *JDSupra*, April 9, 2021, April 19, 2021, May 28, 2021; *Internet and Social Media*, May 4, 2021.

In ***Uzuegbunam et al. v. Preczewski et al. (19-968)***, the Supreme Court ruled 8-1 that requesting a nominal sum satisfied the Constitution's requirement that federal courts decide only actual cases or controversies in cases.

Chike Uzuegbunam is an evangelical Christian who reserved time at one of Gwinnett College's "free speech expression areas" to evangelize.

In 2016, after receiving complaints regarding Uzuegbunam's pontifications, a campus officer informed him that his approach to speaking in the "free speech" zone qualified as disorderly conduct. The officer told Uzuegbunam that he was restricted to distributing literature and having one-on-one conversations. Uzuegbunam sued the college in response.

In ***Uzuegbunam v. Preczewski (1:16-cv-04658)***, Gwinnett College argued the case was moot as it had revised its policy to allow speech across the campus. The court ruled in their favor and Uzuegbunam appealed.

The US Court of Appeals for the 11th Circuit affirmed the ruling of mootness in ***Uzuegbunam v. Preczewski (18-12676)***. Undaunted, Uzuegbunam again appealed and the

Supreme Court agreed to hear the case.

The Supreme Court overturned the mootness ruling, finding that the college's withdrawal of their speech policy did not let them off the hook for harms done while it was in place. They also addressed whether nominal damages constituted sufficient harm for a legal proceeding.

During the proceedings, Justice Elena Kagan evoked "the most famous nominal damages case I know of in recent times, which is the Taylor Swift sexual assault case," in which Swift sued a radio host who groped her, seeking $1 in nominal damages.

"I'm not really interested in your money," Justice Kagan said, summarizing Swift's thinking. "I just want a dollar and that dollar is going to represent something both to me and to the world of women who have experienced what I've experienced."

In the majority opinion, Justice Thomas wrote that, "Despite being small, nominal damages are certainly concrete," and that the merits of a case are not determined by a dollar amount.

Chief Justice John G. Roberts, Jr., was the lone dissenter, writing that this decision would lower the bar for trial and turn "judges into advice columnists" who will have to give opinions "whenever a plaintiff tacks on a request for a dollar."

The ruling did not make any determination regarding the campus's prior use of extremely limited "free speech expression areas," nor did it actually award the $1 in damages to Uzuegbunam. Their ruling merely allowed his lawsuit to proceed.

Reported in: *The New York Times*, March 8, 2021; *FindLaw*, March 9, 2021.

The US Supreme Court rejected an appeal by conspiracy theorist Alex Jones without comment. The *Infowars* host was fighting a Connecticut court sanction in a defamation lawsuit brought by relatives of victims of the Sandy Hook Elementary School shooting and an FBI agent who responded to the shooting.

The shooting claimed the life of twenty first-graders and six educators. The families and the FBI agent are suing Jones and his show over his claims that the massacre was a hoax.

Jones's hoax conspiracy resulted in family members of the victims being subjected to harassment and death threats from Jones' followers.

The sanctions against Jones came in response to violations of numerous orders to turn over documents to the families' lawyers and to Jones's protracted tirade singling out one of the lawyers.

On his webshow, Jones held up a photo of Christopher Mattei, an attorney representing the families, and screamed "You're trying to set me up with child porn!"

Jones pounded his fist on Mattei's picture, continuing, "$1 million to put your head on a pike. $1 million, bitch. I'm gonna get your ass. . . . The bounty is out, bitches. They're going to get your ass, you little dirtbag. One million, bitch. It's out on yo ass."

His tantrum spanned a roughly twenty minute-segment and was peppered with admonitions from his lawyer advising him to stop talking. Mattei's name and photo frequently filled the screen as Jones raved about the bounty.

The Connecticut Supreme Court previously stated the sanctions against Jones did not run afoul of the First Amendment because they were imposed on speech constituting an "imminent and likely threat to the administration of justice" and "language evoking threats of physical harm is not tolerable."

