

No. 18-956

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IN THE  
**Supreme Court of the United States**

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GOOGLE LLC,

*Petitioner,*

v.

ORACLE AMERICA, INC.,

*Respondent.*

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

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**BRIEF OF *AMICUS CURIAE* AMERICAN IN-  
TELLECTUAL PROPERTY LAW ASSOCIATION  
IN SUPPORT OF NEITHER PARTY**

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## TABLE OF CONTENTS

Interest of <i>Amicus Curiae</i> .....	1
Summary of the Argument .....	2
Argument .....	5
I. Software Interface Code Contains Protectable Expression .....	5
A. Software Is Expressly Copyrightable Under Section 102(a) .....	6
B. Courts Must Carefully Scrutinize Whether Software Contains a Non- Copyrightable “Method of Operation” or Other Section 102(b) Exclusion.....	13
II. A Proper Fair Use Analysis Is Critical to Preserving the Constitutional Purpose of Copyright.....	18
A. The Four Non-Exclusive Factors of Section 107 Must Be Weighed Together in Light of the Facts of Each Case, with No One Factor Receiving Greater or Lesser Weight in All Cases.....	21
B. A Jury’s Determination of Fair Use Should Be Afforded Deference .....	25
Conclusion.....	28

## TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alice Corp. v. CLS Bank Int’l</i> , 573 U.S. 208 (2014).....	12
<i>Am. Geophysical Union v. Texaco Inc.</i> , 60 F.3d 913 (2d Cir. 1994) .....	23, 24
<i>Apple Computer, Inc. v. Formula Int’l</i> , <i>Inc.</i> , 562 F. Supp. 775 (C.D. Cal. 1983).....	10
<i>Apple Computer, Inc. v. Franklin</i> <i>Computer Corp.</i> , 714 F.2d 1240 (3d Cir. 1983) .....	10, 17
<i>Atari Games Corp. v. Nintendo of Am.</i> , <i>Inc.</i> , 975 F.2d 832 (Fed. Cir. 1992) .....	11
<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	10, 14
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	<i>passim</i>
<i>Castle Rock Entm’t, Inc. v. Carol Publ’g</i> <i>Grp., Inc.</i> , 150 F.3d 132 (2d Cir. 1998) .....	24
<i>Computer Assocs. Int’l, Inc. v. Altai</i> , <i>Inc.</i> , 982 F.2d 693 (2d Cir. 1992) .....	9

## TABLE OF AUTHORITIES—Continued

	Page
<i>Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.</i> , 109 F.3d 1394 (9th Cir. 1997).....	5, 24
<i>Emerson v. Davies</i> , 8 F. Cas. 615 (C.C.D. Mass. 1845).....	26
<i>Engineering Dynamics, Inc. v. Structural Software, Inc.</i> , 26 F.3d 1335 (5th Cir. 1994), <i>modified</i> , 46 F.3d 408 (5th Cir. 1995).....	10, 11
<i>Folsom v. Marsh</i> , 9 F. Cas. 342 (C.C.D. Mass. 1841).....	18, 19
<i>Fox News Network, LLC v. TVEyes, Inc.</i> , 883 F.3d 169 (2d Cir. 2018) .....	24
<i>Harper &amp; Row Pubs., Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	18, 21, 22, 23, 24, 27, 28
<i>Jurgens v. McKasy</i> , 927 F.2d 1552 (Fed. Cir. 1991) .....	26, 27
<i>Little v. Valley Nat’l Bank</i> , 650 F.2d 218 (9th Cir. 1981).....	26, 27
<i>Lotus Dev. Corp. v. Borland Int’l, Inc.</i> , 49 F.3d 807 (1st Cir. 1995), <i>aff’d by an equally divided Court</i> , 516 U.S. 233 (1996) .....	3, 15, 16

## TABLE OF AUTHORITIES—Continued

	Page
<i>Mattel Inc. v. Walking Mountain Prods.</i> , 353 F.3d 792 (9th Cir. 2003).....	24
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954).....	10
<i>Oracle Am., Inc. v. Google LLC</i> , 886 F.3d 1179 (Fed. Cir. 2018).....	<i>passim</i>
<i>Perkin-Elmer Corp. v. Computervision Corp.</i> , 732 F.2d 888 (Fed. Cir. 1984).....	26
<i>Princeton Univ. Press v. Mich. Document Servs., Inc.</i> , 99 F.3d 1381 (6th Cir. 1996) (en banc) .....	4, 23
<i>Sega Enters. Ltd. v. Accolade, Inc.</i> , 977 F.2d 1510 (9th Cir. 1992).....	9, 25
<i>Sony Comput. Entm't, Inc. v. Connectix Corp.</i> , 203 F.3d 596 (9th Cir. 2000).....	25
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	4, 23, 24, 25, 27
<i>Stewart v. Abend</i> , 495 U.S. 207 (1990).....	18
<i>Synercom Tech., Inc. v. Univ. Computing Co.</i> , 462 F. Supp. 1003 (N.D. Tex. 1978) .....	17

