

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 *AMICUS CURIAE*
ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	3
I. THE FEDERAL CIRCUIT HAS IMPROPERLY REWRITTEN SECTION 102(b).....	3
A. The Federal Circuit Improperly Deleted Important Exclusions from Copyright Protection	4
B. The Federal Circuit Effectively Added Language to Section 102(b) That Doesn't Appear in the Statute	8
II. COURTS CAN AND SHOULD DETERMINE WHEN COMPUTER FUNCTIONALITY IS COPYRIGHTABLE; SEVERAL NON-EXCLUSIVE FACTORS CAN HELP.....	11
A. Does the Work in Question Meet the Definition of a Computer Program That Does <i>Not</i> Fall Within the Statutory Exclusions?.....	12

Table of Contents

	<i>Page</i>
1. A System for a Language Used to Write Computer Programs vs. a Program Written With That Language	13
2. A Computer Interface vs. a Program That Implements That Interface	16
3. The “Certain Result” of a Program vs. the Program Itself	18
4. Does the Work in Question Define a Method of Operating a Machine?	20
B. Does the Primary Value of the Work Derive from Network Effects Created by the User’s Learning and Investment in the Subject Matter?	21
C. Could a Separate Copyright Registration Have Been Obtained on the Subject Matter?	24
D. Is the Work a “Necessary Incident” to the System?	26
E. Not Coincidentally, Some of These Factors Also Militate in Favor of Fair Use	28

Table of Contents

	<i>Page</i>
1. Strong Network Effects Militate in Favor of Fair Use.....	28
2. Fair Use Favors the Borrowing of a Small, Functional Component of a Work	29
III. THE FEDERAL CIRCUIT HAS IMPROPERLY USURPED CONGRESS' ROLE IN ENSURING THAT COPYRIGHT SERVES ITS CONSTITUTIONAL PURPOSE.....	30
CONCLUSION	33

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Affiliated Enters. v. Gruber</i> , 86 F.2d 958 (1st Cir. 1936).....	5
<i>Affiliated Music Enters. v. Sesac, Inc.</i> , 160 F. Supp. 865 (S.D.N.Y. 1958)	15
<i>Alice Corp. v. CLS Bank Int’l.</i> , 573 U.S. 208 (2014).....	6
<i>Apple Comput., Inc. v. Microsoft Corp.</i> , 35 F.3d 1435 (9th Cir. 1994).....	19
<i>Bailey v. United States</i> , 516 U.S. 137 (1995).....	5
<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	<i>passim</i>
<i>Bikram’s Yoga Coll. of India, L.P. v.</i> <i>Evolution Yoga, LLC</i> , 803 F.3d 1032 (9th Cir. 2015).....	10
<i>Bilski v. Kappos</i> , 561 U.S. 593 (2010).....	11
<i>Brief English Sys., Inc. v. Owen</i> , 48 F.2d 555 (2d Cir. 1931)	5, 15

Cited Authorities

	<i>Page</i>
<i>Dastar Corp. v.</i> <i>Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003).....	32
<i>Diamond v. Diehr</i> , 450 U.S. 175 (1981)	7
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991)	10, 31
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994)	31, 32
<i>Fourth Estate Pubs. Benefit Corp. v.</i> <i>Wall-Street.com, LLC</i> , 139 S. Ct. 881 (2019).....	25
<i>Gottschalk v. Benson</i> , 409 U.S. 63 (1972).....	6
<i>Gustafson v. Alloyd Co.</i> , 513 U.S. 561 (1995).....	5
<i>LeRoy v. Tatham</i> , 55 U.S. 156 (1852).....	6
<i>Limelight Networks v. Akamai Techs.</i> , 572 U.S. 915 (2014)	11
<i>Lotus Dev. Corp. v. Borland Int'l, Inc.</i> , 49 F.3d 807 (1st Cir. 1995), <i>aff'd by an equally</i> <i>divided court</i> , 516 U.S. 233 (1996)	<i>passim</i>

Cited Authorities

	<i>Page</i>
<i>Lotus Dev. Corp. v. Borland Int’l, Inc.</i> , 831 F. Supp. 223 (D. Mass. 1993)	15
<i>Mitel, Inc. v. Iqtel, Inc.</i> , 124 F.3d 1366 (10th Cir. 1997).	19
<i>Octane Fitness v. ICON Health & Fitness</i> , 572 U.S. 545 (2014).	11
<i>Oracle Am., Inc. v. Google Inc.</i> , 750 F.3d 1339 (Fed. Cir. 2014), <i>cert. denied</i> , 135 S. Ct. 2887 (2015)	<i>passim</i>
<i>Oracle Am., Inc. v. Google LLC</i> , 886 F.3d 1179 (Fed. Cir. 2018).	11, 28
<i>Perris v. Hexamer</i> , 99 U.S. 674 (1878)	5
<i>Sega Enters. v. Accolade, Inc.</i> , 977 F.2d 1510 (9th Cir. 1992).	17
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	31, 32
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001)	9
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975)	31

Cited Authorities

	<i>Page</i>
STATUTES	
17 U.S.C. § 1012, 11, 12
17 U.S.C. § 102(a)	11, 12, 13
17 U.S.C. § 102(b)	<i>passim</i>
17 U.S.C. § 10729
17 U.S.C. § 411(a)25
35 U.S.C. § 100(b)5
35 U.S.C. § 1015
CONSTITUTIONAL PROVISIONS	
U.S. Const. art. I, § 8, cl. 85, 30
LEGISLATIVE MATERIALS	
1976 U.S.C.C.A.N. 565910
Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975)7, 10
H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54 (1976)10

