

No. 18-956

IN THE
Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

ORACLE AMERICA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF THE AMERICAN CONSERVATIVE UNION
FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENT ORACLE AMERICA, INC.**

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I. INTEREST OF *AMICUS CURIAE*¹

The American Conservative Union Foundation (ACUF) is a 501(c)(3) organization based in Alexandria, Virginia. Established in 1983, its purposes are to educate Americans as to why conservative principles work better than the alternatives to solve the myriad of complex and dynamic problems facing society today, and to equip citizens to become better and more effective problem solvers by implementing such conservative values within their communities.

ACUF's five policy centers represent a range of issues, including property rights, criminal justice reform, statesmanship and diplomacy, arts and culture, and human rights and dignity. Collectively, they bring together many of the nation's most respected thought leaders to share conservative solutions with community influencers, civic and religious leaders, think tanks, elected officials, the media, and the general public. As part of its central objectives, ACUF is dedicated to aiding in the development of intellectual property law consistent with sound Constitutional principles and the rule of law, particularly concerning property rights.

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part or made a monetary contribution intended to fund preparation or submission of the brief, and no person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution. All parties have provided general written consent to the filing of this brief pursuant to Supreme Court Rule 37.3(a).

The United States is famously a nation of laws, and not of individuals. Fundamental to the rule of law is a proper understanding of the U. S. Constitution and the laws promulgated thereunder. The further the nation veers from the Constitution, the further adrift it becomes. Putting the current commercial dispute between the parties in the correct Constitutional context of individual property rights is, in ACUF's view, critical to the nation's success and the preservation of individual rights.

In particular, ACUF believes that private property, in all its forms, is the bedrock for human flourishing. To take a person's property – especially intellectual property – without proper compensation is to misappropriate not only the fruits of that person's labor but also the fruits of that person's creativity that the Constitution seeks to encourage through the Copyright Clause.

This constitutionally grounded understanding of the importance of private property leads to two simple propositions:

- (1) authors of original works of software should receive the statutory protection of the copyright laws of the United States
- (2) the limited exception of "fair use" should not be "flexibly" extended using new standards that would reward the actors most likely to violate those rights.

II. SUMMARY OF ARGUMENT

For all its technical complexities, this case is relatively straightforward. Copyright law is nearly as old as the country itself, and Congress has consistently updated it for the times. Congress passed the first U. S. copyright law in 1790, just one year after the Constitution's ratification. Although Congress initially limited copyright protection to a few specified categories of works known at the time (maps, charts, and books), Congress extended the scope of copyright protection to additional classes of works in 1909, and again multiple times both before and after 1976.

Since the Copyright Act of 1976 went into effect on January 1, 1978, copyright protection has subsisted in "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). Although widely already believed to be protected under the 1976 Act, based on rapid changes in computing technology Congress in 1980 made plain that copyright law protects property rights in computer programs, or software. See 17 U.S.C. § 101 ("computer program" defined). Congress has also seen fit to extend the duration of copyrights from time to time and, consistent with the Constitution, this Court has upheld its authority to do so. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186 (2003).

The rights that U. S. copyright law protects are private property rights, which owners may license,

transfer, or inherit. Google and many of its amici seek to upend this well-ordered system of private property rights in software through either an unworkably complex, nearly metaphysical, interpretation of copyrightability of software, or a broad “fair use” exemption, both based on some conjured up “special status” as players in the software industry.² Computer programmers build on the works of other programmers, they argue, which necessarily requires copying those who have gone before. Their position is that, in the Wild, Wild, West of software development, it is common – indeed, industry practice – to copy without a license other people’s code so long as it is “functional.”³ This is wrong as a matter of industry practice, but even if true would be a distinction without a difference.

Given the overriding importance of property rights in the U. S. system of constitutional rule of law, ACUF respectfully supports Respondent Oracle’s position that its Java SE software, its declaring code, and the structure and organization of the packages, are properly subject to copyright protection under current U. S. copyright law. The purpose, history, and language of the Copyright clause of the U. S. Constitution, the plain language of 17 U.S.C. § 102, and this Court’s precedents amply

² See, e.g., Microsoft Br. at 2: “Microsoft has a unique—and balanced—perspective on the technological, legal, and economic issues this case implicates.”

