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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No. 3:10-cv-03561 WHA

**GOOGLE'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
SECOND MOTION FOR JUDGMENT AS  
A MATTER OF LAW ON COUNT VIII OF  
ORACLE'S AMENDED COMPLAINT**

Dept.: Courtroom 8, 19<sup>th</sup> Floor  
Judge: Hon. William Alsup

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1 **I. INTRODUCTION**

2 It is time to put Oracle's copyright claims to rest.

3 The structure, sequence and organization ("SSO") of the API packages at issue is not  
4 copyrightable, because the SSO is an unprotectable idea, system or method of operation, and  
5 because any arguable expression in the SSO is unprotectable under the doctrines of merger and  
6 *scenes a faire*. The grounds for these conclusions will be given in full in Google's Proposed  
7 Findings of Fact and Conclusions of Law, and have been stated in Google's prior briefs on  
8 copyrightability. *See* Dkts. 260, 368, 562, 601, 778, 823, 831, 852, 860, 897, 898, 955, 993.

9 In addition, Oracle's copyright count fails in its entirety because Oracle has not proven the  
10 contents of the two works at issue that Sun registered with the Copyright Office, versions 1.4 and  
11 5.0 of Java 2 Standard Edition ("J2SE"). Oracle offered various discs into evidence that  
12 purportedly contain copies of versions 1.4 and 5.0 of J2SE. It also offered evidence that shows  
13 that a disc might have been submitted to the Copyright Office along with its application for  
14 registration of version 5.0. And it offered Dr. Reinhold's testimony that the source code excerpts  
15 submitted with the applications come from versions 1.4 and 5.0 of J2SE. But there have been  
16 *multiple releases* of each version of J2SE, and Oracle has not offered evidence from which a  
17 reasonable jury could find that any of the code that is in evidence is a complete copy of the  
18 *actual, specific* releases of versions 1.4 and 5.0 that were registered with the Copyright Office.  
19 This basic failure of proof—and the evidence in the record that contradicts Oracle's assertion that  
20 the correct entire works are in the record—prevents Oracle from obtaining any judgment of  
21 copyright infringement.

22 In addition, Google is entitled to judgment as a matter of law on Oracle's claim that  
23 Android's implementing code is a derivative work of Oracle's 37 API packages, its copyright  
24 claims based on the names and declarations in those packages, its literal copying claims, and its  
25 copyright claims based on the specifications (i.e., the documentation) in the 37 API packages.

26 For these reasons, Google is entitled to judgment as a matter of law pursuant to Rule 50 of  
27 the Federal Rules of Civil Procedure on the entirety of Count VIII of the Amended Complaint.  
28

1 **II. LEGAL STANDARD**

2 Judgment as a matter of law is proper when “a party has been fully heard on an issue  
3 during a jury trial and the court finds that a reasonable jury would not have a legally sufficient  
4 evidentiary basis to find for the party on that issue . . . .” Fed. R. Civ. P. 50(a)(1). Rule 50  
5 “allows the trial court to remove . . . issues from the jury’s consideration when the facts are  
6 sufficiently clear that the law requires a particular result.” *Weisgram v. Marley Co.*, 528 U.S.  
7 440, 448 (2000) (internal quotations omitted). The standard for granting judgment as a matter of  
8 law, in practice, mirrors the standard for granting summary judgment, and “the inquiry under each  
9 is the same.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

10 **III. ARGUMENT**

11 **A. The SSO of the 37 API packages is not copyrightable, and Google is entitled  
12 to judgment as a matter of law on the entirety of Oracle’s copyright count.**

13 The Court should adopt Google’s proposed findings of fact and conclusions of law  
14 regarding the uncopyrightability of the SSO, which Google will be filing tomorrow. For those  
15 reasons, as well as the reasons stated in Google’s prior briefs, Google is entitled to judgment as a  
16 matter of law that the SSO of the J2SE API packages at issue is not copyrightable. *See* Dkts. 260,  
17 368, 562, 601, 778, 823, 831, 852, 860, 897, 898, 955, 993.

18 Google is also entitled to judgment as a matter of law on the remainder of Oracle’s  
19 copyright count—directed to the specifications and the alleged literal copying—for the reasons  
20 given below. Google therefore is entitled to judgment as a matter of law on the entirety of Count  
21 VIII of Oracle’s Amended Complaint.

22 **B. Oracle failed to prove the actual contents of the works that are the subject of  
23 its registrations or that the copyrights cover any component parts of the  
24 works.**

25 **1. Oracle has not proved the contents of the works that were registered  
26 with the Copyright Office.**

27 It is a fundamental requirement of a copyright claim that a plaintiff introduce into  
28 evidence a complete copy of the work on which it suing. *See, e.g., Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 207 (9th Cir. 1988); *see also Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir. 1998); *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316 (9th Cir. 1986). This requirement is

1 especially important in a case such as this, where a complete copy of the work in which the  
2 copyright is registered cannot be obtained from the Copyright Office. It was up to Oracle to  
3 prove at trial what the works consist of and which parts of the complete works it owns.

4 Oracle has not offered proof sufficient to support a jury verdict regarding the actual  
5 contents of the works that are the subject of its copyright registrations. More specifically, there is  
6 no evidence that either trial exhibit 610.2 or 623, the exhibits that Dr. Reinhold sponsored and  
7 identified as “a DVD containing an electronic copy of the Java 5—the JDK documentation,”  
8 including “the API specification for Java 5” (TX 610.2), and a DVD containing “the source code  
9 for Version 5” (TX 623), *see* RT 672:16-19, 691:14,<sup>1</sup> is in fact a true, complete and accurate copy  
10 of *J2SE version 5.0 as it was when Sun’s application was submitted to the Copyright Office in*  
11 *December 2004*.

