No. 18-956

IN THE

Supreme Court of the United States

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GOOGLE LLC,

Petitioner,

v.

ORACLE AMERICA, INC.,

Respondent.

———————

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

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**BRIEF FOR RIMINI STREET, INC.
AS *AMICUS CURIAE*
SUPPORTING REVERSAL**

———————

	MARK A. PERRY
BLAINE H. EVANSON	*Counsel of Record*
JOSEPH A. GORMAN	JEREMY M. CHRISTIANSEN
SHAUN A. MATHUR	MAX E. SCHULMAN
GIBSON, DUNN & CRUTCHER LLP	GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive	1050 Connecticut Avenue, N.W.
Irvine, California 92612	Washington, D.C. 20036
(949) 451-3805	(202) 955-8500
BEvanson@gibsondunn.com	MPerry@gibsondunn.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether copyright protection extends to a software interface.

2. Whether petitioner's use of a software interface constitutes fair use.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Rimini Street, Inc. is a global provider of enterprise software products and services and the leading third-party support provider for Oracle and SAP software products, with more than 2,000 active clients, ranging from Fortune 500 companies to governments, schools, and hospitals. Enterprise software systems are mission critical for companies and other organizations because of their ability to handle human resource, payroll, and other such functions. These complex systems can require regular and substantial updating and maintenance, which in turn implicate numerous legal and policy issues, including copyrightability, other exclusive rights, and the need to ensure legitimate competition and encourage innovation in the marketplace.

Rimini has extensive experience as a competitor in the enterprise software support market, and, consequently, is the target of litigation by respondent Oracle America, Inc. Rimini has participated in important copyright cases before this Court both as an *amicus* (*see Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016)) and as a party (*see Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873 (2019)). Rimini uses the prevalent example of enterprise software support to provide the Court with additional perspectives on the adverse consequences of the Federal Circuit's erroneous decision, which could extend far beyond the Java SE declarations at issue in this case.

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[1] The parties consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court should reverse the Federal Circuit on both questions presented. Oracle's positions, adopted by the court of appeals, not only lack legal justification, but also pose a serious threat to the fundamental public policies that the Copyright Clause and the Copyright Act are intended to advance: competition and innovation. If not halted by this Court, Oracle will continue to attempt to extend its erroneous positions to markets other than those involving Java SE declarations, including the enterprise software service market in which Rimini lawfully competes with Oracle.

I. Oracle's position on the copyrightability of functional components of software programming under 17 U.S.C. § 102 is erroneous and threatens competition in the enterprise software service industry.

Oracle owns the copyrights to several important enterprise software programs. Oracle licenses these programs to companies and organizations for large one-time payments, and then attempts to extract additional payments through annual software support contracts. But Oracle has no copyrights or any other exclusive right in the software support market, and Oracle's licenses permit licensees to hire third parties to provide support, as Oracle itself concedes.

Nonetheless, in copyright lawsuits against competitors in the enterprise software support market, including Rimini, Oracle has advanced broad views on copyrightability of purely functional methods of operation that parallel those it takes here concerning Java SE declarations. For instance, Oracle's PeopleSoft program contains "call" functions that are necessary for interoperability, but Oracle takes the position that

these functions are copyrighted. Similarly, Oracle has asserted that any program written to communicate with PeopleSoft that does not run "independently," is a protected "derivative work"—even if the program contains no Oracle code at all.

Those positions ignore the plain text of 17 U.S.C. § 102(a) and (b), as well as the mountain of case law recognizing that not all components of software are copyrightable, even if they contain an expressive component. Oracle's views are part of a broader anti-competitive litigation scheme in which Oracle seeks to leverage legitimate exclusive rights in copyrighted components of its software to gain *illegitimate* monopolies in areas in which Congress has not granted Oracle any rights at all. Adopting Oracle's errant position on copyrightability in this case would hamper legitimate competition and innovation, which is directly antithetical to the policies of the Copyright Clause and the Copyright Act.

II. To the extent Oracle has any protectable copyrights in the building blocks of computer programming, its position on fair use is indefensible. The very heart of the fair use doctrine is that some copying of copyrighted material is not only permissible but, indeed, desirable to foster innovation.

Oracle's self-serving views on the transformative use of the SE declarations at issue here are a threat to legitimate competition and innovation. Oracle simply ignores that computer programs are prototypically functional works, and that components such as SE declarations within those programs are even more functional. That is why Oracle insists on comparing SE declarations to traditional literary works. But such a comparison would improperly elevate the

standard that Google and any other competitor would have to meet in order to establish fair use.

