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 FOR THE COMMITTEE FOR JUSTICE
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

CURT LEVEY
COMMITTEE FOR
JUSTICE
1629 K Street NW
Suite 300
Washington, DC 20006

RYAN J. WALSH
  Counsel of Record
EIMER STAHL LLP
10 East Doty Street
Madison, WI 53703
(312) 660-7639
rwalsh@eimerstahl.com

JACOB M. HAMANN
EIMER STAHL LLP
224 South Michigan Avenue
Chicago, IL 60604

Counsel for Amicus Curiae *The Committee for Justice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

v

INTEREST OF *AMICUS CURIAE*[1]

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan legal and policy organization dedicated to promoting the rule of law and preserving the Constitution's protection of individual liberty and property rights. The Founding Fathers recognized that the right to security in one's property is a *sine qua non* of liberty and forms a bulwark against an overweening government. CFJ focuses, in part, on the preservation of these principles at the intersection of law and technology, including intellectual property law. CFJ believes that the Constitution's protection of intellectual property and physical property with equal force has helped to make the United States the most prosperous society in the history of the world. CFJ advances its mission by, among other things, filing *amicus curiae* briefs in key cases and educating government officials and the American people about the Constitution and the proper role of the courts.

In addition to its considered views on the fundamental legal principles at issue in this case, CFJ offers subject-matter expertise. Before becoming an attorney, our President, Curt Levey, earned undergraduate and graduate degrees in computer

---

[1] Pursuant to Rule 37.3, all parties consent to the filing of this brief. Petitioner Google LLC has provided blanket consent, and Respondent Oracle America, Inc. has provided written consent.

No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae* has made a monetary contribution to fund its preparation or submission.

science, worked for five years as a scientist at an artificial-intelligence startup company, and invented and patented pioneering technology for explaining the decisions made by machine-learning models. His experience writing code and seeking intellectual-property protection for his invention has informed CFJ's views in this case.

INTRODUCTION AND
SUMMARY OF ARGUMENT

The Copyright Act furthers the design of the Constitution's Copyright Clause. Underlying the original understanding of that Clause is a theory of natural rights under which the right to intellectual property merits the same protection as the right to tangible property. Because it reflects and strengthens that robust conception of intellectual property rights, the Copyright Act—repeatedly expanded to protect all manner of emerging technologies—has long been a driver of America's unparalleled economic prosperity and has made the United States the global leader in software and computing. The Court's task here is merely to apply that Act, with its extremely capacious protections, to Oracle's creative expression in the declaring code and the code organization and structure at issue.

That task "begin[s] and end[s] . . . with the text" of the Copyright Act. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). Under a straightforward analysis of that text, Oracle's code is a protected "original work[ ] of authorship fixed in" a "tangible medium of expression." 17 U.S.C. § 102(a).

Indeed, it is undisputed that Oracle's code is sufficiently "original" to meet the statutory threshold. And while Google invokes Section 102(b)'s proscription on copyright protection for "methods of operation," its argument would eliminate copyright protection for all computer programs, contradicting the clear language of the Copyright Act. Instead, Section 102(b) instructs courts to separate the expressive content in a given work from the unprotected idea or method. The Federal Circuit did that here, correctly holding that Section 102(b) does not preclude copyright protection for the declaring code and the code organization and structure copied by Google. For similar reasons, the merger doctrine does not save Google from liability for copyright infringement. And while Google asserts that its copying was necessary to ensure that its Android operating system would be interoperable with other platforms, the Copyright Act contains no "interoperability" exception. It does not distinguish at all between computer code that is necessary for interoperability and code that is not. Nor does the Act afford lesser protection to declaring code than to other types of code.

Google and various *amici* warn that affirming the Federal Circuit on copyrightability will cause the sky to fall on a critical industry. This argument, frequently deployed in big intellectual-property cases, is a smokescreen. While there are numerous reasons to think this policy-driven prediction baseless, the more important point is that copyright cases do not call for "a free-ranging search for the best copyright policy, but rather depend[] solely on statutory

interpretation." *Star Athletica*, 137 S. Ct. at 1010. After all, "the proper course is not to bend and twist [the Copyright] Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade," *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431, 463 (2014) (Scalia, J., dissenting). And indeed, Congress has successfully performed this task repeatedly over the life of the Act, by balancing complicated and sometimes countervailing policies that are particularly ill-suited for judicial administration. The proper audience for Google's concerns, therefore, is across the street.

