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IF YOU WANNA USE MY LYRICS:
COPYRIGHT PREEMPTION OF BROWSEWRAP CONTRACTS
AFTER *ML GENIUS HOLDINGS LLC v. GOOGLE LLC*

By: Joseph N. Sotile*

INTRODUCTION

The Copyright Act of 1976 (the Act) was enacted to replace the United States' dual copyright system, which included both federal and state protections for different categories of artistic works.¹ To eradicate state copyright, the Act included a statutory preemption clause in § 301. But § 301 preemption has not been uniformly implemented despite the Act's intention to standardize the system. This is particularly true of copyright preemption of contracts. Circuits are split over how to approach preemption here: One side claims that copyright preempts contracts that deal with copyrightable material, and the other asserts that contracts are sufficiently different to survive preemption.²

This circuit split was recently highlighted by the 2022 case of *ML Genius Holdings LLC v. Google LLC*,³ in which the Second Circuit held that an online browsewrap contract was preempted by the copyright regime. This reinforced the circuit split and called into question internet business models that compile information online, such as eBay, Facebook, and Wikipedia. This case has the potential to especially impact businesses that do not own the underlying copyright to the material on their websites since they often rely on online adhesion contracts (commonly browsewrap contracts) to ensure others cannot appropriate their compiled information. Without this contractual protection, there is little preventing other businesses from scraping the site.⁴

* J.D., Columbia Law School, 2024. This article received 2nd Place in the New York Intellectual Property Law Association's Hon. William C. Conner Writing Competition.

1. See *infra* notes 5–8 and accompanying text.

2. See *infra* Section I.B.

3. *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206 (2d Cir. Mar. 10, 2022), *cert. denied*, 143 S. Ct. 2658 (2023).

4. There may still be a copyright claim if the compiled information is presented in a sufficiently original way. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Also, the Computer Fraud and Abuse Act of 1986 and related state law legislation may be applicable in some situations, but a recent Supreme Court decision limited the CFAA's applicability, and its use is beyond the scope of this article. See *Van Buren v. United States*, 141 S. Ct. 1648, 1652 (2021) (The Computer Fraud and Abuse Act “covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who . . . have improper motives for obtaining information that is otherwise available to them.”).

This Article sides with the majority view that copyright and contract differ despite their subject matter similarities. Therefore, contracts should not be preempted by § 301. However, to ensure that copyright policy goals are not unduly intruded upon by this change, implied preemption should be used more frequently in copyright preemption analyses. And since browsewrap contracts offer unique challenges and have the potential to be enforced in a quasi-*in rem* manner, they should be enforced only if the other party is aware that there are terms of service, as was the case in *ML Genius Holdings*.

Section I discusses the Act and the motivation behind § 301 statutory preemption. It outlines the two approaches that courts take in determining whether a contract is expressly preempted by copyright and introduces implied preemption's application. Section II introduces browsewrap contracts and explains how their enforcement is often contingent upon user awareness. Section III reviews *ML Genius Holdings LLC* to demonstrate how its holding emphasized and expanded the circuit split. Finally, Section IV proposes a uniform method of analyzing copyright preemption over contracts, with suggestions on how to resolve the still unanswered questions that the case highlighted.

I. PREEMPTION IN THE COPYRIGHT ACT OF 1976

Prior to 1976, there was a dual system of copyright in the United States. Federal copyright law provided protections for “published” works, while state copyright law, also known as common law copyright, protected “unpublished” works.⁵ This caused a number of issues, including uneven protection and unpredictable results.⁶ The Copyright Act of 1976 was passed in part to resolve this issue and set forth “a single system of Federal statutory copyright from creation.”⁷ Among its primary goals were ensuring national uniformity in copyright's application and updating copyright to align with contemporary practices.⁸

A. § 301 Statutory Preemption

In its attempt to standardize the copyright system, Congress expressly preempted other forms of copyright protections in § 301 of the Act:

5. Sidney A. Diamond, *Preemption of State Law*, 25 BULL. COPYRIGHT SOC'Y U.S.A. 204, 204 (1978).

6. *Id.*; see H.R. REP. NO. 94-1476, at 129 (1976).

7. *Id.* at 129.

8. H.R. REP. NO. 94-1476, at 129, 47 (1976).

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.⁹

This section was “designed to prevent states from setting forth a statutory scheme that would compete with the protection afforded by federal law for unpublished works.”¹⁰ § 301 sought to eliminate both state law copyright laws and any non-copyright laws that would have the same effect as common law copyright. That is why the section not only preempted all copyright schemes but also all “equivalent right[s] . . . under the common law or statutes.”¹¹

To determine whether a state law is preempted by § 301, courts apply a two-pronged test: the subject matter prong and the equivalency prong. If a state law cause of action satisfies both prongs, it is preempted by § 301.

The subject matter prong is a low bar. Any work that “fits within one of the general subject matter categories of sections 102 and 103” passes the subject matter prong.¹² This is true even if the work cannot receive

9. 17 U.S.C.S. § 301(a).

10. Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 329, 332 (2017).

