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August 7, 2020

Honorable Scott S. Harris, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Google, LLC v. Oracle America, Inc.*, No. 18-956

Dear Mr. Harris:

Petitioner Google respectfully submits this "supplemental letter brief[] addressing 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." May 4, 2020 Order.

The second question presented arises from Oracle's argument that the trial evidence was insufficient to support the jury's verdict that Google's limited reuse of the Java SE declarations was fair use. The settled standard of review governing that assertion asks whether—construing all the evidence in support of the verdict—a reasonable jury could find fair use. The Federal Circuit erred in applying *de novo* review based on its incorrect premise that only a court can decide fair use. This Court should reverse and reinstate the judgment in Google's favor. Remanding the case for a third appeal before the Federal Circuit would unnecessarily extend this decade-old litigation and deprive the lower courts and the software industry of certainty on the lawfulness of the longstanding, widespread practice of reusing software interfaces.

The jury in this case found that Google's reuse of certain Java SE declarations to create the Android smartphone platform was a fair use. Oracle moved for judgment as a matter of law (JMOL) under Federal Rule of Civil Procedure 50. The district judge denied that motion in a detailed opinion that applied a well-settled standard of review: It construed the evidence in support of the verdict and concluded that a reasonable jury, after weighing all that evidence and applying the court's instructions, could find fair use. *See* Pet. App. 92a-120a; *infra* Part I.

The Federal Circuit wrongly applied a dramatically less deferential standard of review. The court *sua sponte* deemed the verdict merely "advisory." The court then held that a jury's only role is to find a limited set of "historical facts," drew its own inferences from the trial evidence, and decided *de novo* that Google's conduct was not fair use. *See* Pet. App. 19a, 23a-24a, 55a. That was not only contrary to this Court's decisions and the Rules of Civil Procedure, but doubly unprecedented: No court had ever before held that fair use is a question of law that only judges may decide, and no appellate court had ever overturned a jury's verdict finding fair use.

If this Court reaches the second question presented, it should reinstate the verdict under Rule 50's "reasonable jury" standard. The district court applied the correct standard of review, and the court of appeals should have applied at least the same degree of deference. *See infra* Part I.

The Federal Circuit derived its contrary, *de novo* legal standard from its novel holding that fair use is always "a question for the judge, not the jury, to decide." Pet. App. 20a. On that view,

there was no valid jury verdict on the ultimate question of fair use to which it was required to defer. That is incorrect for three independent reasons. First, Oracle is bound by its agreement to have the jury finally decide Google's fair use defense. *See infra* Part II-A. Second, this Court has held that juries appropriately decide mixed questions of law and fact, particularly questions that are as fact-intensive as fair use. *See infra* Part II-B. Third, the Federal Circuit's ruling violated Google's Seventh Amendment right to a jury trial. *See infra* Part II-C.

I. THE FEDERAL CIRCUIT FAILED TO GIVE THE APPROPRIATE DEFERENCE TO THE JURY'S VERDICT.

The Federal Circuit's decision overriding the jury's fair use verdict is irreconcilable with this Court's precedents specifying the applicable standard of review.

A. Because A Rational Jury Could Weigh The Conflicting Evidence To Find Fair Use, There Is No Basis To Overturn The Verdict.

Rule 50 authorizes a court to overturn a jury verdict only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party." Fed. R. Civ. P. 50(a)(1). A court reviewing a general verdict construes *all* the facts—including the inferences to be drawn from the evidence—in support of it. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150-151 (2000). The court then asks whether a "rational trier of fact" could have reached the jury's conclusion. *Id.* at 153.

