No. 18-956

In The
Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

ORACLE AMERICA, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* CIV PRO, IP & LEGAL HISTORY PROFESSORS IN SUPPORT OF PETITIONER

JACLYN CHERRY
Counsel of Record
UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF LAW
1525 Senate Street, Suite 354
Columbia, SC 29208
803-777-3394
cherryja@law.sc.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ... ii

INTEREST OF AMICI CURIAE ... 1

SUMMARY OF ARGUMENT ... 2

ARGUMENT ... 5

I. The Seventh Amendment Prohibits the Jury Verdict from Being "Re-examined" ... 5

A. English Law Courts Decided Issues of Fair Use ... 6

B. *Feltner* Suggests that the Seventh Amendment Applies to Fair Use ... 11

II. Precedent on Mixed Questions of Law and Fact Implies a Deferential Review of Fair Use ... 12

III. *Harper* Is Consistent with Deferring to a Jury Finding of Fair Use ... 15

A. The *Harper* Court Confined Its Statement to the Review of Judges ... 17

B. Case Law Suggests that *Harper*'s Statement Is Limited to the Review of Judges ... 18

C. The Court Should Clarify *Harper* to Correct Errors on Summary Judgment ... 22

IV. Discretionary Judgments in the Fair-Use Analysis Imply a Heightened Standard to Reverse a Jury Verdict ... 25

CONCLUSION ... 28

TABLE OF AUTHORITIES

Page

CASES

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988) 6

Brewer v. Hustler Magazine, Inc.,
749 F.3d 527 (9th Cir. 1984)....................................19

Bridgeport Music, Inc. v. UMG Recordings, Inc.,
585 F.3d 267 (6th Cir. 2009)....................................21

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994) ....*passim*

Cary v. Kearsley,
(1802) 170 Eng. Rep. 679 ....7, 8, 10

Castle Rock Entertainment v.
Carol Publishing Group, Inc.,
955 F. Supp. 260 (S.D.N.Y. 1997),
aff'd, 150 F.3d 132 (2d Cir. 1998)............................24

Compaq Computer Corp. v. Ergonome Inc.,
387 F.3d 403 (5th Cir. 2004)....................................22

Corbello v. DeVito,
262 F. Supp. 3d 1056 (D. Nev. 2017) 25, 26

Curtis v. Loether,
415 U.S. 189 (1974) 5

DC Comics Inc. v. Reel Fantasy, Inc.,
696 F.2d 24 (2d Cir. 1982) 20

Eisenschiml v. Fawcett Publications, Inc.,
246 F.2d 598 (7th Cir. 1957)....................................20

TABLE OF AUTHORITIES – Continued

Page

Emerson v. Davies,
8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).........10

Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340 (1998) 3, 9, 11, 12, 17

Fiset v. Sayles,
No. 90-16548, 1992 WL 110263
(9th Cir. May 22, 1992)...22

Fisher v. Dees,
794 F.2d 432 (9th Cir. 1986).............................22, 23

Folsom v. Marsh,
9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).....9, 10

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 5, 6

Harper & Row, Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985) ....*passim*

Jartech, Inc. v. Clancy,
666 F.2d 403 (9th Cir. 1982)...................................19

MCA, Inc. v. Wilson,
677 F.2d 180 (2d Cir. 1981) 20

Meeropol v. Nizer,
560 F.2d 1061 (2d Cir. 1977) 19

National Business Lists, Inc. v. Dun & Bradstreet, Inc.,
552 F. Supp. 89 (N.D. Ill. 1982)...............................19

New York University v. Planet Earth Foundation,
163 Fed. App'x 13 (2d Cir. 2005) 21

TABLE OF AUTHORITIES – Continued

Page

Oracle America, Inc. v. Google LLC,
886 F.3d 1179 (Fed. Cir. 2018) 5, 15, 16, 28

Oracle America, Inc. v. Google Inc.,
No. C 10-03561 WHA, 2016 WL 3181206
(N.D. Cal. June 8, 2016), *rev'd*, 886 F.3d 1179
(Fed. Cir. 2018) 28

Pacific & Southern Co. v. Duncan,
744 F.2d 1490 (11th Cir. 1984).................... 16, 20, 21

Parsons v. Bedford,
28 U.S. (3 Pet.) 433 (1830)...6

Piper Aircraft Corp. v. Wag-Aero, Inc.,
741 F.2d 925 (7th Cir. 1984)...................................19

Railroad Co. v. Stout,
84 U.S. (17 Wall.) 657 (1873)..................................17

Roworth v. Wilkes,
(1807) 170 Eng. Rep. 889; 1 Camp. 94 ....8, 9

Roy Export Co. v. Columbia Broadcasting System Inc.,
503 F. Supp. 1137 (S.D.N.Y. 1980),
aff'd, 672 F.2d 1095 (2d Cir. 1982)....................19, 23

Sayre v. Moore,
(1785) 102 Eng. Rep. 138 .... 6, 7, 8, 10

Seltzer v. Green Day, Inc.,
725 F.3d 1170 (9th Cir. 2013).................................23