³ See, e.g., Microsoft Br. at 4: “[T]he modern software industry’s development paradigm ... accepts and expects that much functional code can be reused by follow-on developers.”

support Oracle here because the code and organization that Google copied are original expressions fixed in a tangible medium in which the expressions and the idea have not merged.

ACUF also supports Oracle's position that Google's acknowledged wholesale copying of critical parts of Oracle's software for the lucrative commercial purpose of developing a cellphone operating system is not – and should not be – “fair use” under the law. Taking into account, under the proper standard of review, the Constitutional basis for copyright law, the extra-statutory factors that Google cites, and the statutory factors that 17 U.S.C. § 107 sets forth, Google's use is simply not “fair use.”

In sum, protection of the original work of programming authorship that Oracle now owns is fundamental to a well-ordered system of private property rights and indeed the rule of law itself.

III. ARGUMENT

Consistent with the Constitution, U. S. copyright law grants a time-limited bundle of property rights to original expressions of ideas fixed in tangible media. U.S. Const. art. 1, § 8, cl. 8; 17 U.S.C. § 102(a). Those rights are treated as personal property, which can be conveyed and even renewed. *E.g.*, *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (after death of author, surviving spouse and children may renew copyright); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) (executor of a copyright holder's will may renew that copyright). Although the technical minutiae of this case involve the interworkings of smartphone programming and communications

software, at its heart lies a simple issue: the proper recognition of the property rights of owners and authors, and the appropriate market allocation of associated costs, risks, and rewards.

Neither Google nor its amici seriously dispute that Oracle's Java SE software is subject to copyright protection. See, e.g., Google Br. at 9 (acknowledging Oracle's "copyright in the Java SE libraries"); Brief of 72 Intellectual Property Scholars as *Amici Curiae* in Support of Petitioner ("72 Scholars Br.") at 5 (recognizing the "protection that copyright law provides to work of authorship at issue, namely Java 2 SE (Java SE)" (footnote omitted). No one disputes, for example, that Sun Microsystems developed a creative computer program known as Java SE. *Oracle*, 886 F.3d at 1186. No one disputes that Oracle purchased that software for valuable commercial consideration and therefore owns a copyright in Java SE. *E.g.*, Google Br. at 8, citing Pet. App. at 212a, 216a-218a. ("Oracle holds the copyright in Java SE through its acquisition of the creator, Sun Microsystems (Sun).")

Rather, Google and its amici argue over the scope of Oracle's copyright protection. That dispute has two aspects: first, how much – or what parts – of Oracle's Java SE U. S. copyright law protects; and second, whether copying Oracle's API, if copyrightable, is "fair use."

The Federal Circuit correctly concluded under the proper standard of review that Google's commandeering of Oracle's copyrighted code was ultimately not within the scope of fair use.

Accordingly, this Court should uphold the decision of the Federal Circuit below.

A. Google and Its Amici Seek to Overturn Existing U. S. Copyright Law.

- 1. The history and language of the Copyright Act demonstrate that Oracle’s software is not a noncopyrightable “method of operation.”**

Dating back to the earliest days of the Republic, the United States Congress has seen fit to grant to authors, for limited times, exclusive rights to their original expressions without regard to the language or format in which they are written. Since the initial copyright law of the United States in 1790, Congress has recognized the importance of such time-limited property rights to the development of “Science” (knowledge) by extending the duration of copyright numerous times, each time affirmed by this Court. *E.g., Eldred v. Ashcroft*, 537 U.S. 186 (2003).

The first copyright law of the United States protected only maps, charts, and books,⁴ but over time Congress has seen fit to expand the scope of protection. The 1909 Copyright Act applied to “all the writings of an author,” 17 U.S.C. § 4 (1909), and nonexclusively included: books and other compilations; periodicals; lectures, sermons, and addresses; dramatic or dramatico-musical compositions; musical compositions; maps; works of art and art

⁴ The Public Statutes at Large of the United States of America, from the Organization of the Government, in 1789, to March 3, 1845, edited by Richard Peters, Vol. 1, pp. 124-26.

reproductions; drawings or plastic works of a scientific or technical character; photographs; prints and pictorial illustrations including prints or labels used for articles of merchandise; motion-picture photoplays; and motion pictures other than photoplays. *Id.* at § 5.

