

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 FORMER CONGRESSMEN AS *AMICI*
CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are former United States Congressmen who have personal experience with the passage of federal copyright laws, specifically Congress's careful consideration of the copyright regime as applied to computer programs.

Orrin G. Hatch served as a U.S. Senator from Utah from 1977 to 2019, and as President Pro Tempore of the Senate from 2015 to 2019. From 1995 to 2001, and again from 2003 to 2005, Senator Hatch served as Chairman of the Senate Judiciary Committee, of which he was the Ranking Member from 1993 to 1995, and again from 2001 to 2003. Senator Hatch is one of the longest-serving U.S. Senators in history.

Dennis DeConcini served as a U.S. Senator from Arizona from 1977 to 1995. In the 101st Congress, Senator DeConcini served on the Senate Judiciary Committee, chairing the Subcommittee on Patents, Copyrights, and Trademarks.

Robert Goodlatte served thirteen terms, from 1993 to 2019, as a member of the U.S. House of Representatives from Virginia's 6th district. From 2013 to 2019, Representative Goodlatte served as Chairman of the House Judiciary Committee. While

¹ Petitioner Google LLC has filed blanket consent to the filing of *amicus* briefs, and Respondent Oracle America, Inc. has provided written consent to the filing of this Brief. No counsel for a party authored this Brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this Brief.

in Congress, Representative Goodlatte also served as Co-Chairman of the bipartisan Congressional Internet Caucus, Chairman of the House Republican High-Technology Working Group, and Co-Chairman of the Congressional International Anti-Piracy Caucus.²

Amici therefore have firsthand experience with the passage of the Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015, which amended the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. §§ 101–810, to make it explicit that copyright protection extends to computer programs, as well as other federal copyright laws passed in recent decades. *Amici* have a keen interest in ensuring that judicial interpretation of the federal copyright laws remains consistent with both the text of such laws and Congress’s intent in passing them, so as to honor Congress’s long tradition of reviewing and expanding copyright pursuant to the power granted to it by the U.S. Constitution.

SUMMARY OF ARGUMENT

This Court should affirm the Federal Circuit’s rulings in this case that the Copyright Act of 1976 and its 1980 amendment (together, the “Copyright Act” or the “Act”) provide copyright protection to computer programs, including Respondent Oracle America, Inc.’s declaring code, and that Petitioner Google LLC’s copying of thousands of lines of that code does not

² The Judiciary Committees of both the House and Senate, on which *amici* served, have long had jurisdiction over matters of intellectual property, including copyright.

constitute fair use as a matter of law.³ Pet. App. 1a–3a, 54a–55a; *see also id.* at 123a–124a. As the Federal Circuit recognized, both the text and history of the Copyright Act support Oracle’s arguments in favor of copyrightability and against fair use. *Id.* at 13a–14a, 20a, 43a, 55a; *see also id.* at 136a, 141a, 161a–163a. *Amici* respectfully submit this Brief to elaborate on that text and history, from their vantage point as participants in the passage of the 1980 amendment and other federal copyright laws, and also to reiterate Congress’s constitutional authority and institutional competence in the area of copyright.

First, protection for computer programs, including the declaring code at issue here, is consistent with the U.S. Constitution’s grant of power to Congress to use copyright to “promote the Progress of Science and the useful Arts.” U.S. Const. art. I, § 8, cl. 8.

Second, both the text and history of the Copyright Act show that Congress accorded computer programs full copyright protection, with no carve-out for some undefined subset of software. Computer programs are covered by the language of Section 102(a) of the Copyright Act, which protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). By the time of the 1976 Act, Congress considered “computer

³ *Amici* also support affirmance of the Federal Circuit’s rulings in relation to Oracle’s unique structure, sequence, and organization (also known as SSO), but focus this Brief on Oracle’s declaring code.

programs” among “the new expressive forms” that “could be regarded as an extension of copyrightable subject matter Congress had already intended to protect.” H.R. Rep. No. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