## TABLE OF AUTHORITIES—Continued

	Page
<i>U.S. Bank Nat’l Ass’n v. The Vill. at Lakeridge, LLC</i> , 138 S. Ct. 960 (2018).....	26, 27
 STATUTES AND CONSTITUTIONAL PROVISION	
U.S. Const., Art. I, § 8, cl. 8 .....	18
17 U.S.C. § 102(a).....	2, 6, 7, 13, 28
17 U.S.C. §102(b).....	2, 6, 7, 10, 13, 14, 15, 17, 28
17 U.S.C. § 107 .....	4, 19, 20, 21, 25, 27
Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015 (1980).....	9
Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).....	6, 7, 8, 14, 19
 LEGISLATIVE HISTORY	
H.R. Rep. No. 94-1476 (1976) .....	7, 8, 14, 19, 22
Nat’l Comm’n on New Tech. Uses of Copyrighted Works, Final Report (1978).....	8, 9, 10, 14, 17
S. Rep. No. 94-473 (1975).....	14, 19, 22
Staff of H. Comm. on the Judiciary, 89th Cong., Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments (Comm. Print 1965).....	13

## TABLE OF AUTHORITIES—Continued

	Page
BOOKS AND ARTICLES	
H. Ball, <i>Law of Copyright and Literary Property</i> (1944) .....	18
Elmer Galbi, <i>Proposal for New Legislation to Protect Computer Programming</i> , 17 BULL. COPYRIGHT SOC'Y U.S.A. 280 (1970).....	7
Mark A. Lemley, <i>Convergence in the Law of Software Copyright?</i> , 10 HIGH TECH. L.J. 1 (1995) .....	12
Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> (2019).....	11
<i>Nimmer on Copyright</i> (1976) .....	15
Ralph Oman, <i>Computer Software as Copyrightable Subject Matter: Oracle v. Google, Legislative Intent, and the Scope of Rights in Digital Works</i> , 31 HARV. J.L. & TECH. 639 (2018).....	6, 7
Pamela Samuelson, <i>Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection</i> , 85 TEX. L. REV. 1921 (2007).....	13

## TABLE OF AUTHORITIES—Continued

	Page
Ned Snow, <i>Who Decides Fair Use— Judge or Jury?</i> , 94 Wash. L. Rev. 275 (2019).....	25, 26, 28
Jasper L. Tran & J. Sean Benevento, <i>Alice at Five</i> , 2019 PATENTLY-O PAT. L.J. 25 (2019) .....	12



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**BRIEF OF *AMICUS CURIAE* AMERICAN IN-  
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IN SUPPORT OF NEITHER PARTY**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The American Intellectual Property Law Association (“AIPLA”)<sup>2</sup> is a national bar association representing the interests of approximately 12,000 members engaged in private and corporate practice, government service, and academia. AIPLA’s members

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<sup>1</sup> Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund its preparation or submission.

<sup>2</sup> Pursuant to Rule 37.3(a), *amicus curiae* has obtained the consent of all parties to file this brief.

represent a diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. AIPLA's mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and investment while accommodating the public's interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in any of the parties to this litigation or in the result of this case. AIPLA's only interest is in seeking correct and consistent interpretation of the law as it relates to intellectual property issues.

### **SUMMARY OF THE ARGUMENT**

1. Congress made an intentional policy decision to include software within the category of "literary works" that are copyrightable, despite its functional aspects. 17 U.S.C. § 102(a). Like any copyrightable literary work, the scope of copyright protection for software is subject to the limits imposed by Section 102(b), which states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery \* \* \* ." 17 U.S.C. §102(b). Thus, software must be analyzed to determine whether it contains any methods of operation, and if so, those portions of the work should be excluded from copyright protection.

2. Here, the declaring code portions of the Java application programming interfaces ("APIs") are "method[s] of operation" to which copyright protection does not extend, while the implementing code of the Java

APIs are not, and thus are subject to copyright protection.

The First Circuit's decision in *Lotus Development Corporation v. Borland International, Inc.*, 49 F.3d 807 (1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996), should guide this Court's resolution of the present case. The First Circuit held that the menu command hierarchy of a spreadsheet program was a non-copyrightable method of operation because it provides the means by which users could operate, control, and use Lotus 1-2-3's functional capabilities. *Id.* at 815. The court defined a "method of operation" as a "means by which a person operates something, whether it be a car, a food processor, or a computer." *Ibid.* The court further held that the particular expressive choices used by Lotus for its menu were not copyrightable because they are part of the "method of operation": "If specific words are essential to operating something, then they are part of a 'method of operation' and, as such, are unprotectable." *Id.* at 816.

In this case, the Java API declaring code is the essential and only means by which programmers can operate and access the implementing code of the Java API. The relevant portions of the declaring code comprise merely the name of the function being called or the names of the inputs and outputs. These names do little to describe how those functions or names should be expressed or implemented. The implementing code, by contrast, provides the particular expression of how each command is executed. Consequently, the declaring code is a non-copyrightable method of operation, while the implementing code contains protectable expression.

3. Next, it is vital that the Court maintain the fair use exception to copyright infringement as a flexible,

case-by-case balancing of the fairness of each use. Section 107, which codified fair use case law, lists four non-exclusive factors that courts must consider as part of a fair use analysis. Both Congress and the Court have emphasized the context-specific nature of this analysis, eschewing any bright-line rules. Any court-devised rule that any one of the factors always has greater or lesser weight than the other factors would be inconsistent with the flexibility mandated by Congress.