ARGUMENT

I. **THE CONSTITUTION AND THE COPYRIGHT ACT CONFER EXPANSIVE PROTECTION OVER THE NATURAL RIGHT TO INTELLECTUAL PROPERTY**

A. The Copyright Clause Broadly Empowers Congress To Protect Authors' Natural Right To Intellectual Property

Copyright is rooted in the natural rights of persons in their property. It is not a contingent right that is tolerated only to the extent it incentivizes authors or promotes public good. This is a critical point, since Google focuses much of its argument on utilitarian concerns and thus ignores the natural-rights foundation of Congress's copyright power.

"The founding-era understanding of liberty was heavily influenced by John Locke, whose writings 'on natural rights and on the social and governmental contract' were cited '[i]n pamphlet after pamphlet' by American writers." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2634 (2015) (Thomas, J., dissenting) (quoting B. Bailyn, *The Ideological Origins of the American Revolution*, 27 (1967)). Locke's theory explained that, because the "state of nature" leaves individuals "insecure in their persons and property," they enter into "civil society, trading a portion of their natural liberty for an increase in their security," John Locke, *Second Treatise of Civil Government*, § 97, p. 49 (J.

Gough ed. 1947), but in no way forfeiting the rights to which the laws of nature entitle them.

Locke's and the Framers' conception of property rights equally justify the protection of both tangible and intellectual property. *See, e.g.*, Robert P. Merges, *Justifying Intellectual Property*, 48–66 (2011); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 Hamline L. Rev. 65, 77–86 (1997). The rationale for "propertizing ideas under Locke's approach" follows from several propositions: "first, that the production of ideas requires a person's labor; second, that these ideas are appropriated from a 'common' which is not significantly devalued by the idea's removal; and third, that ideas can be made property without breaching the non-waste condition." Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 300 (1988). Applied to copyright, Lockean theory justifies protection of the "expression" or execution of the idea, as opposed to merely the idea, given that the expression or execution more obviously involves labor. *Id.* at 314.

Ratifying a Lockean understanding of the nature and scope of property rights, the Constitution protects the liberty of individuals to acquire, use, and transfer property freely—including intellectual property. It does this not only in the Fifth and Fourteenth Amendments' Due Process Clauses and the Fifth Amendment's Takings Clause, *see, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002–03 (1984) (citing Locke, among other sources, to support holding that intangible property is "property" within the meaning

of the Fifth Amendment, incorporated against the States through the Fourteenth Amendment), but also by empowering the federal government, through Article I, Section 8, "[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."

While some, more recent observers have suggested that the property right recognized in the Copyright Clause is an exclusively contingent one—legitimately tolerated only to the extent it incentivizes authors or otherwise promotes public policy—the original understanding of the Clause is rooted primarily in the broad, natural-right conception of the right to property as described above. Indeed, when the Constitution was adopted, the prevailing consensus was that copyright and patent rights were founded, like all property rights, in the natural rights of inventors and authors to the fruits of their labors. *See* Randolph J. May and Seth L. Cooper, *Liberty of Contract and the Free Market Foundations of Intellectual Property*, 11 Perspectives from FSF Scholars 27 at 2 (July 29, 2016). That is why twelve of the thirteen states in the founding era had copyright laws. *See* Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 The Green Bag 2d 37, 37 (2002). Many of these state laws expressly affirmed authors' natural right to their works. *Id.* at 44.

Federalist 43 explicitly embraces this reading of the Copyright Clause. There, James Madison located the natural-rights-based "copyright of authors" as

"solemnly adjudged, in Great Britain, to be a right of common law." The Federalist No. 43 (James Madison). And while Madison also acknowledged the "coincide[ntal]" instrumental value of copyright, he was careful to acknowledge that this was a feature of the right only, not its foundation: "The public good fully *coincides* … with the claims of individuals" such that the "utility of this power will scarcely be questioned." *Id.* (emphasis added).