11. 17 U.S.C.S. § 301(a). There is some debate over the legislative history of § 301 because an earlier draft of the section excluded some specific state law claims, including breach of contract claims, from preemption. See Rub, *supra* note 10, at 353 n.107. These exemptions were removed by amendment without discussion as to whether Congress intended to continue exempting breach of contract claims or wanted to undo that provision. See 122 CONG. REC. 32015 (1976). To add to the confusion, the legislative history in House Report 94-1476 retained vestiges of the old § 301(b)(3), claiming, “Nothing 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). This line has been quoted by some courts to support a “no copyright preemption for contracts” stance despite the removal of its partner clause in § 301. See, e.g., *Prosys, Inc. v. Johns Hopkins Bayview Med. Ctr., Inc.*, No. WDQ-07-2104, 2007 U.S. Dist. LEXIS 106761, at *11–13 (D. Md. Nov. 20, 2007). Since the history is unclear, most scholars recommend that courts ignore the old § 301(b)(3) and apply the same analysis regardless of what causes of action were listed in the removed clause. Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616, 630 n.61 (2008); see also Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. Davis L. Rev. 199, 236 (2002) (“[T]he most logical course of action is to disregard the deleted language.”).

12. H.R. REP. NO. 94-1476, at 131 (1976); see 17 U.S.C.S. § 301(a) (The section applies to any

copyright protection due to not satisfying other statutory requirements, such as if the work “has fallen into the public domain” or is “too minimal or lacking in originality to qualify.”¹³ Therefore, § 301 encompasses more works than those protected by the copyright regime.¹⁴ This was intentional. A subject matter scope that has the same bounds as the Act would have “allow[ed] states to interfere with federal policy in a way that is inconsistent with the purpose of the Act.”¹⁵

The equivalency prong is more complicated. It measures if the right given by a state law is equivalent to the “exclusive” right granted by § 106 of the Act,¹⁶ including the right to reproduce, derivative, distribute, perform, and display copyrighted works.¹⁷ Courts use the “extra element” test to determine if a cause of action is equivalent to copyright’s protection of these rights.¹⁸ The test considers whether a state law requires an element *outside of* mere reproduction, derivation, etc. to establish the cause of action.¹⁹ If so, then the rights are not equivalent, and there is no preemption since the state-protected right is outside the scope of copyright. Importantly, the element must be substantial enough to alter the “nature of the action [to make it] *qualitatively* different from a copyright infringement claim.”²⁰ An insignificant element does not differentiate a claim enough if “the underlying nature of [a] state law claim[] is part and parcel of a copyright claim.”²¹

The basis for the circuit split is over what is substantial enough to differentiate contract claims from copyright. Though § 301 was intended to be so clear as “to avoid the development of any vague borderline areas between State and Federal protection,”²² two approaches have emerged to analyze contract preemption. The first maintains that contracts are not preempted due to the extra elements of assent and the *in personam* nature of contract rights. The second argues that contracts are preempted because those elements do not change the nature of a breach of contract claim enough to make it quantitatively different from copyright

“works of authorship that . . . come within the subject matter of copyright.”).

13. H.R. REP. NO. 94-1476, at 131 (1976).

14. *See* *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446, 455 (6th Cir. 2001).

15. Ariel Katz et al., *The Interaction of Exhaustion and the General Law: A Reply to Duffy and Hynes*, 102 VA. L. REV. ONLINE 8, 22 (2016).

16. 17 U.S.C.S. § 301(a).

17. 17 U.S.C.S. § 106(1).

18. 1 NIMMER ON COPYRIGHT § 1.14[C] (2024).

19. *Nat'l Car Rental Sys. v. Comput. Assocs. Int'l*, 991 F.2d 426, 431 (8th Cir. 1993); *Harper & Row, Publs., Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983).

20. *Comput. Assocs. Int'l v. Altai*, 982 F.2d 693, 716 (2d Cir. 1992) (quoting *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)); *see also* *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1144 (9th Cir. 2006) (“The extra element must transform the nature of the action.”).

21. *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1144 (9th Cir. 2006).

22. H.R. REP. NO. 94-1476, at 130 (1976).

infringement.

1. The No Preemption Approach

The No Preemption Approach²³ maintains that contracts should not be preempted because the extra elements inherent in a contract are substantial enough to change the nature of the claim. The quintessential case for this approach is the Seventh Circuit case of *ProCD, Inc. v. Zeidenberg*, and it is also supported by the Fifth,²⁴ Eighth,²⁵ Eleventh,²⁶ and Federal Circuits (through the First Circuit).²⁷

The first difference between contract and copyright is contracts are *in personam*, meaning they “affect only their parties,” whereas copyrights are *in rem*.²⁸ Because third parties “may do as they please, . . . contracts do not create ‘exclusive rights’” in the way that is required by preemption.²⁹ Second, contracts are contingent on the other party’s voluntarily assumed promise. A contract necessitates mutual agreement; without assent from one party, neither would be bound. Since the promise fundamentally changes the nature of a breach of contract claim, it should not be preempted.³⁰ Moreover, courts have historically “read preemption clauses to leave private contracts unaffected.”³¹ This presumption allows preemption clauses to limit a state’s actions, but not a private party’s.³²

Courts that use this approach do not claim that all contracts are preemption-free. As stated in the leading case for this approach, it is “prudent to refrain from adopting a rule that anything with the label ‘contract’ is necessarily outside the preemption clause: the variations and possibilities are too numerous to foresee.”³³ However, the effect of the rule is that the vast majority of contracts will not be preempted since almost all contracts include a promise and are enforceable *in personam*, which this approach claims is enough of a differentiator.

