

No. 19-589

IN THE

Supreme Court of the United States

RIMINI STREET, INC.,

Petitioner,

v.

ORACLE USA, INC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF AMICI CURIAE THE REPAIR ASSOCIATION
IN SUPPORT OF PETITION**

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INTERESTS OF AMICUS CURIAE¹

Amicus curiae The Repair Association, officially the Digital Right to Repair Coalition, is a 501(c) trade association founded in 2013 to represent multiple stakeholders involved in the repair and reuse of technology—from do-it-yourself “DIY” hobbyists and independent repair technicians to environmental organizations and businesses involved in the aftermarkets for computer equipment and consumer electronics. Founding members of The Repair Association include the Service Industry Association (SIA), the Association of Computer Dealers Inc. (ASCDI), the National Association of Telecommunications Dealers (NATD), the Electronic Frontier Foundation (EFF), and iFixit.org.

Through its activities, The Repair Association supports a long tradition of American consumers buying and selling products without worrying about whether they have the ability to repair or reuse those products. The Repair Association’s animating principle is that a free, independent market for repair and reuse of *all* goods and services—from mobile phones to cars to medical devices to software—is more efficient, more competitive, and better overall for consumers, local job growth, and the environment.

The Repair Association defends and promotes consumers’ right to repair by, among other things,

¹ Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, amici certify that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

working to introduce “fair repair” bills in states like South Dakota, New York, Minnesota, and Nebraska; assisting in the passage of the Unlocking Consumer Choice and Wireless Competition Act signed into law by President Barack Obama in 2014; and advocating for the interests of consumer and independent repair technician rights before the Copyright Office and the Federal Trade Commission.

The Repair Association respectfully submits this *amicus* brief to explain the consequences and anticompetitive risks that the underlying court rulings—upholding the entry of a permanent injunction notwithstanding a jury’s finding of innocent conduct—poses to consumers, end users, and the service and repair providers they engage to act on their behalf.

SUMMARY OF ARGUMENT

Ours is a society of stuff. From the cars that transport us, to the phones in our pockets and purses, to the refrigerators and air conditioners that make life comfortable—we rely heavily on machines in nearly every part of modern American life. But machines break and need maintenance, so we take our cars to the mechanic or call the AC repairperson when the air conditioner dies on a sweltering August day.

Mindful of this economic reality, this Court and the Courts of Appeals below have long recognized consumers’ right to repair the products they buy and use every day. In the domains of intellectual property and antitrust law, the courts for decades have defended “the lawful right of the owner to repair his property.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 346 (1961).

The district court's and Court of Appeals' rulings on the permanent injunction below strike at the heart of this vital, well-settled right to repair. As ably explained in Rimini Street's petition for writ of certiorari (Pet. at 4-8), the core of the copyright dispute at trial was over the reasonableness of Rimini Street's interpretation of ambiguous language in Oracle's software license agreements with its end users. Importantly, such license ambiguity is not an idiosyncratic accident limited to the underlying dispute between Oracle and Rimini Street. Rather, it is an unfortunate endemic reality that end users—and the third-party repair providers they hire to act on their behalf—must bear all too often. Both the Department of Commerce and the Copyright Office, in reports issued over the past few years, have grappled with the issue of vague end-user license agreements and the pressures they impose on consumers seeking simply to repair and service the products they bought or licensed.

The court rulings here only exacerbate the problem. Even though Rimini Street's reading of the Oracle's license agreement was ultimately rejected—and Rimini Street was found to infringe because the basic copyright cause of action is a strict liability offense—there is no dispute that the jury found Rimini Street's infringement to be “innocent”—an honest mistake in the reading of the scope of Oracle's license restrictions. Pet. at 6; Pet. App. at 108a-109a. Nor is there a debate that the Rimini Street paid in full the monetary damages the jury and district court assessed to be the consequence of that infringement. Pet. at 6. But by then also granting a *permanent injunction*—and, in so doing, explicitly *ignoring* the adjudicated finding of “innocent” infringement—the

courts below imposed an additional penalty on the repair provider out of proportion to the underlying offense.

Negating the ability to defend against an injunction by pointing to an innocent mental state—*e.g.*, an honest mistake in construing the scope of a vendor's license—would profoundly chill the ability of customers and their service providers to exercise their long-established right to repair.

Consider the server repair technician who is hired by a company to repair company servers located across multiple satellite offices. Repairing those servers requires making copies of the software, but the copying of that software may be limited by a license agreement. There is no question that the client company has the right to repair its servers, or to make the copies of the software necessary to effect that repair, but the specific manner in which those copies are made may be limited by the software vendor's license.

