No. 18-956

IN THE

Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

ORACLE AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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This is the copyright case of the decade. Software interfaces allow software applications, platforms, and devices to communicate with each other. In this case, they allow millions of applications written by thousands of developers to work on billions of devices. Software developers re-use the connections defined by existing interfaces to allow new and innovative applications—like programs that measure your heart rate—to work on mobile phones, tablets, smartwatches, and other devices. But the Federal Circuit has held that (1) a software interface is copyrightable, and (2) re-using it to create even an exceptionally innovative product is not fair use. Both rulings are effectively binding nationwide.

Each of the Federal Circuit's decisions was deemed "the #1 most important [copyright] case of the entire year." EFF Br. 14-15. The petition is supported by 175 amici in 15 amicus briefs. Developers—large and small—have sounded the alarm that the rulings below "threaten[] disastrous consequences for innovation." Microsoft Br. 4; *see also, e.g.*, Software Innovators Br. 2-4; Python Br. 14-15; Red Hat Br. 13; Mozilla Br. 10; Developers Alliance Br. 7. The Nation's leading copyright scholars, including the author of the seminal treatise, stress that the rulings are "of utmost importance to the integrity of copyright law and competition and innovation in the software industry." Menell & Nimmer Br. 25-26; *see also* 65 IP Scholars (Copyrightability) Br. 2; 8 IP Scholars (Fair Use) Br. 1-2.

This Court regularly reviews Federal Circuit rulings that have nationwide effect. Because publishing is inherently a nationwide enterprise, the Court also

has repeatedly decided seminal copyright questions—even absent a circuit conflict. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

There also is no benefit to waiting. No later dispute will present as good a vehicle. "[T]he long history of this case has provided a rich analysis of the specifics of the tools and principles under review." Developers Alliance Br. 14. No accused infringer in a later case will bear the cost and potential damages, hoping this Court might grant review. In any event, bypassing this case would impose too great a burden on innovation in the interim.

Certiorari should be granted.

I. Certiorari Is Warranted By The Grave Harm To Software Development Caused By The Federal Circuit's Rulings.

Regardless of whether one agrees with the rulings below, their importance to the development of software is undeniable. They control the right to re-use software interfaces. An interface is the computer code that forms a bridge, allowing computer applications, platforms, and devices to communicate. Interfaces are re-used to connect new and innovative applications. *See* 78 Computer Scientists Br. 5-6.[1]

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[1] Oracle feigns confusion with the widely used term of art "software interface," BIO 12, which here refers to the Java "application programming interface" (API) declarations. *See generally* 78 Computer Scientists Br. 5-6.

Tens of thousands of diverse software interfaces run on billions of devices. *E.g.*, Software Innovators Br. 7-8; Developers Alliance Br. 5-8; Python Br. 13-15. "[N]early every technical standard in use[] includes one or more software interfaces that must be implemented largely in the same way that Google implemented the Java interface in the present case." R St. Br. 6.

Technological innovation has exploded based on the premise that interfaces are free to re-use. The Federal Circuit's contrary holding is tantamount to "requiring car manufacturers to invent a substitute for the steering wheel," 78 Computer Scientists Br. 23, or forcing manufacturers to make a new "plug and electrical outlet combination to allow [their devices] to connect to a standard power source," Red Hat Br. 10 n.2.

These Federal Circuit rulings are no less controlling nationwide than its decisions on patent law. Oracle does not dispute that "the Federal Circuit has established itself as the de facto national appellate software copyright tribunal." Menell & Nimmer Br. 4 (emphasis omitted). The rulings have "been treated as de facto binding precedent in copyright law, displacing regional circuit law." EFF Br. 2. The ease with which a throwaway patent claim can be asserted lets plaintiffs "opt in to the Federal Circuit's version of Ninth Circuit law at will." Engine Br. 2.