12 Dr. Reinhold’s testimony that the DVDs in evidence (TX 622, 623) are source code for  
13 versions 1.4 and 5.0 of J2SE (RT 691:6-14) does not cure this evidentiary gap, because the  
14 testimony fails to establish that the DVDs in evidence are in fact the *specific releases* of these  
15 versions of J2SE that are covered by the registrations. *See* RT 2236:9-2237:13 (Reinhold)  
16 (admitting that there were multiple releases of version 5.0 of Java 2 Standard Edition). Nor could  
17 Dr. Reinhold testify that trial exhibit 1076, another disc he identified as containing a version 5.0  
18 of J2SE, contained the particular release of version 5.0 of J2SE that actually was registered with  
19 the Copyright Office. *See* RT 2235:10-2238:18. Finally, Dr. Reinhold carefully identified the  
20 disc marked as TX 1076 as one that contained “the *binary distribution* of J2SE 5.0, together with  
21 documentation and some tools and things like that.” RT 2235:11-13 (emphasis added). A  
22 “binary distribution,” however, is compiled code—bytecode, not source code. Yet the fifty pages  
23 of redacted deposit materials that accompanied the copyright application for J2SE version 5.0 was  
24 *source code* (TX 3530), and Oracle’s entire infringement case (except for the eight allegedly  
25 copied “Impl”/“ACL” test files) was based on analysis of and allegations of copying of *source*

26 \_\_\_\_\_  
27 <sup>1</sup> Dr. Reinhold first testified that trial exhibit 623 contained the source code for version 1.4 (RT  
28 689:22-24). After being told by counsel for Oracle that exhibit “623 is the java.nio” (RT 691:13),  
Dr. Reinhold changed his testimony, stating that exhibit 623 is “the source code for Version 5.”  
RT 691:14.



1 *code.*<sup>2</sup> There is plainly a disconnect between the work that Oracle now says is the work and what  
 2 the evidence shows.<sup>3</sup>

3 The disconnect is most troubling, moreover, because—to the best of Google’s knowledge  
 4 after review and analysis of the disc introduced into evidence—the disc that Oracle now says is  
 5 the “complete work” *does not* contain the source code that was redacted to create the deposit  
 6 materials filed with the Copyright Office. While the disc does contain some of the 37 accused  
 7 API packages in source code format, it does not contain them all; at least six of the 37 packages  
 8 are on the disc only in compiled code—rather than source code—format. So the disc does not  
 9 contain all of the 37 packages at issue in any form that is human-readable. Surprisingly, *the disc*  
 10 *also does not contain source code files that contain the source code pages that were redacted*  
 11 *and submitted to the Copyright Office.*<sup>4</sup> Finally, the disc also does not contain *any* version, in  
 12 either source or compiled code form, of at least one of the eight “test” files on which Oracle bases  
 13 its claim of “direct line-by-line copying,” namely the “AclEnumerator” file. Nor does the disc  
 14 contain a source code version of the “PolicyNodeImpl” file.<sup>5</sup>

15 \_\_\_\_\_  
 16 <sup>2</sup> As a matter of common sense, it was incumbent on Oracle to introduce into evidence the works  
 17 in some format that is readable by humans; otherwise, there would be no practical way for Oracle  
 18 to prove its code-based claims or for Google, the Court or the jury to assess them. This is the  
 19 reason why Oracle’s proof at trial was based on source code—readable by humans—and not  
 20 compiled code, and why all of the code exhibits the parties showed to the jury consisted of source  
 21 code rather than compiled code.

19 <sup>3</sup> The testimony of Tiki Dare does not address this failure of proof, because Ms. Dare could not  
 20 testify that trial exhibit 1076 is the same as the disc that Oracle believes may have been submitted  
 21 to the Copyright Office or, indeed, whether *any* disc was in fact submitted to the Copyright  
 22 Office. *See* RT 2261:2-10, 2264:4-13. Oracle did not need to prove that any of the discs in  
 23 evidence are the same as any disc that was or was not submitted to the Copyright Office in 2004  
 24 or 2005, moreover, since the discs were not required by the Copyright Office regulations and the  
 25 one disc that the Copyright Office apparently received (for version 1.4) was not even examined.  
 26 *See* TX 3530 at 1. Oracle only needed to prove that *some* disc that is in evidence in fact contains  
 27 the complete work as it existed at the time the registration was sought. Oracle failed to do so.

24 <sup>4</sup> The source code that was redacted and submitted to the Copyright Office appears to be taken  
 25 from at least 38 different source code files. *See* TX 3529. As far as Google has been able to  
 26 determine, there are *no* source code files in TX 1076—which Oracle now says is the “complete  
 27 work”—that contain *any* of the pages submitted to the Copyright Office. If the disc does not  
 28 contain the files from which the source code deposit was excerpted, the disc cannot be the  
 complete work that was registered.

27 <sup>5</sup> The trial exhibit that Oracle presumably relies on to prove the contents of the “AclEnumerator”  
 28 file (TX 896.8)—like the corresponding exhibits for *all eight* of the “copied” test files (TX 896.1-  
 896.8, 897)—bears a legend indicating that the source code in that exhibit comes from release  
 “5.0u22,” which would be the twenty-second release of version 5.0 after its initial release. *See*

1 Oracle, in short, did not prove that *any* exhibit in evidence is the actual “work” that is the  
 2 subject of the registrations for either version 1.4 or 5.0 of J2SE. Instead, the evidence  
 3 demonstrates that there is no complete copy of the works at issue in the record. Neither the Court  
 4 nor Google should at this point be forced to speculate what the complete works are—that is a  
 5 fundamental, basic element of Oracle’s proof. Without evidence proving the actual contents of  
 6 the complete works it registered—the contents of the actual works registered, not of releases that  
 7 may bear the same version number but are not the same —Oracle cannot prevail on its copyright  
 8 count. Google is therefore entitled to judgment as a matter of law on the entirety of Count VIII of  
 9 the Amended Complaint.

