

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

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Table of Contents

<i>Introduction</i>	1
<i>I. Statutory Preemption in the Copyright Act of 1976</i>	2
A. Preemption in § 301	2
B. Approaches to Copyright Preemption over Contracts	5
1. No Preemption Approach	5
2. The Facts-Specific Approach.....	6
3. Implied Preemption.....	7
<i>II. Understanding Adhesion Contracts</i>	9
<i>III. ML Genius Holdings LLC v. Google LLC</i>	10
<i>IV. Proposal for Resolving the Circuit Split</i>	12
A. The No Preemption Approach Should Prevail	13
B. Implied Preemption Should Be Applied to Copyright	14
C. Preemption of Browsewrap Contracts Depends on Awareness	15
1. Preempted if Unaware of the Terms	17
2. No Preemption if Aware of and Implicitly Accepted the Terms	19
<i>Conclusion</i>	20

INTRODUCTION

The Copyright Act of 1976 (the Act) was enacted to replace the United States' dual copyright system, which included federal and state protections for different categories of works. To effectively eradicate state copyright, the Act included a statutory preemption clause in § 301.

Despite the Act's intention to standardize the system, copyright preemption has encountered hurdles in being uniformly applied. This is particularly true surrounding copyright preemption of contracts. Circuits are split over how to approach statutory copyright preemption over breach of contract claims: One group claims that copyright preempts contracts that deal with copyrightable material and another says contracts are sufficiently different.¹

This circuit split was recently highlighted by the 2022 case of *ML Genius Holdings LLC v. Google LLC*.² The Second Circuit claimed that an online browsewrap contract was preempted by the copyright regime, reinforcing the Circuit's commitment to this approach and calling into question all internet business models that compile information online, such as eBay and Wikipedia.

This Article agrees with the majority of the circuits that copyright and contract claims differ despite their subject matter similarities. For this reason, contracts largely should not be preempted by § 301. The effect of preempting contracts would have impacts on business practices expanding far beyond this case. 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*.

¹ See *infra* Section I.B.

² *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).

Section I discusses the Act and the motivation behind § 301 statutory preemption. It also outlines the two approaches to express preemption and implied preemption’s application. Section II introduces browsewrap contracts and explains how their enforcement turns on user awareness. Section III reviews *ML Genius Holdings LLC* to demonstrate how its holding emphasized and expanded the split. Finally, Section IV proposes uniform analysis moving forward, with suggestions on how to resolve other unanswered questions that the case highlighted.

I. STATUTORY 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.³ This caused a number of issues, including a lack of uniformity in protection, confusion, and unpredictable results.⁴ The Copyright Act of 1976 was passed in part to resolve this issue. Some of its primary goals were to incentivize creative activities,⁵ promote the public interests through expanding the public domain,⁶ ensure national uniformity in copyright’s application,⁷ and update copyright to align with contemporary practices.⁸

A. Preemption in § 301

In its attempt to standardize the copyright system, the Act set forth “a single system of Federal statutory copyright from creation.”⁹ To enforce this aim, Congress expressly preempted other forms of copyright protections in § 301 of the Act. The section claims that:

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

³ Sidney A. Diamond, *Preemption of State Law*, 25 BULL. COPYRIGHT SOC'Y U.S.A. 204, 204 (1978).

⁴ *Id.*; see H.R. REP. NO. 94-1476, at 129 (1976).

⁵ Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA L. REV. 1141, 1152 (2017).

⁶ Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 251 (2002).

⁷ H.R. REP. NO. 94-1476, at 129 (1976).

⁸ *Id.* at 47.

⁹ *Id.* at 129.

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.¹⁰

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.”¹¹ § 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 “equivalent right[s] . . . under the common law or statutes.”¹²

Courts apply § 301 through 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 topic that “fits within one of the general subject matter categories of sections 102 and 103” passes the subject matter prong.¹³ This is true even if the work cannot actually be copyrighted by an individual, such as if the work “has fallen into the public domain,” is “too minimal or lacking in originality to qualify,” or is not copyrightable by the either of the parties in the suit.¹⁴ Therefore, “the Copyright Act’s subject matter is broader than

¹⁰ 17 U.S.C.S. § 301(a).

¹¹ Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 329, 332 (2017).

¹² 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 11, 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 deleted language 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 Rothman, *supra* note 6, at 236 (“Given that the reasons for its deletion are unclear, the most logical course of action is to disregard the deleted language.”); see also Rub, *supra* note 11, at 353 n.107.

¹³ H.R. REP. NO. 94-1476, at 131 (1976); see 17 U.S.C.S. § 301(a) (The section applies to any “works of authorship that . . . come within the subject matter of copyright as specified by sections 102 and 103.”).