23. The names for the approaches came from Guy A. Rub’s article *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA L. REV. 1141 (2017).

24. *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990).

25. *Nat’l Car Rental Sys. v. Comput. Assocs. Int’l*, 991 F.2d 426 (8th Cir. 1993).

26. *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305 (11th Cir. 2001).

27. *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

28. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

29. *Id.*

30. *See* *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990).

31. *ProCD, Inc.*, 86 F.3d at 1454.

32. *See* *Am. Airlines v. Wolens*, 513 U.S. 219, 232–33 (1995).

33. *ProCD, Inc.*, 86 F.3d at 1455; *see also* *Nat’l Car Rental Sys. v. Comput. Assocs. Int’l*, 991 F.2d 426, 432 (8th Cir. 1993) (“[W]e find no general rule holding breach of contract actions such as this one preempted, we examine specifically whether this cause of action seeks to protect rights equivalent to the exclusive copyright rights.”).

2. The Facts-Specific Approach

The Sixth³⁴ and Second³⁵ Circuits subscribe to the Facts-Specific Approach. It maintains that a contractual promise does not, on its own, change the nature of a claim. To find if a contract should be preempted, this approach focuses on whether a contract merely “regulates an activity that is an exclusive right, such as reproduction or distribution.”³⁶ If so, the contract is preempted because the copyright regime exclusively governs that sort of activity.³⁷

A court following this approach will determine if there is any other factual element, outside of an agreement, that differentiates the contract from copyright. A commonly accepted differentiator is a monetary transaction. A promise to pay is substantial enough to change the nature of the claim because “the Copyright Act does not provide an express right for the copyright owner to receive payment for the use of a work.”³⁸ Some courts have framed payment as physical “proof of mutual assent” and pointed to the “difference in the remedy” between a copyright claim and a breach of a promise to pay in an attempt to offer transferable guidance in determining what else could create a permissible contract.³⁹ Outside of payment, though, it is difficult to highlight exactly what factors these courts use to distinguish preempted from non-preempted contracts.⁴⁰

B. Implied Preemption

§ 301 establishes statutory preemption, but implied preemption (stemming from the Supremacy Clause)⁴¹ could still apply to the Copyright Act. Implied preemption makes a state law claim unenforceable if “enforcement of the claim interferes with the objectives of [a] federal statute.”⁴² Express and implied preemption can work in tandem, meaning the existence of an express preemption clause does not

34. *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001).

35. *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206 (2d Cir. Mar. 10, 2022).

36. Rub, *supra* note 23, at 1145.

37. *Wrench*, 256 F.3d at 457–58.

38. *Forest Park Pictures v. Universal TV Network, Inc.*, 683 F.3d 424, 431 (2d Cir. 2012).

39. *Wrench*, 256 F.3d at 456.

40. Rub, *supra* note 23, at 1147; *see generally id.* Section II.

41. U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”).

42. *Bohannon*, *supra* note 11, at 622; *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (The effect of the Supremacy Clause is that “any state law . . . which interferes with or is contrary to federal law, must yield.”).

exclude the possibility of implied preemption.⁴³ However, the Supreme Court has not ruled on implied preemption's use in copyright since the passage of the Act, so its application remains an open question.

The two types of implied preemption are field preemption (“[w]hen Congress intends federal law to ‘occupy the field’”) and conflict preemption (“to the extent of any [state law] conflict[s] with a federal statute”).⁴⁴ Field preemption does not “apply to copyright . . . because there is no evidence that Congress sought to occupy the entire field of intellectual property.”⁴⁵

However, conflict preemption could apply to copyright.⁴⁶ The conflict preemption inquiry encompasses situations where complying with federal and state regulations is impossible⁴⁷ and where the state law obstructs “the full purposes and objectives of Congress.”⁴⁸ This would apply, for instance, to a state law claim that cuts against a core purpose of the Copyright Act. Despite numerous circuit courts analyzing copyright preemption matters using conflict preemption,⁴⁹ including over preempting contract claims, its application has not garnered consistent widespread use.

II. UNDERSTANDING ADHESION CONTRACTS

Adhesion contracts add a layer of confusion when determining if copyright preempts a contract claim. There are two general types of digital adhesion contracts, and each will be analyzed in turn.

Clickwrap agreements require a user to click an “I Agree” button on the website to expressly agree to the terms of service, which are typically linked or listed next to the button.⁵⁰ Courts generally uphold the

43. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000); 1 NIMMER ON COPYRIGHT § 1.13[B] (2024).

44. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

45. *Rothman*, *supra* note 11, at 237. For statutory limitations in the scope of the Act and to § 301's reach, see, e.g., 17 U.S.C.S. Ch. 1 and 17 U.S.C.S. § 301(b)(1).

46. *Jackson v. Roberts* (In re *Jackson*), 972 F.3d 25, 34 n.6 (2d Cir. 2020) (“§ 301 perhaps supersedes the field preemption function of implied preemption, but does not bar the application of implied preemption in its conflict preemption function.”). For an extended discussion arguing for implied preemption's use in copyright, see *Rub*, *supra* note 10, and Guy A. Rub, *Moving from Express Preemption to Conflict Preemption in Scrutinizing Contracts over Copyrighted Goods*, 56 AKRON L. REV. 301, 316–320 (2023).

47. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

48. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

49. See *Jackson v. Roberts* (In re *Jackson*), 972 F.3d 25, 42 (2d Cir. 2020); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1032 (3d Cir. 2008); *Brown v. Ames*, 201 F.3d 654, 659 (5th Cir. 2000); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005); *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 761 (9th Cir. 2015); *Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001).

50. *Viva R. Moffat*, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright*

enforceability of clickwrap agreements, provided that the terms are easily accessible, as this ensures the consumer's awareness of the terms' existence.⁵¹ Therefore, assuming proper notice, well-crafted clickwrap contracts are normally recognized by law and receive the same treatment as paper contracts.⁵²

Browsewrap agreements are different because they are found elsewhere on the website (such as a link at the bottom of the page titled "Terms and Conditions"), and a user does not have to click the link or even know about the existence of the agreement to access the website.⁵³ However, according to the browsewrap agreement's terms, use of the website is conditioned on the user's implied assent. In other words, browsewrap contracts claim assent even when a user does not know they exist. For these and related reasons, browsewrap contracts have not been uniformly enforced.⁵⁴ To evaluate a browsewrap contract's validity, courts will determine if "a reasonably prudent Internet user" in a similar circumstance "would have known or learned of the existence of the license terms."⁵⁵ "Because assent must be inferred, the determination of whether a binding browsewrap agreement has been formed depends on whether the user had actual or constructive knowledge of the Web site's

Policymaking, 41 U.C. DAVIS L. REV. 45, 48 n.5 (2007); PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 2.02 (AM. L. INST. 2010).

51. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459, 466 (2006); see also Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) ("The 'clickwrap' cases often turn on whether consumers could realistically have read the entire contract before agreeing to it."); PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 2.02 rep. notes b (AM. L. INST. 2010) ("Courts generally enforce clickwrap terms and similar processes on the theory that a transferee's clicking on an 'I agree' icon forms a contract.")

52. *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 31 (2d Cir. 2002) (Paper contract principles "apply equally to the . . . world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, [and] scrollable documents."); PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 2.02 cmt. c (AM. L. INST. 2010) (Clicking "I Agree" on a clickwrap contract with proper notice of the terms "closely resembles traditional modes of agreeing to paper standard forms.")

53. Moffat, *supra* note 50, at 48 n.5. Browsewrap contracts are online agreements "in which a website offers terms that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 853 (9th Cir. 2022).

54. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 12 n.8 (2014) ("[C]ourts have been reluctant to enforce browse wraps" due in part to the fact that browsewrap "contracts are not prominent enough to be binding.")

55. *Specht*, 306 F.3d at 20; PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 2.02(b) (AM. L. INST. 2010) ("A transferee adopts a standard form as a contract when a reasonable transferor would believe the transferee intends to be bound to the form."). Note that this test may be used on a clickwrap contract as well, especially where there is an "I Accept" button but no prominent display of or link to the terms. Because there are numerous possibilities in how a website may present its terms and gain assent, there cannot be a hard rule on the enforceability of clickwrap and browsewrap contracts. Instead, a fact-specific reasonableness test is best for both categories. For expediency, this Article assumes that clickwrap contracts are presented such that they are valid contracts (i.e., the terms are presented so that they are readily accessible to the user).

terms and conditions.”⁵⁶ A practical effect of this distinction is that the enforcement of browsewrap contracts typically turns on if the party the agreement is being enforced against is an individual (not enforced) or a corporation (enforceable).⁵⁷ This is because “courts presume that businesses know what they are doing when they access another company’s Web site,” whereas the same presumption cannot be made on behalf of an individual who is not a repeat player in the field.⁵⁸ Simply put, large businesses are “generally assumed to be aware of [a website’s terms of use] while individuals are not.”⁵⁹ Since assent is crucial to contract,⁶⁰ an individual’s lack of knowledge of the contract’s existence will kill an agreement.

III. ML GENIUS HOLDINGS LLC v. GOOGLE LLC

ML Genius Holdings LLC v. Google LLC,⁶¹ a 2022 Second Circuit case, solidified and expanded the circuit split related to copyright preemption over contracts. This case centered on a browsewrap terms of service agreement popular on many websites, and its holding will likely have long-term effects on many businesses that have been designed specifically for online use. This is especially true of businesses that host user- or external-generated information and do not own the underlying copyright to that material, therefore relying on contracts to protect the content from appropriation. As the Supreme Court declined certiorari in this case,⁶² the circuit split is almost certain to deepen.

