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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 18-956, Google versus Oracle.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Mr. Chief Justice, and may it please the Court:

The merger doctrine resolved the copyrightability question in this case. Oracle has a copyright to the computer code in Java SE but not a patent. That means that the public, not Oracle, has the right to Java SE's function, and Oracle cannot leverage its copyright to create patent-like rights. Specifically, under the merger doctrine, there is no copyright protection for computer code that is the only way to perform those functions.

Here, Java software developers have the right to use certain commands to create applications for Google's Android smartphone platform, but, to work, the commands require Google to reuse an exact set of declarations

1 from Java SE, like a key that fits into a lock.
2 Because there are no substitutes, Oracle is
3 impermissibly claiming the exclusive right not
4 merely to what the declarations say but also to
5 what the declarations do. That is not a
6 copyright; it is a patent right.

7 With respect to fair use, the
8 long-settled practice of reusing software
9 interfaces is critical to modern interoperable
10 computer software. Here, reusing the minimally
11 creative declarations allowed the developers to
12 write millions of creative applications that are
13 used by more than a billion people.

14 But those policy questions are almost
15 academic because the issue is not whether this
16 Court would find fair use. The standard of
17 review asks the much narrower question whether
18 the jury could reasonably find fair use. Oracle
19 now obviously regrets its demand that the jury
20 weigh all the evidence and decide fair use in a
21 general verdict that contains no subsidiary
22 findings.

23 No previous court ever held that only
24 a court may decide fair use. It is so
25 fact-bound that no prior appellate court ever

1 overturned a fair use verdict. This uniquely
2 contested case should not be the first.

3 Today, you will hear three lawyers
4 present legal arguments for an hour. In 2016,
5 the jury heard the starkly conflicting testimony
6 of almost 30 witnesses and reviewed roughly 200
7 exhibits over two-and-a-half weeks. This case
8 perfectly illustrates, as this Court recently
9 reiterated in Georgia versus Public.Resource,
10 that fair use "is notoriously fact-sensitive and
11 often cannot be resolved without a trial."

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Goldstein,
14 let's say someone copies the headings in your --
15 your brief and they copy the organization in
16 your brief, which sections you put first and how
17 you organized them.

18 Is your argument -- would your
19 argument say that that's perfectly fine so long
20 as they write their own text?

21 MR. GOLDSTEIN: No, sir. A computer
22 program is entirely different. And, in
23 addition, you wouldn't have the issue of the
24 merger doctrine. The issue here is that it is
25 not possible to provide the functionality that

1 we have the right to with Android without
2 recreating that structure --

3 CHIEF JUSTICE ROBERTS: No, I -- I
4 understand --

5 MR. GOLDSTEIN: -- in this structure.

6 CHIEF JUSTICE ROBERTS: -- I
7 understand your merger doc -- argument is
8 different, but I -- I don't think that was the
9 question I asked.

10 MR. GOLDSTEIN: That -- sir, in terms
11 of whether you could simply recreate the
12 headings from a -- a -- a brief or a book and
13 recreate the structure, not unless it was
14 necessary to do so, and that's what's true here.

15 CHIEF JUSTICE ROBERTS: Well, if
16 you're talking about necessary to do so, and,
17 again, you're force -- forcing me back to the
18 merger -- to the merger doctrine, and that's --
19 that's fine, but the only reason that there's
20 only one way to do it is because Sun and
21 Oracle's product expression was -- was very
22 successful.

23 There were a lot of ways to do it when
24 they did it. And the fact that everybody --
25 programmers really liked it and that's what

1 everybody used, it seems a bit much to penalize
2 them for that.

3 MR. GOLDSTEIN: Well, we don't intend
4 to penalize them, sir. But our point is that in
5 the language of Section 102(b), they may well
6 have come up with a novel method of operation.
7 They may have created one. But they don't get
8 the rights to it. That is a patent-like right.

9 I suppose, just as in -- as your point
10 illustrates, in Baker versus Selden, you could
11 have said, well, Mr. Selden came up with a very
12 innovative form of bookkeeping, and other people
13 could have used a different one. But that was
14 not enough to -- to give him a copyright.

15 CHIEF JUSTICE ROBERTS: I don't think
16 it's a patent right. I mean, it's the -- it's
17 their particular expression. And you want to --
18 you say the only way for you to say what you
19 want to say in the -- the new material that you
20 provide is to copy -- copy theirs. That's not a
21 -- a patent. That's -- that's copyright.

22 MR. GOLDSTEIN: Ah. Sorry. Our point
23 is this: We have the right to provide a certain
24 functionality to make a computer do something.
25 That right is given to us under Section 102(b).

1 If there were other ways for us to do
2 it, that would be another matter. But, because
3 there is only one way, then there is no
4 copyright protection. But, in all events, even
5 if you took the perspective that copyright looks
6 at the options that were available to Oracle to
7 begin with, clearly, fair use looks at it from
8 the other end of the telescope.

9 And there was enormous creativity that
10 is unleashed by the ability to reuse the
11 declarations --

12 CHIEF JUSTICE ROBERTS: Well, before
13 we --

14 MR. GOLDSTEIN: -- that only --

15 CHIEF JUSTICE ROBERTS: -- before --
16 before you get into fair use, you say that was
17 the only way for you to do it. But, you know,
18 cracking the safe may be the only way to get the
19 money that you want, but that doesn't mean you
20 can do it. I mean, if it's the only way, the
21 way for you to get it is to get a license.

22 MR. GOLDSTEIN: Well, Your Honor, I
23 think then that analogy would help us because,
24 if you get a patent on the safe, you may well be
25 able to keep us out. But, if you write a book

1 about the safe that is about how to crack safes,
2 that doesn't give you the exclusive right to do
3 it.

4 CHIEF JUSTICE ROBERTS: Well, all
5 right. I mean, you're -- but what about the --
6 the -- the combination to the lock on the safe?
7 Can you copy that just because somebody else has
8 it and that's the only way to get in?

9 MR. GOLDSTEIN: Well, certainly, if
10 you write a book about how to, you know, unlock
11 the combination of something, unlock the
12 combination of a lock, that doesn't give you the
13 exclusive right to the lock.

14 All it does is it shares the knowledge
15 about how to crack safes or open locks. What
16 copyright wants is for people to be able to use
17 that knowledge. And that's what we want here
18 too. The developers --

19 CHIEF JUSTICE ROBERTS: Thank --

20 MR. GOLDSTEIN: -- the developers --

21 CHIEF JUSTICE ROBERTS: -- thank you,
22 counsel. Thank you, counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Yes. Thank you, Mr.
25 Chief Justice.

1 Mr. Goldstein, you seem to rely quite
2 a bit on Section 102. Why don't we rely on
3 Section 101, which is more specific with respect
4 to computer programs?

5 MR. GOLDSTEIN: So, Your Honor,
6 Section 101 tells us that Oracle holds a
7 copyright in Java SE as a computer program.
8 Then Section 102(b), what it tells us is that,
9 okay, that copyright does not extend to any
10 method of operation in Java SE.

11 And what the merger doctrine tells
12 us -- that's called the idea-expression
13 dichotomy -- and then what the merger doctrine
14 tells us is that if there is only way -- one way
15 to provide the method of operation of Java SE,
16 you cannot get a copyright on that expression.

17 So our point here is that the method
18 of operation of Java SE is the combination of
19 commands by the developers and the declarations
20 in Java SE. If there are no substitutes, if we
21 cannot use anything else, then you would be
22 giving Oracle effectively patent rights by
23 preventing us from reusing the declarations.

24 JUSTICE THOMAS: So at what -- at what
25 point should we determine the merger, whether or

1 not there is merger? When Oracle or Sun
2 develops this program or when you decide to use
3 it?

4 MR. GOLDSTEIN: The latter. And
5 that's the teaching of Baker versus Selden and
6 the text of 102(b). What that tells us is that
7 when you copyright something and you publish it,
8 you disclose it to the public. Selden disclosed
9 his system of bookkeeping, the dual entry
10 system. What the Court said is, once that's
11 published, then the public has the right to use
12 it.

13 So too here. Once Oracle published
14 Java SE, people in the public, developers,
15 companies like Google, had the right to create
16 their own versions of it that would provide the
17 same functionality.

18 Then the question was, is there any
19 way to do it without reusing the expression of
20 the original? When, as here, there is not,
21 there is no copyright protection.

22 JUSTICE THOMAS: You know, you could
23 -- someone could argue, though, that, look, if a
24 -- a team -- if a team takes your best players,
25 a football team, that the only way that those

1 players could actually perform at a high level
2 is if you give that team your playbook. I don't
3 think anybody would say that is -- is right.

4 MR. GOLDSTEIN: Yes, sir -- oh, I'm
5 sorry.

6 JUSTICE THOMAS: No, go on.

7 MR. GOLDSTEIN: Yeah, our point isn't
8 that we can't do it at a high level. Remember,
9 everyone agrees that we have the right as Google
10 to write a computer program that provides all
11 the same functionality as Java SE.

12 And in Android, we wrote new and
13 better versions that were more suitable for use
14 in a modern -- modern smartphone. So it's not
15 like we are trying to take someone's fan base or
16 their football players or anything else.

17 Oracle doesn't want a fan base. It --
18 it effectively wants prisoners. It wants the
19 people who used its work, the developers, only
20 to be able to use it with Java SE. That's not
21 what a copyright gives you. You don't get a fan
22 base with a computer program the way you do with
23 J.K. Rowling's novels.

24 JUSTICE THOMAS: Well, actually, my
25 concern was having to turn over the playbook.

1 But let's go to fair use briefly in -- in -- in
2 the time that I have.

3 How would you distinguish Harper?

4 MR. GOLDSTEIN: Harper & Row is a case
5 in which the district judge made findings, and
6 this Court said, when there are established
7 findings and the court, not a jury, is going to
8 resolve fair use, it can be the appellate court
9 or the district court.

10 Here, you have the opposite. You have
11 a general jury verdict. There are no subsidiary
12 findings whatsoever. The jury was asked to and
13 properly instructed to weigh all the evidence
14 and the fair use factors.

15 You can't unpack it in nearly the same
16 way you could with a court in Harper & Row.

17 JUSTICE THOMAS: So should we -- is
18 that because of the fact-finder or because it
19 was a general verdict?

20 MR. GOLDSTEIN: Both. Both of those
21 are critically important here. It's not the
22 court that is assigned the responsibility for
23 deciding fair use under Rule 39(c) and the
24 Seventh Amendment. It is the role, instead, of
25 the jury. And you would have to construe

1 everything in our favor, which the Federal
2 Circuit disavowed doing.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: Well, I have a
7 question for each side that I'm trying to answer
8 in my own mind. For you, I'd -- I'd like to ask
9 this: I write down at the computer, I have a
10 computer in front of me, and I put
11 `java.lang.math.max(410)`, okay? And that calls
12 up a certain program, which you did not copy,
13 the one it calls up, which is setting the
14 switches of a computer.