Oracle also errs in insisting that because the SE declarations used in this case served the same purpose in their original context as in Google's Android platform, there is no transformative use. That is implausible. Google's use of the SE declarations here is analogous to use of intermediate copies, such as random access memory ("RAM") and other similar copies, that numerous courts have found to be fair use because they facilitate new creative works. A second work can, in context, be transformative even when it uses the copyrighted work without changing the copied component at all. That principle is vitally important to the enterprise software industry, where copying of functional components can be an integral part of software maintenance and support.

Oracle's position on the "effect of the use on the potential market" is similarly anti-competitive and beyond the realm of its copyrights. Rimini's innovative solutions have allowed it to compete with Oracle in the aftermarket for enterprise software support, over which Oracle has no monopoly. Oracle claims that the very existence of a competitor in the software support market impinges on its ability to market new versions of its software. Oracle has even taken the extreme position in its litigation with Rimini that a third-party service provider infringes when its engineer simply uses *knowledge* gained from servicing one licensed customer to service a different licensed customer. This is emblematic of the anti-competitive and anti-innovation positions Oracle is advancing before the Court. Just as Oracle has no exclusive rights in the Java programming market, it has no exclusive rights in the enterprise software support market.

ARGUMENT

This is one of the more technically complex copyright suits this Court has ever considered. Notwithstanding that complexity, the central legal issues—copyrightability and fair use—are fundamental to copyright law and have been applied by this Court and others in a variety of settings. Application of settled doctrine to the technological context here requires reversal of the decision below.

Rimini writes to address a more prosaic, but critically important, point: Affirming the Federal Circuit's adoption of Oracle's positions on copyrightability and fair use would allow powerful copyright holders like Oracle to leverage legitimate exclusive rights under the Copyright Act into *illegitimate* spheres, dominating markets in which they have no exclusive rights. The consequences would be disastrous for competition and innovation—the very policies that the Copyright Clause and the Copyright Act seek to advance. Specifically, Rimini writes to highlight other contexts, such as the market for enterprise software support, in which Oracle asserts unfounded and overbroad positions similar to those it persuaded the Federal Circuit to adopt in this case. Unless Oracle is stopped now, it will continue its attempts to overextend the limited exclusive rights granted by Congress, destroying competition and impeding innovation—all to the detriment of American consumers and the public at large.

For the reasons below (in addition to the reasons advanced by Google and other *amici* supporting reversal), the Court should reverse the Federal Circuit's decision.

I. THE FEDERAL CIRCUIT'S DECISION ON COPYRIGHTABILITY SHOULD BE REVERSED.

The Federal Circuit held that Oracle's Java SE declarations are copyrightable. But the Federal Circuit's reasoning, if affirmed by this Court, would have far-reaching implications well beyond the harms inflicted on Google in this case. The decision below could provide a blueprint for anti-competitive conduct that would diminish, not encourage, innovation across a broad range of fields, including enterprise software support.

Under 17 U.S.C. § 102(b), "copyright protection [does not] extend to any … method of operation." "[C]omputer programs hover … closely to the elusive boundary line described in § 102(b)" because of software's essentially *functional*, rather than expressive, nature. *Comput. Assocs. Int'l, Inc.* v. *Altai, Inc.*, 982 F.2d 693, 704 (2d Cir. 1992). But Oracle takes the untenable position that *all* aspects of its software—even functional aspects—are copyrightable, and asserts that position in war-of-attrition-style litigation against competitors. Oracle takes that position against Google here, and is staking out a similar position in the aftermarket for enterprise software support. The Court should reverse the court of appeals' decision on copyrightability because it could wrongfully permit Oracle to abuse copyright law in service of obtaining illegitimate monopolies over markets in which it holds no exclusive rights.

A. Oracle Makes a Practice of Overextending Copyrights.

Enterprise software is, generally speaking, a computer program that runs on servers for large companies and organizations. Typical enterprise software

programs serve human resource, payroll, and other functions. These systems, like all software programs, break down, contain or develop latent bugs, and require various updates over time. Without such updating and maintenance, these programs can become obsolete to the companies and organizations that have come to depend on them. *See Oracle USA, Inc.* v. *Rimini St., Inc.*, 879 F.3d 948, 955–56 (9th Cir. 2018), *rev'd in part*, 139 S. Ct. 873 (2019).

Oracle owns the copyrights to several enterprise software systems. Indeed, "Oracle software plays an important role in many organizations—and has for quite some time." Dan Woods, *Why Third-Party Software Support Is Possible and a Good Idea*, Forbes, Apr. 18, 2016.[2] Oracle "licenses its proprietary enterprise software for a substantial one-time payment." *Rimini*, 879 F.3d at 952. Oracle then "sells its licensees maintenance contracts for the software that are renewed on an annual basis. The maintenance work includes software updates, which Oracle makes available to purchasers of the contracts." *Ibid.* Oracle's software maintenance contracts are an enormous profit center. Woods, *Why Third-Party Software Support*, *supra*; *see also* Shaun Snapp, *How Accurate Are Oracle's Criticisms of Rimini Street?,* Brightwork Research, Apr. 26, 2019 ("Oracle derives 52% of its revenues from maintenance. Those revenues have operating margins of 94%.").[3]

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[2] https://www.forbes.com/sites/danwoods/2016/04/18/why-third-party-software-support-is-possible-and-a-good-idea/.