Oracle stresses that this Court previously denied certiorari. BIO 1. Back then, the Federal Circuit had held that software interfaces were copyrightable. Pet. App. 123a. But it had further held that re-using interfaces could be lawful "fair use." *See id.* at 182a. Oracle argued emphatically that review would therefore be premature. 14-410 Oracle BIO 37. The Solicitor

General's invitation brief recognized serious concerns with a rule prohibiting the re-use of interfaces, but explained that many of those issues "will be relevant to [Google's] fair-use defense." 14-410 U.S. Br. 17-18. On remand, the jury unanimously found fair use. Pet. App. 57a. The Federal Circuit then took the extraordinary step of reversing the jury's verdict as a matter of law. *Id.* at 53a, 55a. That ruling established that the re-use of software interfaces is in fact subject to copyright liability. As the Solicitor General anticipated, "all [the] potentially relevant statutory arguments" are now presented, making the case ripe for review. 14-410 U.S. Br. 22.

Relatedly, Oracle argues that the Federal Circuit's rulings have not yet been calamitous. BIO 1. But until now, it remained open whether the re-use of software interfaces was lawful fair use. The Federal Circuit's holding to the contrary is regarded by the industry as definitive, triggering an outpouring of support for this Court's intervention. "The Federal Circuit's rulings have inflicted uncertainty on the development of software; on the design of connected devices, features, and services; and programs and devices that interact with other programs. Anxious eyes from all corners of the globe await the outcome of this case." Red Hat Br. 18.

Oracle next argues that it does not require developers to pay royalties to use Java SE. BIO 7. Of course, Oracle is happy for developers to use *its* product. But the Federal Circuit has granted the author of each interface the monopoly power to block the development of a *different* product. Here, Oracle prohibits re-using its interfaces to create software like Android that transforms the Java API in an entirely different

context. Unlike Java SE, Android works on modern smartphones that have limited battery life, small screens, and cellular radios, while shedding unnecessary computer code designed for desktop computers.

For the same reason, Oracle is misguided in complaining that Android is not fully "interoperable" with Java SE. BIO 21. According to Oracle, every application that works with Java SE should work perfectly with a new platform such as Android, and vice versa. The Copyright Act requires no such thing. *E.g.*, Part IV, *infra* (addressing the fair use inquiry into whether the use is "transformative"). Oracle's argument is merely an attempt to lock developers into its own platform.

To allow developers to create applications for new platforms using the skills they already have, those platforms must re-use older interfaces. Otherwise, developers must learn an entirely new programming vocabulary. They will not take on that cost to create products for nascent platforms created by small companies. "In a world where interoperability is critical, an inability to connect to existing products would be the death knell for any small developing business." Software Innovators Br. 3. In turn, "collective switching costs can make it virtually impossible for entrepreneurial rival networks to launch, grow, and eventually challenge established incumbents." AAI Br. 9.

II. The Federal Circuit's Rulings Upend Established Circuit Precedent That Has Given Rise To The Long-Settled Understanding That Software Interfaces May Be Freely Re-Used.

The petition demonstrated that the rulings below conflict with decisions of this Court and other courts of appeals. Pet. 11-17. Oracle claims that no court has considered an identical case. BIO 14. But the works in copyright cases always differ. It is the legal rules that matter. Here, the Federal Circuit rejected the settled understanding that software interfaces may be freely re-used.[2]

Those rulings "upend nearly three decades of sound, well-settled, and critically important decisions of multiple regional circuits." Menell & Nimmer Br. 3. Since 2015, the Copyright Office has itself opined that interfaces may be re-used. *See* Am. Antitrust Inst. Br. 12. Indeed, the rulings below conflict with the "competition-enhancing consensus" of "courts and legislatures around the world." CCIA Br. 3.

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[2] The declarations re-used by Google bear no relationship to thousands of lines of a single computer program. *Contra* BIO 22-23. Each is a separate interface. Further, the number of declarations at issue is not unusual: "real-world software interfaces can include thousands of declarations." 78 Computer Scientists Br. 6. And the Federal Circuit's ruling is most harmful when applied to numerous interfaces, because "[c]onvincing application developers to rewrite their code for hundreds of new APIs every time they want to add it to a new platform is not only burdensome and expensive, but risky, as it may create new errors or incompatibilities that will require extensive quality assurance and maintenance." Mozilla Br. 13.