Cited Authorities

Page

OTHER AUTHORITIES

Dennis S. Karjala, <i>Oracle v. Google and the Scope of a Computer Program Copyright</i> , 24 J. Intell. Prop. L. (2016)	14, 16, 18, 25
Mark A. Lemley & David McGowan, <i>Legal Implications of Network Economic Effects</i> , 86 Calif. L. Rev. 479 (1998)	21, 23
Microsoft Press Computer Dictionary (2d Ed. 1994)	14, 16
Peter S. Menell, <i>An epitaph for traditional copyright protection of network features of computer software</i> , The Antitrust Bulletin/Fall-Winter 1998 (1998)	21
Peter S. Menell, <i>Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software</i> , 31 Harv. J.L. & Tech. 305 (2018)	20, 27
Richard H. Stern, <i>Copyright in Computer Programming Languages</i> , 17 Rutgers Computer & Tech. L.J. 321 (1991)	14, 23
U.S. Copyright Office, <i>Compendium II of Copyright Office Practices</i> , Library of Congress (1984)	13, 15

Cited Authorities

	<i>Page</i>
U.S. Copyright Office, <i>Compendium of U.S. Copyright Office Practices</i> , Library of Congress (3d ed. 2017) (Compendium III)	24, 26

**STATEMENT OF IDENTITY AND INTEREST
OF *AMICUS CURIAE*¹**

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for 29 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 34,000 active donors have a strong interest in helping the courts and policymakers ensure that copyright law serves the interests of creators, innovators, and the general public.

**INTRODUCTION AND SUMMARY
OF ARGUMENT**

The Court should apply 17 U.S.C. § 102(b) as Congress wrote it, to prohibit copyright in computer functionality for methods of operation, systems, and the other subject matter listed in the statute. The Federal Circuit refused to do that here. Instead, it improperly rewrote the language of § 102(b) in two ways. First, it effectively deleted seven

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission. In an abundance of caution and for the sake of transparency, counsel state that Petitioner, Google LLC, has made contributions to the Electronic Frontier Foundation; such funds have been allotted to support specific projects, but not this brief. All parties have consented to the filing of this brief.

Web sites cited in this brief were last visited on January 8, 2020. Unless otherwise indicated, all statutory references are to 17 U.S.C.

of the statute's eight exclusions of copyrightable subject matter, incorrectly limiting the section to the first exclusion, which prohibits copyrighting an "idea." Those additional exclusions are not redundant: most are derived from the patent laws, which Congress felt were better suited than copyright to address functionality. Second, the Federal Circuit effectively added language to § 102(b) that narrowed even the first exclusion so that it would not apply where different words could be used to describe an idea.

The circuit court claimed its approach was necessary to provide "protection to computer programs." *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1367 (Fed. Cir. 2014) ("*Oracle I*"), Pet. App. 163a, *cert. denied*, 135 S. Ct. 2887 (2015). This belief was based on the misguided notion that applying the statute as Congress wrote it would render all computer programs uncopyrightable. The court was wrong. Applying the actual language of § 102(b) simply requires courts to determine which parts of computer programs are copyrightable and which parts are either the province of patent law or in the public domain. Indeed, the majority of Oracle's claims were based on patent law; having lost on those claims, it may not rewrite the scope of copyright to get a second bite at the apple.

This brief offers several non-exclusive factors that can help courts determine copyright eligibility. First, courts can look to whether a computer functionality meets the statutory definition of a "computer program" in 17 U.S.C. § 101 or falls within the scope of one of § 102(b)'s exclusions. Second, courts can consider whether a computer functionality creates network effects, where the value of the functionality increases as the number of

users increases. Section 102(b) is designed to help prevent copyright owners such as Oracle from using network effects to lock their users into a particular implementation of an uncopyrightable interface. Third, courts can consider whether the actual material in dispute—as opposed to an entire program—would be independently registrable. If the Copyright Office likely would have rejected a copyright application for just the part in question, its use shouldn't be the basis of a copyright lawsuit.

The Java declarations at issue here are uncopyrightable under most if not all of the above tests.

As this Court has often noted, the purpose of copyright is to protect the public interest, not merely to give copyright owners 95 year-long monopoly rents. This purpose is best served by upholding the district court's initial dismissal of Oracle's copyright claims on the basis of § 102(b).

ARGUMENT

I. THE FEDERAL CIRCUIT HAS IMPROPERLY REWRITTEN SECTION 102(b)

The Federal Circuit's decisions in this litigation have depended on a cramped view of § 102(b) that ignores important statutory exclusions from copyright protection and improperly adds further narrowing language. The following redline shows how the Federal Circuit effectively rewrote § 102(b) (deletions are in strikethrough, additions are underlined):

In no case does copyright protection for an original work of authorship extend to any idea, ~~procedure, process, system, method of operation, concept, principle, or discovery~~, regardless of the form in which it is described, explained, illustrated, or embodied in such work; unless (1) there are different words that can be used to describe, explain, illustrate or embody that idea, or (2) the idea is complex.

A. The Federal Circuit Improperly Deleted Important Exclusions from Copyright Protection

The Federal Circuit erroneously claimed that § 102(b) simply “codified” the “idea/expression dichotomy.” *Oracle I*, 750 F.3d at 1354-55, Pet. App. 137a. The court then asserted that the statute permits copyright protection if “the author had multiple ways to express the underlying idea.” *Id.* at 1367, Pet. App. 163a.

In fact, § 102(b) excludes far more than just “ideas” from copyrightability. It identifies seven other exclusions: “procedure, process, system, method of operation, concept, principle, or discovery.” Oracle calls these additional categories a mere “synonym” for ideas, and agrees with the Federal Circuit that § 102(b) is limited to the “idea/expression dichotomy.” Brief in Opposition at 15-16, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (March 27, 2019).

Oracle and the Federal Circuit are wrong.