[3] https://www.brightworkresearch.com/oracle/2019/04/26/how-accurate-are-oracles-criticisms-of-rimini-street/.

But Oracle's licenses also permit the licensees to support their own software or to hire third parties to step into their shoes and do it for them. *Rimini*, 879 F.3d at 953 (Oracle's "software licenses … permitted Oracle's licensees to hire Rimini to perform" software support and maintenance); Dan Woods, *Can Oracle Customers Play Hardball and Win?*, Forbes, Mar. 16, 2016;[4] *see also* Dan Woods, *Can Third Party Support Really Hurt Oracle?*, Forbes, Mar. 16, 2016 ("Licensees have the right to update and modify their own software, or hire third parties to do so for them consistent with the terms of their license agreements.").[5]

"Creating these software updates," in many cases, may involve copying components of Oracle's software. *Rimini*, 879 F.3d at 952. For technical reasons, support and maintenance providers, whether they are the original vendors, the licensees themselves, or third-party providers, may reproduce certain components of enterprise software in the course of maintaining it.

Oracle targets these practices in copyright infringement litigation against its competitors, where it asserts that nearly all maintenance and support provided by third-party support providers violate Oracle's "exclusive rights" to reproduce, prepare derivative works, or distribute copies of some copyrighted expression. 17 U.S.C. § 106. In this way, Oracle attempts to use copyright infringement litigation against its competitors to secure indirectly what its own licenses do not and *cannot* provide—a monopoly

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[4] https://www.forbes.com/sites/danwoods/2016/03/16/can-customer-hardball-tactics-counter-oracles-audit-bargain-cloud-earnings-machine/.

[5] https://www.forbes.com/sites/danwoods/2016/03/16/can-third-party-support-really-hurt-oracle/.

in enterprise software support and similar markets. *See Oracle Corp.* v. *SAP AG*, 765 F.3d 1081 (9th Cir. 2014); *Oracle Am., Inc.* v. *Appleby*, 2016 WL 5339799 (N.D. Cal. Sept. 22, 2016); *Oracle Am., Inc.* v. *Hewlett Packard Enter. Co.*, 2016 WL 3951653 (N.D. Cal. July 22, 2016); *Oracle Am., Inc.* v. *Terix Comput. Co.*, 2015 WL 2090191 (N.D. Cal. May 5, 2015); *Oracle Am., Inc.* v. *StratisCom, LLC*, No. 3:14-cv-00356-CRB, Dkt. 14 (N.D. Cal. Feb. 2, 2014); *Oracle Am., Inc.* v. *CedarCrestone, Inc.*, 2012 WL 12897962 (N.D. Cal. Dec. 7, 2012); *Oracle Am., Inc.* v. *Serv. Key, LLC*, 2012 WL 6019580 (N.D. Cal. Dec. 3, 2012); *see also* Adam Mansfield, *Oracle's Attack on 3rd Party Support—A Series of Timelines*, UpperEdge, Nov. 7, 2012 ("Oracle began its aggressive pursuits against third party support providers by suing its major competitor" and then its "former business partner").[6]

Oracle's vast resources and aggressive assertions of copyright infringement allow it to wage a war of attrition against competitors, especially smaller companies. *See* Snapp, *How Accurate are Oracle's Criticisms*, *supra* ("Oracle may never win its case, but even if it doesn't it can continue to send a 'signal.' And Oracle has a virtually unlimited war chest it can use to restrict competition.") (emphasis omitted); *see also ibid.* ("Oracle has been referred to as a law firm with a software business attached."). Indeed, in its litigation against Rimini, Oracle asserted twenty-four claims against two defendants, lost twenty-three of those claims, yet still recovered approximately $90 million. *See Rimini*, 879 F.3d at 952–53; *Oracle USA, Inc.* v. *Rimini St., Inc.*, 783 F. App'x 707, 711 (9th Cir. 2019). Although Rimini satisfied the judgment and

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[6] https://upperedge.com/oracle/oracles-attack-on-3rd-party-support-a-series-of-timelines/.

continues as a robust competitor, a smaller company might have been unable to do so and thus been driven out of the market.