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Court explained that each factor is “only one element to be weighed in a fair use inquiry” and that “the four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” *Id.* at 572, 578. The Court then “emphasized the need for a ‘sensitive balancing of interests’ [and] noted that Congress had ‘eschewed a rigid, bright-line approach to fair use’ . . .” *Id.* at 584–585 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40, 449 n.31 (1984)).

Nevertheless, some lower courts accord certain factors greater or lesser weight *as a rule*. For example, the Sixth Circuit gives the fourth factor—the effect of the use upon the potential market for or value of the copyrighted work—primary importance. See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc). And the Federal Circuit mistakenly followed the Ninth Circuit in rendering the second factor—the nature of the copyrighted work—all but irrelevant. See *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1205 (Fed. Cir.

2018) (citing *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997)).

This Court should reaffirm *Campbell* and abrogate all lower court rulings that give any one fair use factor greater or lesser weight in all cases.

4. Finally, where a jury renders a general verdict on fair use, that verdict should be given deference, and any implicit factual findings may be overturned only if these findings are unsupported by substantial evidence. Until the decision below, no court of appeals had exercised *de novo* review to reverse a jury's general verdict finding of fair use. Indeed, over the last two centuries, courts have treated fair use as a factual question within the province of the jury to resolve.

The Federal Circuit in this case departed from this well-worn path, holding that “[t]he fair use question entails \* \* \* a primarily legal exercise. \* \* \* [T]he historical facts in a fair use inquiry are generally few, generally similar from case to case, and rarely debated, resolution of what any set of facts means to the fair use determination definitely does not ‘resist generalization.’” *Oracle*, 886 F.3d at 1193. In contrast, both Congress and this Court have described the fair use analysis as a case-by-case weighing of the facts and factors, which supports entrusting this question to the jury. A jury's general verdict regarding fair use should thus be reviewed with deference.

## ARGUMENT

### I. SOFTWARE INTERFACE CODE CONTAINS PROTECTABLE EXPRESSION

The first question presented is whether copyright protection extends to application programming interfaces (“APIs”). At issue is whether APIs fall under the

explicit Congressional directive that software is copyrightable as a “literary work” under 17 U.S.C. § 102(a), or whether APIs are inherently a non-copyrightable “method of operation” under Section 102(b).

Oracle’s Java API can be understood as having two distinct sections: declaring code and implementing code. The declaring code identifies and invokes the name of a function; the implementing code implements the function. The declaring code is important because it informs the computer compiler, which interprets the code, what the identifying word means, and how the identified function or variable should be used. Without the ability to invoke the declaring code, the implementing code cannot run. AIPLA urges the Court to hold that the declaring code of Oracle’s Java API—code which, if copyrighted, would allow Oracle to monopolize an idea and prevent others from making calls to essential operations—is a non-copyrightable “method of operation” under Section 102(b). In contrast, the implementing code of the Java API is not a “method of operation,” but copyrightable expression under Section 102(a).

#### **A. Software Is Expressly Copyrightable Under Section 102(a)**

Before the passage of the Copyright Act of 1976, Congress and academics grappled with the scope of copyright protection for software, and the hybrid nature of computer code, which can contain both expressive and functional elements. Some argued that software was too functional and insufficiently expressive to warrant copyright protection, while others argued that software should be treated no differently than more traditional literary works and should receive similar protections. See, *e.g.*, Ralph Oman,

*Computer Software as Copyrightable Subject Matter: Oracle v. Google, Legislative Intent, and the Scope of Rights in Digital Works*, 31 HARV. J.L. & TECH. 639, 639–644 (2018) (recounting this debate); Elmer Galbi, *Proposal for New Legislation to Protect Computer Programming*, 17 BULL. COPYRIGHT SOC’Y U.S.A. 280, 280–282 (1970) (same).

The Copyright Act of 1976 resolved this debate by setting a low bar for the copyrightability of software. Section 102(a) states that copyright protection extends to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Works of authorship include “literary works,” which are defined in Section 101 as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” Section 102(b), in turn, charts the outer limits of copyrightability, providing that “[i]n no case does copyright protection \* \* \* extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied.”

The House Report for the 1976 Copyright Act explained that the term “literary works” makes no distinction regarding the literary merit of a work, but can include factual, referential, or instructional works and compilations of data, such as catalogs and directories. H.R. Rep. No. 94-1476, at 54 (1976) (hereinafter “House Rep.”), *as reprinted in 1976*

U.S.C.C.A.N. 5659. The House Report further recognized that “literary works” “include[ ] computer data bases, and computer programs to the extent that they incorporate authorship in the programmer’s expression of original ideas, as distinguished from the ideas themselves.” *Ibid.* Thus, the 1976 Copyright Act, while not textually singling out computer software, enunciated a framework that applied a unified copyrightability test for software and other types of expression alike.

As the economic and cultural impact of computer technology became increasingly apparent in the wake of the 1976 Copyright Act, Congress appointed the National Commission on New Technological Uses of Copyrighted Works (“the Commission”) to recommend policies that would “protect[ ] the rights of copyright owners and ensur[e] public access to copyrighted works when they are used in computer and machine duplication systems, bearing in mind the public and consumer interest.” Nat’l Comm’n on New Tech. Uses of Copyrighted Works, Final Report 3 (1978) (“CONTU Report”).