15 Well, the thing I -- the words I just
16 spoke also call up a particular program, i.e., a
17 set of computer switches that will get me to the
18 program that does the -- you know, that does a
19 particular thing.

20 Well, it's a computer program, isn't
21 it? And you can copyright computer programs.
22 And so what's the difference between `java.lang`,
23 et cetera, which sets switches on the computer,
24 and any other program that sets switches on the
25 computer?

1 MR. GOLDSTEIN: That's our point, Your
2 Honor. And that is --

3 JUSTICE BREYER: I know that's your
4 point. That's why I wanted you to say it
5 clearly enough so I can understand it, which is
6 pretty tough.

7 MR. GOLDSTEIN: Sure. Okay. So there
8 are two parts to these shortcut programs.
9 There's what we call the implementing code that
10 actually does the program. It does -- it
11 provides the function there. It will produce
12 the larger of two numbers.

13 Oracle agrees that if there's only one
14 way to write that, we can reuse that
15 implementing code. But it can't explain why the
16 same isn't true for the code that you mentioned,
17 which is the combination of the calls written by
18 the developer and the declarations that appear
19 in Android and Java SE.

20 If there is only one way to do it, and
21 you give someone a copyright on that that's
22 exclusive, then you are saying that person is
23 the only one who can make the computer do the
24 thing, whether it's invoke the implementing code
25 through the call and declaration or actually

1 perform the function of the program through the
2 implementing code.

3 JUSTICE BREYER: I bet there aren't --

4 MR. GOLDSTEIN: Principally --

5 JUSTICE BREYER: -- just one way to do
6 it. Why is there just one way to do it? If you
7 spent enough time and you had the most brilliant
8 computer programmers, don't you think they could
9 devise a system of calling up the Java program,
10 though it might be expensive to do and take a
11 long time, that didn't use the word
12 java.lang.math?

13 MR. GOLDSTEIN: Well, two things:
14 First, why would we have a copyright system that
15 does that, where the only upshot of Oracle's
16 rule that it wants you to -- to adopt is to make
17 computer programming credibly inefficient so
18 that we have fewer creative computer programs?

19 But the second is, no, we -- we
20 actually do have very good computer programmers.
21 And when you use that instruction, math dot --
22 max.math.java.lang, the language itself -- it is
23 a rule of the language that there is only one
24 declaration that will work with it. That is a
25 plain finding of the district court that is

1 uncontested.

2 JUSTICE BREYER: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE ALITO: Mr. Goldstein, I --
5 I'm concerned that, under your argument, all
6 computer code is at risk of losing protection
7 under 102(b). How do you square your position
8 with Congress's express intent to provide
9 protection for computer codes?

10 MR. GOLDSTEIN: So, Your Honor, I
11 think that that is a criticism that's been
12 levied at our kind of pure textualist argument
13 about a method of operation, but it is not a
14 criticism, I think, that's fair of our argument
15 about merger.

16 And that is our argument is strictly
17 limited in that sense to circumstances in which
18 the function that is disclosed, that is here the
19 relationship between the calls and the
20 declarations, can only be written one way. And
21 it's a -- it's a principle that Oracle concedes,
22 as I mentioned, with respect to the implementing
23 code that actually makes the shortcut programs
24 work, that produces, for example, the larger of
25 two numbers.

1 JUSTICE ALITO: Well, there have been
2 --

3 MR. GOLDSTEIN: In that --

4 JUSTICE ALITO: -- a lot of questions
5 already about the merger argument, but how do
6 you respond to Oracle's argument that you're --
7 you are arguing in a circle, that there is only
8 one way to write a declaring code like Oracle
9 did?

10 MR. GOLDSTEIN: Well, that is not what
11 we're trying to do. We are not -- our analysis
12 isn't circular. It is by reference to what the
13 developers are trying to do.

14 The developers, it is conceded, have a
15 right to use the commands that they have learned
16 in Java, including the ones that work with Java
17 SE. When the developers use those commands, we
18 have the right to write a computer that will
19 respond to those commands. We would happily not
20 reuse the Java SE declarations if we could. It
21 is that the language only permits us to use
22 those.

23 You could make the same circularity
24 argument about the merger doctrine for anything
25 in English because you could say, well, every

1 word in English, if you get that specific, is
2 the only one that has that precise meaning.

3 But we haven't abandoned the merger
4 doctrine. What we have said is, if a work
5 discloses something, as Java SE discloses this
6 relationship between calls and declarations,
7 then you have the right to perform that
8 function, unless somebody wants to go and get a
9 patent.

10 JUSTICE ALITO: All right. Let me --
11 let me switch to fair use. What should I do if
12 I think that the purpose and character of the
13 use and the effect on market value here weigh
14 very heavily against you on the fair use issue,
15 that a jury couldn't reasonably find in your
16 favor on those factors?

17 MR. GOLDSTEIN: You should recognize,
18 I think, that those factors are continuums. And
19 so, if you were to say, well, I do think, you
20 know, notwithstanding the jury verdict, that
21 there was some market effect here, and you
22 couldn't -- you'd have to check the box that's
23 saying that there is a market effect, what you
24 have to recognize is that a jury, looking at all
25 the evidence, could reasonably conclude that,

1 nonetheless, the other fair use factors,
2 including, importantly, the fact that the
3 original material here, the declarations, is
4 barely creative and the fact that it unleashed
5 millions of creative computer programs used by a
6 billion people, that that on the whole, it is
7 not unreasonable for the jury to find fair use,
8 given that it was the jury's responsibility.

9 JUSTICE ALITO: All right. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: Counsel, I -- I --
13 I go back to the essence of the question that I
14 think my colleagues are asking, is how do you
15 differentiate between declaring codes and
16 implementing codes? Because you agree -- you
17 agree that you couldn't have copied their
18 implementing code because there are multiple
19 ways of doing that.

20 But you fight the declaring codes
21 because there are multiple ways of declaring as
22 well. Apple has a different way of declaring
23 the same functions. They spent the billions of
24 dollars necessary. Presumably, you could have.

25 And yet, you spent so much time in

1 your brief convincing me that implementing and
2 declaring codes go together in this hand. They
3 merge. How do we draw the line?

4 MR. GOLDSTEIN: You don't. It is
5 actually Oracle that is trying to draw the
6 distinction that you say is not recognized by
7 the statute or common sense.

8 The legal principle that you can reuse
9 computer codes that can only be written one way
10 applies to both declaring code and implementing
11 code. Oracle concedes that if the implementing
12 code could only be written one way, we could
13 reuse it.

14 It cannot explain why it is that --
15 that given that the declaring code will not
16 function if it's written another way, we cannot
17 reuse that. They are trying to draw that line.

18 With respect to Apple, it is true that
19 Apple didn't reuse the Java SE declarations
20 because it wasn't using Java. It did reuse
21 other declarations, as the amicus briefs say.
22 That's like saying merger doesn't apply --

23 JUSTICE SOTOMAYOR: Could I --

24 MR. GOLDSTEIN: -- to something in --

25 JUSTICE SOTOMAYOR: May I -- may I

1 stop you right there? That's the nub of the
2 problem, which is, what gives you the right to
3 use their original work? What -- how do you
4 define "method of operation" so that there's a
5 clean line between that and when you have to
6 create new code?

7 MR. GOLDSTEIN: So --

8 JUSTICE SOTOMAYOR: Like an
9 implementing code.

10 MR. GOLDSTEIN: Sure. So Section
11 102(b), what it tells you is that you can't get
12 a copyright in the functionality of a computer
13 code. And there are so many things listed in
14 Section 102(b), like method of operation,
15 because Congress wanted to be encompassing. You
16 get to copyright none of the functionality.

17 It's the merger doctrine that tells us
18 that if there is only one way to write the
19 computer code that will provide that
20 functionality, then you can't get a copyright --
21 copyright protection. You have to get patent
22 protection.

23 With respect to the implementing code,
24 because there are numerous ways to write the
25 implementing code, as the district court found,

1 we wrote it, millions of lines of it. The only
2 reason that we reused the declaring code -- we
3 would have happily rewritten our own -- is that
4 we had no other choice. We couldn't write a
5 computer program that would respond to the
6 developers' instructions without reusing this
7 limited set of instructions.

8 JUSTICE SOTOMAYOR: My problem with
9 your argument is, what's your definition of
10 "interoperability"? It seems one-directional.
11 You seem to define it as the extent to which
12 existing third-party applications can run on
13 your platform but not whether apps developed on
14 your platform can run on systems that use Java
15 SE. So it's one way.

16 MR. GOLDSTEIN: No, Your Honor. The
17 --

18 JUSTICE SOTOMAYOR: So could people
19 now copy your -- your -- you now have developed
20 many different packages and platforms and things
21 like that. Can they copy yours now?

22 MR. GOLDSTEIN: They can copy any part
23 of our code, including certainly our interfaces,
24 our declarations, that can only be written this
25 one -- this way.

1 We have interoperability in the fact
2 that the developers' instructions work with our
3 methods, our classes, and our packages. It very
4 frequently is the case that you have, in modern
5 computer programming, interoperability that
6 means you have a new software program that comes
7 in and supplants an older, less superior one,
8 one that doesn't work nearly as well.

9 That is actually incredibly important
10 and what Congress would want, and that is to be
11 able to take the functionality of a computer
12 program, someone else comes along and does it
13 better. It's no surprise that we don't use all
14 of the packages because they don't have anything
15 to do with a modern smartphone. They don't have
16 a GPS function to them.

17 On the other hand, the smartphone
18 doesn't have a computer mouse. There's no
19 reason in the world to think you would reuse all
20 of them. And it would be impracticable given
21 the constraints of a smartphone.

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Mr. Goldstein, I have

1 to confess to being a little bit surprised or
2 confused about some of the arguments you're
3 making this morning. And maybe it's just me and
4 I don't understand it, but I'm hoping you'll
5 explain it to me, because, when I read your
6 briefs, I took you to be making a somewhat
7 different argument, principally, than the one
8 you're making today.

9 I took you to be saying that the
10 declaring code is unprotected because it's a
11 method of operation, that it's what allows Java
12 programmers to operate the computer, and to be
13 setting forth a pretty flat rule on that -- of
14 -- of that kind.

15 And -- and I don't hear you saying
16 that today. Instead, I hear you saying, you
17 know, the real question is, are there multiple
18 ways of doing the same thing?

19 So are those different arguments? And
20 which one are you making?

21 MR. GOLDSTEIN: They're both different
22 arguments. We're making both of them. I'm
23 focusing on merger. The argument that you
24 mentioned as our lead argument I don't think
25 honestly is.

1 We do have a straight, pure textualist
2 argument that the declaring code is a method of
3 operation because it is the instructions to the
4 developer on how to operate the shortcut
5 pre-written computer program.