Suing competitors is one thing. But it is quite another to do so on the basis of a purported violation of "the *exclusive rights*" to reproduce, prepare derivative works, or distribute copies of some copyrighted expression. 17 U.S.C. § 106 (emphasis added). If Oracle can pinpoint some conduct it wants to stop, and tie that conduct to its exclusive rights in some fashion, however tenuous, then Oracle can potentially force its competitors out of the marketplace altogether. *See MDY Indus., LLC* v. *Blizzard Entm't, Inc.*, 629 F.3d 928, 941 (9th Cir. 2010) (noting the competitive danger of permitting copyright holders to "designate any disfavored conduct" as infringement, which "would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners"). This strong medicine makes overbroad claims of copyright infringement a particularly tempting strategy for aspiring monopolists like Oracle. It is critical for the Court, in resolving this case, to appreciate that Oracle's position on Java SE declarations is but one in a bevy of aggressive stances that Oracle asserts against its competitors.

Enterprise software, like any other computer program, contains functional, effectively non-expressive elements similar to the SE declarations at issue in this case. Oracle has asserted copyright protection over these functional components, but under this Court's precedents, these components are not copyrightable. *See Baker* v. *Selden*, 101 U.S. 99, 100, 103 (1879) (diagrams and forms within accounting system not copyrightable). Below are just three examples of

how Oracle has sought or may seek to limit competition in enterprise software support by asserting similar (and similarly baseless) claims of copyrightability in litigation with Rimini.

First, Oracle owns a popular program called PeopleSoft, which operates as a human resources platform. When Rimini creates its own software fixes for PeopleSoft licensees, pursuant to valid licenses held by the customer, those files will sometimes contain a reference or "call" to some preexisting PeopleSoft functionality in another file or library within PeopleSoft. A computer program that does not include the correct call cannot invoke relevant functionality. Yet, Oracle is staking out the position that a Rimini-created file infringes by virtue of the mere presence of that call language. Similar to its position in the instant case that referencing Oracle's Java SE declarations is infringing, Oracle's position that reproducing calls infringes seeks to use copyright law to block the standard method for accessing particular functionality, thus preventing interoperability and squashing competition. *See* Google Br. 3 (noting that "calls" are not copyrightable).

Second, Oracle has taken the even more brazen position that *any* program written to communicate with PeopleSoft, if the program does not run independently, is necessarily a protected derivative work, even when it contains no Oracle code at all, and that use of that program is infringement. In other words, when Rimini has written software programs that are 100% original to Rimini engineers and do not even contain, for instance, any preexisting Oracle code or "calls" to Oracle code, Oracle still believes that such programs are infringing. For example, PeopleSoft uses, in part, its own programming language, called

"PeopleCode."[7]   Interoperability between programs
can at times require engineers to write using elements
of PeopleCode, but Oracle claims that such Rimini-
created files are necessarily derivative works. This is,
in essence, a claim to own exclusively a software *lan-
guage*—an argument that is without legal basis and
which, if adopted, would have far-reaching negative
consequences. *See* Br. of *Amicus Curiae* Electronic
Frontier Foundation in Support of Pet., *Google LLC* v.
Oracle Am., Inc., No. 18-956 (U.S. 2019) (describing
the potential impact of Oracle's position as permitting
copyright of entire software languages).

Third, Oracle has a popular database program
called Database. Oracle licenses Database to its cus-
tomers, and those customers are entitled by their li-
censes to hire a third party to then service that soft-
ware. *Rimini*, 879 F.3d at 952–53. Database contains
certain "table" names, which describe where certain
information is stored within the complex Database
scheme.[8]   Interoperability sometimes requires that
third-party supporters reference these table names
because that is the only way to extract data from a
particular table within the program. You cannot tell
the program to seek out and retrieve information from
some source within the program if you cannot type the
table name you wish to access. Yet, under the logic of
Oracle's aggressive copyrightability position, Oracle

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[7] *See generally* PeopleCode Developer's Guide, *Understanding
the PeopleCode Language*, Oracle, https://docs.ora-
cle.com/cd/E28394_01/pt852pbh1/eng/psbooks/tpcd/chap-
ter.htm?File=tpcd/htm/tpcd03.htm (last visited Jan. 8, 2019).

[8] *See generally* Database Administrator's Guide, *Managing
Tables*, Oracle Help Center, https://docs.ora-
cle.com/cd/B19306_01/server.102/b14231/tables.htm (last visited
Jan. 8, 2019).

could contend that a user who runs a program that references a Database table name is infringing Oracle's copyrights.

Amicus is not asking the Court to rule on these examples. The point is that far more could be at stake than the disputed Java SE declarations that form the basis of the parties' dispute before this Court, because Oracle is taking similarly broad (and errant) positions in other litigation against competitors in other markets.

