

Case No. 2021-1542

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

SAS INSTITUTE INC.,

Plaintiff-Appellant,

v.

WORLD PROGRAMMING LIMITED,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas
in Case No. 2:18-cv-00295-JRG, Chief Judge J. Rodney Gilstrap

**CORRECTED BRIEF OF AMICUS CURIAE
ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF DEFENDANT-APPELLEE
AND AFFIRMANCE**

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September 7, 2021

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for Amicus Curiae certifies that:

1. The full name of the amicus I represent is:

Electronic Frontier Foundation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) I represent is: Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the amici curiae I represent are: None.

4. The names of all law firms and the partners or associates that appeared for the amicus I represent or are expected to appear in this court are: Michael Barclay and Corynne McSherry, Electronic Frontier Foundation, San Francisco, California.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are: None.

6. The information required by Federal Rule of Appellate Procedure 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors

and trustees in bankruptcy cases is: Not applicable.

September 7, 2021

/s/ Michael Barclay

Michael Barclay

Attorneys for Amicus Curiae

Electronic Frontier Foundation

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTEREST.....	i
TABLE OF AUTHORITIES.....	v
TABLE OF CONVENTIONS.....	viii
STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE....	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	3
I. The General Purpose of Copyright Limits the Scope of Protection for Computer-Related Works.....	4
A. The Fundamental Purpose of Copyright Is to Serve the Public Interest.....	4
B. Consistent With the Public Interest, Copyright Protection in Computer Software Is Limited.....	6
1. Statutory Considerations.....	6
2. Courts Treat Computer Programs Differently	9
C. SAS’s Patents Should Have Provided Any Protection SAS Deserved in Processes, Methods of Operation, and the Like	12
II. “Options” or “Creative Choices” Don’t Establish Copyright Protection for Computer Software.....	15
A. SAS Misinterprets <i>Feist</i>	16
B. <i>Oracle I</i> Does Not Stand for the Proposition SAS Claims it Does, and Should Not Control Here.....	17
C. The Ninth Circuit Has Clarified its View on Copyrightability; this Court Should Follow Suit.....	18
1. <i>Bikram’s Yoga</i> Shows that this Court’s “Multiple Ways to Express” Reasoning Is Not Good Law in the Ninth Circuit	19
2. Other Circuits Agree With the Ninth Circuit.....	20

3. The Supreme Court’s Approach to Copyright in Software Suggests It Would Not Treat “Creative Choices” as Sufficient for Copyrightability	21
4. The Court Should Clarify Its Interpretation of the Ninth Circuit’s Approach to Copyrightability	23
CONCLUSION	25
CERTIFICATE OF SERVICE.....	26
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(a)(7)(C)...	27

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Affiliated Enters. v. Gruber</i> , 86 F.2d 958 (1st Cir. 1936).....	7
<i>Alice Corp. v. CLS Bank Int’l.</i> , 573 U.S. 208 (2014).....	8
<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	7, 8
<i>Bateman v. Mnemonics, Inc.</i> , 79 F.3d 1532 (11th Cir. 1996)	10, 11
<i>Bikram’s Yoga College of India, L.P. v. Evolation Yoga, LLC</i> , 803 F.3d 1032 (9th Cir. 2015)	19, 20, 24
<i>Brief English Sys., Inc. v. Owen</i> , 48 F.2d 555 (2d Cir. 1931).....	7
<i>Comput. Assocs. Int’l, Inc. v. Altai, Inc.</i> , 982 F.2d 693 (2d Cir. 1992).....	10, 11, 12, 20
<i>Eng’g Dynamics, Inc. v. Structural Software, Inc.</i> , 26 F.3d 1335 (5th Cir. 1995)	11
<i>Eng’g Dynamics, Inc. v. Structural Software, Inc.</i> , 46 F.3d 408 (5th Cir. 1995)	21
<i>Eng’g Dynamics, Inc. v. Structural Software, Inc.</i> , No. 89-1655 (E.D. La. May 1, 2001).....	11
<i>Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991).....	5, 16
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994).....	5

Gates Rubber Co. v. Bando Chem. Indus., Ltd.,
 9 F.3d 823 (10th Cir. 1993) 10, 11

Google LLC v. Oracle America, Inc.,
 141 S. Ct. 1183 (2021)..... *passim*

Gottschalk v. Benson,
 409 U.S. 63 (1972).....8

LeRoy v. Tatham,
 55 U.S. 156 (1852).....8

Lexmark Int’l, Inc. v. Static Control Components, Inc.,
 387 F.3d 522 (6th Cir. 2004) 16, 21