Congress then took the step of tasking the recently created National Commission on New Technological Uses of Copyrighted Works (“CONTU”) with examining whether computer programs should remain copyrightable. After three intensive years of study, not only did CONTU recommend that computer programs continue to be copyrightable, but also that general copyright principles, such as fair use, apply to computer programs no differently than any other works. Nat’l Comm’n on New Tech. Uses of Copyrighted Works, *Final Report* 1, 11, 15–16, 21 (1978) [hereinafter CONTU Report]. Notably, CONTU declined to carve out some subset of computer programs as uncopyrightable, recognizing that such an attempt at line-drawing “would be futile” given the difficulty of predicting the future of technological development. *Id.* at 22. In enacting CONTU’s recommendations wholesale, Congress concurred in these judgments, which in turn dictate that Oracle’s declaring code is copyrightable, and that Google’s copying of thousands of lines of it to create a competing commercial product was not fair use.

Third, since Congress made it explicit in 1980 that computer programs are protected by copyright, subsequent Congresses have periodically revisited such protection and, in the interest of innovation and competitiveness, have continued and even strengthened that protection. This Court should not undermine that legislative judgment—based on

Congress’s long tradition of reviewing and expanding copyright to encompass new modes of expression—by creating the loopholes to copyrightability and fair use that Google requests.

“Sound policy,” this Court has remarked, “as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). The issues presented in this case only reinforce the wisdom behind that deference, and counsel in favor of continuing it here.

ARGUMENT

I. CONGRESS’S DECISION TO EXTEND COPYRIGHT PROTECTION TO COMPUTER PROGRAMS IS CONSISTENT WITH THE U.S. CONSTITUTION.

Computer code—notwithstanding that neither the Framers nor the First Congress could have anticipated it—fits comfortably within the language of the Copyright Clause of the U.S. Constitution, as well as the history of copyright protection in this Nation. With the Copyright Clause, the Framers empowered Congress to “promote the Progress of Science and the useful Arts” by investing creators with “the exclusive Right” to their “Writings” “for limited Times.” U.S. Const. art. I, § 8, cl. 8. Since 1790, Congress repeatedly has exercised this grant of power to extend

copyright protection to new modes of expression. *See* CONTU Report 14–15.

Although there is little evidence regarding the Copyright Clause from the Constitutional Convention, *see* Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 Yale L.J. 2331, 2375 (2003), James Madison wrote in the *Federalist Papers* that the “utility of this power will scarcely be questioned,” because the “public good fully coincides in both cases with the claims of individuals.” *The Federalist No. 43* (Madison). Later, in his so-called “detached memoranda,” Madison explained that “the exclusive Right” that Congress grants to authors pursuant to the Copyright Clause is “considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner might otherwise withhold from public use.” Elizabeth Fleet, *Madison’s “Detached Memoranda,”* 3 Wm. & Mary Q. 534, 551 (1946).

Such statements reinforce the understanding, embodied in the language of the Copyright Clause, that the Framers deemed economic incentive the surest way to foster innovation in the young Republic. *See also* Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 1049 (1993) (“the notion of copyright as an economic right” “dominates the Anglo-American system”). This Court has concurred in that understanding. *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“the Framers intended copyright itself to be the engine of

free expression,” because by “establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”).

The First Congress did not waste time in exercising its power under the Copyright Clause, passing the Nation’s first federal copyright law within little more than a year of its initial meeting.⁴ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124. That law granted copyright protection to maps, charts, and books. *Id.* The decision to protect maps and charts—neither of which comes obviously within the term “Writings”—signaled Congress’s expansive understanding of the Clause, as well as its low threshold for originality. *See* Schwartz & Treanor, *supra*, at 2387–88. Notably, neither Madison nor any other member of Congress objected to this broad interpretation of the Clause. *Id.* at 2388.⁵

This history demonstrates that the computer code at issue in this case easily qualifies as a “Writing[]” for constitutional purposes. Declaring code—which is human-readable and rendered in letters, numbers, and symbols, *see* Pet. App. 124a–125a—is perhaps

⁴ This Court has recognized that the action of the First Congress “provides ‘contemporaneous and weighty evidence’ of the Constitution’s meaning since many of the Members of the First Congress ‘had taken part in framing that instrument.’” *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)).