That prevailing view was reinforced when this Court divided four to four and left undisturbed the First Circuit's holding that interfaces are uncopyrightable methods of operation. *See Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd*, 516 U.S. 233 (1996) (per curiam). Below, the Federal Circuit expressly rejected the First Circuit's holding. Pet. App. 159a. The cases are closely analogous: Both involve computer interfaces that are necessary to operate the programs. *See* Pet. 19.

The industry's settled expectations have been further reinforced by fair use case law. "Time and again, courts have held that copying software to access its functional elements—to develop follow-on or interoperable technologies—is fair use that furthers the purposes of copyright law." Microsoft Br. 11. But the field undoubtedly would benefit from this Court's guidance: Appellate fair use decisions have "result[ed] in conflicting focuses and inconsistent outcomes." 8 IP Scholars (Fair Use) Br. 2.

The industry reasonably understood the law to hold that interfaces can be freely re-used. Python Br. 14-15; Developers Alliance Br. 7-8; Mozilla Br. 10-11; 78 Computer Scientists Br. 17-21. Oracle and Sun reinforced that view by touting Java as free and open to use. Oracle offers no sound reason to think that a sophisticated industry structured its practices in a way that it believed could invite massive copyright liability.

Oracle argues that Google also duplicated part of Java SE's "SSO"—*i.e.*, its logical hierarchy. BIO 24. Indeed, it suggests that Google was required to include duplicative Questions Presented that separately address the SSO. That is silly. As Oracle does not dispute, the declarations and SSO are inextricably

intertwined. *See* Pet. 8. The declarations include the SSO. "Reimplementation *requires* duplicating an interface's declarations and organizational scheme—its structure, sequence, and organization (SSO)." 78 Computer Scientists Br. 3 (emphasis added). If Google's reuse of the declarations was permissible, the same is necessarily true of the precisely corresponding SSO.

III. The Federal Circuit's Copyrightability Ruling Conflicts With This Court's Precedent.

The petition established that the Federal Circuit's copyrightability decision is contrary to 17 U.S.C. § 102(b). Unlike implementing code that carries out a program, an interface connects an application to an external program or device, and is thus the "method" used to "operate" the program. "Over the last thirty years, despite some authority to the contrary, a strong judicial consensus emerged, resting upon the language of Section 102(b), that the statutory monopoly of copyright does not extend to programming interfaces." Red Hat Br. 6.

Oracle further errs in reiterating the Federal Circuit's holding that the declarations are not subject to the merger doctrine because there were originally innumerable ways to organize and name them. BIO 10, 22. The petition showed that ruling is irreconcilable with *Baker v. Selden*, 101 U.S. 99 (1880). *See* 65 IP Scholars (Copyrightability) Br. 3. There, Selden published a book of forms required to implement his accounting system. The system was indisputably original and creative; Selden could have chosen from innumerable accounting methods. Nonetheless, this Court held that the forms were not copyrightable because a later author could not utilize Selden's chosen system

without those forms. The forms "merged" with the accounting system itself.

An interface's creator can likewise choose from various options. But once the interface is created, nothing else will work. That computer code "merges" with the "method" by which the interface connects the programs. Here, if Google changed the declarations, they would not connect (1) the computer code written by Google necessary to perform thousands of "methods" to (2) the commands that third-party developers know from years of experience. By contrast, Google did not copy the implementing code, which provides the functionality of the methods, and which can be written multiple ways.[3]

Oracle is equally misguided in relying on the creativity of its "work"—*i.e.*, the entire Java SE platform. BIO 13. Copyright does not protect creative *thought*. It protects original expression. 65 IP Scholars (Copyrightability) Br. 5-6. Once the creator of Java SE made its creative judgments, it had few choices in actually *expressing* the declarations, because of the strict requirements of how interfaces are written. "[O]nly two words in the declaration leave the programmer any choice, and both are names." 78 Computer Scientists Br. 8. Oracle could write everything else—the actual instructions—only one way. And—as Oracle does not dispute—names are not copyrightable. 37 C.F.R. § 202.1.