Although amended many times, see, e.g., U. S. Copyright Office Circular 92, available at <https://www.copyright.gov/title17/92preface.html>, visited January 13, 2020, the Copyright Act of 1976 17 U.S.C. §§ 101, et seq., provides more simply and broadly that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). That this includes computer programs, or software, is no longer in doubt.

In 1980, Congress again amended the Copyright Act, adopting the recommendations of its appointed National Commission on New Technological Uses of Copyrighted Works specifically to include software. Computer Software Act of 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (1980) (amending 17 U.S.C. §§ 101, 117 (1976)); see Brief of Amicus Curiae American Intellectual Property Law Association in Support of Neither Party at 9. By implementing those recommendations, Congress intentionally decided not only to grant copyright protection to software but also to give software the same status as other literary works. *Id.*

Neither Google nor its *amici* dispute that Java SE or the 37 packages Google copied, including the 11,500 lines of declarations, constitute original works of authorship. Sun wrote them; Oracle acquired them. *Oracle*, 886 F.3d at 1186. Google admits that, under Section 102(a), “‘Copyright protection subsists ... in original works of authorship,’ including ‘literary works.’” Google Br. at 17, citing 17 U.S.C. § 102(a). Google further admits that “literary works include a computer program, which the Act defines as ‘a set of statements or instructions to be used directly or indirectly in a computer in order *to bring about a certain result.*’” *Id.*, citing 17 U.S.C. § 101 (*emphasis added*).

Computer software, as Google and amici necessarily concede, is a “tangible medium” from which Oracle’s works of authorship “can be perceived, reproduced, or otherwise communicated, ... with the aid of a machine or device,” 17 U.S.C. § 102(a); otherwise Google could not have copied them. Although Java SE did not exist at the inception of the Copyright Act of 1976, the Act explicitly applies to works of authorship fixed in “any tangible medium of expression, now known *or later developed ...*.” *Id.* (*emphasis added*). Unless otherwise excluded, under any reasonable interpretation of the statute’s plain language, the declarations at issue and the rest of Java SE fall within it.

Google asserts, and some of its amici agree, that the exclusion in this case comes from Section 102(b). Section 102(b) provides that copyright protection does not extend beyond the “expression” to “any idea, procedure, process, system, method of operation, concept, principle, or discovery” that the expression embodies. Google Br. at 17, citing 17 U.S.C. § 102(b);

e.g., 72 Scholars Br. at 14-15. Specifically, Google contends that the declarations constitute either a “method of operation,” or but one of “a few ways to express or embody the system or method.” Google Br. at 17, heading I.A.

Yet Google’s own inability precisely to determine whether the declarations constitute a “method” or a “way to express or embody the method” should give the Court pause. If the declarations constitute an “expression” or embodiment of a method, then Section 102(b) on its face does not exclude them from the copyright protection that Section 102(a) affords. Google undermines its own argument in another way as well. As Google later admits, “Sun (the original creator of Java) had an array of conceptual options in naming and organizing the declarations.” *Id.* at 29. It is Sun’s choice among those options – those multiple original expressions of the same “idea” – that constitutes the original expression that copyright law protects.

The very premise of Google’s conclusion that the declarations are “methods of operation,” however, is that they serve a function. *Id.* at 19. But so too, does every computer program, and Section 101 explicitly recognizes a computer program as subject to copyright protection even though it is “a set of ... instructions ... to bring about a certain result.” 17 U.S.C. § 101. See Br. for the U.S. as Amicus Curiae, *Google Inc. v. Oracle Am.*, No. 14-410, at 13 (“The Copyright Act as a whole makes clear, however, that the functional character of computer code cannot be sufficient to bring it within Section 102(b). If that were so, no computer code would qualify for copyright protection; yet the Copyright Act unequivocally

recognizes that a person can own a copyright in computer code.”).

A group of “pioneering and influential figures in the computer industry,” 83 Comp. Sci. Br. at 1, contend that Java’s “[d]eclarations are purely functional.” *Id.* at 5. Yet in the next sentence they assert that “[b]y themselves, declarations do not instruct a computer to do anything.” *Id.* at 6-7. At the same time, they concede, as they must, that in the case of their own example “it would be possible to use a synonym ... for the same method ...” *Id.* at 8. Their complaint is merely that “few names are as intuitive” as those that Sun chose in Java SE. *Id.* That simply proves the genius of what Sun and the Java creators did; it does not eliminate protection for their work.

