No. 18-956

IN THE

Supreme Court of the United States

GOOGLE LLC,
Petitioner,

v.

ORACLE AMERICA, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

INTERNET ACCOUNTABILITY PROJECT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOHN THORNE
Counsel of Record
CHRISTOPHER M. YOUNG
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(jthorne@kellogghansen.com)

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Internet Accountability Project ("IAP") is a registered 501(c)(4) nonprofit advocacy organization whose mission is to call attention to the economic and political harms caused by the activities of America's dominant information technology companies, including Google. Among these harms are privacy invasions, political bias, and exploitative conduct. The IAP has a strong interest in curtailing activities that cause these harms. Google has appointed itself the world's "organize[r]" of other people's information, http://about.google (visited Feb. 11, 2020), and in this case it copied verbatim substantial amounts of Oracle's software to do so. IAP seeks to ensure that Google respects the copyrights of Oracle and other innovators in order to safeguard incentives to create and thus "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8.

SUMMARY OF ARGUMENT

Computer code may be a relative novelty, but the fair use doctrine is not: Justice Story "gave judicial recognition to the doctrine" in his 1841 decision in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).[2] *Harper & Row Publishers, Inc. v. Nation*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represents that all parties have consented to the filing of this brief.

[2] In *Folsom*, Justice Story himself did not use the phrase "fair use" to describe the doctrine. The first court to use that phrase in conjunction with *Folsom* was *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136).

Enters., 471 U.S. 539, 550 (1985). One hundred and thirty-five years later, Congress ratified *Folsom*, incorporating Justice Story's articulation of the doctrine into the statutory regime governing copyright in the United States. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2546, codified as amended at 17 U.S.C. § 107; *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (observing that Justice Story's formulation of the doctrine is "discernible" in the 1976 Copyright Act); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1105 (1990) ("The 1976 Copyright Act largely adopted [Justice Story's] summary."). Given Congress's endorsement of *Folsom*, it is unsurprising that courts continue to look to *Folsom* for guidance in resolving contemporary copyright disputes. *See*, *e.g.*, *Harper & Row*, 471 U.S. at 550 (relying on *Folsom* to illustrate a feature of the fair use doctrine); *see also* John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. Davis L. Rev. 465, 481 (2005) (identifying *Folsom* as "the foundation of modern copyright jurisprudence").

The doctrine that Justice Story articulated in *Folsom* is aimed at encouraging creation – and thus "promot[ing] the Progress of Science and useful Arts," U.S. Const. art. I, § 8, cl. 8 – by shielding copyrighted original works from copying that facilitates the cannibalization of the original's market. To this end, *Folsom* implemented a clear-cut and commonsense rule: When a secondary user copies a portion of an original work, and the secondary use of the copied portion results in a marketplace replacement for the original and thus threatens to undermine the original's sales, then the secondary use is categorically impermissible.

Worded differently, *Folsom*'s fair use doctrine does not sanction verbatim copying from an original work that results in a marketplace replacement for the original.

That is exactly what Google did. To develop the Android platform – a competitor to Oracle's own Java SE platform – Google copied verbatim 11,500 lines of copyrighted code from Oracle's Java SE platform.[3] For Google, that code was exceedingly valuable: it allowed Google to leverage an existing pool of programmers to develop programs for Android. With Oracle's code as a component, the Android platform was able to effectively replace the Java SE platform in the market. Predictably, Google's verbatim copying of Oracle's code for use in the Android platform had a measurable negative impact on Oracle's bottom line. Under existing law beginning with *Folsom*, such use of another's work is categorically not "fair."

Google urges the Court to break with the past and expand fair use for the "new technological environment." Google Br. 16, 37. Google argues that its "reuse" – Google's preferred euphemism for verbatim copying – should be permitted because otherwise programmers who are already accustomed to and prefer using Oracle's software would continue developing applications only for "Oracle-approved platforms." *Id.* at 40. In Google's view, recognizing Oracle's exclusive rights to own and license its popular software stifles competition and innovation, whereas "shar[ing]" the platform's underlying code with rivals (without a license and for no charge) would enable rivals to create valuable complementary products. *Id.*

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[3] Oracle does not object to Google's copying of 170 of the 11,500 lines of code.

