

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*
DOLBY LABORATORIES, INC.
IN SUPPORT OF RESPONDENT**

RITA M. CARRIER
PETER A. BRULAND
Sullivan & Cromwell LLP
1700 New York Avenue, NW
Suite 700
Washington, DC 20006

GARRARD R. BEENEY
Counsel of Record
JAMES T. WILLIAMS
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
beeneyg@sullcrom.com

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Counsel for Amicus Curiae

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STATEMENT OF INTEREST¹

Since 1965, Dolby Laboratories, Inc. has dedicated itself to research and innovations that have revolutionized consumers' enjoyment of audio and audiovisual entertainment. From noise-reduction systems, to surround-sound technology used in the film and recording industries, to audio-decoding programs built into virtually all smartphones on the market today, Dolby has been at the cutting edge of audiovisual storage, delivery, and playback. Last year alone, Dolby spent almost \$240 million—nearly 20% of its total revenue—on research and development.

Dolby has also led the way in fostering interoperability. For Dolby's technology to be useful in modern smartphones and other platforms, it must be compatible with the other software installed in these devices. At the same time, third-party developers are free to implement Dolby's technologies in their own products so that content recorded on one product can be played back on other devices. To that end, Dolby works to create and support industry-wide standards and shares its intellectual property through patent pools and licens-

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, apart from *amicus curiae* and its counsel, contributed any money to fund its preparation or submission. This brief is submitted with the blanket consent of Google LLC and the written consent of Oracle America, Inc. See Sup. Ct. R. 37.6.

ing programs. These broad-scale interoperability initiatives have enabled a wide array of technology companies to offer consumers innovative, interoperable products built upon Dolby's work, supporting an ecosystem of content creators, distributors, and viewers.

Dolby's contribution to innovation, interoperability, and consumer welfare depends on safeguarding its intellectual property. In 2019, 89% of Dolby's revenue came from licensing. This included licenses to its Dolby Digital, Dolby Digital Plus, TrueHD, Dolby Pulse, and Dolby Audio Processing software programs, among others. Third-party developers then implement these programs in their own technology. For example, Dolby licenses its DS1 software (a surround-sound program that encodes and decodes audio streams) for use in Android smartphones. Dolby made numerous creative choices in designing both the code and the structure, sequence, and organization of DS1, and Dolby relies on copyright to protect that work.

The position petitioner advances in this case would undermine the copyright protection of intellectual property and likely make it riskier for technology companies like Dolby to invest in innovation. Petitioner's approach also threatens interoperability, penalizing developers who open their technologies to third parties by denying developers the flexibility to tailor access to their particular situation. Both consequences would harm consumers and the broader economy. Dolby believes that copyright law should continue to protect software code and the creative structure and organization of computer programs. It also believes that soft-

ware creators should be able to promote interoperability through the methods most consistent with their business models. Dolby thus files this brief to explain why petitioner’s position is fundamentally at odds with the Copyright Act and would threaten technological innovation.

SUMMARY OF ARGUMENT

This case raises questions about intellectual property in the age of complex digital platforms. Yet all that is needed to resolve the copyrightability issue is a straightforward application of statutory language and well-settled law. Neither the Copyright Act nor the merger doctrine forecloses copyright protection for computer code or creative organization and structure.

I. According to petitioner, Section 102(b) of the Act forecloses copyright protection for works that are “entirely functional.” Section 102(b) says nothing about “functional” works, however, so petitioner tries to shoehorn its theory into the phrase “method of operation.” Yet nothing in the ordinary meaning of those words supports the categorical rule that petitioner seeks. And both the statutory context and familiar interpretive principles confirm that Section 102(b) does not distinguish among various forms of expression, preferring, say, imaginative works over “functional” ones. History bears this out. From dressmakers’ diagrams to telegraphy codebooks, early cases show that copyright has long protected works that serve a purely practical function. Finally, petitioner’s approach would lead to results at odds with the Act’s purposes, stifling innovation and leaving consumers worse off by undermining developers’ incentives to invest in new

technology. In the end, plain text, historical practice, and statutory purposes all agree: copyrightability does not turn on the supposedly “functional” nature of an original work.