Simms v. Stanton,
75 F. 6 (C.C.N.D. Cal. 1896)....................................10

TABLE OF AUTHORITIES – Continued

Page

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 6, 14, 20, 25, 26

Television Digest, Inc. v. Telephone Ass'n, 841 F. Supp. 5 (D.D.C. 1993) 24

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) 6

Ty, Inc. v. Publications International Ltd., 292 F.3d 512 (7th Cir. 2002)...................................24

U.S. Bank National Ass'n v. Village at Lakeridge, LLC, 138 S. Ct. 960 (2018) ....*passim*

Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)..7

Yurman Design, Inc. v. PAJ Inc., 262 F.3d 101 (2d Cir. 2001) 12

CONSTITUTIONS AND STATUTES

17 U.S.C. § 107 (2018)....................................11, 20, 21

U.S. CONST. amend. VII......................................*passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Brief for Petitioners, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1984) (No. 83-1632) 19

Brief for Respondents, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1984) (No. 83-1632) 19

H.R. REP. NO. 94-1476 (1976) 14

JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (Little & Brown 1846) (1836) 9

Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483 (2010) 1, 22

Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275 (2019) 1, 5, 18

Special Verdict Form, *Oracle America, Inc. v. Google Inc.*, No. C 10-03561 WHA (N.D. Cal. June 8, 2016), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018) 16

WILLIAM F. PATRY, PATRY ON COPYRIGHT (2019) 5

WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985) 11

INTEREST OF *AMICI CURIAE*

Amici consist of three law professors who teach and write in the areas of civil procedure, intellectual property, and legal history.[1] *Amici* submit this brief for the purpose of assisting the Court in applying the correct standard of review to the jury's finding of fair use.

Ned Snow is the Ray Taylor Fair Professor of Law at the University of South Carolina School of Law. He teaches and writes in the area of intellectual property. He has published two articles relating to the issue addressed in this brief: *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275 (2019); and *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483 (2010).

Lisa A. Eichhorn is a Professor of Law at the University of South Carolina School of Law. She teaches and writes in the area of civil procedure, among other subjects.

---

[1] No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Only the University of South Carolina School of Law made a monetary contribution toward the submission of this brief. Specifically, the School of Law paid for the printing and delivery costs of this brief, consistent with its policy of supporting the scholarly endeavors of its faculty members. The School of Law made this contribution independent of any views advocated in this brief. The parties received timely notice of and have consented to the filing of this brief.

Stephen M. Sheppard is a Professor of Law, Dean Emeritus, and Charles E. Cantú Distinguished Professor of Law Emeritus at St. Mary's University School of Law. He teaches and writes in the area of legal history, among other subjects.

SUMMARY OF ARGUMENT

Reversal of a jury verdict on the issue of fair use is extraordinarily rare. For two centuries, courts have given great deference to jury verdicts. Indeed, history overwhelmingly demonstrates that juries are uniquely situated to make the discretionary judgments that fair-use cases call for. But in this case, the Federal Circuit ignored history, along with the law. It applied de novo review to overturn the jury verdict of fair use. This is the first time that has ever happened. And it is unconstitutional.

The Seventh Amendment requires that a jury finding of fair use not be "re-examined" under a de novo standard of review. This Court has explained that the Seventh Amendment applies to any issue that determines legal rights, as adjudicated by English common-law courts in 1791. During that time period, English common-law courts treated the issue of whether a defendant could fairly use copyrighted material as an issue that determined legal rights of copyright owners. Those courts expressly reserved the issue for the jury. Thus, history satisfies the test for Seventh Amendment protection.

Modern Supreme Court case law further supports this conclusion. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998), this Court held that with respect to copyright, the Seventh Amendment applies to "all issues" pertinent to statutory damages. Fair use is such an issue. It determines liability, so it directly affects whether statutory damages may be awarded. *Feltner* suggests that the Seventh Amendment applies to fair use.

Even if the Seventh Amendment did not apply, the nature of fair use as a mixed question of law and fact mandates deferential review. In *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018), this Court instructed appellate courts to deferentially review mixed questions that require marshaling and weighing of evidence, and that require evaluating historical facts that resist generalization. Fair use is such a mixed question. It requires a jury to marshal and weigh evidence as the jury applies the four fair-use factors to the historical facts, drawing inferences about the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the work used, and the effect of the use on the market for the work. These inferences are specific to each set of historical facts. For this reason, the Court has repeatedly recognized that fair use necessitates a case-by-case inquiry. Therefore, under the principles set forth in *U.S. Bank*, the jury's verdict of fair use is entitled to deference.

