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GOOGLE INC.

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 COMMENTS ON THE
COURT'S APRIL 25 DRAFT SPECIAL
VERDICT FORM**

Dept.: Courtroom 8, 19th Floor
Judge: Hon. William Alsup

1 The parties have met and conferred regarding the draft special verdict form that the Court
2 gave to counsel today. The parties have been unable to reach agreement.

3 Google believes the verdict form can be simplified substantially and still address all the
4 issues that the jury needs to decide.

5
6 The parties do not yet know how the Court will instruct the jury on the “work as a whole”
7 issues relating to the different claims made by Oracle, or on other important issues such as (1) the
8 standards of substantial similarity as opposed to virtual identity; (2) the burden of proof as to the
9 *de minimis* issues; and (3) what, if any, assumptions the jury should make regarding the
10 copyrightability of the SSO of the 37 API packages when considering the *de minimis* issues.

11 Subject to Google’s right to propose further modifications to the special verdict form once
12 Google knows how the Court plans to proceed with the instructions, Google comments and
13 suggests that the draft verdict form should be modified as follows:
14

15 General Comments: Google suggests that all references in the verdict form to “37 APIs”
16 should be changed to “37 API packages.” Although different witnesses have used different
17 terminology to refer to the portions of the parties’ software that is at issue, the phrase “API
18 packages” correctly identifies the 37 portions at issue.

19 Google also believes that use of the word “copied” in the verdict form prejudices Google.
20 As Google has recently briefed, the Supreme Court, the Ninth Circuit and many other courts have
21 repeatedly stated that “not all copying is copyright infringement.” *See* Google April 22 Brief,
22 Dkt. No. 955 at 1213. Suggesting to the jury that any finding of any “copying” ends the
23 infringement inquiry is inconsistent with that well-established law.
24

25 **Question 1A:** The jury does not need to answer two questions to decide the infringement
26 issue as to the SSO of the 37 API packages. As drafted, Question 1A reads as if Oracle needs to
27 prove two separate things: (1) that the APIs as group “had” an overall SSO and (2) that Google
28

1 “copied” that SSO. Neither part asks the correct question. The API packages do have “an” SSO
2 of some kind, and it is therefore not clear what the first part of the question will mean to jurors.
3 In light of Google’s stipulation that the SSO of the 37 accused API packages in Android is
4 substantially the same as the SSO of the corresponding 37 API packages in Java, the second part
5 is unnecessary.

6
7 The issue for the jury to decide is whether the use in Android of the overall SSO of the 37
8 accused API packages as a group infringes, i.e., whether it is sufficient to meet the standard of
9 substantial similarity or virtual identity when the works are compared as a whole. The following
10 revised Question 1A will frame the issue correctly:

11 **1. As to the 37 API packages in question taken as a group:**

12 **A. Has Oracle proven that the overall structure, sequence and**
13 **organization of the 37 API packages in Android infringes Oracle’s copyrights?**

14 **Yes (for Oracle) _____ No (for Google) _____**

15 **(If you answered “no” to Question 1A, then skip to Question 2)**

16
17
18 **Question 1B:** Google’s only comment on question 1B is that the word “constituted”
19 could be changed to “is,” so as to simplify the question. The revised Question 1B would read as
20 follows:

21
22 **B. If so, has Google proven that its use of the overall structure, sequence**
23 **and organization is a fair use?**

24 **Yes (for Google) _____ No (for Oracle) _____**

25
26 **Questions 2A and 2B:** Questions 2A and 2B are unnecessary. Oracle included no claim
27 like the one that is the subject of Question 2A in its “Statement Of Issues” filed on April 12.
28

1 (Dkt. No. 899). Further, there has been no proof of any copyrighted work consisting of an
2 individual API package implementation.

3 **Question 2C and 2D:** For reasons similar to those stated above for Question 1A,
4 Question 2C does not correctly identify the issue the jury needs to decide, and there has been no
5 evidence distinguishing the documentation in any one API package from that in others.
6

7 The following set of questions is simpler and clearer, could be used with proper
8 instructions regarding infringement, substantial similarity, virtual identity, and “work as a whole”
9 regardless of the content of the instructions, and would be similar in format to Questions 1A and
10 1B:

11 **2. As to the documentation for the 37 API packages taken as a group:**

12 **A. Has Oracle proven that the documentation for the 37 API packages in**
13 **Android infringes Oracle’s copyrights?**
14

15 Yes (for Oracle) _____ No (for Google) _____

16 (If you answered “no” to Question 2A, then skip to Question 3)

17 **B. If so, has Google proven that its use of the documentation is a fair use?**

18 Yes (for Google) _____ No (for Oracle) _____

19 **Question 3:** Question 3 can also be simplified and reduced from nine questions to one.
20 Google does not assert a fair use defense as to the twelve files containing allegedly copied
21 elements. The only relevant issue as to those files is not “copying”; it is whether the accused
22 materials are so insignificant that their inclusion is *de minimis*. Depending on the Court’s ruling
23 on burden of proof as to the *de minimis* issue, Question 3 can be stated as simply as:
24

25
26 **3. [If Oracle has the burden of proof on *de minimis*] Has Oracle proven that the use in**
27 **Android of any of the items listed below was more than *de minimis*?**
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- A. The rangeCheck method in TimSort.java and ComparableTimSort.java
- B. The source code in the eight ACL “Impl.java” files
- C. The English language comments in CodeSourceTest.java and CollectionsCertStoreParametersTest.java

Yes (for Oracle) _____ No (for Google) _____

or

3. [If Google has the burden of proof on *de minimis*] Has Google proven that the use in Android of the items listed below was *de minimis*?

- A. The rangeCheck method in TimSort.java and ComparableTimSort.java
- B. The source code in the eight ACL “Impl.java” files
- C. The English language comments in CodeSourceTest.java and CollectionsCertStoreParametersTest.java

Yes (for Google) _____ No (for Oracle) _____

For ease of reference, Google attaches a complete set of the above revised questions as Exhibit A.

Dated: April 25, 2012

KEKER & VAN NEST LLP

By: /s/ Robert A. Van Nest
ROBERT A. VAN NEST

Attorneys for Defendant
GOOGLE INC.

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EXHIBIT A

1. As to the 37 API packages in question taken as a group:

A. Has Oracle proven that the overall structure, sequence and organization of the 37 API packages in Android infringes Oracle’s copyrights?

Yes (for Oracle) _____ No (for Google) _____

(If you answered “no” to Question 1A, then skip to Question 2)

B. If so, has Google proven that its use of the overall structure, sequence and organization is a fair use?

Yes (for Google) _____ No (for Oracle) _____

2. As to the documentation for the 37 API packages taken as a group:

A. Has Oracle proven that the documentation for the 37 API packages in Android infringes Oracle’s copyrights?

Yes (for Oracle) _____ No (for Google) _____

(If you answered “no” to Question 2A, then skip to Question 3)

B. If so, has Google proven that its use of the documentation is a fair use?

Yes (for Google) _____ No (for Oracle) _____

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3. Has Oracle proven that the use in Android of any of the items listed below was more than de minimis?

- A. The rangeCheck method in TimSort.java and ComparableTimSort.java**
- B. The source code in the eight ACL “Impl.java” files**
- C. The English language comments in CodeSourceTest.java and CollectionsCertStoreParametersTest.java**

Yes (for Oracle) _____ No (for Google) _____