⁵ In contrast to this Nation’s first federal copyright law, the English antecedent, the Statute of Anne, did not protect maps or charts. Schwartz & Treanor, *supra*, at 2387 n.307. The First Congress’s departure from this English antecedent further evidences it and the Framers’ expansive view of copyright.

even more readily classed as a “Writing[]” than either a map or chart, both of which often incorporate significant pictorial elements. Furthermore, the maps and charts that have garnered copyright protection since 1790 are, like computer code, primarily functional rather than aesthetic, indicating that a work’s utilitarian nature has never been a bar to copyrightability. See CONTU Report 21; Miller, *supra*, at 986.

Finally, one need look no further than the explosive growth of the software industry in the four decades since Congress explicitly extended copyright protection to computer programs to recognize that decision has promoted “the Progress of Science and the useful Arts.” See Greg Ip, *If the Economy Booms, Thank Software*, Wall St. J. (May 29, 2019, 10:43 AM), <https://tinyurl.com/y5ofk6le>. The pace of technological advancement in that period demonstrates that Congress acted in accord with its constitutional prerogative in passing the Copyright Act of 1976 and its 1980 amendment.

II. THE LANGUAGE AND HISTORY OF THE COPYRIGHT ACT SHOW THAT COMPUTER PROGRAMS ARE ENTITLED TO FULL PROTECTION.

Both the statutory language and legislative history of the Copyright Act—not to mention Congress’s constitutional authority and institutional competency in the area of copyright, as discussed elsewhere in this Brief—support the Federal Circuit’s conclusions that declaring code is copyrightable, and that Google’s copying of thousands of lines of that code to create a competing product was not fair use as a matter of law.

Google's arguments to the contrary are unavailing. This Court should uphold both rulings.

A. THE TEXT AND HISTORY OF THE ACT SHOW THAT CONGRESS ACCORDED DECLARING CODE FULL COPYRIGHT PROTECTION.

Computer programs are covered by the language of Section 102(a) of the Copyright Act of 1976, which protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). Included within the term “original works of authorship” are “literary works,” *id.* § 102(a)(1), which the 1976 Act defines as works “expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied,” *id.* § 101.

As a result, when Congress passed the Copyright Act of 1976, it considered computer programs—which, as previously stated, are rendered in letters, numbers, and symbols—already copyrightable as “literary works.” H.R. Rep. No. 94-1476, at 51 (classifying “computer programs” among “the new expressive forms” that “could be regarded as an extension of copyrightable subject matter Congress had already intended to protect,” and “thus considered copyrightable from the outset without the need of new legislation”); *id.* at 54 (“the term ‘literary works’” includes “computer programs to the extent that they incorporate authorship in the programmer’s

expression of original ideas, as distinguished from the ideas themselves”); *accord* S. Rep. No. 94-473 (1975).

In passing the 1976 Act, Congress tasked a special federal commission, CONTU, with further examining this important issue. H.R. Rep. No. 94-1476, at 116; *see also* Miller, *supra*, at 978–79.⁶ In addition to authors, users, and other copyright owners, CONTU represented “the public generally, with at least one member selected from among experts in consumer protection affairs.” Miller, *supra*, at 979 n.3 (quoting Act of Dec. 31, 1974, Pub. L. No. 93-573, § 202(a)(3), 88 Stat. 1873, 2151). Among CONTU’s members was Professor Arthur R. Miller, who was appointed to the body by President Gerald Ford and served on its Software Subcommittee. *Id.* at 981. Professor Miller later wrote a seminal article on CONTU’s study of computer programs, in which he re-endorsed CONTU’s recommendation that computer programs receive full copyright protection. *Id.* at 981–82.

In 1978, after “three years of data collection, hearings, analysis, and deliberation,” CONTU issued its final report on computer programs. CONTU Report 1. CONTU reached the same conclusion as Congress had a few years earlier: that computer programs were already, and should remain, copyrightable as “literary works.” *Id.*; *see also id.* at 16. “Relatively few changes in the Copyright Act of 1976,” therefore, were needed to ensure the

⁶ Congress had created CONTU two years earlier, in anticipation of the need to study this issue. Act of Dec. 31, 1974, Pub. L. No. 93-573, tit. II, 88 Stat. 1873, 1873–74; *see also* Miller, *supra*, at 979.

continuation of full protection for computer programs. *Id.* at 12.

