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Via e-filing and hand delivery

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
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Re: *Google LLC v. Oracle America, Inc.*, No. 18-956

Dear Mr. Harris:

This letter responds to the Court’s request for briefing on the “appropriate standard of review for the second question presented, including but not limited to the implications of the Seventh Amendment, if any, on that standard.” The standard of review is de novo.

The standard of review flows from established civil procedure principles that the Court of Appeals faithfully applied. The fair use question in this case arises from Oracle’s motion for judgment as a matter of law (JMOL). On JMOL, the court determines the controlling law de novo and assumes that the factfinder resolved in favor of the verdict every disputed issue of historical fact supported by substantial evidence and accepted all other undisputed evidence. In applying the law to that body of established facts, the court determines de novo any mixed question of law and fact that requires it “to expound on the law, particularly by amplifying or elaborating on a broad legal standard.” *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967-68 (2018). As this Court has already held, the ultimate question whether a use is a fair use is the kind of mixed question that is determined de novo. *See Harper & Row Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). De novo review is appropriate because fair use hinges on legal judgments that balance competing interests of property rights, the progress of science and the arts, and free expression, and because copyright holders and the public rely on the stable development of the doctrine.

That said, whether fair use is determined de novo makes no difference in this case. A party is always entitled to JMOL if, under the controlling law, no reasonable jury could find for the non-movant. The Court of Appeals correctly concluded that only one determination was reasonable: It is not fair use for Google to copy popular portions of Oracle’s software for an identical, superseding purpose in a platform that competes with Oracle’s work and its derivatives.

The Seventh Amendment does not affect the standard of review. It is settled that JMOL comports with the Seventh Amendment. And de novo review of a question like fair use does not implicate the Re-examination Clause, which applies to jury factfinding only, not to the application of law to facts. In any event, no Seventh Amendment right attaches because fair use did not exist upon ratification of the Amendment, and no comparable defense was tried by juries at the time.

I. The Court Determines Fair Use De Novo On Review Of Judgment As A Matter Of Law, Though The Court Of Appeals' Judgment Is Correct Under Any Standard.

A. Whether Google's copying is fair use as a matter of law is a question a court evaluates de novo.

1. The second question presented asks whether the Court of Appeals correctly held that Oracle is entitled to JMOL on Google's fair use defense. Because the propriety of judgment as a matter of law is itself a question of law, the appellate standard of review is de novo. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 254 (1940); see 9B Wright & Miller, *Federal Practice & Procedure* § 2540 (3d ed. 2020). On any JMOL review, this Court applies the same standard as the district court: JMOL is proper when, "under the controlling law," "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-movant] on th[e] [claim or defense]." Fed. R. Civ. P. 50(a), (b); accord *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-24 (1967).

As Google conceded in its petition for certiorari, the Court of Appeals "correctly stated" the settled division of labor between the court and the jury when considering a post-verdict JMOL motion. Pet. 22; see Pet. App. 16a. The court determines any "question[s] of law," *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659-61 (1935), which are reviewed de novo, *U.S. Bank*, 138 S. Ct. at 965.¹ The jury determines the historical facts—"who did what, when or where, how or why." *Id.* at 966. The court defers to the jury's factfinding by assuming the jury resolved every dispute of historical fact in favor of the verdict so long as substantial evidence supports that assumption. Pet. 22; Pet. App. 23a. It also assumes the jury accepted any evidence that is "uncontradicted and unimpeached." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Based on that universe of established facts, the court determines whether "the evidence presented ... would ... suffice, as a matter of law, to support a jury verdict under the properly formulated [legal standard]." *Boyle*, 487 U.S. at 513; see Oracle Br. 38.

