No. 18-956

In the Supreme Court of the United States

GOOGLE LLC,
Petitioner,

v.

ORACLE AMERICA, INC.,
Respondent.

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

BRIEF OF AMICUS CURIAE DIGITAL JUSTICE FOUNDATION IN SUPPORT OF AFFIRMANCE

Andrew Grimm
DIGITAL JUSTICE FOUNDATION
15287 Pepperwood Drive
Omaha, NE 68154
(531) 210-2381

Gregory Keenan
DIGITAL JUSTICE FOUNDATION
81 Stewart Street
Floral Park, NY 11001
(516) 633-2633

Edward F. Cunningham
Counsel of Record
LAW OFFICES OF EDWARD F. CUNNINGHAM
62 Cambridge Avenue
Garden City, NY 11530
(516) 328-3705
ed@edcunninghamlaw.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Digital Justice Foundation is a 501(c)(3) nonprofit dedicated to preserving individual rights in digital spaces. The Foundation has particular interest in the impact of digital technologies on civil liberties, personal privacy, individual intellectual-property rights, and individual economic well-being. The Foundation has particular concern for underrepresented users, artists, creators, employees, and innovators, especially those with limited access to law.

SUMMARY OF ARGUMENT

The Foundation writes as *amicus curiae* because many of the Briefs submitted by and in support of Google confuse necessity with convenience. They confuse copyrightability with substantial similarity, *i.e.*, the scope of protection. Likewise, Google and its *amici* wrongly conflate what Google did (appropriate a competitor's platform by copying that competitor's expression) with what everyday programmers do (use some of the method names of APIs to write programs).

That distinction is why many of the policy concerns raised by Google's *amici* are not implicated by this case. Despite the importance of those issues, they are inapposite here.

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[1] No counsel for any party authored this Brief in whole or in part, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the Brief's preparation or submission. All parties have consented to the filing of this Brief.

The Foundation also has concerns about the all-or-nothing approach to fair use advocated by Google. This all-or-nothing approach to fair use destroys markets and concentrates wealth. In the Foundation's view, this all-or-nothing approach, if not course corrected, will have massively negative implications for ordinary Americans. Therefore, the Foundation proposes a doctrinal solution to permit more nuance.

Numerous issues where the Foundation's views might diverge from Oracle's—injunctive relief, fair use by individual developers, substantial similarity, and scope of damages—are not before this Court.

On the issues that *are* before this Court, the Foundation believes that affirmance is vitally important to the rights of individuals not before this Court. The Java APIs are clearly copyrightable under the statute. Google's uses were not *fair* uses, even though many interoperable programs made by Java and Android developers *would* be.

For these reasons, the Foundation respectfully submits this Brief as *amicus curiae* and urges affirmance.

ARGUMENT

I. GOOGLE CONFLATES SUBSTANTIAL SIMILARITY WITH COPYRIGHTABILITY AND CONFLATES NECESSITY WITH CONVENIENCE.

A. The first question presented pertains to eligibility for copyright protection—not the scope of that protection.

1. The first question presented asks "Whether copyright protection extends to [what Google calls] a software interface." Google. Br. at i. Google has not raised the more complicated and difficult questions on the *scope of protection* in APIs. Or, in doctrinal terms, Google has not raised whether its appropriation of Java APIs in making a competing mobile platform resulted in a *substantially similar*, *i.e.*, infringing, work. No issue concerning the *scope* of Oracle's copyright is before this Court.

2. Being clear that the first question presented is a copyrightability question has twofold importance. *First*, ruling for Oracle would not end this lawsuit. It would merely reinstate the first jury's verdict that Google infringed. Cf. District Court Docket No. 1089 (first jury's verdict that Google infringed but deadlocking on fair use). Then the parties would dispute damages. After, if it so wishes and did not forfeit the issues, Google could subsequently appeal questions about the scope of protection for Java APIs to the Court of Appeals. As of now, questions on the scope of the copyright protection afforded to APIs simply have *not* been raised on appeal.

3. *Second*, Google's arguments truly pertain to the scope of protection, not the copyrightability of APIs. That's why the distinction between copyrightability and scope of protection is essential to the disposition of this case. Google relies extensively on Section 102(b). Yet Section 102(b) determines the scope of protection, *not* the subject matter of copyright. Section 102(b) establishes *how far* copyright protection "extend[s]"—not in what subject matter copyright protection "subsists[.]" Compare 17 U.S.C. § 102(b) ("extend") with 17 U.S.C. § 102(a) ("subsists"). The question presented is whether copyright protection can "subsist[]" in an API.

4. What is "most decisive" here "is the text of the Act itself." See Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1036 (2019). In Section 102(a), the Copyright Act states that "[c]opyright protection subsists […] in original works of authorship[.]" Then, the Act further states that "[w]orks of authorship include" eight listed categories. 17 U.S.C. § 102(a)(1)-(8). Among them, the first category is a "literary work[.]" 17 U.S.C. § 102(a)(1). The Act defines literary works as works "expressed in words, numbers, or other verbal or numerical symbols or indicia[.]" 17 U.S.C. § 101.

5. Here, copyright protection subsists in the APIs at issue. Oracle's Java APIs meet the definition of literary works because they are expressed in "words, numbers, or other verbal or numerical symbols or indicia." Cf. Developers Alliance Br. at 4 ("part symbolic logic, part syntax, part symbolic notation, and part pseudo-English").

