

2013-1021, -1022

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**United States Court of Appeals  
for the Federal Circuit**

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ORACLE AMERICA, INC.,

*Plaintiff-Appellant,*

v.

GOOGLE INC.,

*Defendant-Cross Appellant.*

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*Appeal from the United States District Court for the Northern District  
of California in case no. 10-CV-3561, Judge William H. Alsup.*

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**REPLY BRIEF OF CROSS-APPELLANT GOOGLE INC.**

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## I. INTRODUCTION

Google’s cross-appeal required Oracle to address several matters of substance—*e.g.*, whether it made sense for the district court to define individual program files as entire works when there was no evidence that they could function independently; whether the district court was free to override a jury verdict that copying eight test files that never made it onto an Android device<sup>1</sup> was *de minimis* and thus non-actionable; and how a jury reasonably could find that copying a mere nine lines of `rangeCheck` code was *not de minimis*. Oracle also needed to reconcile its contention that the `rangeCheck` copying was “substantial” with the district court’s finding that Google’s copying of those nine lines was “innocent and inconsequential”<sup>2</sup> as well as “innocuous and overblown by Oracle.”<sup>3</sup>

Instead of providing compelling answers to those questions, Oracle’s cross-appeal brief reprises some of the most troubling aspects of Oracle’s main appeal from the adverse judgment on its SSO claim.<sup>4</sup> As in its main appeal, Oracle brushes aside the controlling Ninth Circuit case law while ignoring the fact that it waived its main argument by failing to object to relevant jury instructions.

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<sup>1</sup> A143; *see* A21492.

<sup>2</sup> A143.

<sup>3</sup> A142; *see also* A22044:24-A22045:7 (district court characterizing the literal-copying claims as “a tiny thing” that served Oracle’s purposes as “coloration” at trial).

<sup>4</sup> “SSO” refers to “structure, sequence, and organization.”

Specifically, Oracle now asks this Court to disregard (as “wrongly decided”) binding Ninth Circuit precedent expressly holding that de minimis copying is non-actionable “even where the fact of copying is conceded.” *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). And Oracle ignores the fact that its failure to object to the district court’s jury instructions on de minimis copying bars it from arguing (erroneously) that there is no de minimis-copying doctrine in the Ninth Circuit. Indeed, Oracle actually *proposed* jury instructions embodying the de minimis-copying doctrine whose existence it now denies.

For all the reasons stated below and in Google’s cross-appellant’s brief, the court should grant Google’s cross-appeal, grant JMOL as to the rangeCheck code, and reverse the district court’s grant of JMOL as to the eight test files.

## II. ARGUMENT

### A. In the Ninth Circuit, as elsewhere, trivial copying is not actionable, whether or not the defendant concedes that it occurred.

The maxim “de minimis non curat lex” means “the law does not concern itself with trifles.” *See Newton v. Diamond*, 388 F.3d at 1193. The doctrine’s purpose is “to avoid flooding the courts with trivial infringement cases.”<sup>5</sup> In this case, the district court gave a defective instruction that permitted the jury to decide whether Google’s literal copying was de minimis by comparing the copied code to

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<sup>5</sup> Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 720 (2010).

the individual files containing that code, rather than comparing the copied code to the entire registered work (the Java 2 Standard Edition, Version 5.0 platform). This was error because a copyright registration is for a specific work and fixes the scope of copyright protection. *See Express, LLC v. Fetish Group, Inc.*, 424 F. Supp. 2d 1211, 1218 (C.D. Cal. 2006); *cf. Nicholls v. Tufenkian Import/Export Ventures*, 367 F. Supp. 2d 514, 520 (S.D.N.Y. 2005) (noting that one of the purposes of the deposit requirement is to provide “sufficient material to identify the work in which the registrant claims a copyright.”). Nowhere does the registration for the Java 2SE Version 5.0 platform suggest that each of the thousands of files in the Java platform is an independently protected “work.”<sup>6</sup>