2. Once the court decides the controlling legal principles and identifies the established facts, it must resolve the ultimate question, here whether the challenged use was a fair use. The Court has already established that it reviews that mixed question of law and fact de novo. *Harper & Row*, 471 U.S. at 560. If the historical facts established are "sufficient to evaluate each of the statutory factors, an appellate court ... may conclude as a matter of law that the challenged use does not qualify as a fair use." *Id.* (alterations omitted). Notably, the Court applied that standard in *Harper & Row* even though the parties had significant disputes over fair use, such as the importance of "news reporting" on a "politically significant" matter; the amount of creative expression copied from a non-fiction memoir balanced against the importance of those passages; and how to weigh the Copyright Act's guarantee to creators of "a fair return for their labors," including the right of first publication. *Id.* at 544-46, 549, 560-69. *Harper & Row* established that appellate courts "evaluate" fair use de novo—i.e., apply the legal principles of fair use to the historical facts—without the need to "remand for further factfinding." *Id.* at 560. Google did not ask this Court to overrule *Harper & Row* and has therefore waived that possibility. See *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 n.* (2009).

¹ Contrary to Google's assertion, Google Br. (GB) 35, the court determines and applies the legal rules on JMOL regardless of the rules reflected in the jury instructions. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-14 (1988).

Regardless, *Harper & Row* was right. Its de novo standard comports with *U.S. Bank*'s approach to determining how a court should review a mixed question: Because “[m]ixed questions are not all alike,” the standard of review depends on “whether answering [that mixed question] entails primarily legal or factual work.” *U.S. Bank*, 138 S. Ct. at 967. The ultimate determination whether a defendant’s copying qualifies as fair use entails primarily legal work because that analysis involves *legal* judgments balancing the competing policies embodied in the Copyright Act of rewarding innovation, protecting the author’s property rights, encouraging progress of science and arts, and safeguarding constitutional free expression. Pet. App. 16a-19a; *see* Oracle Br. 37-38. It is the job of a judge, not a lay jury, to calibrate these interests—to demarcate the lines between permissibly building on an earlier work and invading an author’s exclusive right to prepare derivatives of the original work, and between cognizable potential markets reserved for the original author and uses others should remain free to pursue. *See* Oracle Br. 40-41. Because fair use entails primarily legal work, it receives de novo review.

It would undermine the stable development of copyright law to defer to a jury on whether a particular use achieves the Copyright Act’s “essential purpose.” GB37. Where, as here, a mixed question “require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard,” de novo review is appropriate. *U.S. Bank*, 138 S. Ct. at 967. As exemplified by this Court’s four prior fair use decisions, *see* Oracle Br. 37, answering such questions will “clarify legal principles [and] provide guidance,” *U.S. Bank*, 138 S. Ct. at 968, that reverberates throughout copyright law and across industries—as the legions of amici in this case demonstrate, *e.g.*, Creators’ Rights Organization Br. 32-34. Resolving those legal questions is also typically dispositive of fair use.

Google urged the Court of Appeals to apply *U.S. Bank*. Google C.A. 28(j) Letter, ECF No. 240. So it cannot now argue that *U.S. Bank* is inapplicable. Nor can Google now distinguish *U.S. Bank* or *Harper & Row* on the ground that the factfinder was a judge, not a jury. Google Reply (GR) 15. A “primarily legal” mixed question that is reviewed on appeal de novo does not somehow become a “factual” one reviewed deferentially just because the factfinder was a jury rather than a judge. The same is true of a general verdict. The fact that the jury issued a general verdict does not contract a court’s role in stating the applicable legal principles, determining the relative legal import of the historical facts, or assessing what resolution of fair use best meets the Copyright Act’s objectives. On JMOL review, the consequence of a general verdict is that the court presumes the jury resolved every disputed historical fact in favor of the verdict, as opposed to deferring only to the more particularized factfinding in a special verdict or interrogatories on subsidiary factual questions. *Compare Reeves*, 530 U.S. at 150-51, *with* Fed. R. Civ. P. 49.

Contrary to Google’s assertion (GB35-36), *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418 (2015), does not compel deferential review. That case holds that a jury should decide trademark “tacking,” which asks whether an “ordinary consumer” would consider two trademarks equivalent. *Id.* at 422. That mixed question falls on the opposite side of the *U.S. Bank* spectrum: Determining “an ordinary consumer’s understanding of the impression that a mark conveys” is the kind of “fact-intensive” question that “falls comfortably within the ken of a jury.” *Id.* In contrast, fair use does not ask what feels fair to an ordinary person. It applies judge-made factors codified in the Copyright Act and elucidated by additional legal rules developed in a vast body of fair use precedent. Accordingly, fair use is a primarily legal, not factual, question determined de novo.

