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 HUDSON INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Copyright Act protects "literary works," 17 U.S.C. §102(a), expansively defined as "works * * * expressed in words, numbers, or other verbal or numerical symbols or indicia," §101. Computer programs are protected as literary works under the Act. Google copied 11,330 lines of Oracle's original and creative computer code, as well as the intricate organization of its computer program, into a competing software platform, Android.

The questions presented are:

1. Does the Copyright Act protect the code and organization of an original and creative reference system, popular with computer programers who use the Java programming language, that could have been written in countless ways to perform the same function?

2. Does the fair-use limitation on copyright protection apply where the protected computer code was copied for commercial purposes, the copied code serves the same purpose and has the same meaning in the derivative work that it had in the original, and the derivative work containing the copied material competes directly with the original work, harming its actual and potential markets?

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INTEREST OF *AMICUS CURIAE* [1]

Hudson Institute is a nonpartisan public policy research foundation. Founded in 1961 by strategist Herman Kahn, Hudson Institute challenges conventional thinking and helps manage strategic transitions to the future through interdisciplinary studies in defense, international relations, economics, health care, technology, culture, and law. Hudson seeks to guide public policy makers and global leaders in government and business through a vigorous program of publications, conferences, policy briefings, and recommendations.

This case interests Hudson because it involves the intersection of nearly all of those interrelated areas and requires a sensitivity to the intended and unintended consequences of weakening copyright protection in the manner suggested by Petitioner.

INTRODUCTION

While *amicus* will leave the debate over the finer details of copyright law to the extensive and capable briefing of others, it agrees with Respondent that the words and organization of Java SE declarations are a creative expression that could have been and can be expressed in a myriad of other ways and are deserving of protection. Resp. Br. 7, 11, 17. Indeed, to hold otherwise would withdraw protection from the nu-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written blanket consent of Petitioner and the written consent of Respondent.

merous headings and organizational structures of legal treatises, textbooks, the Westlaw Key Number system, and other educational and reference materials. All such materials – or at least the best of them – contribute originality and creativity not merely through their paragraphs and expositions, but also through the descriptive and organizational inventiveness of their structure and headings. Resp. Br. 2, 4-5, 7.

That the creative naming descriptions and organization of Java SE, or analogous reference works, have become extremely and rightfully popular does not deprive such creative works of their protection. There are many ways to organize and code in Java, just like there are many ways to discuss different areas of the law, or to describe human relationships in literature. Saying that there is only one way to "declare" in Java SE is precisely as circular as saying there is only one way to portray love, tragedy, and kings in Shakespeare – it reflects the popularity of the *form* of expression, not the merger of the underlying idea and the expression. See Resp. Br. 18 (saying that necessary "idea" is to copy specific popular expression is circular approach to merger doctrine). While Java SE's declarations and organization may not be Shakespeare, the fact that many programmers prefer Java SE's approach to that of potential competing expressions for organizing Java-based programming should be rewarded with diligent copyright protection, not punished with the loss of protection.

Amicus writes separately, however, to offer the modest additional contribution that lowering protec-

tion for this form of intellectual property (IP) – and thus for any form of popular and widely adopted computer code in general – will have broader international consequences making it harder for the United States to expand and enforce copyright protection, particularly when dealing with difficult actors like China, which has historically encouraged theft of United States IP, and is only recently taking lurching steps to improve its treatment of IP.

SUMMARY OF ARGUMENT

1. Opening a gaping hole in the coverage of and exceptions to copyright protection for computer programs deemed too widely accepted and popular to allow for protection will provide a ready-made excuse for competitors and thieves to appropriate valuable forms of expression. It also will make enforcement of IP rights more difficult and more uncertain, diminishing the value of such rights and the incentives to create original works. Such dangers are present in the United States and among ordinary competitors, but are a particular concern in connection with the United States' on-going difficulties with China on IP theft.