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), this Court without dissent rejected an analogous argument in the antitrust context. Google offers no reason to expand forced sharing duties in the copyright context, particularly given that the copyright statute expressly provides for "exclusive rights." 17 U.S.C. § 106. Indeed, the reasoning in *Trinko* underscores the problematic nature of Google's position: it would eradicate incentives to create. No reasonable person would invest resources in creating an original work if another person could lawfully extract material portions of that work and incorporate them into a marketplace replacement. That was the key insight motivating Justice Story's recognition in *Folsom* of the doctrine now known as fair use, and it is an insight as salient in the age of smartphones as it was in Justice Story's time. *Cf. Department of Homeland Sec. v. New York*, No. 19A785, slip op. 4 (U.S. Jan. 27, 2020) (Gorsuch, J., concurring in the grant of stay) (observing that "good judicial decisions are usually tempered by older virtues").

Applying that insight to the facts of this case leads to an inescapable conclusion: Google's verbatim copying of Oracle's copyrighted code was unfair as a matter of law.

ARGUMENT

The fair use doctrine articulated in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), draws a line between secondary uses that do not result in marketplace replacements for original works and secondary uses that do. The former uses may be fair, while the latter uses are not. Google's use of Oracle's copyrighted code falls on the wrong side of this line, and antitrust policy does not provide a basis for moving it.

I. BASED ON *FOLSOM*, THE COURT SHOULD AFFIRM THE FEDERAL CIRCUIT'S FAIR USE RULING

In *Folsom*, Justice Story introduced into American copyright law a doctrine that focused on protecting original works from verbatim copying that results in marketplace replacements for the originals. Applying that doctrine in this case requires a finding that Google's use of Oracle's copyrighted code was unfair as a matter of law.

A. Prior to *Folsom*, Courts Did Not Consider Abridgments of Original Works To Constitute Copyright Infringement

The arc of English copyright history, running from Crown grants to private property in the form of copyrights, included a period when verbatim copying of portions of original works was permitted. When the British Parliament created the first version of modern statutory copyrights with the enactment of the Statute of Anne, 8 Anne c. 21 (1710), British courts recognized an occasional exception to those copyrights for "abridgments" – shortened versions of original works.

"Preposterous though it now seems, the view was held in 1740 and for many years thereafter that a 'fair' abridgment was not piratical, and that on the other hand it might deserve more praise than the original book because it was more succinct." R.M. Wiles, *Serial Publication in England before 1750*, at 160 (1957) ("Wiles"). "The whole argument was based on an assumption that a long and tedious work *ought* to be abbreviated, for the sake of the reader. 'By this method the original author becomes, perhaps, of less value, but these inconveniences give way to the advantage received by mankind, from the easier propagation of knowledge.'" *Id.* at 161 (quoting Considerations on the Case of Dr. Trapp's Sermons, Gentlemen's Magazine (July 1787)); *see Gyles v. Wilcox*, 2 Atkyns 141, 143, 26 E.R. 489, 490 (Ct. Ch. 1740) ("[I]n many cases [abridgments] are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author."); *Untitled Case in* Capel Lofft, *Reports of Cases Adjudged in the Court of King's Bench, From Easter Term 12 Geo. 3 to Michaelmas 14 Geo. 3*, at 775, 775-76 (1790) ("[A] true and proper abridgment . . . carr[ies] a large work into a smaller compass, and render[s] it less expensive, and more convenient both to the time and use of the reader."). Abridgments functioned as a "market substitute" for the original work and inevitably "encroached upon [the original work's] value." Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 Yale L.J. 186, 242 (2008); *see* Richard Godson, *A Practical Treatise on The Law of Patents for Inventions and of Copyright* 344-45 (2d ed. 1840) ("The inquiry, whether the work is *prejudiced* by the *manner* of making the abridgment, cannot be entertained.").