Because it is very difficult to develop computer programs but quite simple to copy them, the Commission concluded that computer programs should generally be copyrightable to encourage their creation. *Id.* at 11. The Commission ultimately recommended that “computer programs, to the extent that they embody an author’s original creation, are proper subject matter of copyright,” emphasizing that software should be treated no differently than any other “writing”: “[A] program is created, as are most copyrighted works, by placing symbols in a medium. In this respect, it is the same as a novel, poem, play,



musical score, blueprint, advertisement, or telephone directory.” *Id.* at 1, 15.

In 1980, Congress amended the Copyright Act to implement the Commission’s recommendations almost verbatim. Computer Software Copyright Act of 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (1980) (amending 17 U.S.C. §§ 101, 117 (1976)). The CONTU Report has been viewed by courts as the authoritative guide to Congressional intent with respect to the scope of copyright protection for software. See *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 703–704 (2d Cir. 1992); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 & n.5 (9th Cir. 1992); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247–1252 (3d Cir. 1983).

By implementing the recommendations contained in the CONTU Report, Congress made an intentional policy decision to give software the same status under copyright law as other “literary works” despite its functional aspects. As the Commission explained, the “history of copyright legislation and the interpretations courts have given to the Copyright Clause all demonstrate that there is no basis \* \* \* for the imposition of a standard of literary or artistic merit for determining copyrightability.” CONTU Report 25. The Commission elaborated that “[t]he copyright status of the written rules for a game or a system for the operation of a machine is unaffected by the fact that those rules direct the actions of those who play the game or carry out the process.” *Id.* at 21. The majority of the Commission reached this conclusion over Commissioner John Hersey’s dissent, which warned that “copyright is an inappropriate, as well as unnecessary, way of protecting the usable forms of computer programs,” and asserting that computer programs

are “a machine-control element, a mechanical device, which on constitutional grounds and for reasons of social policy ought not be copyrighted.” *Id.* at 27.

Following the Commission’s lead, courts have concluded that the functional aspects of software should not affect the threshold question of copyrightability. For example, in *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), the Third Circuit confronted the question of whether operating systems are copyrightable. Franklin argued that operating systems are categorically excluded from copyright protection under Section 102(b) and *Baker v. Selden*, 101 U.S. 99 (1879), because they are “purely utilitarian works.” *Apple*, 714 F.2d at 1250–1252. The Third Circuit disagreed and distinguished between “the method which instructs the computer to perform its operating functions” and “the instructions themselves.” *Id.* at 1251. The Third Circuit relied on this Court’s decision in *Mazer v. Stein*, 347 U.S. 201 (1954), concluding that there is “nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law.” See *Apple*, 714 F.2d at 1252 (quoting *Mazer*, 347 U.S. at 218). The court further expressed agreement with the statement that “[t]here is nothing in any of the statutory terms which suggest a different result for different types of computer programs based upon the function they serve within the machine.” *Ibid.* (quoting *Apple Computer, Inc. v. Formula Int’l, Inc.*, 562 F. Supp. 775 (C.D. Cal. 1983)).

Similarly, in *Engineering Dynamics, Inc. v. Structural Software, Inc.*, the Fifth Circuit held that input and output formats in a computer program could

qualify as copyrightable subject matter, even though they are only “quasi-textual.” 26 F.3d 1335, 1342 (5th Cir. 1994), *modified*, 46 F.3d 408 (5th Cir. 1995). Despite the “utilitarian function of the input formats, which ultimately act like switches in the electrical circuits of the program,” the court found that the input and output formats were copyrightable because they conveyed substantial information about the selection, sequencing, and coordination of the inputs. *Id.* at 1346. Such highly “functional” works are nonetheless copyrightable and may be infringed by verbatim copying, especially if the same idea could be expressed in many different ways.<sup>3</sup> *Id.* at 1347–1348.

Some *amici* appear to suggest that software’s functional nature should result in weaker copyright protections than those afforded more traditional literary works, such as poems and novels. See, e.g., Br. of Microsoft Corp. as *Amicus Curiae* in Support of Petitioner at 5–9. But, as discussed above, Congress considered the functional nature of software, yet accorded software the same copyright status as other literary works. And courts have similarly held that copyright protections for software should not be diluted because of its functional nature.

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<sup>3</sup> While functional works are copyrightable, courts have held that only near-verbatim copying may constitute infringement. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992) (determining infringement of nonliteral elements of computer program: “Even for works warranting little copyright protection, verbatim copying is infringement.”); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[B][2][b] (2019) (“[I]f the only original aspect of a work lies in its literal expression, then only a very close similarity, verging on the identical, will suffice to constitute an infringing copy.”).

For these reasons, “functionality” considerations should not drive the determination that a piece of software is non-copyrightable, as such an analysis threatens the well-settled copyrightability of software itself.

What is more, a holding that courts must consider the functional nature of a work in analyzing copyrightability could dramatically limit overall intellectual property protections for software. Past arguments for restricting copyright protection for software have relied upon the availability of patent protection for utilitarian aspects of software. See Mark A. Lemley, *Convergence in the Law of Software Copyright?*, 10 HIGH TECH. L.J. 1, 26–27 (1995) (“As software patents gain increasingly broad protection, whatever reasons there once were for broad copyright protection of computer programs disappear. \* \* \* The availability of the patent option affects virtually all cases involving non-literal infringement or the copyright protection of program elements at a high level of abstraction. In these cases, the existence of software patents should make courts less willing to extend the coverage of copyright law to ideas and the functional elements of programs, and more willing to engage in a strict filtration analysis.” (footnote omitted)). However, in *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014), this Court substantially limited the extent to which software technology can qualify for patent protection. Since *Alice*, courts have invalidated software-based patents 56.2% of the time. See Jasper L. Tran & J. Sean Benevento, *Alice at Five*, 2019 PATENTLY-O PAT. L.J. 25, 27 (2019). A broad holding here could further limit intellectual property protections for software and lead to a world

where neither copyright nor patent law would adequately protect software-based technologies.