10 **2. Oracle has not proved that its copyright registrations cover the**  
 11 **individual components of the works on which it bases its claims of**  
 12 **infringement.**

12 Even if Oracle had proven the contents of the complete works, it failed to prove that the  
 13 copyrights cover individual components of the works standing alone.<sup>6</sup> As a result, its rights in  
 14 the works it registered are limited to the specific *combination* of the individual elements that  
 15 make up those specific versions, and any *individual* components of the work to which Oracle  
 16 proved it owns the copyrights. Oracle made no such showing.

---

17 RT 2237:6-13 (Reinhold). Dr. Reinhold testified that releases “generally” occurred “every few  
 18 months.” RT 2236:19-20. Given that the registration states that the first date of publication of  
 19 version 5.0 was on September 30, 2004 (*see* TX 3529 at 2, space 3b) and that the application was  
 filed less than ninety days later on December 20, 2004 (*see* TX 3529 at 2), Dr. Reinhold’s  
 testimony suggests that release 5.0u22 *postdates* the registration application.

20 Thus, there is no evidence that the “decompiled files” are related to files that are in the  
 21 work that is the subject of the registration. Indeed, the materials in TX 897 that come from  
 22 release 5.0u22 bear *copyright notices with dated as late as 2009*—five years after the copyright  
 23 registration. *See* TX 897. These exhibits, moreover, were stipulated into evidence at Oracle’s  
 request. No witness testified about them, *see* RT 1256:25-1262:1 (Mitchell), and Dr. Reinhold  
 testified that he could not state when the various releases of version 5.0 occurred or whether any  
 release after 5.0 was released before December 20, 2004. *See* RT 2236:9-2237:13.

24 <sup>6</sup> Oracle has suggested that Google waived this argument during proceedings outside the presence  
 of the jury when Dr. Reinhold was on the stand. What counsel for Google said, however, is that  
 25 Google is “not disputing ownership *of the copyrights.*” RT 713:19-20 (emphasis added). This  
 was directly in response to a statement by counsel for Oracle that “[t]here is no question that  
 26 Oracle has the right, as a matter of ownership, to assert *the copyrights* at issue here.” RT 713:16-  
 18 (emphasis added). And that is correct—Google does not dispute that Oracle owns and can  
 27 assert the copyrights that it registered, for versions 1.4 and 5.0 of J2SE. What Google disputes is  
 whether Oracle has proved what is *in* those works, and whether Oracle’s copyrights cover  
 28 *particular parts* of those works. *See* RT 1884:10-1885:8 (counsel for Google); RT 1887:16-23  
 (Court).

1 As the registrations confirm, Oracle’s works are derivative works; they include both new  
2 material and material from prior works, namely the prior versions of the Java platform. *See* TX  
3 464 at space 6, TX 475 at space 6 (identifying pre-existing materials and new materials). The  
4 registrations also establish that Sun did not own at least some parts of the works—they identify  
5 the “pre-existing” materials as including “licensed-in components.” *Id.* The registrations and  
6 materials submitted to the Copyright Office do not, however, identify whether the “licensed-in  
7 components” were new to the versions being registered, also present in earlier versions, or some  
8 combination of those two possibilities.

9 Section 103(b) of the Copyright Act provides:

10 (b) *The copyright in a compilation or derivative work extends only to the*  
11 *material contributed by the author of such work, as distinguished from the*  
12 *preexisting material employed in the work, and does not imply any exclusive*  
13 *right in the preexisting material. The copyright in such work is independent of,*  
14 *and does not affect or enlarge the scope, duration, ownership, or subsistence of,*  
15 *any copyright protection in the preexisting material.*

16 17 U.S.C. § 103(b) (emphasis added). In order to maintain any claim based on anything less than  
17 all of version 1.4 or 5.0 of J2SE taken as a whole, Oracle must at a minimum, as part of its burden  
18 of proving that its copyright covers or extends to the matter sued on, establish that it owns any  
19 individual component parts on which it is basing a claim. *See generally Apple Computer, Inc. v.*  
20 *Microsoft Corp.*, 35 F.3d 1435, 1447-48 (9th Cir. 1994); 4 MELVILLE B. NIMMER & DAVID  
21 NIMMER, NIMMER ON COPYRIGHT § 13.01[A] (a plaintiff that is not the author of a work must  
22 prove “a transfer of rights or other relationship between the author and the plaintiff so as to  
23 constitute the plaintiff as the valid copyright claimant”). For purposes of this action, those parts  
24 would include (1) the 37 packages that form the basis of Oracle’s SSO claim; (2) the files that  
25 contain the English-language comments on which Oracle bases its “specifications” claim; and  
26 (3) the individual files that contain all of the code and comments that were allegedly copied  
27 literally.

28 These principles are best illustrated by a simple example. Oracle claims that the eight test  
files that appear in Android were “copied” from its work. In order to sustain a claim that asks the  
Court to treat each individual file as the “work as a whole” for purposes of Oracle’s allegations,

1 Oracle must have proven that (1) each file is in fact a part of the version of the work on which it  
2 is suing; and (2) Oracle owns all rights to each file as a standalone work. Oracle proved neither  
3 one.

4 **C. Google is entitled to judgment as a matter of law that the source code and**  
5 **object code implementing the 37 API packages are not derivative works of**  
6 **Oracle’s specifications.**

7 Oracle claims that Google’s *implementing source code* is a derivative work of Oracle’s  
8 *English-language descriptions* because Google’s source code *does the things that the English*  
9 *descriptions describe*. See Dkt. No. 859 at 10 (Oracle is claiming infringement based on  
10 “Google’s creation of derivative works from the English-language descriptions of the elements in  
11 the API specifications”). That is nothing but an assertion that *Google’s expression* infringes  
12 *Oracle’s ideas*. Oracle thus stands as an exception to the Supreme Court’s statement that “no one  
13 would contend that the copyright of the treatise would give the exclusive right to the art or  
14 manufacture described therein.” *Baker v. Selden*, 101 U.S. 99, 102 (1879).