Lotus Dev. Corp. v. Borland Int’l, Inc.,
 49 F.3d 807 (1st Cir. 1995),
aff’d, 516 U.S. 233 (1996) 17, 18, 24

Oracle Am., Inc. v. Google Inc.,
 750 F.3d 1339 (Fed. Cir. 2014)..... *passim*

Oracle Am., Inc. v. Google LLC,
 886 F.3d 1179 (Fed. Cir. 2018).....9

Perris v. Hexamer,
 99 U.S. 674 (1878).....7

Sega Enters., Ltd., v. Accolade, Inc.,
 977 F.2d 1510 (9th Cir. 1992)11

Sony Corp. of Am. v. Universal City Studios, Inc.,
 464 U.S. 417 (1984).....5

Twentieth Century Music Corp. v. Aiken,
 422 U.S. 151 (1975).....5

Statutes

17 U.S.C. § 102(b)..... *passim*

17 U.S.C. § 117.....9

17 U.S.C. § 121.....9
 17 U.S.C. § 302.....13
 17 U.S.C. § 407.....14
 17 U.S.C. § 408.....14
 35 U.S.C. § 100.....7
 35 U.S.C. § 101.....7
 35 U.S.C. § 102.....15
 35 U.S.C. § 103.....15
 35 U.S.C. § 111.....15
 35 U.S.C. § 112.....15
 35 U.S.C. § 131.....15
 35 U.S.C. § 154.....14
 37 C.F.R. § 202.20(c)14
 37 C.F.R. §§ 1.104-1.198.....15

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 8.....7

Other Authorities

Pamela Samuelson, *Three Fundamental Flaws in CAFC’s Oracle v. Google Decision*, 37 Eur. Intell. Prop. Rev. 702 (2015)24
 Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. Pitt. L. Rev. 1119 (1986).....14
 Richard H. Stern, *Copyright in Computer Programming Languages*, 17 Rutgers Computer & Tech. L.J. 321 (1991)15

TABLE OF CONVENTIONS

SAS	Plaintiff-Appellant SAS Institute Inc.
WPL	Defendant-Appellee World Programming Limited
SAS Br.	SAS's Opening Brief, dated May 14, 2021
WPL Br.	WPL's Corrected Response Brief, dated August 29, 2021
Oman Br.	Amicus Brief of Ralph Oman, dated May 21, 2021
Computer Scientists Br.	Amicus Brief of Computer Scientists, dated May 21, 2021
Copyright Alliance Br.	Amicus Brief of The Copyright Alliance, dated May 26, 2021
Appx	The appellate Appendix in this appeal

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE¹

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for 30 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 30,000 dues-paying members have a strong interest in helping the courts and policymakers strike the appropriate balance between intellectual property and the public interest, and ensuring that copyright law serves the interests of creators, innovators, and the general public.

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a good reason why SAS’s copyright claims have failed in three separate courts: its theory, and that of its supporting amici, rests on a host of mistaken claims about copyright’s animating principles and scope. For example, the sole purpose of copyright is not, as one amicus asserts, to provide economic benefit to the copyright owner. To the contrary, the primary purpose of copyright is to serve the public interest. As for the claim that copyright law treats software

¹ No party’s counsel authored this brief in whole or in part. Neither any party nor any party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Web sites cited in this brief were last visited on August 26, 2021.

no differently than other literary works, both the Copyright Act and case law say otherwise, imposing a host of specific limitations and narrowing mechanisms where, as here, a party tries to use copyright to control the use of functional parts of a computer program.

Relatedly, SAS bases its suit on the wrong body of law: Its claims to protection for processes, methods, and other computer functions properly sound in patent, not copyright, and patent law should have provided any protection SAS deserved. Indeed, SAS initially sued WPL for patent infringement, but those claims failed, and SAS has not appealed their dismissal. Having tried and failed to obtain patent protection for its processes and methods of operation, SAS is not entitled to distort copyright to cover the same territory.

Equally incorrect is the contention that “creative choices” or “unlimited options” are sufficient to justify copyright protection for functional elements such as input formats and output designs. Indeed, SAS and its amici offer no substantive support for this extreme position. Instead, SAS relies on a Supreme Court opinion that neither addresses software nor offers such a broad, sweeping proposition. SAS then turns to a ruling from this Court that is easily distinguishable on the facts. Moreover, with respect to the latter case, *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1367 (Fed. Cir. 2014) (“*Oracle I*”), a subsequent Ninth Circuit opinion has clarified that a key assumption behind this

Court's ruling was incorrect. Indeed, this very case gives this Court an opportunity to clarify *Oracle I's* holding in light of subsequent authority.

