Update: Oracle v. Google Granted Cert

November 18, 2019 SKELJ Uncategorized 0

The Supreme Court has granted cert in the most recent petition for Oracle v. Google.

Predictably, this has resulted in (somewhat hyperbolic) commentary from law professors (e.g., "Big Big Big Case: Oracle v. Google") and tech-inclined news outlets ("Supreme Court agrees to review disastrous ruling on API copyrights"). The former asserts that a "key case on-point" is Baker v. Selden – a 139 year old case preceding the second industrial revolution. Frankly, I think Feist (1991) is a better candidate for "key case on point" Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., (499 U.S. 340) or maybe Atari Games Corp. v. Nintendo of Am., Inc., (975 F.2d 832) as they discuss merger doctrine, fact/expression dichotomy, etc. in a more modern context, not just technically, but legally more modern. Of course, citing a 1991/92 case lacks the dramatic flare of citing an 1880 case. While I have much respect for Professor Crouch (Missouri!), I'm not aware that he has much experience in software development.

As for the Ars Technica article, its language is hardly neutral. "Over the last 13 years, the Supreme Court has **tried to inject some common sense** back into patent law by repeatedly overturning patent-friendly decisions by the Federal Circuit" (my emphasis). I'd be curious what cases the author has in mind – off the top of my head I thought the most recent Oil States and Helsinn v. Teva were both affirmed. A lot of the 101 case flip flopping was because it's just a plain difficult problem. Ditto the recent bankruptcy and licensing stuff.

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In any event, I previously **predicted** that CAFC would overturn the jury's decision (they did) and now that Google has appealed to the Supreme Court, I'm inclined to agree with the Solicitor General's **assessment** (affirming would be very useful, though, as it would provide more certainty during future deals and diligence).

Of course, the above outlets are welcome to their opinions and it's not inconceivable that the Supreme Court might reverse. What would the consequences be if the court were to do so? Though often ignored in the news, I expect the greatest consequences would be for the GPL and open source ecosystem management, as well as derivative work management for the entertainment industry. Let me review the existing situation, the likely consequences of reversal, and then summarize the possible pros and cons if that were to occur. As always, none of this is legal advice so don't rely on it – it's just analytical musing.

At present, life roughly resembles FIG. 1 below.

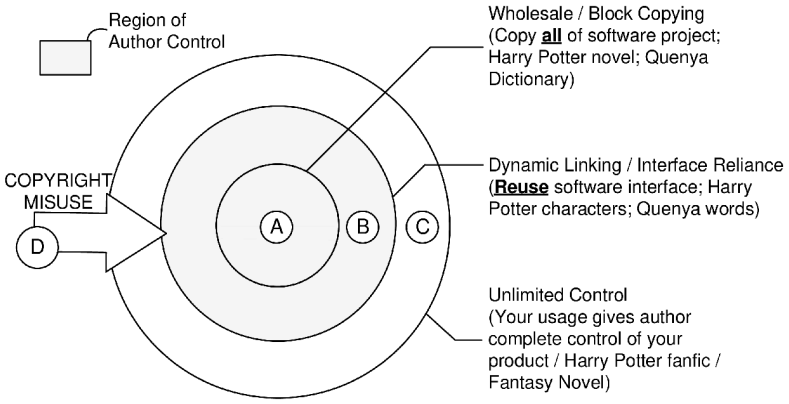

FIG. 1

Imagine I'm **Tolkien** / **Stallman** and I've created a **Quenya** dictionary / GPL-licensed open source project. At the core (A) everyone agrees that if you wholesale copy my dictionary / OSS project, that's copyright infringement. Ditto if you copy big chunks of it. Similarly, everyone (mostly) agrees that if you wrote a poem in Quenya / used the fanciful interface names of the OSS project in your own project, that's likewise infringement based on the existing caselaw. Now BOTH (A) and (B) are subject to a Fair Use defense. If the poem was two lines written on a bathroom wall and the interface was two lines

used in a class project at a University to make an academic point, you might escape infringement under the four factor test of Fair Use. In addition, it's understood that if I stretch my copyright too far, Copyright Misuse (D) will eventually start to constrain my behavior (though its caselaw is also a bit murky). For example, if Tolkien says you can write in Quenya, but have to write exclusively in Tolkien's proprietary ink to do so, or Stallman asserts that the GPL copyleft goes well beyond the bounds of his OSS project code and your inclusions, eventually, a court will probably say you've gone too far into region (C) and deny your claim. Copyright Misuse and to a certain extent Fair Use's transformative prong push on the (very fuzzy) boundary of (B) and (C) at present.