The Federal Circuit's decision cannot be reconciled with that settled standard of review, in multiple respects—even beyond the court's fundamentally erroneous, *sua sponte* decision to deem the jury's verdict merely "advisory." While the jury has the power to find *all* the facts, the court held that the jury may determine only "historical facts," which it opined were "generally few"—here, "the 'origin, history, content, and [Google's] use' of" the Java SE declarations. Pet. App. 19a. Further, the Federal Circuit held that the court should not draw inferences from the trial evidence *in support of the verdict*, but instead should draw whatever inferences it concludes are appropriate *de novo*. *Id.* at 24a. Oracle notably does not defend that holding, which violates the bedrock principle that the court may not "reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because [the court] fe[lt] that other results are more reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944); *see also Lavender v. Kurn*, 327 U.S. 645, 653 (1946).[1]

B. An Appellate Court Appropriately Shows Additional Deference To A Jury Verdict When The Trial Judge Who Heard The Evidence Denies JMOL.

Because the jury's verdict should be reinstated under the traditional standard of review, this Court need not decide whether or when an appellate court should apply an *additional* layer of

[1] Google's position does not foreclose appellate review of fair use verdicts. It simply applies the settled, deferential standard of review for a general verdict. To the extent a party is concerned with certain sub-issues in the fair use inquiry—such as particular statutory factors—it can advocate for particular jury instructions and/or a special verdict form. Oracle did not do so here.

deference to the district court's conclusion that the evidence was sufficient to uphold the jury's verdict. But there is substantial reason to conclude that further deference is warranted, at least in a case like this one. As this Court concluded in an analogous context, "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility" for determining whether an evidentiary record supports the jury's determination. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (addressing district court's denial of Rule 59 motion arguing that the jury's damages award was excessive as a matter of law). "Trial judges," the Court continued, "have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record." *Ibid.* (citations and quotation marks omitted). *Compare Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (district court's grant of summary judgment on ground that no trial is necessary is not reviewed deferentially).

The trial in this case lasted two-and-a-half weeks. The jury heard the conflicting testimony of seventeen live witnesses, and was presented with roughly 200 trial exhibits and the deposition testimony of a dozen more witnesses. That evidence related to numerous hotly disputed factual issues that were likely central to the jury's ultimate fair use determination. *See infra* Part II-B-1. The district court gave the jury extensive instructions on the law of fair use, including: the statutory factors and non-statutory considerations; its responsibility to weigh all the evidence; and the legal standards governing its ultimate determination of fair use. JA267-293.

The district judge denied Oracle's JMOL motion in an extensive opinion, explaining in detail how there was sufficient evidence for the jury to have favored Google with respect to each fair use factor, and for the jury to have found that the weight of the factors favored Google. *See* Pet. App. 105a-112a, 116a-117a (factor one); *id.* at 112a-114a (factor two); *id.* at 114a (factor three); *id.* at 114a-115a (factor four). The court concluded its analysis by observing (*id.* at 117a) that its

> order cannot cover all the myriad ways that the jury could reasonably have balanced the statutory factors and found in favor of fair use. The possibilities above represent but one take on the evidence. Witness credibility was much challenged. Plainly, many more variations and balancings could have reasonably led to the same verdict.

Both the jury's constitutionally prescribed role and the district judge's familiarity with the record accordingly counsel in favor of showing the verdict additional deference on appeal, and reinstating it. *Cf. Reeves*, 530 U.S. at 151-154 (reinstating jury's verdict in similar posture).

II. BECAUSE THE JURY WAS PROPERLY GIVEN THE ROLE OF FINALLY DECIDING GOOGLE'S FAIR USE DEFENSE, THERE IS NO BASIS FOR AN APPELLATE COURT TO RE-DECIDE THAT QUESTION *DE NOVO*.

The Federal Circuit decided fair use *de novo* because it deemed that defense "a question for the judge, not the jury, to decide." Pet. App. 20a. That unprecedented ruling cannot be reconciled with (a) the Rules of Civil Procedure, which hold Oracle to its agreement to a jury trial, (b) this Court's precedents governing the allocation of responsibility between judges and juries, or (c) the Seventh Amendment. It is therefore no surprise that no prior decision of any federal court *ever* held that the ultimate question of fair use must always be decided by a court.