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[3]   The Solicitor General's prior invitation brief recognized that computer code is subject to the merger doctrine. But the Government has not yet addressed the doctrine's application to software interfaces because the Solicitor General believed that Google had chosen not to present the issue in its prior petition. 14-410 U.S. Br. 22.

IV. The Federal Circuit's Fair Use Ruling Conflicts With Basic Copyright Principles.

The Federal Circuit's fair use ruling is irreconcilable with previously settled law. Microsoft Br. 9-12; Am. Antitrust Institute Br. 13; Software Innovators Br. 12-13. The Copyright Office itself explains: "[I]n many cases, copying of appropriately limited amounts of code from one software-enabled product into a competitive one for purposes of compatibility and interoperability should * * * be found to be a fair use." U.S. Copyright Office, *Software-Enabled Consumer Products* 57 (Dec. 2016).

Oracle dismisses the ruling below as fact-bound. BIO 25. That is backwards. The jury assessed the evidence and concluded that Google's use of the interfaces was fair use. But the Federal Circuit reversed *as a matter of law*. That ruling applies equally—and equally negates the role of the jury—for any effort to re-use software interfaces.

It is essentially unheard of for a court of appeals to reverse a jury's finding of fair use under the Copyright Act. The Federal Circuit found no legal error—for example, in the jury instructions—but nonetheless found no fair use as a matter of law. That this ruling was entered by a court with no copyright expertise reinforces the need for this Court to intervene.

The Federal Circuit specifically ignored the essence of the fair use inquiry: Would permitting the use further expression? That tracks the purpose of copyright law under the Constitution: to reward authors in a fashion that will further creation and benefit the public. U.S. Const. art. I, § 8, cl. 8; *Sony Corp.*, 464 U.S. at 429. The Federal Circuit's rulings unques-

tionably would not. Companies would create fewer platforms like Android. Developers would create fewer applications for those platforms. Unlike the declarations, those platforms and applications involve extraordinarily creative programming. This is a classic instance where granting an exclusive right to one party imposes an exponentially greater cost on the creation of other social goods.

The Federal Circuit held that Google's re-use of the declarations for the same purpose as Oracle is not transformative as a matter of law. Pet. App. 37a. That reasoning applies universally, because computer code—unlike literature, art, or song—can only serve one function. The Federal Circuit deemed it irrelevant that Google placed the declarations in an entirely new context to invent an innovative new smartphone platform. But "context is everything." *Campbell*, 510 U.S. at 589. That is why collages and parodies are classic fair use. The contrary principle invoked by Oracle— that "'[n]o plagiarist can excuse the wrong by showing how much of his work he did not pirate,'" BIO 29—relates *only* to the separate inquiry into the substantiality of the use, not whether the new work is transformative. *Harper & Row*, 471 U.S. at 565.

Oracle also stresses that the Federal Circuit found the "market harm" requirement satisfied. BIO 32. But the court found it sufficient that Oracle merely had *some* market presence with respect to feature phones and *sought* to enter the marketplace for smartphones. Pet. App. 52a. Software companies almost always will be exploring new markets. Not even the Federal Circuit agreed that Oracle had suffered commercial harm that approached the social benefit of the creation of a

revolutionary smartphone platform and the corresponding applications created by developers.[4]

*   *   *

Scores of amici implore this Court to review the Federal Circuit decisions because they radically rewrite the rules of the game by holding that software interfaces are copyrightable *and* that their re-use cannot be fair use. This Court has repeatedly intervened to resolve similarly dispositive, recurring, and important copyright questions. It should do so again. This case is too important for a single panel of one court of appeals to have final say on a central issue for a vital segment of the Nation's economy.

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[4] Ignoring the jury verdict, Oracle misrepresents two documents in the massive record to claim that Google believed it was required to secure a license. BIO 8. Those documents do *not* relate to the declarations. Oracle made the same claims to the Federal Circuit, which did not accept them.

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CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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