To prevent sales of their books being undermined by abridgments, publishers petitioned the King, as they had done to obtain Crown grants prior to the copyright statute, for supplemental grants that conferred exactly the same benefits as those available under the Statute of Anne "with the important addition of protection against abridgment." Wiles at 162. To take one example, King George II in 1739 granted a "Royal Privilege and License" to four booksellers whose eight-volume history was "near finish'd" to protect their work for a period of 14 years. *Id.* at 164-65 (quoting license). The license "strictly forbid[] and prohibit[ed] all our Subjects within Our Kingdoms and Dominions to Reprint or ABRIDGE" the work. *Id.* at 165 (quoting license). The license explained its purpose in terms of the booksellers' desire and the King's willingness to accommodate that desire: The booksellers "[we]re desirous of reaping the Fruits of their Labour, and of enjoying the full Profit and Benefit that may arise from Printing, Publishing and Vending the same, without any other Person interfering with their just Property." *Id.* at 164. The King, in response, was "willing to give all due Encouragement to such a useful Work." *Id.*

B. In *Folsom*, Justice Story Held That a Secondary Work Reliant on Verbatim Copying from a Copyrighted Original Work Infringed the Original Work's Copyright

The question of allowing abridgments eventually came to America and ended up in Justice Story's courtroom in *Folsom*.

The *Folsom* case involved competing compilations of George Washington's writings. In 1839, the plaintiffs published Jared Sparks' 12-volume set of writings by Washington, totaling 6,763 pages. *See*

Jared Sparks, *The Writings of George Washington* (1839). The first volume consisted of a biography of Washington, while the remaining 11 volumes contained "the letters of Washington, private and official, and his messages and other public acts, with explanatory notes and occasional illustrations by" Sparks. *Folsom*, 9 F. Cas. at 345. Sparks had acquired a proprietary interest in many of those letters, which had never previously been published. *Id.*

A year after publication of Sparks' work, the defendants published Charles Upham's two-volume set of Washington's writings, totaling 866 pages. *See* Charles W. Upham, *The Life of Washington* (1840). According to Justice Story, Upham's work

> is formed upon a plan different from that of Mr. Sparks, and in which Washington is made mainly to tell the story of his own life, by inserting therein his letters and his messages, and other written documents, with such connecting lines in the narrative, as may illustrate and explain the times and circumstances, and occasions of writing them.

Folsom, 9 F. Cas. at 345. To create his work – which was designed specifically for use in schools – Upham copied verbatim "a selection of the entire contents of particular letters" from Sparks' "whole collection." *Id.* at 348. In total, the copied letters amounted to 353 pages in Upham's two-volume set – a small percentage of Sparks' 6,763 pages. *Id.* at 345. Most of the letters copied by Upham had never been published prior to Sparks' work. *Id.* Even the previously published letters were identified as copies based on "punctuation and other typographical peculiarities" that appeared in Sparks' versions of those letters, but not in other publicly available versions. *Id.* at 344 (Synopsis).

To Justice Story, "the real hinge of the whole controversy" in *Folsom* turned on whether Upham had made "a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs." *Id.* at 347, 348 (opinion). The defendants insisted that Upham had made such a justifiable use, arguing that Upham had "a right to abridge and select, and use" parts of Sparks' work in his own work, which qualified as an "original and new work" that was, "in no just sense, a piracy" of Sparks' work. *Id.* at 347. To support their argument that no "piracy" had occurred, the defendants underscored that Upham had "selected only such materials, as suited his own limited purpose as a biographer." *Id.* at 348.

Justice Story accepted the defendants' contention as "doubtless, true," and acknowledged Upham's creation of "an exceedingly valuable book." *Id.* In light of Upham's "known taste and ability," Justice Story did not doubt that Upham's selection of letters "are the most instructive, useful and interesting to be found" in Sparks' work. *Id.*

But, in Justice Story's view, "that is no answer to the difficulty":

> If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.

Id.

Justice Story further explained that the infringement inquiry does not "necessarily depend upon the quantity taken," but "is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work." *Id.* "In short," the inquiry "often" involves considering several factors: "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.*

For example, even where "a considerable portion of the materials of the original work" are used in a secondary work, the secondary work "cannot fairly be treated as a piracy" if the secondary work "has other professed and obvious objects," and the portion of the original work is "undistinguishable in the mass" of the secondary work. *Id.* On the other hand, if the "best pieces" of an original work were used in a secondary work, then "it would be difficult" to not conclude that copyright infringement had occurred, because those "best pieces" "might constitute the entire value" of the original work. *Id.*

Justice Story ruled that Upham had infringed on the plaintiffs' copyright in Sparks' work and refused to permit the infringement as an abridgment. Despite acknowledging "the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries," Justice Story had "no doubt whatever" that "an invasion of the plaintiffs' copyright" had occurred. *Id.* at 349.