**B. Courts Must Carefully Scrutinize Whether Software Contains a Non-Copyrightable “Method of Operation” or other Section 102(b) Exclusion**

While it is indisputable that software is generally copyrightable pursuant to Section 102(a), copyright protection does not extend to certain enumerated categories, including a method of operation, under Section 102(b). 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). Therefore, software must be analyzed to determine whether it contains any methods of operation or other exclusions. The declaring code section of Oracle’s Java API contains such methods of operation, but the implementing code does not.

The origins of Section 102(b) and the eight categories that it excludes from copyright protection have received surprisingly little commentary. Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921, 1921–1922 (2007). H.R. Mayers, then General Patent Counsel of General Electric, was the first person to identify a need for exclusions to the broad copyright protections of Section 102(a). *Id.* at 1946 (citing Staff of H. Comm. on the Judiciary, 89th Cong., Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments 269–280 (Comm. Print 1965)). While Mr. Mayers believed that software should generally be copyrightable, he

thought software's copyrightability should be "specifically delimited in light of the special character and problems of this art." *Ibid.* Mr. Mayers was concerned that certain "analytical concepts embodied in [computer programs]," and the "logic and mathematics" on which programs relied, should not be copyrightable. *Ibid.*

Later, Professor Arthur Miller, testifying before a Senate subcommittee during consideration of the Copyright Act, advised that, consistent with *Baker v. Selden*, any copyright protection should extend "solely to duplication or replication of the program" and should not be construed to "give the owner of copyright the exclusive right to any idea, process, plan, or scheme embodied or described in the copyrighted work \* \* \* ." *Id.* at 1950. His recommendation was later codified as Section 102(b). *Id.* at 1950–1951. However, the House and Senate Reports explain that Section 102(b) was adopted "to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law." See, e.g., House Rep. at 57; S. Rep. No. 94-473, at 54 (1975) (hereinafter "Senate Rep."), as reprinted in 1976 U.S.C.C.A.N. 5659.

Similarly, the CONTU Report noted that, while the distinction between copyrightable computer programs and uncopyrightable processes and methods of operation may not always "shimmer with clarity," it is important that this distinction be drawn as sharply as possible. CONTU Report 18. To that end, the Commission explained that *Baker v. Selden* is often "misconstrued as imposing a limit on the copyrightability of works which express ideas, systems, or pro-

cesses.” *Id.* at 18–19. The CONTU Report warned that *Baker* should not “justif[y] the denial of copyrightability to any work.” *Id.* at 19 (quoting 1 *Nimmer on Copyright* § 37.31 (1976)). Indeed, under Section 102(b), “[c]opyright \* \* \* protects the program so long as it remains fixed in a tangible medium of expression but does not protect the electro-mechanical functioning of a machine.” *Id.* at 20.

Applying these principles, copyright protection should not extend to the declaring code of the Java API because it constitutes a non-copyrightable method of operation. The First Circuit’s decision in *Lotus Development Corp. v. Borland International, Inc.*, 49 F.3d 807 (1995), *aff’d by an equally divided Court*, 516 U.S. 233 (1996), should guide this Court’s resolution. There, Borland copied the entire menu structure of Lotus 1-2-3, a spreadsheet program where users access a series of over 469 commands, such as “Copy” and “Quit,” arranged in more than 50 menus and submenus, to manipulate the program. *Id.* at 809–810. Users choose the commands by highlighting them or typing the first letter, or by using “macros” or shortcuts to access the commands through fewer keystrokes. *Id.* at 809. Borland copied Lotus 1-2-3’s menu tree without copying any of the underlying computer code, so that users who were already familiar with Lotus 1-2-3 could switch to the Borland program without having to relearn new commands or macros. *Id.* at 810. The district court held that Lotus’s menu command structure was copyrightable expression and that Borland could have offered alternate command words (*e.g.*, replacing “Quit” with “Exit”) rather than copying the exact commands in Lotus 1-2-3. *Id.* at 810–811.

The First Circuit reversed, reasoning that the Lotus menu command hierarchy was a non-copyrightable method of operation because it provides the means by which users could operate, control, and make use of Lotus 1-2-3's functional capabilities. *Id.* at 815. The court defined a "method of operation" as a "means by which a person operates something, whether it be a car, a food processor, or a computer." *Ibid.* The court further held that the particular expressive choices used by Lotus for its menu were not copyrightable because they were part of the "method of operation": "If specific words are essential to operating something, then they are part of a 'method of operation' and, as such, are unprotectable." *Id.* at 816.