B. Oracle's Position on Copyrightability Is Wrong.

Oracle's position is wrong and, if affirmed, would reward anti-competitive behavior that would harm innovation. The Court should reverse in order to rebalance the incentives and obligations imposed by copyright law, and send a message regarding Oracle's use of copyright infringement litigation for purposes that are manifestly contrary to the public interest.

Oracle has argued that "the Copyright Act's plain text protects code whether it is 'used directly or indirectly in a computer in order to bring about a certain result.'" Br. in Opp. 2 (quoting 17 U.S.C. § 101). That statement is demonstrably false. Oracle takes this quote out of its context—it is merely the definition of a "computer program" under the Copyright Act, and has nothing to do with the scope of copyrightability or copyright protection at all. Indeed, other provisions in the Copyright Act expressly state that many copies and derivative works of a "computer program" are "not an infringement" at all. 17 U.S.C. § 117(a). Oracle's overstated position here reveals the root of its error— Oracle's belief that, by its very nature, *all* "creative computer code is copyrightable." Br. in Opp. 1.

Oracle's reading of the interaction between 17 U.S.C. § 102(a) and (b) similarly demonstrates the unreasonable breadth of its position. Oracle erroneously identifies all software code as a creative "literary work," and therefore *by definition* not a "method of operation." *See* Br. in Opp. 4; *see also* 17 U.S.C. § 102(a)(1). Oracle can posit such a broad reading only by ignoring Section 102(b)'s plain text and its relationship with Section 102(a).

Section 102(a) provides that copyright "protection subsists … in original works of authorship fixed in any tangible medium of expression." "Works of authorship" within this general provision "include" "literary works" and several other categories of works. 17 U.S.C. § 102(a)(1). But Section 102(b) carves out an exclusion to that grant of copyrightability, in language whose relationship to Section 102(a) could not be clearer: "*In no case does copyright protection for an original work of authorship* extend to any … *method of operation … regardless of the form in which it is … embodied in such work.*" *Id.* § 102(b) (emphases added).

That is to say, like every other "[w]ork[] of authorship" made copyrightable by Section 102(a), it is undisputed that software may have both copyrightable elements or components, and *non*-copyrightable elements or components. *Cf. Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) ("some works are closer to the core of intended copyright protection than others"); *Sony Comput. Entm't, Inc.* v. *Connectix Corp.*, 203 F.3d 596, 602 (9th Cir. 2000) (acknowledging that some components "of a program may be copyrighted as expression" under Section 102(a), while the program "also contains ideas and performs functions

that are not entitled to copyright protection" because of Section 102(b)).

It simply does not matter that there is some "expressive choice" in *creating* a method of operation (such as Oracle's engineers choosing a particular combination of words or characters to instantiate that method of operation). Under Section 102(b), "that expression is not copyrightable because it is part of [a] 'method of operation.'" *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); *see also Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir. 2004) (Sutton, J.) ("even if a work is in some sense 'original' under § 102(a), it still may not be copyrightable because [of] § 102(b)").

Hence, in the canonical example, an author may copyright a book explaining his accounting system, but not the diagrams and forms "illustrating the system and showing how it is to be used and carried out in practice," which "*are to be considered as necessary incidents to the art, and given therewith to the public*." *Baker*, 101 U.S. at 100, 103 (emphasis added). Surely the tables and diagrams in *Baker* involved substantial expressive choice in their creation. Yet this Court held they were not copyrightable because of their functional nature.

The parsing of the copyrightable and non-copyrightable components of works of authorship rests on constitutional principles. The Constitution provides Congress with the power "[t]o promote the Progress of … useful Arts, by securing for limited Times to Authors … the exclusive Right to their respective Writings." U.S. Const. art. I, § 8, cl. 8. "The primary objective of copyright is not to reward the labor of authors" (*Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499

U.S. 340, 349 (1991)), but "to stimulate artistic creativity for the general public good" (*Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975)), and "to promote the progress of … the arts" by "encourag[ing] people to devote themselves to intellectual and artistic creation" (*Goldstein* v. *California*, 412 U.S. 546, 555 (1973)). "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." *Feist*, 499 U.S. at 349–50.

Holding that the SE declarations in this case are copyrightable would permit Oracle to continue its pattern of suing competitors—competitors that innovate, create, build on, and improve upon Oracle's ideas—to the detriment of the public. Oracle is in fact trying to *prevent* others from "build[ing] freely upon the ideas and information" in their enterprise software programs in order to squeeze competitors, including third-party software support providers, out of the market. *Feist*, 499 U.S. at 349–50. But "the policies served by the Copyright Act are more complex, [and] more measured, than simply maximizing the number of meritorious suits for copyright infringement." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

Courts have long been vigilant in "prevent[ing] copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly." *Assessment Techs.* v. *WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) (quoting *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001)). That is because "the public policy which includes original works within the granted monopoly … equally forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the

Copyright Office and which it is contrary to public policy to grant." *Lasercomb Am., Inc.* v. *Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990) (brackets omitted) (quoting *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942)).