6. The Java APIs are original. "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). "To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice." Ibid.

7. The Java APIs are fixed. The Act permits copyright protection for works "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated[.]" 17 U.S.C. § 102(a). The Java APIs are fixed in many computers, from which they can be "perceived, reproduced [and] otherwise communicated."

8. Thus, Section 102(a) directs that the Java APIs are copyrightable. Copyright protection "subsists" in them. Nor does Section 102(b) subtract from this reading. Section 102(b) is *not* an exception to Section 102(a). For example, Section 102(b) could specify where copyright protection "does not subsist" or "does not lie." It doesn't. Section 102(b) is *not* the converse of Section 102(a).

9. After all, Congress, knows how to expressly exclude from a definition. Take the Act's definition of a "work of visual art." There Congress tells what it is *and* what it isn't. See 17 U.S.C. § 101 (defining what a "'work of visual art' is" and what a "work of visual art does *not* include" (emphasis added)); see also ibid. (defining what an architectural work "includes" and "does not include").

10. Rather, Section 102(b) takes as a given "copyright protection for an original work of authorship" under Section 102(a). It then clarifies the *scope* of that protection. Specifically, Section 102(b) tells *how far* "copyright protection for an original work of authorship extend[s.]" Namely, it says that the copyright protection granted in Section 102(a) never—or "[i]n no case"—"extend[s] to any idea, procedure, process, system, method of operation, concept, principle, or discovery[.]" Yet *scope of protection* for an API is not at issue. Rather, the threshold question of copyrightability is what's been presented by Google.

11. The Act *emphasizes* that Section 102(b)'s limitation on *scope* applies "*regardless* of the form in which [the idea, procedure, etc.] is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (emphasis added). Thus, no matter how the author has expressed herself, her copyright protection will never extend to an idea. Of course, this limitation on the *scope* of copyright protection does not mean she will lose the protection that she already received via the grant of a property interest in Section 102(a). For example, she still has the exclusive right to reproduce her expression, 17 U.S.C. § 106(1)—just not any exclusivity to broader ideas therein, 17 U.S.C. § 102(b).

12. Yet this Court need not go through the trouble of line drawing between the ideas and the expressions in the Java APIs here. Because it is clear that the Java APIs *are* "original works of authorship," they are entitled to *some* copyright protection, however *thin*. The first question presented should be answered in the affirmative. Yes, the Java APIs are copyrightable.

Their scope of protection, however, has *not* been raised here.

13. The distinction between the *existence* of a private property right and the *scope* of that right is no illusory technicality unique to copyright—or even intellectual property. Take a simple real-property dispute: next-door neighbors fighting over where the fence goes. A threshold question would be whether the plaintiff even has a property interest at all. If he doesn't, then the judge has no occasion to answer the literal line-drawing question regarding where one property line ends and the other begins. So too here, except that copyright is about art and technology rather than lines in the dirt.

14. Perhaps another analogy is edifying. The district court quoted the Copyright Office regarding its policy for registration of recipes and cookbooks. See Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974, 984 (2012) ("Listings of ingredients, as in recipes, labels, or formulas [are not copyrightable]. […] [T]ext directions may be copyrightable, but the recipe or formula itself remains uncopyrightable." (quoting U.S. Copyright Office, Circular 34)).

15. Although the Java APIs are dramatically more complex than a cookbook and cookbooks do not "operate a machine," see EFF Br. at 20, the analogy to a cookbook is still useful to distinguish *eligibility* for copyright protection, Section 102(a), from the *scope* of that protection, Section 102(b).

16. In 1961, Julia Child imported French cuisine into kitchens across America when she published her cookbook, Mastering the Art of French Cooking. Like any cookbook, the authors might choose which recipes to include; which ones to exclude; how to organize and categorize the individual recipes among types (entrée vs. appetizer); how to pair wines and various entrees; and maybe some discussion of French table manners to boot.

17. Presumably, Julia Child intended her audience to actually *cook* these recipes (and wouldn't sue them if they did). If Ms. Child opined on the French style to prepare a broth, dumplings, vegetables, and beef, she might not be surprised to hear one of her readers made a nice stew. If she opined on the perfect soufflé and a delectable vanilla sauce, a vanilla soufflé should not shock her. Likewise here, Sun Microsystems (and now Oracle America) clearly intend that programmers use the Java APIs to mix and match among the thousands of methods as they create programs.

18. Now, suppose that Ms. Child learned that an enterprising chef published a competing cookbook, copying hers. The cookbooks had differences, but his also included 37 chapters of the same recipes—6000 total—reworded to reach the same results. The competitor grouped the recipes the same; ensured that the reworded recipes always led to the same result; added some new recipes he liked; and, used the exact same 6000 titles as Ms. Child so that her audience could quickly recognize and use his competing cookbook in lieu of hers.

19. Further, suppose Ms. Child sued the author of the competing cookbook for copyright infringement. Hopefully, no one would be brazen enough to suggest that her cookbook is *not* copyrightable just because it is full of expression intended to facilitate *functional* results. After all, the "same statute that protects the finest literary, musical and artistic expressions—and some not so fine—has also from the beginning protected such functional works as maps and charts and, later, directories and instructional texts, and technical drawings, diagrams and models." Paul Goldstein, The Future of Software Protection, 47 U. Pitt. L. Rev. 1119, 1121 (1986).