This case closely parallels *Lotus* because the declaring code is the essential and only means by which programmers can operate and access the implementing code of the Java API. Standing alone, the declaring code is an abstract command that enables the programmer to invoke a pre-written object or function in order to perform the instructions of the implementing code. The declaring code is thus merely the name of the function being called or the names of the inputs and outputs. These names are merely the means by which a user accesses the implementing code, not how those functions are implemented. The implementing code, in contrast, provides the particular expression of how that command is executed. Consequently, the declaring code is a non-copyrightable method of operation, while the implementing code contains protectable expression.

As in *Lotus*, Oracle argues that Google could have avoided infringement by giving alternative names for the declaring code—for example, by assigning to a



function like “ADD” a facially different name like “ANDROID.ADD.” But this argument serves to reveal the lack of substantively different expressions for the ideas underlying the declaring code.

Moreover, the simple calls made by the declaring code would arguably fall under the “insufficient intellectual labor” exception to copyright, which bars copyright for “instructions of the rankest obviousness and simplicity” such as “apply hook to wall.” CONTU Report 20; see also *Synercom Tech., Inc. v. Univ. Computing Co.*, 462 F. Supp. 1003, 1013 n.5 (N.D. Tex. 1978) (“[I]t would probably be a violation to take a detailed description of a particular problem solution, such as a flowchart \* \* \* and program such a description in computer language.”). Renaming the copied functions in the Android declaring code would contribute no copyrightable expression and do little to promote the useful arts and sciences.

For these reasons, the Court should hold that copyright does not extend to any portion of software that constitutes a method of operation—in this case, the declaring code portions of the Java API. Conferring copyright protection on declaring code would allow a copyright holder to monopolize the method or means by which a programmer unlocks the instructions to operate the Java API. Such essential methods of operation are not copyrightable under Section 102(b)’s straightforward instructions. Holding otherwise might also provide copyright protection for subject matter consisting of short words or phrases or for which the “insufficient intellectual labor” exception to copyright would apply. The implementing code, by contrast, is not a method of operation, but is instead an expressive literary work protected from unauthorized copying. See *Apple*, 714 F.2d at 1251 (“Apple

does not seek to copyright the method which instructs the computer to perform its operating functions but only the instructions themselves.”).

## II. A PROPER FAIR USE ANALYSIS IS CRITICAL TO PRESERVING THE CONSTITUTIONAL PURPOSE OF COPYRIGHT

The fair use doctrine permits limited use of a copyrighted work consistent with copyright’s purpose “[t]o promote the Progress of Science and useful Arts.” U.S. Const., Art. I, § 8, cl. 8. Fair use grants “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent,” *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944)), when the “rigid application of the copyright statute \* \* \* would stifle the very creativity which that law is designed to foster,” *Stewart v. Abend*, 495 U.S. 207, 236 (1990). However, the circuits have provided inconsistent guidance over the weight to be granted certain factors in analyzing fair use. The Court should now resolve that split and clarify this critical doctrine by holding that no factor should receive greater or lesser weight in all cases.

What constitutes a “reasonable manner” for purposes of fair use defies a simplistic definition. In *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), Justice Story “distilled the essence of law and methodology [of the fair use doctrine] from the earlier cases: ‘look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.’” *Campbell v. Acuff-Rose Music*,

*Inc.*, 510 U.S. 569, 575 (1994) (quoting *Folsom*, 9 F. Cas. at 345).

In the Copyright Act of 1976, Congress codified the common law’s fair use doctrine as “one of the most important and well established limitations on the exclusive right of copyright owners.” House Rep. at 65; Senate Rep. at 61. Although the House and Senate Reports acknowledged that “no real definition of the concept has ever emerged,” the legislative history reveals Congress’s intent to adopt the fair use doctrine as developed by the courts. See House Rep. at 65–66; Senate Rep. at 62.

The House and Senate Reports explained that the courts had “evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities,” House Rep. at 65; Senate Rep. at 62—criteria like those identified in *Folsom*. By establishing fair use as a statutory exception to copyright infringement, Congress “endorse[d] the purpose and general scope of the judicial doctrine of fair use” and sought only “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” House Rep. at 66; Senate Rep. at 62.

The Copyright Act now provides:

**§ 107. Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom

use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

AIPLA believes that a robust fair use doctrine is an important part of this nation's copyright regime. Congress codified fair use not as a narrow equitable defense, but as a flexible, fact-based carveout from copyright infringement. See *ibid.* (“the fair use of a copyrighted work \* \* \* is not an infringement of copyright”). The statute requires courts to balance at least the four non-exclusive factors set forth in Section 107 in order to assess the fairness of the use. *Ibid.* (“the factors to be considered *shall include*” (emphasis added)). For its part, the Court has emphasized that the fair use statute mandates a case-by-case analysis. See, e.g., *Campbell*, 510 U.S. at 577 (“The task is not

to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”). As such, AIPLA urges the Court to clarify that no one factor should receive greater or lesser weight than the others in all cases, but instead all should be weighed together and each case decided on its unique set of facts. Furthermore, given the case-specific and totality-of-the-factors nature of fair use analysis, a jury’s general verdict regarding fair use should be given deference, and the underlying implicit factual findings associated with the four statutory factors should be disturbed only if they are unsupported by substantial evidence.