15 Because Oracle’s position is barred by section 102(b) of the Copyright Act, Google is  
16 entitled to judgment as a matter of law that the source code and object code implementing the 37  
17 API packages are not derivative works of Oracle’s specifications. See 17 U.S.C. § 102(b). This  
18 issue raises a question of law that does not depend on any disputed issues of fact.

19 Oracle’s derivative work claim is a “classic case of trying to lay claim to the ownership of  
20 an idea.” RT 1869:15-16 (Court). The specifications “explain in detail what the module is  
21 supposed to accomplish,” and writing implementing code that *does* what the specifications  
22 *explain* is like “creative writing.” RT 1869:18-21 (Court); see also RT 1368:25-1369:1 (Court)  
23 (Oracle’s derivative work argument “just seems to me to be invalid under the basic tenets of  
24 copyright law”); RT 1375:22-24 (Court) (Oracle’s derivative work claim doesn’t “add[] anything,  
25 except violating the principle of you can’t get a monopoly and ownership over an idea”); RT  
26 2434:13-2435:16 (Court) (rejecting Oracle’s derivative work theory).

27 Oracle’s derivative work claim is contrary to the idea/expression dichotomy that is  
28 codified in section 102(b) of the Copyright Act. It also is contrary to the statutory definition of a  
derivative work, which is a work based on “one or more preexisting works,” 17 U.S.C. § 101, not

1 a work based on preexisting *ideas*.

2 Oracle’s approach is barred by *Baker v. Selden*:

3 To give to the author of the book an exclusive property in the art described therein,  
4 when no examination of its novelty has ever been officially made, would be a  
5 surprise and a fraud upon the public. That is the province of letters-patent, not of  
6 copyright. The claim to an invention or discovery of an art or manufacture must  
7 be subjected to the examination of the Patent Office before an exclusive right  
8 therein can be obtained; and it can only be secured by a patent from the  
9 government.

10 101 U.S. at 102. It is also barred by *Mazer v. Stein*: “Unlike a patent, a copyright gives no  
11 exclusive right to the art disclosed; protection is given only to the expression of the idea—not the  
12 idea itself.” 347 U.S. 201, 217 (1954). And it is barred by *Sega Enters. Ltd. v. Accolade, Inc.*,  
13 under which “functional requirements for compatibility” with a system described by or  
14 implemented in a copyrighted work cannot be protected by copyright law. 977 F.2d 1510, 1522  
15 (9th Cir. 1992).

16 **D. Google is entitled to judgment as a matter of law that the names and  
17 declarations from the 37 API packages that appear in the Android source  
18 code are not copyrightable.**

19 The Court has already held that the names of API elements are not protectable. Copyright  
20 MSJ Order [Dkt. 433] at 7:24-8:4. The Court reached this holding based on the “words and short  
21 phrases” doctrine. *See id.*; 37 C.F.R. § 202.1(a).

22 For the same reason, the declarations (i.e., the method signatures)<sup>7</sup> in the 37 API packages  
23 are not protectable. A declaration (e.g., “public static int max(int arg1, int arg2)”<sup>8</sup>) is a short  
24 series of words—a short phrase. A short phrase is not protectable, just as a name cannot be  
25 protected. 37 C.F.R. § 202.1(a); *see also* Copyright MSJ Order [Dkt. 433] at 7:24-8:4. Indeed, in  
26 *Sega*, the Ninth Circuit held that computer code of a similar length was “probably unprotected  
27 under the words and short phrases doctrine.” 977 F.2d at 1524 n.7.

28 Moreover, the declarations are purely functional, and *must* remain exactly the same in  
order to ensure compatibility with Java language programs calling on the methods in those 37  
API packages. Because computers are very literal, “[i]f you get anything even a little bit wrong,

<sup>7</sup> RT 796:2-25 (Bloch) (explaining what a method signature, or declaration, is).

<sup>8</sup> RT 796:19:21 (Bloch).

1 if you type a capital letter when the method name has lower case letter in Java your program  
2 won't run." RT 765:6-8 (Bloch). In contrast, as Oracle's expert Professor Mitchell conceded, if  
3 you implement an API consistent with its specification—i.e., so that "it uses the same API"—  
4 "you would expect the same outcome." RT 2293:5-8.

5 Thus, code written that uses methods from the 37 packages is "compatible" with both the  
6 Android and J2SE platforms. See RT 2293:9-14 (Mitchell) (agreeing that this is "a great  
7 definition of 'compatible'); see also RT 2185:5-9 (Astrachan) (structure of the elements of the  
8 API packages have to be the same "so that the code will work on both platforms, be compatible,  
9 inter-operate"). If Google had instead created its own APIs that were different than the APIs in  
10 the 37 API packages, developers would have had to be re-educated to use the new APIs. See RT  
11 520:3-6 (Screven). Because Google implemented the Java language APIs for the 37 API  
12 packages, the Android and J2SE platforms are compatible with respect to those 37 API packages.  
13 RT 2171:19-2172:11 (Astrachan); see also RT 2287:23-2288:5 (Mitchell) (J2SE core libraries  
14 and Android core libraries are incompatible "beyond the 37 packages," but for the 37 packages  
15 they "overlap"). Because the names and declarations in the 37 API packages are functional  
16 requirements for compatibility, those names and declarations are not protected by copyright.  
17 *Sega*, 977 F.2d at 1522 (citing 17 U.S.C. § 102(b)).

18 In sum, the names and declarations from the 37 API packages are unprotectable both by  
19 virtue of the words and short phrases doctrine, and section 102(b) of the Copyright Act. Thus,  
20 Google is entitled to judgment as a matter of law that its use of the names and declarations from  
21 the 37 API packages is not copyright infringement.