6 Today, I have focused on the argument
7 that if you disagree with that and you believe
8 that Section 102(b) instead embodies only the
9 idea-expression dichotomy, then you apply the
10 merger doctrine and you say: Okay, 102(b) says
11 that you can't copyright all the ways of having
12 the method of operation of Java SE.

13 And my point is that's what they're
14 trying to do here. The district court found --

15 JUSTICE KAGAN: And when you say --

16 MR. GOLDSTEIN: -- that the only --

17 JUSTICE KAGAN: Excuse me. Sorry, Mr.
18 Goldstein. But, if -- if -- if -- if that's
19 your test that you're focusing on today, is that
20 essentially the test that comes out of the
21 Second Circuit Altai case? Is there any
22 difference between what you're saying today and
23 -- and -- and what Altai says, which is
24 essentially that we have to figure out how to
25 separate out the expressive elements of

1 something?

2 MR. GOLDSTEIN: Well, that -- that --
3 the Second Circuit does have the abstraction
4 filtration test, and an element of that test is
5 that you take out the elements that are not
6 subject to copyright protection. And merger
7 fits in there.

8 And that is one of the reasons that
9 something -- an element of a computer program
10 would not receive copyright protection is the
11 fact that it merges, that it's the only
12 available form of expression. So it fits within
13 the Second Circuit framework. It just -- it
14 just doesn't supplant it.

15 JUSTICE KAGAN: And if I could go back
16 to something that I think the Chief Justice was
17 asking about, I mean, suppose I'm -- I'm -- I'm
18 sitting in a mathematics class and the professor
19 says: Do a proof of -- of -- of something or
20 other. And, you know, it turns out that 20
21 people in this mathematics class actually come
22 up with more than one proof, and some are better
23 than others, you know, some are elegant and some
24 are less elegant.

25 So there are more than one way of

1 proving whatever proposition there is. How do
2 we deal with that? I would think that that's
3 pretty analogous to the situation here, that
4 there are more than one way and Oracle happened
5 to come up with a particularly elegant one.

6 MR. GOLDSTEIN: It just depends, Your
7 Honor, on what the "it" is. A computer program
8 works in a very technical and specific way, and
9 that is someone, here, the developer, will type
10 something into the computer. It will put in --
11 that person will put in particular information.

12 And the question is, how is it that
13 you are going to write a computer program that
14 recognizes what they're going to say and
15 responds appropriately?

16 And if you say that you can get a
17 copyright over the only computer code that will
18 listen to -- that will understand the proof,
19 right, if there's only one computer program that
20 will look at students' proofs and understand
21 them, if you give someone a copyright on that,
22 you've given them a patent on it, because no one
23 else can make a computer do that particular
24 thing.

25 And Section 102(b) is extremely

1 granular. It doesn't ask the big picture
2 question: Could you generally find the larger
3 of two numbers or prove something? It gets way
4 down into the details.

5 You cannot get copyright protection
6 with respect to any method of operation. This
7 is plainly the method of operating Java SE.

8 JUSTICE KAGAN: Thank you, Mr.
9 Goldstein.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE GORSUCH: Good morning, Mr.
13 Goldstein. If -- if I understand the
14 conversation so far, you are moving past, rather
15 rapidly, the -- the primary argument in your
16 brief that the code just simply isn't
17 copyrightable.

18 And I -- I -- I think that's probably
19 a wise move given the fact that 101 says
20 computer programs, including statements or
21 instructions, in order to bring about a certain
22 result, may be copyrighted.

23 We might not think otherwise that it
24 should be, but there it is. And, normally, the
25 -- the specific instruction there in 101 would

1 govern the more general idea-expression
2 dichotomy in 102.

3 So am I right, that we can move past
4 that rather rapidly?

5 MR. GOLDSTEIN: Well, our main
6 argument actually is the merger doctrine, but
7 it's not the case that --

8 JUSTICE GORSUCH: So I take that as a
9 yes. I'll be honest with you.

10 MR. GOLDSTEIN: Well, I was going to
11 --

12 JUSTICE GORSUCH: So --

13 MR. GOLDSTEIN: Sorry.

14 JUSTICE GORSUCH: So, if we're moving
15 straight on to the merger doctrine, there, I
16 guess I'm stuck in a similar place as Justice
17 Kagan, which is the argument strikes me very
18 much as I wish to share the facilities of a more
19 successful rival because they've come up with a
20 particularly elegant or efficient or successful
21 or highly adopted solution in the marketplace
22 and -- and to ride on -- on -- on their
23 innovation.

24 What do we do about the -- the fact
25 that other competitors, Apple, Microsoft, who I

1 know is one of your amici, have, in fact, been
2 able to come up with phones that work just fine
3 without engaging in this kind of copying?

4 MR. GOLDSTEIN: Well, everyone agrees
5 that every platform, including Java SE, actually
6 does what we talk about, which is re-implement
7 prior languages or prior platforms.

8 Apple and Microsoft use different
9 languages entirely. It's like saying we can't
10 have merger in English because someone could
11 write something in French.

12 The rule that Oracle wants is
13 fundamentally -- you talk about an essential
14 facility -- is something that has a real-world
15 analogue, again, in an exclusive right like a
16 patent.

17 What Congress said is that you can
18 have the exclusive right to the words on the
19 page, the actual computer code, but not to what
20 the computer does.

21 JUSTICE GORSUCH: Isn't it --

22 MR. GOLDSTEIN: Oracle wants to --

23 JUSTICE GORSUCH: -- isn't it -- isn't
24 it pretty difficult to say that this is an
25 essential facility-type problem when -- when

1 others have managed to -- to innovate their way
2 around it?

3 MR. GOLDSTEIN: Ah, if -- if this was
4 antitrust law and an essential facility test,
5 then perhaps. What Section 102(b) tells us is
6 that you get the -- you can't have an exclusive
7 right to inessential facilities. It doesn't say
8 you can get a copyright with respect to a method
9 of operation so long as it's really unimportant
10 or a system that's, you know --

11 JUSTICE GORSUCH: Well, I -- I -- I --

12 MR. GOLDSTEIN: -- easy to work
13 around.

14 JUSTICE GORSUCH: -- I accept that,
15 but if -- if -- if -- if we're worried about
16 ideas and expressions merging, and -- and others
17 have been able to accomplish the task without
18 reliance on what -- what you might claim to be
19 the essential facility, where -- where do we
20 stand?

21 MR. GOLDSTEIN: We -- we -- we're
22 misunderstanding then what the task is. If the
23 task is at a high level of generality, as you
24 say, an idea of just being able to create a
25 phone, fair enough. But that is not the test.

1 The test is look at the actual
2 copyrighted work and find its methods of
3 operation. Inside there, in Java SE, you will
4 find this relationship between the declarations
5 and the developers' commands.

6 That is something, a function in the
7 computer program, that you cannot get a
8 copyright with. In any event, you would still
9 look to the jury's fair use verdict, I think,
10 very, very, very plainly, given that the jury
11 heard all these debates about the relationship
12 between Java SE and Android and concluded on the
13 whole, as was its responsibility, that this was
14 a fair use.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you, Mr.
19 Chief Justice.

20 And good morning, Mr. Goldstein.

21 To the extent you're still making the
22 method of operation argument, the other side and
23 the solicitor general say that declaring code is
24 a method of operation only in the same sense
25 that computer programs as a whole are methods of

1 operation and that, therefore, your method of
2 operation argument would swallow the protection
3 for computer programs.

4 Your response to that?

5 MR. GOLDSTEIN: Is that declaring code
6 does something very distinct in computer code,
7 and that is it tells -- and this is Oracle's own
8 point -- it is unique in that it tells the
9 outside developer what to do.

10 The developer looks at the declaring
11 code and then knows how to operate the shortcut
12 pre-written programs. That is, it tells someone
13 else how to operate the computer program. That
14 is absolutely unlike any other code.

15 JUSTICE KAVANAUGH: On your merger
16 argument, one concern that has been raised
17 already is the timing issue. Another concern
18 that I want you to respond to is that it seems
19 to define the relevant idea in terms of what you
20 copy. You're not allowed to copy a song just
21 because it's the only way to express that song.

22 Why is that principle not at play
23 here?

24 MR. GOLDSTEIN: Because we're not
25 defining merger self-reflectively. We are not

1 saying, I want to copy these declarations
2 because I like these declarations.

3 We're saying, I have to reuse these
4 declarations because I'm trying to respond to
5 commands from other people. The developers are
6 writing something, in Justice Breyer's
7 hypothetical, max, math, java.lang, again, not
8 very creative, inspired by the declarations.

9 And when they do write that, I have to
10 be able to write a computer program, and Oracle
11 concedes I can write a computer program that
12 does those things. So I -- it is, in the sense
13 of Baker versus Selden teaches that if you have
14 a copyrighted work and it shows the public how
15 to do something, then the public can do it.

16 And if they can only do it by using
17 part of a copyrighted work, that part does not
18 get copyright protection.

19 JUSTICE KAVANAUGH: One of the points
20 in some of the amicus briefs -- and I want to
21 compliment the briefing of the parties and all
22 the amicus briefs, which have been enormously
23 helpful -- of the 83 computer scientists is that
24 the sky will fall, in essence, if we rule
25 against you in this case, threaten significant

1 disruption.

2 One question I had about that, though,
3 is the Federal Circuit ruled in 2014, this Court
4 denied cert in 2015 on the first issue. I'm not
5 aware that the sky has fallen in the last five
6 or six years with that ruling on the books.

7 I know it's different if we rule here,
8 but can you respond to that?

9 MR. GOLDSTEIN: Absolutely. After the
10 copyrightability ruling, it was entirely open
11 that we would prevail on fair use, and we did.
12 We won the fair use trial.

13 And that went up to the Federal
14 Circuit. And when the Federal Circuit did rule
15 against us, then the Court granted cert. I
16 would not then say the representations of not
17 only the country's leading computer scientists
18 but the software industry itself, because the
19 premise is not in dispute.

20 Interfaces have been reused for
21 decades. It has always been the understanding
22 that this, you know, purely functional,
23 non-creative code that is essentially the glue
24 that keeps computer programs together could be
25 reused, and it would upend that world to rule

1 the other way.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Goldstein,
4 would you like to take a minute to wrap up?

5 MR. GOLDSTEIN: Thank you, sir.

6 I want to address the argument that it
7 is sufficient that Google could write new
8 declarations that would require developers to
9 learn new instructions and that we're
10 effectively just stealing this efficient way of
11 doing it.

12 The sole effect of Oracle's rule would
13 be to make the creation of innovative computer
14 programs less efficient. That would turn the
15 Copyright Act on its head. If anything, the
16 declarations so lack creativity that they
17 deserve the least copyright protection.

