No. 22-121

IN THE

Supreme Court of the United States

ML GENIUS HOLDINGS, LLC,

Petitioner,

—v.—

GOOGLE LLC, LYRICFIND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF THE ARGUMENT

In his 2008 Academy Award-winning role as oil baron Daniel Plainview in the film *There Will Be Blood*, Daniel Day Lewis memorably howls at preacher Eli Sunday (played by the inimitable Paul Dano): "I drink your milkshake. I drink it up!"[2] The tense and iconic scene depicts Plainview revealing to Sunday that he had surreptitiously extracted the oil from under Sunday's land after purchasing the surrounding land. Plainview had stolen the economic benefit that rightfully belonged to his would-be rival, and gloated that the rival was without recourse. With similar brazenness, Google has drunk Genius's

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[1] In accordance with this Court's Rule 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] Movieclips, *I Drink Your Milkshake! – There Will Be Blood (7/8) Movie CLIP (2007) HD*, YouTube (Oct. 6, 2011), https://www.youtube.com/watch?v=s_hFTR6qyEo.

milkshake by taking without consent Genius's song-lyric transcriptions and misappropriating its advertising revenue and has convinced the Second Circuit that Genius is without recourse. Google is wrong.

Genius asks the Court for nothing more than to enforce the terms of its agreement with Google, a dominant corporation that has misappropriated its content in violation of that agreement. Google does not contest Genius's allegations of wrongdoing, and indeed cannot, having been caught "red-handed" multiple times by Genius. The Second Circuit, though, turned Genius away based on a flawed interpretation of the preemption clause 17 U.S.C. § 301.

Congress made clear that Section 301 was never intended to preempt breach of contract claims. Rather, it is critical to our economic system that copyright law and contract law work in concert with other laws, including antitrust laws and laws preventing practices like commercial bribery and false advertising, to ensure that companies can reap the rewards of their investments and innovation, and to disallow unfair free riding on the work of others. Copyright law does not and should not excuse companies from honoring the terms of their freely and fairly made contractual agreements, especially where neither party to those agreements has a copyright interest in the subject of those agreements.

The Second Circuit's approach, if not corrected by this Court, calls into question the viability of massive segments of the Internet and the U.S. economy in general. Genius's business model, which is based on substantial investment in collecting, organizing, and presenting information that is either unprotected by copyright or whose copyright is owned by others, is

not unique. Hundreds of websites—from those that focus on product and service reviews, to those that handle statistics on anything from sports to jury opinions, to weather dedicated websites, and many others—rely on a similar model. For example, much of the database industry revolves around the collection and distribution of factual information. Those companies likely cannot, and will not, exist if others are allowed to simply copy and use the information they have invested significant resources to collect. In the absence of copyright protection, those companies primarily rely on contract law to prevent such misappropriation.

The Second Circuit approach provides companies like Google with a license to scrape third-party websites and misappropriate the economic benefit of their work product, even after expressly agreeing not to do so as a condition of accessing that work product. As recognized by most federal courts to address such situations in the last four decades, the text and history of the Copyright Act do not require this result. Indeed, it is hard to see why Congress would desire to void the voluntary contractual agreements between two sophisticated parties, especially where the integrity of those agreements is of critical importance to one party's existence. And the enforceability of those agreements cannot depend on the federal circuit in which relief is sought.

This case warrants review by this Court because it concerns an extremely important question regarding the interpretation of a federal statute and because the federal circuits are clearly split on their interpretation of Section 301 and the broader questions of how to prevent and remedy the sort of inequitable and harmful behavior Respondents engaged in here. Absent unlikely congressional

intervention, only this Court can resolve this issue and bring much needed clarity to the relationship between copyright law and contract law—clarity that our markets need to optimally function.

ARGUMENT

I. Section 301 must be interpreted in light of the greater goals of promoting innovation and disallowing unfair free riding on the work of others

Business competition is not a free-for-all to be won by hook or crook. Recognizing this, both common law and statutory law restrict businesses from assorted methods of competition that are harmful, dishonest, or inequitable. The examples are numerous. Firms are not free to use commercial bribery, employ false advertising, or engage in property destruction to gain a competitive advantage over rivals. See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 (2014) (Scalia, J.) (holding that parties who show "an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations" have standing to bring Lanham Act false advertising claims).