As an initial matter, the Federal Circuit violated the well-established rule that courts should “avoid a reading [of a statute] which renders some words altogether

redundant.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) (“Congress intended each of [the statute’s] terms to have meaning”).

And as a practical matter, the circuit court’s approach misunderstands the role most of the categories play in drawing the line between patent and copyright protection. It is no coincidence that most of them are found in patent law. For example, “process” and “method” are explicitly described in the patent statutes. *See* 35 U.S.C. §§ 100(b) (“process” means “process, art, or method”), 101 (a “new and useful process” is patentable). This Court used both “methods of operation” and “system” in *Baker v. Selden*, 101 U.S. 99 (1879), to illustrate that which “is the province of letters patent, not of copyright.” *Id.* at 102-04. Indeed, since *Baker*, copyright cases often have used the term “system” to describe matter that falls within the ambit of patent rather than copyright. *See, e.g., Affiliated Enters. v. Gruber*, 86 F.2d 958, 961-62 (1st Cir. 1936) (promotional system); *Brief English Sys., Inc. v. Owen*, 48 F.2d 555, 556 (2d Cir. 1931) (system of shorthand). Notably, this Court *rejected* a claim for a copyright on a “system” for making signs and keys on maps. *Perris v. Hexamer*, 99 U.S. 674, 676 (1878).

The distinguishing role of “discovery” may be even more apparent. The term can be found in the Progress Clause itself, U.S. Const. art. I, § 8, cl. 8:

Congress shall have the power. . .To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Copyright gives “authors” a limited exclusive right to “writings,” while patents give “inventors” a limited exclusive right to their “discoveries.”

As for principles and procedures, “principle” has long been used as the patent counterpart of “ideas,” for which no patent can be obtained. *See e.g., LeRoy v. Tatham*, 55 U.S. 156, 174-175 (1852) (“A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right”) (*cited with approval in Alice Corp. v. CLS Bank Int’l.*, 573 U.S. 208, 216 (2014)). And in patent cases such as *Gottschalk v. Benson*, 409 U.S. 63, 65 (1972), the Court specifically used the term “procedure” to define a computer algorithm as a “procedure for solving a given type of mathematical problem.”

Thus, while § 102(b) (and *Baker v. Selden*) are concerned with the idea/expression dichotomy, both are also focused on the difference between things that are patentable and things that are copyrightable. *Baker*, 101 U.S. at 102. When Congress codified *Baker* in § 102(b), it didn’t merely limit the statute’s exclusions to “ideas,” but also excluded many other categories identified in patent law. By their terms, the exclusions establish Congress’ intent that copyright should not be allowed to substitute for or interfere with the subject matter of patent—both that which is unpatentable, such as principles, and that which is patentable, such as processes and methods of operation.

Indeed, Oracle’s attempt to lump these terms together as undifferentiated “ideas” would undo much of patent law. The distinction between “processes” (or “methods

of operation”) and “ideas” (or “principles”) is as central to patent law as the distinction between “expression” and “ideas” is to copyright. *See, e.g., Diamond v. Diehr*, 450 U.S. 175, 182-185 (1981) (contrasting patentable “processes” with unpatentable “ideas”). “Process” and “method of operation” for these purposes are the *opposite* of “ideas”—a fact of which Congress plainly was aware. In 1975 House hearings on the eventual 1976 Copyright Act, the Computer & Business Equipment Manufacturers Association proposed deleting “plan, procedure, process, system, method of operation” from § 102(b); Congress rejected this deletion. Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., Pt. 3, at 2215, 2218, 2223 (1975).²

Patent law’s relationship to § 102(b)’s exclusions is central here, where Oracle initially sued Google on seven patent claims and one copyright claim. Amended Complaint for Patent and Copyright Infringement, Dkt. No. 36, N.D. Cal. No. 10-3561 (Oct. 27, 2010). The jury rejected Oracle’s patent claims—a verdict from which Oracle did not appeal. Special Verdict Form (patent phase verdict), Dkt. No. 1190, N.D. Cal. No. 10-3561 (May 23, 2012). Having lost its patent case, Oracle instead seeks a 95-year copyright on subject matter that § 102(b) says is covered only by the patent laws.

All of the exclusions in § 102(b) have meaning and limit the scope of copyright. To apply the statute as Congress wrote it, none may be disregarded.

2. Available at: <https://babel.hathitrust.org/cgi/pt?id=umn.31951d00827185m&view=1up&seq=839>

B. The Federal Circuit Effectively Added Language to Section 102(b) That Doesn't Appear in the Statute

Not only did the Federal Circuit improperly restrict § 102(b) by deleting words of exclusion, it narrowed the statute further by effectively adding language that also limited the statute's reach. Contrary to Supreme Court precedent and legislative intent, the circuit court held that merger did not bar copyright protection for the Java declarations unless "Sun/Oracle had only one way, or a limited number of ways, to write them." *Oracle I*, 750 F.3d at 1361, Pet. App. 150a. Therefore, the Federal Circuit reasoned, if another company wanted to use a Java method such as "Math.max," Oracle could use copyright to force the second company to use synonyms or "choices" such as "Math.maximum" or "Arith.larger." *Id.* & n.6. And in the context of copyrightability of Java's structure, sequence, and organization, the circuit court held:

We agree with Oracle that, under Ninth Circuit law, an original work—even one that serves a function—is entitled to copyright protection as long as the author had multiple ways to express the underlying idea. Section 102(b) does not, as Google seems to suggest, automatically deny copyright protection to elements of a computer program that are functional.

Id. at 1367, Pet. App. 163a. Therefore, in addition to limiting § 102(b)'s exclusions to solely "ideas," the Federal Circuit effectively narrowed the statute further by improperly adding "unless there are different words that can be used to describe, explain, illustrate or embody that idea."

