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 *Amicus Curiae* of the
Software Freedom Law Center
in Support of Petitioner**

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QUESTIONS PRESENTED

1. Did the Court of Appeals fail to adhere to the teachings of this Court and the decisions of the Ninth Circuit in overturning the jury verdict in favor of Petitioner's fair use defense?

2. Did the Court of Appeals' depend, in its erroneous reversal of the jury verdict, on an erroneous intermediate holding that computer software application program interface declarations are in themselves copyrightable works?

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INTEREST OF *Amicus Curiae*

Much of the world's most important and most commercially significant software is distributed under copyright licensing terms that give recipients freedom to copy, modify and redistribute the software ("free software").[1] One could not send or receive e-mail, surf the World Wide Web, perform a Google search or take advantage of many of the other benefits offered by the Internet without free software. Indeed, this brief was written entirely with free software word processors, namely GNU Emacs and LaTeX, each of which are not just competitive with or superior to non-free software programs, but which also provide their users with the freedom to improve the program to fit their needs and reflect their desires.

The Software Freedom Law Center is a not-for-profit legal services organization that provides legal representation and other law-related services to protect and advance free software. SFLC provides pro bono legal services to non-profit free software developers and also helps the general public better understand the legal aspects of free software. SFLC has an interest in this matter because the decision of this Court will have a significant effect on the rights of the free software developers and users SFLC represents. More specifically, SFLC has an interest in ensuring that there is

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[1]Pursuant to Sup. Ct. R. 37.6, amicus notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae and its counsel made a monetary contribution to its preparation or submission. Petitioner has consented to the filing of this brief through a blanket consent letter filed with the Clerk's Office. Respondent has been notified of and consented to the filing of this brief pursuant to Sup. Ct. R. 37.2(a).

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clarity on the reach of copyright law so that free software development is not unreasonably and unnecessarily impeded.

SUMMARY OF ARGUMENT

In overturning the jury verdict on the issue of fair use, the court below flagrantly ignored the teachings of this Court on the appropriate standard of review under Fed. R. Civ. Proc. 50. Despite this Court's clear instructions in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 533 U.S. 130 (2000)—and the Ninth Circuit decisions in accord with it which the Federal Circuit is statutorily required to follow when exercising ancillary jurisdiction over non-patent claims—the court below insisted on reweighing the evidence, refused to draw inferences favorable to the non-moving party and adopted inferences favorable to the moving party. Indeed, it went so far as to declare erroneously that this Court's decisions, including *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985) and *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) require that, in the context of Rule 50 review, "[a]ll jury findings relating to fair use other than [the jury's] implied findings of historical fact must, under governing Supreme Court and Ninth Circuit case law, be viewed as advisory only." *Oracle America, Inc.* v. *Google, Inc.*, 886 F.3d 1179, 1196 (CAFC 2018).

In the course of reaching this surprising conclusion, the court below—not for the first time in this litigation—based its own inferences on factual misunderstandings concerning contemporary software copyright licensing practices. Like its prior decision on the copyrightability of application program interfaces, *Oracle America, Inc.* v. *Google, Inc.*, 750 F.3d 1339 (CAFC 2014), *cert. denied* 135 S. Ct. 2887 (2015), the decision below is based on misunderstanding the scope of copyright under §102(b) of the Copyright Act of 1976, 17 U.S.C. §102(b), as applied to computer programs,

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and the practices involving "free and open source software," otherwise known as "FOSS," that have come to dominate the global production and distribution of software over the last twenty-five years. The decision below, overturning the jury verdict on fair use, should be reversed. The Court of Appeals' "law of the case" on copyrightability of application program interfaces, which had no basis in Ninth Circuit decisions and is in explicit tension with the consensus established by *Lotus Development Corp.* v. *Borland International, Inc.*, 49 F.3d 807 (CA1 1995), *aff'd by equally divided court*, 513 U.S. 233 (1996), should be explicitly rejected.

ARGUMENT

I. The Court Below Erroneously Reversed The District Court's Denial Of Respondent's Rule 50 Motion

The Court of Appeals for the Federal Circuit was required under the statutory terms of its ancillary jurisdiction to apply the law of the Ninth Circuit to its review of the District Court's denial of respondent Oracle's Rule 50 motion for judgment as a matter of law. *See Atari Games Corp.* v. *Nintendo of America, Inc.*, 975 F.2d 832, 837 (CAFC 1992). It did no such thing. It invented a "standard of review" that had no basis in the decisions of this Court or of the Ninth Circuit, impermissibly substituting its own weighing of the evidence for the verdict of a properly instructed jury.