But assume the vendor's license requires that the software be copied only at the licensee's "principal place of business." In that case, the repair technician who visits a satellite office and makes a software copy necessary to repair at that location is technically in violation of the "principal place of business" license restriction and could therefore be found to infringe. That is not bad faith conduct by the technician. In fact, the technician most likely would not have had access to the license agreement itself, because in such scenarios in the real world, the technician typically relies on his or her *client's* assurances (often memorialized in the service agreement between the technician and the client) that the client has the right to copy the software. Nonetheless, in this example, the repair technician—

operating in good faith—could be found liable for copyright infringement, a strict liability offense.

Because of this violation, the technician could be required to pay compensatory damages under the Copyright Act, such as statutory damages or, in the unlikely event the licensor suffered lost profits or the technician received profits directly attribute to the infringement, actual damages. But the damages in such a scenario would be minimal and—importantly—would not have a dramatic impact on competition in the repair market. That is decidedly not the case were the repairman, having engaged in innocent infringement, is *also* subject to a broad and punitive *permanent* injunction, like the one upheld in the proceedings below. The unfortunate consequence of entering such permanent injunctive relief against innocently infringing repairpersons would be to force independent repairpersons out of the market and thereby chill effective and client-beneficial competition.

Moreover, such risks of innocent infringement are common throughout the repair industry. Repair businesses and their employees often operate as subcontractors to original equipment manufacturers (OEMs) but also offer their services directly in competition with OEMs, and are often engaged directly by the OEMs' licensees to perform repair on the licensees' behalf. As a result, repair businesses must rely upon the licensees' own assurances that their license status vis-à-vis the OEMs is correct, rather than examining the upstream OEM-to-licensee agreement itself.

It would be impractical, if not impossible, for a repair business to scrutinize *all* the upstream contracts

between its clients and such clients' vendors. Indeed, most corporate clients of repair businesses operate multi-vendor information technology environments with upwards of 50 different types of hardware and software products, each of which commonly carries its own specific license agreement. And many of these license agreements also include confidentiality or non-disclosure clauses, which only further restrict the ability of third-party repair businesses from examining or assessing the scope of their clients' license.

Lastly, even if the license agreements themselves could be examined, they often include ambiguous terms and can change over time, as explained further in Section II.A. *infra*. Thus, from the repair businesses' perspective, the scope of license restrictions may be uncertain from the outset or may even change over time, without the repair business' knowledge, as OEMs and other vendors amend license agreement terms. In that circumstance, a repair business or its customer could easily find itself inadvertently acting outside the scope of license, and thereby be subject to copyright infringement liability, even based on honest mistakes or innocent conduct. To punish such conduct with a permanent injunction—or even to allow the *threat* of such an injunction to loom over a repair business—serves no beneficial, remedial, or pro-competitive purpose.

These problems are likely to cross over to the consumer goods sphere as well. With the proliferation of “smart” (i.e., computer-, software-, and networking-enabled) televisions, doorbells, refrigerators, and personal voice assistants, end-user license agreements are only becoming more prevalent. In our modern marketplace, where software and accompanying end-

user license agreements are embedded in all manner of products, it is all the more urgent to protect consumers and repair providers from any encroachment on the fundamental right to repair such products—and from the threat of punitive injunctions arising from innocent readings of ambiguous license terms.

ARGUMENT

I. THIS COURT AND THE COURTS OF APPEAL HAVE LONG RECOGNIZED A RIGHT TO REPAIR

First identified over a century and a half ago, see *Wilson v. Simpson*, 50 U.S. 109, 123 (1850), this Court has long safeguarded “the lawful right of the owner to repair his property.” *Aro Mfg. Co.*, 365 U.S. at 346. This patent law doctrine observes that a license to use a patented item includes the right “to preserve its fitness for use so far as it may be affected by wear or breakage.” *Id.* at 345-46.

Similarly, in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), this Court, in the anti-trust context, sought to protect aftermarkets for repair parts and services—chiefly the domain of third-party “independent service organizations.” *Id.* at 455. The Court held that a manufacturer could be found to possess market power in the secondary repair market, even if it lacked such power in the primary market for its equipment. *Id.* at 469-71.

In the wake of this Court’s *Aro* decision, lower courts recognized the importance of the right to repair in a host of scenarios. Thus, when a manufacturer bundled and sold kits, which included another company’s patented device and the manufacturer’s own replacement parts for that device, the Ninth Circuit

ruled in favor of the manufacturer in the patent infringement suit under the right-to-repair doctrine. See *Fromberg, Inc. v. Gross Mfg. Co.*, 328 F.2d 803, 804-05, 808 (9th Cir. 1964). Likewise, the Fifth Circuit found no patent infringement under the right-to-repair doctrine regarding a company that cleaned, resurfaced, and reassembled patented tubes that had become unusable due to grime deposits. See *High Voltage Eng'g Corp. v. Potentials, Inc.*, 519 F.2d 1375 (5th Cir. 1975).