3. Fair use’s constitutional implications further justify de novo review. “In the constitutional realm,” this Court has “often held that the role of appellate courts in marking out the limits of a standard through the process of case-by-case adjudication favors de novo review even when answering a mixed question primarily involves plunging into a factual record.” *U.S. Bank*, 138 S. Ct. at 967 n.4. For example, because the defense of “actual malice” in a defamation case implicates First Amendment protections, the court must conduct an “independent review of the evidence,” which entails deferring to the factfinder’s “purely factual findings,” such as credibility determinations, but not to the jury’s assessment whether those historical facts prove “actual malice.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-501, 508, 510-11, 513 & nn.27, 31 (1984) (applying *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

The same First Amendment considerations that compel de novo review of the actual malice defense apply to fair use. Fair use, too, is “designed to accommodate First Amendment concerns.” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020). Parody, satire, news reporting, criticism, education, research, and other core applications of fair use are part of copyright’s “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003); see, e.g., *Harper & Row*, 471 U.S. at 555-60 (considering First Amendment implications but holding no fair use). De novo review is essential for courts to protect the stability and development of such constitutional safeguards, without regard to whether any particular case implicates the First Amendment. See *Bose*, 466 U.S. at 502-11 & n.29; *id.* at 514 (“reaffirm[ing] the principle of independent appellate review,” although First Amendment concerns “may seem out of place in a case involving a dispute about the sound quality of a loudspeaker”).

4. Google emphasizes that the statutory fair use factors are non-exclusive and suggests the jury’s inquiry was therefore entirely open-ended. GB37-41. But a standard with some flexibility does not require total deference to juries. If it did, a court could rarely resolve fair use on summary judgment or test a jury verdict against the legal standard on JMOL—a dispute on any factor or additional consideration would drive the case to a jury. Such an approach would radically alter the settled practice of resolving many fair use cases without a jury trial. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions 1978-2005*, 156 U. Penn. L. Rev. 549, 570 & tbl.2 (2008). Indeed, because fair use typically turns on legal disputes, courts “most frequently” resolve fair use at summary judgment, including where factors point in different directions. *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016); see also *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (affirming summary judgment of no fair use).² This practice furthers the stable development and predictability of the law, while effectively and efficiently resolving most fair use cases.

B. Even if fair use is not reviewed de novo, the Court of Appeals correctly held that Oracle is entitled to judgment as a matter of law.

1. The standard of review makes no difference here because the Court of Appeals correctly concluded that no reasonable jury could have found fair use on these facts under controlling law.

² This Court’s dictum in *Public.Resource.Org* that fair use will often require a jury trial, 140 S. Ct. at 1513, simply reflects that a jury trial may be necessary to *determine* the historical facts where there are genuine disputes regarding those facts. But once the jury settles those facts, the ultimate question of fair use is a legal mixed question that a court determines on JMOL without deference to the verdict.

A court always determines on JMOL whether the evidentiary record can satisfy the governing legal standard. Fed. R. Civ. P. 50(a)(1); *Boyle*, 487 U.S. at 513-14; *Hana Fin.*, 574 U.S. at 423. And although the Court of Appeals explained why the standard of review for fair use is de novo, its opinion did not rely on that characterization. Rather, the court determined that “no reasonable jury” could conclude that Google met the legal standard for fair use, particularly in light of the uncontroverted evidence and the parties’ stipulations. U.S. Br. 27 (Court of Appeals “correctly identified several specific bases for its conclusion that ‘no reasonable jury’ could have ruled for petitioner on fair use”); *cf. Bose*, 466 U.S. at 514 n.31 (declining to remand where appellate court stated errant standard of review but did not apply it).