This Court has repeatedly stated that "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. ... draw[ing] all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Reeves* v. *Sanderson Plumbing Products, Inc.*, 533 U.S. 130, at 150 (citing *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990); *Anderson* v. *Liberty Lobby, Inc.*, 447 U.S. 242, 254; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696 n. 6 (1962)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, *supra*, at 255.

In recognition of this fundamental principle protecting the province of the jury, the Ninth Circuit distin-

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guishes between the *de novo* standard for review of the District Court's denial of a reserved rule 50 motion, and the review of the verdict itself. *See Fifty-Six Hope Road Music, Ltd.* v. *A.V.E.L.A., Inc.*, 778 F.3d 1059, 1068 (CA9 2015). The verdict itself must be sustained unless "the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.* at 1068-69 (quoting *Pavao* v. *Pagay*, 207 F.3d 915, 918 (CA9 2002)). Thus, if there is sufficient evidence before the jury on a particular issue, and if the instructions of law on the issue are correct, then the jury's verdict must stand. *Harper* v. *City of Los Angeles*, 533 F.3d 1010, 1021 (CA9 2008) (citing *Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (CA9 1985).

All this, the court below ignored.

A. The Court Below Impermissibly Weighed Evidence For Itself In Reviewing the Jury's Verdict

Respondent did not challenge the correctness of the District Court's jury instructions, and the Court below found no error in them. 886 F.3d, at 1197 n.5. Given that the instructions were without fault, under this Court's teaching as applied in the relevant Ninth Circuit decisions, the verdict stands if the evidence, considered as a whole and drawing inferences favorable to the non-moving party, was sufficient to find fair use. *Reeves*, *supra*, at 150; *Harper*, *supra*, at 1021. The court below was required to follow the Ninth Circuit's Rule 50 doctrine that:

A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion. In making this determination, the court must not weigh the evidence, but should simply ask whether the [nonmoving party] has presented sufficient evidence to support the jury's conclusion. While the court must review the entire evidentiary record, it must view all evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in the favor of the non-mover, and disregard all evidence favorable to the moving party that the jury is not required to believe.

Harper, *supra*, at 1021 (quoting and citing *Pavao*, *supra* at 918; *Johnson* v. *Paradise Valley Unified School District*, 251 F.3d 1222, 1227-28 (CA9 2001)).

It did not. Instead, the court below—on the specious ground that fair use is a mixed question of law and fact—set itself to rebalancing the evidence, proving to its own satisfaction that it is also possible to draw a contrary conclusion to the one the jury reached.

Section 107 of the Copyright Act of 1976, 17 U.S.C. §107, codifies the common law defense of fair use against claims of infringement. The statute says in pertinent part:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a com-

mercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. the effect of the use upon the potential market for or value of the copyrighted work.

The court below, apparently unconcerned with any additional factors that might have been considered by the jury, limited itself to asking about the mandatory factors. The jury was instructed that Google's use was commercial, and that it was up to the jury to determine the degree of commerciality. The court, reviewing the evidence for itself and drawing inferences favorable to the *moving* party, concluded that the nature of the use was "highly commercial and non-transformative." 886 F.3d, at 1204.

With respect to the nature of the work, the court decided for itself that a reasonable jury could have found that Java class declarations "involved some level of creativity—and no reasonable juror could disagree with that conclusion—reasonable jurors could have concluded that functional considerations were both substantial and important. Based on that assumed factual finding, we conclude that factor two favors a finding of fair use." 886 F.3d, at 1205.

On the amount and substantiality of copying, the court below cut itself yet further adrift from the required respect for the province of the jury:

In assessing factor three, the district court explained that the "jury could reasonably

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have found that Google duplicated the bare minimum of the 37 API packages, just enough to preserve inter-system consistency in usage, namely the declarations and their SSO only, and did not copy any of the implementing code," such that Google "copied only so much as was reasonably necessary." Order Denying JMOL, 2016 WL 3181206, at *10. In reaching this conclusion, the court noted that the jury could have found that the number of lines of code Google duplicated was a "tiny fraction of one percent of the copyrighted works (and even less of Android, for that matter)." *Id*. We disagree that such a conclusion would have been reasonable or sufficient on this record.

886 F.3d, at 1206. Whereas in respect of the first factor the court below had merely defied settled doctrine by drawing inferences favorable to the party moving to overturn the verdict, the Court of Appeals here refused to permit the drawing of an inference favorable to the non-moving party, as required.