This Court's copyright precedents accord with our constitutional tradition's long-held understanding of the nature and scope of the right, beginning with this Court's pronouncement in 1834 that "a literary man is as much entitled to the product of his labour as any other member of society," *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834). *See* Jessica Litman, *Sharing and Stealing*, 27 Hastings Comm. & Ent. L.J. 1, 13 n.45 (2004) (observing that the "the incentive rationale for copyright has become so conventional that it is easy to forget that it is in fact [a] relatively recent" explanation). For example, in *Bobbs-Merrill Co. v. Straus*, the Court said that, in construing the Copyright Act, courts needed to consider "the nature of the property and the protection intended to be given the inventor or author as the reward of genius or intellect in the production of his book or work of art." 210 U.S. 339, 347 (1908). In *Mazer v. Stein*, the Court, while ostensibly discussing the incentive rationale, affirmed the natural-rights justification for copyright, declaring that "[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." 347 U.S. 201, 219 (1954).

B. Consistent With The Framers' Far-Reaching Conception Of The Right's Scope And Justifications, The Copyright Act Extensively Protects Authors' Natural Right To Intellectual Property and Promotes Innovation and Prosperity

Beginning in 1790, Congress has consistently expanded the subject-matter scope of the Act in response to technological developments, evincing an intent to legislate close to the limits of the Copyright Clause's grant of authority. The First Congress passed the Copyright Act of 1790, which provided protection for "maps, charts, and books," that period's state-of-the-art technologies. 1 Stat. 124-126.[2] The Copyright Act of 1831 added musical compositions, prints, cuts, and engravings. *See* 4 Stat. 436. In 1870, Congress amended the Act again, extending copyright protection to translations and dramatizations of literary works, paintings, drawings, chromo-lithographs, and statues. *See* 16 Stat. 198. The 1909 Act broadened the range of copyrightable subject matter still further, to include dramatic compositions, motion pictures, and sound recordings. *See* Pub. L. No. 60-349, 35 Stat. 1075. So far-reaching were the 1909 Act's protections that, when computer programs first surfaced in the 1960s, the Copyright Office held them

---

[2] Importantly, this first Act acknowledged that, like other forms of property, copyrights are transferrable by granting the right to authors and "their executors, administrators or assigns." Session II, Ch. 15, § 1; *see also* 17 U.S.C. § 201(d)(1) ("ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law").

to be protected under the 1909 Act's definition of "book." The Office began registering the copyrights of computer programs in 1964. 2 Patry on Copyright § 3.71.

The last major revision to the Copyright Act was the 1976 Act, which is still in effect today. Like the versions that came before it, the 1976 Act expanded the scope of copyright protection, including by adopting a capacious definition of protected "literary works." *See* 17 U.S.C. § 101, *et. seq.* That term is not limited to works of literature but rather includes any tangible form of expression, "other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects . . . in which they are embodied." 17 U.S.C. § 101. With its expansive definition of "works of authorship", the 1976 Act provides for "an indefinite expansion of the subject matter covered . . . contemplate[ing] technologies not in existence at the time of the law's enactment." Yvette Joy Liebesman, *The Wisdom of Legislating for Anticipated Technological Advancements*, 10 JMARRIPL 154, 161 (2010).

Congress has steadily expanded the scope of the Copyright Act in response to scientific and technological developments to ensure that creative works are protected to the limit of Congress's constitutional grant. The expansions have generally fallen into two categories. First, with respect to wholly new technologies, such as photographs, sound recordings, and motion pictures, expanding the

Copyright Act was "deemed necessary to give them full recognition as copyrightable works." *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 48 (D. Mass. 1990) (quotation omitted). Second, in the case of technologies like electronic music, filmstrips, and computer programs that built upon previously existing media or technology, these were regarded as "an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation." *Id* (quotation omitted).[3]

Because strong commitments to private-property protection enable an economy to more effectively allocate resources and opportunities, *see* Gerald P. O'Driscoll Jr. and Lee Hoskins, *Property Rights: The Key to Economic Development*, 482 Policy Analysis at 8 (Aug. 7, 2003), it is no surprise that, as Congress has expanded and strengthened copyright protection, intellectual-property-intensive industries such as software have contributed increasing wealth and innovation to the American economy. As the United States Patent and Trademark Office found in a 2016

