No. 18-956

# In The Supreme Court of the United States

GOOGLE LLC,

*Petitioner,*

v.

ORACLE AMERICA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICUS CURIAE*[1]

The Computer & Communications Industry Association ("CCIA") represents more than 20 companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $540 billion in annual revenues.[2] CCIA members have a large stake in the rules of software copyright: effective intellectual property protection encourages developers to create new applications, but the improper extension of copyright law to functional elements discourages innovation and inhibits competition in the industry.

Over the past 30 years, and largely as a result of American jurisprudence and leadership, a global consensus has emerged on the appropriate scope of copyright protection for software. Legislatures and courts around the world have exercised great care to prevent overly restrictive rules that would impede the creation of new computer programs that can run on existing

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[1] No counsel for any party authored this brief in whole or part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of CCIA's intent to file, and consented to the filing of this brief.

[2] A list of CCIA members is available at https://www.ccianet.org/members. Google is a CCIA member, and Oracle and Sun were formerly members of CCIA, but none of these parties took any part in the preparation of this brief.

operating systems, or the creation of new operating systems that can be used by programmers with their existing skill-set. The two decisions in this case of the U.S. Court of Appeals for the Federal Circuit run directly contrary to this global consensus, and thus threaten uniquely to disadvantage American innovation. For this reason, Google's Petition should be granted.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Computer systems have evolved into robust systems of complementary products. This complexity can give the manufacturer of a system an advantage over other firms that seek to interact with that system. Products made by the same manufacturer are more likely to be seamlessly interoperable with one another because the manufacturer has a complete understanding of its products' functionality. Similarly, products made by the same manufacturer often are operated in the same manner, making it easier for employees to migrate from one product to another without retraining.

This inherent advantage is significantly magnified if the elements necessary for interoperability are protected by intellectual property laws. Such protection discourages the development of competing interoperable products, which in turn leads to less competition, higher prices, and less innovation.

The complexity of computer systems can also affect a different form of competition: the ability of computer programmers to use their skills in different programming environments. Programmers must invest significant time and resources to learn the conventions of a programming environment, and understandably are reluctant to learn a new set of conventions to program in a new environment. As a practical matter, a new firm can develop software products only if it can attract skilled programmers, and it can do so more readily if it can employ widely used conventions the programmers already know. If intellectual property laws prohibit a new firm from using existing conventions, the new firm is less likely to attract the programmers it needs to develop innovative products.

Recognizing the potential for copyright to promote competition by enabling the development of new computer products and services, courts and legislatures around the world, including in the United States, have applied copyright to software in a manner that facilitates, rather than inhibits, legitimate competition. Unfortunately, the Federal Circuit's two decisions in this case deviate from this competition-enhancing consensus. Google's Petition explains how the two decisions depart from precedents in U.S. copyright law. This brief describes how the decisions depart from competition-enhancing rules adopted abroad. The brief first discusses the competition-enhancing approach adopted in the European Union. Next, the brief explains how jurisdictions in the Pacific Rim and elsewhere have enacted copyright exceptions encouraging competition in

the software industry. Finally, the brief discusses the pro-competitive provisions in U.S. free trade agreements.

Significantly, these norms developed in large part in response to U.S. judicial decisions such as *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), and Congressional enactment of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 (1998). Allowing the Federal Circuit's decisions in this case to stand will lead to the anomalous result of less competition in the software industry in the United States than in foreign jurisdictions by virtue of those jurisdictions following the pro-competitive rules invented here but rejected by the Federal Circuit.

## ARGUMENT

The Federal Circuit, in its 2014 decision in this case, *Oracle America, Inc. v. Google Inc.*, 750 F.3d 1339, 1375 (Fed. Cir. 2014), endorsed the long-discredited *dicta* in *Apple Computer v. Franklin Computer*, 714 F.2d 1240, 1253 (3d Cir. 1983), that compatibility is "a commercial and competitive objective which does not enter into the somewhat metaphysical issue of whether particular ideas and expression have merged." By indicating that program elements necessary for interoperability could be protectable under copyright, the Federal Circuit impeded the development of interoperable programs. The Federal Circuit compounded this error in its 2018 decision that the fair

use doctrine did not permit Google to employ widely-used Java application programming interface ("API") declarations for the purpose of attracting Java developers to the new Android platform. *Oracle America, Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018). This decision will impede the development of new software. Taken together, these two decisions represent a major setback to competition and innovation in the software industry.