Soon thereafter, Congress adopted CONTU's recommended language regarding computer programs verbatim.⁷ To define protected computer programs, as suggested by CONTU, Congress passed the Computer Software Copyright Act of 1980, which amended the 1976 Act to include a definition of a "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101. As also suggested by CONTU, the 1980 Act amended Section 117 of the 1976 Act⁸ to prescribe narrow limitations on exclusive rights for computer programs, *id.* § 117, further evidencing Congress's broad extension of copyright to such works.⁹ In light of Congress's wholesale adoption of CONTU's recommendations, "[s]ubsequent Congresses, the courts, and commentators have regarded the CONTU Report as the authoritative guide to congressional intent." *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 n.5 (9th Cir. 1992); *accord Krause v. Titleserv, Inc.*, 402 F.3d 119, 128 (2d Cir. 2005).

⁷ As Professor Miller observed, "Congress changed only the words 'rightful possessor' to 'owner'" in CONTU's recommended language for Section 117, Miller, *supra*, at 980 n.5 (citations omitted), which concerns "[l]imitations on exclusive rights" for computer programs, 17 U.S.C. § 117.

⁸ Congress had passed Section 117 of the 1976 Act as a placeholder "to preserve the status quo" pending CONTU's recommendations on the subject. H.R. Rep. No. 94-1476, at 116.

⁹ None of the "very specific" limitations outlined in Section 117 apply to this case, Miller, *supra*, at 1023, and Google has not presented any argument to the contrary.

1. LAWMAKERS AND CONTU MADE CLEAR THAT ORIGINAL EXPRESSION IN COMPUTER PROGRAMS IS COPYRIGHTABLE, WITH NO CARVE-OUT FOR A SUBSET OF SOFTWARE.

Two of the *amici*, Senators Hatch and DeConcini, were U.S. Senators when Congress adopted CONTU's recommendations by passing the Computer Software Copyright Act of 1980, and can speak to its intent from personal experience. That the legislative history of the 1980 amendment is sparse emphasizes the extent of lawmakers' consensus on the wisdom of CONTU's recommendations.

- Senator Bob Dole, a co-sponsor of the amendment with Senator Birch Bayh, said that it would “clarify the 1976 Copyright Act as it pertained to the ability to obtain copyrights on computer software,” and that the “language reflects that proposed by” CONTU “and is supported by the Copyright Office.”¹⁰ 126 Cong. Rec. 30,366 (1980).
- Senator Bayh's statement was almost identical: The amendment “clarifies the 1976 Copyright Act as it is related to the ability to obtain copyrights on computer software,” and its “language reflects that proposed by” CONTU

¹⁰ Notably, the Copyright Office had begun accepting computer programs for registration in 1964, CONTU Report 15, and was still doing so by the time CONTU issued its final report fourteen years later, *id.* at 11 n.42. In its report, CONTU observed, “The Register's 1964 determination has never been challenged.” *Id.* at 16.

“and is supported by the Copyright Office.” *Id.* at 30,365.

- Likewise, in the House, Representative Robert Kastenmeier of Wisconsin—who had sponsored the Copyright Act of 1976—said that the amendment “eliminates confusion about the legal status of computer software by enacting the recommendations of” CONTU “clarifying the law of copyright of computer software.” *Id.* at 29,895; *accord* H.R. Rep. No. 96-1307(I), at 23–24 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6460, 6482–83.

While lawmakers’ statements on the 1980 amendment were brief, though uniformly supportive, CONTU provided a thorough explanation of its reasoning, specifically opining on the distinction between a “computer program” and a “process,” “system,” or “method of operation,” as the latter terms are used in Section 102(b) of the Copyright Act. *See* 17 U.S.C. § 102(b). Recognizing that this distinction “does not always seem to ‘shimmer with clarity,’” but that it was “important that the distinction between programs and processes be made clear,” CONTU explained that Section 102(b) codified the idea/expression dichotomy articulated in *Baker v. Selden*, 101 U.S. 99 (1879), whereby original expression is copyrightable but the underlying ideas are not. CONTU Report 18–19. That doctrine, however, “in no event justifies the denial of copyrightability to any work.” *Id.* at 19 (quoting 1 Melville Nimmer, *Nimmer on Copyright* § 37.31 (14th ed. 1976)); *see also* H.R. Rep. No. 94-1476, at 57 (“Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law.

Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.”).

For computer programs, CONTU explained that the idea/expression dichotomy means that “one is always free to make a machine perform any conceivable process (in the absence of a patent), but one is not free to take another’s program.” CONTU Report 20. In other words,

The movement of electrons through the wires and components of a computer is precisely that process over which copyright has no control. Thus, copyright leads to the result that anyone is free to make a computer carry out any unpatented process, but not to misappropriate another’s writing to do so.

Id. at 22; *see also* H.R. Rep. No. 94-1476, at 57 (“Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.”).

CONTU recognized only two exceptions to the rule of copyright protection for computer programs: when a program consists “of a very few obvious steps,” characterized by “the rankest obviousness and simplicity”; or “when specific instructions” “are the only and essential means of accomplishing a given task.” CONTU Report 20.

Neither exception applies to the computer code at issue in this case. The 11,330 lines of Oracle’s declaring code that Google gratuitously copied for its own commercial gain, *see* Pet. App. 45a, are not, by definition, “a very few obvious steps.” Nor were they “the only and essential means” of creating the Android platform. As CONTU was able to recognize even four decades ago, the “availability of alternative noninfringing language is the rule rather than the exception” for computer programs, a precept that holds true today. CONTU Report 20 n.106. Oracle had myriad options and made numerous expressive choices in writing its declaring code. *See* Pet. App. 150a–151a. The fact that Google had numerous choices when writing its own declaring code, had it not been intent on capitalizing on Java’s preexisting fan base and its familiarity with Oracle’s declaring code, is likewise significant. A ruling for Google in this case would effectively penalize Oracle for the success of its highly efficient and elegant code, contrary to Congress’s clear intent to incentivize such innovation through economic reward. *See* Miller, *supra*, at 1004 (“a court must employ considerable caution in excluding efficient or speedy program expression lest it undermine the effective protection of computer programs”); *see also id.* at 1020.

With regard to this second exception—whether “specific instructions” “are the only and essential means of accomplishing a given task,” CONTU Report 20—Google claims that CONTU instructed that, “at least in the context of computer software,” it be “evaluated at the time material is reused,” Brief for the Petitioner at 30, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (U.S. Jan. 6, 2020). But precisely the opposite is true: CONTU repeatedly explained that

the 1976 Act “provides that federal copyright exists in any literary work”—which, as discussed, includes computer programs—“from the moment it is fixed.” CONTU Report 15; *accord id.* at 18 n.92, 21 (“the design of the Act of 1976” “was clearly to protect all works of authorship from the moment of their fixation in any tangible medium of expression”). In this respect, as in all others, computer programs were to be treated no differently than any other works.

Just as notable is what CONTU did *not* recommend in its report, and thereby what Congress too rejected in enacting CONTU’s recommendations in full. *Accord* 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, 643 (2018) (by former U.S. Register of Copyrights). In particular, CONTU considered, but expressly declined, the option of drawing distinctions between different elements of computer programs, such as source code, which is human-readable, and object code, which is only machine-readable. CONTU Report 21 n.109, 22–23, 25. Fully aware of its own inability to predict the future of technological development, CONTU wrote that it “would be futile” to try to carve out some subset of computer programs as uncopyrightable. *Id.* at 22. Rather, the “line which must be drawn”—and which had already been drawn by Section 102(b)—“is between the expression and the idea.” *Id.* at 25. CONTU expressly refused to create a subset of computer software that was *per se* uncopyrightable, instead trusting the capacity of copyright principles to adapt to technology, as they had for nearly two centuries. *See also* Miller, *supra*, at 1034–36 (rejecting calls for a sui generis regime of protection

for computer programs, or some subset thereof, as unadministrable and unnecessary). This Court should not effectively create such a category, at Google's behest, where Congress explicitly chose not to.¹¹

2. THE LEGISLATIVE HISTORY ALSO DEMONSTRATES THAT COMPUTER PROGRAMS SHOULD NOT BE TREATED DIFFERENTLY UNDER THE FAIR-USE ANALYSIS.