The Federal Circuit's erroneous application of de novo review was largely due to its misinterpretation of

a statement in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). The *Harper* Court stated that appellate courts could independently review a fair-use decision of a district court. The Court made this statement while reviewing a bench trial, so the statement should be limited to that context. Indeed, neither before nor after *Harper* has any court applied de novo review to a jury finding on the issue of fair use (until this case). On the other hand, courts have erroneously relied on the statement in *Harper* to justify deciding fair-use issues on summary judgment, even where reasonable minds would disagree on the issue. This case affords the Court an opportunity to correct that misinterpretation of *Harper*.

The appropriate standard of review, then, does not permit reversal of a jury finding unless that finding is wholly unreasonable. In fair-use cases, that standard is usually too difficult to satisfy. Especially where underlying facts are complicated, the four fair-use factors call for many discretionary judgments, and judgments that allow for discretion are rarely unreasonable. Here, the facts are undeniably complicated. So the required showing of unreasonableness simply cannot be met.

Thus, the analysis becomes straightforward and simple once the Court applies the correct standard of review. The Court need not analyze the intricacies of computer-software technology. That is the province of the jury. The Court need merely recognize the reasonableness that is inherent in the jury verdict.

ARGUMENT

The argument of this brief focuses solely on the standard of review that governs the issue of fair use.[2] In this case, the Federal Circuit applied de novo review on that issue. *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1196 (Fed. Cir. 2018) ("[W]e must assess all inferences to be drawn from the historical facts found by the jury and the ultimate question of fair use de novo. . . ."). That was legal error. Both the Constitution and this Court's precedent require a deferential standard of review.

I. The Seventh Amendment Prohibits the Jury Verdict from Being "Re-examined."

The Seventh Amendment prohibits de novo review of the jury's finding of fair use. The Amendment provides that "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. "[T]he thrust of the Amendment was to preserve the right to jury trial as it existed in 1791." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). The Amendment applies "to suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Granfinanciera,*

---

[2] For an elucidation of the arguments in this brief, see Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275 (2019). Helpful commentary is further set forth in WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 10:160 (2019).

S.A. v. Nordberg, 492 U.S. 33, 41 (1989). It "also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Id*. Where the Seventh Amendment applies to a jury finding, an appellate court may not apply de novo review to re-examine that finding. *See Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830). Rules of the common law allow for reversal only if substantial evidence does not support a jury finding, or in other words, only if no reasonable jury could have made the finding. *See*, *e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 514 (1988).

A. English Law Courts Decided Issues of Fair Use.

Law courts of the relevant time period heard issues very similar to the modern issue of fair use. Those issues addressed the infringement of a legal right, so juries decided them. The 1785 English common-law case of *Sayre v. Moore*, (1785) 102 Eng. Rep. 138, 139 n.(b), is illustrative.[3] In *Sayre*, the Chief Justice of the King's Bench, Lord Mansfield, sat as the trial judge in a copyright dispute over the defendant's use of the plaintiffs' sea charts. *Id*. at 140. The defendant had

[3] *Sayre* has proven influential in modern American copyright jurisprudence. *See*, *e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 480 n.33 (1984) (Blackmun, J., dissenting) (relying on *Sayre* to explain copyright law); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 n.6 (1975) (same).

copied four sea charts belonging to the plaintiffs in order to create one large map, and in doing so, the defendant had made many "alterations and improvements," including the correction of inaccuracies. *Id*. at 139-40. Noting similar cases, Lord Mansfield summarized these types of copyright disputes as follows: "In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not." *Id*. at 140. Lord Mansfield considered the issue of whether a defendant's use was permissibly fair or impermissibly infringing to be one for the jury. As it turns out, the jury found for the defendant.

Another illustrative case is *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679. *Cary* is an 1802 copyright case that arose in an English common-law court.[4] The plaintiff, Mr. Cary, had created a book that detailed nine-hundred miles of roads. Mr. Kearsley had copied portions of Mr. Cary's book into his own. At trial, Cary's attorney argued that Kearsley's copying was analogous to copying an entire essay from a book, and adding mere notations at the end of copied text. In response to this argument, Lord Ellenborough observed that the specific facts surrounding the act of copying would determine whether piracy had occurred. Lord Ellenborough observed that Kearsley's copying

[4] The Supreme Court has relied on *Cary* in explaining principles of fair use. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Cary* to delineate principles of fair use); *cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 613 (1834) (relying on *Cary* to decide copyright dispute that did not raise an issue of fair use).

would not amount to piracy if his use had been "for the promotion of science, and the benefit of the public," or in other words, if he had "used fairly" Cary's materials. *Id*. at 679-80. Lord Ellenborough then declared that this was an issue for the jury, explaining the jury's responsibility as follows:

> I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff?

Id. Simply put, the *Cary* court recognized that the issue of whether a defendant "used fairly" another's copyrighted work determined whether the defendant had infringed the copyright, so it was unquestionably an issue for the jury to decide.