ARGUMENT

The proper analysis of the policy and legal issues here starts with a core fact: This case does not involve allegations of literal copying, since WPL did not copy any of SAS's computer code. WPL Br. at 9, 11, 20, 27, 44; Appx3318-3319, Appx3392. Rather, this case concerns non-literal copying of functions of SAS's program that serve as an interface between the computer and its human programmer. SAS wants copyright to cover its program's input formats (which say how a programmer should input data to a program to make the program work properly) and output designs (which the computer uses to let the programmer view the results correctly). These interfaces specify how the computer is supposed to operate—in response to inputs in a certain format, produce outputs that are arranged in a certain design. But those interfaces don't instruct the computer *how* it should perform those functions, for which WPL wrote its own code. SAS's problem is that copyright law does not, and should not, grant a statutory monopoly in these functional elements of a computer program.

I. THE GENERAL PURPOSE OF COPYRIGHT LIMITS THE SCOPE OF PROTECTION FOR COMPUTER-RELATED WORKS

A. The Fundamental Purpose of Copyright Is to Serve the Public Interest

To support SAS’s expansive view of its legal rights, amicus The Copyright Alliance narrows the purpose of copyright to simply providing economic benefit to the copyright owner. Copyright Alliance Br. at 4 (“encouragement of individual effort by personal gain”), at 5 (“copyright law ensures that those who labor to create expressive works receive fair compensation for their efforts, without which the creators could not continue to innovate”).

That impoverished view of copyright is incorrect. As the Supreme Court observed, an author’s “exclusive right” is deliberately circumscribed to ensure that copyright serves its true purpose—promoting the public interest in fostering, accessing, and re-using the cultural commons:

The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. 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. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’ *When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.*

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (footnotes and citations omitted; emphasis added).

The Court has repeatedly affirmed this understanding. For example, in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991), the Court stressed that:

The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. (Citations omitted.)

Similarly, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994), the Court reiterated that “the monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good” (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

And in *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1195 (2021) (“*Google v. Oracle*”), the Supreme Court once again confirmed *Aiken*'s principle that copyright acts “not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply.”

B. Consistent With the Public Interest, Copyright Protection in Computer Software Is Limited

Recognizing the risk that expansive protection for essentially functional works might result in unfair and unnecessary monopolies over non-expressive material, the Copyright Act limits the scope of protection for computer programs. A fair reading of the statute and case law shows that amicus Ralph Oman’s claim that Congress “afforded computer programs the same level of protection as novels, poems, film scripts, or any other type of literary work” is simply incorrect. Oman Br. at 2; *see also id.* at 7 (asserting that Congress’s policy decision was “to grant broad protection to computer programs, no different from that afforded other forms of literary work”).

1. Statutory Considerations

First, the statute itself excludes from copyrightability many of the basic elements of computer programs, in 17 U.S.C. § 102(b). Contrary to Mr. Oman’s reading, Oman Br. at 9, § 102(b) excludes not just “ideas” but also “procedure, process, system, method of operation, concept, principle, or discovery.” Most of these other exclusions aren’t relevant to literary works such as a play or novel, but they are highly relevant to functional works such as computer programs.

These exclusions play an important role in both establishing the traditional boundaries of copyright protection, and drawing the line between patent and copyright protection. Indeed, it is no coincidence that most of these terms are

found in patent law. For example, “process” and “method” are explicitly described in the patent statutes. *See* 35 U.S.C. §§ 100(b) (“process” means “process, art, or method”), 101 (a “new and useful process” is patentable). The Supreme Court used both “methods of operation” and “system” in *Baker v. Selden*, 101 U.S. 99 (1879), to illustrate that which “is the province of letters patent, not of copyright.” *Id.* at 102-04.

Indeed, since *Baker*, copyright cases often have used the term “system” to describe matter that falls within the ambit of patent rather than copyright. *See, e.g., Perris v. Hexamer*, 99 U.S. 674, 676 (1878) (system for making signs and keys on maps); *Affiliated Enters. v. Gruber*, 86 F.2d 958, 961-62 (1st Cir. 1936) (promotional system); *Brief English Sys., Inc. v. Owen*, 48 F.2d 555, 556 (2d Cir. 1931) (system of shorthand).