With respect to the fourth factor, the "effect of the use upon the potential market for or value of the copyrighted work," the court below involved itself in the active reinterpretation of the evidence. Here, as at earlier junctures in this case, the Federal Circuit shows a harmful absence of awareness of the basic change in legal arrangements involving computer software production and distribution over the last quarter century.

Since the last decade of the twentieth century, software development and distribution worldwide has increasingly occurred within the paradigm of "free and

open source software licensing," conventionally abbreviated "FOSS." FOSS licensing models, in which Software Freedom Law Center and its clients have been pioneers, allow free copying, modification and redistribution of computer program code. The central FOSS idea is that voluntarily reducing copyright owners' right to exclude others from making and using versions of the software will best achieve the practical goal of increasing software innovation, thereby also best achieving the goal "to promote the Progress of Science and useful Arts." U.S. Const., Art. I, §8, cl. 8. This form of commons production—in which voluntarily ceding exclusive ownership accelerates innovation and leads to superior software—has transformed the software industry as its proponents foresaw,[2] and has led to other powerful and important experiments in "free culture" licensing such as Creative Commons. The world's most widely-used FOSS license, the GNU General Public License (the "GPL"), establishes a "share and share alike" (or "copyleft") approach to the commons, which commits all parties who distribute works based on the licensed code to make their own program available under the same terms. There are no major IT firms that are without substantial commitments to FOSS software projects in general and copyleft licensing in particular, including both petitioner and respondent here, who are both large-scale licensors and supporters of FOSS.

In 2006, Sun Microsystems, respondent's predecessor in interest, relicensed Java under the GPL version 2. All of the Java programming language and environment (called Java SE by the court below) became

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[2]*See* Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 First Monday 8 (1999), https://journals.uic.edu/ojs/index.php/fm/article/view/684/594

available for royalty-free use, modification and redistribution under the terms of the GPL, with an additional permission (known as the "Classpath exception") to allow use of the Java standard class APIs by application programs licensed under non-FOSS terms, modifying the "share alike" requirement of the GPL.

B. THE COURT BELOW FAILED TO DRAW INFERENCES IN PETITIONER'S FAVOR FROM THE EVIDENCE CONCERNING THE LICENSING OF JAVA UNDER THE GPL

After respondent's predecessor in interest, Sun Microsystems, changed Java's licensing in 2006 by allowing royalty-free use of Java under the GPL, all the declaring code presently in question was available for anyone to copy, modify, use, and redistribute. As the District Court explicitly noted in its opinion denying respondent's rule 50 motion, this fact could have been taken by a reasonable jury both to explain the decline in Sun's (and later Oracle's) Java licensing revenues and to strengthen petitioner's fair use case. Order Denying JMOL, 2016 WL 3181206, at *38.

The court below acknowledged that the jury could have drawn pro-fair use inferences from this salient fact, but then dismissed those inferences and substituted its own:

> Google submits that the jury could have discounted this evidence [of lost Java licensing revenue] because the Java SE APIs were available for free through OpenJDK [the GPL-licensed Java system]. But Amazon moved from Java to Android — not to OpenJDK. And the evidence of record

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makes clear that device manufacturers did not view OpenJDK as a commercially viable alternative to using Java SE because any improvement to the packages in Open-JDK had to be given away for free to the Java community.

886 F.3d, at 1209 n.13.

There was no basis for the court below to disregard the District Court's appropriate adherence to the requirement to draw inferences from the evidence in the non-movant's favor. Indeed, the court below chose to impose its own inferences on the record, but what it said the record "made clear" was merely wrong. As Software Freedom Law Center pointed out to this Court in a brief amicus curiae at an earlier stage of this litigation, the record unequivocally shows that Google's decision not to use Java under the terms of the GPL in Android after Sun adopted those terms arose from an erroneous judgement by a single former Google executive, Andy Rubin, who misunderstood the licensing terms. Brief for Amici Curiae Software Freedom Law Center and Free Software Foundation, No. 14-410, at 12. We suggested in that brief that Google could remove all further cause for dispute by adopting OpenJDK as the Java environment for Android. *Id.*, at 13. This, indeed, subsequent to our briefing, Google decided to do. *See* Google's Statement Re Damages Periods, Oracle America, Inc. v. Google Inc., No. 3:10-cv-03561 WHA (N.D. Cal. Jan. 4, 2015). Thus, use of Java under GPL was indeed a fully viable commercial alternative, despite the ungrounded factual speculation of the court below. On the fourth statutory factor, which it weighed most heavily against fair use, the court below dismissed the District Court's careful

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and well-informed review of the substantiality of the evidence supporting the jury's verdict, substituted its own factual inferences which were wrong, and on that basis entered the judgment it preferred under Rule 50(e).