The importance of both *Sayre* and *Cary* cannot be overstated. They demonstrate that English law courts decided issues closely akin to the modern issue of fair use. They occurred in the decade prior to and the decade following the ratification of the Seventh Amendment. They represent common-law courts expressly recognizing that the jury should decide whether copyrighted material was used fairly by a defendant.[5]

[5] *Roworth v. Wilkes*, (1807) 170 Eng. Rep. 889; 1 Camp. 94, is another English common law case that considered whether a

The story does not end with English law courts, however. Courts in the United States adopted the approach of English law courts in applying the doctrine of fair use. The first articulation of that doctrine in American jurisprudence arose in *Folsom v. Marsh*, 9 F. Cas. 342, 348-49 (C.C.D. Mass. 1841) (No. 4,901). Relying on English jurisprudence (including opinions of law courts), Justice Joseph Story portrayed the issue of fair use as an issue that defines infringement of a legal right. *See Folsom*, 9 F. Cas. at 348 ("The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as *no infringement* of the copyright of the plaintiffs.") (emphasis added). This fact is important because issues that define infringement of a legal right are issues that customarily would arise in actions at law—not in equity. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-48 (1998). Justice Story's description portrays fair use as an issue of law.

Notably, the fact that *Folsom* reflects an equitable proceeding does not imply that the fair-use doctrine is equitable in nature; it implies only that the copyright owner sought an equitable remedy. Indeed, Justice Story recognized the well-established maxim that equity follows the law. *See generally* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, §64, at 70-71 (Little & Brown 1846) (1836) ("Where a rule, either of the Common or the Statute Law is direct, and

---

use was permissibly fair. There, the defendant used 75 pages of a 118-page treatise. The issue was whether this was a permissible extraction of the original. A jury found for the plaintiff.

governs the case with all its circumstances, or the particular point, a Court of Equity is as much bound by it as a Court of Law, and can as little justify a departure from it."). This point is further illustrated by a copyright case that Justice Story decided a few years after the *Folsom* decision, *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436). Again sitting in equity, Justice Story explained principles related to fair use, such as "what degree of imitation constitutes an infringement," and whether similarities between two works result from "the nature of the subject." *Id.* at 622-24. In explaining such principles, Justice Story adopted language from the English common-law case discussed above, *Sayre v. Moore*: "[T]he question of fact to come to a jury, is, whether the alteration be colorable or not. . . . [A] question of this nature the jury will decide, whether it be a servile imitation or not."[6] *Emerson*, 8 F. Cas. at 624. Here, Justice Story explicitly recognized the role of a jury in deciding issues of infringement, even though the case was brought in equity. The equitable posture of the suit did not change the legal status of the issue.

In sum, during the relevant time period, the issue of whether a defendant fairly used copyrighted material arose in English law courts, so juries decided those issues. American courts then adopted the English

[6] A few decades later, another early American copyright case quoted the same portion of *Sayre* in explaining fair use. *See Simms v. Stanton*, 75 F. 6, 9 (C.C.N.D. Cal. 1896). The *Simms* court also relied on the English common-law case discussed above, *Cary v. Kearsley*, in describing the fair-use doctrine. *Id.* at 11.

courts' legal treatment of the issue. *See* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 5 (1985) (reciting history of early fair-use cases and concluding that "[i]t is incorrect to characterize fair use as a child of equity"). History thus satisfies the constitutional test for whether to apply the Seventh Amendment to the issue of fair use.

B. *Feltner* Suggests that the Seventh Amendment Applies to Fair Use.

The Court indirectly answered the question of whether the Seventh Amendment applies to fair use in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). In *Feltner*, the Court considered whether the Seventh Amendment applies to the issue of whether to award statutory damages in copyright law. The *Feltner* Court traced the history of copyright law to the middle of the seventeenth century, observing that copyright suits were tried in courts of law as actions on the case. *Id.* at 349-51. Based on this history, the Court concluded that "the Seventh Amendment provides a right to a jury trial on *all issues* pertinent to an award of statutory damages. . . ." *Id.* at 355 (emphasis added).

Fair use is an issue that is pertinent to an award of statutory damages. Section 107 of the Copyright Act states that "the fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107 (2018). The issue of fair use thus determines infringement, and the issue of infringement determines whether

statutory damages should be awarded. Under *Feltner*, then, the Seventh Amendment must apply to the issue of fair use. *Cf. Yurman Design, Inc. v. PAJ Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (interpreting *Feltner* as suggesting "that a jury's findings as to 'substantial similarity' are subject to the same deferential review under Rule 50 that applies to other jury findings"). *Feltner* therefore implies deferential review of a fair-use jury verdict.