Due to that instructional error, the jury found that Google had actionably infringed Oracle’s copyright by including in the `TimSort.java` and `ComparableTimSort.java` files the nine lines of code comprising the `rangeCheck` method. And, applying the same erroneous standard, the district court granted Oracle’s JMOL motion, overturning the jury’s finding that Google had *not*

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<sup>6</sup> Even assuming that it was proper to define the “work as a whole” as the individual files, the `rangeCheck` copying still was quantitatively de minimis. The `Arrays.java` file containing the `rangeCheck` code has 3,179 lines of code. A2877,2937,21426-28. The `rangeCheck` function comprises less than three tenths of one percent of this file. Even under the erroneous “work as a whole” instructions given by the district court, therefore, no reasonable jury could have concluded that the `rangeCheck` code was anything but quantitatively de minimis.

actionably infringed Oracle’s copyright on eight decompiled test files and holding that no reasonable jury could have found that copying de minimis.

Oracle’s principal response to Google’s cross-appeal is to argue that, in the Ninth Circuit—contrary to the “de minimis” maxim—the law *does* concern itself with trifles. Indeed, Ninth Circuit law is so thoroughly obsessed with trifles, according to Oracle, that it would impose copyright-infringement liability for the literal copying of just *nine* of the millions of lines in the Java platform—even when the district court found that copying to be “innocent and inconsequential”<sup>7</sup> as well as “innocuous and overblown by Oracle.”<sup>8</sup> According to Oracle, Ninth Circuit law also imposes liability for copying eight files out of the tens of thousands of files in the Java platform—files of such trifling significance that the district court found that they “were merely used as test files and never found their way into Android or any handset.”<sup>9</sup>

The theory behind Oracle’s arguments is that the Ninth Circuit “does not recognize a freestanding de minimis” doctrine—in other words, that Ninth Circuit law only excuses trivial copying as part of a larger substantial-similarity or fair-use analysis that becomes superfluous if the defendant admits copying or invokes no

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<sup>7</sup> A143.

<sup>8</sup> A142.

<sup>9</sup> A143.



fair-use defense. Reply at 64.<sup>10</sup> Based on this erroneous premise, Oracle argues that, because Google conceded that it copied the rangeCheck code and the test files, there was no need to analyze substantial similarity and thus no occasion to apply the de minimis doctrine.

As explained below, this argument is both meritless and waived.

**1. Oracle’s “no freestanding de minimis” argument is meritless.**

Oracle’s “no freestanding de minimis” argument attempts to rewrite Ninth Circuit law. The Ninth Circuit unquestionably recognizes a “freestanding de minimis” doctrine under which insubstantial copying is non-actionable “even where the fact of copying is conceded.” *Newton v. Diamond*, 388 F.3d at 1193.

The *Newton* decision explains the lineage of this rule:

For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. *See Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir.1997). This means that ***even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.*** . . . The principle that trivial copying does not constitute actionable infringement has long been a part of copyright law. Indeed, as Judge Learned Hand observed over 80 years ago: “Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.” . . . This principle reflects the legal

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<sup>10</sup> “Reply” refers to Oracle’s Response and Reply Brief of Plaintiff-Appellant (Doc. 133).





also extends to the question whether an insubstantial amount of copying is actionable at all:

Google agrees that the accused lines of code and comments came from the copyrighted material, but contends that the amounts involved were *so negligible as to be de minimis and thus should be excused*. . . .

Copying that is considered “de minimis” is not infringing. Copying is “de minimis” only if it is so meager and fragmentary that compared to the work as a whole the average audience would not recognize the appropriation.<sup>13</sup>

. . .

The [“work as a whole”] issue arises when (1) comparing Oracle’s work and Google’s work for similarity under both a substantial similarity and virtual identity standards, **(2) deciding where [sic: whether] Google copied only a de minimis amount of Oracle’s work**, and (3) evaluating the third factor of fair use: the amount and . . . substantiality of the portion used in relation to the copyrighted work as a whole.<sup>14</sup>

Oracle never once mentions these instructions, but tacitly admits—as it must—that its “no freestanding de minimis” argument is doomed if *Newton* represents the state of the law in the Ninth Circuit. *See* Reply at 64-66. Oracle therefore asserts that *Newton* was “wrongly decided” (Reply at 65)—even though Oracle itself repeatedly cited *Newton* to the district court as authority for Oracle’s

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<sup>13</sup> A22777:6-16 (emphasis added).