Among other statutes regulating business rivalry, the antitrust laws limit the types of competition firms can use. The Federal Trade Commission Act generally prohibits "unfair methods of competition." 15 U.S.C. § 45 (emphasis added). Monopolists, under the Sherman Act, can acquire or maintain their positions through "a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). They, however, cannot do so through unfair competitive

tactics. See *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1071-72 (10th Cir. 2013) (Gorsuch, J.) (listing unfair competitive practices, such as tying, exclusive dealing, and "efforts to defraud or lie to regulators or consumers"); see, e.g., *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 787-88 (6th Cir. 2002) (holding that widespread destruction of a competitor's property can constitute illegal monopolization).

Monopolists face special restrictions on their competitive behavior that non-monopolistic firms do not. *United States v. Dentsply Int'l, Inc.,* 399 F.3d 181, 187 (3d Cir. 2005). As the late Justice Scalia wrote, "Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). This principle is motivated by monopolists' extraordinary power. The Third Circuit wrote, "[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *LePage's Inc. v. 3M*, 324 F.3d 141, 151-52 (3d Cir. 2003) (*en banc*).

Copyright law and contract law complement and reinforce the greater body of laws to ensure healthy competition that benefits the public. Neither was intended, nor should be permitted, to work to the exclusion of the other.

Copyright law aims to induce companies and individuals to produce new creative works for the benefit of the public by making the barrier to protection low and the cost of infringement high. Indeed, statutory damages and attorneys' fees under

17 U.S.C. §§ 504-05 are available to remedy infringement of any work that "was independently created by the author (as opposed to copied from other works), and... possesses at least some minimal degree of creativity." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). But "in no case does copyright protection . . . 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). Thus, copyright law ensures that the building blocks of creative expression are free for all to use, but what is built by others with those blocks is not—unless those others choose to make their work freely available, e.g., through a creative commons license.

Contract law is similarly important, if not critical, to establish a stable market through which businesses may offer their goods and services. As with copyright law, contract law permits businesses to control the terms on which they make their goods or services available to the public where that work product falls outside the scope of copyright. Indeed, contract law is so important to the fair and productive functioning of society that Milton Friedman famously declared in his book Capitalism and Freedom that the enforcement of contracts was one of the three primary functions of government (along with providing for the military defense of the nation and protecting citizens from crimes against themselves and their property).[3]

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[3] Friedman, M., & Snowden, P. N. (2002). *Capitalism and Freedom*. University of Chicago Press. See also https://www.youtube.com/watch?v=HrgckWNgNgE (Milton Friedman – The Proper Role of Government).

Copyright, contract, and other laws must work in concert to ensure that companies are able to reap the rewards of their investments and innovation. The law was designed to preclude loopholes through which companies can violate contractual agreements to unfairly free ride on the work of others and take the income that should rightly go to the innovating company. Rather, courts must enforce the integrity of contractual agreements to the extent they are freely and fairly made.

II. Respondents' conduct in this case is a type of unfair competitive behavior that will proliferate if content-protective contract terms are vitiated by Section 301

Genius provides a valuable service to the public that requires significant resources to build and sustain. In order to transcribe and post lyrics for thousands of songs, Genius obtains licenses for song lyrics from artists and labels and hires workers and encourages music fans to ensure the most accurate information available. This free service for users generates revenue by hosting ads that users see when visiting lyric pages.

With the benefit of its search engine data collection, Google saw the success and promise of Genius' business and wanted it for itself. But rather than try to develop a superior song-lyric service, it simply stole Genius' content—avoiding all the costs of licenses and hiring workers to transcribe lyrics—and used that content to kept users on its search page, which in turn deprived Genius of visitors and advertising revenues. Google did not create anything new, has been unfairly cannibalizing Genius's

business, and has expressly violated its terms with Genius. What Genius built, Google took.

Respondents are, of course, endowed with vast financial resources and were under no obligation to contract with Genius. They could have developed their own service to display song lyrics, perhaps delivering greater accuracy, addressing songs that Genius did not, providing a different user interface, providing commentary alongside song lyrics, or in any number of other ways that represented socially beneficial competition. Instead, Google competed against Genius using Genius's content after expressly agreeing not to do so—plainly unfair competitive behavior.