The Court should apply Section 102(b)'s prohibition on copyrightability of methods of operation in light of the broader market context in which players like Oracle unfairly seek to extend the exclusive rights of Section 106 into areas in which they have no legitimate right to do so. Affirming the Federal Circuit would prove injurious to competition and innovation—which is exactly what Oracle wants. Reversal, in contrast, would benefit the public interest by promoting competition and innovation.

II. THE FEDERAL CIRCUIT'S DECISION ON FAIR USE SHOULD BE REVERSED.

Even if some software interfaces are copyrightable, Oracle's conception of the fair use doctrine, as accepted by the Federal Circuit, would hamper legitimate competition and innovation in the enterprise software industry in various ways, contrary to the public interest.

The fair use doctrine serves to safeguard the essential public interests at the heart of copyright law. "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'" *Campbell*, 510 U.S. at 575 (alteration in original) (quoting U.S. Const. art. I, § 8, cl. 8). For this reason, "the fair use doctrine[] guarantee[s] … breathing space" (*id.* at 579), particularly when it comes to adapting copyright law to "new technology" (*Sony*

Corp. of Am. v. *Universal City Studios, Inc.*, 464 U.S. 417, 430, 456 (1984); *see also id.* at 431 (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"); *Sega Enters. Ltd.* v. *Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992) ("[w]hen technological change has rendered an aspect or application of the Copyright Act ambiguous, 'the Copyright Act must be construed in light of [copyright's] basic purpose'") (quoting *Sony*, 464 U.S. at 432)).

Following centuries of common-law development from the dawn of the Republic (*see Folsom* v. *Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)), Congress codified fair use in the 1976 Copyright Act, which instructs courts to consider four non-exclusive factors when "determining whether the use made of a work in any particular case is a fair use": (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. This Court has cautioned against adopting "bright-line rules" in this analysis, and warned lower courts to "avoid rigid application" of the fair use factors, which "would stifle the very creativity which that law is designed to foster." *Campbell*, 510 U.S. at 577 (quoting *Stewart* v. *Abend*, 495 U.S. 207, 236 (1990)).

Oracle's position paves over the nuanced public policies enshrined in the fair use doctrine in two criti-

cal ways: ignoring the functional nature of many aspects of software, and prioritizing Oracle's private interests over the public interest in a competitive and innovative marketplace. Oracle's position is a threat not just to the Android-related market at issue here, but also to the enterprise software market, where Oracle advances similar arguments about fair use.

A. Oracle Disregards the Functional Nature of Software Programs.

Oracle's position on the transformative use of SE declarations ignores important distinctions relevant to software. "[S]ome works are closer to the core of intended copyright protection than others, with the consequence that fair use is [easier] to establish when the [latter] works are copied." *Campbell*, 510 U.S. at 586. For instance, "if a work is largely functional, it receives only weak protection. 'This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.'" *Sega*, 977 F.2d at 1527 (quoting *Feist*, 499 U.S. at 350).

Computer programs like software interfaces are prototypical functional works, fair use of which is essential to generating new technologies that "benefit the public." *Blanch* v. *Koons*, 467 F.3d 244, 250 (2d Cir. 2006). After all, they "are, in essence, utilitarian articles—articles that accomplish tasks"—and thus "the exact set of commands used by [a] programmer is deemed functional." *Sega*, 977 F.2d at 1524. Functional software interfaces "lie[] at a distance from the core" of copyright protection, and are "accord[ed] … a 'lower degree of protection than more traditional literary works.'" *Sony*, 203 F.3d at 603 (quoting *Sega*, 977 F.2d at 1526).

Oracle ignores these functional features in its broad assessment of software. In fact, Oracle flatly and repeatedly characterizes *all* computer programs, software interfaces, and SE declarations as "literary works." Br. in Opp. i, 13–14. Indeed, in its litigation against Rimini, Oracle has broadly asserted, in discussing the "[n]ature" of its software, that *all* "computer software" receives blanket copyright protection. *Rimini St., Inc.* v. *Oracle Int'l Corp.*, No. 2:14-cv-01699-LRH-DJA, Dkt. 898 at 26 (D. Nev. Oct. 12, 2018). In defending that same position in this litigation, Oracle repeatedly invokes analogies to traditional literary works (Br. in Opp. 4, 23), illustrating that it views functional software interfaces as essentially indistinguishable from those works—contrary to the teachings of this Court. *See Campbell*, 510 U.S. at 586; *Sony*, 203 F.3d at 603; *Sega*, 977 F.2d at 1526. This fundamental error infects Oracle's entire fair use analysis, as it elevates the standard that Google was required to meet in order to prove fair use—particularly when it came to analyzing the transformative use component of the first fair use factor, "the purpose and character of the use." 17 U.S.C. § 107(1). By extension, it could also elevate the standard that any of Oracle's competitors would have to meet in order to demonstrate fair use, as functional elements abound in enterprise software programs that third-party service providers maintain.