<sup>14</sup> A22778:8-14 (emphasis added).

proposed instructions on the de minimis doctrine.<sup>15</sup> See Part II.B., below. Now, however, Oracle claims that the *Newton* panel improperly ignored an earlier case—*Norse v. Henry Holt & Co.*, 991 F.2d 563 (9th Cir. 1993)—supposedly establishing that there is no “freestanding de minimis” doctrine in the Ninth Circuit.

Oracle is wrong. *Norse* held no such thing. *Norse* reversed a district court’s grant of summary judgment to defendants who had quoted phrases from a poet’s unpublished letters in a literary biography of William S. Burroughs. The district court had analyzed the case under the **second** aspect of the de minimis doctrine identified in *Ringgold* (namely, whether “copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity . . . .” *Ringgold*, 126 F.3d at 74). But the Ninth Circuit held in *Norse*—unsurprisingly—that the substantial-similarity inquiry was “inapposite” because the defendants had admitted copying. *Norse*, 991 F.2d at 566. The court further held that, given the context of the case—involving the scholarly use of short excerpts in a nonfiction work—the question of substantial copying might be “best resolved” as part of a fair-use inquiry (the **third** aspect of the de minimis doctrine identified in *Ringgold*). *Norse*, 991 F.2d at 566. This, too, was unsurprising. The court therefore remanded the case for the district court to evaluate fair use. *Id.* at 566-67.

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<sup>15</sup> See A24692,24696-97.

But *Norse* never mentioned (let alone disapproved, as Oracle contends) the *first* aspect of the de minimis doctrine identified in *Ringgold*—namely, the concept, applicable in copyright as in “most legal contexts,” that “a technical violation of a right” can be “so trivial that the law will not impose legal consequences.” *Ringgold*, 123 F.3d at 74. Again, *that* is the aspect of the de minimis doctrine at issue in Google’s cross-appeal. *Newton* recognizes it expressly, and *Norse* doesn’t discuss it.

Oracle tries to chip away at *Newton*’s authority by asserting that subsequent music-sampling “cases” (plural) in the Ninth Circuit have not followed *Newton*—but it cites just one example, *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004). Reply at 65. *Swirsky* held that a qualitatively significant seven-note melodic line was not “too short to garner copyright protection” as matter of law. *Id.* at 851-52. Given the instantly recognizable character of a short melodic line, one can easily understand how the court reached that conclusion. But *Swirsky* made no grand pronouncements about the de minimis doctrine—indeed, never mentioned the doctrine by name—and likewise said nothing negative about *Newton*, which it cited on two unrelated points of law. *See Swirsky*, 376 F.3d at 847, 851 (citing *Newton*, 349 F.3d at 595). Notably, *Swirsky* cited the original version of the *Newton* decision, not the amended version cited and relied upon here—which was issued *after Swirsky*.

Accordingly, this Court should reject Oracle’s erroneous contention that the Ninth Circuit does not recognize a “freestanding de minimis” doctrine that applies even when copying is admitted.

**2. Oracle waived its “no freestanding de minimis” argument by proposing jury instructions that contradict that argument.**

Oracle concedes that it “did not argue” its “no freestanding de minimis” theory “throughout the proceedings below.” Reply at 63 n.12. The truth is that Oracle *actually proposed* jury instructions reflecting the de minimis doctrine whose existence it now denies.<sup>16</sup> Oracle informed the district court that “[b]oth sides adopt the general principle that copying is only de minimis where it is qualitatively and quantitatively insignificant.”<sup>17</sup> And while Oracle now attacks the Ninth Circuit’s *Newton* decision as “wrongly decided,” it repeatedly cited *Newton* to the district court as authority for the instructions that it proposed on de minimis copying.<sup>18</sup> Oracle likewise failed to object to the instructions that the district court ultimately gave, insofar as they, too, adopted the “freestanding de minimis” doctrine.