20. Ms. Child's lawsuit (Oracle) against the brazen chef (Google) would be a far cry from an outlandish lawsuit against a home cook for the preparation of a recipe in one of the two cookbooks. (Similarly, this lawsuit is a far cry from a lawsuit against an individual Java or Android developer for programs made using Java or Android APIs.)

21. Although Ms. Child's hypothetical (and Oracle's actual) lawsuit would implicate complicated questions about the scope of copyright protection, at least one aspect of the lawsuit is clear: that she (and Oracle) have a valid copyright (whatever its scope). Google's position that APIs are not copyrightable is akin to saying that no cookbook could be copyrighted. That's a bridge too far.

22. For Ms. Child or Oracle to "establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist, 499 U.S. at 361.

23. Reasonable minds might disagree whether Section 102(b)'s limitations on the *scope* of infringement pertain to the *second* element of infringement or are an affirmative defense. Regardless, Section 102(b) certainly does not govern the *first* element, ownership of a *valid* copyright. The first element, about a *valid* copyright, is where copyrightability is decided. Thus, Section 102(b)—whether about an affirmative defense or the second element of infringement—is *not* at issue here.

24. Yes, this case has thorny doctrinal questions, but they do not bear on *copyrightability*. Those complicated issues do not make the issue of copyrightability itself any more complex or different. Ms. Child clearly has a copyright in her cookbook whether or not we think the competing cookbook infringed. Likewise, Oracle clearly has a copyright whether or not we think Google infringed.

25. Many of Google's *amici* are confused on this doctrinal point. One *amicus* repeatedly admits it is arguing about the "scope of protection[.]" Risch Amicus Br. at 1, 2, 7, 13, 24. Others import their *scope* arguments more subtly, *i.e.*, by making assumptions about the scope of protection *if* copyrightability is affirmed.

26. For example, the Center for Democracy and Technology *presumes* that a copyright in Java APIs will *necessarily* lead to a parade of horribles, *even if* this Court nowhere opines on the *scope* of the copyright. See Br. at 4 ("fragmentation, higher prices, and

frustration"); ibid. (purported effects on the blind);[2] ibid. at 6-9 (loss of universal remotes); ibid. at 9-10 (fed-up parents of diabetic children disenfranchised); ibid. at 11 ("mercy of device makers").

27. This all sounds very worrying until one recognizes that Section 102(a)'s broad copyrightability is the foot in the door to asserting infringement, not a judgment of infringement itself. Yes, a runaway *scope* of copyright (by ignoring Section 102(b) in the *infringement* analysis) and *amnesia* as to copyright's multitude of affirmative defenses (fair use, §§108-122, copyright misuse, implied license, etc.) would be problematic. Deciding that highly expressive APIs are copyrightable is not.

28. After all, one of Google's own *amici*, Professor Nimmer, admits that the issue of a copyright's scope is *not* readily susceptible to generalities. Professor Nimmer writes that the "determination of the extent of similarity that will constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the **least susceptible of helpful generalizations**." 4 Nimmer on Copyright § 13.03[A] (italics in original, bolding supplied).

29. Many of Google's *amici* make just these generalizations without considering that a protection might be *narrow*. Merely saying the Java APIs are copyrightable under Section 102(a) is a threshold question. Whether Google has infringed and whether an

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[2] But see 17 U.S.C. §§ 121, 121A (exceptions to copyright specifically for blind persons).

affirmative defense applies are separate questions, as the second question presented shows. Section 102(a) was not designed to be a standalone panacea for all of *amici*'s fathomable policy concerns.

30. Section 102(b) is *not* at issue here because it's either an affirmative defense or an aspect of infringement analysis, *not* implicated in the question presented. Although Google and some of Google's *amici* write powerfully and eloquently about the meaning of Section 102(b), see generally, e.g., EFF Brief, their arguments are inapposite. They should have saved their thunder. These *amici*, like the district court, have "failed to distinguish between the threshold question of what is copyrightable—which presents a low bar—and the scope of conduct that constitutes infringing activity." Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1354 (Fed. Cir. 2014).

* * * * *

The first question presented is whether the Java APIs are copyrightable at all. They are.[3]

[3] The Foundation also concurs in the analysis of the Copyright Thought Leaders Brief as to copyrightability.

B. Google could have enabled Java programmers to transition to Android by making a code-conversion tool.

1. Google repeatedly conflates two different acts when arguing it was necessary to copy Java APIs:

- *Using* Java APIs to write ***non-API*** programs in Java, and
- *Copying* Java APIs to supplant Java APIs with Android APIs.

2. The district court similarly conflated coding a program using the name of methods from an API (what individual programmers do to write programs) and making a new set of APIs (as Google did). The district court said:

> [S]ince there is only one way to declare a given method functionality, everyone using that function must write that specific line of code in the same way.