There can be no real question that such behavior will only become more common if the Second Circuit's holding is left to stand. Already such behavior is no aberration, but rather appears to be part of Google's business model. The House Judiciary Committee's investigation into four dominant digital firms (Amazon, Apple, Facebook, and Google) found many instances of Google "intercept[ing] traffic from third-party websites by forcibly scraping their content and placing it directly on Google's own site.") Majority Staff of House Subcomm. on Antitrust, Commercial & Admin. Law, 116th Cong., Investigation of Competition in Digital Markets 184 (2020 [hereinafter House Tech Report]. To be clear, this is not Google acting as a search-engine to direct users to those third-party sites but rather Google offering the third-party content on its own properties and thus depriving rivals of traffic necessary to support their businesses. As such, Google has weakened rivals and sought to extend its dominance in general search into countless adjacent markets not through the

development of "a superior product," *Grinnell*, 384 U.S. at 571, but through the theft of rivals' content.

While Google has invested in its own operations and developed socially valuable services, it has also used an array of unfair competitive methods to acquire, entrench, and extend its dominant positions. For example, Google allegedly makes use of tying arrangements to require phone manufacturers to install its Search Engine with its Android Operating System and make its search engine sole service on manufacturer devices that use Android. See Amended Complaint at 45-49, *United States v. Google*, (D. D. C. 2021) (20-CV-03010). Further, it is accused of an exclusive dealing arrangement with Apple whereby it pays the maker of the iPhone and iPad billions of dollars annually to make Google the default search tool—and not install rival search tools—on Apple mobile devices. *Id.* at. 27-28.

Google has also relied on acquisitions to fuel its growth. Between 2001 and 2020, Google acquired 256 companies. House Tech Report, *supra*, at 431-50. By engaging in this acquisition spree, Google often eschewed internal expansion that "is more likely to provide increased investment in plants, more jobs and greater output." *Brown Shoe Co. v. United States*, 370 U.S. 294, 345 n.72 (1962).

In recent years, Google has begun to face government scrutiny of its conduct. See Nicolas Rivero, A Cheat Sheet to All of the Antitrust Cases Against Big Tech in 2021, Quartz (Sept. 29, 2021), https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021/. The Department of Justice filed a monopolization suit against the corporation in October 2020. Two coalitions of states soon after followed with antitrust suits of their

own. And the Department of Justice is reportedly on the verge of filing another antitrust suit against Google over its practices in digital advertising markets. Google may be on the verge of facing justice. Leah Nylen & Gerry Smith, DOJ Is Preparing to Sue Google Over Ad Market as Soon as September, Bloomberg (Aug. 9, 2022), https://www.bloomberg.com/news/articles/2022-08-09/doj-poised-to-sue-google-over-ad-market-as-soon-as-september.

Faced with governmental scrutiny of, *inter alia*, its prospective acquisitions, Google now has a much better option. It can continue its large-scale appropriation of content by stealing a would-be competitor's business rather than spending the time and money to either acquire that competitor or develop its own content. Why buy the cow when you can get the milk for free? Fortunately, contract law protections provide companies like Genius with an answer to companies like Google. This Court should accept review of this case to ensure that those protections are available nationwide.

III. The Second Circuit erroneously held that a bilateral contract is "equivalent" to "the exclusive rights within the general scope of copyright" and therefore preempted

The elements of a contract, including the requisite meeting of the minds of the parties and tender of bargained for consideration, are extra elements that make breach of contract claims qualitatively different from copyright infringement claims. Those additional elements change the nature of the action from one seeking to enforce exclusive rights against the world at large to one seeking to enforce an agreement freely entered into between two parties. Thus, the Seventh

Circuit correctly held in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (Easterbrook, J.) that "a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced." *Id.* at 1455.

As detailed in Petitioner's brief, the Fifth, Eighth, Eleventh, and Federal Circuits each appear to agree with the Seventh Circuit, as do multiple state appellate Courts, including state courts inside the Second Circuit. *See Meyers v. Waverly Fabrics, Div. of F. Schumacher & Co.*, 65 N.Y.2d 75, 78 (1985) (breach-of-contract claims not preempted). For example, in *Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305 (11th Cir. 2001) the Eleventh Circuit explained that "claims involving two-party contracts are not preempted because contracts do not create exclusive rights, but rather affect only their parties." *Id.* at 1318; *see also Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313, 1327 (11th Cir. 2010) ("pro[of] [of] a valid license agreement . . . constitutes an 'extra element'" rendering the rights under the agreement "not 'equivalent to' exclusive rights under section 106, as required for preemption."). Moreover, the Ninth Circuit, and its district courts, consistently hold that contract claims are not preempted by the Copyright Act. *See* Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 Va. L. Rev. 1141, 1179-81 (exploring the Ninth Circuit caselaw).