On the topic of fair use, which Congress codified for the first time in the Copyright Act of 1976, 17 U.S.C. § 107, lawmakers made clear that “Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” H.R. Rep. No. 94-1476, at 66. That said, the House Judiciary Committee did amend the first of the four traditional factors—“the purpose and character of the use”—to explicitly add consideration of “whether such use is of a commercial nature or is for nonprofit educational purposes,” which change was included in the final Act. *Id.*; *see also* 17 U.S.C. § 107(1). The Committee noted that this consideration, “while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.” H.R. Rep. No. 94-1476, at 66. This history supports

¹¹ Although this Court has never considered the copyrightability of computer software, lower courts are uniform in their protection for it. *See, e.g., JustMed, Inc. v. Byce*, 600 F.3d 1118, 1125 n.3 (9th Cir. 2010); *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004); *Comput. Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir. 1992); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 838–39 (Fed. Cir. 1992).

the considerable weight that the Federal Circuit accorded to Google's commercial use of Oracle's code in concluding that Google's use was not fair as a matter of law. Pet. App. 25a–28a.

Also telling are the statements—directly referencing the scope of copyright protection for computer software—made by lawmakers in connection with the passage of a 1992 amendment to Section 107, which brought unpublished works within the ambit of fair-use analysis. *See Miller, supra*, at 1017 n.187; Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145. Two *amici*, Senators Hatch and DeConcini, were co-sponsors of this amendment, which took pains to ensure that it would not impact the applicability of copyright principles to computer programs. 137 Cong. Rec. 10,487 (1991) (statement of Sen. Hatch) (the amendment “guards against unintended consequences that might otherwise adversely affect the ability of computer software and other high-technology industries to preserve the integrity of their copyrights”); *see also id.* at 10,486 (statement of Sen. Leahy) (“Nothing in this legislation is intended to broaden the fair use of unpublished computer software and I am confident that that will not be its effect.”).

This amendment and its history demonstrate that Congress has scrupulously avoided any action that would alter the application of general copyright principles, like fair use, to computer programs, underscoring that such principles applied with full force to computer programs by virtue of the Copyright Act. Section 107—as the only fair-use provision in the Act—applies to “literary works,” like computer programs, and all of the other copyrightable works

listed in Section 102(a). In amending the Copyright Act in 1980 and 1992, Congress could have included a special fair-use analysis for computer programs, but it did not.

B. GOOGLE’S ARGUMENTS AS TO COPYRIGHTABILITY AND FAIR USE FAIL IN LIGHT OF THE LANGUAGE AND HISTORY OF THE COPYRIGHT ACT.

1. GOOGLE’S INTERPRETATION OF THE ACT AS TO THE COPYRIGHTABILITY OF ORACLE’S DECLARING CODE IS UNTENABLE.

Google’s proposed reading of the Copyright Act—that “Congress protected the expression in computer programs as a limited departure” from the “general rule,” codified in Section 102(b), “that copyright protection does not extend to purely functional works”—is insupportable. Brief for the Petitioner, *supra*, at 22–23.

Specifically, Google’s reading would render Congress’s 1980 addition of “computer program[s]” to the Act a nullity, a highly disfavored outcome in statutory interpretation. See Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software*, 94 Colum. L. Rev. 2559, 2569–70 & n.62 (1994) (citing *United States v. Am. Trucking Ass’ns, Inc.*, 310 U.S. 534, 543 (1940) (refusing to interpret a statute in a way that yielded “absurd or futile results” that were “plainly at variance with the policy of the legislation as a whole”)).

Google argues that Section 102(b) of the Act, which states that protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,” 17 U.S.C. § 102(b), excludes Oracle’s declaring code, since it merely controls the functioning of a machine, Brief for the Petitioner, *supra*, at 19–21. But that argument ignores, at its peril, the Act’s definition of a “computer program” as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101. That language, with its emphasis on “instructions” used “to bring about a certain result,” demonstrates Congress’s full awareness that the expression in computer programs is necessarily put to functional ends. As further evidence, CONTU explicitly rejected the suggestion that computer programs, or some undefined subset of them, were uncopyrightable “simply because of their utilitarian aspects,” CONTU Report 21, just as the First Congress had in granting copyright protection to functional maps and charts, *id.* at 15.