The distinguishing role of the last exclusion, “discovery,” is even more apparent. The term is found in the Progress Clause itself, U.S. Const. art. I, § 8, cl. 8:

Congress shall have the power. . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Thus, copyright gives “authors” a limited exclusive right to “writings,” while patents give “inventors” a limited exclusive right to their “discoveries.”

As for principles and procedures, “principle” has long been used as the

patent counterpart of “ideas,” for which no patent can be obtained. *See e.g., LeRoy v. Tatham*, 55 U.S. 156, 174-175 (1852) (“A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right”) (*cited with approval in Alice Corp. v. CLS Bank Int’l.*, 573 U.S. 208, 216 (2014)). And in patent cases such as *Gottschalk v. Benson*, 409 U.S. 63, 65 (1972), the Court specifically used the term “procedure” to define a computer algorithm as a “procedure for solving a given type of mathematical problem.”

Thus, while § 102(b) (and *Baker v. Selden*) are concerned with the idea/expression dichotomy, both are also focused on the difference between things that are patentable and things that are copyrightable. *Baker*, 101 U.S. at 102. When Congress codified *Baker* in § 102(b), it didn’t merely limit the statute’s exclusions to “ideas,” but it also excluded many other categories identified in patent law. By their terms, the exclusions establish Congress’ intent that copyright should not be allowed to substitute for or interfere with the subject matter of patent—both that which is unpatentable, such as principles, and that which is patentable, such as processes and methods of operation.

Accordingly, technology companies that wish to claim a limited monopoly over these elements must turn to patent law, and indeed, that is precisely what SAS did. *See* Section I.C. below.

Other statutory provisions also demonstrate copyright law’s necessarily careful treatment of computer programs. For example, 17 U.S.C. § 117 lists some exemptions that apply only to computer programs, and § 121 limits copyright protection in reproductions used to assist blind or disabled persons, excluding many aspects of computer programs. 17 U.S.C. § 121(b)(2).

2. Courts Treat Computer Programs Differently

The case law has consistently developed other specific limitations on software. Fair use is a good place to start. While many courts, including this one, have suggested that the nature of the copyrighted work “typically has not been terribly significant” in the fair use analysis, the Supreme Court paid close attention to factor two in analyzing the use of computer application interfaces. *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1205 (Fed. Cir. 2018) (“*Oracle II*”); *Google v. Oracle*, 141 S. Ct. at 1201-02. The Supreme Court’s fair use analysis began with factor two—unlike virtually all other fair use opinions—and concluded that the software interface in that case is further “from the core of copyright.” *Id.* at 1202. The Supreme Court also expanded the use of factor one for computer interfaces, *see id.* at 1202-04; and explained how user lock-in to a given interface (something present both in that case and here) was relevant to factor four. *Id.* at 1207-08.

The distinct status of computer software is reflected as well in the

abstraction-filtration-comparison (AFC) test that courts have applied for decades to assertions of copyright protection in functional aspects of software. The leading case is *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992) (“*Altai*”), which held that “district courts would be well-advised to undertake a three-step procedure, based on the abstractions test utilized by the district court, in order to determine whether the non-literal elements of two or more computer programs are substantially similar.” *Altai*’s filtering step excludes program components that are “dictated by considerations of efficiency, so as to be necessarily incidental to that idea; required by factors external to the program itself; or taken from the public domain and hence is nonprotectable expression.” *Id.* at 707. Also excluded are external factors such as compatibility requirements and widely accepted programming practices. *Id.* at 709-10.

Court after Court has adopted *Altai*’s reasoning. In *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 833 (10th Cir. 1993), the Court noted that “[l]iability for copyright infringement will only attach where *protected elements* of a copyrighted work are copied” (emphasis in original). The Tenth Circuit’s interpretation of the AFC test filtered out the “unprotectable elements” listed in 17 U.S.C. § 102(b), and specifically found processes unprotectable. 9 F.3d at 836-37. In *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543-45 (11th Cir. 1996), the Eleventh Circuit extended the AFC test to analyze the literal copying

of computer code. That Court joined *Altai* and the Ninth Circuit in finding that “external factors such as compatibility may negate a finding of infringement,” 79 F.3d at 1547 (citing *Altai* and *Sega Enters., Ltd., v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (“functional requirements for compatibility” between computer programs “are not protected by copyright”)).

Relying on *Gates Rubber*, the Fifth Circuit endorsed the AFC test in *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1342 (5th Cir. 1995). During the filtration step, the Court directed the district court to “consider whether or to what extent industry demand and practice” dictated the “input and output formats” in that case, and observed that filtration “may well render many of EDI’s output formats uncopyrightable,” *id.* at 1347 & n.13. Following a supplemental opinion, 46 F.3d 408, on remand, the district court applied the AFC test to conclude that no breach of copyright law occurred. *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, No. 89-1655 (E.D. La. May 1, 2001), Appx1717.