These decisions run directly contrary to legal norms promoting competition in the software industry that have been adopted by more than 40 of our trading partners, including all members of the European Union, countries around the Pacific Rim, and parties to free trade agreements with the United States. These norms developed in large part in response to U.S. judicial decisions such as *Sega* and Congressional enactment of section 1201(f) of the DMCA.

## I. European Union Law Encourages Competition in the Software Industry.

In 1991, the European Union adopted a Software Directive, which reflects a policy judgment that copyright should not prevent competition in the software industry.[3] Council of Ministers Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer

[3] The legislative process leading to the adoption of the Directive is discussed in Jonathan Band, *The Global API Copyright Conflict*, 31 HARV. J.L. & TECH. 615, 617-19 (2018) ("*Global API Conflict*").

Programs, 1991 O.J. (L 122). In particular, Article 6 of the Software Directive permits reverse engineering "indispensable to obtain the information necessary to achieve . . . interoperability."[4] Further, Article 9(1) renders unenforceable contractual prohibitions on such reverse engineering. The Software Directive has been implemented by all EU member states, as well as Norway, Russia, Serbia, Switzerland, and Turkey. *Global API Conflict* at 619.

The Software Directive did not directly address the protectability of software interfaces. However, in 2012, the EU's highest court ruled in *SAS Institute v. World Programming*, (C-406/10) [2012] 3 CMLR 4 (Eng.), ¶ 40, that the Software Directive "must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit its functions constitute a form of expression of that program and, as such, are not protected by copyright. . . ." This affirmed World Programming's ability to create "middleware" that interoperated with SAS Institute's software. The Court of Justice of the European Union ("CJEU")

[4] Identifying software interfaces often requires reverse engineering because software typically is distributed only in machine-readable object code. Software reverse engineering necessitates the making of reproductions and derivative works, for example, translating the object code into human-readable source code. This translation technically would be infringing but for an exception. In this case, Google did not need to reverse engineer the Java software interfaces because Sun made them publicly available in source code.

observed that "the main advantage of protecting computer programs by copyright" as opposed, presumably, to patents, "is that such protection covers only the individual expression of the work and thus leaves other authors the desired latitude to create similar or even identical programs," *id.* at ¶ 41, provided that they refrain from copying protected expression. In other words, the CJEU reached precisely the same conclusion as the district court below, and the opposite of the Federal Circuit's 2014 decision.

## II. Copyright Policies Around the Pacific and Across the World Promote Competition in the Software Industry.

As policymakers in the Pacific Rim considered how best to encourage the development of domestic software industries, they followed either the U.S. fair use approach based on *Sega* or the specific statutory exception approach of the Software Directive – two different means to the same end.[5] *Global API Conflict* at 617. After a decade-long copyright law review, Australia in 1999 followed the Directive model, adopting an exception for reverse engineering for purposes of interoperability. *Id.* at 631-33. Australian officials explained that "if Australian industry is to be allowed to compete on level terms with producers of similar products in the USA and Europe, Australian software copyright

[5] In *Sega*, the Ninth Circuit held that the copying incidental to reverse engineering a computer program for the purpose of uncovering unprotectable elements, such as software interfaces, was a fair use as a matter of law. *Sega*, 977 F.2d at 1514.

laws must be brought more into line with the law in these countries."[6]

In the months before the 1997 turnover to China, the Hong Kong Legislative Council broadened Hong Kong's fair dealing provision to more closely resemble the fair use provision of the U.S. Copyright Act, in order "to encourage competition in the information technology industry by facilitating timely access to information and ideas underlying computer programs."[7] Similarly, Singapore in 1998 amended its fair dealing provision to "bring [it] in line with the United States, the United Kingdom, other European Union countries, Hong Kong, and Australia, which do not bar the use of copyright materials for commercial research."[8]

Over the following years, other Pacific Rim countries, including Canada,[9] Chile,[10] Malaysia,[11] New Zealand,[12]

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[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8479 (Daryl Williams, Attorney-General) (Austl.).