22 **E. The alleged literal copying is *de minimis* and thus non-actionable.**

23 *De minimis* acts of copying are not actionable. *Newton v. Diamond*, 388 F.3d 1189, 1192-  
24 93 (9th Cir. 2004). Where the only similarity is as to "nonessential matters," the copying is *de*  
25 *minimis*. See *id.* at 1195 (quoting 4 NIMMER ON COPYRIGHT § 13.03[A][2]). Where a defendant  
26 copies only "a portion of the plaintiff's work exactly or nearly exactly . . . the dispositive question  
27 is whether the copying goes to trivial or substantial elements." *Id.* That substantiality is judged  
28 by "considering the qualitative and quantitative significance of the copied portion in relation to

1 the plaintiff's work as a whole." *Id.* (emphasis added); *see also Computer Assoc. Int'l, Inc. v.*  
2 *Altai, Inc.*, 982 F.2d 693, 714-15 (2d Cir. 1992). Oracle bears the burden of proving the  
3 significance of any copied code. *MiTek Holdings, Inc. v. ArcE Eng'g Co.*, 89 F.3d 1548, 1560  
4 (11th Cir. 1996) ("The burden is on the copyright owner to demonstrate the significance of the  
5 copied features, and, in this case, MiTek has failed to meet that burden.").

6 Oracle hired Dr. Marc Visnick to compare the code in the Java JDK to Android 2.2. RT  
7 1309:8-1310:18 (Mitchell). This entailed a comparison of hundreds of thousands, or even  
8 millions, of lines of code as well as "thousands and thousands" of separate files. RT 1310:19-  
9 1311:1 (Mitchell). Despite this "very extensive" search, RT 1310:24-1311:1, Dr. Visnick only  
10 identified 12 files that allegedly contained copied code. *See* RT 1313:1-11 (Mitchell). These  
11 files consist of a nine-line function called `rangeCheck`, two comment files that never appeared on  
12 a phone, and ten test files that never appeared on a phone. *See* RT 1314:2-1320:6 (Mitchell).

13 **1. Oracle failed to prove that Google's use of the `rangeCheck` method is**  
14 **more than *de minimis*.**

15 The evidence cannot support a finding that the nine-line `rangeCheck` method is  
16 *qualitatively* significant. RT 813:7-8 (Bloch) (`rangeCheck` is a "very short simple method"); RT  
17 815:5-9 (Bloch) (`rangeCheck` "simply makes these three checks"); RT 815:13-16 (Bloch)  
18 (`rangeCheck` is a "[v]ery, very simple" method that "[a]ny competent high school programmer  
19 could write"). Even Oracle's expert Dr. Mitchell conceded that "a good high school  
20 programmer" could write `rangeCheck`. RT 1316:24-25. In fact, the `rangeCheck` method is not  
21 even a part of the most recent and current versions of Android. *See* RT 825:8-19 (Bloch). When  
22 asked whether the `rangeCheck` method has any economic significance outside of the library it is a  
23 part of, Dr. Mitchell stated that he was "not sure" it had any such significance. RT 1316:12-18.

24 Even within the library, Dr. Mitchell did not opine that it was *significant*, only that it was  
25 "useful." *Id.* The purported subtlety to the code, according to Dr. Mitchell, "is figuring out  
26 exactly what you wanted the function to do, more than realizing that function in Java code once  
27 that's understood." RT 1317:3-5. That, however, confirms that while the *idea underlying* the  
28 code might have some importance, the *code itself* is not qualitatively significant. The idea, of

1 course, is not copyrightable. 17 U.S.C. § 102(b).

2 Dr. Mitchell also testified that the rangeCheck method is purportedly called over 2,600  
3 times when an Android emulator is started up. *See* RT 1329:15-21. But he offered no testimony  
4 that would allow a reasonable jury to conclude that a method called that many times is  
5 qualitatively significant. He offered no testimony, for example, whether there are other methods  
6 that are called tens of thousands of times, hundreds of thousands of times, or even millions of  
7 times during startup. Nor did he offer any testimony about the qualitative significance of the calls  
8 to rangeCheck. Mere frequency of use of a trivial element cannot support a finding of qualitative  
9 significance. A typical novel might include the word “the” thousands of times, but that does not  
10 render the word “the” qualitatively significant to *Moby Dick*. During a business meeting,  
11 attendees might blink their eyes hundreds or thousands of times, but that does not mean the act of  
12 blinking was qualitatively significant. Professor Mitchell’s testimony about how many times  
13 rangeCheck is purportedly called during the startup of an Android emulator, standing alone and  
14 without any frame of reference, cannot support a finding of qualitative significance.

15 The evidence also cannot support a finding that the nine-line rangeCheck method is  
16 *quantitatively* significant. The rangeCheck method is only nine lines long—thirteen lines, if four  
17 lines of comments are included. TX 623 at 25 (lines 1314-26). The Arrays.java file in J2SE that  
18 includes this method is 3,179 lines long. TX 623 at 61 (final line number in file is 3,179). Thus,  
19 even assuming Oracle’s “work as a whole” is just the Arrays.java file,<sup>9</sup> the method is less than  
20 three-tenths of one percent of the work as a whole.

21 Because Oracle has not proven that the rangeCheck method is qualitatively or  
22 quantitatively significant, its use is at most *de minimis*, and therefore not actionable.

23 **2. Oracle failed to prove that the use of the allegedly copied comments in**  
24 **CodeSourceTest.java and CollectionCertStoreParametersTest.java is**  
25 **more than *de minimis*.**

26 The evidence cannot support a finding that the allegedly copied comments in  
27 CodeSourceTest.java and CollectionCertStoreParametersTest.java are qualitatively significant.