As the U.S. Solicitor General has previously explained to this Court, declaring code—whether “directly or indirectly,” 17 U.S.C. § 101—necessarily “instruct[s] a computer to work,” Brief for the United States as Amicus Curiae at 12, *Google LLC v. Oracle Am., Inc.*, No 18-956 (U.S. Sept. 27, 2019). That such functionality would invariably mark it as a “system” or “method of operation” would render meaningless Congress’s decision to extend copyright protection in the first place to “a set of statements or instructions” used in a computer “to bring about a certain result.” Far more sensible is a reading that protects computer code, despite its functional purpose, so long as it

constitutes original expression, as Oracle’s declaring code does. See Brief for Respondent at 6–7, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (U.S. Feb. 12, 2020) (describing the range of “creative choice,” *id.* at 6, entailed in writing declaring code).

2. GOOGLE’S FAIR-USE ARGUMENTS ARE SIMILARLY WITHOUT MERIT.

Google’s fair-use arguments fare no better. In particular, Google’s expansive interpretation of the second fair-use factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2), would effectively make all copying of software fair, even though Congress—in explicitly extending protection to computer programs, *id.* §§ 101, 117—could not possibly have intended such a result.

On the second factor, Google argues that the jury in this case had “ample basis” to find that Google’s copying of Oracle’s declaring code was fair, because the code is “functional, not creative.” Brief for the Petitioner, *supra*, at 46. But allowing a computer program’s functional purpose to *always* weigh conclusively in favor of a finding of fair use would contravene not only Congress’s instruction that all four statutory fair-use factors “be considered,” but also its command that the analysis look at “the use made of a work in *any particular case.*” 17 U.S.C. § 107 (emphasis added).

Just as Congress refused to designate a subset of computer software as *per se* uncopyrightable, so too did Congress decline to create a special fair-use analysis for computer programs, in which functionality would invariably tend toward a finding

of fair use, without the need for case-by-case determination. Rather, when Congress brought computer programs within the federal copyright regime, it expected that general copyright principles, like fair use, would apply to them. Miller, *supra*, at 983, 992; *see also id.* at 1023 n.215 (Section 117 of the Copyright Act, which imposes only narrow limitations on exclusive rights for computer programs, “evinces a Congressional concern with program copyrights that the judicial construction of the fair use doctrine should not undermine,” and the “equitable discretion inherent in fair use analysis continues to be appropriate when applied to computer programs by way of § 117”).

III. CONGRESS HAS A LONG TRADITION OF REVIEWING AND EXPANDING, NOT RETRACTING, COPYRIGHT TO PROMOTE INNOVATION AND COMPETITIVENESS.

The courts have traditionally deferred to Congress’s view of its power under the Copyright Clause, in light of the constitutional text and history discussed above. *See Eldred v. Ashcroft*, 537 U.S. 186, 198, 204–05, 218 (2003) (the Court has been “deferential to the judgment of Congress in the realm of copyright,” *id.* at 198); *Sony*, 464 U.S. at 430–31 (deference flows from “the constitutional authority and the institutional ability” of Congress “to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology,” *id.* at 431). *Amici* respectfully submit that this traditional deference is warranted and should continue.

Since 1790, successive Congresses have been active in the area of copyright legislation, and without fail, have *expanded* the scope of copyright to encompass the new modes of expression that accompany technological change. CONTU Report 15 (describing this history and noting, “On no occasion in American history has copyright protection been withdrawn from a class of works for which it has been available”). With the Copyright Act of 1976, Congress granted protection to all “original works of authorship,” in recognition that it could not possibly “delineate every specific work for which copyright is available.” *Id.* As a result of Congress’s action, copyright protection now extends to a wide variety of functional “Writings” beyond the maps and charts protected by the first federal copyright law. These include fact compilations, dictionaries, encyclopedias, advertisements, and instruction manuals, Miller, *supra*, at 986, as well as blueprints and other architectural plans, Ginsburg, *supra*, at 2567.

