

1 DAVID H. KRAMER, SBN 168452  
Email: dkramer@wsgr.com  
2 MAURA L. REES, SBN 191698  
Email: mrees@wsgr.com  
3 WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
4 650 Page Mill Road  
Palo Alto, CA 94304-1050  
5 Telephone: (650) 493-9300

PAUL J. SAMPSON (admitted *pro hac vice*)  
Email: psampson@wsgr.com  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
95 S. State Street  
Suite 1000  
Salt Lake City, Utah 84111  
Telephone: (801) 401-8510

6 ERIC P. TUTTLE, SBN 248440  
Email: eric.tuttle@wsgr.com  
7 WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
8 701 Fifth Avenue, Suite 5100  
Seattle, WA 98104-7036  
9 Telephone: (206) 883-2500

10 *Counsel for Defendant*  
GOOGLE LLC

11  
12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN JOSE DIVISION**

15  
16 *In re Google Generative AI Copyright*  
17 *Litigation*

Master File Case No.: 5:23-cv-03440-EKL  
Consolidated with Case No.: 5:24-cv-02531-EKL

18 **DEFENDANT GOOGLE LLC'S**  
19 **OPPOSITION TO PLAINTIFFS' MOTION**  
20 **TO EXCLUDE THE TESTIMONY OF**  
21 **WILLIAM PATRY AND RYAN SULLIVAN**

22 Date: February 4, 2026  
23 Time: 10:00 A.M.  
24 Courtroom: 7, Fourth Floor  
25 Judge: Hon. Eumi K. Lee

1 Plaintiffs fail to demonstrate any basis on which the testimony of Mr. William Patry and  
2 Dr. Ryan Sullivan, Ph.D. is inadmissible. Their motion should be denied.

3 **Mr. Patry:** Plaintiffs’ effort to exclude the report of William Patry is misguided from start  
4 to finish. According to Plaintiffs, Mr. Patry offers improper legal conclusions, an invalid  
5 methodology and is not sufficiently qualified. The arguments are meritless.

6 Mr. Patry draws on a remarkable 40+ year career as a copyright authority—with the United  
7 States Copyright Office, working for Congress, serving as a law professor, authoring a leading  
8 copyright treatise for decades, and as a practitioner—to identify myriad work-specific factual and  
9 legal issues that often arise in assessing the ownership of a copyrighted work and the validity and  
10 scope of a copyright registration. That testimony is properly offered to aid the Court in assessing  
11 Plaintiffs’ ability to carry their burden to show that common issues predominate over those  
12 requiring individualized consideration. *See In re Lithium Ion Batteries Antitr. Litig.*, 2017 WL  
13 1391491, at \*6 (N.D. Cal. Apr. 12, 2017) (at the class certification stage, “the court considers only  
14 whether the expert evidence is ‘useful in evaluating whether class certification requirements have  
15 been met.’”) (citation omitted).

16 Plaintiffs’ own cases belie their claim that Mr. Patry offers improper legal opinions. At  
17 most, those cases recognize that it is improper for an expert to give an opinion as to “*legal*  
18 *conclusions*, i.e., an opinion on an ultimate issue of law.” *Utne v. Home Depot U.S.A., Inc.*, 2022  
19 WL 1443338, at \*3 (N.D. Cal. May 6, 2022) (excluding opinions that individualized issues in the  
20 case “cannot be managed,” and “all other opinions about the appropriateness of class-wide  
21 determination of liability or damages”); *LD v. United Behav. Health*, 2023 WL 2806323, at \*3  
22 (N.D. Cal. Mar. 31, 2023) (excluding opinion that “an ERISA 23(b)(1)(B) and/or 23(b)(2) class  
23 should be certified as well as a RICO 23(b)(2) and 23(b)(3) class”); *Fitzhenry-Russell v. Keurig*  
24 *Dr. Pepper Inc.*, 2018 WL 10472794, at \*3 (N.D. Cal. Sept. 25, 2018) (excluding opinion that  
25 individual inquiries required to assess damages mean “that the class cannot be certified”). That is  
26 not what Mr. Patry does. While he identifies a host of issues that, by their nature, are specific to  
27 individual copyrighted works and claims, he does not purport to advise or instruct the Court on  
28 how to resolve them or opine that they ultimately defeat class classification. He merely describes

1 the wide variation of factual circumstances that can arise in assessing copyright claims based on  
2 what he has handled, seen, heard, and read.

