No. 18-956

IN THE

Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

ORACLE AMERICA, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF THE RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Copyright Act provides that, while "original works of authorship" are generally eligible for copyright protection, 17 U.S.C. 102(a), "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work," 17 U.S.C. 102(b). The Act also makes clear that "the fair use of a copyrighted work * * * is not an infringement of copyright." 17 U.S.C. 107.

The questions presented are:

1. Whether copyright protection extends to a software interface that allows developers to operate prewritten libraries of code used to perform particular tasks.

2. Whether, as the jury found, petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.

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INTEREST OF *AMICUS CURIAE*

The Retail Litigation Center, Inc. respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

The Retail Litigation Center, Inc. ("RLC") is the only trade association dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases.

Since its founding in 2010, the RLC has participated as an *amicus* in more than 150 judicial proceedings of importance to retailers. This Court has relied upon the RLC's submissions in the past, *see South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (citing RLC brief), including in copyright cases. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013) (citing RLC brief), *abrogating*

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[1] Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for the parties received timely notice of the intent to file this brief and have granted consent, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than *amicus* or its counsel made such a monetary contribution.

Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 986 (9th Cir. 2008).

The questions presented have enormous practical significance for the retail industry and many other markets that are heavily dependent on software. Retailers and the business community at large have a strong interest in preventing copyright law from being used in an anti-competitive way to "lock in" users to existing platforms and applications by hampering migration of existing databases and other information to new and better software systems.

SUMMARY OF ARGUMENT

This case will determine whether incumbent firms can use copyright law as a barrier to entry and as a device for hampering competition among the software systems vital for the efficient operation of the retail industry and the rest of 21st century commerce that depends on them.

Retail, like many businesses, increasingly depends on software. Until now, software engineers have developed competing alternatives to existing platforms and applications by relying heavily on reuse and reimplementation of application programming interfaces ("APIs"), without fear of copyright infringement. As other briefs in this case have explained, an API is essentially a language for providing instructions to a computer. Retailers, other businesses, and ultimately consumers benefit when APIs are consistent across platforms, allowing application developers to create new and improved software systems and products quickly and efficiently. In this case, for example, Google was able to create a competing Android platform by

reimplementing a small number of Java's APIs, minimizing the need for software developers and users to learn new protocols and thereby dramatically lowering switching costs not only for the company but for downstream users as well.

The Oracle-Google dispute is but one example of a more global development in the retail industry: the increasing ability of incumbent technology platform providers to use their market power to exploit their positions, foster inefficient "lock ins," and thus further entrench their market power. The Federal Circuit's decision magnifies the gravitational pull of these developments by imposing new hurdles that make it even more difficult for retailers and other businesses to switch to new software systems, even when those systems are better. Allowing reimplementation is a key measure to prevent lock-in, check incumbent power, and ensure competition, not merely in the computer marketplace but also in the retail industry.

Copyright law, which is designed to protect original works of authorship, should not be used to interfere with beneficial switching to new and improved software systems that facilitate interoperability and portability across platforms. Such interference would reduce innovation and allow dominant firms to further entrench themselves by creating substantial barriers to entry to the detriment of the business community and consumers. As shown by examples from telecommunications and other fields, interoperability and portability result in greater choices for users and increased competition.

The Federal Circuit's decision here would enable incumbents to weaponize copyright law in an anticompetitive fashion. This Court has rejected previous attempts to use copyright law to impair competition in *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013), and *Quality King Distribs., Inc. v. L'anza Research Int'l Inc.*, 523 U.S. 135 (1998). In both of those cases, this Court considered the importance of competition and the practical implications on retailers and other businesses in construing the Copyright Act. This Court should follow the same approach here. The judgment of the Court of Appeals should be reversed.

ARGUMENT

I. Copyright Law Should Not Be Transformed Into An Anticompetitive Weapon For The Benefit Of Software Incumbents.

As is true for much of the 21st century economy, the retail industry is increasingly software-driven, with the importance of internet-based platforms growing daily. "The Internet's prevalence and power have changed the dynamics of the national economy." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018). In 1992, U.S. mail-order sales totaled $180 billion. *Id.* In 2018, e-commerce sales rose to an estimated $513.6 billion. Dept. of Commerce, U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 4th Quarter 2018 (CB19–25, Mar. 13, 2019). And e-commerce sales continue to increase steadily. *See* Dept. of Commerce, U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 3rd Quarter 2019 (CB19–170, Nov. 19, 2019).