¹⁴ H.R. REP. NO. 94-1476, at 131 (1976).

the scope of the Act's protections."¹⁵ 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."¹⁶

The equivalency prong is more complicated. It measures if the right given by a state law is equivalent to the right granted by § 106 of the Copyright Act.¹⁷ § 106 protects several exclusive rights granted to the author, like to reproduce, derivative, distribute, perform, and display copyrighted works.¹⁸ The test all circuits use to determine if a cause of action is equivalent to copyright's protection of these rights is the "extra element" test. If the state law requires an extra element such that the rights are not equivalent, then there will be no preemption.¹⁹ Specifically, the test looks if an element outside of mere reproduction, distribution, performance, or displaying is required "to constitute a state-created cause of action."²⁰ If so, there is no preemption because the right is outside the scope of copyright.²¹ Importantly, the element must be substantial enough to alter the "nature of the action [to make it] *qualitatively* different from a copyright infringement claim."²² 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."²³ The basis for the circuit split is over what is considered a substantial enough element to differentiate contract claims.

¹⁵ *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446, 455 (6th Cir. 2001).

¹⁶ 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).

¹⁷ 17 U.S.C.S. § 301(a) (The section protects "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.").

¹⁸ 17 U.S.C.S. § 106(1).

¹⁹ *Harper & Row, Publs., Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983).

²⁰ *Nat'l Car Rental Sys. v. Comput. Assocs. Int'l*, 991 F.2d 426, 431 (8th Cir. 1993) (quoting 1 Nimmer on Copyright § 1.01[B], at 1-14-15).

²¹ *Id.*

²² *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.").

²³ *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1144 (9th Cir. 2006).

B. Approaches to Copyright Preemption over Contracts

§ 301 was intended to be so clear as “to avoid the development of any vague borderline areas between State and Federal protection.”²⁴ Despite this target, 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* contract rights, as opposed to *in rem* copyright rights. The second argues 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 infringement.

1. No Preemption Approach²⁵

The No Preemption Approach maintains that contracts are typically not 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 7th Circuit case of *ProCD, Inc. v. Zeidenberg*, and it is supported by the 5th,²⁶ 7th, 8th,²⁷ 11th,²⁸ and Federal Circuits (through the 1st Circuit).²⁹

The approach asserts that contracts are different for two reasons. First, contracts are *in personam*, meaning they “affect only their parties” whereas copyrights are *in rem*.³⁰ Since third parties “may do as they please, . . . contracts do not create ‘exclusive rights.’”³¹ Second, contracts are contingent on the other party’s voluntary promise.³² 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.³³ Moreover, courts have

²⁴ H.R. REP. NO. 94-1476, at 130 (1976).

²⁵ The names for the approaches came from Guy A. Rub’s article *Copyright Survives*, *supra* note 5.

²⁶ *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990).

²⁷ *Nat’l Car Rental Sys. v. Comput. Assocs. Int’l*, 991 F.2d 426 (8th Cir. 1993).

²⁸ *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305 (11th Cir. 2001).

²⁹ *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

³⁰ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

³¹ *Id.*

³² Rub, *supra* note 5, at 1145.

³³ *See Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990).

historically “read preemption clauses to leave private contracts unaffected.”³⁴ This presumption allows preemption clauses to limit a state’s actions but not a private party’s.³⁵

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.”³⁶ However, the effect of the rule is that the vast majority of contracts will not be preempted almost all contracts include a promise and are enforceable *in personam*, which this approach claims is enough of a differentiator.

2. *The Facts-Specific Approach*

The 6th³⁷ and 2nd³⁸ Circuits follow 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 weighs if a contract merely “regulates an activity that is an exclusive [copyright] right, such as reproduction or distribution.”³⁹ If so, “it creates a right that is equivalent to copyright and is therefore expressly preempted.”⁴⁰ This is because the promise is merely refraining you from doing something that copyright would already prevent you from doing.⁴¹

A court following this approach will look at the facts of the specific agreement to see if there is any element that differentiates it from copyright. An example of a commonly accepted differentiator is a transaction.⁴² A promise to pay is substantial enough to change the nature of the

³⁴ *ProCD, Inc.*, 86 F.3d at 1454.

³⁵ *See* *Am. Airlines v. Wolens*, 513 U.S. 219, 232–33 (1995).

³⁶ *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.”).

³⁷ *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001).

³⁸ *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206 (2d Cir. Mar. 10, 2022).

³⁹ *Rub*, *supra* note 5, at 1145.