This test is rarely applied to any other potentially copyrightable works, presumably because there is no need. With most works, there is far less risk of mistakenly granting protection beyond copyright’s proper scope. And with most literary works, there is even less risk of blurring the borders between patent and copyright protection.

C. SAS’s Patents Should Have Provided Any Protection SAS Deserved in Processes, Methods of Operation, and the Like

SAS’s argument that “creative choices” entitled it to legal protection begs the question: What kind? Even assuming that SAS was highly “creative” when fabricating its interfaces, that doesn’t mean that *copyright* protects that fabrication. Here, SAS’s claims sound in patent law, if they sound anywhere at all.

SAS’s amici Computer Scientists’ description of SAS’s input formats and output designs is instructive. They describe the input formats as “the way a user provides instructions to the software,” Computer Scientists Br. at 4, 8. The formats “tell the software what kind of analysis should be done,” *id.* at 9. The output designs are “are how the program presents the information and analysis for the user—or, more simply, what the user sees as the results.” *Id.* at 10. Each of these describes processes, procedures, methods of operation, considerations of efficiency, or functional requirements for compatibility excluded from copyright protection by 17 U.S.C. § 102(b) and the *Altai* line of cases.

Instead, processes, methods of operation, interfaces, and the like are potentially *patentable* subject matter. Indeed, SAS obtained and sued on an explicit patent on its output designs (U.S. Patent No. 7,170,519, Complaint Ex. 1 and ¶¶ 156-157, 162-167 (Appx120-121, Appx124-126, Appx155-187)), and two patents for database queries related to input formats (U.S. Patent Nos. 7,447,686

and 8,498,996, Complaint Exs. 2-3 and ¶¶ 158-159, 160-161, 168-174, 175-183 (Appx121-124, Appx126-131, Appx188-240)). (By an amended complaint, Appx13812-13880, SAS added a claim on U.S. Patent No. 6,920,458, for a data model repository.)

Before judgment, SAS withdrew all of its patent infringement allegations and dismissed its patent claims with prejudice. Appx22 (Stipulation and Order for Dismissal, December 10, 2020). Perhaps SAS abandoned all its patent claims because WPL didn't infringe, or because the claims were invalid, or because SAS had been accusing prior art programs of infringement.

Whatever the reason, if SAS couldn't succeed on its patent claims for output designs and input format processes, it shouldn't be allowed to rely on copyright as a backstop to cover the same subject matter. In other words, SAS cannot both (1) evade the limits on patent protection such as novelty, obviousness, eligible patent subject matter, the patent claim construction process, etc.; and, at the same time (2) evade the limits on copyright protection by recasting functional elements as "creative" products.

To allow such a masquerade would undermine the overall intellectual property framework established by Congress. Copyright is broad, long-lasting, easily obtainable protection. Copyright protection lasts until 70 years after the death of the author for some works and 95 years for others. *See* 17 U.S.C. § 302.

Copyright registration is obtained for copyrightable elements of a computer program merely by making a deposit of any copyrightable subject matter (including only a portion of computer code). *See* 17 U.S.C. §§ 407, 408; 37 C.F.R. § 202.20(c)(2)(vii). There is no examination procedure resembling anything like the patent examination procedure.

Because copyright protection is so easy to obtain and lasts so long, it was neither intended for, nor is it suited for, processes, methods of operation, or interfaces. Simply put, a monopoly on any of those has far greater social costs than the monopoly on a book, poem, or painting. *See* Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. Pitt. L. Rev. 1119, 1123-24 (1986) (copyright law “sets a low standard for protection and attaches a correspondingly thin array of rights to the works protected.”). Precluding a competitor’s product from offering another’s process, method of operation, or interface means that users will lose their investment in the skill set necessary to implement that process, etc., if they switch to a competitor’s product. *See Google v. Oracle*, 141 S. Ct. at 1208.

That is why such a broad government-sanctioned monopoly must be secured, if at all, through the patent system (as SAS tried to do here), which strikes a very different bargain. Unlike copyright, patent protection is not automatic and lasts a short time (20 years from the application date, *see* 35 U.S.C. § 154). Patent

applications must state the invention and set forth the claims for protection clearly and specifically. The patent examination process requires that the applicant contribute something new to the state of the art (something novel and non-obvious), as the quid pro quo for the grant of monopoly. *See* 35 U.S.C. §§ 102, 103, 111, 112, 131; 37 C.F.R. §§ 1.104-1.198. None of these safeguards are present in the copyright system, in part because Congress never intended the scope of copyright protection to be equivalent to that of patent.

