IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

GOOGLE LLC, APPLICANT

v.

ORACLE AMERICA, INC.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for
Google LLC respectfully requests a 60-day extension of time, to
and including January 25, 2019, within which to file a petition
for a writ of certiorari to review the judgment of the United
States Court of Appeals for the Federal Circuit in this case.
The court of appeals entered its judgment on March 27, 2018,
App., infra, 1a-56a, and denied applicant's petition for rehear-
ing on August 28, 2018, id. at 57a-58a. Unless extended, the
time for filing a petition for a writ of certiorari will expire
on November 26, 2018. The jurisdiction of this Court would be
invoked under 28 U.S.C. 1254(1).

1. This case presents important questions concerning the
copyrightability and fair use of computer software interfaces in
the creation of new programs. A predecessor of Oracle America,
Inc. (Oracle), developed the software interfaces at issue, which
are part of the Java application programming interface packages

(Java API). The Java API contains interfaces for specific functions, also known as declarations, which a programmer can use to cause a computer to run prewritten code corresponding to the relevant function. Oracle encouraged millions of programmers to adopt the efficient programming made possible by the Java API. Google used a subset of the declarations from the Java API in Android, a revolutionary open-source platform for modern mobile devices such as smartphones and tablets, to permit programmers to use their skills with the concededly open and free Java programming language to write new programs for the Android platform.

After years of protracted litigation, the Federal Circuit has issued two opinions, the first holding that the declarations in the Java APIs are copyrightable and the second overturning a jury's verdict that Google's use of the declarations constituted fair use. Those opinions throw a devastating one-two punch at the computer software industry. If allowed to stand, the Federal Circuit's approach will upend the longstanding expectation of software developers that they are free to use existing computer software interfaces to build new programs.

2. Oracle initially sued Google in 2010 for copyright infringement based on Google's use of the Java API declarations in Android and for patent infringement. The case went to a jury trial. The jury did not reach a resolution on the copyright-infringement claims (because it was unable to reach a verdict on fair use) but found for Google on the patent-infringement claims. After the trial, the district court granted Google's

motion for judgment as a matter of law, holding that the Java API declarations were not copyrightable, 872 F. Supp. 2d 974 (N.D. Cal. 2012), and denied Oracle's motion for judgment as a matter of law on Google's fair use defense. Oracle appealed the copyrightability ruling and the denial of its motion for judgment as a matter of law on fair use. The Federal Circuit reversed the copyrightability ruling and remanded for a new trial on Google's fair-use defense. 750 F.3d 1339 (2014).

Google petitioned for a writ of certiorari, and this Court called for the Solicitor General's views. The Solicitor General recommended against granting certiorari, citing the case's then-interlocutory posture and stressing that Google's concerns about the effects of recognizing Oracle's claimed copyright rights could be addressed through the fair-use defense. This Court denied certiorari. 135 S. Ct. 2887 (2015).

On remand, after a two-week trial featuring 29 witnesses and hundreds of exhibits, the jury found that Google's use of the Java API declarations constituted a fair use. The district court denied Oracle's motions for judgment as a matter of law and for a new trial. Civ. No. 10-3561, 2016 WL 5393938 (N.D. Cal. Sept. 27, 2016); Civ. No. 10-3561, 2016 WL 3181206 (N.D. Cal. June 8, 2016).

3. The Federal Circuit again reversed, setting aside the jury verdict and holding that Google's use of the declarations did not constitute fair use as a matter of law. App., infra, 1a-56a.

Under 17 U.S.C. 107, the factors relevant to determining fair use include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work. See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560-561 (1985). In holding that Google's use of the declarations did not constitute fair use, the Federal Circuit focused primarily on the first and fourth factors.

With respect to the purpose and character of the use, the Federal Circuit determined that the commercial nature of Google's use of the Java API declarations weighed against a finding of fair use. App., infra, 30a. In considering whether Google's use was transformative, the Federal Circuit asserted that the Java API declarations served the same function in Android as in the Java platform, and it concluded on that basis that the Java API declarations themselves had not been transformed. Id. at 34a-35a. Although Google used the Java API declarations to create an entirely new mobile platform, the court reasoned that "moving material to a new context is not transformative in and of itself -- even if it is a 'sharply different context.'" Id. at 37a (citation omitted).

With respect to market harm, the Federal Circuit found that the Java platform had been used in early smartphones, which meant that "Android competed directly with Java SE in the market for mobile devices." App., infra, 51a. And even if, as the

district court found, Oracle had only entered the market for desktops and laptops with its Java SE software, the Federal Circuit would still have concluded that there was market harm by considering how "Google's copying affected potential markets Oracle might enter or derivative works it might create or license others to create," which included the smartphone market. Id. at 52a. Weighing the four factors together, and without considering other relevant evidence, the Federal Circuit held that Google's use was not fair use and overturned the jury's contrary verdict. Id. at 53a-54a.

Google filed a petition for rehearing, in which it challenged both the Federal Circuit's earlier holding on copyrightability and its more recent holding on fair use. After calling for a response from Oracle, the Federal Circuit denied the petition. App., infra, 57a-58a.

4. Counsel for applicant respectfully requests a 60-day extension of time, to and including January 25, 2019, within which to file a petition for writ of certiorari. The Federal Circuit's decisions in this case present important and complex issues of copyrightability and fair use, the resolution of which will have a significant impact on the development of computer software. The undersigned counsel did not represent applicant in the courts below. Moreover, the undersigned counsel is presenting oral argument in this Court in three cases in the next few months: (1) Henry Schein, Inc. v. Archer & White Sales, Inc., No. 17-1272, on October 29; (2) Republic of Sudan v. Harrison, No. 16-1094, on November 7; and (3) Helsinn Healthcare v.

Teva Pharmaceuticals, No. 17-1229, on December 4. In addition, the undersigned counsel is currently preparing the brief for respondents in Obduskey v. McCarthy & Holthus LLP, No. 17-1307, which is due in this Court on November 7; the reply brief for petitioner in Helsinn Healthcare, supra, which is due in this Court on November 8; and other filings, both in this Court and in other courts, with proximate due dates. Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted.

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