A. Oracle Is Bound By Its Own Choice To Put The Question Of Fair Use To The Jury.

After resolving the initial appeal in this case over the copyrightability of the Java SE declarations, the Federal Circuit expressly remanded for a jury trial on Google's fair use defense. Pet. App. 182a-184a. Just as in the first trial, Oracle expressly "agree[d]" that fair use was a "factual issue[] . . . to be tried" by the jury. Doc. 1709 at 5; *see also* Doc. 525 at 13; Doc. 780 at 12. The instructions—to which Oracle did not object on appeal—specified that the jury was responsible for determining *all* the facts relevant to *all* statutory and non-statutory factors, weighing those facts, and determining the ultimate question of fair use. *E.g.*, JA289 ("It is up to you to decide whether all relevant factors, when considered fully and together, favor or disfavor fair use.").

The parties further agreed that the jury, after weighing all the evidence, would issue a general verdict, deciding the overarching question of fair use without making any other findings. Doc. 1700. The verdict form asked only the ultimate question: "Has Google shown by a preponderance of the evidence that its use in Android of the declaring lines of code and their structure, sequence, and organization . . . constitutes a 'fair use' under the Copyright Act? Yes ___ (finding for Google) No ___ (finding for Oracle)." *Ibid.* The jury answered "Yes." JA295.

Consistent with its position throughout the case, Oracle's JMOL motion accepted that the jury's appropriate role was to evaluate and weigh the relevant evidence, and then decide the ultimate question of fair use. *Compare* Doc. 1914 at 6, 14 (citing the preliminary jury instructions) *with id.* at 23 n.8 (contesting solely the instruction on the relevance of industry practice). Oracle did not ask the district court to treat the jury's verdict as "advisory" and make its own findings of fact. *See* Fed R. Civ. P. 52(a)(1). Oracle also did not request that the district court make its own determination of any individual fair use factor (or anything else) or conduct its own weighing of the evidence and determine fair use itself *de novo*. Oracle instead simply challenged the sufficiency of the evidence. Doc. 1914 at 1 (Rule 50(a) motion: "No reasonable jury could find that Google's verbatim and entirely commercial use of the declaring code and SSO to compete against the Java platform was a fair use."); *see also* Doc. 1993 at 1 (Rule 50(b) motion (same)).

Having agreed that the jury should decide fair use and lost, and then having asked the district court to overturn the verdict under the correct standard of review and lost again, Oracle now argues that an appellate court should decide fair use itself *de novo*. But Oracle is bound to its original choice. A party that agrees to a jury trial and does not like the result does not get a *de novo* appellate do-over as if the jury trial never happened. The entire point of the deferential Rule 50 standard is that the verdict of a properly instructed, reasonable jury is the final say.

That conclusion is confirmed by two other Federal Rules of Civil Procedure. First, Rule 39(c)(2) provides that the district "court . . . may, with the parties' consent, try *any issue* by a jury whose verdict has *the same effect* as if a jury trial had been a matter of right" (emphases added). The Federal Circuit's holding that it may retroactively deem the resulting verdict to be merely "advisory" deprives the Rule of effect, because a "judge could *always* rule that the verdict was advisory if the judge did not agree with the jury's verdict." *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 52 (3d Cir. 1989) (emphasis added). Deeming the verdict advisory *post hoc* can

also seriously prejudice litigants such as Google, given the "significant tactical differences in presenting a case" to an advisory jury. *Ibid.* (quotation marks omitted). Other courts of appeals accordingly recognize that Rule 39 prohibits recharacterizing the jury's verdict as advisory after the judgment. *See ibid.* (citing cases); *see also Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 795-796 (5th Cir. 1999); *Thompson v. Parkes*, 963 F.2d 885, 888 (6th Cir. 1992).