---

[3] An example in the latter category is the mechanical piano roll. This Court, in *White-Smith Music Publishing Company v. Apollo Company*, held that a mechanical piano roll could not constitute a "copy" of a copyrighted musical composition because it could not be seen or read by the human eye. 209 U.S. 1, 17 (1908). Congress, however, disagreed with the Court's conclusion: "[A]lmost before the ink was dry on the Apollo decision . . . Congress passed the 1909 Copyright Act, rejecting the Court's crabbed definition of a 'copy.'" Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900 – 2000*, 88 Cal. L. Rev. 2187, 2194 (2000).

study, IP-intensive industries now account for almost 40 percent of U.S. Gross domestic Product. *USPTO, Intellectual Property and the U.S. Economy: 2016 Update* at ii. The link between innovation and strong intellectual property protection is unmistakable in the software industry. As Oracle has pointed out, no company would "make the enormous investment required to launch a groundbreaking work like Java SE" if it could be copied "precisely because it has become so popular." Resp. Br. 57.

II. SOUND TEXTUALIST PRINCIPLES DICTATE THAT THE ORACLE CODE AND ORGANIZATION ARE PROTECTED BY THE COPYRIGHT ACT

A. Oracle's Code Is A Protected Literary Work

Whether Oracle's declaring code warrants copyright protection "begin[s] and end[s] . . . with the text" of the Copyright Act. *Star Athletica*, 137 S. Ct. at 1010. The Copyright Act protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). Thus the statute imposes three basic conditions on copyrightability. The item must be a (1) "work of authorship" that is (2) "original" and is (3) "fixed" in "tangible medium of expression." Works of authorship include "literary works," 17 U.S.C. § 102(a), a generic term covering all "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia." *Id.* § 101.

Computer code is a "literary work" under the statute. Computer code consists of source code, the spelled-out computer code that humans can read, and binary code, which is expressed in ones and zeroes that tell the computer how to operate. *Johnson Controls, Inc. v. Phoenix Control Sys.*, 886 F.2d 1173, 1175 (9th Cir. 1989). Both are works "expressed in words, numbers, or other verbal or numerical symbols or indicia." Indeed, the Act defines "computer program" as "a set of statements or instructions [*that is, computer code*] to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101. And other provisions of the Act make clear that "computer programs" are protectable. Section 117, for example, sets out narrow limitations to the copyright in computer programs, such as copies made for archival purposes. 17 U.S.C. § 117(a)(2). *See also id.* §§ 109, 121. Hence the leading treatise reports that it is "firmly established" that computer code is copyrightable. 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 2A.10[B] (2019); *accord Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 838 (Fed. Cir. 1992) ("As literary works, copyright protection extends to computer programs"); *Johnson Controls, Inc.* 886 F.2d at 1175; *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 533 (6th Cir. 2004).

That Congress chose to protect computer code under the Copyright Act should not be surprising. Computer code has all of the hallmarks of Lockean intellectual property. Like other intellectual property, computer code requires labor, is based up ideas

appropriated from a commons that is not significantly devalued by the idea's removal, and, when protected as property, is not wasted. *See* Section I.A, *supra.*

Oracle's declaring code meets the Section 102(a) requirements for copyrightable subject matter. There is no dispute here over the fixation and originality requirements. *See, e.g.*, Pet. App. at 140a. ("At this stage, it is undisputed that the declaring code and the structure and organization of the Java API packages are original.").

There is likewise no serious dispute that Oracle's declaring code is a "work of authorship." The declaring code that Google copied is a set of statements that, when called by developers, command the computer to execute corresponding implementing code. *See* Pet. App. at 127a. Oracle's declaring code is a fixed set of statements expressed in words, numbers, and symbols and therefore is fundamentally a "literary work[ ]," 17 U.S.C. § 101, an express covered category of "work[s] of authorship." *Id.* § 102(a). The declaring code also easily fits the Copyright Act's definition of "computer program," *i.e.*, "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." *Id.* § 101. This is important because provisions of the Copyright Act make clear that computer programs are protectable.