3 Plaintiffs cite no case suggesting that such testimony is improper. Nor could they. It is  
4 precisely the sort of testimony on which expert guidance is welcomed by courts. *See, e.g., In re*  
5 *Hydrogen Peroxide Antitr. Litig.*, 552 F.3d 305, 322-26 (3d Cir. 2008) (seminal case reversing  
6 certification based on erroneous exclusion of expert testimony on the individualized issues that  
7 would arise in antitrust/price-fixing case); *In re Rail Freight Fuel Surcharge Antitr. Litig.* 292 F.  
8 Supp. 3d 14, 67 (D.D.C. 2017) (rejecting challenge to expert’s opinions regarding the importance  
9 of putative class-member-specific permissions and absence of injury). Indeed, Plaintiffs here have  
10 offered “expert” testimony in the hopes of showing their proposed classes have issues that can be  
11 litigated in common. *See, e.g.,* McCarron Rpt. (ECF No. 266-1) (purporting to show class  
12 members can be identified through a common method); Smith Rpt. (ECF No. 253-7) ¶ 11  
13 (“[c]ommon evidence shows functional licensing markets operate”). They can hardly be heard to  
14 complain when testimony is offered to establish the contrary.

15 Regardless, it is not an impermissible legal opinion for Mr. Patry to highlight the many  
16 ownership disputes that he has seen arise with respect to copyrighted works—whether a work is  
17 jointly owned; who between two claimants is the rightful owner; whether a work is one made for  
18 hire; whether a work has been assigned and whether that assignment is valid; whether ownership  
19 of a work has reverted to its original author; whether the work has lapsed into the public domain;  
20 whether ownership has transferred by law through marriage or to descendants after death—or to  
21 note the vast universe of “orphan works” for which no owner can be identified. ECF No. 288-27,  
22 Expert Report of William Patry (“Patry Rpt.”) ¶¶ 10-20.<sup>1</sup>

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25 <sup>1</sup> It is likewise not a legal opinion for Mr. Patry to describe the U.S. Copyright Office’s standard  
26 operating procedure of accepting, without scrutiny, the representations made in copyright  
27 applications and declining to resolve disputes they generate, instead leaving those disputes for  
28 interested parties to resolve through court actions. Patry Rpt. ¶¶ 8-13; *see The Meds. Co. v. Mylan*  
*Inc.*, 2014 WL 1758135, at \*5 (N.D. Ill. May 2, 2014) (“Dr. Linck may offer opinions regarding  
the Patent Office’s practices and procedures based on her prior experience in the Patent Office and  
her extensive experience in patent law and procedure.”).

1 Many of these and other issues regarding copyright ownership are presented by the claims  
2 of the named plaintiffs in this case, and countless others would be presented by unidentified  
3 members of the putative classes Plaintiffs propose. The Court specifically invited Plaintiffs to  
4 explain how these individualized issues could be resolved on a class-wide basis, ECF No. 128 at  
5 7 n.4, but Plaintiffs failed to accept the Court’s invitation. Now they want to pretend that the issues  
6 do not exist by trying to exclude evidence showing how complicated and individualized it would  
7 be to investigate and adjudicate them. But given that Mr. Patry is not offering legal conclusions,  
8 there is no basis for exclusion.<sup>2</sup>

9 Mr. Patry’s testimony regarding the multiple, complex issues that pervade the copyright  
10 registration process is also properly before the Court. This includes his recognition of the need to  
11 assess ownership and first publication dates for each work in registrations for collective or group  
12 works; whether the original and pre-existing aspects of a derivative work have been properly  
13 identified; whether a work is truly original; and whether the registration form contains material  
14 misrepresentations. Patry Rpt. ¶¶ 21-25. Again, some of these issues are starkly presented by the  
15 named plaintiffs’ claims in this case. By identifying them, Mr. Patry is not presuming to tell the  
16 Court how they should be resolved. Rather, he is explaining that these individualized issues arise  
17 frequently, and that they are often complicated and require discovery and judicial resolution. This  
18 testimony will be of assistance to the Court because it provides further foundation for an important  
19 point in Google’s opposition to the class certification motion: that the flaws in named Plaintiffs’  
20 claims will equally arise in an untold number of claims of absent class members, rendering class  
21 treatment untenable and improper.