In short, “copyright law must not be used to grant pseudo-patents; only the patent system should give out patents.” *See* Richard H. Stern, *Copyright in Computer Programming Languages*, 17 Rutgers Computer & Tech. L.J. 321, 369-70 (1991). The patent system did so here, and SAS must be content with what it got.

II. “OPTIONS” OR “CREATIVE CHOICES” DON’T ESTABLISH COPYRIGHT PROTECTION FOR COMPUTER SOFTWARE

A key theme of SAS’s case is the idea that the interfaces at issue are copyrightable because SAS had many so-called “options” or “creative choices” when constructing its input formats and output designs. *See* SAS Br. at 5, 9, 34, 48-49, 58; Computer Scientists Br. at 14-17, 19-21. For several reasons, this simplistic argument is incorrect.

A. SAS Misinterprets *Feist*

Initially, SAS relies on *Feist* (a non-computer-related case) for the assertion that creative choices “are the essence of protectability.” SAS Br. at 48, *citing Feist*, 499 U.S. at 345 (1991) (but apparently meaning to cite to page 348 of the opinion). But *Feist* can’t possibly stand for SAS’s broad, sweeping proposition—if it did, the Court would have found the white pages directory to be copyrightable. After all, Rural Telephone also made choices. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 536 (6th Cir. 2004) (noting that the telephone directory in *Feist* “could have been organized in other ways—for instance, by street address or phone number, or by the age or height of the individual.”).

Indeed, the relevant part of *Feist* cuts the other way. *Feist*, 499 U.S. at 348. The Supreme Court noted that “the mere fact that a work is copyrighted does not mean that every element of the work may be protected.” *Id.* In other words, the drafter’s choices must be separately analyzed to determine whether they are sufficiently expressive. That is why courts must use tools such as abstraction and filtration to analyze which *parts* of the work at issue are protectable—as the district court did here.

B. *Oracle I* Does Not Stand for the Proposition SAS Claims it Does, and Should Not Control Here

SAS and its amici also lean on *Oracle I* to support their assertion that the works at issue are copyrightable because there were multiple ways to express the same idea. *Oracle I*, 750 F.3d at 1354, 1367. This pillar crumbles as well.

Oracle I's conclusion was based in large part on distinguishing *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995) ("*Lotus*"), *aff'd by an equally divided court*, 516 U.S. 233 (1996). *Oracle I*, 750 F.3d at 1365-67. But the distinctions the Court drew there largely don't apply in this case.

First, the Court observed that the defendant in *Lotus* (Borland) didn't copy any of the plaintiff's code, while Google admittedly did just that. *Id.* at 1353 ("it is undisputed that Google copied 7,000 lines of declaring code"), at 1365. Like Borland, and unlike Google, WPL did not copy any of SAS's code.

Second, the Court asserted that the Oracle API packages, unlike the Lotus menu commands, were "both creative and original." 750 F.3d at 1365. Here, that issue is very much in dispute. Appx17 (district court opinion describing how elements of SAS's works were in the public domain, were not original, were process or method elements, were well-known display elements, were material for which SAS was not the author, and more). That is not surprising: SAS is trying to protect functional computer interfaces, namely input formats and output designs.

With these distinctions set aside, and with the closely analogous facts in view, *Lotus* offers clear and persuasive authority rejecting SAS’s “creative choices” argument:

The fact that Lotus developers could have designed the Lotus menu command hierarchy differently is immaterial to the question of whether it is a “method of operation.” . . . The “expressive” choices of what to name the command terms and how to arrange them do not magically change the uncopyrightable menu command hierarchy into copyrightable subject matter.

49 F.3d at 816. This Court should do the same.

C. The Ninth Circuit Has Clarified its View on Copyrightability; this Court Should Follow Suit

In order to decide the copyrightability issue, *Oracle I* had to determine whether the structure, sequence, and organization of the Java API packages was copyrightable under 17 U.S.C. § 102(b). *Oracle I*, 750 F.3d at 1364-65. The Court believed (1) that the Ninth Circuit would not follow *Lotus*’s reasoning, 750 F.3d at 1365-66, and (2) that the Ninth Circuit had not “addressed the precise issue” raised in *Oracle I*. Thus, this Court came to its own conclusion about what the Ninth Circuit would do:

We agree with Oracle that, under Ninth Circuit law, an original work—even one that serves a function—is entitled to copyright protection as long as the author had multiple ways to express the underlying idea.