The court below made no secret of its distaste for jury decision-making. It explicitly lamented that "all aspects of Google's fair use defense went to the jury with neither party arguing that it should not." Basing its analysis on a series of cases involving summary judgment, not Rule 50 challenges to jury verdicts,[3], and entirely ignoring this Court's decisions in *Reeves*, *supra*, and preceding cases, the court below reached the astonishing conclusion that

> [A]ll jury findings relating to fair use other than its implied findings of historical fact must, under governing Supreme Court and Ninth Circuit case law, be viewed as advisory only.

It is hard to imagine a purported statement of law more evidently in conflict with this Court's instruction that "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. ... draw[ing] all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, *supra*, at 150. The Court of Appeals' flagrant disregard for this Court's teachings and the relevant Ninth Circuit decisions effectuating them requires reversal.

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[3]886 F.3d, at 1195 (citing *Fisher* v. *Dees*, 794 F.2d 432 (CA9 1986); *Seltzer* v. *Green Day, Inc.*, 725 F.3d 1170 (CA9 2013); and *Hustler Magazine, Inc.* v. *Moral Majority, Inc.*, 606 F. Supp 1526 (C.D. Cal 1985)).

C. The Court of Appeals Relied On Its Prior Legal Error Concerning Copyrightability of Application Program Interfaces When It Overturned the Jury Verdict

The Federal Circuit's continuing failure to learn about the now decades-long FOSS revolution in computer software production and distribution has brought us to the current situation in more ways than one. The notional and specifically ill-informed fair use analysis with which the court below simply replaced a jury verdict it erroneously characterized as merely "advisory" depended, as we show above, on a misunderstanding of current practices in the industry at large, and concerning Java, Android and other FOSS programs in particular. The present error can be dealt with by a simple reversal of the order on which certiorari was granted, and the entry of judgment for petitioner. But the Court of Appeals based its faulty analysis of the statutory fair use factors on its previous decision in this case that the API definitions contained in the files at issue are copyrightable material. *See Oracle America, Inc.* v. *Google, Inc.*, 750 F.3d 1339 (CAFC 2014), *cert. denied* 135 S. Ct. 2887 (2015) ("Oracle I").

Since this Court affirmed by equal division the holding of the First Circuit in *Lotus Development Corp.* v. *Borland International, Inc.*, 49 F.3d 807 (CA1 1995), *aff'd by equally divided court*, 513 U.S. 233 (1996), there has been a stable consensus that application program and user interaction interfaces for computer programs are "method[s] of operation," falling outside the scope of copyrightability under §102(b) of the Copyright Act. *See* 17 U.S.C. §102(b). *See also* Brief of *Amicus Curiae* League for Programming Freedom in

Support of Respondent in *Lotus Development Corporation* v. *Borland International, Inc.*, No. 94-2003 (1995). That consensus was a critical contribution to the success of FOSS in greatly accelerating the pace of software innovation, not only in the US but throughout the world. Application program interfaces determine the conventions by which computer programs communicate with one another. The rule established in *Lotus* enabled parties to write programs that interoperated with one another without friction caused by rent-seeking. Programmers who wanted to write programs that interoperated with existing software could do so without fearing infringement actions by the copyright holders of other programs that worked on the same or opposite side of the relevant interface. The rule in *Lotus* thus avoided the creation of what scholars have come to call "anticommons" in the domain of computer software. *See, e.g.,* Clark D. Asay, *Software's Copyright Anticommons*, 66 Emory L.J. 265 (2017). The result was the flourishing of interconnected software structures, such as those we have come to call "the Web" and "the Cloud," based around heterogeneous collections of program code—much of it licensed under FOSS sharing models—communicating using "protocols," (that is, shared signalling rules, like languages) that are effectively public goods.

In *Oracle I*, the Federal Circuit predicted, on the basis of no evidence whatever, that the Ninth Circuit would, after twenty years, depart from the consensus on the copyrightability of APIs. By doing so, it introduced significant uncertainty in the legal arrangements on which trillions of dollars of IT commerce around the world now annually depend. Reversing the present judgment below, while absolutely necessary on other grounds as we have shown, will not

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entirely eliminate the source of the error, because that aspect of this case is not presently before the Court.