II. Petitioner’s fallback argument fares no better. Invoking the common-law merger doctrine, petitioner insists that the software code it copied was the only code that could perform its intended function. But petitioner reaches this conclusion only by gerrymandering the merger analysis—defining the “intended function” as allowing developers to write new software by using Oracle’s copyrighted phraseology. If successful, this perverse spin on the merger doctrine would let infringers retroactively strip any popular work of its copyright protection. Petitioner also distorts the traditional merger analysis by focusing on the options facing an infringer after the fact—not those initially available to the creator. Tellingly, petitioner cites not a single case following that novel approach, and the only authority it does muster—an independent commission report—actually undermines its argument. Properly applied, the merger doctrine does not sanction petitioner’s copying of Oracle’s work.

This Court should affirm and make it clear that copyright fully protects computer code and creative organization and structure.

ARGUMENT**I. Copyrightability does not turn on the supposedly “functional” nature of an original work.**

Petitioner argues that Section 102(b) of the Copyright Act forecloses copyright protection of original works that are “entirely functional.” Google Br. 19. This argument fails because the Act provides that computer programs like the ones at issue here are unquestionably copyrightable. *See* Oracle Br. 20-21 (citing 17 U.S.C. §§ 101, 117, 109(b), 506(a)). But there are further reasons to reject a test that denies copyright protection based on the supposedly “functional” nature of an original work: any such test would be inconsistent with the plain text of Section 102(b), historical practice, and the Act’s purposes.

A. Petitioner’s “functionality” test is at odds with the plain text of Section 102(b).

Under Section 102(b), copyright protection does not extend to any “idea, procedure, process, system, method of operation, concept, principle, or discovery.” On its face, the statute says nothing about “functional” works—let alone that they are entitled to any less copyright protection than other kinds of works. So petitioner tries to equate “functional” with the statutory phrase “method of operation.” But those words cannot bear the weight petitioner needs them to carry.

The Act does not define “method of operation,” so this Court “interpret[s] the words consistent with their ‘ordinary meaning at the time Congress enacted the statute.’” *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444

U.S. 37, 42 (1979)). In 1976, as today, the word “method” was ordinarily understood to mean a “procedure or process for attaining an object.” Webster’s Seventh New Collegiate Dictionary 533 (1969); *see also* Black’s Law Dictionary 1142 (Revised 4th ed. 1968) (“the means of attaining an object”); Oxford Am. Dictionary 418 (1980) (“a procedure or way of doing something”). Modified by the prepositional phrase “of operation,” the statutory language thus denotes a procedure, process, or means of attaining “a piece of work” or “something to be done.” Oxford Am. at 467.

Notably absent from these definitions is any basis for asserting that Section 102(b) distinguishes among various forms of original expression, preferring, say, imaginative or descriptive works over “functional” ones. And even if some procedures, processes, or means of attaining something to be done might be described as “functional” or utilitarian in nature, that hardly gets petitioner to the categorical rule it seeks. At bottom, nothing in the ordinary meaning of “method of operation” indicates that Section 102(b) forecloses copyright protection of works that serve a “functional” purpose.

The statutory context bolsters this conclusion. For one thing, while Congress explicitly addressed “article[s] having an intrinsic utilitarian function” in the Act’s previous section, 17 U.S.C. § 101 (statutory definitions), it chose not to use similar language in Section 102(b). “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464

U.S. 16, 23 (1983) (original brackets omitted) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Since Congress did not address “functional” works in Section 102(b), petitioner is wrong to read such language into the statute.

Moreover, given the “familiar principle of statutory construction that words grouped in a list should be given related meaning,” the phrase “method of operation” must be read in view of the other terms listed in Section 102(b). *Third Nat’l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 195 (2012) (under *noscitur a sociis* canon, “[a]ssociated words bear on one another’s meaning”). These neighboring terms—idea, procedure, process, system, concept, principle, and discovery—all refer to underlying *objects* of expression, rather than discriminating among the various *forms* that a given expression might take. “Method of operation” “must be similar in nature.” *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016).