As with all works, this copyright protection applies both to the work's literal elements and to its non-literal elements. *See Johnson Controls*, 886 F.2d at 1175. The court of appeals correctly found, therefore, that by verbatim copying the declaring code for 37 of

Java SE's packages, Google copied both the literal elements (the code itself) and non-literal elements (the sequence, structure, and organization) of Oracle's code. Pet. App. at 129a (By copying the declaring source code from the 37 Java SE packages verbatim, "Google copied the elaborately organized taxonomy of all the names of methods, classes, interfaces and packages").[4]

B. Section 102(b) Does Not Preclude Copyright Protection For Oracle's Code

Section 102(b) of the Copyright Act states that copyright protection does not "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." 17 U.S.C. § 102(b). This provision clarifies the scope of protection in a given copyrightable work by codifying the idea/expression dichotomy. *See Golan v. Holder*, 565 U.S. 302, 328 (2012). That doctrine holds that, for any work of authorship, copyright protection only applies to the author's original expression of an idea, not to the idea itself. As noted in Section I.A *supra*, this distinction reflects the natural-law origins of copyright protection in that only the author's original contribution and his or her labor in executing the idea is protected. Copyright is therefore limited to "those aspects of the work—termed 'expression'—that display the stamp of

---

[4] Calling Oracle's code an "interface" does produce a different conclusion. See Resp. Br. 26–27.

the author's originality." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985).

Just as Section 102(b)'s foreclosure of copyright protection for an "idea" requires a court to distinguish the expressive aspects of a work from the unprotectable idea, Section 102(b)'s preclusion of copyright protection for any "process, system, [or] method of operation" requires that a court differentiate between the expressive aspects and the unprotectable process, system, or method. *See Atari*, 975 F.2d at 839. It does not mean that any work that can be characterized as a "system" or "method of operation" is not copyrightable. *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1372 (10th Cir. 1997) ("Section 102(b) does not extinguish protection accorded a particular expression of an idea merely because that expression is embodied in a method of operation at a higher level of abstraction.").

Applied here, Section 102(b) does not preclude copyright protection for either Oracle's declaring code or the structure and organization of Java SE. Oracle claims copyright protection only for its *particular* declaring code and for its *particular* way of choosing, connecting, and organizing the various components of Java SE. Those aspects are expressive. At trial, it was undisputed that the declaring code and the structure and organization of the Java SE packages were both creative and original. Pet. App. at 140a. Further, the evidence showed that Oracle had "unlimited options" for the selection and arrangement of the code that Google ultimately copied. Pet. App. at 150a. The

software engineers that designed Oracle's code made myriad creative choices; they did not just select among preordained names and phrases. *Id.*

It is those creative choices, not any idea, that Oracle seeks to protect. Oracle does not claim a copyright in the general functions that its code causes a computer to perform. And indeed, Google could have written its own declaring code to express the same functionality as the code it copied. Pet. App. 151a-152a ("nothing prevented Google from writing its own declaring code, along with its own implementing code to achieve the same result."). Google's competitors, Apple and Microsoft, did just that, designing their own software packages from scratch for all of the functions in their respective operating systems. Pet. App. 165a n. 14 (noting Apple and Microsoft's platforms "provide the same functions with wholly different creative choices."). In fact, Google itself did this for most of the packages it used in the Android operating system. Pet. Br. 7–8. Google simply chose not to do so for the 37 Java SE packages that it copied outright.

Oracle does not claim a copyright in the idea of structuring code in packages and methods—as it does in Java SE—only in its own particular structure. As the District Court recognized, Google could have structured these components in a variety of different ways and the Android operating system still would have worked. Pet. App. 152a n.7. Because Google chose not to do so, it is liable for copyright infringement.

The commonly used Microsoft Excel spreadsheet program provides a close and useful analogy. In Excel, Microsoft has included hundreds of functions that help users manipulate numbers, characters, dates, and the like. These functions are conceptually very similar to the methods in Java SE, and the function structure that the Excel user sees is analogous to the declaring code in Java. When an Excel user invokes one of these functions, unseen implementing code is triggered, telling the computer what to do, much like what happens when a developer's app calls one of Java's methods. For example, an Excel user invokes the COUPPCD bond function via the function structure chosen by Excel's creators—in this instance, by specifying the four parameters (settlement date, maturity date, frequency of coupon payments, and type of day count basis) required by the creators' design decisions.[5]