872 F. Supp. 2d at 979.

3. That's true ***if*** you're writing a program using Java APIs. That's ***not*** true if you're copying APIs into a supplanting set of APIs, as Google did. From the perspective of the individual Java programmer, telling her she cannot *use* Java APIs is akin to telling an English speaker she cannot write using English words. If the programmer writing a *Java* program tries to determine the maximum of two numbers other than via *java.lang.Math.max(x,y)*, it won't work. Likewise, speaking Mandarin Chinese to someone who only speaks English won't work. That's the

concept of a programming *language*. To express herself using an API, the programmer must necessarily employ the API's syntax.[4]

4. The same does not hold for Google. Google has copied and incorporated the Java APIs as a part of its Android APIs. Google could have changed the APIs' structure and renamed them to, for example, *android.program.Arithmetic.most(x,y)*. In fact, Google could have named any particular Android method something entirely arbitrary, including gibberish such as *ooo.rtun.atjk.imsw(x,y)*. Google had ***unlimited*** options in the naming and grouping of its methods for the Android APIs.

5. Critically, a single method name like *max* is not copyrightable, but the names, selection, structure, and taxonomy of ***6000*** of them is. The Act is clear that, even if the constituent methods' names are *not* individually copyrightable, their grouping would be copyrightable as a compilation. See 17 U.S.C. § 101 (defining "compilation").

6. It is true that a new naming and grouping of an API's methods would be less familiar to individual programmers, until they became acquainted with the new APIs. Yet widespread familiarity with a work has not, and should not, count against that work's copyrightability.

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[4] Nor would her programs be anywhere near substantially similar to the APIs themselves even if the *scope* of protection (not at issue here) were deemed to be broad. Programmers wouldn't copy the 6000 methods verbatim in their programs.

7. The Java APIs do not become ineligible for copyright merely because so many programmers prefer and are accustomed to the way that Sun expressed its APIs. By analogy, a rival cookbook author cannot challenge the copyrightability of Julia Child's cookbook merely because many French-food enthusiasts might prefer her book because they're familiar with it already.

8. Google equivocates to blur this clear distinction between its competing APIs and non-API programs that *use* the method names in APIs. Yes, Java APIs are "essential tools for building new computer programs" *but* ***not*** for creating a new API. See Google Br. at i. Yes, a "call will not work correctly unless it corresponds precisely to instructions called 'declarations'"—*but* not if the new API-maker (Google) had decided to pick different names for its own API's methods. Ibid. at 4. Google could have done differently here.

9. Google acknowledges that Oracle has *not* made the broader claim that someone writing a program using Java APIs is in the same circumstances as Google copying Java APIs to make Android APIs. See ibid. at 22 ("It also is significant that Oracle claims no copyright interest in the calls that Java developers use to invoke the methods."). Google's error, however, is to conflate itself and its acts with those of individuals writing ordinary (non-API) programs using the Java APIs.

10. Truly, Google's argument is about *convenience*, not necessity. It's arguing that Java APIs are not within the subject matter of copyright *because* Java programmers could more easily switch existing Java programs into Android if Google copied certain Java APIs into Android APIs.

11. Google's argument is tantamount to a reverse "sweat of the brow" theory. In Feist, this Court rejected the idea that someone can obtain a copyright as "a *reward* for the hard work" that went into making the expression. 499 U.S. at 352 (emphasis added). Today, Google argues that Oracle's copyright protection should disappear if it would take *too much* sweat equity, *too much* investment, to be as creative in the naming taxonomy for Android's API. However, this new-fangled reverse-sweat-of-the-brow theory fails for the same reason its counterpart did in Feist: it strays from Section 102(a)'s plain meaning.

12. Moreover, Google's argument about convenience is undermined by the existence and possibility of making *code-conversion tools*. Google could have made a code-conversion tool to help Java programs transition to its Android platform.

12. For example, suppose you had existing programs written using Java APIs and wanted them to work in one of Microsoft's programming environments, called the .NET applications. You're in luck. There's an app for that: IKVM.NET. It permits developers to write in Java APIs and will then translate the code into Microsoft's .NET languages (such as C# or VB.NET)—or vice versa:

> IKVM.NET makes it possible both to develop .NET applications in Java, and to use existing Java API's and libraries in applications written in any .NET language. This guide includes information of interest to developers who want to use Java as their preferred .NET development language, as well as for those who wish to use Java libraries in their C# or VB.NET applications.

Stephen Schaub, IKVM.NET Developer's Guide, http://www.ikvm.net/devguide/intro.html (accessed Feb. 19, 2020).

13. Code conversion is not a rare phenomenon. In fact, there are excellent tools to convert from Java to Python, which is arguably a much harder task than the tasks needed to convert between APIs' method names. See, e.g., Eman J. Coco et al., JPT: A Simple Java-Python Translator, 5 Computer Applications 1, 1 (2018) ("present[ing] an approach for programming language inter-conversion which can be applied to all types of programming languages").

14. Other programmers have developed code-conversion tools to translate Java code into a variety of other formats. Google could have done the same. And, it's not as though Google is lacking in sufficient engineering talent to make a Java-to-Android code-conversion tool.

15. So why didn't Google make a code-conversion tool? Business strategy. Google didn't invent this strategy either; it copied this too. Microsoft tried something similar with Java in the 1990s. Cf. Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1116 (9th Cir. 1999) (copyright suit by Oracle's predecessor). Microsoft tried to "capture an open standard" and partially succeeded:

> In a dispute involving Microsoft and Sun Microsystems, Inc. ("Sun"), for example, Sun promulgated the Java language as an open standard so that everybody would be able to write programs in Java (the better to compete with Microsoft); but Microsoft changed Java a little bit so that those who wanted to write programs in Java compatible with Microsoft products would have to use Microsoft's proprietary version of Java.