II. Precedent on Mixed Questions of Law and Fact Implies a Deferential Review of Fair Use.

Even assuming that the Seventh Amendment does not mandate deferential review of fair use, this Court's precedent in *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966-68 (2018), suggests a deferential standard. *U.S. Bank* teaches about the standards of review that govern mixed questions of law and fact. The Court explained that "the standard of review for a mixed question depends on whether answering it entails primarily legal or factual work." *Id.* at 967. Legal work "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard"; legal work "involves developing auxiliary legal principles of use in other cases." *Id.* By contrast, factual work requires a decision-maker "to marshal and weigh evidence, make credibility judgments," and address underlying historical facts that "resist generalization"; factual work "immerse[s] courts in case-specific factual issues." *Id.*

The *U.S. Bank* Court applied these principles to the issue before it. Specifically, a bankruptcy judge had determined that a particular creditor should not be classified as a "non-statutory insider." That determination represented a mixed question because the judge had applied a legal test (i.e., whether a debtor and creditor are strangers to a transaction) to historical facts (i.e., the specific interactions of the debtor and creditor at issue). In assessing the standard of review for that determination, the Court observed that the bankruptcy judge "takes a raft of case-specific historical facts, considers them as a whole, balances them one against another—all to make a determination that when two particular persons entered into a particular transaction, they were (or were not) acting like strangers." *Id*. at 968. The process essentially required the bankruptcy judge to draw "a factual inference from undisputed basic facts." *Id*. Accordingly, the Court held that the clear-error deferential standard of review should apply.

The issue of fair use is similar to this issue in *U.S. Bank*. Applying the four factors to the historical facts, the jury must draw inferences that determine whether a use is fair. Specifically, those inferences relate to the purpose of a defendant's use, the nature of the copyrighted work, the amount and substantiality of the work that was used, and the effect on the market for the work. Like the inference in *U.S. Bank*, each of these inferences represent "a factual inference from undisputed basic facts." *Cf. id*. at 967. They require the jury to "marshal and weigh evidence." *Cf. id*. at 968.

Moreover, the inferences of fair use represent "case-specific factual issues" that arise from historical facts that "resist generalization." *Cf. id*. at 967. Indeed, this Court has repeatedly taught that the issue of fair use calls for a "case-by-case analysis," which "is not to be simplified with bright-line rules." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Quoting legislative history regarding fair use, the Court in *Sony Corp. of America v. Universal City Studios, Inc*., 464 U.S. 417 (1984), noted that "no generally applicable definition is possible, and each case raising the question must be decided on its own facts." *Id*. at 448-49 n.31 (quoting H.R. REP. NO. 94-1476, at 66 (1976)). The *Sony* Court continued:

> [T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Id. The fair-use determination thus rests upon the narrow, individualized facts of each case. Therefore, the issue of fair use—like the issue in *U.S. Bank*—entails primarily factual work. It requires a deferential standard of review for jury verdicts.

Sometimes, though, it is appropriate for appellate courts to provide guidance to juries and judges on the proper application of the four fair-use factors. *See*, *e.g.*,

Campbell, 510 U.S. at 578-94 (articulating the proper application of the four factors for parodic works). This would be consistent with applying a deferential standard of review to a jury verdict. The *U.S. Bank* Court recognized that even under a deferential standard, appellate courts may articulate legal principles to guide juries and judges. *U.S. Bank*, 138 S. Ct. at 968 n.7 (explaining that under the clear-error standard, "if an appellate court someday finds that further refinement of the . . . [substantive-law] standard is necessary to maintain uniformity among bankruptcy courts, it may step in to perform that legal function"). Hence, the refinement of legal principles in a mixed question, such as fair use, does not mandate de novo review.

III. *Harper* Is Consistent with Deferring to a Jury Finding of Fair Use.

In the case at bar, the Federal Circuit justified its de novo review of the jury verdict by relying on a statement that this Court made in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1193 (Fed. Cir. 2018). In *Harper*, a news organization, The Nation, published an article containing excerpts of President Gerald Ford's memoirs, without obtaining permission from the copyright owner. The district court held a bench trial and determined that The Nation had infringed the copyright in Ford's memoirs, rejecting The Nation's fair-use argument. On appeal, this Court affirmed the district-court decision.

In affirming the district court's denial of fair use, the *Harper* Court made a statement concerning the procedure for reviewing fair use:

> Fair use is a mixed question of law and fact. *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (CA11 1984). Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court "need not remand for further factfinding . . . , [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work." *Id*. at 1495.

Harper, 471 U.S. at 560.

This statement means that if a district-court judge has made findings of historical facts sufficient for an appellate court to perform its own fair-use analysis, the appellate court may decide the issue of fair use as a matter of law. The statement does not mean that an appellate court may apply de novo review to a jury verdict. Consider the instant case, where the jury made no specific findings of fact other than the general verdict that Google's use was fair. *See* Special Verdict Form, *Oracle Am., Inc. v. Google Inc*., No. C 10-03561 WHA (N.D. Cal. June 8, 2016), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018). With its sole finding, the jury had not "found facts sufficient to evaluate each of the statutory factors." *Cf. Harper*, 470 U.S. at 560. An appellate court cannot analyze historical facts without any historical facts having been found. Therefore, the quoted

statement in *Harper* cannot mean that jury verdicts are always subject to de novo review.