18 There's no practical or textual basis
19 for that theory. Connecting the developers'
20 commands is essential to the method, without
21 which they're worthless. By claiming the
22 exclusive right to the declarations' function,
23 Oracle is inevitably asserting, as I said, a
24 patent right in order to insulate itself from
25 competition.

1 Textually, Section 102(b) provides
2 that copyright does not extend to any method of
3 operation that is embodied in Java SE. There's
4 no exception for the methods for which there are
5 possible substitutes.

6 Saying that the developers could use
7 different commands is just another way of saying
8 they could use a different method of operation,
9 and that would be in conflict with Baker versus
10 Selden.

11 Finally, the argument proves too much
12 because it would apply equally to the
13 implementing code. Developers don't have to use
14 the pre-written programs at all. They could
15 just write their own computer code from scratch.
16 It would just be less efficient and no one would
17 be better for it.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Goldstein.

20 Mr. Rosenkranz.

21 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

22 ON BEHALF OF THE RESPONDENT

23 MR. ROSENKRANZ: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 Google's whole argument this morning

1 is code is different.

2 Now a few basic legal principles and
3 concessions control the outcome of this case.

4 Legal principle 1: Congress defined
5 literary work to include software and granted
6 copyright protection as long as the code is
7 original. Google conceded Oracle's code is
8 original. That's the end of the question.

9 Google asks this Court to carve out
10 declaring code, but Congress rejected the very
11 carveout in multiple ways, including in its
12 definition of computer program and by not
13 including Google's carveout among the
14 limitations in Section 117.

15 Legal principle 2: This Court held in
16 Harper and in Stewart that a superseding use is
17 always unfair as a matter of law. No court has
18 found fair use or upheld a fair use verdict
19 where a copyist copied so much valuable
20 expression into a competing commercial sequel to
21 mean the same thing and serve the same purpose
22 as the original. Google conceded the purpose
23 and the meaning are the same. That's the end of
24 Question 2.

25 No one else thought that innovating

1 required copying Sun's code without a license.
2 As Justice Alito notes, Apple and Microsoft did
3 not copy to create their competing platforms.
4 Neither did others who wrote competing platforms
5 in the Java language.

6 There was and still is a huge market
7 for declaring code. Other major companies, like
8 IBM and SAP, were paying a lot of money to
9 license just the Sun declaring code precisely
10 because it was created. And throughout this
11 litigation, Google never denied this.

12 If this Court holds that a jury may
13 conclude that copying declaring code is fair, it
14 will encourage copying, create legal
15 uncertainty, and decimate the business model
16 which a lot of companies depend on, undermining
17 the very incentives copyright was designed to
18 promote.

19 CHIEF JUSTICE ROBERTS: Mr.
20 Rosenkranz, let's say you want to open a
21 restaurant. You've got a great new chef. He's
22 got great new dishes. And you say: Well, we've
23 got to figure out what the menu should look
24 like. You know, of course, you're going to
25 have, you know, appetizers first, then entrees,

1 and then desserts. Now you shouldn't have to
2 worry about whether that organization is
3 copyrighted.

4 And I think Mr. Goldstein is saying
5 that that's what's going on -- on here. Every
6 restaurant organizes its menu that way, and you
7 don't want to discourage people from opening it
8 because they're going to have to spend their own
9 time trying to figure out what the menu should
10 look like.

11 Why isn't that exactly what Google is
12 saying here?

13 MR. ROSENKRANZ: Well, Your Honor,
14 this will be a constant theme, I think. It's
15 like there's an app for that. There's a
16 doctrine for that, two, actually.

17 First, for the -- for the menu,
18 there's standard fare. If it's a standard way
19 of doing things, it is not protected, or it's
20 unoriginal by your own description.

21 What we've got here is very different.
22 It's not a menu just saying here are apps and
23 here are dinner plates with standard
24 descriptions that everyone uses of those apps
25 and dinner plates. We filled the blanks in

1 30,000 times over, and each item had its own
2 description that no one else was using.

3 CHIEF JUSTICE ROBERTS: Well, you say
4 that they did have a choice; in other words,
5 your work did not leave them with no -- no
6 option. Well, what choice did they have without
7 having to spend billions of dollars, which would
8 be wasteful and impede the development of the
9 high-tech business?

10 MR. ROSENKRANZ: Oh, my goodness, Your
11 Honor, so -- so without spending the billions of
12 dollars? Microsoft and -- and Apple both spent
13 billions of dollars creating their competing
14 platform. That's exactly what the Copyright Act
15 requires. The Copyright Act does not give
16 Google a pass just because it would be expensive
17 to recreate our expression.

18 CHIEF JUSTICE ROBERTS: Well,
19 Mr. Goldstein --

20 MR. ROSENKRANZ: The Copyright --

21 CHIEF JUSTICE ROBERTS: -- Mr.
22 Goldstein says the most efficient, the best way
23 to do it, the way to keep programmers doing new
24 things, rather than old things, is to use Java.

25 MR. ROSENKRANZ: Right, Your Honor.

1 In -- in -- in no other context would it be
2 appropriate to be asking whether there's either
3 unprotected -- whether the work is unprotected
4 or whether there's fair use by saying that the
5 audience has learned the words by heart.

6 I mean, if -- if -- if someone wanted
7 to write a book that preserved -- that
8 reproduced the 11,000 best lines of Seinfeld,
9 they couldn't do it by claiming but -- but we
10 had to do it because those are the lines that
11 everyone knows. And the --

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. Thank you.

14 Justice Thomas.

15 JUSTICE THOMAS: Yes. Thank you,
16 Mr. Chief Justice.

17 Mr. Rosenkranz, in your brief, you
18 seem to be arguing for more than the declaring
19 code. If I'm right there, do we need to decide
20 more than that?

21 MR. ROSENKRANZ: No, Your Honor. All
22 this Court has to decide is whether the
23 declaring code, for purposes of
24 copyrightability, whether the declaring code was
25 original -- it was -- and for purposes of fair

1 use, whether it was fair to copy the declaring
2 code.

3 Our point, I think, that you're noting
4 in the brief is the point that several Justices
5 made this morning. You can't distinguish
6 declaring code from implementing code, certainly
7 not in the way that Congress defined the code.

8 There's no principle distinguished --
9 distinction and -- and no distinction that
10 courts are capable of drawing. As Justice
11 Breyer noted, code is code. Declaring and
12 implementing code both consist of "words,
13 numbers, or other numerical symbols within the
14 definition of literary work." Both operate a
15 computer.

16 Mr. Goldstein says that his rule is
17 what Congress would have wanted. But Congress
18 rejected the exact line that Google proposed
19 when it defined "computer programs" in Section
20 101 as code to be used "directly or indirectly"
21 to bring about a result.

22 JUSTICE THOMAS: You argue that -- you
23 seem to argue, in any case, that Google's use
24 was not transformative because the use of
25 declaring code operates in Android the same way

1 it operates in Java.

2 What would, in your way of thinking,
3 transformative look like in the context of a
4 computer code?

5 MR. ROSENKRANZ: Well, Your Honor, in
6 -- in the context of computer code, the Ninth
7 Circuit in both Sega and Sony versus Connectix
8 gave a great example of transformative use.

9 The code was never incorporated into a
10 competing product. Instead, it was used to
11 study, to figure out how the machine worked, and
12 that was a transformative use.

13 In order to preserve the author's
14 statutory right to create derivative works, this
15 Court has held a transformative use must alter
16 the original work's expression, meaning, or
17 message. Google did not do that.

18 It concedes that every line of code it
19 copies -- copied serves the same purpose and
20 communicates the same thing. And adapting our
21 code for the supposedly new smartphone
22 environment does not change the meaning and is
23 no more transformative than adapting a short
24 story into a movie.

25 What Google did is the epitome of

1 commercial superseding use, what Campbell
2 describes as "using a work to get attention or
3 to avoid the drudgery of working up something
4 fresh."

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Breyer.

8 JUSTICE BREYER: All right. Please
9 assume with me the following: Assume that the
10 -- what you read, the computer -- computer
11 programs which do something, after all, are
12 copyrightable, but then it says methods of
13 operation are not, whether they're computer
14 programs or not.

15 The problem for us is, is this more
16 like Baker v. Selden, where they said the
17 accounting is not, it's a method of operation?
18 Or is it more like an ordinary computer program?

19 All right. Now what I got out of
20 reading through this very good briefing is,
21 look, Java's people divided the universe of
22 tasks, of which there are billions, in a certain
23 way. All the things that tell the computer to
24 do one of those things, we'll do. But that
25 which tells the computer which to do, that's the

1 declaration.

2 Here is what it's like. It's like, as
3 Judge Boudin said, the QWERTY keyboard. You
4 didn't have to have a QWERTY keyboard on
5 typewriters at the beginning, but, my God, if
6 you let somebody have a copyright on that now,
7 they would control all typewriters, which really
8 has nothing to do with copyright.

9 Or it's like switchboards on
10 old-fashioned telephone systems. You could have
11 done it in 1,000 ways. But, once you did it,
12 all those operators across the world learned
13 that system, and you don't want to give a
14 copyright holder a monopoly of -- hmm --
15 telephone systems.

16 Or it's like, to use the Chief
17 Justice's example, a chef who figures out
18 brilliant ways of mixing spices and then putting
19 the spices for this and that in a certain order
20 on a shelf, and then he writes something that
21 tells you which shelf to go to and which shelf
22 to pick out -- and which spice to pick out for
23 which dish.

24 Now all those things are somewhat
25 ordinary programs, but they also are doing

1 something. They're giving you an instruction as
2 to how to call up those programs that reflect
3 Java's organization.

4 And at this point in time, it's really
5 tough, just like the QWERTY keyboard, to go
6 backwards, and very bad consequences will flow
7 if you don't see that distinction. Okay?

8 Long question, but that's what I got
9 out of their method of operation argument. And
10 I wanted you to say what you want about that.

11 MR. ROSENKRANZ: Thank you, Your
12 Honor. So I'll -- I'll answer your several
13 questions, I think, with really two answers.

14 The first is this is not like the
15 QWERTY keyboard. There was never anything
16 expressive in QWERTY. Semi, L, K, J, H doesn't
17 mean anything to anyone. It was purely
18 mechanical. That is true of all of your
19 examples.

20 But -- but you're -- you get -- you
21 got right to the nub of it, Justice Breyer, by
22 asking about Baker. In Baker, the author,
23 Selden, published a book describing a
24 bookkeeping system. Selden tried to extend his
25 copyright in the description to block everyone

1 else from using that system.

2 His book attached some ledger forms
3 that were necessary to use the system. Baker's
4 forms were not even the same as Selden's, but
5 Selden sued for copyright infringement because
6 Baker's forms used Selden's system, which was to
7 say they just depicted debits and credits on a
8 single page, and this Court said you can't
9 monopolize lined paper.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Alito?