Second, Rule 52(a) provides that in "an action tried . . . with an advisory jury, the court *must find the facts specially* and state its conclusions of law separately" (emphasis added). But because the district court did not treat the jury as advisory, those factual findings—which would facilitate close appellate review in a case in which there was no jury verdict—are completely absent.

At the very least, Oracle can prevail on the standard of review only if it has an unwaivable right to have a court decide fair use *de novo*. That is essentially the claim that Rule 39(c)(2) is rendered unconstitutional by an inverted Seventh Amendment right to *avoid* a jury trial. But there is no such right to undo the consent to a jury trial, and Oracle is bound by its choice.

B. This Court's Precedents Hold That Juries Properly Decide Fact-Intensive Mixed Questions Of Law And Fact Such As Fair Use.

Wholly apart from Oracle's agreement, this Court's precedents make it clear that juries properly decide mixed questions such as fair use.

1. Fair use is a fact-bound determination appropriately made by a jury.

In *Hana Financial, Inc. v. Hana Bank*, this Court held that a jury may properly decide whether a trademark holder has engaged in "tacking"—a principle that gives a new mark the priority date of an earlier mark. 574 U.S. 418, 419-420 (2015). The tacking inquiry is whether a "reasonable" person would regard the two marks as equivalent. Although the "test involves the application of a legal standard," the Court recognized that such "'mixed question[s] of law and fact[]' ha[ve] typically been resolved by juries." *Id.* at 423-424 (quoting *United States v. Gaudin*, 515 U.S. 506, 512 (1995)). Moreover, "when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer." *Id.* at 422. The jury's task of making "the ultimate conclusion" is, the Court explained, its "constitutional responsibility." *Id.* at 424 (quoting *Gaudin,* 515 U.S. at 512).

Fair use is more fact-intensive, and therefore even more suitable for a jury determination, than tacking. This Court has not reviewed a jury verdict on fair use, but has recently reaffirmed that it is a "notoriously fact sensitive" issue that "often cannot be resolved without a trial." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020). The Court has also held that the ultimate question of fair use is a "mixed question of law and fact" that "requires a case-by-case determination" of the "particular use." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549, 560 (1985); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Accordingly, every fair use case "must be decided on its own facts." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984) (quotation marks omitted).

Consistent with this Court's precedents, the lower courts have regularly put the ultimate question of fair use to juries, without the slightest suggestion that only judges have the power to

make such a determination. *See, e.g.*, *Balsley v. LFP, Inc.*, 691 F.3d 747, 757-761 (6th Cir. 2012) ("[T]he jury was not unreasonable in weighing the four statutory factors of the fair use defense in Plaintiffs' favor."); *New York Univ. v. Planet Earth Found.*, 163 F. App'x 13, 14 (2d Cir. 2005) ("[T]he evidence . . . supports the jury's finding of fair use."); *Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 409-411 (5th Cir. 2004) ("The evidence presented at trial and the reasonable inferences therefrom, when viewed through the lens of the statutory fair use factors, support the jury's fair use finding."); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) ("[T]here was sufficient evidence from which a jury could have found that Hustler's publication of the photograph was not a fair use."); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982) ("[T]he jury's [fair use] verdict is certainly supported by substantial evidence.").

A jury is well suited to make such a judgment. Each statutory fair use factor is a continuum, not binary. The first addresses "whether and to what extent the new work is transformative," *Campbell*, 510 U.S. at 579 (quotation marks omitted); the second "recogni[zes] that some works are closer to the core of intended copyright protection than others," *id.* at 586; the third addresses "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," 17 U.S.C. § 107(3); and, as to the fourth, the effect of the use on the market for the original "is a matter of degree" and "the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors," *Campbell*, 510 U.S. at 590 n.21. The factors are also intertwined: "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism," *id.* at 579, and, when the second use is transformative, "market harm may not be so readily inferred," *id.* at 591.