⁴⁰ *Id.*

⁴¹ *Wrench*, 256 F.3d at 457–58.

⁴² *Rub*, *supra* note 5, at 1187–1188.

claim because “the Copyright Act does not provide an express right for the copyright owner to receive payment for the use of a work.”⁴³ However, outside of payment, it is difficult to highlight exactly what factors “separate[] contracts that should be enforced from those that should not.”⁴⁴

3. Implied Preemption

While § 301 puts forth a method of express preemption, implied preemption (stemming from the Supremacy Clause) is available to many federal statutes. Implied preemption demands that a state law claim be unenforceable if “state enforcement of the claim interferes with the objectives of [a] federal statute.”⁴⁵ The effect of the Supremacy Clause is that “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”⁴⁶ Express and implied preemption can work in tandem, meaning the existence of an express preemption clause does not exclude the possibility of implied preemption.⁴⁷ However, the Supreme Court has never ruled on implied preemption’s use in copyright, 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’”)⁴⁸ and conflict preemption (“to the extent of any [state law] conflict[s] with a federal statute”).⁴⁹ Field preemption does not “apply to copyright . . . because

⁴³ *Forest Park Pictures v. Universal TV Network, Inc.*, 683 F.3d 424, 431 (2d Cir. 2012).

⁴⁴ Rub, *supra* note 5, at 1147; *see generally id.* Section II. 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. *Wrench*, 256 F.3d at 456.

⁴⁵ Bohannan, *supra* note 12, at 622.

⁴⁶ *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)).⁴⁷ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). For an extended discussion arguing for implied preemption’s use in copyright, see Rub, *supra* note 11, 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 *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). For an extended discussion arguing for implied preemption’s use in copyright, see Rub, *supra* note 11, 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).

⁴⁸ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).⁴⁹ *Id.*

⁴⁹ *Id.*

there is no evidence that Congress sought to occupy the entire field of intellectual property.”⁵⁰ For instance, there are limitations to the scope of the Act⁵¹ and to § 301’s reach.⁵²

However, implied conflict preemption could apply to copyright.⁵³ The conflict preemption inquiry encompasses situations where “compliance with both federal and state regulations is a physical impossibility”⁵⁴ and where “the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁵⁵ This would apply, for instance, to a state law claim that cuts against a core purpose of the Copyright Act.

Conflict preemption’s application is supported by the House Report. The House Report noted that part of § 301 is meant to be “consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234.”⁵⁶ Both of these decisions upheld conflict preemption, which implies that Congress did not intend for § 301 to abrogate conflict preemption’s application to copyright.⁵⁷ Additionally, lower courts have at times used conflict preemption for copyright since the passage of the 1976 Act.⁵⁸ This notably includes two instances of appellate courts applying implied conflict

⁵⁰ Rothman, *supra* note 6, at 237.

⁵¹ For various statutory limitations in the Copyright Act, see, e.g., 17 U.S.C.S. Ch. 1.

⁵² 17 U.S.C.S. § 301(b)(1).

⁵³ See generally Rub, *supra* note 11.

⁵⁴ *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)).

⁵⁵ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁵⁶ H.R. REP. NO. 94-1476, at 131 (1976).

⁵⁷ Rub, *supra* note 11, at 354; see also *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)) (noting that “[w]hen state law touches upon [federal copyright or patent] statutes, . . . the federal policy ‘may not be set at naught, or its benefits denied’ by the state law”).

⁵⁸ See, e.g., *Am. Soc’y of Composers v. Pataki*, 930 F. Supp. 873 (S.D.N.Y. 1996) (holding that a New York statute hindered the federal copyright scheme); see also *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988) (holding that a Louisiana statute’s provision conflicted with rights granted by the Copyright Act and is therefore unenforceable).

preemption to contracts specifically.⁵⁹ Nevertheless, conflict preemption’s application in copyright remains uncertain since it has not been widely used.

II. UNDERSTANDING ADHESION CONTRACTS

Adhesion contracts add a layer of confusion to the preemption analysis in *ML Genius Holdings LLC* since that case dealt with a browsewrap contract. There are two types of adhesion contracts that websites use. Clickwrap agreements require a user to click an “I Agree” button on the website to expressly agree to the terms of service.⁶⁰ 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 link’s existence to access the website.⁶¹ However, according to the browsewrap agreement’s terms, use of the website is conditioned on the user’s implied agreement to its terms. In other words, browsewrap contracts claim assent even when a user does not know they exist.⁶²

Courts will often find clickwrap agreements enforceable because of the consumer’s awareness of the terms’ existence.⁶³ For this reason, paper contract principles “apply equally to the . . . world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, [and] scrollable documents.”⁶⁴ Accordingly, clickwrap contracts are normally recognized by law.