Finally, this Court’s precedents further reinforce the plain-text reading of Section 102(b). In *Golan v. Holder*, 565 U.S. 302, 328 (2012), for example, the Court explained that Section 102(b) simply “codif[ies]” the “idea/expression dichotomy,” a “‘traditional contour[.]’ of copyright protection.” *See also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (“Section 102(b) in no way enlarges or contracts the scope of copyright protection Its purpose is to restate that the basic dichotomy between expression and idea remains unchanged.” (quoting H.R. Rep. No.

1476, 94th Cong., 2d Sess. 54, 57 (1976) (original alteration omitted)). In sum, then, statutory language, context, and precedent confirm that Section 102(b)'s plain text merely prevents a monopoly on underlying objects of expression, rather than foreclosing protection of original works that serve some practical function.

B. Petitioner's "functionality" test is at odds with historical practice.

While petitioner insists that the "entirely functional" nature of Oracle's code and "organizational system" makes them unsuitable for copyright protection, Google Br. 19, this argument collides with historical practice. Indeed, original works valued wholly for their practical function—from dictionaries to the Dewey Decimal Classification system—have historically been protected by copyright. Examples abound in early copyright cases.

In 1828, for instance, Justice Thompson, riding circuit, upheld the copyright in a maritime chart of soundings off the Nantucket coast. *Blunt v. Patten*, 3 F. Cas. 763, 763 (C.C.S.D.N.Y. 1828) (No. 1580). Functional though the chart was, the court praised its "great public utility," concluding that the plaintiff "ought to be protected in the enjoyment of the profits of his enterprise." *Id.* at 764.

Likewise, in *Drury v. Ewing*, 7 F. Cas. 1113, 1115 (C.C.S.D. Ohio 1862) (No. 4095), the Circuit Court upheld the copyright in a sheet of diagrams and instructions for measuring and cutting dresses. Noting the work's practical nature, the court nonetheless explained that "[i]t is clearly no objection to the validity

of [the plaintiff's] copyright, that her production does not claim a standing as a work of great literary merit." *Id.* at 1116. Even works of "practical utility, having no pretension to literary merit," the court observed, may be "within, not only the words, but the scope and design" of copyright law. *Id.*

In a similar vein, several early twentieth-century courts upheld the copyright in telegraphy booklets containing "coined words" with "no meaning," functioning as "cable code" "in accordance with the requirements of the cable companies." *Reiss v. Nat'l Quotation Bureau, Inc.*, 276 F. 717, 717 (S.D.N.Y. 1921); *see also Hartfield v. Peterson*, 91 F.2d 998, 1000 (2d Cir. 1922); *Hartfield v. Herzfeld*, 60 F.2d 599, 600 (S.D.N.Y. 1932). Judge Learned Hand recognized the copyright in one such codebook, remarking that, even if the words "communicate nothing," they "may have their uses . . . aesthetic or practical, and they may be the productions of high ingenuity, even genius." *Reiss*, 276 F. at 719.

As these examples show, courts have long recognized that copyright protects original works that serve a purely functional or utilitarian purpose. Petitioner does not even try to reconcile its atextual approach with this history or to show why computer code deserves any less protection than charts, dressmakers' diagrams, or telegraphy codebooks.

C. Petitioner's "functionality" test would produce results at odds with the Act's purposes.

Petitioner's reading of Section 102(b) would also thwart the Act's purposes by disincentivizing invest-

ment in innovative technology to the detriment of consumers and businesses alike. As this Court has repeatedly explained, the Copyright Act is “intended to motivate the creative activity of authors and inventors by the provision of a special reward,” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), thereby “promot[ing] the Progress of Science and the useful Arts.” U.S. Const. art. 1, §8, cl. 8; *see also Twentieth Cent. Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (explaining that the Act stimulates creativity “for the general public good” by guaranteeing a “fair return for an author’s creative labor”). Yet petitioner’s theory would upset this careful “balance,” *Sony Corp.*, 464 U.S. at 429, undermining the incentive to create original works that serve a practical function.