Margaret Radin, Online Standardization, 70 Fordham L. Rev. 1125, 1134 (2002). Contrary to many *amici*, Sun's copyright (and copyrightability in APIs generally) is essential to ensuring that an open-source platform stays *open*.

16. Google here (and Microsoft before it) used an opportunistic strategy called "embrace, extend, extinguish" to take other APIs and make them obsolete:

> In this gambit, a firm [Google] adopts a Software Standard [Java APIs], embracing it, but adds capability to the standard [Android APIs], extending it. It keeps that additional capability private [or at least not interoperable with the Java APIs], and hopes that its version of the implementation will become favored and widespread in the market [as Android has]. This could occur due to technical advantages, network effects if the firm is a successful first mover on the standard, or a firm's preexisting market prevalence [all of which Google has]. A victorious gambit would extinguish the original standard [which Android has accomplished for Java's mobile APIs].

Greg Vetter, Open Source Licensing and Scattering Opportunism in Software Standards, 48 B.C. L. Rev. 225, 234 (2007).

17. This "*embrace, extend, extinguish*" strategy is one way that large technology companies prevent meaningful competition. They *embrace* (take a competitor's API), *extend* (make minor tweaks at first), and *extinguish* (make significant enough changes to render the original APIs obsolete).

18. That strategy is bad for competition, is bad for open-source, and removes the incentives to create

genuinely new expressions and organizations of APIs. Copyright protection, even if narrow, limits this foul play and provides incentives for *original* APIs, just as copyright does for other types of works.

19. Ultimately, however, this Court need not weigh this or that policy implication. Its copyright decisions are not "a free-ranging search for the best copyright policy[.]" Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017). Rather, copyrightability is a matter of statutory interpretation channeled toward Section 102(a).

20. Google's size; its policy support by its *amici*; its easy access to the public through its platform; and its success in lobbying against previous copyright legislation (e.g., the 2012 Stop Online Piracy Act or "SOPA") are telling. Google doesn't need courts to put a thumb on the scale in its favor. It's not a discrete and insular minority that Congress would ignore if it persuaded Congress that carving APIs out of copyrightability were truly necessary for the public interest. Amending Section 102(a) can be safely entrusted to Congress if it is needed.

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II. GOOGLE'S ALL-OR-NOTHING APPROACH TO FAIR USE DESTROYS MARKETS AND CONCENTRATES WEALTH.

A. Even if it is seen as transformative, Google's use was not fair.

1. Google argues that its copying of Oracle's Java APIs was "transformative." Google Br. at 16. To Google, its "reuse was so transformative" that "its commercial purpose was less significant." Ibid. at 44. The Digital Justice Foundation disagrees.

2. Notably, Google's appropriation of Java APIs is far afield from the parody-specific context in which this Court employed transformative use in 1994. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994) ("Because we hold that a *parody's* commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of *parody* in weighing the degree of copying, we reverse and remand." (emphasis added)).

3. Since 1994, unauthorized, commercial transformative uses of copyrighted works have reached staggering scales. See, e.g., Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2nd Cir. 2015) ("[W]ithout permission of rights holders, Google has made digital copies of tens of millions of books").

4. In part, that's because the meaning of transformation has bled so far from Campbell. As applied by the lower courts, the doctrine has become "a triumph of mindless sound bite over principled analysis[.]" Paul Goldstein, Fair Use in Context, 31 Colum. J.L. & Arts 433, 442 (2008).

5. Today, unauthorized transformative uses aren't merely a one-off commercial song like the parody in Campbell. Today, transformative uses are a business model: large-scale, repeated, unauthorized commercial "transformative" use has become a way of life unto itself for some in Silicon Valley—a lucrative one since it entails a business without the need to pay anything for the raw materials if one can get the right fair use precedent. Some advance expressive interests but by no means are all transformative technological uses acting as "the engine of free expression." Harper & Row, Publishers, Inc. v. Nation Enter's, 471 U.S. 539, 589 (1985).

6. These transformative uses invite the question of whether there ever comes a point at which repeated and indifferent unauthorized commercial uses, transformative or not, cross the line. If possible, Google crossed that line here. There's little-to-no transformation of expression when Google took the Java APIs and appropriated them for Android. Nonetheless, this Brief assumes, *arguendo*, that Google's copying *was* transformative. Even on that assumption, a question remains: was it *fair*?

B. There are major, and growing, costs to an all-or-nothing approach on fair use.

1. Because Google's fair uses argument implies that it owes Oracle *nothing*, not even a reasonable royalty, Google has taken a Manichean, all-or-nothing view of fair use. It's the view that *all* fair uses—no matter how profitable or how commercial—justify a complete absence of any compensation to the rightsholder(s) whatsoever. This view is a crude and problematic response to a recurring and complex fair use dilemma.

2. The explosion of commercial transformative uses has revealed a recurring ***fair use dilemma*** for courts. See Benjamin Sobel, Artificial Intelligence's Fair Use Crisis, 41 Colum. J.L. & Arts 45, 79 (2017). Treatise author Paul Goldstein frames this all-or-nothing approach eloquently:

> The Google Books litigation reveals an important flaw in fair use as an instrument of copyright policy. The doctrine forces even the most public-spirited users to pay full price [or more] if their defense fails, and it forces copyright owners to [forever] compete with free if the defense succeeds.