Like Google’s own position, this is simply an argument of expedience: that Google chose to copy aspects of Java to accelerate its task of competing with Apple in the smartphone market. Such an argument turns copyright law on its head.

2. Google fails to show that this Court’s precedents demonstrate that the “merger” doctrine applies here.

Google’s argument that the “merger” doctrine precludes copyright protection here, *id.* at 20-33, should be given short shrift. At the outset, each of Google’s alleged factual arguments or analogies is either incorrect or misleading.

First, Google argues that Oracle claims a copyright on the function of the declarations – not their expression – because Oracle cannot identify differently expressed declarations that perform the same functions. But that Oracle/Sun chose one set of declarations does not mean it could not have chosen

others. Both Google and 83 scientists concede that Sun could have made other choices. Google Br. at 83; 83 Comp. Sci. Br. at 1.

As the Federal Circuit correctly observed, Google itself could have written different declarations that would still have allowed the methods to perform the same general functions. *Oracle*, 886 F.3d at 1187. So, for that matter, could have any other software developer. *Id.* (“anyone using the Java programming language can write their own library of prewritten programs to carry out various functions”); *see* Google Br. at 28.

Google also contradicts its own unsupported assertion that no alternative means of expression exist. “In one respect,” Google admits, “developer’s calls will respond properly to declarations that deviate from those in the Java SE libraries.” *Id.* at 20, citing Pet App. 226a. “The Java language does not require that a declaration use particular argument names.” *Id.* Oracle claims no copyright in the names assigned; it claims, *inter alia*, copyright in the original expression of the declarations.

Second, Google implores the Court to “look to the conduct of Google, which expended years writing millions of lines of computer code.” Google Br. at 21. In other words, Google asserts, Google’s choice to copy proves that Google had no choice other than to copy. Yet Google’s assertion that it “reused” the declarations “only because it had no other choice,” *id.*, finds no support in the record. The obvious other choice was licensing. As the Federal Circuit twice noted, Google and Sun had discussed Google’s taking a license to adapt the Java platform for mobile devices in 2005, but were unable to agree. *Oracle*,

886 F.3d at 1187; *Oracle*, 750 F.3d at 1350. Only after failing to agree on a license did Google choose to copy Oracle’s code instead, “perhaps making enemies along the way.” *Oracle*, 886 F.3d at 1187, citing *Order Denying JMOL*, 2016 WL 3181206, at *6. In the end, Google’s choice was one of pure convenience: as it candidly concedes, to do otherwise would have required Java developers to learn “thousands of new calls.” See Google Br. at 8.

The courts of appeal, moreover, widely agree that merger is assessed at the time of creating original work, not at the time of copying. *See, e.g., Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 215 (3d Cir. 2002) (expert testimony about interoperability “wholly misplaced” because expert “focused on externalities from the eyes of the plagiarist, not the eyes of the program’s creator”); *Mitel v. Iqtel*, 124 F.3d 1366, 1375 (10th Cir. 1997) (in merger, “[t]he court’s analytical focus should have remained upon the external factors that dictated [plaintiff’s] selection” of programming); *Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992) (examining whether “external factors [] dictate[d] the design of the . . . program” at the time of the creation of the program, not at the time of the copying); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1076 (2d Cir. 1992) (merger not found for plaintiff’s diagrams where “[plaintiff] could have [created the diagrams] in any number of ways,” noting “protecting [plaintiff’s] decisions [] will not preclude others from developing their own ways of presenting this information”); *Kern River Gas Transmission Co. v. Coastal Corp.*, 889 F.2d 1458, 1464 (5th Cir. 1990) (merger applied to pipeline map where “[plaintiff’s]

principal planning engineer testified that he could think of no other way to portray the idea of the pipeline's proposed location"); see also, *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983) (defendant's desire "to achieve total compatibility... is a commercial and competitive objective which does not enter into the ... issue of whether particular ideas and expressions have merged.").

Third, Google argues by analogy that, had Oracle described in an English sentence how a particular declaration works, Oracle could not assert an exclusive right to the described function. *Id.* at 21-22. Yet Oracle could certainly have claimed copyright in an original manual or textbook describing how Java works, and that copyright would extend to its original expression in words and their arrangement. *See* 17 U.S.C. § 101 ("compilation" defined).