13 JUSTICE ALITO: Mr. Rosenkranz, can I
14 ask you about the -- the standard of review
15 question on fair use? The jury returned a
16 verdict on fair use, and Oracle moved for
17 judgment as a matter of law.

18 Why wasn't the Federal Circuit
19 required to apply the Rule 50 standard and ask
20 whether the evidence presented at trial viewed
21 in the light most favorable to Google would have
22 been sufficient as a matter of law to support
23 the jury's fair use verdict?

24 MR. ROSENKRANZ: Well, Your Honor, so
25 I'll -- I'll -- I'll first say that that is, in

1 fact, what the Federal Circuit did. The court
2 of appeals performed the "no reasonable jury
3 standard" that Google now urges.

4 The court said "no reasonable juror"
5 five times, at Petition Appendix 27 to 28, 42,
6 46, 51, and 52. Having found that Factors 1 and
7 4 strongly favored Oracle and that Google's use
8 was superseding, there was no other reasonable
9 conclusion but that Google's use was an unfair
10 use.

11 So -- so -- but then I'll circle back
12 to the first half of your question. The
13 standard of review is de novo, by which I mean
14 it respects the jury's findings of historical
15 fact but then allows the courts, as courts have
16 been doing for decades, usually on summary
17 judgment, to decide what legal conclusions to
18 draw from those facts.

19 De novo is the right standard because
20 revolve -- resolving fair use requires primarily
21 legal work. In an area of law where stability
22 is paramount and where precedents matter, as
23 this Court's fair use precedents illustrate,
24 fair use cases typically turn on disputes about
25 the legal standard.

1 JUSTICE ALITO: There are some --

2 MR. ROSENKRANZ: What it didn't --

3 JUSTICE ALITO: -- there are some
4 mixed questions of fact and law that are
5 submitted to juries, and -- and that was -- that
6 is what was done here, wasn't it, under fair
7 use, so was that an error?

8 MR. ROSENKRANZ: No, Your Honor. I --
9 I -- I think what this Court has done under fair
10 use is de novo review. Harper was a -- was a de
11 novo case. This Court said explicitly that it
12 was not sending it back to the district court to
13 resolve anything, that this Court could decide,
14 "an appellate" -- and I'll quote here, "an
15 appellate court may conclude, as a matter of
16 law, that the challenged use does not qualify as
17 fair use once it has the factual record and
18 resolves all factual -- subsidiary factual
19 questions in favor of the fact-finder."

20 Now note there were numerous disputes
21 in Harper, including how you weigh various
22 factors, questions like the value of news
23 reporting weighed against the original author's
24 derivative work rights.

25 I grant you that a lot of mixed

1 questions are more factual. But the stability
2 the judicial review provides is essential for
3 fair use because it has constitutional
4 implications.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, at the --
9 in your beginning statement, you had the sky
10 falling if we ruled in favor of Google.

11 The problem with that argument for me
12 is that it seems that since 1992, and Justice
13 Kagan mentioned the case, the Second Circuit
14 case, a Ninth Circuit case, an Eleventh Circuit
15 case, a First Circuit case, that a basic
16 principle has developed in the case law, up
17 until the Federal Circuit's decision.

18 I know there was a Third Circuit
19 decision earlier on in the 1980s. But the other
20 circuits moved away from that. They and the
21 entire computer world have not tried to
22 analogize computer codes to other methods of
23 expression because it's sui generis.

24 They've looked at its functions, and
25 they've said the API, the Application

1 Programming Interface, of which the declaring
2 code is a part, is not copyrightable.
3 Implementing codes are.

4 And on that understanding, industries
5 have built up around applications that know they
6 can -- they can copy only what's necessary to
7 run on the application, but they have to change
8 everything else. That's what Google did here.
9 That's why it took less than 1 percent of the
10 Java code.

11 So I guess that's the way the world
12 has run in every other system. Whether it's
13 Apple's desktop or Amazon's web services,
14 everybody knows that APIs are not -- declaring
15 codes are not copyrightable. Implementing codes
16 are.

17 So please explain to me why we should
18 now upend what the industry has viewed as the
19 copyrightable elements and has declared that
20 some are methods of operation and some are
21 expressions. Why should we change that
22 understanding?

23 MR. ROSENKRANZ: Well, Your Honor, I
24 -- I beg to differ with the understanding in --
25 of the lower court cases. Not a single case has

1 ever said that you can copy this vast amount of
2 code into a competing platform to use for the
3 same purpose.

4 The Third Circuit, the First Circuit,
5 the Ninth Circuit, the Tenth Circuit, they all
6 agree with that. No one draw that -- drew that
7 distinction between implementing code and
8 declaring code. You will not find a single case
9 that does this.

10 Google is just wrong that the success
11 of the software industry depends on unlicensed
12 copying. Major corporate entities were paying a
13 lot of money just to license our declaring code.
14 Google and its amici point to non-record
15 examples that involved either no copying at all,
16 licensed copying, or copying of elements that
17 were so uncreative that no one would say they
18 were protectable.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kagan.

22 JUSTICE KAGAN: Mr. Rosenkranz, as --
23 as I understand it, there are two features of
24 your declaring code that you think merit
25 copyright. And I want to make sure I'm -- I'm

1 -- I'm right on this first.

2 The -- the first feature, and this is
3 pretty basic, is that we need some way of
4 connecting a programmer's inputs, whatever they
5 happen to be, some way of connecting those
6 inputs to implementing code.

7 And then the second feature is that
8 there needs to be a way to organize those
9 inputs, those calls, into various classes and
10 packages.

11 So one is like the trigger and one is
12 the method of organization. Is that right? Is
13 that the thing that you're saying merits
14 copyright?

15 MR. ROSENKRANZ: No, Your Honor.
16 There are two things that we say merit copyright
17 protection.

18 The first is the manner in which we
19 describe each function, each -- each method.
20 That is itself creative. And it's -- each line
21 of declaring code actually teaches the user what
22 that method does, how it's used, how it relates
23 to others, and what the result will be.

24 The second piece is the overall
25 structure, sequence, and organization. Those

1 are the two things that --

2 JUSTICE KAGAN: Okay. So let's start
3 with that, the taxonomy, the structure, the
4 organization, and we can, if we have time, get
5 back to the other.

6 I'll give you an example that's
7 similar to one that the Chief Justice used, but
8 I think you won't be -- you won't be able to
9 answer in quite the same way.

10 Suppose I own a grocery store and I
11 come up with a really terrific way of organizing
12 all my fresh produce, all my fruits and
13 vegetables, into these categories and
14 sub-categories, very intuitive for the shopper.
15 And this is not the standard way. So it's
16 different from the Chief Justice's hypothetical
17 in that way. It's novel, and it's great. And a
18 rival grocery store -- all rival grocery stores
19 want to copy it.

20 Do I have a copyright claim?

21 MR. ROSENKRANZ: Your Honor, you don't
22 have a copyright claim in anything that isn't
23 set down in writing. So you're hypothesizing
24 that you've put down, let's say, in outline form
25 the way of organizing.

1 I'd say maybe. I mean, there -- there
2 would be a lot of fair use questions about that,
3 but this is worlds different from what --

4 JUSTICE KAGAN: Well, why is it worlds
5 different? I mean, it seems to me that there
6 are all kinds of methods of organization in the
7 world, you know, whether it's the QWERTY
8 keyboard or whether it's the periodic table or
9 whether it's the system of kingdoms and classes
10 and phyla and so forth that animals are
11 organized into.

12 I mean, there are 1,000 ways of
13 organizing things, which the first person who
14 developed them, you're saying, could have a
15 copyright and then prevent anybody else from
16 using them.

17 MR. ROSENKRANZ: Well, so, Your Honor,
18 two answers.

19 First, let's not forget that the
20 declaring code itself would be -- is -- is
21 enough volume to take up 600 pages in the Joint
22 Appendix. So the declaring code itself gets
23 protection.

24 But the answer is the relationships of
25 the methods, classes, and packages, it's not --

1 it's not just the most intricate hierarchy
2 you've ever seen. If you look at one package on
3 page 9, you will see it, and multiple pages of
4 the supplemental appendix. But the
5 relationships cross from one package to the
6 next, from one class to the next.

7 It is extraordinarily intricate in a
8 way that does deserve copyright protection, the
9 same way the plot of a novel --

10 JUSTICE KAGAN: Thank you,
11 Mr. Rosenkranz.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Good morning,
15 counsel. Your -- your colleagues on the other
16 side suggest that the Federal Circuit did not
17 give sufficient deference to the jury's finding
18 of fair use, and I'd like to follow up on that
19 and some of Justice Alito's questions.

20 Often, you know, fact-specific
21 questions like fair use that are multifactor
22 balancing kind of inquiries are -- are reviewed
23 for substantial evidence in the record, and that
24 is not what the Federal Circuit here did,
25 particularly when -- when the questions are kind

1 of novel and yet -- and legal rules have yet to
2 crystallize and form around them. Why -- why --
3 why should the Federal Circuit not have used
4 that traditional standard of review?

5 MR. ROSENKRANZ: Well, Your Honor, so
6 -- so my first answer is the same as the answer
7 to Justice Gorsuch. It actually did when it was
8 conducting its analysis at those page numbers
9 that I mentioned.

10 JUSTICE GORSUCH: Well, then --
11 then -- I'm sorry to interrupt, but let's just
12 suppose that's not how I read the Federal
13 Circuit's decision. Let's suppose I -- I agree
14 with you -- I think you've said elsewhere that
15 it properly reviewed it de novo.

16 Why -- why -- why shouldn't -- why
17 shouldn't we remand the case for consideration
18 of it under -- under a more deferential standard
19 of review normally applied to jury findings and
20 general verdicts?

21 MR. ROSENKRANZ: Well, Your Honor,
22 this Court certainly could if it believes that
23 that's not what the Federal Circuit did. But I
24 would say, in addition to the point that I made
25 earlier about the need for clear rules for the

1 business, I would also say in terms of
2 institutional confidence, this is a question
3 that courts have primacy.

4 I mean, the key difference between us
5 and -- and Google is that it thinks that only a
6 jury can balance the factors. Now that can't be
7 right. That would mean that even if parties
8 stipulate on all the historical facts, a court
9 cannot grant summary judgment.

10 But granting summary judgment is what
11 courts do all the time. Professor Beebe
12 identifies over four -- over 100 fair use cases
13 decided by courts on summary judgment in a
14 30-year time span. Google could find only five
15 cases that even went to a jury in a similar
16 30-year span.

17 Under Google's approach -- approach,
18 summary judgment would be nearly impossible
19 because weighing would be a fact question for
20 every jury.

21 JUSTICE GORSUCH: Thank you, counsel.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 And welcome back, Mr. Rosenkranz. I
2 just want you to follow up on two of my
3 colleagues' questions.