Given the public's familiarity with Excel, competing spreadsheet developers would be eager to copy the precise selection and structure of Excel's functions, as well as the overall organization of the Excel software, despite the fact that they can make a wide variety of different choices while still achieving similar functionality. Copying Microsoft's many thousands of creative choices is certainly more convenient and likelier to result in commercial success than starting from scratch, much like the Google

---

[5] *See* Microsoft, *Excel Functions (Alphabetical)*, https://support.office.com/en-us/article/excel-functions-alphabetical-b3944572-255d-4efb-bb96-c6d90033e188 (visited Feb. 17, 2020).

copying at issue in this case. Yet no one doubts that the expressive and creative aspects of Microsoft's choices are entitled to copyright protection. The same should be true of Oracle's declaring code and the organization of Java SE, which reflect similar creative choices.

Google's argument that Oracle's declaring code is an unprotectable "method of operation" and that neither it nor the structure and organization of Oracle's Java SE are protected because they are "functional," Pet. Br. 19, must be premised upon a misreading of Section 102(b). To conclude otherwise would essentially eliminate copyright protection for all computer programs. That is because all computer code, whether it is declaring code or implementing code, is functional—it tells a computer how to operate. Indeed, the definition of "computer program" in the Copyright Act *requires* functionality. "Computer program" is defined as a "set of statements or instructions . . . used in a computer *in order to bring about a certain result.*" 17 U.S.C. § 101 (emphasis added). *See* 2 Patry on Copyright §3:74 (§ 101 contains a "functional requirement definitionally imposed for computer programs"). As discussed in Section II.A *supra*, the Copyright Act makes plain that computer programs can be copyrighted. So it cannot be the law that the functional character of computer code places it under Section 102(b)'s bar to copyright. In any event, this Court recently reaffirmed that copyright protects original expression that is also functional. *Star Athletica,* 137 S. Ct. at 1011-12 (reaffirming *Mazer*, 347 U.S. at 214).

C. The Merger Doctrine Does Not Apply

The merger doctrine elaborates on the idea/expression dichotomy and applies where an idea can be expressed in only a limited number of ways such that the idea and its expression merge and the expression is uncopyrightable. *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 103 (2d Cir. 2014). Courts applying the merger doctrine to computer code have held that "when specific [parts of the code], even though previously copyrighted, are the only and essential means of accomplishing a given task, their later use by another will not amount to infringement." *Computer Associates Intern. Inc. v. Altai, Inc.*, 982 F.2d 693, 708 (2d Cir. 1992). But the "unique arrangement of computer program expression . . . does not merge with the process so long as alternate expressions are available." *Atari*, 975 F.2d at 840.

For example, in *Atari*, Nintendo wrote a computer program to generate an arbitrary data stream to prevent other parties' game cartridges from operating in Nintendo's consoles. *Id.* at 836. Atari, a competing manufacturer, copied Nintendo's program so it could generate a matching data stream and thereby unlock the Nintendo consoles. *Id.* The Federal Circuit held that while the idea or process of generating a data stream to unlock a console was not protectable, Nintendo's specific program was protectable. It did not merge with the abstract process because there was a multitude of different ways to generate a data stream to unlock the console. *Id.* at 840.

The same reasoning applies here. Google admitted and the court found that Oracle had an infinite range of possible options to choose from in writing its declaring code and in organizing and structuring its Java SE packages. Pet. App. 165a-166a. Indeed, as the evidence showed, it took experienced, creative engineers years to create the millions of lines of code that make up Java SE. Pet. App. 150a n.6. Those engineer's particular coding choices do not merge with the ideas the code expresses.

III. WHETHER TO PARE BACK THE COPYRIGHT ACT'S PROTECTION OF COMPUTER CODE IS A QUESTION FOR CONGRESS, NOT THIS COURT

It was "the American people's decision to give *Congress* '[a]ll legislative Powers' enumerated in the Constitution." *King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting) (citation omitted). And so it is "Congress, not this Court, [that is] responsible for both making laws and mending them." *Id.* This means that even if the best reading of a law produces outcomes that one thinks mistaken or inadvisable, the Court must "faithfully apply [its] settled interpretive principles, and trust that Congress will correct the law if what it previously prescribed is wrong." *Hamilton v. Lanning*, 560 U.S. 505, 537 (2010) (Scalia, J., dissenting).