A. The *Harper* Court Confined Its Statement to the Review of Judges.

The *Harper* Court made its statement with respect to the review of a "district court." *Id*. The common meaning of "district court," coupled with the fact that the *Harper* Court was reviewing a bench trial, indicates that the *Harper* Court was referring to the review of a judge, not a jury. *Cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345-46 (1998) ("The word 'court' in [the Copyright Act] appears to mean judge, not jury."). This means that even if a jury has found facts sufficient to evaluate the statutory factors, the *Harper* statement does not authorize appellate courts to conduct an independent review of the jury's findings. The *Harper* statement says nothing about reviewing a jury.

This understanding of the *Harper* statement makes good sense. On the issue of fair use in particular, the review of a judge presents a different exercise than the review of a jury. For one thing, the Seventh Amendment prohibits re-examining a jury finding—not a judicial finding. But putting that aside, juries are especially well suited to decide issues of fair use. A jury brings collective experience and consensus to the process of factfinding, which judges simply lack. *See generally Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664-65 (1873) ("It is assumed that twelve men know

more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. . . . [W]hen the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination."). Juries comprise a multiplicity of life experiences that shape value judgments and cultural understandings. Those judgments and understandings are relevant to determining whether a use is fair: they inform whether a use's purpose is socially beneficial, whether the content of the original work merits strong protection, whether the defendant used a significant quantity or a qualitatively substantial amount of the original work, and whether the use could plausibly cause harm to a potential market of the copyrighted work. *See* Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275, 325-31 (2019). Simply put, the heterogeneous composition of a jury provides a collective perspective that is more likely to reflect the norms and values of a community and culture, and that perspective is particularly valuable to the process of assessing whether a use is fair. For this reason, a jury should be entitled to more deference than a judge.

B. Case Law Suggests that *Harper*'s Statement Is Limited to the Review of Judges.

To construe the statement in *Harper* as meaning that an appellate court may apply de novo review to overturn a jury verdict would be to interpret *Harper* as

effecting a monumental change in copyright law. *See Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977) (concluding that "[i]t was error to hold that as a matter of law the fair use defense was available to defendants" and recognizing that the fair-use determination "should have been made by the trier of fact"). Tellingly, this issue of procedure was not even before the *Harper* Court. Neither party had briefed it.[7] Prior to *Harper*, deferential review on the issue of fair use was a well-established principle of law. *See, e.g.*, *Brewer v. Hustler Magazine, Inc*., 749 F.3d 527, 529 (9th Cir. 1984) ("We conclude that there 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, 407-08 (9th Cir. 1982) ("[T]he jury's verdict [of fair use] is certainly supported by substantial evidence."); *Nat'l Bus. Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 97 (N.D. Ill. 1982) ("[T]here was substantial evidence to support [the jury's] verdict that NBL infringed, beyond fair use, valid D&B copyrights."); *Roy Exp. Co. v. Columbia Broad. Sys. Inc.*, 503 F. Supp. 1137, 1147 (S.D.N.Y. 1980) ("In sum, there was sufficient evidence for the jury reasonably to decide that each relevant factor went against CBS' claim of a fair use defense."), *aff'd*, 672 F.2d 1095, 1099 n.9 (2d Cir. 1982) ("[T]he evidence supported the jury in its finding that CBS's use was not fair."); *cf. Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 936 (7th Cir. 1984) (Posner, J., concurring)

---

[7] *See* Brief for Petitioners, *Harper*, 471 U.S. 539 (No. 83-1632); Brief for Respondents, *Harper*, 471 U.S. 539 (No. 83-1632).

(recognizing, in dicta, that a finding of fair use is subject to a deferential standard of review); *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) ("Since the issue of fair use is one of fact, the clearly erroneous standard of review is appropriate.") (citation omitted); *Eisenschiml v. Fawcett Publ'ns, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957) ("[T]he issue of fair use is a question of fact. We cannot say that the Master's finding in this respect is clearly erroneous.") (citation omitted). Two years prior to this Court hearing the *Harper* case, the Second Circuit explained:

> The fair use defense turns not on hard and fast rules but rather on an examination of the facts in each case. The four factors listed in Section 107 raise essentially factual issues and, as the district court correctly noted, are normally questions for the jury.

DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982). In the year prior to *Harper*, this Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), deferentially reviewed a bench-trial finding of fair use. Although the *Sony* Court was not explicit in the standard that it applied, its language indicated deference. *See id.* at 456 ("[T]his record amply supports the District Court's conclusion that home time-shifting is fair use."). Given this history, it seems highly unlikely that the *Harper* Court would have intended to change the procedural standard for reviewing jury verdicts.

Also relevant is the case on which the *Harper* Court relied for the quoted statement—*Pacific &*

Southern Co. v. Duncan, 744 F.2d 1490, 1494-95 (11th Cir. 1984). Like *Harper*, *Pacific* was a bench trial. There, the district-court judge refused to recognize fair use unless the use was inherently productive or creative. The Eleventh Circuit rejected this per se rule. The district court's application of a per se rule appears to have constituted legal error. Yet rather than remanding the case for the district court to re-analyze the facts under the four fair-use factors, the Eleventh Circuit went ahead and analyzed the factors itself, applying an independent review, and reached the same conclusion as the district court—that fair use did not apply. Thus, the case on which *Harper* relied for its statement, *Pacific*, was another instance of an appellate court conducting an independent review to affirm a non-jury holding of a district court.