4 First, any more you want to say about
5 Justice Breyer's QWERTY keyboard question?

6 And, second, Justice Sotomayor's
7 question about settled expectations? And -- and
8 I would add the 83 computer scientists' concern
9 about threatening significant disruption. If
10 you could just follow up on those two, and I
11 have no further questions after that.

12 MR. ROSENKRANZ: Thank you, Justice
13 Kavanaugh. Yes, I -- let me just finish the
14 answer on Baker. I was saying that this case
15 would be like Baker if we were trying to block
16 others from using their own package, class,
17 method, structure, to organize their own pre-
18 written programs.

19 But Sun wrote its own specific layout
20 and filled in the blanks 30,000 times over. We
21 seek to protect only that fully realized
22 expression. And others are free to write and
23 organize their own pre-written programs however
24 they see fit, as long as they don't copy ours.

25 And to answer the second half about

1 settled expectations -- and we've heard dire
2 predictions from Google about the future of
3 software innovation, but two different
4 administrations would not be supporting us if
5 our position were a threat to innovation.

6 The software industry rose to world
7 dominance since the 1980s because of copyright
8 protection, not unlicensed copying. And as --
9 as -- as you pointed out earlier, Justice
10 Kavanaugh, the -- the sky hasn't fallen in six
11 years since the court of appeals' first decision
12 have brought new bursts of innovation and
13 interoperability. In that time frame, we've
14 seen the explosion of interoperability, cloud
15 computing, 5G, machine -- machine learning, and
16 autonomous vehicles.

17 I can tell you two things that will
18 kill software innovation. The first is change
19 the rules under which the industry has thrived
20 for 40 years and substitute a rule that what is
21 fair to copy is what every jury decides as a
22 matter of public policy. And the second is take
23 away the incentive to write original code.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. You want to take a minute to wrap up?

1 MR. ROSENKRANZ: Yes, Mr. Chief
2 Justice. Thank you.

3 Let me -- let me just say -- say two
4 things. The first is that ruling for Google
5 will decimate the incentive to create
6 high-quality user-facing declaring code, close
7 the code that the amici on both sides insist is
8 essential for the industry to survive.

9 That will hurt app developers and the
10 industry in the long run, because who will
11 invest the excruciating time it takes to refine
12 code from the passable to the masterful if all
13 of it can be stolen? Big companies are paying
14 lots of money right now to license declaring
15 code. No, Justice Sotomayor, it is simply not
16 true that they're all paying for nothing because
17 it's all unprotected.

18 The whole market, that whole market,
19 will be gone with the stroke of a pen. Congress
20 passed the Copyright Act to further the
21 long-term incentive to create, not short-term
22 expedience to copy.

23 Ruling for Google will also
24 destabilize copyright law. Our rule protects
25 original code. It's a simple rule. It comports

1 with traditional copyright principles.

2 Google's rule that code can be copied
3 whenever necessary for a user to bring about a
4 result is poorly defined and will doom courts
5 and the industry to decades of uncertainty.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. ROSENKRANZ: For this reason, this
9 Court should affirm.

10 CHIEF JUSTICE ROBERTS: Mr. Stewart.

11 ORAL ARGUMENT OF MALCOLM L. STEWART
12 FOR THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING THE RESPONDENT

14 MR. STEWART: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 In the mid 1970s, Congress established
17 a national commission to study problems related
18 to copyright law and computer code. And in
19 1978, the Commission issued its report which is
20 known as the CONTU report. It recommended that
21 computer code continue to be eligible for
22 copyright protection.

23 And the central justification it gave
24 was that computer code is much more expensive to
25 draft than it is to copy. And, consequently, if

1 potential authors of computer code knew that
2 their works could be freely copied, there would
3 be a pronounced disincentive to creation.

4 And, of course, it's the creation --
5 it's the preservation of those economic
6 incentives to create that is the core
7 justification for having copyright protection in
8 the first place.

9 Here, Google's core argument is that
10 once the app developers have -- have learned the
11 calls, it would be inefficient to make them
12 learn new calls in order to invoke new
13 declarations.

14 But, in a wide variety of
15 circumstances, once a work has been created, if
16 you focus exclusively on that work, it will
17 often seem more efficient to allow
18 indiscriminate copying. The part of the
19 analysis --

20 CHIEF JUSTICE ROBERTS: Thank you.
21 Mr. -- Mr. Stewart, you represent the United
22 States, of course, and we're told that if we
23 agree with Oracle, we'll ruin the tech industry
24 in the United States.

25 Why -- why is that not true, if we --

1 why is that not true --

2 MR. STEWART: I'd say it's three --

3 CHIEF JUSTICE ROBERTS: -- if you
4 think it is.

5 MR. STEWART: I'd give three or four
6 reasons. The first has been explored already
7 that the Federal Circuit issued its
8 copyrightability opinion in 2014 and we haven't
9 seen deleterious effects from that.

10 The -- the second is that the briefs
11 talk about the practice of copying interfaces or
12 APIs, but those terms are very vague and
13 potentially expansive. And a -- a lot of things
14 that might be called interfaces would be
15 segments of code that are so short that they --
16 they don't exhibit necessary creativity,
17 segments of code that are necessary to preserve
18 interoperability.

19 It may be that in particular
20 circumstances, particular interfaces can be
21 copied without authorization, but that's not a
22 basis for a general rule.

23 And the third thing is there's a
24 prevalent practice of licensed copying of
25 declarations. And often that is done through

1 what is called open source licensing. One way
2 it can be done is that the copyright holder can
3 simply announce to the world: You are free to
4 copy this code as long as you comply with the
5 following conditions, a common --

6 CHIEF JUSTICE ROBERTS: Thank -- thank
7 you, Mr. Stewart.

8 Justice Thomas.

9 JUSTICE THOMAS: Thank you, Chief
10 Justice.

11 Mr. Stewart, a couple of quick
12 questions. One, do you think the Federal
13 Circuit applied the proper review standard?

14 MR. STEWART: We do. And we agree
15 that the Rule 50 standard applies, could any
16 reasonable jury have reached this verdict, but,
17 in litigation, it's -- it's obviously very
18 common that there can be disputed questions both
19 of fact and of law.

20 And even when the questions of law are
21 close and reasonable, judges could disagree, the
22 district court is supposed to say what is the
23 right answer to those legal questions.

24 And so, when we ask could a reasonable
25 jury have found use here, fair use here, we

1 should be asking, could a reasonable jury
2 applying an accurate version of the law have
3 found fair use?

4 And so we assume that the jury made
5 the factual findings that are most favorable to
6 Google, but then we ask: What is the right
7 answer? Was this transformative? And I think
8 that's the way that the Federal Circuit did it.

9 The Federal Circuit said: We'll
10 assume the version of the facts that is most in
11 Google's favor, but then we will determine as a
12 matter of law whether this is transformative.

13 And that's the way that the Court did
14 it in Harper & Row. That was a bench trial.
15 But there's no reason that a lay jury's
16 resolution of questions like was this use
17 transformative or how do we balance the relevant
18 factors should be given greater weight than the
19 view of a district court with respect to the
20 same questions.

21 JUSTICE THOMAS: The -- one final
22 question. The -- Congress's -- in the fair use
23 analysis, Congress has provided four factors.
24 And we've said that those were non-exhaustive.

25 Can you think of anything else that

1 should be added to -- in that analysis?

2 MR. STEWART: I -- I -- I can't think
3 of any -- anything else. There -- there may be
4 other factors in particular cases. The -- the
5 only thing I would emphasize is that in deciding
6 questions of fair use, the Court shouldn't just
7 be asking how would consumers potentially
8 benefit from widespread copying with respect to
9 this particular work.

10 The Court should also be asking: What
11 incentives to future innovation would a rule of
12 a particular sort create?

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer.

16 JUSTICE BREYER: I'm curious as to why
17 the government thinks the balance of harms lies
18 the way you do. I do think of the QWERTY
19 keyboard. The QWERTY, the keyboard, calls up
20 the metal rods that make an impression on a
21 piece of paper and then that's how you write
22 words.

23 This system calls up a system of
24 dividing the world into a variety of tasks which
25 then will be done.

1 Now nothing in copyright is meant to
2 give the owner of the QWERTY, whoever thought of
3 that beginning, QWERTY, a copy -- a monopoly of
4 typewriting.

5 And nothing here, they say, if, in
6 fact, you give them a monopoly of this, the
7 millions of people who have learned this, as
8 Justice Sotomayor says, will have to spend vast
9 amounts of money when we get all kinds of new
10 methods for using computers turning on heaters,
11 stoves, et cetera, and a million others.

12 And teaching them is unbelievable. It
13 will give the owner of the declaration monopoly
14 power over all those uses.

15 Now that, I think, is roughly what
16 they're arguing. Why does the government reject
17 that?

18 MR. STEWART: Well, I think there are
19 all sorts of things like -- like the QWERTY
20 keyboard that have become standard but that
21 wouldn't have been eligible for copyright
22 protection in the first instance because, for
23 instance, they're not sufficiently creative.

24 Here, Google has conceded that the --
25 the large volume of individual declarations and

1 the intricate method of organization that's
2 reflected in the SSO are sufficiently creative
3 to qualify for copyright protection in the first
4 place.

5 The -- the second thing is, when we
6 talk about the people who will have to learn new
7 calls in order to invoke the declarations, we're
8 -- we're not talking about consumers. We're not
9 talking about the people who actually use the
10 smartphones.

11 We're talking about app developers.
12 And these are economic actors. Their interests
13 happen to align with Google's because, if they
14 can create popular apps, then the app developers
15 will gain money and Google will gain advertising
16 revenue because the Android platform will become
17 more popular.

18 But if Google --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Alito.

22 JUSTICE ALITO: Well, my question for
23 the government is essentially the one the Chief
24 Justice asked, and there's been some elaboration
25 on it.

1 And, obviously, there's this argument
2 that the sky is going to fall if we do not rule
3 for Google, so unless you have -- do you have
4 anything you want to add on that -- on that
5 point?

6 MR. STEWART: The only thing I would
7 flesh out a little bit was the last point that I
8 had gotten to towards the end, which is that
9 there is this phenomenon of licensed copying.
10 And sometimes, often, the license terms don't
11 include the payment of money. They simply
12 include a requirement like whatever improvements
13 to the code you make have to be given back to
14 the -- the programming community, have to be
15 made known to other potential programmers.

16 But the copyright holders' authority
17 to impose and enforce those licenses obviously
18 depends upon the proposition that the code is
19 copyrightable to begin with. And so those
20 licenses would be a pointless gesture otherwise.

21 And the very fact that those licenses
22 are offered with such frequency I think tends to
23 dispel the idea that there is a common
24 understanding in the relevant community that
25 this material is not copyrightable at all.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Counsel, could you
5 tell me why you think that Google's work was not
6 transformative? It moved Java's platform from a
7 PC, essentially, to mobile phones.