**A. The Four Non-Exclusive Factors of Section 107 Must Be Weighed Together in Light of the Facts of Each Case, with No One Factor Receiving Greater or Lesser Weight in All Cases**

The Court has recognized that the four fair use factors enumerated in Section 107 “are not meant to be exclusive.” *Harper & Row*, 471 U.S. at 560; see *id.* at 549 (“[T]he statute notes four nonexclusive factors to be considered.”); 17 U.S.C. § 107 (“the factors to be considered shall include \* \* \*”). Thus, courts may appropriately consider other factors depending on the nature of a given case. Consequently, it is important that courts evaluate fair use on a case-by-case basis, weighing each of the four factors together, along with any other relevant considerations. A bright-line rule—for example, that one factor is always more or less important than another—would be inconsistent with the flexible nature of fair use and the case-by-case approach mandated by Congress and this Court’s precedent.

In codifying the fair use doctrine, the House and Senate Reports declared that “no generally applicable definition [of fair use] is possible, and each case raising the question must be decided on its own facts.” House Rep. at 65; Senate Rep. at 62. That is because “the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.” House Rep. at 66; Senate Rep. at 62. Therefore, “courts must be free to adapt the doctrine to particular situations on a case-by-case basis.” House Rep. at 66; Senate Rep. at 62.

The Court has likewise emphasized the case-by-case nature of the fair use inquiry. In *Campbell*, the Court explained that “[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” 510 U.S. at 577. And in *Harper & Row*, the Court stated that the “fair use analysis must always be tailored to the individual case.” 471 U.S. at 552.

Any bright-line rule, such as one that reflexively grants a particular factor greater or lesser weight than the others in all cases, would be inconsistent with the flexibility mandated by Congress. See House Rep. at 65 (noting that the factors are “in no case definitive or determinative”). In *Campbell*, for example, the Court reversed the court of appeals for “giving virtually dispositive weight to the commercial nature of the parody,” 510 U.S. at 584, which was “only one element to be weighed in a fair use enquiry,” *id.* at 572. “[T]he four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” *Id.* at 578. The *Campbell* Court then “emphasized the need for a ‘sensitive balancing

of interests’ [and] noted that Congress had ‘eschewed a rigid, bright-line approach to fair use’ . . .” *Id.* at 584–585 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 n.31, 455 n.40 (1984)). The commercial nature of the work was thus “not conclusive” and was “rather a fact to be ‘weighed along with other[s] in fair use decisions.’” *Id.* at 585 (quoting *Sony*, 464 U.S. at 448–449, 449 n.32).

Despite this Court’s guidance, some lower courts continue to give certain factors greater or lesser weight than others *as a rule*, without considering how the facts of each case may affect the relative weight of the factors. The Court should squarely resolve the confusion among the lower courts by reaffirming that all factors must be considered and weighed in light of the facts of the case, with no single factor always receiving greater or lesser weight than the others.

Specifically, the Court’s opinion should resolve a circuit split concerning the primacy of the fourth factor—the effect of the use upon the potential market for or value of the copyrighted work. Overlooking *Campbell* and citing this Court’s earlier pronouncement in *Harper & Row* that the fourth factor “is undoubtedly the single most important element of fair use,” 471 U.S. at 566, the Sixth Circuit has held that “[t]he four statutory factors may not have been created equal” and that the fourth factor “is at least *primus inter pares*.” *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc). Other circuits, however, have interpreted *Campbell* to “abandon[] the idea that any factor enjoys primacy.” See *Am. Geophysical Union v. Texaco*

*Inc.*, 60 F.3d 913, 926 (2d Cir. 1994)<sup>4</sup>; see also *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1207 (Fed. Cir. 2018) (acknowledging *Harper & Row*'s statement regarding fourth factor and *Campbell*'s emphasis on considering all factors).

Similarly, in this case, the Federal Circuit mistakenly followed the Ninth Circuit in virtually eliminating the second factor—the nature of the copyrighted work—by categorically declaring that the factor “typically has not been terribly significant in the overall fair use balancing.” *Oracle*, 886 F.3d at 1205 (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997)); see *ibid.* (“Accordingly, although the jury’s assumed view of the nature of the copyrighted work weighs in favor of finding fair use, it has less significance to the overall analysis.”). But the Federal Circuit failed to appreciate the distinction between the software context at bar and the cases it relied upon, which involved traditional creative works where courts accorded less weight to the second factor. See *Dr. Seuss*, 109 F.3d 1394 (*Dr. Seuss’s The Cat in the Hat*); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (Barbie doll); *Fox News*, 883 F.3d 169 (news broadcasts). As reflected in the Ninth Circuit’s decision in *Sony*, however, software cases may warrant

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<sup>4</sup> While the Second Circuit recognized in its initial post-*Campbell* decisions that this Court had “retreated from its earlier cases suggesting that the fourth statutory factor is the most important element of fair use,” *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998), it recently quoted *Harper & Row* for the proposition that “[s]ome of the factors are more important than others, with the fourth (market impact) being ‘the single most important element.’” *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018).



attributing more significant analysis and weight to the second factor. See *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 603–605 (9th Cir. 2000) (addressing the second factor first and explaining that “Sony’s BIOS lies at a distance from the core [of intended copyright protection] because it contains unprotected aspects that cannot be examined without copying.”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (“Computer programs pose unique problems for the application of the ‘idea/expression distinction’ that determines the extent of copyright protection.”). Courts should be free to flexibly apply the fair use factors as the circumstances warrant. The Federal Circuit erred by departing from a context-specific approach that gives appropriate weight to each factor depending on the facts of the case.