Adding this exception to the statute is improper for several reasons. First, as a general rule, it is improper to add exceptions into a statute, in the absence of legislative intent. See *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001).

Second, the availability of synonyms or creative choices doesn't convert uncopyrightable subject matter into copyrightable subject matter. The Court encountered this very issue in *Baker v. Selden*. According to the trial court record, Baker copied many of the same words that Selden used as headings in his accounting system, such as "current receipts and disbursements," "totals," "balances," and "present receipts." Supreme Court Record in *Baker* at 19-20 (trial court decree dated Jan. 21, 1875), at 103-04 (testimony of Samuel Raber).³ Synonyms existed for many of those words, such as "sums" for "totals" and "revenue" for "receipts." Nevertheless, the Court rejected Selden's claim that "no one can make or use similar ruled lines and headings, or ruled lines and headings made and arranged on substantially the same system, without violating the copyright." *Baker*, 101 U.S. at 101. Thus, because Selden's system of headings could not "be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public." *Id.* at 103.

3. The Supreme Court Record in *Baker v. Selden*, including the trial court record, is available at: <https://www.dropbox.com/s/azafhdqr5frf5iv/Baker%20v%20Selden.pdf?dl=0>.

Pages 19-20 of the Record are located at page 7 of the PDF document, and pages 103-04 are at pages 41-42 of the PDF.

Since § 102(b) “in no way enlarges or contracts” existing law, *Baker’s* principles remain embodied in the statute. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54, 57 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670).

Indeed, Congress specifically rejected the proposed modification to the statute’s language that the Federal Circuit effectively adopted here. In the 1975 House hearings, the Information Industry Association proposed adding language to § 102(b) giving copyright protection to “alternative ideas or abstractions or in a discretionary pattern of events or processes.” Congress refused. Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., Pt. 1, at 332, 334-35 (1975).⁴

Several circuit courts have rejected similar claims by copyright owners seeking to protect uncopyrightable § 102(b) subject matter on the same “other choices” theory. See, e.g., *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 816 (1st Cir. 1995), *aff’d by an equally divided court*, 516 U.S. 233 (1996) (“expressive” choices of what to name or arrange menu command terms do not “magically” change uncopyrightable terms or their arrangement into copyrightable subject matter); *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1042 (9th Cir. 2015) (“the possibility of attaining a particular end through multiple different methods does not render the uncopyrightable a proper subject of copyright”).

4. Available at: <https://babel.hathitrust.org/cgi/pt?id=pur1.32754075290456&view=1up&seq=344>

Finally, the Federal Circuit repeatedly alluded to “7,000 lines” of allegedly copied code, and 37 copied API packages. *See, e.g., Oracle I*, 750 F.3d at 1353, 1356, 1359, 1361, 1363, Pet. App. 134a, 139a, 146a, 150a, 154a; *see also Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1187, 1206 (Fed. Cir. 2018) (“*Oracle II*”), Pet. App. 7a, 45a (references to “11,500 lines” of code). It appears that the circuit assumed that if code is lengthy and complex, there must be something copyrightable in it. But the language of § 102(b) contains no exception for “complex” cases.

The Federal Circuit’s approach reflects an unfortunate pattern usually found in its patent jurisprudence: misinterpreting patent statutes to alter the text. In those cases, this Court has not hesitated to correct the Federal Circuit’s ruling and hold that statutes should be interpreted as Congress wrote them. *See, e.g., Limelight Networks v. Akamai Techs.*, 572 U.S. 915, 926 (2014) (the Federal Circuit’s alteration of the statute would result in “serious and problematic consequences”); *Octane Fitness v. ICON Health & Fitness*, 572 U.S. 545, 548 (2014) (Federal Circuit rule is not “consistent” with the statutory text); *Bilski v. Kappos*, 561 U.S. 593, 612 (2010) (“Today, the Court once again declines to impose limitations on the Patent Act that are inconsistent with the Act’s text.”). The Court should make a similar correction here.

II. COURTS CAN AND SHOULD DETERMINE WHEN COMPUTER FUNCTIONALITY IS COPYRIGHTABLE; SEVERAL NON-EXCLUSIVE FACTORS CAN HELP

The Federal Circuit’s approach is purportedly intended to resolve a potential conflict between 17 U.S.C. § 101, § 102(a), and § 102(b). The first two provisions say

that computer programs are copyrightable as a literary work. But § 102(b) excludes many aspects of computer functionality, such as procedures, processes, methods of operation, and others. The circuit court feared that applying the statute as written would mean that “no computer program is protectable.” *Oracle I*, 750 F.3d at 1367, Pet. App. 163a.

The Federal Circuit’s concern is overstated. Courts can and should determine which parts of computer programs are excluded from copyright under § 102(b), and which parts are protectable. That determination can be rooted in a set of practical and statutory factors that, taken together, offer a rubric to help identify noncopyrightable material. To be clear, since § 102 outlines a large range of different types of copyrightable and uncopyrightable subject matter, the same work may be noncopyrightable for multiple reasons. Likewise, some copyright-ineligible program components might not satisfy all of these factors, since they are designed to cover a large scope of possible § 102(b) ineligible subject matter.

Under this rubric, while the Java implementing code may be copyrightable, the Java declarations are not.

A. Does the Work in Question Meet the Definition of a Computer Program That Does *Not* Fall Within the Statutory Exclusions?

The Copyright Act defines a “computer program” as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101. This provides copyright protection for computer programs as a literary work under 17 U.S.C. § 102(a).

But “computer programs,” like other works, are subject to § 102(b). When a work describing computer functionality does not even qualify as a “computer program,” it is unlikely to be eligible subject matter. Also, in some cases there are parts of a computer program that, standing alone, clearly do not meet the definition of a computer program and won’t be a copyrightable literary work under § 102(a). If it is a close question, an analysis of whether a computer component has the characteristics of something that does not meet the definition of “computer program” may not provide easy resolution, but should still be helpful.