Even outside of e-commerce, retailers use software applications to improve efficiency and quality for countless functions, including point-of-sale transactions, order processing, product returns, billing, data storage, inventory management, accounting, payroll, business analytics and reporting. Toward this end, retailers use innumerable different software applications that are dependent on API reimplementation.

Nonetheless, the advent of new tools like software and the internet into every aspect of retail business also raises serious potential concerns. Among them: the information infrastructure is subject to only limited public regulation and controlled by a relatively small number of highly influential firms. In particular, webhosting services are overwhelmingly provided by a small set of technology firms. While internet platform firms have used innovation to revolutionize the retail business (and many other industries), those firms can pose competitive concerns once they become entrenched.

These concerns are evident here. Countless programmers hired by the retail sector have invested substantial time and resources to become proficient in Java and other kinds of programming. That collective investment by businesses who use Java is a key reason for Java's success and its value to Oracle.

But, under the Federal Circuit's decision, this mutually beneficial investment also risks locking retailers into the Java platform, if switching platforms means that retailers must discard what they invested in mastering Java and develop new

ways of coding in order to use a new platform, as well as incur high costs of migrating existing data to the new application. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 473 (1992) (noting that sunk costs may prevent switching from one product to another); Carl Shapiro & Hal R. Varian, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 103-34 (1999) (discussing "lock-in").

In order to facilitate the ability of retailers and other users to switch to competing alternatives from incumbent platforms and applications, software engineers have long relied heavily on reuse and reimplementation of APIs, without fear of copyright infringement. By way of illustration, reimplementing a small number of Java's APIs is what allowed Google to create a competing Android platform that minimized the need to learn new ways to code and thereby dramatically lowered switching costs for downstream users.

Other examples abound. For instance, cloud-based services have their own APIs, which enable businesses using such services to issue commands to the cloud servers and thereby access their own data they have stored there. *See* C. Duan, *Oracle Copied Amazon's API--Was That Copyright Infringement?*, Ars Technica, Jan. 3, 2020, available at https://arstechnica.com/tech-policy/2020/01/oracle-copied-amazons-api-was-that-copyright-infringement/.

Software engineers also reuse and reimplement APIs in order to integrate old legacy back-end systems into new systems (for example, connecting an older database to a new cloud-based service). A

firm trying to compete with an incumbent cloud-based system faces the problem that many firms have invested considerable resources training their engineers in the incumbent's API. *See* Duan (noting that competitors of Amazon's cloud services reimplement Amazon's API to convince programmers to switch). If switching to a competitor means having to learn a new way of programming in order to interact with cloud data (including potentially having to rewrite substantially the company's existing systems), it would be very difficult to offer businesses a viable alternative. If each operating system or platform developer were forced to create its own alternative APIs, retailers and other businesses would be impeded from switching to new software systems – even when they are better.

But when competitors can reimplement the incumbents' API, the costs of switching are dramatically reduced. That is the widespread practice today, and the end result is increased innovation and competition, benefitting both immediate users in the retail industry and ultimate consumers.

The alternative is to allow a few dominant companies to act as gatekeepers, locking existing customers in and keeping competition out. Copyright law should not be transformed into an anti-competitive tool to reinforce incumbents' market power.

After all, this Court has considered competition as an important value in construing the Copyright Act. In *Kirtsaeng*, for example, this Court held that

the "first sale" doctrine applies to copies of copyrighted works lawfully made abroad. In so doing, this Court abrogated decisions that had punished retailers for selling imported watches, books, and other copyrighted goods. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013). This Court explained that "competition, including freedom to resell, can work to the advantage of the consumer," *id.* at 536, and it pointed to the harm that would befall retailers under a different approach:

> [O]ver $2.3 trillion worth of foreign goods were imported in 2011. American retailers buy many of these goods after a first sale abroad. And, many of these items bear, carry, or contain copyrighted "packaging, logos, labels, and product inserts and instructions for [the use of] everyday packaged goods from floor cleaners and health and beauty products to breakfast cereals." . . . American sales of more traditional copyrighted works, "such as books, recorded music, motion pictures, and magazines" likely amount to over $220 billion. A geographical interpretation would subject many, if not all, of them to the disruptive impact of the threat of infringement suits.