This Court has warned that copyright law and the fair use doctrine must “respon[d] to significant changes in technology,” such as those seen in the software industry. See *Sony*, 464 U.S. at 430; accord House Rep. at 66 (seeking to avoid “freezing the doctrine” of fair use “especially during a period of rapid technological change”). The departure of some lower courts from the flexible fair use analysis mandated by the statute generates uncertainty and stifles creativity, including in the technological field. The Court should reaffirm *Campbell* and clarify that each of the four Section 107 factors must be weighed together on a case-by-case basis and that no single factor has greater or lesser weight than the others in all cases.

### **B. A Jury’s Determination of Fair Use Should Be Afforded Deference**

Until the decision below, no court of appeals had reviewed *de novo* a jury’s finding of fair use in a gen-

eral verdict. Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 Wash. L. Rev. 275, 277 (2019). The Federal Circuit thus broke new ground when it held that “[a]ll jury findings relating to fair use other than its implied findings of historical fact must \* \* \* be viewed as advisory only.” *Oracle*, 886 F.3d at 1196. The Federal Circuit acknowledged that its actions departed from centuries of jurisprudence, in which “courts once treated the entire question of fair use as factual, and, thus, a question to be sent to the jury.” *Id.* at 1194. Indeed, Justice Story “described fair use as a ‘question of fact to come to a jury’ in 1845.” *Id.* at 1194 n.3 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 623–624 (C.C.D. Mass. 1845) (No. 4,436)); see also Snow, *supra*, at 276 n.1 (identifying cases spanning two centuries). Because fair use is primarily a factual inquiry turning on the case-by-case weighing discussed above, appellate courts should defer to jury findings on fair use. Thus, if a jury renders a general verdict on fair use, all supporting facts implied by the verdict must be construed in favor of the prevailing party and disturbed only if they are not supported by substantial evidence. See *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir. 1991) (citing *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984)); *Little v. Valley Nat’l Bank*, 650 F.2d 218, 220 (9th Cir. 1981).

The Federal Circuit held that “[t]he fair use question entails . . . a primarily legal exercise. . . . [T]he historical facts in a fair use inquiry are generally few, generally similar from case to case, and rarely debated, resolution of what any set of facts means to the fair use determination definitely does not ‘resist generalization.’” *Oracle*, 886 F.3d at 1193 (quoting *Nat’l Ass’n v. The Vill. at Lakeridge, LLC*, 138 S. Ct. 960,

966 (2018)). That holding is inconsistent with this Court's precedent as well as the text and legislative history of the fair use statute, all of which reflect the fact-specific nature of the inquiry. As discussed above, Congress intended that "each case raising the question [of fair use] must be decided on its own set of facts." House Rep. at 65; see *Harper & Row*, 471 U.S. at 560. Indeed, Congress understood that an "endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules." House Rep. at 66 (emphasis added). In *Campbell*, the Court explained that "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis" in which "[a]ll [factors] are to be explored, and the results weighed together." 510 U.S. at 577, 578. These statements clash with the Federal Circuit's conclusion that "facts in a fair use inquiry are *generally few, generally similar* from case to case." *Oracle*, 886 F.3d at 1193 (emphases added).

Each of the four Section 107 factors involves facts that must be "weighed along with other[s] in fair use decisions." *Campbell*, 510 U.S. at 585 (quoting *Sony*, 464 U.S. at 449 n.32). Consequently, if a jury renders a general verdict on fair use, implicit factual findings relevant to each factor must be construed in favor of the prevailing party, and can be disturbed only if they are not supported by substantial evidence. See *Jurgens*, 927 F.2d at 1557; *Little*, 650 F.2d at 220.

In addition, fair use analysis depends heavily on subjective judgments, which juries are well-positioned to make. The weighing of facts to determine what is "fair" involves the application of societal values and norms, which benefit from both the diver-

sity and common sense of a jury. See *Snow, supra*, at 314–331. A jury is also free to consider other factors beyond those enumerated in Section 107, which may be unknown to a reviewing court. Cf. *Harper & Row*, 471 U.S. at 560 (“The factors enumerated in the section are not meant to be exclusive \* \* \*”). Courts are ill-suited to review *de novo* such an intensely factual, multifaceted, and value-laden conclusion by the jury.

Thus, where a jury makes findings on fair use as part of a general verdict, the appropriate standard of review is deferential, and the verdict should be disturbed only if it lacks substantial evidentiary support.

### CONCLUSION

AIPLA respectfully urges the Court to avoid any holding that limits the copyrightability of software under Section 102(a) due to software’s functional nature. The Court should hold that the declaring code of Oracle’s Java API—code which, if copyrighted, would allow Oracle to monopolize an idea and prevent others from making calls to essential operations—is excluded from the scope of copyrightable subject matter as a “method of operation” under Section 102(b). In contrast, the implementing code of the Java API is not a “method of operation,” but copyrightable and protectable expression under Section 102(a).

AIPLA also respectfully asks the Court to clarify that no statutory fair use factor should receive greater or lesser weight than the others in all cases. Instead, all should be weighed together, with each factor assigned the appropriate weight in light of the nature and facts of the case. Furthermore, where a jury issues a general verdict regarding fair use, that verdict should be reviewed deferentially, with courts disturbing implicit factual findings associated with the

four statutory factors only if they are unsupported by substantial evidence.

Respectfully submitted,

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