1. A System for a Language Used to Write Computer Programs vs. a Program Written With That Language

A computer language used to write a program is typically an uncopyrightable system or method of operation. The Copyright Office has defined a computer language as “a programming language used by a programmer for writing a computer program.” Compendium II of Copyright Office Practices, the Library of Congress, § 326 at 300-32 (1984) (“Compendium II”).⁵ A commentator summarized a number of definitions of computer language as follows:

A computer programming language is a formal system of expression including:
(1) a set of vocabulary elements;

5. Available at: <https://www.copyright.gov/history/comp/compendium-two.pdf>. Page 300-32 is at page 66 of the online document.

- (2) a set of syntax rules for combining vocabulary elements into statements; and
- (3) the assignment of meaning to statements that properly combine vocabulary elements in accordance with the syntax rules.

Richard H. Stern, *Copyright in Computer Programming Languages*, 17 Rutgers Computer & Tech. L.J. 321, 327 (1991) (“Stern”) (footnotes omitted).⁶

As this suggests, a computer language is fundamentally different than a program written in that language. A computer language includes a set of rules and associated syntax; a computer program, by contrast, is a particular set of the language’s available instructions that achieves a “certain result” upon execution by the computer. See Dennis S. Karjala, *Oracle v. Google and the Scope of a Computer Program Copyright*, 24 J. Intell. Prop. L. 1, 16 (2016) (“Karjala”).⁷ In other words, a computer program uses selected words of the language in the order appropriate for the function being performed. The Java language is sometimes called a “high-level language,” which can be defined as a “computer language that provides a certain level of abstraction from the underlying machine language through the use of declarations, control statements, and other syntactical structures.” Microsoft Press Computer Dictionary at 198 (2d Ed. 1994); see 2016 Fair Use Trial Tr. 1211-14 (“Trial Tr.”) (Astrachan).

6. Available at: <http://docs.law.gwu.edu/facweb/claw/ProgLang.pdf>

7. Available at: <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1399&context=jipl>

Other examples of uncopyrightable language systems that can be used to create a program or copyrighted work appear both in the computer context and otherwise. For example, the Lotus macro language allowed users to write their own macro programs. *Lotus*, 49 F.3d at 809-10, 811-12 (majority opinion), 820-21 (Boudin, J., concurring); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 831 F. Supp. 223, 227-29 (D. Mass. 1993). Non-computer examples include systems of shorthand, *Brief English Sys.*, 48 F.2d at 556; musical notation as opposed to compositions written with the notation, *Affiliated Music Enters. v. Sesac, Inc.*, 160 F. Supp. 865, 867 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959) (antitrust case); and systems of dance notation as opposed to dances written with the notation, Compendium II, § 450.07(b) at 400-20.

Here, the Java declarations that Google used meet most or all of the above definitions of a computer language. They provide vocabulary elements (such as the declaration of method “max”) and syntax rules to combine the vocabulary elements (such as the declaration “public static int max(int x, int y”). *Oracle I*, 750 F.3d at 1349-50, Pet. App. 126a-127a. The district court’s 2012 copyrightability decision explains the Java syntax generally, Pet. App. 221a-224a, and contains an example of a short program written with the “max” method, Pet. App. 224a-225a. The Java declarations are thus different than a program *written* using the declarations—here, the Java implementing code is the computer program.

While Oracle and the court of appeals referred to the Java declarations as “declaring code,” the district court’s factual findings following the 2012 trial didn’t use that phrase anywhere, Pet. App. 212a-272a. The declarations

in fact “become actual computer code only as part of an application program written in the Java (or Android) language,” Karjala, 24 J. Intell. Prop. L. at 15. The jury heard testimony from Google’s CEO (which it was entitled to credit) that the so-called “declaring code” isn’t in fact code, and that the declarations aren’t the same as their implementations. Trial Tr. 1833, 1846 (Page).

Thus, the record suggests that the Java declarations do not meet the statutory definition of a “computer program,” which suggests in turn that they are part of an uncopyrightable “system” or “method of operation” under § 102(b).

In addition to the basic building blocks of the vocabulary, syntax rules, and assignment of meaning to statements, computer languages will often have associated documentation such as a book or specification describing the language, giving examples of the language’s implementation, and other explanatory information. In this case, the first jury found that Google did not infringe the Java documentation, so it is not at issue. Special Verdict Form, Question 2, Dkt. No. 1089, N.D. Cal. No. 10-3561 (May 7, 2012).

2. A Computer Interface vs. a Program That Implements That Interface

Like computer languages, computer interfaces are highly functional. Broadly speaking, an interface is the “point at which a connection is made between two elements so that they can work with one another.” Microsoft Press Computer Dictionary at 218. In computing, there are different types of interfaces, such as user interfaces that

enable people to communicate with computer programs, and software and hardware interfaces that enable computer software and hardware components to work and communicate with each other. *Id.* Other examples of interfaces include the Lotus menu command hierarchy and Borland's emulation of its interface, *Lotus*, 49 F.3d at 810-12; and the Sega interface specifications for its game cartridges, *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1515 (9th Cir. 1992).

As the First and Ninth Circuits recognized, interfaces, standing alone, do not meet the definition of a computer program. Briefs submitted by two groups of amici at the petition stage of this litigation help explain why, as a matter of law and sound policy. The brief of 78 computer scientists explained that interfaces describe *what* functional tasks a computer performs, as opposed to the implementations (a computer program) that tell the computer *how* to perform the tasks. The brief also explained the history of computer interfaces and how the industry has relied for decades on the right to implement them freely. Brief of 78 Amici Curiae Computer Scientists in Support of Petitioner, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (February 25, 2019). Also, amici R Street and Public Knowledge filed a brief giving examples of software interfaces and showing why the use of standard interfaces is essential to modern technology. Brief of the R Street Institute and Public Knowledge as Amici Curiae in Support of the Petition, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (February 25, 2019).