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24 <sup>2</sup> More than 25 years ago, in *Music Sales Corp. v. Morris*, a court concluded Mr. Patry was  
25 giving an expert view on “the correct interpretation of the 1976 [Copyright] Act,” and deemed it  
26 an impermissible legal conclusion. 73 F. Supp. 2d 364, 381 (S.D.N.Y. 1999). Plaintiffs invoke  
27 *Music Sales* as if it were relevant here, but the case actually shows why their motion is misguided.  
28 Here, Mr. Patry offers no interpretation of the law. Instead, he offers what the *Music Sales* court  
expressly recognized as proper when it held: “[t]he testimony of a legal expert is admissible as to  
the ordinary practices of those engaged in the business of law, legal studies, or law-related fields,  
or as to trade customs and usages of those so employed.” *Id.* at 381.

1 Citing *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124-25 n.4, 1128 (9th Cir. 2017),  
2 Plaintiffs also argue that Mr. Patry’s opinion does not speak to “an issue in dispute in the case”  
3 because he supposedly addresses “administrative feasibility” and “the Ninth Circuit expressly  
4 rejected” any such requirement. Mot. 5. Plaintiffs are mistaken multiple times over. In *Briseno*,  
5 the Ninth Circuit did not rule that administrative feasibility was irrelevant to class certification,  
6 but rather that it should be addressed “through analysis of Rule 23’s enumerated requirements”  
7 and not as an additional or separate requirement. *Briseno*, 844 F.3d at 1124-25 & n.4. As further  
8 explained in *Norton v. LVNV Funding, LLC*, 2020 WL 5910077, at \*5 (N.D. Cal. Oct. 6, 2020),  
9 also cited by Plaintiffs, *Briseno* “determined that there is no need for a separate feasibility  
10 requirement because the other Rule 23 factors, including the superiority analysis of Rule 23(b)(3),  
11 adequately account for that concern.” In any event, Mr. Patry does not purport to opine on  
12 “administrative feasibility.” Rather, he is offering building blocks for the Court’s predominance  
13 and superiority analyses, issues very much before the Court on Plaintiffs’ motion.

14 Plaintiffs’ criticism of Mr. Patry’s methodology similarly makes little sense. He is not  
15 engaged in any sort of experiment or sampling exercise where flaws in his process cast doubt on  
16 his conclusions. He is simply reporting on what he has observed, first-hand, over the course of  
17 decades immersed in the field. To criticize his “methodology” is akin to criticizing a physician’s  
18 general observations of patients. Plaintiffs were welcome to depose Mr. Patry but elected not to,  
19 presumably recognizing that his straightforward testimony is beyond reproach.<sup>3</sup>

20 Finally, Plaintiffs claim that Mr. Patry is unqualified because his years working at the  
21 Copyright Office were at the beginning of his long career and he later practiced at various  
22 technology companies including Google. Somehow Plaintiffs overlook that Mr. Patry literally  
23 wrote the book on copyright: *Patry on Copyright*, a leading treatise on copyright regulatory and  
24 case developments which he has been revising and updating annually for decades. Mr. Patry’s  
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26 <sup>3</sup> Plaintiffs purport to quote from cases critical of expert methodologies. Although the cases  
27 involve *other* experts and have nothing to do with Mr. Patry, Plaintiffs misleadingly insert his  
28 name (“[Patry]”) to suggest that the courts were criticizing him. Mot. 9. That flirts with violating  
the duty of candor.