Endorsing the overly lenient standards for using copyrighted software proposed by Petitioner not only will embolden numerous companies and nations to steal American IP, it will make it extremely difficult to police international theft of IP. Vague and circular standards regarding "merger" of ideas and expression, or loose and manipulatable standards for fair use make it difficult to prosecute or sue bad actors, difficult to identify and discourage inadequacies in

foreign enforcement, and ultimately undermine negotiations with China and others by blurring relevant legal lines. Such diminished protection for the IP of American companies will harm the U.S. national interest, harm creative companies, and harm the rule of law.

2. Concerns over copyright protection creating potential barriers to interoperability and American competitiveness abroad are overblown. The facts of this case reflect the ready availability of licenses that allow both interoperability and the creative incentives of copyright protection to coexist. They also demonstrate that undermining copyright protection does not ensure interoperability given that Android was intentionally designed *not* to be interoperable in many instances. To the extent there are genuine barriers to interoperability in other cases, there are numerous alternative means of solving that problem without eliminating the rewards and incentives provided by copyright.

ARGUMENT

I. Reduced and Indeterminate Copyright Protection for Computer Code Will Undermine Efforts To Reign in IP Theft by China, which Has a Long History of Hostility toward IP.

Apart from the predictable domestic impact of weakened and amorphous standards for protecting copyrighted works – lower incentives and rewards for creativity, greater resort to secrecy, increased enforcement and litigation costs even for vindicating still-protected works – such standards have a compa-

rable if not greater impact on efforts to obtain international protection for American copyrighted works. Efforts to improve protection in countries with a history of disregarding such rights, and that might only now be improving their IP regimes, require brighter lines for what is permissible and impermissible, fewer opportunities for abuse of vague or uncertain standards, and a consistency in valuing IP that can serve as both a model and a promise of protection for such property.

China stands as an apt example of a country with a long history of acquiring technology and intellectual property from foreign countries and companies by any means fair or foul, but that only recently is moving towards a more protective regime.

According to the independent and bipartisan Commission on the Theft of American Intellectual Property (the "IP Commission"), the annual direct cost of IP theft to the United States is at least $225 billion and may be as high as $600 billion. IP Commission, UPDATE TO THE IP COMMISSION REPORT, THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY 1 (Feb. 2017), available at http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf. Indirect costs such as loss of competitiveness and devaluation of remaining IP rights are much harder to measure but may well be higher. *Id*. at 13.

China appears to be the chief culprit in this international problem, with many examples reflecting years of abuse. See, *e.g.*, White House Office of Trade

and Manufacturing Policy, HOW CHINA'S ECONOMIC AGGRESSION THREATENS THE TECHNOLOGIES AND INTELLECTUAL PROPERTY OF THE UNITED STATES AND THE WORLD 2 (June 2018) (noting that China has a policy of obtaining international technology and intellectual property through virtually any means possible, including state-sponsored IP theft, evasion of U.S. export control laws, counterfeiting, and piracy), available at www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf; IP Commission, 2019 REVIEW: PROGRESS AND UPDATED RECOMMENDATIONS 4 (Feb. 2019) (noting that China was placed on the U.S. "Priority Watch List due to critical IP concerns, including trade secret theft, online piracy and counterfeiting, * * * and weak enforcement"), available at http://ipcommission.org/report/ip_commission_2019_review_of_progress_and_updated_recommendations.pdf.[2]

Despite China's long and multifaceted history of participation in, encouragement of, and protection for IP theft, there has been some measure of progress in bringing China into line with rule-of-law principles in the IP space, and in obtaining at least a grudging level of legal protection for U.S. intellectual property.

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[2] The problem of IP theft by China is widespread in addition to being costly. In 2019 one in five American companies reported it had IP stolen by China within the past year. Eric Rosenbaum, *1 in 5 corporations say China has stolen their IP within the last year: CNBC CFO survey*, CNBC (Mar. 1, 2019), available at www.cnbc.com/2019/02/28/1-in-5-companies-say-china-stole-their-ip-within-the-last-year-cnbc.html.

