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Google, Oracle to disclose payments

By Michael Reedy

Judge William Alsup has opened a can of worms. On Aug. 7, he ordered the parties and counsel in the *Oracle v. Google* case to identify (by tomorrow) "all authors, journalists, commentators or bloggers who have reported or commented on any issues in this case AND who have received money ... from the party or its counsel during the pendency of this action." It's an unusual order, issued "sua sponte" and without warning.

In the middle of the last century, fishermen could go to bait shops and buy a can of worms. The problem with the cans was that they were easy to open, but difficult to close. The worms did not want to go back in the cans and they generally ended up all over the boat or the dock. Those cans often caused more trouble than they were worth.

Judge Alsup will need to determine whether his order will cause more trouble than it is worth. It is not fair to speculate about why he issued the order when he did — more than two months after the jury was dismissed — but we can assume he acted as he did because he felt it was necessary.

The four-sentence order, entitled "Order re Disclosure of Financial Relationships With Commentators on Issues in This Case," provides some insight about what is required to comply, but not much. It begins by expressing the court's concern that Oracle and Google, as well as their attorneys, "may have retained or paid print or internet authors, journalists, commentators or bloggers who have and/or may publish comments on the issues in this case." Since "this case" concerns whether Google's use of Java programming tools infringed Oracle copyrights or patents when Google developed its Android software, thousands of people likely have commented or blogged about these issues.

The language about the court's concern raises many questions. Does the order apply to the companies' employees, executives and board members? Does it apply to outside vendors? Presumably not, but the order requires Google and Oracle to identify "all authors, journalists, commentators or bloggers who have reported or commented on any issues in this case." It likely would be impossible for Oracle or Google to identify every comment or blog that their employees may have written about Android or Java. So although the order does not specifically exclude employees, executives or board members, common sense indicates that only "outside" writers need be identified. Of course, imposing your own beliefs on what the court wants could be dangerous.

The court then remarks that "the disclosure required by this order would be of use on appeal or any remand to make clear whether any treatise, article, commentary or analysis on the issues posed by this case are possibly influenced by financial relationships to the parties or counsel." This reasoning demonstrates the court's concern that treatises or legal articles cited in the parties' briefs may have been written by authors who were paid by the parties.

I do not know to what extent these disclosures will make anything "clear." They certainly will raise more questions. When might these authors have been paid? How much? For what purpose? Who paid them? Was there a contract?

Since both Oracle and Google have said they will comply with the court's order, their attorneys must believe the court has the authority to require this disclosure.

The order does not require the parties to disclose the amounts or the purpose of the payments, only the payees. But once the payees are disclosed, does the court have authority to request more information, such as the amount, the timing and the purpose? To what extent would that information be protected by the attorney-work doctrine? Is the right to seek protection under the attorney-work doctrine waived once the parties disclose the payees? I see a lot of worms crawling out of this can.

Since both Oracle and Google have said they will comply with the court's order, their attorneys must believe the court has the authority to require this disclosure. To the extent an author, journalist or blogger was cited in the parties' briefs, the court would have an interest in knowing whether those legal authorities obtained a financial benefit for writing their opinions, similar to an expert witness.

However, the court's order is not limited to writers who have been cited by the parties in their briefs or oral argument. It covers all authors who have written about "any issues in this case ... and who have received money ... from the party or its counsel during the pendency of this action." Thus, a consultant who may be an expert on one of the issues in the case, who was hired by counsel to offer an opinion, but not disclosed as an expert, likely would have to be disclosed if he or she wrote a blog about Java or the Android system. Under Rule 26(b)(4)(D) of the Federal Rules of Civil Procedure, consulting experts generally are kept confidential.

The parties may have retained experts, including some who have published treatises, books or blogs about copyright and patent issues. Under the terms of the order, the court will not know when those writers were paid, what pieces were written before they hired, or what was published after they were paid. The order requires disclosure without explanation. And then there are free speech issues. Does the court have the right to restrict a party from paying someone to write articles, books or blogs that would be favorable to the party's legal position? Certainly not. *Citizens United v. Federal Election Commission* gives corporations the right to spend without limit to influence public opinion. But by requiring the parties to disclose these payments, does the court open the door to further inquiry? If so, how far can that inquiry proceed?

As the court wants to "make clear" whether any articles or commentary on the issues posed by this case were influenced by financial relationships, it may need to conduct an inquiry into the timing, amounts, and reasons for the payments. If it does, the can of worms will be very difficult to close.

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