For each fair use factor, the Court of Appeals properly began by articulating the controlling legal standards de novo. It held that not charging consumers directly and having mixed commercial and noncommercial motivations cannot negate commerciality, Pet. App. 27a-28a; a transformative use must “alter[] ‘the *expressive content or message* of the original work,’” Pet. App. 34a; “a copyist’s good faith cannot weigh in favor of fair use,” Pet. App. 39a; the functional nature of copyrightable software cannot, without more, establish fair use, Pet. App. 42a-43a; and “harm to the ‘market for potential derivative uses,’ including ‘those that creators of original works would in general develop or license others to develop,’” weighs against fair use, Pet. App. 49a. And the court reaffirmed the longstanding *legal* rule that a “superseding use is inherently unfair.” Pet. App. 53a; *Harper & Row*, 471 U.S. at 550 (holding fair use “has always precluded a use that ‘supersede[s] the use of the original.’” (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (No. 4,901) (C.C.D. Mass. 1841) (Story, J.))); *see* Oracle Br. 36.

The court then correctly determined that, based on these controlling legal rules, no reasonable jury could have found fair use in this case. First, employing the governing legal standards it identified, the court determined what a jury could have concluded on each factor based on the assumed historical facts.³ Next, the court held that the overarching legal principle that a superseding use is inherently unfair meant that a reasonable jury could find it only unfair that Google commercially exploited Oracle’s code for the same purpose for which Oracle created it in a protected market for Oracle’s work, Pet. App. 53a—a “classic example of an unfair use” as a matter of law, *Stewart v. Abend*, 495 U.S. 208, 238 (1990).

2. Nothing about the court’s application of JMOL principles and substantive fair use law intruded on the jury’s factfinding role. Contrary to Google’s assertion, the Court of Appeals did not treat the jury’s *factfinding* “as ‘advisory only.’” GB36. Rather, as Google’s petition concedes, the court correctly stated that it “‘must assume’” the jury’s implicit factual findings were binding. Pet. 22. The court stated that “findings relating to fair use *other than* [the jury’s] implied findings

³ *E.g.*, Pet. App. 27a-28a (“no substantial eviden[ce]” that Google’s use was “anything other than overwhelmingly commercial”); Pet. App. 31a-37a (Google’s use “not transformative as a matter of law”); Pet. App. 39a (Google’s alleged “good faith” legally irrelevant); Pet. App. 42a (“[R]easonable jurors could have concluded that functional considerations were both substantial and important. Based on that assumed factual finding, we conclude that factor two favors a finding of fair use.”); Pet. App. 46a (“[N]o reasonable jury could conclude that what was copied was qualitatively insignificant, particularly when the material copied was important to the creation of the Android platform.”); Pet. App. 51a (“Given this evidence of actual market harm, no reasonable jury could have concluded that there was no market harm to Oracle from Google’s copying.”); Pet. App. 52a (“Even assuming a reasonable jury could have found no *current* market harm, the undisputed evidence showed, at an minimum, that Oracle intended to license Java SE in smartphones; there was no evidence in the record to support any contrary conclusion.”).

of historical fact must ... be viewed as advisory,” Pet. App. 23a-24a (emphasis added)—meaning the only aspect of the verdict that the court considered “advisory” was the jury’s answer to *legal questions* subsumed within its verdict, which the court correctly reviewed de novo.

The procedural history of this case demonstrates that the Court of Appeals took care to respect the jury’s role. In the first appeal, the Court of Appeals thought Oracle’s case for JMOL was “not without force,” but Google contended that there were disputes regarding certain material historical facts, and so, with due “respect for the limit[s] of [the] appellate function,” the court remanded for the factfinder to resolve them. Pet. App. 181a-82a. The court’s grant of JMOL in the second appeal reflected a changed evidentiary landscape—not a changed approach. Pet. App. 23a-25a (observing evidentiary differences between appeals). The court noted that key purported disputes evaporated on remand. Google ended up admitting some of them were not disputed, the parties resolved other disputes by stipulation, and others turned out to be immaterial. *Id.*⁴

3. Google barely addresses the mass of undisputed evidence that drives the fair use result here as a matter of law. It waited for its reply to challenge three discrete instances in which it asserts the Court of Appeals resolved disputed facts against it. Google waived these challenges to the Court of Appeals’ opinion by making the tactical decision not to assert them in its opening brief. In any event, each further illustrates Google’s misunderstanding of the standard of review and the substantive law of fair use.