IP Commission, 2019 REVIEW, at 4 (noting USTR conclusion that while "China has continuously failed to implement its promises to strengthen IP protection * * * there is positive momentum in China's judicial reforms that include its specialized IP courts and tribunals, which demonstrate competence, expertise, and transparency to a greater degree than other Chinese courts"); Robin Brant, *How a Chinese firm fell victim to intellectual property theft*, BBC News, March 25, 2019 (officials in Washington "argue American and other foreign companies in China have endured decades of theft and infringement," and while "China has taken some steps to address the problem * * * [n]ow though comes the hard part – enforcement."), available at www.bbc.com/news/business-47689065.

But there remain numerous barriers to and challenges facing further improvement in IP protection in China. Office of the United States Trade Representative (USTR), Executive Office of the President, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, at 180 (Mar. 22, 2018), available at https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF. Such problems are caused and exacerbated by a variety of factors, including "substantial obstacles to civil enforcement and ineffective and inconsistent criminal and administrative enforcement by the government of China." *Id*.

Given the difficult history and difficult progress surrounding China's protection of IP, and particularly American IP, creating uncertainty and diminished protection for important aspects of IP such as copyrights in computer code will inevitably throw a wrench into efforts to get China to provide greater and more certain protection. At a minimum, it will create a gaping and ill-defined hole in copyright protection for computer code making it more difficult to enforce remaining protections in historically hostile foreign venues such as China, where agencies and courts have greater incentives to favor domestic appropriators over American innovators.

Excluding fundamental and popular software from copyright protection because its very popularity makes it the "only" thing that will satisfy programmers who prefer it creates a built-in loophole denying protection to any creative work in the software space that is broadly successful. Indeed, the more a creative work exceeded the offerings of its competitors in quality and popularity, the easier it would be to argue for an exception to copyright protection. China thus could readily justify appropriation of U.S. software packages, or parts thereof, on the argument that the software is so popular that consumers or clients demand "interoperability" and the same functionality.

Petitioner's appeal to "fair use" to justify its appropriation of Respondent's Java SE declarations and organization likewise provides a roadmap to foreign actors like China to circumvent U.S. and international copyright protection for computer code and other

works. Such a roadmap, if adopted by this Court, will remove the brighter lines and greater clarity provided by the decision below, and would eliminate a significant tool for private and governmental enforcement of IP rights.[3]

It is not hard to foresee how such loopholes and uncertainties would be taken advantage of by a country like China with a limited commitment to IP protection in general, and a strong incentive to favor Chinese appropriators of American IP. Weakening of actual and potential enforcement regimes will obscure not only the enforcement of rights, but also the definition of the rights in question, thereby making even negotiations over the subject more difficult. Copyright Thought Leaders *Amicus* Br. 34 (a ruling for Petitioner in this case would become a "weakness in our negotiating posture that would be exploited [by China] to our detriment"). Such uncertainty and imprecision raise the especial danger that they will embolden China to continue its predatory practices in the future regarding U.S. IP.

If the U.S. is going to insist that China respect the IP rights of American companies, and adhere to a robust standard for protecting copyright as well as patent rights, it is imperative that the U.S. set a strong example and adopt clear and enforceable rules for protecting popular and valuable works and other IP.

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[3] If fair use includes commercial and competing uses of fundamental creative aspects of a work in order to create derivative works, then it only requires surrounding the core originality and innovation with frills and add-ons to effectively exclude protections for derivative works. Resp. Br. 19.

The nascent positive trend in China's treatment of IP rights needs to be reinforced by U.S. actions, not just words. Maintaining strong and difficult-to-circumvent protection at home would help demonstrate that the U.S. upholds the same strong protections for IP that we demand of China and others.