8 Why wasn't that a transformative step?
9 I mean, the -- the answer is that all -- that
10 all fair use involves copying. So, to do fair
11 use, you have to copy something and create
12 something new from it.

13 So why wasn't that a giant step of
14 fair use?

15 MR. STEWART: I guess I'd say three or
16 four -- four things as to why this wasn't
17 transformative.

18 The first is, when Google explains why
19 it copied these particular declarations and not
20 others within the Java platform, the explanation
21 that it gives is -- is these are the
22 declarations, these are the functionalities that
23 will carry over to a smartphone platform. These
24 are the declarations that will be useful in the
25 new technological environment. So even though a

1 lot of the code that Oracle had written might
2 not be useful, this -- this code is.

3 The second is, when they talk about --
4 JUSTICE SOTOMAYOR: That's the only
5 way to make -- I mean, what they copied in terms
6 of the declaring code was only that that would
7 function in the new environment, that needed to
8 function in the new environment.

9 MR. STEWART: It's not the only way
10 they could do it that would make it function in
11 the new environment. It's the -- they're very
12 careful about this. It's the only way that
13 would do it that would allow the developers, the
14 app developers, to use the preexisting calls in
15 order to call up the established methods.

16 The second thing I would say about
17 transformativeness is that whole argument about
18 allowing app developers to use their knowledge,
19 the only way it works is that app developers can
20 have confidence that when they use a call with
21 which they are familiar, it will trigger the
22 same functionality that it has triggered on the
23 Java platform. And so it's not transformative
24 in that sense. The code is performing exactly
25 the same function that it performed on Java.

1 The third thing I would say is, if you
2 imagine a motion picture that has only been
3 released in theaters and somebody gets the print
4 and offers to live stream it over the Internet.
5 It's the same content that has been -- being --
6 simply being used on a different platform. No
7 one would think of that as transformative.

8 Similarly --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Kagan.

12 JUSTICE KAGAN: Mr. Stewart, suppose
13 that I come up with a new and very useful
14 keyboard, you know, not QWERTY, but something
15 better than QWERTY, and it's so useful that
16 everybody starts using it.

17 Now let's assume, for the purposes of
18 my question, that this is copyrightable, which
19 it might be or it might not be. But let's
20 assume it is and -- and go to the fair use
21 question. When -- when a -- a -- a -- a cell
22 phone, a smartphone manufacturer takes that
23 layout, takes that keyboard, and uses it for its
24 next phone, is that fair use and why or why not?

25 MR. STEWART: Well, the fair use

1 analysis would depend upon a lot of factors,
2 but, yes, I think, in fair use analysis, you
3 could take into account kind of developing
4 expectations, concerns about interoperability.
5 We don't -- we're assuming, for -- for these
6 purposes, as -- as you asked, that this is
7 copyrightable, and so that would be a factor to
8 consider in fair use analysis.

9 We -- we don't have a quarrel, for
10 instance, with the proposition that preserving
11 interoperability can be a favored purpose for
12 fair use analysis. It's just that they're --

13 JUSTICE KAGAN: So why -- why is it
14 any -- any different here; in other words, that
15 Google took Java's interface so the programmers
16 wouldn't have to learn a whole new system for
17 coding, just as the cell -- the cell phone
18 manufacturer took my keyboard so that people
19 could rely on something familiar?

20 MR. STEWART: One of the differences
21 is that the app developers are in a
22 fundamentally different position from the -- the
23 consumers, the smartphone users. And if Google
24 had tasked its own employees with creating new
25 apps so that the Google platform -- that the

1 Android platform would become more popular to
2 consumers, nobody would think that the desire to
3 make it easier on those employees by not
4 requiring them to learn new calls would be the
5 basis for finding fair use. As -- as the Court
6 said in Campbell, that was the paradigmatic
7 example of copying in order to avoid the
8 drudgery of working up something new.

9 And the analysis shouldn't be
10 different simply because the app developers are
11 independent economic actors whose interests
12 happen to align with Google's rather than Google
13 employees. Those -- those people are a defined
14 --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Gorsuch.

18 JUSTICE GORSUCH: Mr. Stewart, the
19 government concedes that this work is
20 copyrightable but then says the fair use
21 analysis has to -- to permit the -- the copying
22 here.

23 And I wonder whether it -- it -- it
24 gives with one hand and takes away with another.
25 The -- the fair use analysis or four

1 incommensurable factors that need to be weighed,
2 why could no reasonable jury have concluded that
3 it was fair use here? Aren't you essentially
4 saying that, yes, code, is copyrightable, but,
5 really, it -- it -- it's always subject to fair
6 use?

7 MR. STEWART: I mean, we're certainly
8 saying it's subject to fair use analysis, but
9 we've argued in our brief that the use here was
10 not fair.

11 And the reason we think that the --
12 the error we think the district court made, or
13 at least the primary error, was that it treated
14 as a factual question what it should have
15 treated as a subsidiary legal judgment; that is,
16 on the question of transformativeness, Google
17 argued this is transformative because it's being
18 used in a new platform. Oracle argued it's the
19 same code being used for the same purposes.
20 It's not transformative.

21 The district court didn't decide which
22 of those views was right. It simply said a
23 reasonable jury could have sided with Google.

24 That -- that would be fine if this had
25 been a factual determination, but the question

1 is that sufficient to make for a transformative
2 use is fundamentally a legal question. The
3 court of appeals appropriately reviewed that
4 determination de novo and found -- and correctly
5 found that it was not transformative.

6 JUSTICE GORSUCH: If we disagree with
7 you on -- on the standard of review that should
8 apply here, what should we do?

9 MR. STEWART: I -- I think, if you
10 disagreed and you thought that questions about
11 is this transformative or not, given a stable
12 body of facts, if you think that is a question
13 as to which the view of a reasonable jury should
14 be deferred to, then a remand probably is the --
15 the appropriate course.

16 I'd point out that is not only going
17 to affect jury trial practice; it's going to
18 affect summary judgment practice because a lot
19 of fair use questions are decided on summary
20 judgment. That -- that won't be possible any
21 longer if issues like does putting it on a new
22 platform make for transformativeness are
23 regarded as jury questions.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Kavanaugh.

2 JUSTICE KAVANAUGH: Thank you, Chief
3 Justice.

4 Good morning, Mr. Stewart. One
5 question on merger doctrine and one question on
6 method of operation.

7 First, Google says in its reply brief
8 that the dispositive undisputed fact in this
9 case is that the declarations could not be
10 written in any other way and still properly
11 respond to the calls used by Java programmers.

12 Are they wrong in saying that?

13 MR. STEWART: I don't think that they
14 are wrong in saying that, but that argument is
15 circular; that is, they are invoking the correct
16 proposition that merger applies if there's only
17 a way of getting the computer to perform a
18 particular function. But they are defining the
19 function as invoking the implementing code in
20 response to calls that are known to developers.

21 And that's wrong for two or three
22 reasons. The first is Section 302(a) says
23 copyright protection subsists from the work's
24 creation. And at the time that the work was
25 created, there were no calls known to

1 developers. The argument wouldn't have flown as
2 a justification for copying at that time.

3 The second is, as the Chief Justice
4 pointed out in -- in an earlier part of the
5 argument, that would effectively penalize Oracle
6 for its marketplace success. The fact that the
7 calls were well known was simply a function of
8 the fact that the Java platform was popular and
9 a lot of people had written a lot of apps for
10 it.

11 JUSTICE KAVANAUGH: And the method of
12 operation, Google says that the declarations are
13 a method of operation because they are for the
14 developers to use, while the implementing code
15 instructs the computer.

16 Your response to that?

17 MR. STEWART: I think the -- the CONTU
18 report -- the term "method of operation" comes
19 from Baker versus Selden, and what the Court
20 said in Baker versus Selden -- and it was a long
21 list of examples of, if you write a book about
22 how to do a useful task, you can get a copyright
23 on the book but no exclusive rights in the
24 performance of a task. And the Court said a
25 mathematician who propounded -- who -- who wrote

1 a treatise couldn't get an exclusive right to
2 his methods of operation.

3 The CONTU report discussed the way in
4 which Section 102(b) would apply to computer
5 code. And I think the -- the -- the clearest
6 expression was on page 21 of the CONTU report,
7 where it said one is always free to make the
8 machine do the same thing as it would have if it
9 had the copyright work -- copyrighted work
10 placed in it but only by one --

11 CHIEF JUSTICE ROBERTS: Mr. Stewart,
12 if you'd like to take a minute to wrap up.

13 MR. STEWART: Thank you, Mr. Chief
14 Justice.

15 I think that the fundamental line that
16 should be drawn for purposes of merger analysis,
17 for purposes of 102(b), is, if a particular line
18 of code is, without regard to the -- the
19 acquired expertise of other actors, the only way
20 to make the computer perform a particular
21 function, then the code is not copyrightable.

22 Here, it's really undisputed that
23 Google could have written new declarations and
24 they could have been used to invoke the relevant
25 methods so long as the developers were -- were

1 willing to -- to learn new calls.

2 And that is a -- analyzing the case
3 that way gives appropriate weight to the
4 copyright policy of creating adequate incentives
5 for the creation of new works of author --
6 authorship.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 Mr. Goldstein, to even out the time a
10 little bit here, I think we'll go through
11 another round of questioning for you if that's
12 all right.

13 MR. GOLDSTEIN: Thank you, Mr. Chief
14 Justice.

15 CHIEF JUSTICE ROBERTS: Okay. I guess
16 I'll -- I'll start.

17 I wonder if you had any further
18 response to Mr. Stewart's representation about
19 the effects of the case on the technology market
20 if we rule in favor of Oracle.

21 MR. GOLDSTEIN: Yes, Mr. Chief
22 Justice. I don't think that Mr. Stewart is
23 accurately reflecting how the industry operates.
24 You have briefs from the country's leading
25 computer scientists and the software industry

1 that say that the non-licensed re-implementation
2 of interfaces is widespread. That's the concern
3 about decimating how the industry operates.

4 But I would pay very close attention
5 to the wisdom of what he says, when he says
6 categorical rules in this area are bad in
7 response to, example, your question about how
8 would this play out with other kinds of
9 interfaces, and Justice Kagan's restaurant
10 hypothetical, he says there are lots of factors
11 involved.

12 That's why deferring to the jury's
13 fair use verdict, which is extremely fact-bound
14 about the record in this case, is a perfectly
15 appropriate and sensible way to resolve the
16 case.

17 CHIEF JUSTICE ROBERTS: I wonder if
18 you wanted to take a bit more time to respond
19 further to my question about why your merger
20 argument doesn't make Sun and Oracle a -- a
21 victim of its -- of its own success.

22 The -- the -- Mr. Rosenkranz mentioned
23 that several tech companies did, in fact, find a
24 way to develop their programs without relying on
25 the Java coding. So why shouldn't we impose

1 that -- that same obligation on Oracle?