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<sup>16</sup> See A24692-94,24696-97.

<sup>17</sup> A24692 (emphasis omitted).

<sup>18</sup> See A24692,24696-97.





Indeed, the argument is doubly waived because Oracle again failed to properly raise it in this Court. *Cf. Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (holding that an argument was doubly waived where not raised below and not “fully articulated” until appellants’ reply brief on appeal). Oracle’s cross-appellee’s brief doesn’t even **mention** the district court’s instructions on the “freestanding de minimis” doctrine, let alone try to carry Oracle’s appellate burden of showing that those instructions contained “plain error” that calls “the integrity or fundamental fairness of the proceedings in the trial court . . . into serious question.” *Jerden v. Amstutz*, 430 F.3d 1231, 1236 n.4 (9th Cir. 2005); *see* Fed. R. Civ. P. 51(c)(1), (d)(1)(A), (d)(2). Oracle’s failure to challenge the jury instructions in its cross-appellee’s brief therefore constitutes a double waiver.

Avoiding the waiver issue altogether, Oracle instead cites cases holding that an appellate court can affirm the judgment based on any ground supported by the record, even if the district court did not rely on that ground. *See* Reply at 63 n.12. But the alternative-ground rule merely allows a reviewing court to affirm the judgment based on arguments that the district court ignored or rejected **after those arguments were properly presented to it**. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989). Only in ““exceptional cases”” will courts overlook a party’s waiver of an alternative ground, *id.* (citation omitted); and Oracle does not

even try to show that this case is “exceptional.” Its alternative-ground cases are therefore inapposite.

Accordingly, the Court should hold that Oracle waived its “no freestanding de minimis” argument.

**B. The district court’s “work as a whole” instruction was erroneous and prejudicial.**

Google’s cross-appeal argues that the district court erred in instructing the jury that, for purposes of applying the de minimis doctrine to copying of the rangeCheck code, “‘the work as a whole’ is the compilable code for the individual file,” not the entire registered work.<sup>20</sup> Under that erroneous standard, the jury found that copying nine lines of rangeCheck code was not de minimis, and the district court granted JMOL overriding the jury’s verdict that copying the eight test files was de minimis. Neither result should stand.

Oracle’s sole defense of the “work as a whole” instruction is that “Google does not show the trial court erred in determining that the copied code files were stand-alone works.” Reply at 70 (citing A33). That response has two flaws.

*First*, the district court made no factual finding that the copied code files could function as stand-alone works. Oracle cites only to an order denying Google’s motion for summary judgment on Oracle’s claims for copying of the

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<sup>20</sup> A989-93,22779.

rangeCheck code and the eight test files.<sup>21</sup> “[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). At trial, Oracle submitted no evidence that these files could function on a stand-alone basis. Indeed, the evidence suggested the contrary.<sup>22</sup>

**Second**, Oracle’s only basis for claiming that the copied code files were stand-alone works is that they were contained in separate files. But that is not the standard. The standard is whether the copied portion is “copyrighted separately” or “stored separately” and can “stand totally alone” from the rest of the copyright work.<sup>23</sup> *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1154-55 (9th Cir. 1986) (citing *Pacific and Southern Co.*, 744 F.2d 1490, 1497 (11th Cir. 1984)); see also *American Geophysical Union v. Texaco Inc.*, 60 F. 3d 913, 926 (2d Cir. 1994) (noting that each article in a journal volume was separately authored, constituted a “discrete original work of authorship,” and enjoyed independent copyright protection). In *Hustler Magazine*, for example, the Court

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<sup>21</sup> A33

<sup>22</sup> See A3673-83,3705-20 (establishing that programmers need files other than the ones at issue in this cross-appeal—*e.g.*, the java.lang package—to do anything with Java).