Similarly, the Federal Circuit concluded that a company that replaced the removable inner container of a surgical disposal system was not infringing a patent under the right-to-repair doctrine. See *Sage Prods., Inc. v. Devon Indus., Inc.*, 45 F.3d 1575, 1579 (Fed. Cir. 1995). Moreover, the court noted that by suing the defendant, the patent holder was seeking to monopolize the market for that replacement part and illegitimately extend its patent rights to an unpatented component. *Ibid.* See also *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, 1098, 1110-11 (Fed. Cir. 2001) (holding that refurbishing patented single-use, disposable cameras, which included removing the camera's cover, cutting open plastic casing, installing new film, replacing the film's winding wheel, replacing the camera's battery, resetting the film counter, resealing the case, and adding a new cover, did not constitute patent infringement because of the right to repair).

Although not explicitly raised in Rimini Street's petition for certiorari, the court rulings on permanent injunctive relief below present an extension of the issues raised in the long line of right-to-repair cases summarized above. If allowed to stand, the rulings pose grave threats to this important customer right.

II. AMBIGUOUS SOFTWARE LICENSE
TERMS COUPLED WITH
INDISCRIMINATE PERMANENT
INJUNCTIONS PRESENT PROFOUND
THREATS TO CUSTOMERS' RIGHT TO
REPAIR AND TO THIRD-PARTY SUPPORT
PROVIDERS' LEGITIMATE BEHAVIOR

End users seeking to repair the products they bought—and the independent third-party support providers they hire to act on their behalf—often face a substantial dilemma. On the one hand, there is no question that customers' conduct and the providers' business model is legitimate. Indeed, as the Ninth Circuit observed below, Rimini Street “[a]t all relevant times * * * provided third-party support for Oracle’s enterprise software, in *lawful competition* with Oracle’s direct maintenance services.” *Oracle USA Inc. v. Rimini Street, Inc.*, 879 F.3d 948, 952 (9th Cir. 2018) (emphasis added). Even the Oracle respondents in their briefing to the Court of Appeals stressed that “[n]othing in Oracle’s licenses prohibits Oracle’s customers from using other products, or from using third parties to service Oracle’s products. Third parties remain free to offer their own software and their own support services for Oracle’s software.”²

On the other hand, commercial enterprise-software relationships are inevitably defined by software license agreements—and these agreements, like many end-user license agreements, can include ambiguous license terms that *ex post* can be interpreted by certain vendors in aggressive and unilaterally

² Answering Brief for Appellee at 41, Dkt. 50 in *Oracle USA Inc. et al. v. Rimini Street, Inc.*, Case Nos. 16-16832, 16-16905 (9th Cir.).

advantageous fashion to in fact prevent or substantially impede the use of such third-party services. Customers and their support providers thus run the risk that a vendor will later dispute their honest, good-faith reading of the relevant license agreements and institute copyright infringement litigation.³

In the ordinary case, copyright law provides a balanced solution to this dilemma. If the vendor's reading of the license is held to be correct, a customer or support provider may be subject to liability for infringement, and be required to pay typical compensatory copyright damages. Moreover, in assessing those damages, a defendant's *innocent* state of mind can be considered. For instance, in calculating statutory damages, the Copyright Act explicitly grants the district court the discretion to "reduce the award of statutory damages to a sum of not less than \$200" upon a finding that the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement." 17 U.S.C. § 504(c)(2). An honest mistake in the interpretation of the scope of a license does not *immunize* a defendant from liability—

³ Cf. Dan Woods, *Why Third-Party Software Support is Possible and a Good Idea*, Forbes, Apr. 18, 2016, <https://www.forbes.com/sites/danwoods/2016/04/18/why-third-party-software-support-is-possible-and-a-good-idea/#39e7371f6c77> ("Needless to say, Oracle isn't exactly happy with customers successfully moving to third-party support options. After all, annual support fees provide a profit margin of 90% or more for them[.] * * * Third-party support vendors such as Rimini Street and others have clearly proved third party support is not only possible for Oracle customers, but that they are enabling organizations to reduce costs, obtain improved support and position themselves for new initiatives. While Oracle doesn't think this is such a good idea, an increasing number of organizations are finding the model works for them.")

and requires the defendant to fairly compensate the copyright holder for the harm caused—but it does not *penalize* the defendant either, or, worse still, threaten to keep the defendant out of the repair or service market altogether.