Oracle compounds the error of its approach when it comes to the "transformative" use analysis under this prong. Although "transformative use is not absolutely necessary for a finding of fair use," "the goal of copyright, to promote science and arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doc-

trine's guarantee of breathing space within the confines of copyright." *Campbell*, 510 U.S. at 579. A use is transformative if "the new work … adds something new." *Ibid.* Here, Google's new work (the Android smartphone platform and use of the Java software interfaces) clearly added something new. As Google explains, it used Java SE declarations to create an entirely new platform in an entirely new context, and in doing so created millions of lines of its own implementing code for functions necessary to operate smartphones. Google Br. 8–9.

In this way, Google's use of SE declarations is analogous to the use of intermediate copies of software, such as RAM copies, that are incident to developing new creative works. *See Sony*, 203 F.3d at 602–03.[9] In *Sega*, for example, the defendant disassembled copyrighted computer code to create its own video games that would run on Sega's Genesis gaming console and compete with Sega's video games. *Sega*, 977 F.2d at 1514–16. The Ninth Circuit held that the use was fair because the intermediate copying created a new creative work, and Sega had no right to monopolize the market for games. *Id.* at 1522–26; *see also Sony*, 203 F.3d at 608 (intermediate copying of Sony's

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[9] RAM copies are copies of an entire program necessarily created in a computer's random access memory temporarily. *See MAI Sys. Corp.* v. *Peak Comput., Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (holding RAM copies were sufficiently fixed to constitute infringement); 17 U.S.C. § 117(a) (overturning *MAI Systems* and providing that "it is not an infringement" to make a copy or adaptation of a "computer program" when the copy or adaptation "is created as an essential step in the utilization of the computer program in conjunction with a machine"). RAM copies can be a form of legitimate intermediate copying for fair use purposes in order to create some other transformative work. *See Sega*, 977 F.2d at 1522–26.

BIOS software to create Virtual Game Station that would compete with Sony's PlayStation game console was fair use). Incidental copying of this nature, whether done through the creation of an intermediate copy, or through the use of an SE declaration, should be robustly protected as a fundamental aspect of fair and transformative use.

Oracle brushes aside *Sega* and *Sony* with scarcely any discussion, purporting to limit these cases' reasoning strictly to circumstances in which the new product does not include copied code. Br. in Opp. 27–28. But this Court has eschewed "bright-line rules" (*Campbell*, 510 U.S. at 577), in favor of a "sensitive balancing of interests," particularly when addressing new technology (*Sony*, 464 U.S. at 455 n.40; *Twentieth Century Music*, 422 U.S. at 156). And numerous courts have held that "a secondary work can be transformative in function or purpose *without* altering or actually adding to the original work." *Am. Soc'y for Testing & Materials* v. *Public.Resources.Org, Inc.*, 896 F.3d 437, 450 (D.C. Cir. 2018) (emphasis added; quotation marks omitted); *Swatch Grp. Mgmt. Servs. Ltd.* v. *Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (same); *see also Katz* v. *Google Inc.*, 802 F.3d 1178, 1183 (11th Cir. 2015) ("[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature") (quoting *A.V. ex rel. Vanderhyde* v. *iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009)); *Bouchat* v. *Baltimore Ravens Ltd. P'ship*, 737 F.3d 932, 940 (4th Cir. 2013) (same). Indeed, the relevant question is not whether the copied portion of the underlying work has been transformed, but whether the "new work" as a *whole* is transformative. *Campbell*, 510 U.S. at 579; *Seltzer* v. *Green Day, Inc.*, 725 F.3d 1170, 1176–78 (9th Cir. 2013); *L.A. News Serv.* v. *CBS Broad., Inc.*, 305 F.3d 924, 939–40 (9th Cir. 2002).

To be sure, Oracle also states that Google's use of the SE declarations served the "same purpose" in both contexts. Br. in Opp. 29. But that is because SE declarations are purely functional, and their very purpose is to create a set of "specific instructions" that a Java programmer can copy into a program to invoke pre-written functions and methods to "accomplish[] a given task." *Sega*, 977 F.2d at 1524. It makes no sense that use of a functional work in a new environment cannot qualify as fair use simply because it is used to perform the very function it was designed to perform.