Nowhere would petitioner’s approach prove more disruptive than in the field of computer science, where original works are by their very nature functional. Consider Dolby. In 2019 alone, Dolby invested nearly \$240 million into researching and developing new technology. Many of Dolby’s products include creative and original software code and corresponding structure and organization, conceived and honed through years of costly research and development. Dolby Digital Plus, for example, is an innovative surround-sound program installed in smartphones, operating systems, browsers, and home theatres around the world. Dolby made countless creative choices in developing this software, relying in part on the promise of copyright protection to recover its investment. Stripping technology companies of the historical copyright afforded such works would undermine the entire industry’s incentive structure, making it riskier to invest in research and development. It would also discourage companies from

sharing their code with third-party developers, thereby harming interoperability. Taken together, these consequences would deprive consumers of innovative, interoperable products from which they would otherwise benefit.

Given the Act’s well-established goal of incentivizing creativity, it is “difficult to believe, absent some indication in the statute itself or the legislative history, that Congress would have undercut sharply that purpose,” *McElroy v. United States*, 455 U.S. 642, 655 (1982), by withholding copyright protection from any work that serves a practical function. *See also Ralston v. Robinson*, 454 U.S. 201, 217 (1981) (quoting *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968)) (“[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate.”).

II. Petitioner misapplies the merger doctrine.

Given the evident weakness of its statutory argument, petitioner defends its infringement on a second, “narrow[er]” ground: the merger doctrine. Google Br. 19. A corollary to the traditional idea-expression dichotomy, the merger doctrine provides that a work is not copyrightable if the underlying idea “can be expressed in only one way.” *Satava v. Lowry*, 323 F.3d 805, 812 n.5 (9th Cir. 2003). In such cases, the expression is said to “merge” with the idea. Yet petitioner distorts the traditional merger analysis in two important respects. First, petitioner begs the very question it sets out to answer, defining the key variable in a way that guarantees petitioner’s preferred outcome.

And second, contrary to “well-established” doctrine, *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1361 (Fed. Cir. 2014), petitioner incorrectly focuses on the options it faced at the time of infringement—not on the options available to Oracle when it created the work in question.

A. Petitioner gerrymanders the key step of its merger analysis.

In analyzing whether an expression has merged with its underlying idea, courts ask whether there are other ways of expressing that idea. Here, this means determining whether other expressions and creative choices could carry out the basic functions that Oracle’s software code performs. “The unique arrangement of computer program expression . . . does not merge with the process so long as alternate expressions are available.” *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992).

According to petitioner, the merger doctrine blocks Oracle’s copyright because Oracle’s software packages were “the only instructions that can perform their intended function.” Google Br. at 29. But this argument hinges entirely on petitioner’s definition of the “intended function.” If the “intended function” is “the ability to write software code using the precise phraseology that the original author created,” then it becomes “an *a priori* truth that there is no way to achieve *that* function” except by copying that phraseology verbatim. Ralph Oman, *Computer Software as Copyrightable Subject Matter: Oracle v. Google, Legislative Intent, and the Scope of Rights in Digital Works*, 31

Harv. J. L. & Tech. 639, 647 (2018). So too if the “intended function” is “allowing users already familiar with the [structure, sequence, and organization] of Oracle’s packages to continue using them.” *Id.* at 648.

By focusing not on the actual operations that Oracle’s software code performed—which could be expressed and structured in many ways—but instead on using Oracle’s copyrighted phraseology and creative organization, petitioner constructs a circular argument bound to generate its desired litigation outcome. Unsurprisingly, petitioner cites no authority for this approach to the merger analysis. *See generally King v. St. Vincent’s Hosp.*, 502 U.S. 215, 215 (1991) (rejecting “unconvincing” argument where “its conclusion rest[ed] on circular reasoning, requiring the assumption of the point at issue.”).