28 <sup>9</sup> Google continues to assert that the works as a whole should, for all purposes, be the entire  
platforms registered by Sun. *See, e.g.*, Dkt. 993.



1 Because they are comments, they have absolutely no effect on any compiled code. *See* RT  
 2 1317:6-14 (Mitchell). All that Dr. Mitchell was able to say is that “comments are for other  
 3 programmers or users of the code.” RT 1317:24-25. But whether comments *generally* can offer  
 4 guidance to programmer fails to address whether *these* comments offer *qualitatively significant*  
 5 guidance to programmers. There is no evidence of the purported qualitative significance of these  
 6 comments.

7 The evidence also cannot support a finding that the comments are *quantitatively*  
 8 significant. The comments at issue are less than three percent of one file, and only one quarter of  
 9 the other. *See* TX 623.9, 623.10.

10 The ultimate test is that alleged copying is *de minimis* “if the average audience would not  
 11 recognize the appropriation.” *Newton*, 388 F.3d at 1193. Here, there is *no evidence* that anyone  
 12 even noticed the alleged copying until an extensive forensic analysis was performed, using  
 13 specialized computer tools. *See* RT 1309:8-1313:11 (Mitchell) (testifying about Dr. Visnick’s  
 14 forensic analysis). On this record, no reasonable jury could find that the average audience would  
 15 recognize the alleged appropriation in these files.

16 Finally, Google again notes that, as it has addressed in its prior briefs, the proper “work as  
 17 a whole” is the entire registered work, or at least that there is no evidence supporting using the  
 18 individual files as the works as a whole. Because the work as a whole should be larger than the  
 19 individual files, the allegedly copied comments are even more quantitatively insignificant.

20 Because Oracle has not proven that the allegedly copied comments are qualitatively or  
 21 quantitatively significant, Google’s use of them is at most *de minimis*, and thus not actionable.

22 **3. Oracle failed to prove that the use of the eight “Impl” and “ACL” files**  
 23 **is more than *de minimis*.**

24 Oracle failed to prove that there was *any* copying (let alone copying of more than a *de*  
 25 *minimis* amount) from Oracle’s works as a whole for these eight files, even assuming that the  
 26 individual Oracle files are the proper works as a whole for this analysis. Oracle offered into  
 27 evidence the *source code* for seven Oracle “Impl” files. *See* TX 623.2-623.8.<sup>10</sup> Oracle does not

28 <sup>10</sup> Oracle did not introduce into evidence the source code for any file named  
 “AclEnumerator.java,” only what appears be a decompiled file named “AclEnumerator.jad.”

1 claim, however, that Google copied anything from these *source code* files. Instead, Oracle argues  
2 that Google copied from *object code* using a *decompiler*. See RT 1257:3-1258:6 (Mitchell). Dr.  
3 Mitchell testified that the source code in the eight Android “Impl” and “ACL” files is similar to  
4 the *decompiled versions* of certain Oracle object code files. See RT 1259:16-1260:18. Dr.  
5 Mitchell did not testify, however, that the object code files he examined are the compiled versions  
6 of the *source code files* in evidence as trial exhibits 623.2-623.8. See *id.*

7 Oracle also moved into evidence by stipulation what appear to be decompiled versions of  
8 the eight “Impl” and “ACL” files, with filenames ending in “.jad”. See RT 1153:8-13; TX 896.1-  
9 896.8. There was, however, *no testimony* explaining what these files are. Moreover, Dr. Mitchell  
10 *did not identify the names of the allegedly copied Oracle files that he purportedly examined*. See  
11 RT 1259:16-1260:18. In fact, Dr. Mitchell did not even testify that the unnamed Oracle files he  
12 examined were part of either of the registered works at issue in this case. See RT 1259:16-  
13 1260:18. Because of this failure of proof, Oracle has not established that the eight Android  
14 “Impl” and “ACL” files involved more than *de minimis* copying from any files that are part of  
15 either of the registered works at issue in this case or are owned by Oracle.

16 Moreover, as with the comments, there is *no evidence* that anyone noticed the alleged  
17 copying in the eight “Impl” and “ACL” files until an extensive forensic analysis was performed,  
18 using specialized computer tools. See RT 1309:8-1313:11 (Mitchell) (testifying about Dr.  
19 Visnick’s forensic analysis). Thus, there is no evidence that the average audience would  
20 recognize the alleged appropriation. See *Newton*, 388 F.3d at 1193. Oracle therefore as not  
21 proven that the alleged copying was more than *de minimis*.

22 Furthermore, Oracle offered no evidence that the code in these files is qualitatively  
23 significant. Dr. Mitchell testified that the code has some connection to access control lists, which  
24 relate to security. See RT 1329:22-1330:5. He did not, however, explain what the code does, or  
25 why it is *qualitatively significant*. Moreover, Dr. Mitchell testified that he had no reason to  
26 believe that these files were ever placed on a handset. See RT 1319:15-20. There is no other

27  
28 There is no evidence in the record that this eighth allegedly copied file, “AclEnumerator.java,” is  
part of either of the two registered works at issue in this case. See n.5, *supra*.

1 evidence in the record suggesting that these files were ever placed on a handset. There is also no  
2 evidence in the record that these files had any significance at all to the functioning of either J2SE  
3 or Android.<sup>11</sup>

4 Finally, properly compared to the proper works as a whole, as addressed by Google's  
5 prior briefs, the code in these eight files is quantitatively insignificant whether considered  
6 individually or collectively.