Since passing the Copyright Act of 1976, and amending it in 1980 to explicitly extend copyright to computer programs, Congress has regularly revisited the scope of these protections—and, given the technological and economic success of the software industry, has wisely decided to continue its protections for computer programs. In the intervening decades, Congress has updated the copyright regime to strengthen, rather than lessen, protections for software and other forms of expression. *E.g.*, Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). As early as the 101st Congress, a House committee conducted oversight hearings on the issue

of whether to amend copyright protections for computer programs, but ultimately took no action. Miller, *supra*, at 980 n.7 (citing *Computs. & Intellectual Prop.: Hearings Before the Subcomm. on Courts, Intellectual Prop. & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. 1 (1989 & 1990)).

More recently, between 2013 and 2015, the House Judiciary Committee—chaired by *amicus* Representative Goodlatte—undertook an extensive review of the Copyright Act and related provisions of Title 17, and notably did not propose any changes to protections for computer programs. The U.S. Register of Copyrights at the time, Maria A. Pallante, called the Committee’s work “the most comprehensive focus on copyright issues in over four decades.” *The Reg.’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 7 (2015) (statement of Maria A. Pallante, U.S. Reg. of Copyrights & Dir. of U.S. Copyright Office).

After twenty hearings on the subject, including ones specifically dedicated to the scope of copyright protection and the intersection of technological innovation and copyright, the Committee did not find it necessary or prudent to suggest any changes to the copyright regime as it applies to computer programs. *See The Scope of Copyright Prot.: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2014); *Innovation in Am. (Part II): The Role of Tech.: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 141–43 (2013). Nor did the Committee propose any modifications to the doctrine of fair use,

codified in Section 107 of the Act, as it applies to computer programs or otherwise. *See The Reg.'s Perspective on Copyright Review, supra*, at 35 (statement of Maria A. Pallante, U.S. Reg. of Copyrights & Dir. of U.S. Copyright Office) (asserting that “witnesses agree, as does the Copyright Office, that further codification of the doctrine is ill-advised at this time”). The Court should not second-guess these recent legislative judgments by creating software-specific loopholes to copyrightability and fair use, as Google would have it do.

As the Framers contemplated, successive Congresses have adjudged robust copyright protection central to promoting innovation and competitiveness in the United States. The success of such policies domestically has resulted in the dominance of American software developers on the world stage. Likewise, for decades the United States’ “pro-protection” example, Ginsburg, *supra*, at 2571, has led other countries and international bodies to protect computer programs by bringing them fully within their respective copyright regimes, *id.* at 2559, 2562 (“Copyright protection of computer programs is not simply compatible with software creators’ needs; it has become the international intellectual property norm.”); Oman, *supra*, at 652 (former U.S. Register of Copyrights stating that “under the leadership of the United States,” there has developed an “international consensus that computer programs are best protected with the application of general copyright principles”).

Honoring these strong copyright protections for computer programs at home is more important now than ever, as our Nation seeks to encourage greater appreciation and adoption of these principles with

critically important trade partners around the globe, such as China. *E.g.*, Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, arts. 1.22–23, 1.29, China-U.S., Jan. 15, 2020, Office of the U.S. Trade Representative, <https://tinyurl.com/r2xvd5w>. With theft of software and other intellectual property costing the U.S. economy as much as \$600 billion per year, this Court must proceed cautiously to avoid giving China and other infringers carte blanche to copy the original expression in computer programs for any so-called “innovative” purpose. *See* Comm’n on the Theft of Am. Intellectual Prop., *Update to the IP Commission Report 1* (2017), <https://tinyurl.com/ydc4ayd2>.

CONCLUSION

As the Solicitor General has previously advised this Court, to the extent that Google has a different, less-protective vision for the federal copyright regime, it is “free to seek action from Congress.” Brief for the United States as Amicus Curiae, *supra*, at 21 (quoting *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 451 (2014)). Thus far, Congress has not seen fit to take such action, notwithstanding its recent comprehensive review of the federal copyright laws, which directly examined the scope of copyright protection and technological innovation. This Court should not diminish copyright protections for computer programs where Congress, as is its constitutional prerogative, has chosen to refrain from doing so for four decades.

For these reasons, the Court should affirm the Federal Circuit’s decision in its entirety.

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