All three purported disputes are legally irrelevant. They all concern the extent to which Java SE and Android *actually* competed in *existing* markets for identical devices. GR19-21. But as a matter of law, Google cannot establish fair use simply by showing that Java SE and Android were not competing in existing markets. Congress confirmed that point by directing the factor four inquiry to “the effect of the use upon the *potential market* for or value of the ... work.” 17 U.S.C. § 107(4) (emphasis added). This inquiry requires courts to consider all harms to the value of the work, including harms to opportunities to adapt the work for new markets and the effect of “widespread conduct of the sort engaged in by the defendant.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). Because, by definition, a potential market is one that the work has not entered, direct competition is unnecessary.

That is why *Stewart* found no fair use as a matter of law where a movie producer usurped a short story author’s exclusive right to create the derivative work of a movie based on the story, even though the author did not have his own competing movie. 495 U.S. at 238. And it is why *Campbell* stressed the importance of determining harm to the potential market for rap derivatives of “Oh, Pretty Woman” even though Roy Orbison had never tried to market one (and probably would have failed had he tried). 510 U.S. at 592-93. Yet, in Google’s view, a jury could *always* find fair use in the absence of direct competition, vitiating the author’s exclusive right to create

⁴ Specifically, Google admitted on remand that the declaring code in Java SE and Android serve the same purpose, Pet. App. 30a-31a & n.6; the district court accepted Google’s admission that its use was “commercial,” Pet. App. 27a n.5; Google conceded that it copied 11,500 lines of code (not 7000) and that only 170 of those lines were necessary to program in the Java language, Pet. App. 45a; and Google abandoned its argument that Android is interoperable with Java SE, Pet. App. 46a n.11. In addition, new evidence on remand included that Google had made \$42 billion on Android, Pet. App. 7a, 26a; that Android’s founder admitted that Android “compet[es]” with Java SE, JA366; that Amazon extracted a “steep discount” by threatening to use Android for free instead of Java SE, Pet. App. 51a; and that Android competed in the same market as SavaJe, a smartphone platform that used Java SE, Pet. App. 50a.

derivative works—or to decide not to. 17 U.S.C. § 106(2); *see* Oracle Br. 40-43. By focusing on actual markets, Google tacitly concedes the dispositive point that the Court of Appeals found as a matter of law: that Android harmed the opportunity and ability for Oracle to extend Java SE and its derivatives to the smartphone market. Pet. App. 53a.

Although Google’s purported factual disputes concerning existing markets are legally irrelevant, we address each to illustrate the other ways in which Google misapplies the JMOL standard. First, Google argues that the Court of Appeals should have ignored *all harm* to Oracle’s relationship with Amazon, because Amazon licensed a modified derivative version of Java SE (Java *ME*, rather than Java SE) in *one version* of the Kindle. GR20-21. Google never made this argument to the Court of Appeals. Regardless, it ignores that Amazon used Java SE to power another Kindle version (the Paperwhite) and that Amazon expressly leveraged Android to obtain a 97.5% discount on Java SE. JA396, 670. The court properly credited that uncontroverted evidence of price-erosion harm to Java *SE* on JMOL review, U.S. Br. 31. *See Reeves*, 530 U.S. at 151. Moreover, Google ignores that Java ME is itself a derivative of Java SE, Oracle C.A. Opp. Br. 7; Oracle C.A. Reply 40 n.9—an abridgment made for smaller devices—and so Amazon’s switch from Java ME in the Kindle to Android in the Kindle Fire qualifies as “harm to the market for derivative works.” *Campbell*, 510 U.S. at 590. It also shows that a potential market existed for adaptations of Java SE and that Google harmed that potential market.