However, browsewrap contracts have not been uniformly enforced. To evaluate a browsewrap contract’s validity, courts will determine if “a reasonably prudent Internet user” in a

⁵⁹ Both cases held that the contracts did not conflict with the purpose of the federal Copyright Act and were not preempted. See *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754 (9th Cir. 2015); *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

⁶⁰ Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 48 n.3 (2007).

⁶¹ *Id.* at 48 n.3.

⁶² 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).

⁶³ Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459, 466 (2006); see also, e.g., *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 31 (2d Cir. 2002).

⁶⁴ *Specht*, 306 F.3d at 31.

similar circumstance “would have known or learned of the existence of the license terms.”⁶⁵ “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 terms and conditions.”⁶⁶ Scholars have noted that the 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).⁶⁷ 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.⁶⁸ In other words, large businesses are “generally assumed to be aware of [a website’s terms of use] while individuals are not.”⁶⁹ Since assent is crucial to contract,⁷⁰ lack of knowledge of the contract’s existence will typically kill an agreement.

III. ML GENIUS HOLDINGS LLC V. GOOGLE LLC

ML Genius Holdings LLC V. Google LLC, a 2022 Second Circuit case, solidified and expanded the circuit split related to copyright preemption over contracts. This case centered on terms of service agreements 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-generated information and do not own the underlying copyright to that material, therefore relying on contracts to protect the content. As the Supreme Court declined certiorari in this case,⁷¹ the circuit split is almost certain to deepen.

⁶⁵ *Id.* at 20.

⁶⁶ Long v. Provide Com., Inc., 245 Cal. App. 4th 855, 858, 200 Cal. Rptr. 3d 117, 119–20 (2016) (emphasis added).

⁶⁷ Lemley, *supra* note 63, at 462.

⁶⁸ *Id.* at 463.

⁶⁹ *Id.* at 477 n.64.

⁷⁰ Restatement (Second) of Contracts § 1–3 (Am. L. Inst. 1981).

⁷¹ *ML Genius Holdings LLC v. Google LLC*, 143 S. Ct. 2658 (2023).

Genius and Google both display lyrics to popular songs on their websites, but neither of them owns the underlying copyright to the lyrics they exhibit. Instead, they have licenses from the copyright holders of song lyrics to reproduce and display the lyrics on their sites.⁷² However, the licensors typically do not release the lyrics to songs.⁷³ Genius provided a solution to this issue: They crowdsource lyric transcriptions to songs, providing the transcriptions free to visitors.⁷⁴ Genius alleged that LyricFind, a company that collects and licenses its own transcribed lyrics, copied Genius’s crowdsourced transcriptions and licensed them to Google.⁷⁵ Google then displayed these lyrics atop its page, decreasing Genius’ web traffic and ad and licensing revenue.⁷⁶

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”⁷⁷—imbued on 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].”⁷⁸ 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.⁷⁹

⁷² Brief in Opposition to the Petition for Writ of Certiorari, *MLGenius Holdings LLC*, 2022 U.S. App. LEXIS 6206 (No. 22-121), at 1.

⁷³ Petition for Writ of Certiorari, *MLGenius Holdings LLC*, 2022 U.S. App. LEXIS 6206 (No. 22-121), at 7.

⁷⁴ GENIUS, HOW GENIUS WORKS, <https://genius.com/Genius-how-genius-works-annotated> (last visited Feb. 5, 2024).

⁷⁵ *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206, at *2 (2d Cir. Mar. 10, 2022).

⁷⁶ *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).

⁷⁷ GENIUS, <https://genius.com> (last visited Feb. 5, 2024).

⁷⁸ GENIUS, TERMS OF SERVICE, <https://genius.com/static/terms> (last visited Feb. 5, 2024).

⁷⁹ *Id.*

Genius notified Google three different times with evidence that its lyrics had been copied, but Google did not alter its behavior.⁸⁰ Genius sued for breach of contract, among other claims, in New York state court.⁸¹ Google removed the case to the Eastern District which held that Genius’s claims were preempted by § 301.⁸² This dismissal was affirmed by the 2nd Circuit.⁸³

Going through the first § 301 preemption prong, the Second Circuit held that the breach of contract claim satisfied the subject matter prong easily since lyrics have copyright protections.⁸⁴ The Second Circuit also 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.’”⁸⁵ 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.”⁸⁶ Therefore, the contract claim is “not qualitatively different from a copyright claim.”⁸⁷ The court did not analyze implied preemption. Genius’s writ of certiorari was denied.⁸⁸

IV. PROPOSAL FOR RESOLVING THE CIRCUIT SPLIT

Left alone, this holding presents a dangerous precedent. The Facts-Specific Approach lacks clarity,⁸⁹ leads to inconsistent outcomes,⁹⁰ and would alter modern business practices. Browsewrap contracts are ubiquitous online, and many internet businesses that rely on user-

⁸⁰ *Genius Media Grp.*, 2020 U.S. Dist. LEXIS 173196, at *6–*9.