The twin rulings of the district court and the Ninth Circuit in the case below upset this important balance. The district court issued a permanent injunction by, among other things, relying on what it characterized as Rimini’s “conscious disregard for Oracle’s software copyrights,” Pet. App. 21a, notwithstanding the fact that a jury had determined at trial that Rimini’s conduct—including its interpretation of ambiguous terms in Oracle’s license agreements—was “innocent,” Pet. App. 108a-110a. The Ninth Circuit then compounded that error by holding that the district court’s failure to consider the innocence finding before issuing the injunction was “harmless” and that considering Rimini’s adjudicated “mental state was not necessary” to the injunction determination. Pet. App. 3a-4a.

A. The ambiguity of many software license agreements creates challenges to individual customers and their independent repair and support providers

Ambiguity in license agreements is often inescapable. In 2016, for instance, the Department of Commerce’s Internet Policy Task Force acknowledged concerns that end-user license agreements (EULAs) for digital goods had grown to be lengthy and confusing: “commentators and participants on all sides agreed that consumers are entitled to clarity and that more should be done to communicate what rights they

are or are not getting.”⁴ The Department of Commerce therefore recommended “the creation of a multistakeholder process” to “establish best practices on how to inform consumers clearly and succinctly about the terms of EULAs regarding whether they ‘own’ the copies provided and what they may do with them.”⁵

The Copyright Office reached similar conclusions later that year in its own report on “Software-Enabled Consumer Products.”⁶ The Office noted a “common theme raised by commentators regarding the practice of software licensing”—“the use of complex and opaque EULAs to frustrate reasonable consumer expectations.”⁷ Like the Department of Commerce, the Copyright Office recommended a “multistakeholder process * * * to establish best practices for EULAs in the context of software-enabled consumer products,” concluding that “it would be beneficial if manufacturers * * * made clear what rights consumers had in the goods they were buying, including the right to resell, repair, and improve the device.”⁸

⁴ Department of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages* 57 (Jan. 2016), <https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf> [hereinafter *Internet Policy Task Force White Paper*].

⁵ *Internet Policy Task Force White Paper*, at 69.

⁶ U.S. Copyright Office, *Software-Enabled Consumer Products: A Report to the Register of Copyrights* (Dec. 2016), <https://www.copyright.gov/policy/software/software-full-report.pdf> [hereinafter *Copyright Office Report*].

⁷ *Copyright Office Report*, at 67.

⁸ *Copyright Office Report*, at 68-69.

As desirable as the Department of Commerce's and the Copyright Office's recommendations may be, individual customers and their independent support providers do not yet have recourse to a "multistakeholder process" to disambiguate software license agreements. Instead, like Rimini Street in the underlying litigation, support providers often find themselves as defendants in copyright infringement suits brought by motivated software vendors like Oracle. In that adversarial, high-stakes context, it is imperative that support providers—and their customers—be permitted to establish the honesty of any mistaken reading of the scope of a vendor's license agreement, including, as equity requires, during any proceedings on the issuance of an injunction.

B. Customers and their support providers must be permitted to rely on the innocence of their conduct to the fullest extent allowed in a copyright infringement action

Because of the often-unavoidable ambiguity in license language, it is essential that customers and their support providers be permitted to have the *entirety* of their conduct weighed in any copyright infringement trial, including during any injunctive phase. Rimini Street's petition establishes well the historical, doctrinal, and equitable reasons why an accused infringer's state of mind must be considered prior to the issuance of an injunction—and why a jury's finding of innocent infringement cannot be simply disregarded as a matter of law. But practical concerns have equal force.

In copyright infringement cases premised on a theory that the defendant infringed by acting outside the scope of its license, the accused infringer often seeks

to establish the innocence of its conduct by demonstrating the reasonableness of its reading of ambiguous license terms. To render this defense irrelevant, as the district court and Ninth Circuit did below, would grant vendors free reign to insist on one-sided, sweeping license readings that would chill legitimate conduct. Ironically, in an earlier decision arising in a related licensing context, the Ninth Circuit recognized that very danger, observing that to permit a vendor to use licensing terms to “designate any disfavored conduct during software use as copyright infringement * * * would allow software copyright owners far greater rights than Congress had generally conferred on copyright owners.” *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 941 (9th Cir. 2010).

That concern is all the more acute when the vendor does not simply “designate any disfavored conduct” *explicitly* in the license but instead does so *implicitly* through after-the-fact interpretation of ambiguous terms in aggressive enforcement and litigation proceedings. Customers and their support providers are not well served by having to guess as to how expansively and one-sidedly a vendor will interpret its license agreements—and by having to assume the significant risk that a mistaken view, even if honest and reasonable, will carry dramatic consequences, like the entry of a permanent injunction.