But even beyond its naked tautology, petitioner’s spin on the merger doctrine would threaten the copyright in any work that becomes too popular—effectively punishing creators who develop successful works. After all, under petitioner’s approach, any time “a pre-existing community” has an “affinity for the creative, unconstrained choices made by the original author,” any “follow-on work” could “indiscriminately replicate” the original. Oman, 31 Harv. J. L. & Tech. at 648. In the software context, this would discourage developers from allowing others to build upon their platforms, lest a platform become so ubiquitous that third parties could wrest control from the developer. The Act “simply does not tolerate” such results. *Id.*

Properly applied, the merger doctrine does not foreclose copyright protection for Oracle’s software

code or the “intricate organization and relationships among the lines of code,” Oracle Br. 1, because there were numerous ways for petitioner to achieve the same functionalities. Petitioner was free to provide these functionalities in Android—just as Apple and Microsoft did. *See Oracle*, 750 F.3d at 1360 n.5. As the district court correctly found, petitioner did not have to copy Oracle’s software code to do so. *See Oracle Am., Inc. v. Google, Inc.*, 872 F. Supp.2d 974, 976 (N.D. Cal. 2012).

B. Petitioner’s merger analysis focuses on the wrong time period.

Under the Act, “[c]opyright in a work . . . subsists from its creation.” 17 U.S.C. § 302(a); *see also Harper & Row, Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 546-47 (1985) (“[A] bundle of exclusive rights . . . vest in the author of an original work from the time of its creation.”). Applying this principle, courts have historically analyzed merger based on the options initially available to the creator of a copyrighted work—not those available to an infringer after the fact.² And this makes sense: if copyright protection attaches at the point of creation, merger must be evaluated at that point, not at some undefined future moment when the work is infringed.

Petitioner does not dispute this longstanding approach. Instead, it asks this Court to carve out an ex-

² *See, e.g., Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 215 (3d Cir. 2002); *Mitel v. Iqtel*, 124 F.3d 1366, 1375 (10th Cir. 1997); *Atari Games Corp.*, 975 F.2d at 840.

ception “in the context of computer software” and evaluate merger “at the time material is reused.” Google Br. 30. Finding no support in statutory text or case law, petitioner relies on two statements in a report by the National Commission on New Technological Uses of Copyright Works (CONTU). Commissioned by Congress in 1974, the CONTU report is sometimes treated as “a surrogate legislative history” of the Act’s 1980 amendments. *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1240-41 (3d Cir. 1986). But “legislative history is not the law,” *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018), and the Act includes neither of the statements petitioner cites. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010) (“The manner in which the law could have been written has no bearing; what matters is the law the Legislature *did* enact.” (internal quotation marks and citation omitted)).

Yet even on their own terms, the statements petitioner cites do not support a categorical exception to the traditional merger analysis. The first such statement—that if certain instructions are “the only and essential means of accomplishing a given task,” “their later use by another will not amount to an infringement”—says nothing about when merger should be evaluated and is fully consistent with the traditional analysis. CONTU Report at 20. Likewise with the second statement petitioner cites—that copyright does not “block the use of” computer code “necessary to achieve a certain result.” *Id.* Instead, as the report’s preceding sentences make clear, these statements merely apply the “fundamental principle that copyright cannot protect ideas” to the “computer context.” *Id.*

Far more telling is another line from the report that petitioner omits: “[t]he availability of alternative non-infringing language is the rule rather than the exception.” CONTU Report at 20 n.106. That rule applies here. Because there were numerous ways for Oracle to write and arrange its code, petitioner cannot invoke the merger doctrine to complain about the creative choices Oracle made.

CONCLUSION

Neither the Act nor the merger doctrine sanctions the copying of computer code and creative structure. This Court should affirm to guarantee that copyright continues to protect such works.

Respectfully submitted,

RITA M. CARRIER
PETER A. BRULAND
Sullivan & Cromwell LLP
1700 New York Avenue, NW
Suite 700
Washington, DC 20006

GARRARD R. BEENEY
Counsel of Record
JAMES T. WILLIAMS
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
beeneyg@sullcrom.com
Counsel for Amicus Curiae

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