Id. at 542.

Similarly, in *Quality King Distribs., Inc. v. L'anza Research Int'l Inc.*, 523 U.S. 135 (1998), this Court provided retailers (as well as importers and distributors) welcome certainty under the "first sale" doctrine that lawfully produced non-pirated goods could be imported and resold in the United States free from copyright infringement claims. These

decisions also benefited U.S. consumers through greater competition and lower prices from lawfully made imported goods and, with the rise of the internet, through opportunities to resell and buy previously owned goods on sites such as eBay.com and craigslist.org.

Just as this Court considered the importance of competition and the practical implications on retailers and other businesses in *Kirtsaeng* and *Quality King* in the copyright context, it should consider the same principles here. Incumbents should not be allowed to use copyright law to erect opportunistic barriers to entry and protect their dominant position by limiting innovation and discouraging economic actors from switching to improved systems.

II. There Is A Strong Public Interest In Promoting Interoperability And Portability.

Modern commerce depends on the ability of many different devices to connect with each other. Without interoperability, the Internet, computer communications, mobile phone services, television broadcasts, electronic documents, and other technologies could not function – and nor could the commerce that depends on them. *See* Shapiro & Varian at 173-226.

This principle is not new. Electrical plugs and outlets, bicycle pedals, automobile tires, and printer cartridges – to name only a few obvious examples – are interoperable among products and devices. If they were not, consumers would be significantly

inconvenienced and competition would be greatly hindered.

Interoperability, which facilitates switching and portability, is a key check on the market power of software incumbents. As one scholar has noted, "network industries are especially prone to leveraging market power in one software field to hamper innovation and competition in other sectors." Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software*, 31 HARV. J. L. & TECH. 305, 465 (2018). "The network effects driving software users and programmers ma[k]e interoperability critical to competition in the software industry." *Id.* at 448.

Accordingly, principles of antitrust and competition law have long recognized the beneficial effect of interoperability in a wide range of contexts. The 1996 Telecommunications Act, Pub.L. 104–104, 110 Stat. 56, for example, required incumbent local telephone companies "to share [their] network with competitors," *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999), by offering unbundled services and interconnection access, which created a degree of interoperability enabling competition in previously monopolized landline telephone markets.

Congress also recognized the importance of portability in encouraging mobile phone competition. *See Central Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 206 (D.C. Cir. 2005) ("Congress viewed number portability as a means of encouraging competition: a customer is less likely to switch carriers if he cannot retain his telephone number.") (citing *Cellular*

Telecomms. & Internet Ass'n v. FCC, 330 F.3d 502, 513 (D.C. Cir. 2003)).

This Court has recognized that common rules for interoperability, even among competitors, can enable products and services that would not otherwise be possible. *E.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101-02 (1984) (recognizing that college football, which requires "rules on which the competitors agree," is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

Interoperability is especially important in network markets, where a product's value is dependent upon its capacity to interact with others. Thus, in *Lotus v. Borland*, the First Circuit denied copyright protection to a user interface that had become the *de facto* standard in the industry, in part because of interoperability considerations. *Lotus Dev. Corp. v. Borland Int'l Inc.*, 49 F.3d 807, 817-18 (1st Cir. 1995) ("Under Lotus's theory, if a user uses several different programs, he or she must learn how to perform the same operation in a different way for each program used."), *aff'd by an equally divided Court*, 516 U.S. 233 (1996). As Judge Boudin put it, "to the extent that Lotus' menu is an important standard in the industry, it might be argued that any use ought to be deemed privileged." *Id.* at 822 (concurring opinion). As he trenchantly observed, "if a better spreadsheet comes along, it is hard to see why customers who have learned the Lotus menu and devised macros for it should remain captives of Lotus because of an investment made by the users

and not by Lotus." *Id.* at 821. The same reasoning applies here.

Without the ability to reimplement APIs, interoperability suffers. Whether a software engineer is writing smartphone applications or accounting systems for use in retail businesses, the ability to reimplement APIs allows each new innovation to operate with existing platforms. Absent that ability, each innovator seeking to create new technology and offer more choices for consumers would have to create new programming languages and maintain multiple versions of its software. Moreover, those wishing to develop compatible applications or programs would have to learn those new programming languages. The substantial resources required to do so would hamstring innovation, burden retailers and other firms with inefficiencies, and ultimately harm consumers in the marketplace.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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