Paul Goldstein, Copyright's Highway 179 (2d Ed. 2019). That's the fair use dilemma in a nutshell.

3. The fair use dilemma often comes to a choice between "no use" or "free use." Judges find themselves increasingly fielding transformative fair use disputes placing them between Scylla and Charybdis:

- If they hold that a use is *not* a fair use then an emerging technology may be stifled and its associated markets eliminated.

- If they hold that a use *is* a fair use then the rightsholders' interests are effectively eliminated and their licensing markets evaporate with the stroke of a pen. See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007), Authors Guild v. Google, Inc., 804 F.3d at 207.

Either way, the courts are destroying markets and concentrating wealth through this all-or-nothing fair use application. Indeed, the precedential system of American courts means that an all-or-nothing fair use holding today will serve as a lasting blow against either technologists or creators.

4. After all, *fair* uses are commonly conceptualized as *free* uses. And, as a practical matter, findings of commercial, transformative fair use ensure that copyright holders and content creators of a particular type will "forever be condemned to competing with free." Goldstein, Copyright's Highway, at 176.

5. This is especially so at scale. A holding that commercial transformative copying is fair permits companies to make repeated, ongoing, large-scale copying of unlimited works *without* any compensation to the authors, even though copyrighted works are essential to

the value created by new technologies. See Sobel at 48 (discussing how both "Google Images and Google Books are services powered by unauthorized copying of protected expression, and both have been excused by the fair use doctrine"). *None* of the value generated from this copying finds its way to authors' pockets.

6. Of course, innovative uses like Google Images and Google Books have social benefit. Desirable but disruptive innovations *can* create new markets. Thus, the ideal answer often lies in a fair use decision-making that *both* allows transformative uses to flourish, while also ensuring the preservation, adaptation and creation of licensing markets alongside technological advance. Such a balance would ensure compensation to copyright creators whose works serve as the lifeblood flowing through the veins of new digital ecosystems. It would permit innovators to innovate. It would ensure copyright owners are incentivized.

7. Yet under Google's all-or-nothing approach to fair use, the proverbial innovator's dilemma has increasingly become the *judge's* dilemma. And the courtroom increasingly becomes the forum for high stakes games of liar's poker, exacerbated by the digital age. What is more, the fair use dilemma is poised to become a full-fledged crisis as digital technologies continue to develop.

8. Courts face an undesirable option going one way: "giving carte blanche to unauthorized uses" of copyrighted works. Sobel at 81. An expansive fair use defense for transformative uses might allow for technological progress but it does so at the cost of the individual, disaggregated copyright contributors and any "fair return" for the value generated from their

work. Sobel at 83. Deciding this way puts judicial imprimatur upon "a fair use paradigm that allows sophisticated actors to extract expressive value from copyrighted works, without compensation to authors, in the service of technology that may well deprive those authors of a livelihood." Sobel at 82.

9. Yet, going the other way isn't much better: a "finding of infringement would justly affirm authors' exclusive rights to exploit their protected expression, but it could hamstring a new, promising technology." Sobel at 83. "This outcome would be devastating because the remedies that copyright law offers are mismatched with the harms an author would suffer from [use of their work]." Sobel at 80.

10. Again, an all-or-nothing doctrinal approach to fair use puts courts in an uncomfortable position. Unsurprisingly, an all-or-nothing approach tends toward extremes. As Professor Goldstein summarizes, "without copyright, too little art and literature will be *produced*, but with copyright, too little art and literature will be *used*." See Goldstein, 31 Colum. J.L. & Arts at 435 (emphasis added).

11. Today, with rapid technological innovation, the frequency and size of these all-or-nothing fair use disputes has ballooned. This problem is getting worse. Yet courts still might think that they have two bad options: whichever way they rule they will likely eliminate a market and concentrate wealth.

12. *Another* wrinkle has compounded the fair use dilemma into a genuine Gordian Knot. Namely, the emergence of a copyright-creating public. This development has completely reshuffled the traditional

dynamics of fair use: "Traditionally, fair use is understood to benefit the public by fostering expressive activity." Sobel at 49. "Today, the doctrine increasingly serves the economic interests of powerful firms at the expense of disempowered, individual rights holders." Ibid.

13. Today, most Americans are regular content creators and publishers of copyrighted content. There has been a democratization of authorship: "An amazing number of people offer an amazing amount of value over networks." Jaron Lanier, Who Owns the Future? 9 (2013).

14. Today, ordinary citizens have unprecedented individual property interests in their copyrighted content. While these interests may seem trivial in isolation, in the aggregate they are of immense social and economic value. Overlooking or failing to account for the individual interests in their creative expressions simply ensures that "the lion's share of wealth now flows to those who aggregate and route those offerings, rather than those who provide the 'raw materials.'" Lanier at 9.

15. In decades past, fair uses seemed to resolve a dispute between two competing industry players to the public's benefit and the copyright owner's marginal expense. Because members of the public were not copyright owners, a holding of fair use was rarely to the public's detriment.

16. One example of this traditional type of fair use dispute surrounds Alice Randall's novel The Wind Done Gone. Ms. Randall repurposed the setting, story, characters, etc., of Margaret Mitchell's classic novel Gone with the Wind, retelling the story from the perspective of an enslaved woman. A copyright dispute ensued. Neil Netanel, Copyright's Paradox 3 (2008).