Id. at 1367.

Subsequent case law suggests otherwise. Soon after the 2014 *Oracle I* opinion was issued, the Ninth Circuit decided *Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015), and clarified the Ninth Circuit's view of copyrightability.

1. *Bikram's Yoga Shows that this Court's "Multiple Ways to Express" Reasoning Is Not Good Law in the Ninth Circuit*

In October 2015, the Ninth Circuit considered a copyright claim in a sequence of yoga poses. *Bikram's Yoga*, 803 F.3d 1032. Bikram Choudhury and his company, Bikram's Yoga, had sued a competitor who used the same sequence. Simply put, Choudhury was claiming copyright in a process for improving one's health by practicing certain yoga poses in a specific order.

Relying on 17 U.S.C. § 102(b), the Court concluded that a "Sequence" of 26 yoga poses and two breathing exercises, performed in a particular order, was not subject to copyright protection. The Court stressed that copyright recognizes a "vital distinction" between ideas and expression, so "the copyright for a work describing how to perform a process does not extend to the process itself." *Id.* at 1037-38. Choudhury himself described his Sequence as a "system" or "method" to use yoga to optimize the body's health and function. *Id.* at 1038-39. Given that, the Court had little difficulty concluding that the idea/expression dichotomy, codified in § 102(b), precluded copyright protection of the Sequence. *Id.* at 1039-40.

Bikram's Yoga also considered, and rejected, the argument that a system or method can be copyrightable if there were different ways to “express” that system.

The Ninth Circuit held:

It makes no difference that similar results could be achieved through a different organization of yoga poses and breathing exercises. Choudhury argues that he could have chosen from “hundreds of postures” and “countless arrangements of these postures” in developing the Sequence. But the possibility of attaining a particular end through multiple different methods does not render the uncopyrightable a proper subject of copyright. Though it may be one of many possible yoga sequences capable of attaining similar results, the Sequence is nevertheless a process and is therefore ineligible for copyright protection.

803 F.3d at 1042 (citations, quotations, and footnote omitted).

A finding of copyrightability based on the fact that “the author had multiple ways to express the underlying idea,” *Oracle I*, 750 F.3d at 1367, cannot be reconciled with the Ninth Circuit’s holding above. Accordingly, this Court’s “multiple expressions” theory is not the law in the Ninth Circuit, and the Court should avoid relying on *Oracle I*’s interpretation of that law here.

2. Other Circuits Agree With the Ninth Circuit

In addition to the First Circuit, other circuits agree with the Ninth Circuit that “options” do not confer copyright protection on otherwise uncopyrightable subject matter. *See, e.g., Altai*, 982 F.2d at 708 (while “there might be a myriad of ways in which a programmer may effectuate certain functions within a program,—i.e., express the idea embodied in a given subroutine—efficiency

concerns may so narrow the practical range of choice as to make only one or two forms of expression workable options”); *Lexmark Int’l*, 387 F.3d at 536 (“The question, however, is not whether *any* alternatives theoretically exist; it is whether other options practically exist under the circumstances . . . In order to characterize a choice between alleged programming alternatives as expressive, in short, the alternatives must be feasible within real-world constraints”) (emphasis in original).

The Fifth Circuit does not believe otherwise. *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 46 F.3d 408, 410 (5th Cir. 1995) (supplemental opinion) (“The panel did not say that in any case involving user interface the fact that the ‘author’ has selected from among possible formats is dispositive.”). Thus, applying the law of any of the First, Second, Fifth, Sixth, or Ninth Circuits leads to the same conclusion: “options” or “creative choices” do not by themselves establish copyrightability.

3. The Supreme Court’s Approach to Copyright in Software Suggests It Would Not Treat “Creative Choices” as Sufficient for Copyrightability

In *Google v. Oracle*, the Supreme Court reviewed the *Oracle I* copyrightability decision and this Court’s subsequent *Oracle II* fair use decision. The Supreme Court’s decision may not have reached copyrightability, but its fair uses analysis suggests it would have rejected the idea that options or creative

choices in creating computer interfaces sufficed to merit copyright protection.