Google's repeated insistence that "[o]nly one precisely written set of declarations will perform the function of responding to the corresponding calls *known to the developer*," *id.* at 20, emphasis added, is akin to arguing that Google could copy another employer's copyrighted training manual because Google employees are already familiar with the language in which it is written.⁵ But the inconvenience of not copying does not excuse copying.

In contrast, this Court's precedents point starkly in the opposite direction. That Sun engineers chose particular declarations from a myriad of those

⁵ See also, *id.* at 19, third paragraph.

available makes this case different from both *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991), Google Br. at 24, and *Baker v. Selden*, 101 U.S. 99, 106 (1880), 72 Scholars Br. at 5-10. Sun engineers chose one set of original declarations in Java SE, but as both Google and Microsoft agree, not the only one. Oracle seeks not to protect the arrangement of columns and headings, as in *Baker*, see 101 U.S. at 101, but by analogy the book itself. As the 72 Scholars concede, *Baker* recognized “a clear distinction between the book as such, and the useful art which it intended to illustrate.” 72 Scholars Br. at 9, quoting *Baker* at 102.

Similarly, neither *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), Google Br. *passim*, nor *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1996), Google Br. at 27, is controlling here. Unlike in *Campbell*, Google is not parodying Oracle's software; it is simply copying portions of it for the sake of convenience. And unlike in *Borland*, Oracle is holding nothing “hostage”; indeed, Oracle makes the Java programming language itself available for free. *Oracle*, 886 F.3d at 1186. It merely charges a licensing fee to those who want to use the declaring code and organization in a competing platform or to embed them in an electronic device. *Id.*

Under this Court's established precedents, Google's merger argument fails.

3. Google seeks to substitute its own one-sided view of industry custom and practice for the laws Congress has passed.

It is no surprise, as Google’s amicus Microsoft Corporation observes, that “a broad swath of the software industry—from individual developers and computer scientists to start-ups to large companies—have filed amicus briefs supporting petitioner in this case.” Microsoft Br. at 4. As Microsoft puts it, “[t]he modern software industry’s development paradigm, which accepts and expects that much functional code can be reused by follow-on developers, depends upon a *flexible* application of copyright law.” *Id.* (*emphasis added*); *see also, e.g.*, 83 Comp. Sci. Br. at 3-4. Google and its amici argue that such a “flexible” approach best promotes the progress of science and the useful arts. *E.g.*, Google Br. at 23.

With their trillion dollar empires,⁶ software giants like Google and Microsoft may believe that they are the proper arbiters of the metes and bounds of software copyright protection. With their own proprietary software, of course, they are free to do as they wish: to sell it, license it, assign it, or destroy it. What they are not free to do in a properly-ordered

⁶ Remarkably, as of January 2020, Google’s parent, Alphabet, Inc., had joined Microsoft, Apple, and Amazon in achieving a market capitalization of one trillion U. S. dollars. See Daisuke Wakabayashi, “Google Reaches \$1 Trillion in Value, Even as It Faces New Tests,” *The New York Times*, January 16, 2020, <https://www.nytimes.com/2020/01/16/technology/google-trillion-dollar-market-cap.html>, visited January 22, 2020.

system of property rights under the copyright laws and the Constitution of the United States is to appropriate others' proprietary software without negotiated compensation. For over two hundred years this Court has held that the Constitution gives Congress, not private industry, the authority to decide how best to promote the "progress of science and the useful arts." *See, e.g., Evans v. Jordan*, 13 U.S. (9 Cr.) 199 (1815); *Wheaton v. Peters*, 33 U.S. (8 Pet.), 591 660 (1834); *see also, Golan v. Holder*, 565 U.S. 302 (2013) (to serve these Constitutional ends, Congress may even restore copyright in public domain works).

Consistent with the Constitution's copyright clause, the means of encouragement for authors to contribute to the growth of knowledge that Congress has chosen lies in the ability of copyright holders to charge licensing fees or royalties for the authorized use of their copyrighted works for the duration of their copyrights. *Wheaton v. Peters*, 33 U.S. (8 Pet.), 591 660 (1834) (the exclusive rights Congress is authorized to secure to authors owe their existence purely to the acts of Congress securing them). Having failed to agree with Oracle on a license here, Google simply appropriated the heart of Oracle's protected Java SE – its applications program interface or API – "perhaps making enemies along the way." *Oracle*, 886 F.3d at 1187, citing *Order Denying JMOL*, 2016 WL 3181206, at *6.