This majority position is in line with legislative intent. Congress made clear that copyright law was never intended to hobble the protections afforded by contract law. A House report accompanying the Copyright Act of 1976 stated that "[n]othing in the bill derogates from the rights of parties to contract

with each other and to sue for breaches of contract." H.R. Rep. No. 94-1476, at 132 (1976).

That position is also compelled by the language of Section 301 that only "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" are governed by the Act, and that nothing in Section 103 "annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301 (f)(2).

To establish its contract claim, Genius will need to prove that both Respondents took actions that contract law recognizes as acceptance, which is not trivial. *See, e.g.*, *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (Sotomayor, J.) (holding that the terms on a website were not accepted by its users). Contract claims also require proof of adequate consideration, and do not have a secondary liability doctrine, ensuring that contract law claims are truly bilateral. Thus, the elements of the claims are materially different, as are the remedies available under each claim, and the rights being enforced are not equivalent to those within the general scope of copyright. A finding of preemption in this case was thus inappropriate.

From license agreements to targeted non-disclosure agreements, businesses depend on contract law to control the use and dissemination of content regardless of whether that content is entitled to copyright protection. At its core, the Genius business model is to collect, display, and distribute information without copyright law's protection. Many companies

which employ that model do not hold copyright protection in their content, including companies that run websites and apps that collect reviews (like Yelp, TripAdvisor, and Angi), websites that host and present statistical information and polling data (like FiveThirtyEight and RealClearPolitics), weather services, and hundreds of other types of companies. Yet the Second Circuit's holding creates a legal loophole through which contract terms critical to protecting such ventures are of no effect.

The dark shadow cast by the Second Circuit's holding is not limited to websites and apps. The U.S. database industry, which is worth billions of dollars and includes a broad array of companies from Dow Jones to Westlaw, relies on contracts that limit the reproduction and distribution of the data collected. The Supreme Court's decision in *Feist*, which held that factual information cannot be protected by copyright, 499 U.S. at 346, sparked a lively debate in the 1990s concerning the abilities of databases to exist without copyright protection, with some suggesting legislation to provide copyright-like protection to factual databases. Such bills were never enacted in the United States and still the database industry flourished because of the industry's reliance on contracts. *See* Kal Raustiala & Christopher Sprigman, *The Knockoff Economy* 162-66 (2012); Rub, *supra*, at 1192. Indeed, several important federal court decisions enforced such contracts governing databases, holding they were not preempted by the Copyright Act, establishing a base-level of certainty and stability until now. *ProCD*, 86 F.3d at 1455; *Lipscher*, 266 F.3d at 1305.

The Second Circuit's erroneous interpretation of Section 301 stands to seriously disrupt decades of consistent and predictable enforcement of business

agreements. Since the passage of Section 301 in 1976, courts of appeals, apart from the Second Circuit, ruled on the preemption of contract claims 14 times. Only in one of these cases, *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005), was a contract held to be preempted. But in the last four years, the Second Circuit held a contract to be preempted twice. In both cases the contracts were standard agreements, the type of which sophisticated businesses enter routinely, and which are necessary for their operation. The Second Circuit's casual invalidation of such routine bilateral contracts casts a foreboding shadow over large segments of our economy.

Stripped of contract protections, Genius and other similarly situated firms will have little incentive to undertake ventures that collect and share publicly valuable information in which they hold no copyright. Simply put, there is no other practical way to protect their businesses. And there should not have to be—contract law is designed to address exactly this situation, where one party agrees to a condition for access to another party's work and then breaches that agreement. Section 301 of the Act does not authorize any company, whether small startup or behemoth like Google, to "drink the milkshake" of another company by accessing and using the work of that other company in violation of their contractual agreements. Genius' petition should therefore be granted.

CONCLUSION

For the reasons set forth above, *amicus* Open Markets Institute respectfully requests that the Court grant review of this case in order to address the merits of the Second Circuit's opinion and the split of authority regarding preemption of breach of contract claims under the Copyright Act.

Dated: September 8, 2022

Respectfully submitted,

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