The Java APIs in *Google v. Oracle* were a “user interface” that allow programmers to perform certain tasks, similar to Lotus’s menu commands, 141 S. Ct. at 1201, and to SAS’s input formats and output designs. Oracle accused Google of using Java’s so-called “declaring code,” which labels those tasks and organizes them. *Id.*

Google v. Oracle’s analysis of fair use factor two, the nature of the copyrighted work, is instructive. 141 S. Ct. at 1201-02. The Supreme Court observed that the nature of declaring code was different from the computer programs Congress intended to protect in the Copyright Act:

[The declaring code] differs, however, from many other kinds of copyrightable computer code. It is inextricably bound together with a general system, the division of computing tasks, that no one claims is a proper subject of copyright. It is inextricably bound up with the idea of organizing tasks into what we have called cabinets, drawers, and files, an idea that is also not copyrightable. . . . And it is inextricably bound up with implementing code, which is copyrightable but was not copied.

...

[A]s part of a user interface, the declaring code differs to some degree from the mine run of computer programs. Like other computer programs, it is functional in nature. But unlike many other programs, its use is inherently bound together with uncopyrightable ideas (general task division and organization) and new creative expression (Android’s implementing code). Unlike many other programs, its value in significant part derives from the value that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API’s system. And

unlike many other programs, its value lies in its efforts to encourage programmers to learn and to use that system so that they will use (and continue to use) Sun-related implementing programs that Google did not copy.

Google v. Oracle, 141 S. Ct. at 1201-02. The Court also concluded that “the declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright.” *Id.* at 1202.

Similar considerations apply here. WPL used input formats and output designs, which are specifications for “computing tasks” and their organization. Programmers using the SAS system invest their time and effort to learn those formats, designs, and their organization. *See* SAS Br. at 27 (“All users of the SAS software expect WPS to give precisely the same output as is produced by the SAS software in response to any given input.”). And again, while Google used Oracle’s declaring code, WPL didn’t use any of SAS’s code at all.

4. The Court Should Clarify Its Interpretation of the Ninth Circuit’s Approach to Copyrightability

Amicus urges the Court to not only distinguish *Oracle I*, but also recognize the change of law and weight of authority outlined above.

First, *Oracle I* has been criticized as “deeply flawed and at odds with more than two decades of copyright precedents applying copyright law to computer programs.” Pamela Samuelson, *Three Fundamental Flaws in CAFC’s Oracle v.*

Google Decision, 37 Eur. Intell. Prop. Rev. 702, 708 (2015).² In particular, it created an unnecessary split with the First Circuit's holding in *Lotus*, 49 F.3d 807. As noted, *Oracle I's* reasoning was based in part on the mistaken premise that the Ninth Circuit would not follow *Lotus*, see *Oracle I*, 750 F.3d at 1365-66. *Bikram's Yoga* dispels that perception and creates an opportunity to reconcile the circuits.

Second, clarifying *Oracle I* avoids the serious practical problems that arise if courts treat methods of operating a computer as copyrightable. Amicus briefs filed by numerous prominent computer scientists in both *Oracle* appeals explained the pervasive belief and expectation that computer interfaces were uncopyrightable, and how that lack of copyright was essential to the development of modern computers and the Internet. See Corrected Brief of Amici Curiae Computer Scientists, filed May 30, 2013 in the first appeal in *Oracle I* (Fed. Cir. Case No. 2013-1021, Docket No. 118);³ Brief of Computer Scientists as Amici Curiae, filed May 30, 2017 in the second *Oracle* appeal (Fed. Cir. Case No. 2017-1118, Docket No. 175);⁴ Brief of Amici Curiae Eighty-Three Computer Scientists filed January 13, 2020 in *Google v. Oracle* (Supreme Court Case No. 18-956),⁵

² Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643840.

³ Available at <https://www.eff.org/document/amicus-brief-computer-scientists>.

⁴ Available at <https://www.eff.org/document/computer-scientists-amicus-brief>.

⁵ Available at <https://www.eff.org/document/brief-amicus-curaie-eighty-three-computer-scientists>

cited with approval in Google v. Oracle, 141 S. Ct. at 1204.

CONCLUSION

The district court correctly applied computer copyright law and the AFC test to conclude that WPL did not use any feature of SAS's input formats and output designs protected by copyright. The judgment below should be affirmed.

September 7, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I caused the foregoing
CORRECTED BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER
FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE AND
AFFIRMANCE to be served by electronic means via the Court's CM/ECF system
on all counsel registered to receive electronic notices.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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I hereby certify as follows:

1. The foregoing Corrected Brief of Amicus Curiae Electronic Frontier Foundation In Support of Defendant-Cross Appellant and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(a). The brief is printed in proportionally spaced 14-point type, and there are 5,732 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and by Fed. Cir. R. 32(b)).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 365 in 14-point Times New Roman font.

September 7, 2021

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