7 **F. Google is entitled to judgment as a matter of law that its specifications for the**  
8 **37 API packages do not infringe Oracle's copyrights.**

9 Oracle alleges that Google's specifications (i.e., the documentation) for the 37 accused  
10 API packages infringe Oracle's copyrights. Specifically, Oracle alleges that (a) the substance of  
11 Android's English-language documentation infringes; and (b) the SSO of that documentation also  
12 infringes. The Court should grant judgment as a matter of law as to the first allegation because  
13 the evidence cannot support a finding that the contents of the documentation describing the 37  
14 accused API packages in Android was copied from the J2SE documentation. The Court should  
15 also dismiss the second allegation because it simply collapses into Oracle's claim that Google  
16 copied the SSO of the 37 accused API packages; the documentation is generated by an automated  
17 program, such that the SSO of the documentation is a natural derivative of the SSO of the API  
18 packages it represents. *See* RT 1169:3-4 (Lee). Moreover, the second allegation is barred  
19 because, for the reasons stated in Google's proposed findings of fact and conclusions of law, the  
20 SSO of the 37 accused API packages is not copyrightable.

21 **1. The evidence cannot support a finding that Android's English-**  
22 **language documentation was copied from the Java API specifications.**

23 Oracle presented evidence of precisely three examples of alleged substantial similarity  
24 between Google's and Oracle's specifications for the 37 API packages. A "mere scintilla" of

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25 <sup>11</sup> Dr. Mitchell did testify that *test files generally* are an important part of software development.  
26 RT 1330:15-24. However he never testified as to how many test files there are in J2SE or  
27 Android, or to the role played by *these particular* test files. The best Dr. Mitchell could do was to  
28 state that "*if* [these files] helped [Google] test other code they were developing, and speed up and  
lessen the cost of testing and quality assurance, then that would have a big value to [Google]." RT 1331:3-5 (emphasis added). There is no evidence in the record that these eight files, out of the tens of thousands of files in both Android and J2SE, were anything other than trivial and insignificant.

1 evidence is insufficient to support a jury verdict. *See Lakeside-Scott v. Multnomah County*, 556  
 2 F.3d 797, 802 (9th Cir. 2005) (quoting *Willis v. Marion County Auditor's Office*, 118 F.3d 542,  
 3 545 (7th Cir. 1997)). Oracle's three examples—out of over 11,000 pages of specifications (RT  
 4 617:2-7 (Reinhold))<sup>12</sup>—cannot support a jury verdict.

5 In its first example, Oracle focused on the descriptions in the J2SE and Android  
 6 specifications for the CipherInputStream class in the javax.crypto package. Counsel for Oracle  
 7 asked Bob Lee to compare the following portions of the descriptions of CipherInputStream in the  
 8 J2SE 5.0 and Android specifications:

J2SE 5.0	Android
<p>10 A CipherInputStream is composed of an            11 InputStream and a Cipher so that read()            12 methods return data that are read in from the            13 underlying InputStream but have been            14 additionally processed by the Cipher. The            Cipher must be fully initialized before being            used by a CipherInputStream.</p>	<p>This class wraps an InputStream and a cipher            so that read() methods return data that are read            from the underlying InputStream and            processed by the cipher.</p> <p>The cipher must be initialized for the requested            operation before being used by a            CipherInputStream.</p>

15 *Compare* TX 610.2 with TX 767; *see also* RT 1169:25-1170:19 (Lee). These are sufficiently  
 16 different that no reasonable jury could find that they are virtually identical. Oracle's second and  
 17 third examples are no better. *See* RT 1171:3-1172:25 (Lee) (comparing descriptions in the  
 18 Android and J2SE specifications for the Cipher class in the javax.crypto package); RT 1174:17-  
 19 1175:9 (Lee) (comparing descriptions in the Android and J2SE specifications for the Pipe class in  
 20 the java.nio.channels package).

21 As Mr. Lee explained, any similarities between the specifications are to be expected,  
 22 given that the thing being described *is the same* in both specifications:

23 Q. Highly similar? Not so similar? What's your judgment?

24 A. In this case they contain the same words, certainly, but that's to be  
 25 expected when you're trying to—you're describing various specific concepts in as  
 26 few words as possible. You're trying to provide, like, a very concise explanation.

27 <sup>12</sup> The 11,000 page figure is the length of the specifications for just the 37 API packages. The  
 28 specifications for all 166 API packages of the J2SE 5.0 platform presumably are several-fold  
 longer, and the size of the J2SE 5.0 platform *as a whole* is larger still.

1 Like, for example, the first sentence. What is a pipe, in one sentence.  
2 Certainly, if you're trying to do it in that few words, they are going to contain  
3 similar words because these are kind of, I guess, the common language or  
4 currency of these APIs and simply the technology.

5 Like, "pipe" isn't even actually a—it's not necessarily a Java term. It  
6 predates Java.

7 Q. So you would—

8 A. Like, it's a common technical term.

9 RT 1175:10-24 (Lee). On these facts, any protection in the descriptions in the J2SE 5.0  
10 specifications is, at best, thin, and protected only against virtually identical copying. *See Allen v.*  
11 *Academic Games League of Am., Inc.*, 89 F.3d 614, 618 (9th Cir. 1996) (applying merger doctrine  
12 to deny protection to written expression of game rules); *Incredible Techs., Inc. v. Virtual Techs.,*  
13 *Inc.*, 400 F.3d 1007, 1013 (7th Cir. 2005) ("utilitarian explanations" of a system "are not  
14 sufficiently original or creative to merit copyright protection," or alternatively are protected "only  
15 against virtually identical copying").<sup>13</sup> And no reasonable jury could find that the Android and  
16 J2SE specifications are virtually identical.