If the Supreme Court reverses, the situation will likely become, at a high level, more like FIG. 2 below.

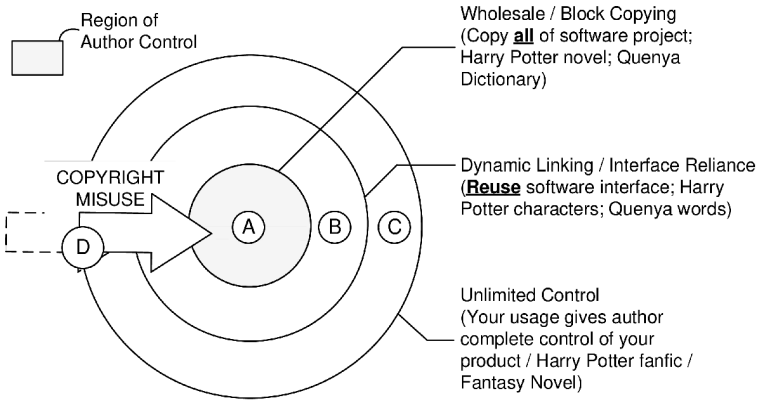

FIG. 2

Now the boundary being pushed upon is between (A) and (B) rather than (B) and (C) (again, at a high level). Practically, that means that if you wrote a novel in Quenya and sold it for a profit, Tolkien would now probably have a very hard time stopping you. Even if construed as "infringing" and for profit, the Fair Use analysis would now seem to be so changed so as to protect that behavior. Similarly, Stallman's assertions regarding dynamic linking to his OSS project may fall flat. A competitor wanting to obviate his OSS project and capture his user base by writing a transitioning product to the competitor's platform would probably be protected under Fair Use, even though it was clearly for profit. E.g., if OpenGL were the OSS project in question and OpenGL were GPL-licensed (it's not), I could write a competing

graphics library accepting the same interfaces, capture the OpenGL userbase, wait for OpenGL to die from neglect, and then make my competing library proprietary since it'll take too much effort for the users to restart OpenGL. Phase 3 – **Profit**!

Whether these are good or bad things depends upon whether you're Tolkien/Stallman or the competition. Below is a summary of the pros / cons.

	Pros	Cons
S. Ct. affirms	(a1) GPL dynamic linking enforcement greatly strengthened; (b1) Language-type works easier to enforce	(c2) Consequences for incidental infringement more likely / higher diligence costs
S. Ct. reverses	(c1) Consequences for incidental infringement less likely / lower diligence costs	(a2) GPL dynamic linking enforcement greatly diminished; (b2) Language-type creations difficult / impossible to enforce

If there was a reversal, I'm not sure what you could do for Tolkien/Stallman. Certainly, there are other ways to manage OSS ecosystem control than by the GPL. For example, you could ensure the software is associated with your hardware or try to modify the GPL to waive Fair Use (many EULAs ask that you waive the Fair Use reverse engineering right). But now that the boundary is at (A) and (B) rather than (B) and (C), those are probably going to be rather challenging to enforce. Certainly, pure software libraries (like OpenGL) can't use the hardware defense. Telling someone "don't reverse engineer and share the results with a third party lacking privity with me" is more concrete (albeit itself not always effective) than saying "don't let a third party lacking privity with me see the interface." The latter seems much more amenable to a copyright misuse attack. It's also impractical in the open source context (once it's on GitHub, *of course* everyone's going to see the interface).

So you may see more deliberate fragmentation in OSS projects (when possible) if the Supreme Court reverses – the less "universal" your code, the less value imitating the interfaces will provide the competition.

As for Tolkien, at present, as far as I can tell – he'd just be plain out of luck.

> *"Then Elrond and Galadriel rode on; for the Third Age was over and the Days of the Rings were passed and an end was come*

> *of the story and song of those times”*

I’ll give it some thought and see if I can come up with some creative solutions for him in case there’s a reversal.

[This post was updated to correct my initially creative (i.e. wrong) case cites]

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