We understand amici will be filing similar briefs at this stage so we will not belabor the point, except to note that the district court carefully distinguished the Java

interface itself from programs that implements the “max” example of the Java interface. Pet. App. 224a-225a. As that court understood, the Java application programming interface is an example of a system or method of operation. Pet. App. 266a-267a. By contrast, the Java implementing code is a computer program embodying Sun/Oracle’s particular implementation of the interface.

As discussed in Section I above, the Federal Circuit’s copyrightability opinion effectively rewrote § 102(b). By holding that computer languages and interfaces are copyrightable, the circuit court has *also* arguably rewritten § 101, as follows:

A “computer program” is (1) a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result; and (2) a system including the computer language, syntax, or interfaces used to write the statements or instructions.

The Court should not endorse the Federal Circuit’s misguided rewrites, particularly given widespread industry reliance on the noncopyrightability of interfaces and the role it has played in promoting competition and innovation.

3. The “Certain Result” of a Program vs. the Program Itself

Many computer programs accept inputs and generate outputs in defined formats. Karjala, 24 J. Intell. Prop. L. at 15. These input/output formats are not the program itself, but rather the “certain result” of its operation.

The district court's 2012 copyrightability opinion gave one simple example wherein the sample program's input was two integers and the output was the greater of those two integers. Pet. App. 224a-226a. Other examples are more complicated, such as the telephone call controller command codes at issue in *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1369-70 (10th Cir. 1997).

A "certain result" of a computer program generally is not the same as the program itself, and therefore is not eligible for copyright protection as a literary work under § 102(a). Of course, the *output* of a computer program, such as a screen display, may be eligible for copyright protection under some other category of § 102(a), such as an audiovisual work. *See, e.g., Lotus*, 49 F.3d at 816 & n.10 (the way the Lotus menu screens look don't affect "how users control the program" so they are not part of the method of operation). The copyrightability of such works is still subject to analytic dissection under doctrines such as idea/expression, *scènes à faire*, originality, and others. *See Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-46 (9th Cir. 1994).

In this case, Oracle only asserts copyright in the Java declarations as a literary work. 2012 Trial Exs. 464, 475, 476 (registration certificates) (admitted into evidence April 18, 2012). To the extent that the Java declarations have characteristics of a "certain result" of the larger Java program, they do not qualify as copyrightable computer programs.

4. Does the Work in Question Define a Method of Operating a Machine?

Courts can also consider whether the works at issue are essentially operating procedures that, as such, fall more logically under the province of patent law. In *Lotus*, for example, the court analogized the disputed menu commands to buttons used to control a video cassette recorder (VCR). *Lotus*, 49 F.3d at 817. A more modern analogy could be the utilitarian features of a smart phone.

This query helps identify the key flaw in Oracle’s claim that the Java APIs are analogous to the chapter titles and topic sentences of a Harry Potter book. *See* Trial Tr. 2158-63 (Oracle closing argument); Opening Brief and Addendum of Plaintiff-Appellant at 1-2, *Oracle Am., Inc. v. Google Inc.*, No. 2013-1021, 1022 (Fed. Cir. Feb. 11, 2013); Brief in Opposition at 23, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (March 27, 2019).

The jury rejected that theory, with good reason. Trial Tr. 1453-59 (Reinhold). Harry Potter chapter titles and topic sentences “do not operate a machine. By contrast, the Java API declarations define the gears and levers of a virtual machine.” Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software*, 31 Harv. J.L. & Tech. 305, 446 (2018) (“Menell”).⁸ They are therefore an uncopyrightable “system” or “method of operation.”

8. Available at: <https://jolt.law.harvard.edu/assets/articlePDFs/v31/31HarvJLTech305.pdf>

B. Does the Primary Value of the Work Derive from Network Effects Created by the User's Learning and Investment in the Subject Matter?

As Judge Boudin recognized in *Lotus*, attention to network effects can help identify material that properly sounds in patent, rather than copyright. *Lotus*, 49 F.3d at 819-21. If a work's primary value is network effects created by the user's learning and investment, it is probably functional and more likely to fall within one of § 102(b)'s exclusions.

For most copyrighted works that operate in a traditional market, "the utility that consumers derive from the purchase and consumption of a product is largely independent of the behavior of other consumers." Peter S. Menell, *An epitaph for traditional copyright protection of network features of computer software*, *The Antitrust Bulletin/Fall-Winter 1998* at 651, 655 (1998).⁹ Where the utility of a product depends on network effects, however, the value of the product depends on the number of other consumers using the product; the value of products dominated by network effects increases with the number of other users on the network. *Id.* at 655-58; *see also* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 *Calif. L. Rev.* 479, 483 (1998) ("Lemley").¹⁰ And because, as Judge Boudin explained, widespread adoption of a set of features is

9. Available at: <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1984&context=facpubs>

10. Available at: <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1588&context=californialawreview>

likely to derive not from how *creative* it is, but from how *useful* it is, where the material at issue has generated such effects, courts should consider whether it is really a “useful article” rather than an expressive one.

Granting copyright in such features or code also raises policy concerns. As with patentable inventions:

Requests for the protection of computer menus present the concern with fencing off access to the commons in an acute form. A new menu may be a creative work, but over time its importance may come to reside more in the investment that has been made by *users* in learning the menu and in building their own mini-programs—macros—in reliance upon the menu.