The fact-finder must consider evidence relevant to each statutory factor, make a qualitative judgment about where on the spectrum of each factor a particular use falls, assess any evidence relevant to non-statutory factors, and weigh all of the evidence. *Campbell*, 510 U.S. at 578; *Harper & Row*, 471 U.S. at 560. That evaluation is "a sensitive balancing of interests." *Sony*, 464 U.S. at 455 n.40. The weighing is *itself* a factual exercise, comfortably within the jury's fact-finding capacity. *See* 17 U.S.C. § 107 (describing a determination that a reuse is fair use as a "finding" that is "made upon consideration of all the above factors"). This Court has made clear that the importance of any single factor will vary from case to case, depending on the totality of circumstances. *Campbell*, 510 U.S. at 579, 590 n.21; *Harper & Row*, 471 U.S. at 563.

This case illustrates how fair use calls for a fact-intensive determination. Oracle itself could not have been more emphatic that "[f]air use is a complex issue requiring the jury to weigh a wealth of evidence in considering the four fair use factors." Doc. 1708 at 9; *see also* Doc. 1709 at 5; Doc. 568 at 25-26; Doc. 525 at 13, 15. In that respect, Oracle was correct. The parties presented the jury with conflicting evidence on innumerable factual questions relevant to the mix of statutory and non-statutory factors that lead to the fair use determination, including:

- the significance of the common practice of reusing software interfaces;
- the extent to which Oracle made the declarations available to use without a license;
- whether or how Java SE was used in smartphones or was suited for that environment;
- how functional the declarations are, and thus removed from the core of copyright;

- how quantitatively or qualitatively significant the reused declarations were in comparison to the whole of the copyrighted work;
- how much Sun Microsystems (the original creator of Java SE) supported Google's reuse;
- the degree of market harm, if any, suffered by Oracle;
- how transformative Google's reuse of the declarations in a smartphone was;
- whether Google reused more than necessary to achieve an innovative purpose;
- whether Android competed with Java SE in the market for any derivative product;
- what were the reasonably likely future derivative markets for Java SE;
- whether the amount of creativity Android unleashed justified the reuse; and
- which of the four statutory factors or other unenumerated factors was more or less important in view of all other evidence in the record.

These qualitative, fact-intensive, and hotly disputed determinations were relevant to the jury's assessment of the four statutory factors, as well as non-statutory factors, and thus its ultimate fair use verdict. At the very least, that inquiry is not so purely legal that *only* a court can undertake it.

Oracle misstates the record in claiming that the trial evidence could support only the conclusion that Google did not engage in fair use. *See* Google Br. 37-50; Reply Br. 16-23. Just as important, Oracle's own arguments highlight the primacy of the particular facts and evidence presented in this particular case—rather than legal principles determined by judges—in determining fair use. Oracle's arguments about the trial record would not establish a broadly applicable legal rule regarding the reuse of software interfaces; subsequent cases would be decided on their particular facts. Fair use is thus not a question that categorically must be decided by a court *de novo* in every case, including this one.

2. Juries regularly decide such mixed questions of law and fact.

The jury also properly decided the overall question of fair use because, as *Hana Financial* explains, "the application-of-legal-standard-to-fact sort of question…, commonly called a 'mixed question of law and fact,' has typically been resolved by juries." *Hana Financial*, 574 U.S. at 423-424 (quoting *Gaudin*, 515 U.S. at 512 (quoting in turn J. Thayer, *Preliminary Treatise on Evidence at Common Law* 194, 249-250 (1898))). Indeed, most jury verdicts are properly thought of as the resolution of mixed questions because in reaching the ultimate determination, a jury applies the relevant legal standards, as set forth in the jury instructions, to its assessment of the evidence presented at trial. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (mixed question asks whether "the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

This Court has repeatedly affirmed that a jury properly decides such mixed questions. That is particularly true when, as here, the question requires drawing inferences from facts and assessing their significance. For example, juries decide the issue of "materiality" with respect to false or omitted statements. The Court explained in the civil context that "[t]he issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). The Court applied the same rule in the criminal context. *Gaudin*, 515 U.S. at 512-513; *see also*