17. Ms. Randall's appropriation of Ms. Mitchell's expression represents a traditional transformative fair use. Under this type of fair use, the public got a new book to read; Ms. Randall was able to contribute a new perspective and voice to a social conversation; and the rights of the original author conceded only marginal ground to accommodate this socially beneficial purpose. Such a fair use did not interfere with the public's rights at large.

18. But in the age of a copyright-creating public, transformative fair use is not so naturally salutary. In this new context, the dynamics of fair use decisions are remarkably different. Ordinary citizens are creating and sharing a tremendous number of copyrighted works across various online media platforms, ranging from pictures to videos to literary posts and more. Congress gave individual Americans rights in those works through Section 102(a) of the Copyright Act. Yet an all-or-nothing fair use approach effectually denies the public a meaningful benefit from the rights Congress endowed in many instances, especially in the context of emerging technologies:

> Commercial machine learning, trained on expressive media, promises tremendous social value. But it is not the sort of value that fair use exists to foster. Unlike the benefits realized by, say, scholarship, the value of advanced machine learning services is internalized by the large firms that furnish those services.

Sobel at 89.

19. In fact, the all-or-nothing approach to fair use entrenches incumbents. Given the stakes of statutory damages and the unpredictability of fair use decisions, only the biggest companies can pay to play. Not many have the legal team and the deep pockets to "test[] the boundaries of fair use[.]" See Authors Guild v. Google, Inc., 804 F.3d at 206 (Leval, J.).

20. Some even note a trend in fair use decisions that prefers incumbents. For example, two scholars acknowledge that courts do need a "means of distinguishing 'transformative' uses from 'market substitutes[.]'" See Andrew Gilden & Timothy Greene, Fair Use for the Rich and Fabulous?, 80 U. Chicago L. Rev. Dialogue 88, 89 (2013). Yet they worry fair use has functionally become a "a privilege largely reserved for the rich and famous." Ibid.; see also Andrew Gilden, Raw Materials and the Creative Process, 104 Geo. L.J. 355, 375 (2016) (noting trend that courts "seem more able to perceive sufficient transformation where a big-name defendant mines raw material from a smaller name plaintiff").

21. In sum, Google's all-or-nothing fair use approach forces courts into a fair use dilemma. Either way to rule destroys markets in a lopsided fashion and concentrates wealth toward the winner. Courts find themselves picking economic winners and losers. It's a dilemma between two extremes: *free* use or *no* use.

22. Yet the Copyright Act does not ordain an all-or-nothing approach to fair use. It ordains something more nuanced.

C. A more nuanced approach to fair use shows greater fidelity to the Copyright Act and its animating purposes.

1. In the digital age, the fair use dilemma has become a bedeviling Gordian knot for the judiciary to manage. Yet, cutting the Gordian knot can be achieved through fidelity to the text of Section 107.

2. Here's how. Clarify that courts can and should consider the payment of reasonable royalties as part of the fourth factor. The *absence* of reasonable royalties should weigh *heavily* against a finding of fair use, acting as a decisive tiebreaker between the commercial and transformative considerations when a use generates profit at scale. Yet also instruct courts to permit flexibility in the mechanisms of payment when many works are at issue (e.g., permitting startups to get off the ground; permitting payment funds when orphan works' authors cannot be located; permitting alternative arrangements when transaction costs bar ready transmission of funds). If the royalties tendered are market rate, however, that should weigh in favor of fair use.

3. In other words, recognize, as the Copyright Act extensively does in Sections 108-122 that there are many occasions to eliminate the proprietary interest of copyright (with its holdout problems and transaction costs) ***without*** wholly eliminating the authors' economic interests. Permit flexibility in disaggregated markets, but do not throw the baby (pecuniary interest) out with the bathwater (proprietary interest).

4. After all, Section 107(4), demands that the "potential market" and "value" of the copyrighted work always be considered:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered **shall include** [...] (4) the effect of the use upon the **potential market** for or **value** of the copyrighted work.

17 U.S.C. § 107(4) (emphasis added).

5. The use of the word "shall" indicates that the consideration of a use's effect upon a *potential* market is a mandatory consideration when assessing fair use. See Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

6. Some commentators have resisted the literal meaning of that phrase: any commercial use of a work *always* implicates a "potential market" if an exclusive right is at issue. Yet, if users tender reasonable royalties for fair uses, the users would be expanding the licensing market for a copyrighted work and *increasing* the work's value. Thus, where some measure of remuneration is paid, the fourth factor should weigh in favor of fair use because innovators can innovate; creators can get paid (and continue to work in that market); and the public can benefit at large.

7. It's not that fair uses should *never* result in *free* uses (especially for small-scale individualized uses making newfound expression). But for industrial-scale, commercial enterprises, the existing doctrine of all-or-nothing makes fair uses cases some of the highest stakes cases in copyright. We think that this Court's admonition in the separate context of qualified immunity rings true here as well: "In general, courts should think hard, and then think hard again, before turning small cases into large ones." Camreta v. Greene, 563 U.S. 692, 707 (2011). So too for fair use. And saying that (1) a use is forever free or (2) there's no price at which the innovator can innovate makes transformative fair use cases involving technology "into large ones."