Genius and Google both display lyrics to popular songs on their websites, but neither of them owns the copyright to the exhibited lyrics. Instead, they have permission, in the form of licenses, from the copyright holders to display the lyrics on their sites.⁶³ But the licensors typically do not release the lyrics to songs.⁶⁴ Genius created a solution to this issue:

56. Long v. Provide Com., Inc., 245 Cal. App. 4th 855, 858, 200 Cal. Rptr. 3d 117, 119–20 (2016).

57. Lemley, *supra* note 51, at 462; *contra, e.g.*, Hubbert v. Dell Corp., 359 Ill. App. 3d 976, 984, 835 N.E.2d 113, 122 (2005) (finding individual plaintiffs bound by a browsewrap contract).

58. Lemley, *supra* note 51, at 463; *see* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 2.02 cmt. b (AM. L. INST. 2010) (“[M]ere reference to standard terms found on another page (browsewrap) may be insufficient under the reasonable-transferor test unless the transferee is already well-acquainted with the terms . . . from previous notices and transactions.”).

59. Lemley, *supra* note 51, at 477 n.64.

60. RESTATEMENT (SECOND) OF CONTRACTS § 1–3 (AM. L. INST. 1981).

61. *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206, at *2 (2d Cir. Mar. 10, 2022).

62. *ML Genius Holdings LLC v. Google LLC*, 143 S. Ct. 2658 (2023).

63. Brief in Opposition to the Petition for Writ of Certiorari, *MLGenius Holdings LLC*, 2022 U.S. App. LEXIS 6206 (No. 22-121), at 1.

64. Petition for Writ of Certiorari, *MLGenius Holdings LLC*, 2022 U.S. App. LEXIS 6206 (No. 22-121), at 7.

It crowdsources lyric transcriptions to songs, providing the transcripts free to site visitors.⁶⁵ Genius alleged that LyricFind, another company that collects and licenses its own transcribed lyrics, copied Genius’s crowdsourced lyrics and licensed them to Google.⁶⁶ Google then displayed these lyrics atop its page, decreasing Genius’ web traffic and ad and licensing revenue.⁶⁷

Genius alleged that these actions violated their Terms of Service. These Terms—found at the bottom right of the Genius webpage hyperlinked to text reading “Terms of Use”⁶⁸—bound everyone who accessed the site through a browsewrap contract. The Terms claimed that “[b]y accessing or using the [website], [the user] signif[ies] that [they] have read, understand and agree to be bound by these Genius Terms of Service. . . . These Terms apply to all visitors, users, and others who access the [website].”⁶⁹ The relevant contractual restriction stated:

Unless otherwise expressly authorized herein or by Genius’ express written consent, you agree not to display, distribute, license, perform, publish, reproduce, duplicate, copy, create derivative works from, modify, sell, resell, exploit, transfer or transmit for any commercial purposes, any portion of the Service, use of the Service, or access to the Service. The Service is for your personal use and may not be used for direct commercial endeavors without the express written consent of Genius.⁷⁰

Genius notified Google three times with evidence that its lyrics had been copied, but Google did not alter its behavior.⁷¹ Genius sued for breach of contract, among other claims, in New York state court.⁷² Google removed the case to the Eastern District of New York which held that Genius’s claims were preempted by § 301.⁷³

65. GENIUS, HOW GENIUS WORKS, <https://genius.com/Genius-how-genius-works-annotated> (last visited Feb. 5, 2024).

66. *MLGenius Holdings LLC*, 2022 U.S. App. LEXIS 6206, at *2.

67. *Genius Media Grp. v. Google Llc & Lyricfind*, No. 19-CV-7279 (MKB), 2020 U.S. Dist. LEXIS 173196, at *4, *32, *9 (E.D.N.Y. Aug. 10, 2020).

68. GENIUS, <https://genius.com> (last visited Feb. 5, 2024).

69. GENIUS, TERMS OF SERVICE, <https://genius.com/static/terms> (last visited Feb. 5, 2024).

70. *Id.*

71. *Genius Media Grp.*, 2020 U.S. Dist. LEXIS 173196, at *6–*9.

72. *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206, at *2 (2d Cir. Mar. 10, 2022).

73. *Id.* at *2.