Google’s second argument is another one it did not make to the Court of Appeals and one that also invokes the legally irrelevant distinction between Java ME and Java SE: that the jury could have concluded that Danger did not use Java SE in its smartphones. GR20. The only basis for that assertion is the non sequitur that “the jury heard that Danger *licensed* Java ME.” *Id.* (emphasis added). So what? Danger’s decision to take a license to Java ME does not mean it did not *use* SE. Google does not address or dispute the uncontradicted testimony from Danger’s founder (Andy Rubin, who also founded Android) that Danger *used* Java SE and was paying for that use. JA359, 370.

Third, Google argues that the Court of Appeals should have concluded that the jury dismissed harm to SavaJe as irrelevant because the Java-SE-based SavaJe platform “had proven unsuccessful before the first Android phones were *released*.” GR20 (emphasis altered). But Google again ignores the uncontroverted evidence: Google does not dispute that it pitched Android to device manufacturers and wireless carriers before Android’s release. Oracle Br. 15. And Android’s co-founder recognized that the *announcement* that the Java-SE-based Android was coming was what cost SavaJe critical investment. JA584. That is undisputed harm to the market for adapting Java SE for mobile devices.

II. The Seventh Amendment Does Not Alter The Standard Of Review.

The Seventh Amendment provides that “the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” Because there was a jury trial on fair use, only the Re-examination Clause is potentially at issue here. *Cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 344 (1998) (reversing denial of request for jury trial without addressing standard of review). As a threshold matter, Google has never raised any Seventh Amendment issue

and has therefore forfeited any violation. *See Duignan v. United States*, 274 U.S. 195, 198-200 (1927); 9 Wright & Miller, *supra*, § 2321. Nevertheless, the Seventh Amendment does not alter the standard of review. An otherwise proper JMOL ruling does not violate the Re-examination Clause (§II.A). In any event, the Seventh Amendment does not attach to fair use (§II.B).

A. Holding Google’s use unfair as a matter of law comports with the Re-examination Clause.

This Court has held, and Google concedes (GB35), that an appellate court’s grant of JMOL setting aside a jury verdict under “Rule 50(b) does not violate the Seventh Amendment’s guarantee of a jury trial.” *Neely*, 386 U.S. at 321. That is true whether the basis for JMOL concerns sufficiency of the evidence, *id.* at 319-21, a legal issue, *Redman*, 295 U.S. at 659-60, or the application of law to fact, *Boyle*, 487 U.S. at 513. Accordingly, this Court has held that there is no Seventh Amendment issue with a court of appeals clarifying the governing legal principles and then granting JMOL. *Id.* It has also rejected a Seventh Amendment challenge to an appellate court reevaluating the trial record and granting JMOL to the verdict loser after holding a subset of the evidence inadmissible, *Weisgram v. Marley Co.*, 528 U.S. 440, 443-44, 454 n.10 (2000).

These holdings flow naturally from the Re-examination Clause’s text, which applies only to a “fact tried by a jury.” The Clause’s “ban on re-examination of facts does not preclude [the Court] from determining whether governing rules of federal law have been properly applied to the facts.” *New York Times*, 376 U.S. at 284-85 & n.26 (quotation marks omitted). “Seventh Amendment concerns [are not] ... implicated in appellate review” of an issue that “does not constitute a finding of ‘fact.’” *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437-38 (2001) (no Seventh Amendment concern presented by de novo review of punitive damages award). Because the ultimate question of fair use is a mixed question applying law to fact, not a finding of fact, the Re-examination Clause does not affect the standard of review.

B. Regardless, there is no Seventh Amendment right to a jury trial on fair use.

Because the standard of review on JMOL does not implicate the Seventh Amendment, this Court need not address whether there is a jury trial right on fair use. *See also* Fed. R. Civ. P. 39(c)(2) (verdict after jury trial on consent has “the same effect” as if it were as of right). But, insofar as a Seventh Amendment right has any bearing on the standard of review, we address it for completeness: There is no such jury trial right.