C. The solution to the dilemma facing support providers and their customers is to ensure that jury findings of innocent behavior are weighed in the decision to grant a permanent injunction

As Rimini Street's petition makes clear, the solution here is straightforward: The innocence of a defendant's conduct must be adjudicated by the jury and, consistent with longstanding equitable practice, any finding of innocence must be considered as part of the weighing of factors before granting injunctive relief.

In the proceedings below, the district court's contravention of the jury's innocence finding was not "harmless," as the Ninth Circuit held. In fact, it created three related consequential harms impacting not just Rimini Street but *all* independent third-party support providers and their customers.

1. The courts' rulings would allow vendors to leverage ambiguous licensing terms into threats of litigation—and threats of prohibitive injunctions during and resulting from the litigation—that would drastically chill customers' willingness to engage in legitimate repair, as well as support providers' ability to compete in the service and repair market. As noted, no "multistakeholder process" or other objective mechanism currently exists by which licensees or their third-party support providers can obtain any reasonable degree of *ex ante* certainty about whether their conduct will run afoul of vendors' ambiguous licensing restrictions. Support providers and their customers must instead treat the issue as a business risk, but one in which the ultimate consequences of accepting that risk are highly uncertain and not truly amenable to adequate risk mitigation.

2. Unlike most business risks, however, the approach followed by the district court and Court of Appeals below imposes a punitive consequence out of all proportion to the actual harm. All entrepreneurs take on risk, including legal or regulatory risk, but in the ordinary case the consequence of an incorrect business judgment call is a monetary fine at least roughly commensurate with the harm caused. Such a fine was, for instance, imposed in the case below, in the form of damages for copyright infringement, and there is no question that Rimini Street paid the compensatory amount owed to Oracle in full. Pet. at 6. But to add a prohibitory permanent injunction on top of that damages award—even in the face of a jury finding of innocent infringement—imposes a grossly disproportionate penalty. The unfortunate result is that for support providers and their customers, the risk that their interpretation of the scope of a license is mistaken no longer remains a straightforward business-judgment risk. Rather, it has transformed into an existential and potentially business-ending threat.

3. Finally, this threat—of an indiscriminate permanent injunction, even on conduct adjudicated to have been innocent—has a drastic impact on the lawful marketplace for third-party repair and support services. Any reasonable entrepreneur facing the twin threat of (a) ambiguous license terms and (b) the real prospect of a permanent injunction would surely think twice before accepting that systemic risk and entering the market—if they are brave enough to enter the market at all. And the lamentable though predictable consequence of fewer third-party support offerings is lessened competition in the market for maintenance and repair, with accompanying higher prices and lower-quality service. That state of affairs may advantage Oracle, but certainly not the hundreds of

thousands of Oracle users deprived of competitive choice.⁹

D. The district court's and Court of Appeals' injunctive rule threatens harsh consequences beyond the market for software service and maintenance

Most problematic of all is that, if allowed to stand, the impact of the courts' permanent-injunction rulings below will be felt in multiple industries. As noted above, software is at the heart of the digital economy of the 21st century, which encompasses a vast marketplace of goods and services, from cars to mobile phones to electronic books to "smart" air conditioners. Even if Oracle is not a player in those markets, the threat of aggressive vendors dictating and enforcing ambiguous license terms under the threat of punitive permanent injunctive relief is no less present. Indeed, it is that very real and profound concern that motivated the Department of Commerce and Copyright Office to question the increasing use of ambiguous and string EULAs now found in virtually "all digital goods, including software, books, and music."¹⁰

Nothing in the district court's or the Court of Appeals' opinion cabins their rule or rationale to the enterprise-software support market in which Oracle and Rimini Street participate. In an economy where

⁹ See Oracle, *Corporate Facts*, <https://www.oracle.com/corporate/corporate-facts.html> (last visited Dec. 2, 2019) (reporting that Oracle has "430,000 customers in 175 countries").

¹⁰ *Copyright Office Report*, at 68; *Internet Policy Task Force White Paper*, at 55-58, 68-69.

“software is eating the world,”¹¹ the consequences of those decisions are too severe to permit the courts’ rulings below on permanent injunctive relief. Innocent infringers must be afforded the opportunity to have their adjudicated innocence appropriately weighted before any permanent injunction issues.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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¹¹ Marc Andreessen, *Why Software is Eating the World*, Wall St. J. (Aug. 20, 2011), <https://www.wsj.com/articles/SB10001424053111903480904576512250915629460>.