This dismissal was affirmed by the Second Circuit.⁷⁴ Going through the first prong of the § 301 analysis, the Second Circuit held that the breach of contract claim satisfied the subject matter prong easily since lyrics have copyright protections.⁷⁵ Next, the Second Circuit held that the claim satisfied the equivalency prong since “the right Genius ‘seek[s] to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material.’”⁷⁶ The Court emphasized that by promising only to “refrain from reproducing” the lyrics, the Terms of Service contract was protecting “an act which in and of itself would infringe one of the exclusive rights of § 106.”⁷⁷ Therefore, the contract claim was “not qualitatively different from a copyright claim.”⁷⁸ Finding express preemption sufficient, the court did not mention or analyze implied preemption.⁷⁹ Genius’s writ of certiorari to the Supreme Court was denied.⁸⁰

Left alone, this holding presents a new dangerous precedent and would alter modern business practices. Browsewrap contracts are ubiquitous online, and many internet businesses that rely on repositories of user-generated content (Yelp, Facebook, eBay, Wikipedia) will be forced to reevaluate their business model and the protections they have over their product. And the effects would not be limited to internet browsewrap contracts. All contracts that protect information that is not copyrightable by the contractor, such as corporate nondisclosure agreements, could be deemed unenforceable unless they are accompanied by a significant enough differentiator, such as payment.

IV. MOVING FORWARD WITH COPYRIGHT PREEMPTION OVER ADHESION CONTRACTS

Contractual rights inherently differ from copyright rights despite protecting similar material. Contracts have the extra elements of a promise and being *in personam*, and those should be sufficient enough extra elements to differentiate it from copyright. Therefore, most properly formed contracts should not be expressly preempted by

74. *Id.* at *1.

75. *Id.* at *5 (quoting *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996)).

76. *Id.* at *9 (quoting *Harper & Row, Publrs., Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983)).

77. *Id.* at *10. (quoting *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446, 457–58 (6th Cir. 2001)).

78. *Id.* at *11.

79. The Second Circuit has previously approved the use of implied preemption in copyright in *Jackson v. Roberts (In re Jackson)*, 972 F.3d 25 (2d Cir. 2020).

80. *ML Genius Holdings LLC v. Google LLC*, 143 S. Ct. 2658 (2023).

copyright law. However, to protect the goals of the Copyright Act and to ensure that there is still uniformity in copyright protections, implied preemption's use in copyright should become mainstream. Additionally, given browsewrap contract's prevalence, how courts settle on the issue of their preemption will dictate business practices for years to come. The preemption of browsewrap contracts, as with their enforcement, should turn on a reasonable party's awareness of entering the contract. This proposed analysis strives to ensure contracts do not become too expansive over copyright so as to upset the balance of opposing interests that Congress navigated when designing copyright law, while also safeguarding a party's contracting autonomy.

A. *The No Preemption Approach Should Prevail*

The No Preemption Approach, maintaining that most contracts over copyrightable subject matter should not be preempted, should prevail in the split since copyright and contractual rights fundamentally differ in their scope and nature. Regarding scope, copyright applies to everybody. Copyright vests in the copyright owner and is enforceable *in rem*. That is not true of contract, in which the rights are only enforceable against the contracting parties. A contractual promise also materially alters the nature of the claim. Contractual claims cannot be properly categorized as general obligations to refrain from conducting an action—instead, the contractee voluntarily yielded their ability to engage in a preexisting right in exchange for the contractor's goods or services. Moreover, the Facts-Specific Approach lacks clarity and leads to inconsistent outcomes.⁸¹

Economic policy rationales support the determination that private contracting should be allowed even where the subject matter resembles that of copyright. Without control over the product, creators will be disincentivized to invest in their service or incentivized to make the price inaccessibly high since they will be unable to protect it from others who could freely scrape the original work.⁸² This reduces public access to a good unnecessarily, cutting against a core copyright principle of accessibility.

81. Rub, *supra* note 23, at 1147 (The Approach “requires courts to analyze contracts and compare them to copyright policies” without adequately presenting “a test that separates contracts that should be enforced from those that should not.”); *id.* at 1184–1191 (The Fact-Specific Approach is overly narrow and overly broad.).

82. Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953, 965 (2005). But see Guy A. Rub, *Contracting around Copyright: The Uneasy Case for Unbundling of Rights in Creative Works*, 78 U. CHI. L. REV. 257 (2011) for a more cautioned approach to the economics of the *ProCD* approach

B. Implied Preemption Should Be Applied to Copyright

To protect core copyright objectives, implied conflict preemption should be routinely applied to copyright.⁸³ This would provide a check to the express preemption analysis suggested in Section IV.A., which would broadly allow contracting over copyrightable materials. Conflict preemption would deem contracts invalid if they imposed too heavily on the goals of the Act, including limiting public access, fair use, or creation. While these goals are not expressly mentioned in § 301, they are crucial to the operation of the Act, triggering implied preemption.

Take the example of fair use. Limitations on fair use are ubiquitous in contracts, particularly in online browsewrap contracts: “If you have surfed the web, bought a computer, done online banking, ordered flowers, purchased a plane ticket, downloaded software, listened to music on iTunes, or watched a video on YouTube, you have entered into a contract and agreed not to make fair use of the material you encountered.”⁸⁴ These contracts “convert fair uses into breaches of contract, thereby fundamentally altering the copyright balance.”⁸⁵ Not only does this hamper fair uses of copyrighted works, but it also shifts “fair use policymaking from Congress and the courts to business entities.”⁸⁶ To be clear, not every instance of contracting around fair use should be implicitly preempted by copyright: A court would still have to analyze numerous factors, like the facts of the case as well as the extent the contract intrudes upon the goals of fair use⁸⁷ and the applicable “purposes and objectives of” the Copyright Act.⁸⁸ Altogether, implied preemption would be a necessary safeguard on far-reaching contracts and would

83. This is also recommended by the American Law Institute’s *Principles of the Law of Software Contracts*. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 1.09 (AM. L. INST. 2010) (“A term of an agreement is unenforceable if it . . . (b) conflicts impermissibly with the purposes and policies of federal intellectual property law.”).

