

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ORACLE AMERICA, INC., a Delaware
Corporation; ORACLE
INTERNATIONAL CORPORATION, a
California Corporation,
Plaintiffs-Appellants,

v.

HEWLETT PACKARD ENTERPRISE
COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 19-15506

D.C. No.
4:16-cv-01393-
JST

OPINION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted June 8, 2020
San Francisco, California

Filed August 20, 2020

Before: MILAN D. SMITH, JR. and ANDREW D.
HURWITZ, Circuit Judges, and C. ASHLEY ROYAL,*
District Judge.

Opinion by Judge Milan D. Smith, Jr.

* The Honorable C. Ashley Royal, United States District Judge for
the Middle District of Georgia, sitting by designation.

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SUMMARY**

Copyright

The panel affirmed in part and reversed in part the district court's grant of summary judgment in favor of Hewlett Packard Enterprise Co. in a copyright infringement action brought by Oracle America, Inc., and Oracle International Co.

Oracle, owner of the proprietary Solaris software operating system, granted customers a limited use license and required customers to have a prepaid annual support contract to access patches for a server. Oracle alleged that HPE improperly accessed, downloaded, copied, and installed Solaris patches on servers not under an Oracle support contract. HPE provided support for all of its customers' servers, including servers running Solaris software, and it subcontracted indirect support to Terix Computer Co. Oracle asserted direct copyright infringement claims concerning HPE's direct support customers, and it asserted indirect infringement claims concerning joint HPE-Terix customers.

The panel affirmed the district court's partial summary judgment for HPE on claims for copyright infringement and intentional interference with prospective economic advantage based upon the statute of limitations. Following a prior suit by Oracle against Terix, Oracle and HPE entered into an agreement, effective May 6, 2015, to toll the statute

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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of limitations for any claims that Oracle might assert against HPE. The panel held that under the Copyright Act's three-year statute of limitations, Oracle's copyright infringement claims were barred for conduct before May 6, 2012. The panel concluded that Oracle had constructive knowledge and thus a duty to investigate but did not conduct a reasonable investigation into the suspected infringement. The panel held that under a California two-year statute of limitations, the IIPEA claim was barred for conduct before May 6, 2013.

As to remaining infringement claims, the panel affirmed in part the district court's summary judgment on indirect infringement claims for patch installations by Terix. The panel reversed the district court's summary judgment on all infringement claims for pre-installation conduct and on direct infringement claims for unauthorized patch installations by HPE. As to indirect infringement, the panel held that in interpreting Oracle's licenses, the district court erred by failing to consider pre-installation conduct. As to direct infringement, the panel held that for certain customers, referred to as "non-Symantec customers," Oracle possibly could provide unauthorized installations by HPE. Summary judgment for HPE on the direct infringement claims concerning customer Symantec was also improper.

The panel addressed other issues in a concurrently filed memorandum disposition.

COUNSEL

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Francisco, California; Dorian Estelle Daley and Deborah Kay Miller, Oracle America Inc., Redwood City, California; Jeffrey S. Ross, Oracle America Inc., Burlington, California; Dale M. Cendali and Joshua L. Simmons, Kirkland & Ellis LLP, New York, New York; for Plaintiffs-Appellants.

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Mark E. Ferguson, Bartlit Beck LLP, Chicago, Illinois; Abigail M. Hinchcliff, Bartlit Beck LLP, Denver, Colorado; for Amici Curiae Repair Association and Electronic Frontier Foundation.

OPINION

M. SMITH, Circuit Judge:

Oracle America, Inc. and Oracle International Corporation (together, Oracle) own the proprietary Solaris software operating system. Oracle periodically releases patches for this software to address functionality, improve

performance, and resolve security issues. As is relevant here, Oracle restricts use of the Solaris software, including software patches. It grants a customer a limited use license, and it requires a customer to have a prepaid annual support contract to access patches for a server.

Oracle brought copyright infringement claims, California state law intentional interference claims, and a California Unfair Competition Law (UCL) claim against Hewlett Packard Enterprise Company (HPE), alleging that HPE and nonparty Terix Computer Company, Inc. (Terix) improperly accessed, downloaded, copied, and installed Solaris patches on servers not under an Oracle support contract. On cross motions, the district court granted summary judgment for HPE. We affirm the district court's partial summary judgment for HPE on the infringement and intentional interference claims based upon the statute of limitations. We affirm in part and reverse in part the summary judgment on what remains of the infringement claims. We address all other issues in a concurrently filed memorandum disposition.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Solaris Software

Oracle has owned federally registered copyrights for the Solaris software since it purchased Sun Microsystems (Sun) in January 2010. Various Solaris patches also have code registered with the United States Copyright Office. Oracle licenses use of the Solaris software to a customer when the customer purchases a server with preinstalled software. The Solaris versions at issue here are Solaris 8, 9, 10 and 11. The Binary Code License Agreement applies to Solaris 8 and 9.

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