Chandris, Inc. v. Latsis, 515 U.S. 347, 369 (1995) (jury properly determines whether a plaintiff is a Jones Act "seaman" under 46 U.S.C. App. § 688(a)).[2]

Oracle's argument that fair use is determined according to legal principles—derived from the four statutory factors—fails to recognize that the fair use determination turns on the weighing of an array of evidence relevant to those factors, each of which is a continuum, as well as other relevant factors not defined by the Copyright Act. Just as important, Oracle's argument confuses the legal *framework* for the fair use analysis (which guides the jury through the jury instructions) with the *application* of those rules to the facts (which is the verdict). Oracle "offers no support for the claim" that fair use "cases 'have to be' resolved by reliance on precedent." *Hana Financial*, 574 U.S. at 424. "And insofar as [Oracle] is concerned that a jury may improperly apply the relevant legal standard, the solution is to craft careful jury instructions that make that standard clear." *Ibid.* Here, the district judge did exactly that, JA267-293 (jury instructions), and Oracle did not challenge any of those instructions on appeal.[3]

3. Juries properly determine the reasonable use of copyrighted material.

A jury also properly decides fair use because it is well suited, from both a practical and a policy perspective, to determine how a "reasonable" party would assess the defendant's conduct. A jury brings a diverse range of experience, offering a holistic perspective on how a community views the reasonableness of conduct. *See Hana Financial,* 574 U.S. at 423. The overarching fair use inquiry is whether a defendant "use[d] the copyrighted material in a reasonable manner." *Harper & Row,* 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944)). Thus, traditionally, the question of fair use was viewed as whether the "'custom or public policy' at the time would have defined the use as reasonable." *See Wall Data Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 778 (9th Cir. 2006) (quoting Subcomm. on Patents, Trademarks & Copyrights of the S. Comm. on the Judiciary, 86th Cong., 2d Sess., Study No. 14, Fair Use of Copyrighted Works 15 (Comm. Print 1960)); *see also Harper & Row*, 471 U.S. at 549. There is no reason to conclude that a court is categorically better suited to make such a judgment.

4. This Court's decisions applying de novo *review have involved the review of court rulings, not jury verdicts.*

Oracle's contrary argument for *de novo* review relies on decisions that *did not involve juries*. Like the losing party in *Hana Financial*, Oracle "relies on cases in which judges have resolved [such] disputes in bench trials, at summary judgment, or the like." *Hana Financial,* 574 U.S. at 425; *see* Oracle Br. 37. Sometimes judges resolve questions that would otherwise go to a jury. For

[2] By contrast, this Court held that patent claim construction is a question for the judge because it requires construing legal documents, a task peculiarly within the province of the court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-390 (1996).

[3] Neither party argues categorically that the reuse of software interfaces is always or never fair use. Such a purely legal claim arguably would be reviewed *de novo*. *Cf. Campbell*, 510 U.S. at 572 (1994) (rejecting the argument that parody never qualifies as fair use).

example, the court may grant "a motion for summary judgment or for judgment as a matter of law," or "the parties [may] opt[] to try their case before a judge." *Hana Financial*, 574 U.S. at 423. But that does not imply that a jury may never decide the question. *Id.* at 422.

For example, *Harper & Row* involved a *bench* trial, in which the district judge made express factual findings. This Court did not address the standard of review. It stated that when the judge has found the relevant facts and decided fair use, an appellate court "need not remand for further factfinding but may conclude as a matter of law that the challenged use does not qualify as a fair use." 471 U.S. at 560 (cleaned up and quotation marks omitted).