Since the time that the *Harper* Court made its statement, all courts that have reviewed a jury finding on fair use have still applied a deferential standard (except in this case). *See*, *e.g.*, *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) ("Applying the statutory factors from 17 U.S.C. § 107, we conclude that the result reached by the jury was not unreasonable."); *N.Y. Univ. v. Planet Earth Found.*, 163 Fed. App'x 13, 14 (2d Cir. 2005) ("[T]he evidence also supports the jury's finding of fair use, under the four-factored analysis prescribed by statute. While [the copyright owner] vehemently argues, for instance, that [the defendant's] display of copyrighted material at a fund-raiser was of a commercial nature, this issue is the jury's to decide.") (citations omitted); *Compaq*

Comput. Corp. v. Ergonome Inc., 387 F.3d 403, 410-11 (5th Cir. 2004) (upholding the jury's fair-use decision under substantial-evidence standard); *Fiset v. Sayles*, No. 90-16548, 1992 WL 110263, at *4 (9th Cir. May 22, 1992) (same). In the nearly thirty-five years since *Harper*, no court has interpreted its statement as suggesting that appellate courts should apply de novo review of a jury finding on the issue of fair use. Until this case.

C. The Court Should Clarify *Harper* to Correct Errors on Summary Judgment.

The Court should address the standard-of-review issue in order to correct a mistaken interpretation of the quoted statement from *Harper*. Several courts have misinterpreted the statement from *Harper* and, as a result, have inappropriately considered the issue of fair use on summary judgment.[8] The first court to do so was the Ninth Circuit in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). There, the copyright owners argued for a jury to decide the issue of fair use, specifically pointing out that fair use "is appropriate for determination only when no reasonable jury could have decided the question differently." *Id*. at 436. The Ninth Circuit rejected this argument, stating that it was "completely undercut" by *Harper*. *Id*. After quoting *Harper*'s

---

[8] For further discussion about this history of courts deciding fair use on summary judgment, see Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483 (2010).

statement about independent review of a district court, the Ninth Circuit reasoned:

> No material historical facts are at issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper & Row*, these judgments are legal in nature, we can make them without usurping the function of the jury.

Id. Hence, the Ninth Circuit misconstrued the *Harper* statement as suggesting that in the fair-use analysis, the inferences to be drawn from the historical facts are "legal in nature." They are not. As argued above, the Seventh Amendment guarantees the right to a jury on the issue of fair use, which includes the process of drawing inferences under the four factors. As argued above, that process of drawing inferences reflects "factual work" according to principles set forth in *U.S. Bank*. Indeed, courts prior to *Fisher* rarely considered fair use on summary judgment. *See*, *e.g.*, *Roy Exp.*, 503 F. Supp. at 1143 (rejecting copyright owner's argument for summary disposition on grounds that "the fair use defense is ordinarily a factual question for the jury to determine"). But because of the *Harper* statement, none of that mattered to the Ninth Circuit.

Unfortunately, *Fisher* is no longer an outlier. Courts have continued to rely on the statement from *Harper* to regularly decide fair use on summary judgment, even where reasonable minds would disagree on whether a use is fair. *See*, *e.g.*, *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (relying on the

Harper statement to affirm a district court's summary-judgment ruling that a use was fair, where a rock band used an artist's illustration in its music video, despite the artist having licensed the illustration for use in a different music video and despite the original meaning of the illustration being "debatable"); *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 267, 272 (S.D.N.Y. 1997) (relying on the *Harper* statement to decide on summary judgment that defendants' trivia book about a copyrighted television show was not a fair use, and recognizing that the fair-use decision was "a difficult one"), *aff'd*, 150 F.3d 132 (2d Cir. 1998); *Television Digest, Inc. v. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (relying on the *Harper* statement to deny defendant's argument that fair use is inappropriate for summary judgment, and ruling on summary judgment that defendant's use was not fair, where defendant had paid a subscription for a trade newsletter, which contained mostly uncopyrightable information, and then made several copies for its employees). *But see Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (Posner, J.) ("Fair use is a mixed question of law and fact, which means that it may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion—but not otherwise.").

This case presents an opportunity for the Court to rectify this common misinterpretation of *Harper*. In recognizing the important role that the standard of review plays in this case, the Court should clarify that the inferences in the fair-use analysis represent issues for a jury to determine. Such clarification will cure the

problem of courts inappropriately deciding fair use on summary judgment.