84. Moffat, *supra* note 50, at 48.

85. *Id.*

86. *Id.* at 66.

87. *Id.* at 45. The goals of fair use include “encouraging creativity and promoting ‘progress’ by permitting some use of copyrighted works, balancing the rights of owners with public benefits, allowing flexibility for the law to adapt to changing technology, and permitting the law to reflect social norms.” *Id.* at 90.

88. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The goals underlying the particular adhesion contract must be weighed in this analysis. See Guy A. Rub, *Moving from Express Preemption to Conflict Preemption in Scrutinizing Contracts over Copyrighted Goods*, 56 AKRON L. REV. 301, 319 (2023) (The goals of a particular contract can impact the implied preemption analysis. For instance, “Genius’s standard-form agreement, which prevents copying to stop competitors for users’ attention in providing content, should be relatively problematic, as somewhat similar to the goals of copyright law. On the other hand, Facebook’s standard-form agreement, which prevents copying to maintain its users’ privacy, should be unproblematic from a copyright law perspective.”).

assuage some fears about the No Preemption Approach encroaching upon the balance of rights that copyright establishes.⁸⁹

C. Preemption of Browsewrap Contracts Depends on Awareness

In summary, the No Preemption Approach should apply to copyright preemption over contracts, and courts should utilize implied conflict preemption to protect the objectives of the Act. Applying the proposed preemption analysis to browsewrap contracts introduces complexity because the factors it relies on to distinguish a typical contract from copyright do not fit neatly. By their terms, browsewrap contracts do not require express assent, or even notice, to be binding. Further, the low barrier to entry diminishes the contracts' classification as an *in personam* right and moves it toward *in rem* since the terms bind anyone who accesses the site. Browsewrap contracts' omnipresence also has the potential to intrude on the purposes of copyright protections and on fair use of the material, triggering implied preemption.

There is a largely agreed-upon method for courts to determine when a browsewrap contract is *enforceable*: if a defendant had actual or constructive notice of the contract. Courts tend to find that sophisticated businesses are aware of the terms of such contracts. Conversely, in cases involving individuals, courts commonly find them to be unaware.⁹⁰ Individuals are often infrequent users of these services and are unfamiliar with contractual obligations. It is illogical—and debatably unconscionable—to enforce browsewrap contract terms against them if a reasonably prudent user would be unaware of its existence. This is not true for businesses. Businesses are inherently more adept and aware of the types of agreements that they may be bound to. While it would be unreasonable to expect an individual to know of or understand browsewrap contracts, it would be equally unreasonable for a corporate player *not* to expect or comprehend them. This line of reasoning is strengthened when a business is larger and has more experience in the field, such as if they are a competitor. Applied to *MLGenius Holdings LLC*, Google knew or should have known about the Terms and the accompanying commercial use provision. Genius notified Google of its alleged copying three times, and Google responded thrice.⁹¹ Therefore, it is undeniable that Google had actual awareness of the contract's Terms and (according to Genius) continued to use the site. That qualifies as

89. See Rub, *supra* note 23, at 1168–1169.

90. This standard has not been articulated by a court, which typically goes through a fact-based analysis. However, the results are largely adherent to this pattern. See Lemley, *supra* note 51.

91. *Genius Media Grp. v. Google Llc & Lyricfind*, No. 19-CV-7279 (MKB), 2020 U.S. Dist. LEXIS 173196, at *6–*9 (E.D.N.Y. Aug. 10, 2020).

contractual acceptance, and the browsewrap contract should be enforced.

As *ProCD, Inc.* discussed, just because something is a valid contract does not mean it should automatically bypass the preemption analysis, even in the No Preemption Approach.⁹² Each contract should be analyzed independently because of its unique characteristics. However, the structural faults in adhesion contracts support a more generalized stance toward the preemption analysis of shrinkwrap and browsewrap contracts. Because these contracts' enforcement turns on the reasonably prudent internet user's awareness of the terms, under the No Preemption Approach, the preemption of adhesion contracts should similarly turn on awareness.

Clickwrap contracts receive express assent and are typically treated as regular contracts, so their preemption analysis will mirror that of paper contracts. Applying the No Preemption Approach, well-crafted clickwrap contracts should not be expressly preempted by copyright, though implied preemption may still limit it. Browsewrap contracts introduce more uncertainty.