This case is very different. In *Harper & Row*, the parties agreed that the court would determine fair use; here, the parties agreed on a jury trial. In *Harper & Row*, the trial judge made express factual findings that could be applied by an appellate court; here, there are none. *See supra* at 5 (discussing Rule 52(a)). Indeed, it is hard to see how a court could determine fair use *de novo* while remaining true to the jury's implicit resolution of numerous factual disputes.[4]

Similarly, in *U.S. Bank*, this Court addressed "which kind of *court* (bankruptcy or appellate)" is best situated to decide whether a third party is a non-statutory insider. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (emphasis added). But even under the *U.S. Bank* framework, the jury would determine fair use, because it is such a fact-bound defense. *See supra* Part II-B-1; *U.S. Bank*, 138 S. Ct. at 968.

C. The Federal Circuit's Ruling Is Inconsistent With The Seventh Amendment Right To A Jury Trial And The Re-examination Clause.

Finally, the jury properly decided the ultimate question of fair use because Google had a constitutional right to a jury trial on that defense. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, 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." U.S. Const. amend. VII. The phrase "rules of the common law" refers to the "common law in respect of trial by jury as these rules existed in 1791" in England. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935); *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446, 448 (1830).

At that time, suits seeking damages for copyright infringement were tried by common-law juries. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-352 (1998). The jury decided all questions of liability, including early forms of what would become the fair use defense. *See, e.g.*, Cherry Professors Br. 6-11; *see also Campbell*, 510 U.S. at 576 (fair use defense originated in "fair abridgements" cases under 18th-century English copyright statute) (citing W. Patry, *The Fair Use Privilege in Copyright Law* 6-17 (1985)); *Patry on Fair Use* § 1:4 & nn.16-17. As a consequence, any diminishment of the jury's role in deciding fair use would raise serious

[4] In the other fair use cases cited by the Federal Circuit, the trial judge granted summary judgment because there was no material factual dispute to give to the jury, and courts of appeals applied *de novo* review to those decisions under Rule 56. *See* Pet. App. 17a-18a.

Seventh Amendment concerns. *See Feltner*, 523 U.S. at 355 (holding that Seventh Amendment preserves the right to jury trial in copyright damages actions).

The fact that fair use is sometimes labeled an "equitable rule of reason" does not mean it can be decided only by a judge. The Seventh Amendment allows a court to reject a jury-trial demand on a common-law claim only if the defense would have been prosecuted by filing a separate action in a court of equity to enjoin the common-law proceeding. *See Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242-243 (1922). Neither fair use, nor its precursor, ever constituted such a defense sounding solely in equity. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1127 (1990). Instead, as the cases above document, fair-use-like questions were decided by juries in common-law cases seeking damages and by judges in suits seeking injunctions from courts of equity. The Seventh Amendment preserves the right to a jury determination of such a defense in a suit, like this one, seeking legal relief. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43 (1989).

The Seventh Amendment's Re-examination Clause ensures that courts do not abrogate the jury right by revisiting a jury's express or implied factual determinations. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 379-380 (1913). The Court "read[s] it as a substantial and independent clause." *Parsons*, 28 U.S. at 447 (Story, J.). The Federal Circuit's *de novo* determination of the intensely fact-bound question of fair use violates the Seventh Amendment's guarantee "that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway v. United States*, 319 U.S. 372, 396 (1943).

The constitutional guarantee of the right to a jury trial is at its most expansive, and most important, when a jury is asked to review factually intensive questions, weigh the credibility of live witnesses, and apply a legal standard to a complex web of facts. Creating a new precedent for *de novo* review of the mixed question of fair use, empowering appellate courts to ignore the verdicts of juries properly instructed on the law, would weaken the protections of the Seventh Amendment and the traditional role of juries in the American system of justice.[5]

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Sincerely,

Thomas C. Goldstein

cc: See Attached Service List

[5] Google also prevails on the view that the Seventh Amendment's Re-examination Clause prohibits a court of appeals from overturning the jury's implied factual determinations. *See, e.g.*, *Gasperini*, 518 U.S. at 450-458 (Scalia, J., dissenting).

Service List:
Google, LLC v. Oracle America, Inc., No. 18-956

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