17 Professor Mitchell's testimony does not help Oracle's case because he did not apply the  
18 correct standard. When asked whether the description "Returns a reference to the private key  
19 component of this key pair" (J2SE) is substantially similar to the description "Returns the private  
20 key" (Android), Professor Mitchell testified, "I think if you were considering using this method,  
21 both would *tell you the same information*, that you can use this method to get the private key  
22 component of the key pair." RT 1327:14-24, 1328:2-4 (emphasis added). When asked again, he  
23 testified, "I think in the context of the rest of the description they *mean the same thing*." RT  
24 1328:9-10 (emphasis added). When asked a *third* time whether the descriptions are substantially  
25 similar, and directed by the Court to answer "yes" or "no," Professor Mitchell responded, "Yes."  
26 RT 1328:24. The only reasonable conclusion that a jury can draw from this series of responses is  
27 that Professor Mitchell is basing his conclusion of substantial similarity on the fact that both

28 <sup>13</sup> *See also Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir. 2005) ("copyright law protects original  
expressions of ideas but it does not safeguard either the ideas themselves or *banal expressions of*  
*them*" (emphasis added) (citing *Feist Pubs., Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345-51  
(1991))).

1 descriptions express the same *idea*. That, however, is not infringement. *See* 17 U.S.C. § 102.  
2 Moreover, as the Court has held, the test for infringement for the documentation is “virtual  
3 identity.” Because Professor Mitchell did not opine that the documentation for Android and J2SE  
4 are virtually identical, it cannot support a jury verdict. Professor Mitchell’s opinion about alleged  
5 substantial similarity between the Android and J2SE specifications must therefore be disregarded  
6 entirely.

7 Given the thin protection for these descriptions, no reasonable jury could conclude that the  
8 Android specifications infringe Oracle’s copyrights.

9 **2. The evidence cannot support a finding that the SSO of Android’s**  
10 **English-language documentation was copied from the Java API**  
11 **specifications.**

12 Oracle elicited testimony that the SSO of the documentation for the 37 accused API  
13 packages lines up with that of the corresponding Java documentation. Mr. Lee testified as  
14 follows:

14 Q. And the structure of the documentation is identical; correct, sir? And if  
15 you think of it as an outline, the outline would match identically; correct, sir?

16 A. Yes.

17 Q. And that’s because on the Android side you’re documenting the same  
18 application programming interfaces as were documented on the Java side; correct,  
19 sir?

20 A. Yes.

21 RT 1174:9-16. But this is no surprise. As Mr. Lee also testified, the documentation for both  
22 J2SE and Android is created automatically by a tool that reads demarcated portions of the source  
23 code for inclusion in a template. *See* RT 1168:21-1169:15 (Lee). In short, the creation of the  
24 documentation is mechanized. *See* RT 607:18-24, 614:1-4 (Reinhold). Since the documentation  
25 is based on the same starting point—the names of the methods in the 37 API packages at issue—  
26 the SSO of the Android and J2SE documentation inevitably will be the same.

27 Given that the documentation is generated automatically, Oracle’s allegation that the SSO  
28 of the Android documentation infringes Oracle’s copyrights on the J2SE specification collapses  
into Oracle’s separate, overriding claim that Google’s use of the names in the 37 API packages

1 infringes Oracle’s copyrights in the SSO of its API packages. Similarities in the SSO of the  
2 documentation are an inevitable byproduct of using the same names in those API packages and  
3 their elements; they are not a separate act of infringement. Put another way, the similarities  
4 derive from Google’s use of the names in the 37 API packages at issue, not from a separate act of  
5 copying any Oracle documentation for those 37 API packages. Accordingly, Oracle’s separate  
6 claim that the SSO of the documentation infringes should be dismissed as a matter of law, leaving  
7 the actual issue—Google’s use of the names in the 37 accused API packages—for the jury to  
8 decide.

9 **G. Google is entitled to judgment as a matter of law on Oracle’s claims based on**  
10 **alleged literal copying, because Oracle failed to prove that either of the two**  
11 **copyright registrations on which it relies provides protection for the**  
12 **individual files on which the literal copying claims are based.**

13 As noted above in Part III.B.2, Sun’s registration of the works as derivative works means  
14 that, absent proof that it owns individual components, Oracle’s copyright in version 5.0 “extends  
15 only to material contributed by [Sun, as] the author of the derivative work.” *See* 17 U.S.C.  
16 § 103(b). Over Google’s objection, Oracle convinced the Court to define the “works as a whole”  
17 for its literal copying claims as *the individual files* in which the allegedly copied materials (code  
18 or comments) appear in version 5.0 of J2SE. Oracle made no attempt to prove that it owns any of  
19 those individual files, let alone when those files and the allegedly copied material were first added  
20 to the J2SE platform. *See* Part III.B.2, *supra*. Absent such proof, Oracle’s claims based on  
21 copying of specific files as separate protected works must fail.

22 **H. If the Court accepts Oracle’s now-withdrawn “collective work” argument,**  
23 **Google is entitled to judgment as a matter of law of non-infringement of each**  
24 **of the component parts of the registered works, because Oracle has not**  
25 **proved authorship of the constituent elements.**

26 Oracle has now confirmed that it has withdrawn its “collective work” argument. If Oracle  
27 had not done so, and had the Court accepted the “collective work” argument, Google would be  
28 entitled to judgment as a matter of law of non-infringement of each of the component parts of the  
registered works, because Oracle has not proved authorship of the constituent elements, for the  
reasons set forth in Google’s prior Rule 50 motion. *See* Dkt. 984 at 11-12.

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**I. Google is entitled to judgment as a matter of law on the entirety of Oracle's copyright count, because Oracle's copyright claims are barred by the equitable doctrines of laches, equitable estoppel, waiver and implied license.**

The Court should adopt the proposed findings of fact and conclusions of law regarding Google's equitable defenses that Google will be filing tomorrow. For those reasons, Google is entitled to judgment as a matter of law that Oracle's copyright claims are barred by the equitable doctrines of laches, equitable estoppel, waiver and implied license.

**IV. CONCLUSIONS**

For the foregoing reasons, Google respectfully requests that the Court grant its motion for judgment as a matter of law on the entirety of Count VIII of Oracle's Amended Complaint.

Dated: May 1, 2012

KEKER & VAN NEST LLP

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