Joshua Koskoff, a lawyer for the Sandy Hook families, said, "The families are eager to resume their case and to hold Mr. Jones and his financial network accountable for their actions. From the beginning, our goal has been to prevent future victims of mass shootings from being preyed on by opportunists."

The lawsuit against Jones alleges he has made tens of millions of dollars a year by employing false narratives and that he has "persistently perpetuated a monstrous, unspeakable lie: that the Sandy Hook shooting was staged, and that the families who lost loved ones that day are actors who faked their relatives' deaths."

Reported in: *NBC News*, April 5, 2021.

FREE SPEECH

The US Court of Appeals for the First Circuit upheld First Amendment protections for individuals to secretly audio record on-duty police officers in public spaces in the case ***Martin, et al. v. Rollins (19-1629)***.

In their ruling, the First Circuit affirmed the district court's 2019 judgment that Massachusetts' anti-eavesdropping or "wiretap law" (Mass. G.L. c. 272, Sec 99) unconstitutionally criminalized this right to record the police.

The First Circuit held that recording on-duty police officers, even secretly, is a protected newsgathering activity serving "the very same interest in promoting public awareness of the conduct of law enforcement--with all the accountability that the provision of such information promotes."

The court's opinion stated that recording provides one avenue of "informing the public about how the police are conducting themselves, whether by documenting their heroism, dispelling claims of their misconduct, or facilitating the public's ability

to hold them to account for their wrongdoing."

The Electronic Frontier Foundation, who filed an amicus brief in the case, pointed out that "the ability to *secretly* audio record on-duty police officers is especially important given that many officers retaliate against civilians who openly record them."

The court was not persuaded by the argument that the law served to protect the privacy of civilians speaking with or near police officers, asserting that "an individual's privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer."

Federal appellate courts in the Third, Fifth, Seventh, Ninth, and Eleventh Circuits have also upheld the right to record on-duty police officers.

Reported in: EFF, April 5, 2021.

Kentucky

The US Court of Appeals found a Kentucky law distinguishing between on-site and off-site advertising to be unconstitutional on its face.

The case, ***L.D. Management Company v. Gray (20-5547)***, revolved around a billboard advertisement for the Lion's Den Adult Superstore which was displayed on a tractor-trailer parked on a neighboring property at Exit 251.

According to the court's February 16 opinion, Lion's Den sells "books, magazines, and other items not worth belaboring." The billboard read "Lion's Den Adult Superstore Exit Now."

When this billboard came to the attention of the Kentucky Department of Transportation, they ordered Lion's Den to remove it.

Kentucky's "billboard" law imposes special requirements on roadside billboards advertising off-site activities which did not apply to billboards advertising on-site activities.

The case was previously tried at the US District Court for the Western District of Kentucky at Louisville (no. 3:18-cv-00722). The district court prohibited the Commonwealth from enforcing its law.

The US Court of Appeals ruled that since the law restricted billboard advertisements based on their content, it violated the First Amendment, upholding the district court's verdict.

The finding was in keeping with prior rulings, including *Reagan National Advertising of Austin, Inc. v. City of Austin (19-50354)*.

Reported in: *Courthouse News Service*, February 16, 2021.

Madison, WI

The Animal Legal Defense Fund (ALDF) sued the University of Wisconsin-Madison (UW-Madison) for blocking former student Madeline Krasno from commenting on their official social media accounts.

Krasno worked as a primate caretaker for approximately two years at the university's Harlow Center for Biological Psychology.

She alleges the university scrubbed critical comments about their animal research practices from their social media accounts in violation of her First Amendment rights.

Krasno said she encountered animal abuse first-hand in the lab and urged the university to stop its monkey studies through comments posted on their official Instagram and Facebook accounts.

In spring of 2020, the US Department of Agriculture fined UW-Madison $74,000 for twenty-eight violations of federal animal research standards dating back to 2015. These included numerous Animal Welfare Act violations involving primates, corroborating Krasno's claims.