8. Section 107(4) strikes the balance between society's right to use a work to create transformative value—even absent an owner's consent—and the owners' economic rights in the use of their works. In short, section 107(4) should sometimes be used to limit the exclusive right and to allow unauthorized transformative uses. Yet that limitation need not limit the copyright holders' entitlement to some measure of remuneration for industrial-scale commercial uses.

9. There is nothing foreign to the Copyright Act in embracing the nuanced solution of divorcing copyright holders' proprietary interests from their pecuniary interests. Nor would such an approach be at odds with to the cluster of exceptions and limitations on a copyright owner's exclusive rights, of which §107 is explicitly a part, *i.e.*, a cluster of compulsory licenses, reasonable royalties, and the like. See generally 17 U.S.C. §§ 107-122.

10. Indeed, Section 107 must be read and interpreted in light of the Copyright Act's structure.

> Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).

11. Section 107's neighboring provisions, §§ 108-122, lay out an incredibly nuanced, painstakingly granular, and contextual balance of a copyright owners rights vis-a-vis others' rights to make socially beneficial uses. The statute's very structure groups Section 107 amongst these nuanced limitations on exclusive rights. These sections reflect Congress' careful construction of a delicate balance between a copyright holder's interests and one making unauthorized but socially beneficial uses for a fair price.

12. Both by "physical and logical relation" Section 107's fair use analysis is a part of these nuanced exceptions to the copyright holder's rights to hold up an innovative use, while still aiming to ensure *some* remuneration for uses. It is no oddity to limit some rights in certain circumstances but preserve others to copyright holders throughout these provisions. Nor is it an oddity to require some remuneration be given to the copyright owner, even as socially desirable uses of

these works are permitted. There is nothing foreign to these sections about conditioning a use on the condition of some payment. Cf. 17 U.S.C. §108 (discussing "fair price").

13. Thus, Congress clearly understands and contemplates throughout these provisions of the Act that proprietary interests in copyright differ from and are separable from economic interests. And there is nothing in the terms of Section 107 to mandate that all fair uses must be *free* uses.

14. After all, "Congress meant § 107 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the ***common-law tradition of fair use adjudication***." Campbell 510 US at 577 (emphasis added) (citing legislative history).

15. Yet, "starting in the 1990s a judge-made doctrine, transformative use, insinuated itself like a virus into section 107's four-factor formula, and two decades later, had materially altered the structure of the defense." Goldstein on Copyright § 12.2.

16. Whatever transformative use means, the fourth factor as plainly written in the statute itself, surely deserves at least equal footing to the unenumerated transformative use factor haunting the fair use provision. One way to restore the compatibility of transformative use with the explicit fourth factor is to reconcile the two by requiring reasonable royalties for industrial-scale, commercial uses that reap financial rewards. After all, whether they like it or not, the copyright holders have often become unwitting

investors in the technologists latest venture—just unpaid ones as of now.

17. It's worth emphasizing a fact from Campbell:

> 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were ***willing to pay a fee*** for the use they wished to make of it.

510 U.S. 569 at 572 (emphasis added). This Court could encourage similar behavior—and reasonableness—by enshrining this approach into its doctrine.

18. In deciding commercial fair use, such offers of payment should be a consideration under the fourth factor. This offer of payment in Campbell stands in stark contrast to commercial transformative use in cases where no attempt to provide remuneration to the creator was made.

19. Certain all-or-nothing gambits on fair use amount to little more than a fair use abuse—marching ahead, baiting the copyright holders to sue, and then all but daring the courts to impose the statutory remedies if they dare. This decision, whether it affirms or reverses on fair use could go a long way in assuring that fair use is not all-or-nothing by channeling innovators to pay and creators to accept reasonable payments through a plain reading of the fourth factor.

20. Emphatically, this approach would also advance several desirable policy considerations.

21. First, it would reduce unnecessary litigation and send a clear signal to parties on how to interpret fair use, avoiding the chilling effect often caused by the vagueness and unpredictability of fair use. See Amanda Levendowski How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem 93 Wash. L. Rev. 579, 595-596 (2018) ("When the cost of infringement can run as high as $150,000 for each infringing copy, few AI creators can afford to take a gamble.").

22. Second, this approach would also incentivize copyright defendants to extend offers before making unauthorized uses, and it would incentivize copyright plaintiffs to accept such offers at the risk of looking unreasonable in court. This approach would norm set in a salutary way. Most importantly, it shows fidelity to the text and avoids the social ills that come with all-or-nothing fair use decisions: inefficient market elimination and unfair wealth concentration.

CONCLUSION

This Court should affirm. However it decides fair use, this Court should clarify that that fair use is not an all-or-nothing doctrine, but tender offers of reasonable royalties (or their absence) are highly relevant.

Respectfully submitted,

Andrew Grimm
DIGITAL JUSTICE FOUNDATION
15287 Pepperwood Drive
Omaha, NE 68154
(531) 210-2381

Gregory Keenan
DIGITAL JUSTICE FOUNDATION
81 Stewart Street
Floral Park, NY 11001
(516) 633-2633

Edward F. Cunningham
Counsel of Record
LAW OFFICES OF EDWARD F. CUNNINGHAM
62 Cambridge Avenue
Garden City, NY 11530
(516) 328-3705
ed@edcunninghamlaw.com

Counsel for Amicus Curiae

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