Courts assess the Seventh Amendment’s application issue by “particular issue.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996); *accord City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999). For example, in patent cases there is a right to a jury trial on infringement, but there is no such right on the “subsidiary question” of the meaning of a patent claim—even though that question is indispensable to, and often dispositive of, an infringement case. *Markman*, 517 U.S. at 375-77, 391. Similarly, just because a plaintiff is entitled to a jury trial on statutory damages in a copyright case, *Feltner*, 523 U.S. at 353, does not mean that the right extends to the fair use defense.

For several reasons, there is no jury trial right on fair use. First, looking to “existing precedent,” *Markman*, 517 U.S. at 384, this Court has repeatedly described fair use as “equitable

[in] nature.” *Harper & Row*, 471 U.S. at 551; accord *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (“equitable rule of reason”). There is no jury trial right for equitable defenses. *Liberty Oil Co. v. Condon Nat’l Bank*, 260 U.S. 235, 242-43 (1922).

Second, there was no established historical practice of juries deciding fair use during the relevant period—i.e., before the Seventh Amendment’s ratification in 1791. See *Markman*, 517 U.S. at 376, 383-84. A prominent copyright scholar recently investigated this very question and reached this conclusion. See Justin Hughes, *The Respective Role of Judges and Juries in Copyright Fair Use*, 58 *Houston L. Rev.* (forthcoming 2020), <https://ssrn.com/abstract=3592361>. In fact, fair use did not exist in 1791. It derived from *Folsom v. Marsh*, decided in 1841. See Internet Accountability Project Br. 1-2.

Google’s amici cite just two English law cases that they say demonstrate juries decided “issues very similar to the modern issue of fair use,” Civ. Pro. Profs. Br. 6-7—*Sayre v. Moore*, 102 Eng. Rep. 138, 139 n.(b) (K.B. 1785), and *Cary v. Kearsley*, 170 Eng. Rep. 679 (K.B. 1803). Two cases are not enough to show the kind of robust historical practice that establishes a constitutional right—even if the cases were on point, which they are not. *Cary* is irrelevant because it postdates the Seventh Amendment’s ratification. Moreover, neither *Cary* nor *Sayre* are fair use cases or anything like fair use. Both concerned road atlases, and in both the sole question the court identified for the jury was whether the substantial similarity between maps was due to copying, versus simply reflecting the same geographic elements that anyone is free to document. *Sayre*, 102 Eng. Rep. at 139-40 n.(b); *Cary*, 170 Eng. Rep. at 679-80. That mirrors not fair use but rather the modern infringement question—whether a defendant copied protectable expression from a plaintiff’s work. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). *Cary* recounts one hypothetical exchange between the bench and counsel that sounds vaguely like fair use considerations, but Lord Ellenborough presented it as merely a hypothetical and did not say the issue would be for a jury were it actually presented. 170 Eng. Rep. at 680 (Paley’s Philosophy hypothetical). Moreover, in both *Sayre* and *Cary*, the bench pronounced the applicable principles of law de novo, just like modern courts do on JMOL. *Sayre*, 102 Eng. Rep. at 140 n.(b) (pronouncing “[t]he rule of decision in this case”); *Cary*, 170 Eng. Rep. at 679 (similar).⁵

Third, there was no “established jury practice sufficient to support an argument by analogy.” *Markman*, 517 U.S. at 379-80. The only analog Google’s amici have cited is the ancient doctrine of “fair abridgment.” Fair abridgment categorically excused a historical practice of shortening a longer work enough to “be called a new [work],” *Gyles v. Wilcox*, 2 Atk. 141, 143

⁵ *Emerson v. Davies*, 8 F. Cas. 615 (No. 4,436) (C.C.D. Mass 1845), which also postdates the ratification of the Seventh Amendment, is inapposite for the same reason as *Cary* and *Sayre*: The question Justice Story identifies for the jury is expressly “confined to” whether the similarity between two arithmetic books was due to copying, as opposed to shared use of common materials and facts that predated both works. *Id.* at 625-26. In *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769), Judge Aston noted in dicta that juries should resolve the historical fact question whether a plaintiff owned the copyright to the work, rather than the original author having “abandoned” the rights or “gift[ed] [it] to the public,” *id.* at 224. But that described only a plaintiff’s ability to prove ownership such that he had a “right” to recover damages, *id.*, not, as Google’s amici have suggested elsewhere, a “fair use” analog of “circumstances that would justify copying,” Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. Davis L. Rev. 483, 547 & n.358 (2010).