1 extensive knowledge of copyright and his influence in the field are reflected in the more than 500  
 2 federal court decisions, including 12 U.S. Supreme Court decisions, that cite to and rely on his  
 3 treatise and other copyright scholarship. The notion that this long-time Copyright Office staffer  
 4 and venerated chronicler and practitioner is unqualified to give his testimony is frivolous.<sup>4</sup>

5 Far from improper, Mr. Patry’s report is some of the best evidence before the Court  
 6 regarding the individualized nature of copyright claims because it comes from his direct  
 7 observation. While the Court can certainly draw conclusions from the evidence Google has  
 8 adduced about the individualized claims of the named plaintiffs and from the case law, Mr. Patry  
 9 amply bolsters those conclusions with his real-world expertise.

10 **Dr. Sullivan:** Dr. Ryan Sullivan, Ph.D. is a highly accomplished economist with extensive  
 11 experience, including testifying at trial in more than 25 cases and providing expert reports in over  
 12 100 cases. ECF No. 289-36, Expert Rebuttal Report of Dr. Ryan Sullivan (“Sullivan Rebuttal  
 13 Rpt.”) ¶¶ 3, 6 & Attachment A-1. His economic testimony has been widely accepted and relied  
 14 upon by courts across the nation in a broad variety of cases. Plaintiffs do not suggest that Dr.  
 15 Sullivan is unqualified, that he lacks expertise, or that he fails to apply a reliable methodology.  
 16 Instead, Plaintiffs argue (1) that Dr. Sullivan’s testimony “fail[s] to assist the Court” and (2) that  
 17 he allegedly “offers legal conclusions.” Mot. 4, 6. Plaintiffs are wrong, and the Court should deny  
 18 their motion to exclude Dr. Sullivan’s testimony.

19 Plaintiffs start with a baffling argument: Dr. Sullivan’s testimony “fail[s] to assist the  
 20 Court” as he “offers no opinion that Google’s conduct caused no market harm, nor any affirmative  
 21 economic analysis of his own.” Mot. 6. Plaintiffs either fail to recognize (or for some reason are  
 22 choosing to ignore) that Dr. Sullivan’s report is offered as a rebuttal to the report of Plaintiffs’

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 24 <sup>4</sup> Plaintiffs attempt to make hay of an obvious math error in Mr. Patry’s report. They make the  
 25 absurd claim that it renders his testimony “entirely speculative” (Mot. 7). His point remains valid  
 26 even after correcting for an extraneous zero. The number of applications each copyright examiner  
 27 must review per year (over 4,500) still dwarfs the number to be reviewed by patent examiners  
 28 (approximately 90 per year), and that is before accounting for applications to register many  
 different works at once. Mr. Patry’s testimony—that resource limitations preclude a robust  
 application examination in the Copyright Office—is beyond dispute, and is confirmed by the Office.  
*See* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, § 602.4(C) (3d ed.  
 2017).

1 proposed expert Michael D. Smith. As plainly stated in the Sullivan Rebuttal Report, his  
2 assignment was to “evaluate and analyze the economic arguments contained in the Smith Report,”  
3 not to develop affirmative opinions on other issues. Sullivan Rebuttal Rpt. ¶ 8. Accordingly, the  
4 Sullivan Rebuttal Report addresses the incorrect, poorly reasoned, speculative, conclusory, and  
5 baseless opinions in the Smith Report, and explains how Prof. Smith’s conclusions are shown to  
6 be wrong when analyzed using a proper economic analysis and methodology. Dr. Sullivan’s  
7 testimony will certainly “assist the Court” by explaining why it should reject Prof. Smith’s  
8 opinions.