Lotus, 49 F.3d at 819 (emphasis in original). Similarly, when a computer program has a selection of functional features (in *Lotus*, the menu commands; here, the Java declarations), the program’s users who learn those features become “locked in” to the “choices” made by those programs. Simply put, the more useful the functionality is, the more the users invest their own time to learn the way the functionality is written and organized.

Strong copyright protections for such works give rightholders far greater power than Congress intended. As Judge Boudin observed:

If *Lotus* is granted a monopoly on this pattern, users who have learned the command structure of *Lotus* 1-2-3 or devised their own macros are locked into *Lotus*, just as a typist who has

learned the QWERTY keyboard would be the captive of anyone who had a monopoly on the production of such a keyboard.

...

But if a better spreadsheet comes along, it is hard to see why customers who have learned the Lotus menu and devised macros for it should remain captives of Lotus because of an investment in learning made by the users and not by Lotus.

Lotus, 49 F.3d at 821.

When Lotus sought review in this Court, a prominent group of economics professors filed an amicus brief explaining the dangerous impact of recognizing copyrightability in computer program interfaces precisely because they usually exhibit strong network effects. Brief Amicus Curiae of Economics Professors and Scholars in Support of Respondent, *Lotus Dev. Corp. v. Borland Int'l, Inc.* (No. 94-2003) (December 8, 1995), 1995 WL 728562, at *11 (“If interfaces are protected by copyright, the copyright holder can prevent competitors from making their products compatible. In this way the intellectual property treatment of interfaces crucially affects the nature of competition.”); *see* Lemley, 86 Calif. L. Rev. at 532-33; Stern, 17 Rutgers Computer & Tech. L.J. at 373-75 (noting “market-distorting effects” of copyright protection in such circumstances).

In this case, the jury heard evidence of network effects from both sides’ experts. Oracle’s expert admitted

to the network effects resulting from a large “network of developers” that have learned Java. Trial Tr. at 1746-47 (Jaffe). If enough users are locked into one platform, the network can “tip” the market to that platform. *Id.* at 1748. With millions of Java users, Google “needed the community of developers and the device makers in order to launch and be successful” with the Android phone. *Id.* at 1755-56; *see id.* at 1758-60 (noting need to leverage the “existing base of developers”). Google’s expert noted that if the API labels change, then users “wouldn’t be able to accomplish their tasks,” and developers “would have to learn a whole new language to be able to use” the API labels. *Id.* at 1221 (Astrachan).

C. Could a Separate Copyright Registration Have Been Obtained on the Subject Matter?

Courts can also consider whether the work at issue could be independently registered. While registration is not a prerequisite for copyright protection, it does require independent Copyright Office review of copyrightability, according to an administrative manual that “provides instruction to agency staff regarding their statutory duties and provides expert guidance to copyright applicants” on what may or may not be registered for copyright—including computer programs.¹¹ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 101 (3d ed. 2017) at 1 (“Compendium III”).¹² Moreover, as

11. The Copyright Office’s statements about the law are not precedential and are cited primarily for their persuasive value.

12. Available at: <https://www.copyright.gov/comp3/docs/compendium.pdf>. Section 721 of Chapter 700 (a chapter including copyright procedures for computer programs) begins at page 384 of

Congress has predicated infringement litigation on registration of the work at issue, it makes sense to consider whether the infringement claim could go forward if the claimant had followed the required procedures under 17 U.S.C. § 411(a) for the actually disputed material. *See Fourth Estate Pubs. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) (“registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights”).

Applied here, this factor would look at whether Oracle could have registered the Java declarations at issue in this lawsuit as a stand-alone work. Karjala, 24 J. Intell. Prop. L. at 15-16. Oracle did not try to do that. Instead, Oracle’s copyright registrations identified the work at issue as “Java 2 Standard Edition 1.4” or “Java 2 Standard Edition, Version 5.0.” 2012 Trial Exs. 464, 475, 476. Thus, Oracle based its claims in this case on copyright registrations for the entire Java SE program, all 2.8 million lines of it (in the 166 Java SE packages).

If Oracle had tried to register only the Java declarations, it likely would have failed. According to the Compendium:

[T]he Office will not register the functional aspects of a computer program, such as the program’s algorithm, formatting, functions, logic, system design, or the like. Likewise, the Office will communicate with the applicant and may refuse registration if the applicant asserts

the online document. Section 721.7 is at pages 386-87, and Section 721.9(J) is at pages 396-98.

a claim in uncopyrightable elements that may be generated by a computer program, such as menu screens, layout and format, or the like.

Compendium III, Chapter 700, Section 721.7 at 30. Section 721.9(J) of the Compendium lists many “unacceptable” terms that may result in a copyright application being refused. *Id.*, Chapter 700 at 39-41. These include algorithms, computer languages, formulas, functions, interfaces, menu screens, software methodology, systems, and many others. The Java declarations fall easily within these terms.

D. Is the Work a “Necessary Incident” to the System?

Oracle claims that “creative choices” defeat any application of § 102(b). *See* Section I.B. above. This argument is misplaced.

An API defines labels for abstract concepts. In order for a computer and human to communicate with each other, a name has to be applied to each abstraction—a name is necessary for the computer to look up what abstraction the human wants, and vice versa. Once that name is chosen, it becomes the API. The existence of “creative choices” in choosing that name, or “multiple ways to express” that name, doesn’t mean that the name is copyrightable. Just the opposite. To a computer, the *names themselves* are methods of operation under § 102(b) because they serve as unique identifiers that are used to invoke functions; using a different name invokes a different function.

This principle dates back to *Baker v. Selden*. Selden’s system of headings could not “be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them.” *Baker*, 101 U.S. at 103. Thus, the heading labels Selden chose are “considered as *necessary incidents* to the art, and given therewith to the public.” *Id.* (emphasis added). Just as Selden’s choice of heading labels are “necessary incidents” to his accounting system, the labels that Sun/Oracle chose for the Java declarations are “necessary incidents” to its system. In other words, once these declarations are expressed in a certain way, they are the only and essential means of accomplishing a certain task. Menell, 31 Harv. J.L. & Tech. at 443.