II. Concerns Over Interoperability Do Not Justify Diminished Protection for IP.

Petitioner and various *amici* raise the need for national and international interoperability as a justification for removing copyright protection when a computer program becomes sufficiently popular that many businesses want to use it and copy its key features. See, *e.g.*, Pet. Br. 15, 41, 50 (arguing that copyright protection for interface programs could prevent interoperability); Computer & Communications Indus. Ass'n *Amicus* Br. 5-6 (discussing supposed need to deny copyright protection to allow international interoperability); R Street Inst. *Amicus* Br. 31-32 (discussing reimplementation and standardization).

As an initial matter, *amicus* notes that the benefits from interoperability described in those briefs do not turn on denying copyright protection to the creators of original and popular naming conventions and organizations structures for various coding tools. The many licenses offered by Respondent, Resp. Br. 12, including a free license for those actually sharing their derivative works with others or paid licenses requiring genuine interoperability, readily solve such problems and better achieve the benefits supposedly advanced by undermining copyright protection.

Conversely, undermining copyright protection does not even ensure interoperability, as evidenced by the fact that Android was intentionally designed *not* to be interoperable with other Java SE-based programs in many instances. Resp. Br. 14. Petitioner's proposed weakening of copyright protection thus is neither necessary nor sufficient to address the central concern advanced by Petitioner and its *amici*.

Even if interoperability were a genuine issue in some other case, there are other ways to mitigate such concerns that do not involve destroying the existence or value of IP and the incentive for high-level organizational innovation. For example, if the organization and naming conventions of Java SE were truly essential – though they are not – interoperability and access could be addressed through private standard-setting organizations in much the same way such issues are dealt with in the patent context. See, *e.g.*, *Microsoft Corp.* v. *Motorola, Inc.*, 696 F.3d 872, 875-77 (9th Cir. 2012) (discussing standard-setting process and licensing requirements for standard-essential patents). In such instances the many stakeholders collaborate to decide what is essential for interoperability, and the contributors to the selected standard agree to fair, reasonable, and non-discriminatory (FRAND) licensing regimes. See Copyright Thought Leaders *Amicus* Br. 17-19 (discussing benefits of FRAND licensing regime as an approach that provides access without destroying IP protection).

Alternatively, if voluntary fair licensing terms were unsuccessful, governments presumably could

impose a compulsory license with a judicially-determined fair royalty – providing just compensation for what might otherwise be a taking of intellectual property. Cf. *Faulkner* v. *Gibbs*, 199 F.2d 635, 638 (9th Cir. 1952) (an "established royalty" is the "best measure of value of what was taken" by patent infringement).

Similarly, many of Petitioner's complaints about the potential loss of interoperability due to an uncooperative copyright holder sound suspiciously like antitrust, monopolization, or patent abuse complaints that could be addressed by doctrines in those or related fields to the extent the implicit complaints actually prove true. If Java SE is to be viewed as a monopoly on a critical interface, or as an essential facility of some sort, the law has ample means of evaluating and addressing such concerns. See, *e.g.*, *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 568-71 (2d Cir. 1990) (discussing requirements for essential facilities and monopolization claims).[4] But invalidating or narrowing property rights should be the last resort in such circumstances, and solutions can be better tailored so as not to undermine the very point of IP rights in the first place.[5]

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[4] Petitioner does not raise a claim or defense of copyright misuse or similar issues in this Court.

[5] And, of course, it goes without saying that in a policy-dependent area such as this, a court should be more inclined to let the elected branches sort out any future balance of competing interests.

Given the many alternatives to resolving any interoperability concerns not already resolved by Respondent's existing license offerings, copyright law should not be distorted or muddled to reach a result that effectively appropriates the value of Respondent's work. It should be sufficient that the work in question falls within the plain language of the Copyright Act, is unquestionably creative and original, and hence should not lose protection because others seek to appropriate its success and popularity.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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