(1740)—a practice fair use does not similarly excuse.⁶ While this Court has suggested in dicta that “fair abridgement[.]” is the doctrinal ancestor to fair use, that case did not involve the Seventh Amendment. *See Campbell*, 510 U.S. at 575-76. That ancestry does not mean, and this Court has never held, that fair abridgment is analogous to fair use for Seventh Amendment purposes.

Regardless, there was no established practice of trying fair abridgment to a jury either. The doctrine originated in courts of equity, not courts of law. *See Patry on Fair Use* §1:7 (fair abridgment originated in a series of cases decided by Lord Chancellor Hardwicke). Chancery judges routinely ruled on this equitable doctrine without a jury.⁷ In one case, the court expressly *refused* to send a case to the law court for a jury to determine whether the accused work was a “real and fair abridgment,” explaining that “[t]he court is not under an indispensable obligation to send all facts to a jury.” *Gyles*, 2 Atk. at 143-44.

Oracle is aware of just one case in which a fair abridgment issue was heard in a court of law (as opposed to equity), *Roworth v. Wilkes*, 1 Camp. 94 (K.B. 1807), and even in that case the judge, not the jury, decided fair abridgment. Lord Ellenborough stated, “I think the plaintiff is entitled to a verdict,” and he “therefore, directed the jury to find ... damages.” *Id.* at 98-99. Google’s amici hide the ball by asserting that in *Roworth* “[a] jury found for the plaintiff.” Civ. Pro. Profs. Br. 8 n.5. That was on damages, not fair abridgment. Regardless, *Roworth* too is irrelevant, because it postdates ratification of the Seventh Amendment.

In short, neither the historical practice with respect to fair abridgment nor Google’s amici’s two irrelevant cases supply the kind of “overwhelming evidence” of a “consistent practice at common law” that can establish a jury-trial right. *Feltner*, 523 U.S. at 353. Even if the historical record were mixed or ambiguous, the Seventh Amendment would not automatically attach. Rather, this Court would look to “functional considerations” to determine whether “judges, not juries, are ... better suited” to resolving the ultimate question of fair use. *Markman*, 517 U.S. at 388 (relying on such considerations to find no jury right attaches). For similar reasons as stated above, *supra* §I.A, in our answering brief, Oracle Br. 37-38, and in the opinion below, Pet. App. 16a-19a, those functional considerations weigh strongly against a Seventh Amendment requirement that a jury decide fair use.

CONCLUSION

For the forgoing reasons and those in our merits brief, the Court should affirm.

⁶ *See* Internet Accountability Project Br. 6; Alexandra Sims, *Appellations of Piracy: Fair Dealing’s Prehistory*, 1 *Intell. Prop. Q.* 3, 7, 13-15 (2011); Ronan Deazley, *Commentary on Copinger’s Law of Copyright (1870)* §7, in *Primary Sources on Copyright (1450-1900)* (2008); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993) (explaining that works historically protected as “a ‘real and fair abridgment’” are *not* categorically protected as “fair use,” and that the Copyright Act defines an “abridgment” as a type of “‘derivative work’”).

⁷ *E.g.*, *Strahan v. Newbery*, Lofft 775 (1774) (Chancellor calls on Justice Blackstone for “assist[ance]” in examining the work and determining that it is a fair abridgment); *Macklin v. Richardson*, 2 *Amb.* 694, 696-97 (1770) (Lord Commissioners rule that infringing work is not an abridgment and permanently enjoin it); *Bell v. Walker & Debrett*, 1 *Bro. C.C.* 451, 452 (1785) (Lord Chancellor “had heard sufficient read” to determine work was not a fair abridgment, preliminarily enjoined it, and “directed a reference to the Master” to resolve outstanding questions).

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