The crux of the infringement inquiry was whether "the value of the original is sensibly diminished" or the "labors of the original author are substantially to an injurious extent appropriated by another." *Id.* at

348. Justice Story recognized that this inquiry in any given case could entail a number of considerations, among them "the value of the materials taken" for use in the secondary work and "the importance of it to the sale of the original work." *Id.*; *see also Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5,728) (identifying "various considerations" relevant to the infringement analysis, including whether a secondary work "will be adapted to the same class of readers" as the original work and whether the secondary work will "prejudice or supersede the original work").

Justice Story ultimately distilled these considerations into his famous fair use formulation, with emphasis on "the market impact of the competitive use." L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. Intell. Prop. L. 431, 447 (1998). The effect on the market for or value of the original work, expressly incorporated by 17 U.S.C. § 107(4), is "undoubtedly the single most important element of fair use." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

C. Under *Folsom*, Google's Use of Oracle's Copyrighted Code Was Unfair as a Matter of Law

Google copied verbatim 11,500 lines of copyrighted code from Oracle's Java SE platform for use in its Android platform. Pet. App. 7a. Google was not required to use that code to create a functional platform; both Apple and Microsoft developed their own platforms without resorting to copying Oracle's code. *See id.* at 47a (noting Google's concession "that it could have written the [application programming interfaces ('APIs')] differently to achieve the same functions"); U.S. Cert. Br. 14 (noting that "Microsoft and Apple developed mobile operating systems from scratch") (citation omitted). Google simply wanted to take advantage of the popularity of Oracle's Java SE platform: because the Java SE platform was familiar to and popular with programmers, Google's incorporation of the Java SE code made it easier for programmers to develop programs for Google's competing Android platform. *See* Pet. App. 46a ("Google sought 'to capitalize on the fact that software developers were already trained and experienced in using the Java API packages at issue.'") (citation omitted); *id.* (Google "explained to the jury the importance of the APIs to the developers it wished to attract").

Google's plan worked. As the Federal Circuit noted, "substantial evidence" in the record shows that the Android platform became a marketplace replacement for Oracle's Java SE platform. *Id.* at 51a.

The evidence at trial showed that Oracle's Java SE platform "had been used for years in mobile devices, including early smartphones, prior to Android's release." *Id.* at 50a. Indeed, trial testimony established that the Java SE platform was in use in Blackberry, SavaJe, Danger, and Nokia smartphones before the Android platform hit the market. *Id.* Thus, as the Federal Circuit correctly recognized, "Android competed directly with Java SE in the market for mobile devices." *Id.*

The trial evidence also established that manufacturers that had previously licensed Oracle's platform in fact switched to Google. The evidence showed that Oracle had licensed the Java SE platform to Amazon for use in the Kindle tablet, but, following the Android platform's release, Amazon abandoned Java SE for the free Android platform. *Id.* at 50a-51a. The evidence also showed that Amazon later leveraged the free Android platform to demand a "steep discount" from Oracle for use of the Java SE platform in an e-reader. *Id.* at 51a. "In other words, the record contained substantial evidence that Android was used as a substitute for Java SE and had a direct market impact." *Id.*

Finally, the trial evidence showed that "the material copied was important to the creation of the Android platform." *Id.* at 46a. That material allowed Google "to leverage the existing community of developers, minimizing the amount of new material and maximizing existing knowledge." *Id.* at 46a-47a (citation omitted). Thus, the copied material was qualitatively significant and materially contributed to Google's ability to replace the Java SE platform on the market. *See id.* at 46a (describing Google's action as "[t]aking those aspects of the copyrighted material that were familiar to software developers to create a similar work designed to be popular with those same developers").

In light of this evidence, any reasonable jury would have been required to find that "the value of the original [work] [wa]s sensibly diminished" by the secondary work. *Folsom*, 9 F. Cas. at 348. As Justice Story held in *Folsom*, "that is sufficient, in point of law, to constitute a piracy pro tanto" – in other words, that is enough to prove copyright infringement as a matter of law. *Id.*; *see* Pet. App. 53a ("There is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.").