In this case, there was extensive trial testimony that the Java label declarations are highly functional, and “necessary incidents” to the Java system. Google used only the Java class and method labels, writing its own implementations. Trial Tr. 1234 (Astrachan). Those labels “are very functional in nature” and allow developers to “use them more effectively.” *Id.* at 1239. The Java method names “are highly functionally descriptive of what their purpose is.” *Id.* at 1241. The *names themselves* are functional: they serve the “function of connecting my software” with the implementing code. *Id.* at 1243.

As Google’s expert explained, no matter how “creative” the choice, changing a function name means changing the function. Dr. Astrachan gave the example of assigning “control P” or “command P” to the print function. If “control P” or “command P” instead meant paste, then “printing wouldn’t work anymore” and “users of that file menu and their software wouldn’t be able to accomplish

their tasks.” *Id.* at 1220-21; *see also id.* at 1085-87 (Bornstein; the “max” method names and arrangements had little or no flexibility). The jury was entitled to believe this testimony. And as the district court found following the first trial, the Java commands “must be” in the form originally written. Pet. App. 266a-267a.

E. Not Coincidentally, Some of These Factors Also Militate in Favor of Fair Use

Fair use, like copyrightability exclusions, helps ensure that copyright fulfills its constitutional purpose.¹³ Thus, it is no coincidence that some of the above factors are also relevant to the application of fair use in software cases.

1. Strong Network Effects Militate in Favor of Fair Use

The Federal Circuit incorrectly described fair use factor two as not “terribly significant” and having “less significance” than the other factors. *Oracle II*, 886 F.3d at 1205, Pet. App. 42a-43a. In fact, factor two is crucial where, as here, the material at issue is highly functional. For example, fair use might be one way to address the dangers of lock-in. *Lotus*, 49 F.3d at 821-22 (Boudin, J., concurring). By focusing on the nature of the work, the factor two analysis calls attention not only to whether the work lies at the core of copyright’s purpose, but also to the

13. While this case can and should be decided on copyrightability, if the Court decides otherwise it should at least reverse the Federal Circuit’s equally erroneous fair use holding. We understand Google and several amici are addressing the fair use analysis, and accordingly offer only limited remarks on this point here.

necessary line between subject matter that is primarily creative and strongly protected by copyright, and subject matter that is primarily useful and therefore subject to weaker copyright protection, if any. Strong copyright protections for the latter category are more likely to lead to lock-in, which in turn makes the fair use safety valve more necessary and more appropriate.

Put another way, granting copyright protection to a book such as Harry Potter doesn't necessarily lock the reader into anything; the reader can read or write a second book about wizards and magic without having to use any installed base of knowledge acquired from the first book. By contrast, where users have invested in learning a particular way of doing something functional and useful, a finding of copyright liability allows the copyright owner to control that acquired knowledge and future uses of the functionality in question. That is not the purpose of copyright.

2. Fair Use Favors the Borrowing of a Small, Functional Component of a Work

The capability of independent registration is also relevant to fair use factor three. The question of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” under 17 U.S.C. § 107 starts with the identification of the copyrighted work. The Java declarations that Google's Android used represent about 11,500 lines of the Java SE code, a miniscule 0.4% of the 2.86 million lines of code in the entire program. Trial Tr. at 1244-45. (Astrachan). Using somewhat circular reasoning, the circuit court concluded that these 11,500 lines must be qualitatively significant, since they were

“important” to Android. *Oracle II*, 886 F.3d at 1207, Pet. App. 46a. But if those Java declarations were not a separately copyrightable work to begin with, then any copying of them could not be either quantitatively or qualitatively significant under factor three.

III. THE FEDERAL CIRCUIT HAS IMPROPERLY USURPED CONGRESS’ ROLE IN ENSURING THAT COPYRIGHT SERVES ITS CONSTITUTIONAL PURPOSE

In its zeal to find some aspect of the Java declarations protectable, the Federal Circuit ignored the fundamental purpose of copyright. The Progress Clause of the Constitution empowers Congress “[t]o promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const., art. I, § 8, cl. 8. As the Court has explained, that “exclusive right” is deliberately circumscribed so as to best serve the overall public interest:

The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole

interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' *When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.*

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (footnotes and citations omitted; emphasis added).

This theme appears throughout the Court's copyright decisions, such as *Feist*, 499 U.S. at 349-50:

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. (Citations omitted.)

Similarly, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994), the Court reiterated that "the monopoly privileges that Congress has authorized, while 'intended to motivate the creative activity of authors and inventors by the provision of a special reward,' are limited in nature and must ultimately serve the public good" (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

In particular, the Court has cautioned that courts confronted with new technologies such as those in this case should afford them breathing space by erring on the side of

limited copyright. In *Sony*, the Court observed that where “Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.” 464 U.S. at 431. Thus, the Court held that time-shifting of television programs was fair use, and left it to Congress to decide otherwise: “It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.” *Id.* at 456. *See also Fogerty*, 510 U.S. at 527 (“Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible”); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (rejecting an attempt to over-extend the Lanham Act to confer copyright-like protection, noting that when “Congress has wished to create such an addition to the law of copyright,” it does so with “specificity”).

This Court should follow its own sound precedents, and reject the Federal Circuit’s judicial expansion of copyright protection. If there is any doubt whether extending a copyright monopoly to cover interfaces such as those here serves copyright’s purpose, Congress should resolve that doubt. Until then, § 102(b), as written, resolves the question—against Oracle.

CONCLUSION

The decisions of the Federal Circuit should be reversed.

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