

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.*

————— ♦ —————  
**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

————— ♦ —————  
**BRIEF OF CENTER FOR MEDICINE IN THE  
PUBLIC INTEREST AS *AMICUS CURIAE*  
SUPPORTING RESPONDENT**

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

*Amicus* Center for Medicine in the Public Interest (“CMPI”) is a registered 501(c)(3) nonprofit health policy research institute that has researched, published, and advised on the role of health information technology in biomedical research, health care outcomes and quality of care. Its founders have served on several committees and institutes devoted to the proper use of personal health data in numerous health care contexts, ranging from the use of genomic, laboratory, and electronic medical records to accelerate clinical trials, the use of such data in submissions to the FDA, and the use of personal health data to personalize the diagnosis and treatment of complex conditions.

Over the past 16 years, CMPI has made significant contributions to the scholarship and policy discussion regarding the use of personal health data to improve the well-being of patients. For instance, CMPI has explored the use of machine learning of extensive patient-level data to develop *in silico* or digital models that can be used to improve the accuracy of diagnosis and personalize the prevention and treatment of illnesses for all patients. The ultimate goal of creating a digital health information technology platform is to use algorithms to match

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represents that all parties have consented to the filing of this brief.

people to treatments and behaviors that prevent or stop disease and enhance well-being.

CMPI's interest in this case is governed by its concern that Google's treatment of the fair use doctrine to encompass virtually anything that Google believes is necessary to achieve interoperability will lead to a rapid consolidation of control over health data and will inhibit the ability and motivation of other parties to develop health care innovations.

### **SUMMARY OF ARGUMENT**

The health care industry is becoming increasingly reliant on technological innovation. However, allowing parties such as Google to abuse the fair use doctrine by claiming "interoperability" as a public benefit would have a devastating effect on the health care industry. "Fair use" in the name of "interoperability," as envisioned by Google, would discourage innovation, to the detriment of the public welfare. Indeed, parties who would otherwise have invested significant time and resources in developing technological innovations to improve health care will no longer choose to do so if they have no ability to protect their works under U.S. copyright laws.

### **ARGUMENT**

#### **I. Google's "Interoperability" Position Discourages Innovation and Does Not Benefit the Public**

Google's position – that copyright protection does not extend to application programming

interfaces (“APIs”) because they are purportedly necessary for interoperability – establishes a “fair use” standard that would cause great harm to the commercialization and creation of health data systems. The health care industry already enjoys a robust marketplace of health care systems that employ APIs. Indeed, thousands of APIs have been developed or are being developed to increase individual access and ownership of health data. The collection of an individual’s medical information is facilitated through the use of myriad APIs in a variety of contexts, from fitness apps to genetic testing, prescription information, imaging, and laboratory reports. An individual’s medical information can then be combined with previously gathered data from millions of other patients. APIs can also facilitate the analysis of that data, providing insights on how to prevent disease, optimize treatment, and improve patient well-being. The health care industry treats these APIs as enjoying protection under U.S. copyright laws, and many of these APIs can be licensed under specific business arrangements or open-source grants.

While Google downplays the value of APIs in its brief, claiming that an API is merely the interface connecting programs (Google Br. at 8 n.5), Google itself has recognized the commercial value of APIs in the health care field. Indeed, Google spent \$625 million to acquire Apigee, a company that helps companies design APIs to manage data. Jackie Kimmell, *What ‘Google Health Care’ Could Look Like in 5 Years*, ADVISORY BOARD (Mar. 13, 2019, 11:00 AM), <http://www.advisory.com/daily-briefing/2019/03/13/google>. Thus, at least in the health care

space, Google cannot credibly claim that APIs inherently have little value and are undeserving of full copyright protection.

“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)). If Google’s position – allowing for wholesale copying of APIs as being permissible under the fair use doctrine – were to be adopted by the Court, much of the technological advances in the health care space would be stifled. Companies would have little incentive to devote time and money into developing health care innovations, knowing that their work could easily be copied by a competitor. Google’s position simply cannot stand.

## **II. Interoperability in the Health Care Field Can Already Be Achieved Without Infringing on Copyrights**

While Google claims that interoperability is a sufficient justification for invoking the fair use doctrine, it is not necessary to use copyrighted code to promote interoperability in the health care field. Indeed, a standards-setting organization, Health Level Seven International, has already promulgated an open standard called Fast Healthcare Interoperability Resources (“FHIR”). HL7 FHIR, <http://hl7.org/implement/standards/fhir> (last visited Feb. 19, 2020). FHIR describes data formats and

elements (known as "resources") as well as an API for exchanging electronic health records.

One of the goals of FHIR is to facilitate interoperability between legacy health care systems to make it easy to provide health care information to health care providers and individuals on a wide variety of devices, as well as to allow third-party application developers to create medical applications which can be easily integrated into existing systems. Major technology companies, including Google, have developed the ability to collect and store data with a FHIR API. *Cloud Healthcare API*, GOOGLE CLOUD, <https://cloud.google.com/healthcare> (last visited Feb. 19, 2020). Thus, Google's claimed "interoperability" justification for invoking the fair use doctrine has little applicability in the health care arena.

### **III. Allowing Wholesale Copying of Health Care APIs Raises Patient Privacy Concerns and Leads to Concentration of Health Care Information**

As Oracle notes in its brief, Sun Microsystems made Java available for licensing, but Google did not want to comply with the terms of Sun's license agreement. Oracle Br. at 13. Rather than take a license, Google simply copied Java instead. Just as Sun/Oracle wished to license the Java APIs on its terms, health care entities similarly may wish to place certain conditions on access to their APIs. Indeed, given the sensitive nature of personal medical data, health care companies may have a need or legal requirement to place certain restrictions on the use of data retrieved or collected through its APIs. But if an



unlicensed party simply copies the APIs, that party can potentially gain access to data without complying with the restrictions contained in a license.

Moreover, allowing companies, particularly large technology-based companies such as Google, to infringe on copyrighted material simply because it deemed it necessary for “interoperability” purposes would lead to a rapid concentration of control over personal health data and clinical decisions. Indeed, Google’s goal, as is that of other large technology companies, is to be a ubiquitous gatekeeper that forecloses competitive threats to any of the markets it enters. The ability to simply copy a competitor’s API rather than take a license or develop its own system would have a chilling effect on the marketplace.

## CONCLUSION

The Federal Circuit’s fair use ruling should be affirmed.

Respectfully submitted,

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