1. Preempted if Unaware of the Terms

Enforcement of browsewrap contracts against reasonably unaware parties should be preempted by copyright because they effectively create an *in rem* rights regime. Unlike paper contracts, browsewrap contracts are not private agreements since they are designed to be binding without the user's express consent.⁹³ Where online browsewrap contracts are ubiquitous and "the standard of assent necessary to form contractual relationships is minimal, then no unlicensed access to works will be possible," removing the contract from a merely *in personam* structure.⁹⁴ A browsewrap contract is effectively turned into an *in rem* framework when the information behind the browsewrap contract is only accessible by going through the contract.⁹⁵ Therefore, the minimal requirement for 'assenting' to browsewrap contracts makes their "provisions essentially

92. See *supra* note 33 and accompanying text.

93. Julie E. Cohen, *Lockner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 485 (1998); see Moffat, *supra* note 50, at 49. For a more in-depth discussion of where standard form contracts fall along the *in personam* and *in rem* spectrum, see Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

94. Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 104, 106 (1997).

95. Moffat, *supra* note 50, at 69 ("There are many situations in which the expressive material is available *only* pursuant to contract terms that limit fair use. Private contract rights that seek to restrict fair uses become exclusive rights when the contract terms apply to anyone who wishes to have access to the copyrighted work.").

equivalent to copyright protection.”⁹⁶

Browsewrap contracts in this instance should be expressly preempted by § 301. The analysis is straightforward. To start, as discussed in Section II, browsewrap contracts are unenforceable against unaware parties. Because one party is unaware, the contract is invalid and therefore unenforceable. Even if a court finds that it is a valid contract, browsewrap contracts binding a party unaware of its terms do not have an “extra element” under the Facts-Specific Approach since they do not include an element like payment. Further, the No Preemption analysis would not apply since there is no acceptance and since the contract veers into *in rem* rights due to their one-sided construction, the lack of consent necessary, and their omnipresence.⁹⁷

Implied preemption should also preempt browsewrap contracts when used against unaware individuals. The ubiquity of browsewrap contracts can conflict with the objectives of the Act, including the uniformity motivation.⁹⁸ § 301 was intended to disallow “the states [from] establish[ing] alternative, universally-applicable regimes of property-like protection for works falling within the subject matter of copyright,”⁹⁹ yet that is what the enforcement of these browsewrap contracts accomplish. Further, the enforcement of adhesion contracts depends on the peculiarities of each state’s contract law, which could alter the enforceability of the Act by state. Because of the intrusion into copyright policy and protections, these contracts should be implicitly preempted where such interference is significant.

This suggestion—that browsewrap contracts that interfere with unaware users be preempted—is not likely to have a large impact. Many unaware parties will be individual actors, and the most litigated aspects of browsewrap contracts target the commercial distribution or production of protected material.¹⁰⁰ These terms do not target casual users of the internet who have no interest in commercially reproducing the information.

2. No Express Preemption if Aware of and Implicitly Accepted the Terms

Browsewrap contracts should not be expressly preempted by copyright

96. Elkin-Koren, *supra* note 94, at 106.

97. Moffat, *supra* note 50, at 69.

98. *Id.* at 49; *see also id.* at 58 (“In the new prototypical contract of adhesion, the consumer agrees not to use the content of the website in a variety of ways that might be fair uses under the Copyright Act.”); *see generally id.* Section III.

99. Cohen, *supra* note 93, at 485.

100. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 493 (2002).

where a party is reasonably aware of the terms' existence and implicitly accepts them by continuing to use the website. This agreement would be appropriately categorized as a valid contract under the current adhesion contract analysis and should be treated as a paper contract would. Therefore, following the analysis recommended in Section IV.A, the contract should make it through the express preemption analysis because it has assent and is enforceable *in personam* to those that agreed to abide by its terms. Note that it may still be preempted by implied conflict preemption if its terms unduly undermine the Act's goals.

Under this framework, the contract in *MLGenius Holdings LLC* should not have been expressly preempted. The breach of contract claim is distinguishable from a copyright claim because Google voluntarily agreed to Genius's Terms, establishing an *in personam* claim. Google allegedly continued to scrape lyrics from Genius's site even after the practice, and the contractual rules it violated, were brought to its attention. Here, the assent and scope of enforcement is a significant enough element to distinguish the contractual claim, and it should not be expressly preempted. This would leave the court to analyze conflict preemption, which would take into account relevant facts like the goals of Genius's contract and the objectives of the Copyright Act.

CONCLUSION

MLGenius Holdings LLC emphasized and widened the circuit split regarding copyright preemption over contract, but its impact should be narrowed: Most contractual rights are different from copyright rights in nature and scope and should not be preempted under § 301. Still, implied preemption has a place to ensure that contracts do not intrude upon the purposes and objectives of the Copyright Act given that the endorsed analysis will largely allow for contracting over copyrightable material. Implied preemption will serve as a check to ensure broad-reaching contracts do not upset the balance the Copyright Act sought to create. And in upholding the balance and objectives of the Copyright Act, browsewrap contracts should be preempted when used against unaware parties. This proposed analysis strives to ensure that parties can exercise their autonomy in contracting, to respect Congress's wishes when they created the copyright regime, and to account for modern business practices in a digital reality.