

How Oracle Went from Nine Zeros to One Zero

By Ross Todd

SAN FRANCISCO — When trial commenced earlier this month in U.S. District Judge William Alsup's courtroom, Oracle Corp. seemed to have all the momentum in its copyright rematch with Google Inc.

It had an energetic new trial team led by Peter Bicks and Annette Hurst from Orrick, Herrington & Sutcliffe. It had a streamlined case. And it had a favorable determination from the U.S. Court of Appeals for the Federal Circuit establishing that Google infringed copyrights for basic elements of the Java programming language in building its hugely profitable Android mobile operating system. What the jury was left to decide was whether Google's use of 37 application programming interfaces, or APIs, in Android was a protected fair use under copyright law.

But on Thursday, after two weeks of trial and three days of jury deliberation, a San

Francisco federal jury of eight women and two men sided with Google and said "yes" on that single question. The verdict stopped the case short of a damages phase where Oracle was seeking nearly \$9 billion.

Google won over the jury by largely sticking to its guns from the previous trial four years ago. The search giant brought back the same legal team, led by Robert Van Nest of Kecker & Van Nest. He and his colleagues repeated a familiar narrative for anyone who followed along back in 2012. Oracle's predecessor, Sun Microsystems, which developed Java, initially welcomed Android with open arms, they said. Oracle only sued, Google's lawyers complained, after the company's



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own efforts to develop a Java-based smartphone were fruitless. The APIs themselves, Van Nest said in closing arguments, were "a system and a method of organization," not a creative work due a higher degree of copyright protection.

Copyright expert Peter Menell, a professor at UC-Berkeley School of Law, said that Google's

lawyers likely persuaded jurors about the level of copyright protection that APIs are due. “Declaring code is not poetry,” he said. Menell said he expects the jury’s verdict to remain intact in the face of posttrial motions and a potential appeal. “I just think it is going to be very surprising to have this completely reversed in any sense,” Menell said.

But Oracle has vowed to fight on, with GC Dorian Daley issuing a statement shortly after the verdict was handed down Thursday afternoon saying the company would appeal.

Ira Levy of Goodwin Procter said that “the battle is far from over.” Levy, who isn’t involved in the case, said that Alsup’s jury instructions, which didn’t strictly follow the guidance the Federal Circuit gave the judge on fair use, would be a likely target on appeal. (See “Handicapping the Googacle Appeal.”)

But should the verdict stand, Levy thinks it provides a road map for winning similar code copyright cases by “diminishing the value of the APIs as being something new and creative.” The ultimate outcome, Levy said, could decrease parties’ willingness to take a license to copyrighted APIs and make

parties who think they have infringement claims less likely to sue.

While the litigation battle has been between the two Silicon Valley giants, jurors saw the conflict play out through the back-and-forth between the legal teams. Orrick’s Bicks, who replaced Morrison & Foerster partner Michael Jacobs as Oracle’s lead lawyer, took an energetic and, at times, confrontational approach. After coming across as low key in pretrial proceedings, Bicks came out hot during opening statements and developed a mellifluous moniker for Google’s defense, calling it the “fair-use excuse.” The 56-year-old New York litigator repeatedly returned to internal Google emails that said alternatives to Oracle’s Java code “all suck” and that Google’s own equivalent was “half-ass” at best.

He and Hurst often wielded those emails during cross-examinations to try to discredit Google’s witnesses, particularly Android founder Andy Rubin, who had written that certain Java APIs were “copyrighted” in another email that came up at trial. Hurst also prodded Rubin on Google’s deal to acquire Android, trying to show that Rubin was motivated to copy the

APIs to receive incentive payments for getting the operating system onto phones quickly.

But after this second trial, Oracle once again comes out of Alsup’s courtroom with empty hands. After the first trial, members of Oracle’s legal team could console themselves with the jury’s decision that Google had in fact infringed Oracle’s copyrights—they’d just run into Alsup ruling against them on copyrightability. Now, however, Oracle’s side is left with nothing but a jury loss.

“Relative to where they were before,” said UC-Berkeley’s Menell, “they’re far worse off.”

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