2 MR. GOLDSTEIN: Well, that wouldn't,
3 of course, resolve whether we had the fair use
4 right to reuse the code. But, in any event, I
5 think that's an optical illusion.

6 The computer scientists' brief at page
7 18, the Microsoft brief at 14, explain that both
8 Apple and Microsoft, Oracle's examples, did
9 re-implement prior interfaces. The reason that
10 they didn't use these interfaces is they were
11 using a different language, as if they were
12 writing in French rather than English.

13 We are not -- Oracle does not get to
14 claim as -- the exclusive right to a highly
15 functional computer program without a patent.
16 It gets to claim the words on the page. And if
17 those are the only words on the page that will
18 produce this result in the computer, they don't
19 get that exclusive copyright.

20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas, do you have further questions?

22 JUSTICE THOMAS: I have no further
23 questions, Chief Justice.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer?

1 JUSTICE BREYER: I -- I've heard from
2 the other side that, yes, that may be true, but
3 this result is simply calling up a set of
4 programs that were written by Java. And maybe
5 at the beginning you could have done this in
6 different ways with different divisions of tasks
7 in a world with different call-up numbers. And
8 there weren't people trained at that time. And
9 copyright, you just heard quoted, runs from the
10 beginning.

11 What do you do about that?

12 MR. GOLDSTEIN: Well, fair use
13 certainly runs from the end.

14 JUSTICE BREYER: I'm not talking about
15 fair use. I'm talking about --

16 MR. GOLDSTEIN: Okay.

17 JUSTICE BREYER: -- your merger
18 argument and let's say the -- the method of
19 operation argument.

20 MR. GOLDSTEIN: Sure. So there's the
21 difference between the fact that they have a
22 copyrighted work, which ran from the point of
23 publication, from whether merger applies. This
24 is Baker versus Selden.

25 Selden, when he published his book of

1 dual column accounting, on that day, he was the
2 person who had created that. But the Court
3 said, what about a later user that wants to use
4 this system? Can they do it without part of the
5 work? This Court said no, and that meant that
6 there's no copyright protection within the
7 copyrighted work for that particular piece of
8 expression.

9 JUSTICE BREYER: All right. Thank
10 you.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: No further questions.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: Mr. Goldstein, is
16 this your answer to Mr. Malcolm's transformative
17 use argument, and what's your best argument on
18 fair use?

19 MR. GOLDSTEIN: Our answer with
20 respect to transformative use is it cannot be
21 that transformative use only exists when
22 computer code does something different.
23 Computer code only does one thing. There is no
24 parity of computer code.

25 That would mean ironically that this

1 highly and functional expression is less
2 susceptible of fair use than a highly creative
3 novel. That cannot be right.

4 And, in any event, even if -- if the
5 jury was entitled to conclude based on the
6 record evidence that this was an entirely new
7 context, the Java SE was not useable in this
8 particular -- in a smartphone, with respect to
9 fair use more broadly, our best argument is
10 about the standard of review.

11 Under Rule 39(c), this mixed question
12 of fact and law was put to the jury at Oracle's
13 insistence. The question is, could the jury
14 have balanced these factors? I know that the
15 other side is concerned about providing legal
16 guidance. That's why we have jury instructions.

17 But the Court in Georgia versus
18 Public.Resource and in other cases has made
19 quite clear this is incredibly fact-bound. It
20 will depend on the circumstances. And Mr.
21 Stewart has only reinforced that point.

22 In that context, you cannot say that
23 the jury couldn't reasonably find that this
24 massive creativity with a million applications
25 and a new -- entirely new way of computing on

1 the smartphone is not fair use.

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: I -- I'm wondering,
6 Mr. Goldstein, whether the first part of the
7 answer that you gave to Justice Sotomayor,
8 whether that suggests that transformative use
9 isn't the right question here, although it is in
10 other contexts.

11 I mean, as -- as -- as I understand
12 it, you're using this for the exact same
13 purpose. It's just that the purpose, to make
14 sure that users are dealing with a familiar
15 interface, is one that should favor fair use.

16 So is that right? Is the
17 transformative use question really a mismatch in
18 this context?

19 MR. GOLDSTEIN: As articulated by
20 Oracle, it is. Call it what you will. The
21 statute doesn't say transformative. It asks
22 about the nature of the use.

23 What we're doing here is using an
24 interface, which is connective tissue between
25 computer programs. It is at the most barely

1 creative. Even the Federal Circuit acknowledged
2 that's the only inference that's possible from
3 the jury verdict.

4 And then you ask: Well, what comes of
5 it? What is the nature of this use? Are we
6 using on a desktop computer anymore? No, we're
7 using it in an entirely different environment.

8 And there was extensive evidence
9 before the jury. The nature of the use here is
10 quite significantly different from the original
11 use. I think that's the statutory question.

12 And, of course, the jury's question
13 was, balancing that and all the other factors,
14 is it fair use?

15 JUSTICE KAGAN: Thank you, Mr.
16 Goldstein.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.

19 JUSTICE GORSUCH: Briefly, just to
20 follow up on -- on that, Justice Sotomayor's
21 question.

22 Mr. Stewart argued that if -- if we
23 were to uphold the jury verdict or send it back
24 on fair use, that we would be negatively
25 impacting summary judgment practice and that

1 most district courts take these questions up as
2 a matter of law in summary judgment.

3 MR. GOLDSTEIN: Yes, this is the exact
4 argument that was made and rejected in the
5 Court's Hana Financial decision, and that is,
6 sure, some issues are decided very frequently on
7 summary judgment, but that doesn't deem that
8 there aren't other incredibly highly contested
9 facts -- cases that arise in new environments,
10 as I believe you pointed out earlier.

11 This is that kind of case. It went to
12 the jury under Rule 39(c). Oracle didn't move
13 for summary judgment in this case.

14 When you have such a case, the fact
15 that others are resolved on summary judgment,
16 isn't a license to just throw out the actual
17 standard of review that applies. Courts have
18 had no problem reaching summary judgment where
19 it's appropriate because, generally, there, you
20 don't have anything like a factual fight, did
21 Android supplant Java SE in the marketplace?
22 How is it that they were technically different?

23 Classical fair use cases are things
24 like parities or news reporting in which we have
25 established legal rules. Mr. Stewart is

1 cautioning you against writing an opinion that
2 articulates categorical rules, and I don't
3 understand how he wants to do that and adopt a
4 categorical rule against the reuse here.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh.

8 JUSTICE KAVANAUGH: Thank you.

9 Mr. Stewart responded to my question
10 quoting page 7 of your reply brief about the
11 merger doctrine, and I wanted to see if you had
12 anything further you wanted to add on the merger
13 doctrine to help us understand that.

14 MR. GOLDSTEIN: Sure. So Mr.
15 Stewart's answer is effectively we are -- we are
16 asking the wrong question. He agrees with the
17 district court's factual findings that the only
18 way to respond to these developers' calls is
19 with these instructions.

20 That's a very important point. His
21 point is: Well, so what? The developers can
22 write other calls. That is a way of saying that
23 we can use a different method of operation.

24 It also is nonsensical as a matter of
25 copyright law. Why would Congress want a rule

1 that says: Okay, these developers are extremely
2 familiar with these commands. They're used to
3 write creative computer programs. Let's just
4 make it as inefficient as possible for them.

5 That's not trying to create a fan base
6 for Oracle. It's trying to create a set of
7 prisoners. They want to lock the developers
8 only into using Java SE. That is not a right
9 that you can get from copyright or that Congress
10 would want to confer.

11 JUSTICE KAVANAUGH: All right. Thank
12 you, Mr. Goldstein.

13 CHIEF JUSTICE ROBERTS: Mr. Goldstein,
14 you've got three minutes left, if you want to
15 shift to rebuttal.

16 REBUTTAL ARGUMENT OF THOMAS C.

17 GOLDSTEIN ON BEHALF OF THE PETITIONER

18 MR. GOLDSTEIN: Thank you, Mr. Chief
19 Justice.

20 I do want to focus on the question of
21 fair use and the fair use jury verdict, because
22 I do think that Mr. Stewart's argument that
23 categorical rules are inappropriate, his point
24 that different kinds of interfaces might call
25 for different kinds of results, as might

1 different kinds of uses, is the exact reason why
2 the Rule 50 standard should be applied with such
3 vigor here, because the jury heard testimony on
4 a variety of points that Mr. Rosenkranz is just
5 attempting to deny and assert the opposite as a
6 factual matter.

7 I don't think there is actual debate
8 about the expectations of the industry. And
9 they have nothing to do with licensed reuse of
10 interfaces. The -- there's a widespread
11 consensus in the industry and among computer
12 scientists that this has been the practice.

13 So what do you do if you are asked to
14 adopt a categorical rule that all those people
15 say will upend the industry's expectations and
16 how it's operated? I think what you realize is
17 that, of course, the jury's fair use verdict was
18 reasonable here. It is ultimately, in fair use,
19 an inquiry, would this be a reasonable
20 application of copyright or would it, on net,
21 reduce expression?

22 Here, you have minimally creative
23 declarations and they are being invoked to block
24 the publication of millions of programs on an
25 innovative smartphone platform.

1 Now I do think that there was no
2 traction to Mr. Rosenkranz and Mr. Stewart's
3 argument that the Federal Circuit had correctly
4 applied the right standard of review when, at
5 page 24a of the petition appendix, they say the
6 ultimate question of fair use will be decided
7 fair -- de novo, at page 53a, they say, well,
8 they will decide it as a matter of law, and the
9 same at page 54a.

10 The Federal Circuit made the point
11 they deemed the jury verdict advisory and said,
12 well, we'll take it from here. That is not
13 appropriate. Under Rule 39(c), Oracle made the
14 choice to litigate this case in a particular
15 way. It is impossible to unpack the supposed
16 factual findings that they are relying on.

17 And I just want to point out how many
18 times Mr. Rosenkranz is contradicting the jury
19 evidence. The evidence at trial, for example,
20 JA 56, is the former CEO of Oracle saying that
21 the APIs were never licensed or sold separately
22 from the language, in contrast to his just base
23 assertion that IBM was paying for it.

24 Mr. Rosenkranz says that Android
25 supplanted and superseded Java SE, page JA 255.

1 The market harm expert says expressly Android
2 has not superseded Java SE. They say that the
3 declarations were so important to developers
4 using Oracle's product, but, at JA 125, again,
5 the former CEO says the strategy, which has been
6 the strategy long before I joined Sun, was that
7 we agree on the APIs, these declarations, we
8 share them, and then we compete on
9 implementation.

10 The evidence at the trial is certainly
11 sufficient, easily, to reasonably conclude that
12 there was fair use.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Goldstein.

16 Mr. Rosenkranz, Mr. Stewart, thank
17 you.

18 The case is submitted.

19 (Whereupon, at 11:36 a.m., the case
20 was submitted.)

21

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23

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