As *Folsom* makes plain, it is irrelevant that Google may have produced "an exceedingly valuable" product through (in part) otherwise "very meritorious labors." *Folsom*, 9 F. Cas. at 348, 349. Moreover, it is irrelevant that Google's product may to some extent be "formed upon a plan different from that of" Oracle's product. *Id.* at 345. It is also immaterial that Google "appropriated [only] a part," or even only a small part, of Oracle's code. *Id.* at 348.

Since its earliest articulation in *Folsom*, the fair use doctrine has not sanctioned verbatim copying from an original work that results in a marketplace replacement for the original. That straightforward and intuitive rule resolves the parties' dispute over fair use in favor of Oracle.

II. GOOGLE'S PROPOSAL TO EXPAND FAIR USE TO REQUIRE FORCED SHARING WITH COMPETITORS IS UNJUSTIFIED

To avoid condemnation under current fair use precedents, Google and its *amici* urge the Court to radically expand the recognized scope of fair use to permit "reuse," "sharing," "collaborative development," and "commons production" (verbatim copying by other names) of useful software created by others. *See* Google Br. 16; Microsoft Amicus Br. 7 ("Innovation . . . Relies on Collaborative Development"; "[s]oftware production 'has undergone a radical transformation'"; "'more and more software is collaboratively built'") (citations omitted); Software Freedom Law Ctr. Amicus Br. 10 ("free copying, modification and redistribution of computer program code" and "commons production" "accelerates innovation and leads to superior software").

Under Google's proposed expansion of fair use, copiers avoid costs in the fashion of "heads you lose, tails I win": If Oracle sinks large costs in writing code that does not succeed in the market, Oracle alone bears those costs. Yet if Oracle (or any other software developer) sinks large costs in writing code that becomes popular and is widely adopted by programmers, Oracle still bears those costs but "reuse" and "sharing" allow competitors to copy popular parts of Oracle's code and undermine the market for Oracle's original work.

Google and its *amici* assert that making free use of Oracle's code is necessary to open up competition for large software platforms. "[R]euse . . . prevents Oracle from locking Java developers into Oracle-approved platforms." Google Br. 40. In Google's view, competition concerns override copyright exclusivity. *See id*. (quoting *Sega Enters. Ltd. v. Accolade, Inc*., 977 F.2d 1510, 1523-24 (9th Cir. 1993): "'[A]n attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine.'"); *see also* Am. Antitrust Inst. Amicus Br. 7-8 ("Affording Copyright Protection . . . Can Entrench Dominant Firms"; successful software may "give[] a copyright holder anticompetitive power"); Developers Alliance Amicus Br. 18 (Oracle's ability to control who uses its code, and on what terms, would create "a choke point for monopoly control").[4]

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[4] It is notable that Google does not often make affirmative claims of harm to competition. Most often, its own conduct is the issue. *See* Ken Paxton, "Alternative to Google? Your Search Returned No Results," Wall St. J., Sept. 10, 2019 (announcing antitrust investigation of Google by 50 State Attorneys General); U.S. Dep't of Justice Press Release, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (July 23, 2019) (announcing antitrust investigation), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

In appealing to competition principles, Google and its *amici* do not cite antitrust precedents and in particular do not cite this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), which involved an analogous demand for sharing parts of an alleged monopolist's investment (lines of a telephone network rather than lines of software code). The plaintiff in *Trinko* claimed that Verizon was required by Section 2 of the Sherman Act to assist telephone rivals to displace Verizon's own sales, line by line, by sharing pieces of Verizon's own telephone network. Under a parallel regulatory statute that in fact required sharing, the shared facilities were to be turned over to rivals at heavily discounted prices "designed to give aspiring competitors every possible incentive to enter local retail telephone markets." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 489 (2002) (affirming the Federal Communications Commission's pricing rule for shared facilities). Here, Google and its *amici* want to share Oracle's lines of code at no charge.