II. The Law of This Case, That Application Interfaces Are Copyrightable, Should Not Survive Reversal

Before the Federal Circuit's decision in *Oracle I*, the Ninth Circuit had never expressed any criticism of *Lotus, supra*, or indicated that it would not follow the decision. The Federal Circuit reached its tortured contrary conclusion by a series of wrong steps:

First, the Federal Circuit held that the Ninth Circuit in *Sega Enterprises, Ltd.* v. *Accolade, Inc.*, 977 F.2d 1510, 1525 (CA9 1992) expressed approval for the Second Circuit's approach to computer program copyright infringement that culminated in *Computer Associates International* v. *Altai*, 982 F.2d 693 (CA2 1992), which it asserted differs from the holding in *Lotus, supra*, because it "eschews bright line approaches and requires a more nuanced assessment of the particular program at issue." *Oracle I*, 750 F.3d, at 1357. The Ninth Circuit, in other words, would predictably not apply the rule in *Lotus, supra*, because three years before *Lotus* was decided it expressed approval of the Second Circuit's supposedly conflicting doctrine. Second, in support of this prediction of Ninth Circuit law, the court below cites *Mitel, Inc.* v. *Iqtel, Inc.*, 124 F.3d 1366 (CA10 1997), in which the Tenth Circuit expressed doubt about the decision in *Lotus, supra*, shortly after its affirmance by equal division in this Court.

Thin as this basis was for the prediction that the Ninth Circuit would have rejected *Lotus, supra*, the

argument was made still weaker by the fact that the test set forth by the Second Circuit in *Altai, supra*, and mentioned approvingly in *Sega, supra*, concerned the method for determining infringement in the event of non-literal copying from computer program source code (what in more familiar literary copyright examples would involve "adaptation" of the copyrighted work), while *Lotus, supra*, and the instant case are cases of literal copying of application program interface declarations or equivalent menu hierarchies in a user interface. Why the court below confidently predicted that the Ninth Circuit would fail to follow the holding of the First Circuit—affirmed by equal division in this Court—on facts squarely apposite, in favor of a novel approach based on cases inapposite because about adaptation rather than literal copying, it did not say.

A. MORE THAN TWENTY-FIVE YEARS OF INNOVATION IN COMPUTER SOFTWARE WAS ENDANGERED UNDER THE LAW OF THIS CASE

Every firm in the information technology industry has assumed for the past quarter century that it is free to implement programs interoperating with other programs through published, defined APIs; and to modify and service such programs, if they are published under FOSS licensing terms, as part of its business, without payment of royalties or danger of injunction. The communities of programmers who make and share "free software," like the non-profit and for-profit clients of *amicus* Software Freedom Law Center, also assume that they are free to implement software of their own creation that interoperates with other software over publicly-defined APIs. Oracle itself benefits

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from the rule in *Lotus, supra*, in its own widespread and highly profitable software support business. Overturning the rule in *Lotus*, as the Federal Circuit proposed in *Oracle I, supra,* would subject every effort at software interoperation throughout the information technology economy to 110-year state-granted monopolies of uncertain breadth.

III. This Court Should Therefore Reaffirm Strongly the Federal Circuit's Responsibility to Follow the Decisional Law of the Regional Courts of Appeals When Exercising Ancillary Jurisdiction

The ruling in *Oracle I* is not presently before this Court.[4] It has persisted as law of the present case, with some doubtful precedential value in the Federal Circuit. When this Court reaffirms in the context of the order under review that the Federal Circuit is bound to follow the existing law of the regional courts of appeals when exercising its ancillary jurisdiction, it should consider providing for legal certainty and avoidance of forum shopping by restating that princi-

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[4]When Google sought certiorari from the decision in *Oracle I*, present counsel filing on behalf of *amicus* Software Freedom Law Center recommended denial. Brief for Amici Curiae Software Freedom Law Center and Free Software Foundation, in No. 14-410, at 9. We believed that a mere prediction of Ninth Circuit law would be swiftly rendered immaterial by an actual Ninth Circuit decision following the consensus established by *Lotus, supra*. Our expectation was wrong. The decision has survived long enough to create a significant hazard to uniformity, because parties may bring insubstantial patent claims solely in order to secure the ancillary jurisdiction of the Federal Circuit. *See* Brief of Professors Peter S. Menell and David Nimmer in Support of Grant of Certiorari, in No. 18-956, at 19.

ple with respect to all aspects of the case under review. That should constitute sufficient direction to the Court of Appeals to ensure uniformity of copyright doctrine.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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