As Google admits, this is copying for the sake of economic and temporal expediency: Google wished to be the first to challenge Apple's iPhone successfully in the smartphone marketplace. *See* 886 F.3d at 1186.

Google and its amici seek to justify Google’s unauthorized appropriation as “fair use” because Google allegedly copied no more than necessary to save its developers the time to get their product to market as quickly as possible, a use they now incorrectly claim is “transformative.” More broadly, Google and its amici seek to establish a rule of general applicability in the software industry that will justify future unauthorized copying whenever it saves the copier time and money. But this violates this Court’s directive, when it comes to copyright, not to “alter the delicate balance Congress has labored to achieve.” *Stewart v. Abend*, 495 U.S. 207, 203 (1990).

With limited exceptions, the current Constitutional copyright scheme requires creators to be fairly compensated for their original works of authorship. Congress has determined that this promotes “the Progress of Science and the useful Arts” by providing economic and other incentives to encourage the creation of such works. Google and its amici openly seek to pave the way for a new “collaborative” regime in which users, rather than the creators themselves, determine what they may or may not copy based on the users’ own predatory industry practices and claims of public benefit and efficient infringement. *See, e.g.*, Microsoft Br. at 7, citing Clark D. Asay, *Software’s Copyright Anticommons*, 66 Emory L. J. 265, 279 (2017).

Yet given the general worldview of Google and many of its amici of an increasingly interconnected computer ecosystem on which the further spread of

knowledge depends,⁷ it is simply inconceivable that copyright protection should not continue to apply to original expressions of ideas fixed in the media of computer programs. The alternative that Google and its amici openly urge is to abandon the current system of copyright protection in favor of communal control of property rights in selected portions of software based on the convenience of copying. This vision of an industry-based “collaborative” regime is contrary not only to long-established private property rights and statutory language, but also to the very rule of law.

Microsoft candidly concedes that Google and its amici seek not to comply with existing copyright law but to change it: they wish unfettered access to the fruits of others’ labor while preserving their own. Yet one might as easily argue that Microsoft should make Microsoft Word available free of charge, because consumers long accepted and expected ownership not only of their computers but also of the software that came with them. Making Word available to users at no charge would also, no doubt, unleash untold numbers of writers whose original expressions of their ideas would advance the progress of science and the useful arts.

⁷ See, e.g., Brief of Microsoft Corporation as Amicus Curiae in Support of Petitioner (“Microsoft. Br.”) at 31 (“[A]nother pillar of today’s computer ecosystem [is] seamless interoperability and compatibility across software platforms and hardware devices made possible through the reuse of common functional code.”); Brief Amici Curiae of 83 Computer Scientists in Support of Petitioner (“83 Comp. Sci. Br.”) at 2 (“As computer scientists, amici have long relied on reimplementing interfaces to create fundamental software.”); see also, *id.* at 3-4.

Microsoft would argue, one presumes, that Microsoft Word is but one of a number of ways to write a word processing program, yet Word, in and of itself, serves only a “function”: to permit writers to express themselves on screens rather than paper, and to fix those expressions in the media of bits and bytes. Microsoft also asserts proprietary rights to its initial operating system, DOS, and to its many upgrades of Windows. Indeed, Microsoft today touts the importance of protecting its intellectual property not just to its business model but also to the advancement of science and the useful arts.⁸

Because Microsoft recognizes this importance, Microsoft actually supported Oracle at the Federal Circuit, arguing that the code and organization that Google copied was copyrightable. *See* Brief for Amici Curiae Microsoft Corporation, et. al, in Support of Appellant, *Oracle v. Google*, 2013 WL 792968 (Fed. Cir. 2013). Presumably because Microsoft agrees with Oracle and disagrees with Google as to the

⁸ “We relentlessly seek to drive the future of innovation—for us, our partners, and our customers,” Microsoft proclaims on its website, in part by “licensing our technologies and patents to help them innovate and grow.” Microsoft, “A Unique History of Innovation,” at <https://www.microsoft.com/en-us/legal/intellectual-property/iplicensing/default.aspx>, visited January 23, 2020; see also, Microsoft Br. at 2 (“Microsoft relies on copyright protection, which enables it to license its own products and services and earn a fair return on its creations.”)

threshold copyrightability question (QP1), Microsoft does not address that issue at all before this Court. This critical omission should not be overlooked.