The ALDF argues that by blocking Krasno's criticisms from view, the university is preventing Krasno from participating in discussions on designated public forums.

"Whistleblowers have a right to share their first-hand experiences, so the public can intervene and comment on the way tax-dollars are spent," said Stephen Wells, executive director of ALDF.

According to a report published on April 22, 2020, by the Foundation for Individual Rights in Education, UW-Madison was not blocking any users on Facebook or Twitter at that time. Krasno said they began blocking her in September of 2020.

While the university's campus policies on free speech herald their "long history of vigorous debate on controversial topics," their social media policy holds that they "have the right to remove any content for any reason."

The case, ***Krasno v. Board of Regents of University of Wisconsin et al. (civil action no. 21-99)*** is being adjudicated in the **US District Court for the Western District of Wisconsin**.

Reported in: *Wisconsin State Journal*, February 15, 2021; Animal Legal Defense Fund, February 9, 2021; *The FIRE*, February 19, 2021.

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The **US Court of Appeals for the Second Circuit** ruled that Andy Warhol's 1984 series of 16 silkscreen prints and pencil illustrations of Prince do not qualify as transformative works of art under the fair use doctrine.

The photograph of Prince which Warhol worked from was taken by Lynn Goldsmith in 1981. Condé Nast licensed the then-unpublished photo as an illustration reference. Warhol created an image from it for the article

"Purple Fame," which appeared in the November 1984 issue of *Vanity Fair.*

Vanity Fair licensed 12 images from Warhol's Prince series to accompany a memorial article on Prince in 2016. When they did, the Andy Warhol Foundation preemptively sued Goldsmith, seeking to establish that these additional prints' creation and licensure was fair use.

In 2019, US District Judge John G. Koetl ruled in their favor, finding that Warhol's boldly-colored print and signature silk-screening process transformed the photo of a vulnerable and uncomfortable looking man into an "iconic, larger-than-life figure."

In overturning his ruling, the Second Circuit said that a work had to add "something new, with a further purpose or different character, altering the first with new expression, meaning or message" in order to be considered transformative.

The Second Circuit did not consider "the bare assertion of a 'higher or different artistic use'" to be sufficient, indicating instead that derivative works are transformative only when they "obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created."

According to Erin Connors writing for *JDSupra*, this ruling constitutes a narrowing of the fair use doctrine which was at its broadest when the Second Circuit held in 2013 that a work was transformative if it possessed "a different character" and "new aesthetics with creative and communicative results," even if it did not comment on the original work.

In the opinion for ***The Andy Warhol Foundation for the Visual Arts, Inc., v. Goldsmith (19-2420)***, Judge Gerald Lynch seemed to assert this past ruling bordered on all-encompassing. Lynch stated that the secondary work must rather be "fundamentally different and new."

Lynch wrote, "Whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—draws from the work. Were it otherwise, the law may well recognize any alteration as transformative."

The Court also ruled that the distinctiveness of the secondary artist's style should not factor into a fair use analysis, as that would "create a celebrity-plagiarist privilege."

"The imposition of another artist's style on the primary work" does not suffice to render a work transformative. Famous artists still need to license the originals on which their work is based no matter how recognizable their style may be.

In their ruling, the Court also seemed to narrow what might constitute fair use by expanding the considerations for how a derivative work affects the original's value.

Despite finding that the markets for the Goldsmith photograph and the Warhol prints did not meaningfully overlap, the Court determined Warhol's prints threatened Goldsmith's actual or potential licensing revenue, as both depictions of Prince have been licensed to accompany articles.

In a prepared statement, Goldsmith said, "Four years ago, the Andy Warhol Foundation sued me to obtain a ruling that it could use my photograph without asking my permission or paying me anything for my work. I fought this suit to protect not only my own rights, but the rights of all photographers and visual artists to make a living by licensing their creative work."

Reported in: *Courthouse News Service*, March 26, 2021, and September 15, 2020; *JDSupra*, April 7, 2021, and May 7, 2021.