IV. Discretionary Judgments in the Fair-Use Analysis Imply a Heightened Standard to Reverse a Jury Verdict.

The no-reasonable-jury standard is particularly difficult to satisfy in fair-use cases. This is because the fair-use analysis usually requires the jury to make several discretionary judgments over which reasonable minds may disagree. That discretion affords a jury considerable latitude in reaching its conclusion on the issue of fairness. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 479-80 (1984) (Blackmun, J., dissenting) ("The inquiry [of fair use] is necessarily a flexible one."). As a practical matter, that discretion suggests that demonstrating the unreasonableness of a jury verdict would be extraordinarily challenging.[9]

---

[9] *Amici* are aware of only one case (other than this case) in which a court has overturned a jury verdict on the issue of fair use. In *Corbello v. DeVito*, 262 F. Supp. 3d 1056, 1059-62 (D. Nev. 2017), the defendant, Mr. DeVito, used a small portion of an autobiography about DeVito's own life (and which DeVito assisted in creating) to develop a screenplay for a Broadway musical. The screenplay increased demand for the copyrighted book. The jury found DeVito's use to be infringing; the district court overruled that verdict as a matter of law, holding his use to be fair. *Id*. at 1068-77. The district court appears to have applied the correct standard of review. The court specifically recognized that "the fair use issue was properly a jury question," and that the court had "closely examined the evidence under the relevant standards." *Id*. at 1068. The court's analysis under the four fair-use factors

The first factor—the character and purpose of the use—is laden with discretionary judgments. The jury must determine whether the purpose of a use suggests fairness, and that determination often turns on subtle contextual nuances. *Compare Harper*, 471 U.S. at 563 ("Fair use distinguishes between a true scholar and a chiseler who infringes a work for personal profit.") *with Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) ("[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."). Relatedly, the jury must decide whether a use is transformative, communicating a new meaning, expression, or message. *See Campbell*, 510 U.S. at 578-79. Even if the use is transformative, the jury must determine whether the defendant used more expression than was necessary to accomplish the purpose. *See id.* at 581. These judgments are discretionary and may involve an element of subjectivity.

The second factor—the nature of the copyrighted work—may present a debatable issue. Reasonable minds may disagree over whether content represents

suggested that no reasonable jury could have found the use to be infringing. Although the court never explicitly stated the standard of review that it was applying, the court did not give any indication that it was applying an independent or de novo review. Indeed, its language and analysis strongly suggest that even under a deferential standard, substantial evidence in the record did not support the jury's verdict of infringement. *Corbello* thus represents the rare instance of when a court should overturn a jury verdict on the issue of fair use.

creative expression or functional information.[10] Likewise, the third factor—the amount and substantiality of the portion that is used—often requires discretionary judgment about whether the amount used is in fact significant, and whether the specific content used is qualitatively substantial. *See id.* at 587 ("[T]his factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too."). The fourth factor—the potential market effect—often calls for judgments relating to the potential effects of a use if the use were to become widespread, including effects on potential markets not yet in existence. *See id.* at 590 (explaining that the fourth factor requires consideration of "whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original"). Judgments about potential effects on potential markets invite subjective assessments.

The jury must also perform "a sensitive balancing of interests," *Sony*, 464 U.S. at 584-85, weighing the four-factor judgments together in light of copyright's

---

[10] Consider, for instance, the memoirs of President Gerald Ford, which described events in his presidency, including his pardon of former President Richard Nixon. On the one hand, this work seems like a historical account that merits less protection under factor two. *See Harper*, 471 U.S. at 594 (Brennan, J., dissenting) (characterizing memoirs as "informational work" under factor two). On the other hand, the memoirs contain "subjective descriptions" and "individualized expression" that deal with the pardon of President Nixon, thereby suggesting creativity. *See id.* at 564.

purposes, *Campbell*, 510 U.S. at 578. This process of balancing and weighing represents an inherently discretionary exercise. Moreover, if the historical facts are complicated, the jury has even more discretion to apply and weigh each factor according to the different ways that the complicated facts can be interpreted.

As a final point, the standard to reverse becomes especially difficult to satisfy where the jury issues a general verdict. A general verdict means that the reviewing court must assume that the jury has exercised its many opportunities for discretion in a way that will favor its verdict. Under that assumption, the standard to reverse is that the reviewing court must not be able to recognize any possibility that the jury could have acted reasonably. In the case at bar, with complicated facts, the possibility that the jury acted reasonably is certain.

CONCLUSION

The Court need not wade into the intricacies of computer-software technology to determine whether Google's use was fair. That is an issue for the jury. The Court need merely recognize the reasonableness of the jury's verdict—a conclusion that easily follows from the many discretionary judgments that inhere in the fair-use analysis.[11] Once the Court recognizes the

---

[11] *See Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 3181206, at *6-11 (N.D. Cal. June 8, 2016), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018).

inherent reasonableness of the jury verdict, that verdict cannot be re-examined. The Seventh Amendment mandates it. Precedent on mixed questions implies it. History demands it. The verdict must be upheld.

Respectfully submitted,

Jaclyn Cherry
Counsel of Record
University of South Carolina
School of Law
1525 Senate Street, Suite 354
Columbia, SC 29208
803-777-3394
cherryja@law.sc.edu

Counsel for Amici Curiae