To ensure the development of “building blocks” on which Google and its software industry amici seek to anchor their empires, programmers need the incentives that intellectual property laws provide. Microsoft, for example, concedes that “[t]he proprietary model still serves an important role in the industry.” Microsoft Br. at 7. Like Google itself, Microsoft “relies on copyright protection, which enables it to license its own products and services and earn a fair return for its creations.” *Id.* at 2.

B. Google Fails to Show that its Copying of the Heart of Oracle’s Software for Lucrative Commerical Purposes Constitutes “Fair Use.”

While claiming otherwise, Google effectively admits it infringes Oracle’s copyright.⁹ To excuse this admitted infringement, Google and its amici support a broad and admittedly “flexible” application of the defense of “fair use.” *E.g.*, Google Br. at 37-50; Microsoft Br. at 15-22. Based on industry practice

⁹ Google agrees that it copied certain “declarations that correspond to the calls for the Java methods reimplemented by Android.” Google Br. at 8, citing Pet. App. 218a-221a. Google further admits that “[t]hose methods, and the declarations, were originally set forth in the ‘Java SE libraries,’ which are in turn included in a work called ‘Java 2 SE’ (Java SE),” to which Google admits Oracle owns the copyright *Id.* (footnote 5 omitted).

and consumer demand, they say, courts should permit as much copying of others' software as may be necessary to develop their own commercial products and services. *See id.* This, they contend, serves the public interest and promotes the ends of the Constitution's copyright clause by advancing knowledge and technology. *Id.*

Google's argument, however, wrongly presumes that the commercial conduct of competitors, rather than established law or the Constitution, should determine the meaning of "fair use." Yet in accordance with *Golan v. Holder*, 565 U.S. 302 (2013) and cases dating back to *Wheaton v. Peters*, 33 U.S. (8 Pet.), 591 660 (1834) and *Evans v. Jordan*, 13 U.S. (9 Cr.) 199 (1815), this Court has reiterated that it is for Congress, not competitors, to make this determination. A true respect for property rights will maintain that statutory balance.

Here again, Google makes three arguments. First, it says, fair use analysis is the province of the jury and the Federal Circuit improperly invaded it. Google Br. at 34-36. Second, Google says, the extra-statutory factors of long-standing practice of "reasonable" software owners and the high value of its "reuse" of Oracle's declarations favor a fair use finding. *Id.* at 37-41. Finally, Google argues, substantial evidence supports the jury's presumed/hypothetical application of the traditional four statutory factors. *Id.* at 41-50.

- 1. The Federal Circuit applied the proper standard of review.**

Although "fair use" is by nature a fact-intensive inquiry, this Court characterizes it as

the proverbial mixed question of law and fact. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), *citing Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984); *see Oracle*, 886 F.3d at 1192.

As this Court explained in *U.S. Bank Nat'l Ass'n ex rel. CW Capital Asset Mgmt. LLC*, ___ U.S. ___ 138 S.Ct. 960, 200 L.Ed.2d 218, 2018 WL 1143822 (2018), the standard of appellate review of such questions is not transparent. 2018 WL 1143822 at *5. Here, the Federal Circuit devoted substantial time and energy to apply the proper standard of review, meticulously following this Court's directives in both *Harper* and *U.S. Bank*. *See Oracle*, 886 F.3d at 1192-1196.

In *Harper*, this Court said, “[w]here the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court ‘need not remand for further fact finding but may conclude as a matter of law that the challenged use does not qualify as a fair use of the copyrighted work.’” 471 U.S. at 560, 105 S.Ct. 2218 (quoting *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)) (internal alterations omitted); *see Oracle*, 886 F.3d at 1193. And where applying the law to the historical facts “involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*.” *U.S. Bank* at *5, citing *Salve Regina College v. Russell*, 499 U.S. 225, 231–33, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

Here, Google and its amici squarely argue that a wide-ranging rule of general applicability is essential to the future of the software industry and to technological progress and development more generally. *E.g.*, Google Br. at 37-41; 83 Comp. Sci. Br. at 22-26; Microsoft Br. at 30-32. Giving proper deference to the facts the jury determined, the Federal Circuit correctly concluded that the proper standard of review of the ultimate question of fair use was *de novo*. *Oracle*, 886 F.3d at 1193.