Adopting Oracle's narrow view on fair use here would inhibit innovation in the enterprise software service industry, because incidental copying, particularly of functional elements of software programs, can be vital to maintaining software for licensed customers. If Oracle is able to eliminate a fair use defense with respect to such copying, it could have adverse effects on the enterprise software support market.

B. Oracle's Position Would Harm Innovation.

Oracle's hostility to the public good of legitimate competition emerges clearly from its one-sided analysis of the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). The market harm factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant … would result in a substantially adverse impact on the potential market for the original." *Campbell*, 510 U.S. at 590 (alteration in original; quotation marks omitted); *see Harper & Row Publishers, Inc.* v.

Nation Enters., 471 U.S. 539, 568–69 (1985). "Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." *Campbell*, 510 U.S. at 590 n.21. And "[w]hereas a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original, a transformative work is less likely to do so." *Sony*, 203 F.3d at 607.

Here, Google's use of Java SE declarations to create a new product in a new context was transformative. *See Twentieth Century Music*, 422 U.S. at 156 (primary purpose of copyright is "to stimulate artistic creativity for the general public good"). Oracle may want "control over the market for [smartphone] devices" that use functional SE declarations, but "[t]he copyright law … does not confer such a monopoly." *Sony*, 203 F.3d at 607.

Oracle's efforts in this case to stifle competition in the smartphone market resemble its efforts elsewhere to obtain a monopoly in markets in which it owns no exclusive rights. In its litigation against Rimini, for example, Oracle has sought to leverage its copyrights in enterprise software in order to preclude Rimini from providing third-party support of that software to Oracle's licensees—even though Oracle owns no exclusive rights in the aftermarket for software support, and Rimini engages in "lawful competition" with Oracle's own support services. *Rimini*, 879 F.3d at 952.[10]

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[10] In the past, Oracle has argued that the copyright misuse doctrine can effectively police the boundary between legitimate and illegitimate invocations of its exclusive rights. *See* Answering Br. 28–30, *Oracle USA, Inc.* v. *Rimini St., Inc.*, Nos. 16-16832,

For instance, when discussing the market harm factor, Oracle has argued that the very *existence* of third-party enterprise software services competing with Oracle "impinges on Oracle's ability to market new versions of its PeopleSoft software," because licensees that use Rimini can continue using their old version instead of paying Oracle for a new version. *Rimini St., Inc.* v. *Oracle Int'l Corp.*, No. 2:14-cv-01699-LRH-DJA, Dkt. 898 at 27 (D. Nev. Oct. 12, 2018) (brackets and quotation marks omitted). Oracle thus attempts to leverage its limited exclusive rights in order to expand its reach and circumvent the limitations on its own licenses.

Oracle has also taken the even more extreme position that Rimini engineers may not use the *knowledge* they gain from providing software support for one licensed client when providing software support for another licensed client. *See Rimini St., Inc.* v. *Oracle Int'l Corp.*, No. 2:14-cv-01699-LRH-DJA, Dkt. 1065 at 15 (D. Nev. Nov. 16, 2018). But just as Oracle has no exclusive rights in the smartphone platform market, so too does it lack exclusive rights in the third-party support market, let alone in know-how obtained in providing support services. Oracle's position threatens to harm legitimate marketplaces in which it has no exclusive right to operate.

16-16905, Dkt. 50 (9th Cir. Feb. 21, 2017). Oracle, of course, takes an exceedingly narrow view of that doctrine. *See ibid.* Copyright misuse is primarily a doctrine of antitrust law, and has proven vexing to lower courts in the copyright context. *See* Roger E. Schechter & John R. Thomas, *Principles of Copyright Law* 422–23, § 9.7.1 (2010) (noting that "some courts would limit the misuse concept to acts that are outright antitrust violations" while others apply it to "other types of behaviors"). The better approach here is proper application of copyright doctrine.

The primary purpose of copyright law is not to reward individual authors, but "to stimulate artistic creativity for the general public good." *Twentieth Century Music*, 422 U.S. at 156. Affirming the Federal Circuit's fair use decision and allowing Oracle to extend its limited monopoly into adjacent markets would benefit only Oracle and harm everyone else.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

	MARK A. PERRY
BLAINE H. EVANSON	*Counsel of Record*
JOSEPH A. GORMAN	JEREMY M. CHRISTIANSEN
SHAUN A. MATHUR	MAX E. SCHULMAN
GIBSON, DUNN & CRUTCHER LLP	GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive	1050 Connecticut Avenue, N.W.
Irvine, California 92612	Washington, D.C. 20036
(949) 451-3805	(202) 955-8500
BEvanson@gibsondunn.com	MPerry@gibsondunn.com

Counsel for Amicus Curiae

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