9 Plaintiffs’ further criticism that Dr. Sullivan’s opinions are excludable because they “do  
10 not themselves establish that individualized inquiries would predominate” (Mot. 6) is  
11 incomprehensible, because that sort of opinion on an ultimate legal issue is precisely what  
12 Plaintiffs argue is improper elsewhere in the very same *Daubert* motion. (*e.g., id.* at 3). Further,  
13 Plaintiffs are incorrect in asserting that the Sullivan Rebuttal Report does not explain “how factor  
14 four evidence used for Google’s fair use defense would differ for any one plaintiff versus another.”  
15 *Id.* at 6. Dr. Sullivan sets forth multiple ways in which Prof. Smith’s opinions about a “common  
16 licensing market” or “common evidence” are erroneous, as Prof. Smith’s testimony actually  
17 describes individualized transactions with differing outcomes depending on the specific  
18 copyrighted works at issue. *E.g.,* Sullivan Rebuttal Rpt. ¶¶ 15, 31-32. Dr. Sullivan’s rebuttal  
19 testimony is fully admissible to support Google’s class certification opposition.

20 Even more puzzlingly, Plaintiffs argue that the Sullivan Rebuttal Report submitted in  
21 opposition to class certification should be excluded because it is “entirely devoid of any affirmative  
22 theory as to why Google’s conduct caused no market harm despite bearing the burden on that  
23 issue.” Mot. 6. Apparently still referring to the fourth factor of fair use, Plaintiffs confuse expert  
24 reports on the merits—which are not due until March 11, 2026—with expert reports on class  
25 certification issues. Google bears no burden on class certification; the burden of demonstrating  
26 certifiability rests entirely on Plaintiffs. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee*  
27 *Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022).

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1 Plaintiffs also wrongly argue that Dr. Sullivan’s report “offers legal conclusions” because  
2 it allegedly “depends on the assumption that Google’s use of copyrighted works for AI training  
3 constitutes fair use under the Copyright Act.” Mot. 4. That is not at all what Dr. Sullivan does.  
4 To the contrary, the Sullivan report clearly states that it relies on the accurate factual premise that  
5 “issues of fair use . . . are disputed in this case,” Sullivan Rebuttal Rpt. ¶ 24, which is what matters  
6 at this class certification stage. Plaintiffs selectively excerpt sentence fragments from Dr.  
7 Sullivan’s report referencing fair use in an attempt to portray it as a legal conclusion. *See* Mot. 4  
8 (“Sullivan opines that ‘[n]ot entering a license to undertake a fair use is an expected outcome that  
9 would not cause harm, because no license fee would be owed.’”). But that is hamfisted deception.  
10 In the cited portion of his report, Dr. Sullivan is actually explaining that Prof. Smith’s opinion is  
11 erroneous as an economic matter because Prof. Smith “*ignores the potential applicability of fair*  
12 *use*, as not entering a license to undertake a fair use is an expected outcome that would not cause  
13 harm, because no license fee would be owed.” Sullivan Rebuttal Rpt. ¶ 34 (emphasis added). In  
14 other words, Prof. Smith’s opinion improperly rests on the legal conclusion that fair use does not  
15 apply to AI training, whereas Dr. Sullivan correctly recognizes that fair use has “potential  
16 applicability” that Prof. Smith wrongly ignores. By referring to “potential applicability”—a key  
17 phrase that Plaintiffs omit—Dr. Sullivan does *exactly the opposite* of making an “assumption that  
18 Google’s use of copyrighted works for AI training constitutes fair use,” as Plaintiffs falsely assert.  
19 Mot. 4.

20 Plaintiffs use another misleadingly excerpted quote to argue that Dr. Sullivan’s report is  
21 “accepting Google’s position ‘that its access to and use of AI training materials has been legitimate,  
22 both as fair use and licensed as applicable.’” *Id.* at 4-5. In fact, Dr. Sullivan’s report does not  
23 “accept” anything and simply states what is unquestionably Google’s position: “I understand that  
24 *this point is disputed and that Google contends* that its access to and use of AI training materials  
25 has been legitimate, both as fair use and licensed as applicable.” Sullivan Rebuttal Rpt. ¶ 43  
26 (emphasis added). Plaintiffs’ characterization of this as “accepting” Google’s position is not in  
27 good faith; it is the *opposite* of “accepting” a point to acknowledge that it is disputed and  
28 unresolved. By contrast, Plaintiffs’ expert Prof. Smith chose not to take into account the existence