In *Trinko*, this Court held that a firm's failure to share its property with rivals is generally not a cognizable Section 2 claim. 540 U.S. at 410. Firms such as Verizon "may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.* at 407. But "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* at 407-08; *cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999) (Breyer, J., concurring in part and dissenting in part) ("A totally unbundled world – a world in which competitors share every part of an incumbent's existing system . . . – is a world in which competitors would have little, if anything, to compete about.").

Justice Scalia's reasoning in *Trinko* lines up with Justice Story's reasoning in *Folsom*. Firms are driven to invest by the prospective financial rewards that their investments may yield. The prospect of profit "induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407; *cf. Folsom*, 9 F. Cas. at 347 (an "exclusive copyright" in works "encourages their publication"). If antitrust or copyright compelled firms to share the rewards of their successful investments, then those incentives to invest would be severely undermined, if not eliminated altogether. *See Trinko*, 540 U.S. at 407-08; *Folsom*, 9 F. Cas. at 347. Forced sharing would risk diminishing investments by an established firm – both investments to create and investments to maintain – for the rewards must be shared but the risks fully borne. *See Folsom*, 9 F. Cas. at 347 (asking who would undertake the efforts to create and publish original works "if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits?").

Forced sharing would also likely deter investments by new firms, because sharing may be cheaper, and is certainly less risky, than the process of innovation. Moreover, forced sharing by incumbents would harm the new firms that *do* invest in innovation, because they would be faced with competition not just from the incumbent but from all the rivals who can cheaply share the incumbent's assets. For example, Apple and Microsoft each invested resources in writing their own competing platforms "from scratch." U.S. Cert. Br. 14 (citation omitted). Those platforms compete with Google's Android platform, but, because Google copied verbatim 11,500 lines of Oracle's copyrighted code when developing Android, Google was able to avoid start-up costs that Apple and Microsoft were not. Thus, Apple and Microsoft would be competitively disadvantaged by their decision to innovate rather than imitate – precisely the opposite incentive that copyright law is designed to protect.

Trinko was a categorical decision, holding that an entire class of conduct could not meet the "anti-competitive conduct" element of a Section 2 claim as a matter of law. John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. Chi. L. Rev. 289, 289 (2005). Like the claim at issue in *Trinko*, a fuzzy copyright rule that authorized free sharing of the most successful portions of a software program would be difficult to administer. *Trinko* noted that courts do not lightly take on the obligations of "central planners," setting "proper price, quantity, and other terms of dealing." 540 U.S. at 408. Google tries to simplify those tasks by pegging the price at "zero" and the quantity at "unlimited," and providing no clear definition of what software is to be shared or on what terms.

Putting aside the absurdity of giving away private investments to "unlimited" users for "free," the software industry's evolving "terms" for "collaborative development" are quite unsettled. The website of *amicus* Open Source Initiative notes that, in real-world attempts to collaborate using open-source software, there are many variations of licenses. *See*

Open Source Initiative, "Open Source Licenses by Category" (listing nine types of licenses that are "popular and widely-used or with strong communities," eight "[s]pecial purpose licenses," nine licenses that are "redundant with more popular licenses," 26 types of "[n]on-reusable licenses," and five other licenses), https://opensource.org/licenses/category (visited Feb. 16, 2020). There is even a "License Proliferation Committee" comprised of experts trying to solve the problems that "too many different licenses makes it difficult for licensors to choose" and that "some licenses do not play well together." Open Source Initiative, "Report of License Proliferation Committee," https://opensource.org/proliferation-report (visited Feb. 16, 2020). And these are all voluntary, not coerced, arrangements. The happy world of "free" software is in fact as disorganized and messy as the campers at Woodstock.

The Federal Circuit correctly followed *Trinko* and *Folsom* in holding that substantial verbatim copying that results in a marketplace replacement for the original work is not "fair" as a matter of law. *See* Pet. App. 53a; *cf. Folsom*, 9 F. Cas. at 348 ("If so much is taken, that the value of the original is sensibly diminished, . . . that is sufficient, in point of law, to constitute a piracy pro tanto.").

CONCLUSION

The Federal Circuit's fair use ruling should be affirmed.

Respectfully submitted.

JOHN THORNE
Counsel of Record
CHRISTOPHER M. YOUNG
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(jthorne@kellogghansen.com)

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