Because “fair use” is an affirmative defense, the burden of persuasion was on Google by a preponderance of the evidence, and remains so on *de novo* review. *Campbell*, 510 U.S. at 590. Looking to both the extra-statutory factors that Google cites and the statutory factors of 17 U.S.C. § 107, Google fails to meet that burden.

2. Google’s extrastatutory factors do not argue in favor of “fair use.”

Citing *Harper & Row*, 471 U.S. at 560, for the proposition that the four statutory factors of 17 U.S.C. § 107 are “not meant to be exclusive,” Google Br. at 37 (internal quotation marks omitted), Google argues that both alleged long-standing practices of the software industry (and “reasonable” software owners) and “the expression made possible by reuse of software interfaces” should be considered as part of the fair analysis here. *Id.* at 37-39. Neither argument is persuasive. Once again, to accept this argument would permit players in a particularly predatory industry, rather than the laws and the Constitution, to determine the appropriate allocation of copyright law’s property rights.

First, citing *Harper* at 549 and *Wall Data Inc. v. L. A. City Sheriff's Dept.*, 447 F.3d 769, 778 (9th Cir. 2006), Google argues that a “reasonable” author – such as Sun, which apparently *initially* did not object to Google’s “reuse” of its declaring code (citing JA119-120; JA 124-125; JA129; JA 132; JA 148-149; TX2352) – would have agreed that Google’s copying was fair and that this should support fair use in this case. Yet the actual conduct of the parties and their amici here belie Google’s claims.

Oracle – which makes much of Java SE free to users in other contexts, insisted on a license in this context, and Google attempted – albeit unsuccessfully – to negotiate one. *See Oracle*, 886 F.3d at 1187. Amicus Microsoft admits that it, too, seeks to license software when possible. Microsoft Br. at 2. Indeed, this nearly decade-long litigation demonstrates that Google’s position is not universally, even generally, accepted. In addition, the record reflects no evidence that Sun ever attempted to develop its own competing cellphone operating system, whereas it demonstrates that Oracle did. *Id.*

Second, Google’s argument that its “reusing” Oracle’s declarations “unleashes enormous innovation and creativity” and “prevents Oracle from locking Java developers into Oracle-approved platforms” is patently unpersuasive. Oracle’s conduct has been no different from Microsoft’s. Both are private parties that may license, sell, or hold as much of their private property as they wish for as long as the law allows; *i.e.*, as long as that property right exists. The Java programming language itself is free and available for use without permission. *Oracle*, 886 F.3d at 1186. Anyone using the Java programming language can write one’s own library of

prewritten programs to carry out various functions. *Id.* at 1187.

Oracle, as it has every right to do, simply devised a licensing scheme to attract programmers while simultaneously commercializing the platform. *Id.* Google cites no authority for the proposition that Google’s inability or unwillingness to agree to licensing terms with Oracle makes its decision to “[d]o Java anyway and defend [its] decision, perhaps making enemies along the way” “fair use.” *Id.*, citing Order Denying JMOL, 2016 WL 3181206, at *6.

3. The Federal Circuit correctly found that the four traditional statutory factors do not favor “fair use.”

The Federal Circuit has extensively analyzed and supported its decision that, under the four statutory factors Section 107 sets forth, Google’s copying does not constitute fair use. *See Oracle*, 886 F.3d at 1196-1210. ACUF sees no need to repeat those arguments here. Suffice it to say that, taking into account (1) the commercial purpose and character of Google’s use, (2) the innovative nature of Oracle’s copyrighted work, (3) the substantiality of the portion used in relation to the copyrighted work as a whole – *i.e.*, the copyrighted declarations at the heart of Java SE; and (4) the disastrous effect of Google’s appropriation on Oracle’s subsequent licensing efforts, *see Oracle*, 886 F.3d at 1187-88 (citing App. Br. at 15), the Federal Circuit correctly found as a matter of law, *see Harper*, 471 U.S. at 569, 105 S.Ct. 2218, based on the jury’s actual factual findings, that Google’s use is not fair.

IV. CONCLUSION

Google and Oracle have fought this litigation for roughly a decade. Consonant with the Constitution's respect for individual property rights and the rule of law, it is time for this Court to bring the liability phase of this case to an end and to permit Oracle to proceed to obtain damages for Google's infringement of Oracle's valid copyrights.

This Court should affirm the decision of the Federal Circuit below.

Respectfully submitted,

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