<sup>23</sup> The fact that the files bore legends stating, for example, “Copyright 2004 Sun Microsystems, Inc.” (A2877), does not indicate that they were copyrighted separately or could stand alone, as Oracle intimates. See Reply at 70.

held that a single item from a magazine could constitute the work as a whole for purposes of copyright infringement, because that item “represent[ed] the essence of *Hustler Magazine*” and was not “an interwoven component of the magazine, but [could] stand totally alone.” 796 F.2d at 1155.

Oracle failed to (and cannot) satisfy that standard here. Oracle introduced no evidence to suggest that these files can “stand totally alone” or that they are “stored separately” from the rest of the Java platform. Indeed, if one were to try to “use” the Arrays.java file or one of the decompiled test files independently from all other parts of the platform, they would not perform any useful function or do anything at all.<sup>24</sup> Moreover, Oracle introduced no evidence that these files are “stored” differently than the rest of the code that makes up the Java platform. Rather, the code for these files is interwoven among millions of other lines of code, and Oracle did not even recognize any similarities in the files until it ran a forensic search of Google’s source code.<sup>25</sup>

Moreover, holding that the mere placement of code in a separate file creates a stand-alone work would effectively nullify the de minimis doctrine in software-copying cases. It may be possible to carve up a program arbitrarily into multiple

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<sup>24</sup> See A3673-83,3705-20.

<sup>25</sup> A21480-85.



Oracle’s only argument on quantitative significance is that there is no “bright line” as to how much copying must occur before it becomes actionable. Reply at 68-69. Well, of course not. But that need not prevent a court—or, as here with respect to the eight test files, a jury—from deciding the issue of quantitative significance in a particular case. *Cf. Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267-68 (5th Cir. 1988) (holding that an allegedly infringed work was not “substantially similar” to an original work where it contained 30 characters from the original work’s 80 pages of source code).

As to the eight test files, Oracle’s argument is that testing can be qualitatively important. Google addressed that vague and unsupported contention at pages 77-78 of its opening brief on cross-appeal, demonstrating that the district court had no adequate basis to override the jury’s verdict of non-infringement on those files.

As to the rangeCheck code, the evidence revealed that it was “[v]ery, very simple”<sup>28</sup> and that (as Oracle’s own expert agreed) it could have been written by a “good high school programmer.”<sup>29</sup> Oracle’s claim of qualitative significance rests entirely on testimony by its expert that, in an experiment, an Android device called on the method “at least 2600 times” when powering on. Reply at 67.

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<sup>28</sup> A20905.

<sup>29</sup> A20905,21488.



qualitatively significant. Standing alone and without any frame of reference, Oracle’s expert testimony about the number of times that rangeCheck is called during the startup of an Android emulator does not support a finding of qualitative significance.

The district court said it best when it noted that the copying of the rangeCheck code was “innocuous and overblown by Oracle.”<sup>31</sup> As such, it was de minimis and not actionable.

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<sup>31</sup> A142.



### III. CONCLUSION

As in its main appeal, Oracle's cross-appeal brief disregards controlling Ninth Circuit law that is fatal to Oracle's arguments, while attempting to revive arguments that Oracle waived when it failed to object to relevant jury instructions.

For all the reasons stated above and in Google's cross-appellant's brief, the court should reverse the district court's denial of Google's JMOL motion concerning the rangeCheck code and reverse the district court's grant of Oracle's JMOL motion concerning the eight decompiled test files.

Dated: July 22, 2013

Respectfully submitted,

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**United States Court of Appeals  
for the Federal Circuit**

ORACLE AMERICA, INC. v. GOOGLE INC., 2013-1021, -1022

**CERTIFICATE OF SERVICE**

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by KEKER & VAN NEST LLP, Attorneys for Defendant-Cross-Appellant to print this document. I am an employee of Counsel Press.

On **July 22, 2013**, Counsel for Defendant - Cross-Appellant has authorized me to electronically file the foregoing **Reply Brief of Defendant- Cross-Appellant** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

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July 22, 2013

/s/ Elissa Matias

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