[7] Denise Yu, Sec'y of Trade and Indus., Speech by the Secretary of Trade and Industry on Resumption of Second Reading Debate 10 (June 24, 1997).

[8] Attorney-General of Law, Second Reading of Copyright (Amendment) Bill of 1998 (Sing.) (February 19, 1998).

[9] Copyright Modernization Act, S.C. 2012, c 20, sec. 30.61 (Can.).

[10] Law No. 20435 art. 71N, Abril 23, 2010, Diario Oficial [D.O.] (Chile).

[11] Copyright Act § 13.2 (Malaysia).

[12] Copyright Amendment Act 2008, s 80A (N.Z.).

the Philippines,[13] South Korea,[14] Taiwan,[15] and Japan all amended their copyright laws to encourage competition through interoperability, often citing the U.S. approach. Nations in other regions have also explicitly embraced competition through interoperability in their copyright statutes, including India,[16] Kenya,[17] Israel,[18] Zimbabwe,[19] and Malawi.[20]

## III. U.S. Free Trade Agreements Encourage Competition in the Software Industry.

The contours of U.S. trade agreements reflect pro-competition principles similar to the statutory provisions described above. Since 2002, U.S. free trade agreements ("FTAs") have included provisions modeled on the interoperability exception to section 1201 of the DMCA, 17 U.S.C. § 1201(f).[21] *See*, *e.g.*, United

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[13] Intellectual Property Code of the Philippines, § 185.1, Rep. Act 8293, as amended (Phil.).

[14] Cheojakkweonbeob [Copyright Act], Act No. 432, January 28, 1957, amended by Act No. 11110, Dec. 2, 2011, art. 35-3 (S. Kor.).

[15] Copyright Law art. 65 (2007) (Taiwan).

[16] Copyright Act, No. 14 of 1957, India Code (1999), § 52(1)(ab).

[17] Copyright Act (2009) Cap. 130 § 26(5) (Kenya).

[18] Copyright Act, 5767-2007, 2007, § 24(c)(3), 2199 LSI 34 (Isr.).

[19] Copyright and Related Rights Act (2004), § 40 (Zimbabwe).

[20] Copyright Act (2016), § 52(3) (Malawi).

[21] Section 1201(f)(1) of the DMCA permits the circumvention of technological protection measures for the "purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created

States-Korea Free Trade Agreement, art. 18.4.7(d)(i), June 30, 2007, 46 I.L.M. 642 (parties may allow circumvention of technological protection measures in order to engage in "[n]oninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program . . . for the sole purpose of achieving interoperability of an independently created computer program with other programs"). Interoperability exceptions appear in FTAs with Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. *Global API Conflict* at 636. Like the United States, many of these countries have implemented their FTA obligation to promote competition by adopting exceptions permitting circumvention for the purpose of software reverse engineering.

## CONCLUSION

Over 40 countries, including many of our major trading partners, have recognized that permitting copyright law to obstruct competition would impede the growth of the software industry and the Internet economy. By extending copyright protection to software interfaces, and overturning the jury's fair use finding, the Federal Circuit's decisions in this case run

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computer program with other programs. . . ." Section 1201(f)(4) explains that "the term 'interoperability' means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged."

contrary to global competition-enhancing copyright norms that have evolved in part in response to U.S. case law and the DMCA. The Federal Circuit's decisions would stifle innovation in the United States, and encourage the outsourcing of software jobs overseas, where interoperable software can be developed without the threat of copyright liability.

For the forgoing reasons, the Court should grant Google's Petition.

Respectfully submitted,

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