Notwithstanding this "Supremacy-of-Text Principle," Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 56 (West 2012), Google urges the Court not to protect the declaring

code for Java SE largely on the basis of an atextual policy argument—namely, that Google had to copy the declaring code so that Google's Android operating system would be interoperable with other platforms. Pet. Br. 27–28. This argument sits uneasily with the fact that, as discussed in Section I.A supra, the Constitution envisions that intellectual property be protected as a natural right rather than a contingent right, and with no less force than tangible property. No one would seriously argue that it would be permissible to take (without compensation) someone else's land just because it might bring some technological or economic benefit. In any case, Google's argument fails because the Copyright Act does not distinguish between computer code that is necessary for interoperability and code that is not.[6] Nor does it distinguish between declaring code, implementing code, or any other type of code.

The Act simply provides that computer programs are copyrightable, so long as they meet the requirements of Section 102(a). Because Oracle's declaring code meets those requirements, any concerns about interoperability are irrelevant to the copyrightability question. If Google needed to copy Oracle's code to take advantage of the success and popularity of Java SE and developers' familiarity with it, Google should have obtained a license.

---

[6] Regardless, Google's platform is not interoperable. Google created its own platform that does not follow the "write once and run anywhere" philosophy.

Google and various *amici* argue that, by failing to permit verbatim copying for the purposes of interoperability, the Federal Circuit's decision threatens the viability of the entire software market. *See, e.g.*, Pet. Br. 28. This form of argument often rears its head in this Court's copyright cases. *See Aereo*, 573 U.S. at 462 (2014) (Scalia, J, dissenting) (noting that the Court "came within one vote of declaring the VCR contraband" based in part on predictions "that VCR technology would wreak all manner of havoc in the television and movie industries."). Yet it is misdirected. If applying the Copyright Act as it stands results in harmful consequences, Congress, not the Court, must amend the Act to fix it.

Matters of intellectual-property policy are particularly ill-suited for judicial intervention. The Constitution gives Congress, not the courts, the authority to set the parameters of authors' exclusive rights, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), precisely because this tasks requires a sensitive, inherently legislative weighing of the interests of authors and the public. *Id.* That weighing also involves, as this case shows, accounting for major technological and economic changes. *Id.* And indeed, unlike in many areas of governance, Congress has largely proved up to the task. Ever since the first Copyright statute was enacted in 1790, Congress has continually and effectively adjusted the scope of the Copyright Act to best effectuate its constitutional role. *See* Section I.B, *supra.*

And this Court, meanwhile, has consistently and correctly deferred to Congress's words, and not to its own policy-driven speculations, when interpreting the limits of the Copyright Act. *Star Athletica*, 137 S. Ct. at 1010 (noting that copyright cases do not call for "a free-ranging search for the best copyright policy, but rather depend[] solely on statutory interpretation"); *see also Stewart v. Abend*, 495 U.S 207, 230 (1990) ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . It is not our role to alter the delicate balance Congress has labored to achieve."). As Justice Scalia wrote in his dissent in another copyright case in which a party sounded alarms over industry demise, "the proper course is not to bend and twist [the Copyright] Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade." *Aereo,* 573 U.S. at 463; *see also Fourth Estate Pub. Benefit Corp. v. Wall-Street.Com, LLC*, 139 S. Ct. 881 (2019). So too here. Congress is free to exempt declaring code from copyright protection if it wants to, although the fact that Congress has steadily expanded the scope of copyright protection, as described in Section I.B *supra,* suggests that Congress is unlikely to do so. Congress is also free to amend the Copyright Act to account for interoperability concerns in the software industry. Until it does, however, the Court must stick to the statute as written and leave questions of policy to Congress.

CONCLUSION

The Court should affirm the decision below.

February 19, 2020   Respectfully submitted,

RYAN J. WALSH
   Counsel of Record

CURT LEVEY   EIMER STAHL LLP
COMMITTEE FOR   10 East Doty Street
JUSTICE   Madison, WI 53703
1629 K Street NW   (312) 660-7639
Suite 300   rwalsh@eimerstahl.com
Washington, DC 20006

JACOB M. HAMANN
EIMER STAHL LLP
224 South Michigan Avenue
Chicago, IL 60604