⁸¹ *MLGenius Holdings LLC v. Google LLC*, No. 20-3113, 2022 U.S. App. LEXIS 6206, at *2 (2d Cir. Mar. 10, 2022).

⁸² *Id.* at *2.

⁸³ *Id.* at *1.

⁸⁴ *Id.* at *5 (quoting *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996)).

⁸⁵ *Id.* at *9 (quoting *Harper & Row, Publrs., Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983)).

⁸⁶ *Id.* at *10. (quoting *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446, 457–58 (6th Cir. 2001)).

⁸⁷ *Id.* at *11.

⁸⁸ *ML Genius Holdings LLC v. Google LLC*, 143 S. Ct. 2658 (2023).

⁸⁹ *Rub*, *supra* note 5, at 1147 (The Fact-Specific 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.”).

⁹⁰ *Id.* at 1184–1191 (The approach is overly narrow and overly broad at different times.).

generated content (like Yelp, eBay, and Wikipedia) will be forced to reevaluate their business model and the protections they have over their product. The effects would not be limited to internet browsewrap contracts either. 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 approved substantial-enough-differentiator, such as payment.

Contractual rights inherently differ from copyright rights despite protecting similar material. The extra elements of a promise and of it being an *in personam* right should be sufficient to differentiate the two. Where there is a proper contract (with assent and valid consideration), this differs from copyright in both scope and nature. Therefore, most properly formed contracts should not be expressly preempted by 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, *ML Genius Holdings LLC* dealt with a browsewrap contract, slightly complicating the matter; how courts settle on this issue will dictate business practices for years to come. The preemption of these browsewrap contracts, as with their enforcement, should turn on the party's awareness that they have entered into a contract. This proposed method of 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 circuit split since copyright and contractual rights fundamentally differ in their scope and nature. Regarding scope, copyright applies to

everybody. § 301 refers to it as an “exclusive right,”⁹¹ which is a “right vested in one person, entity, or body to do something or be protected from something.”⁹² That is true of copyright since the right is conferred in the copyright owner and is enforceable *in rem*. That is not true of contract, in which the rights are only enforceable against the other contracting party. While a contract may grant certain rights, these rights cannot be described as exclusive as required by § 301 since you cannot enforce them against a third party. A contractual promise also materially alters the nature of the claim. Contractual claims cannot be properly categorized as a statutory obligation 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.

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 would be incentivized to make the price inaccessibly high.⁹³ This reduces public access to a good unnecessarily, cutting against a core copyright principle of accessibility.

B. Implied Preemption Should Be Applied to Copyright

To further protect core copyright objectives, implied conflict preemption should be applied to copyright. 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

⁹¹ 17 U.S.C.S. § 301(a).

⁹² *Exclusive right*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁹³ 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.

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, “an integral element of the federal copyright system.”⁹⁴ 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.”⁹⁵ This “convert[s] fair uses into breaches of contract, thereby fundamentally altering the copyright balance.”⁹⁶ 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.”⁹⁷ To be clear, not every instance of contracting around fair use should be implicitly preempted by copyright: A court would still have to analyze the applicable “purposes and objectives of” the Copyright Act,⁹⁸ the facts at hand, and the extent that the contract intrudes upon the overarching goals of fair use.⁹⁹ But this would be a necessary check on far-reaching contracts and would assuage some fears about the No Preemption Approach encroaching upon the balance of rights that copyright establishes.¹⁰⁰

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 these analyses to browsewrap contracts introduces complexity because their terms do

⁹⁴ Moffat, *supra* note 60, at 55.

⁹⁵ *Id.* at 48.

⁹⁶ *Id.*

⁹⁷ *Id.* at 66.

⁹⁸ *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁹⁹ 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.” Moffat, *supra* note 60, at 45, 90.

¹⁰⁰ *See Rub*, *supra* note 5, at 1168–1169.

not require express assent, or even notice, to be bound. This diminishes the contracts' classification as an *in personam* right and moves it toward *in rem* since the terms bind anyone who accesses the site. These are two of the primary factors that the No Preemption Approach uses to distinguish a typical contract from copyright. Further, browsewrap contracts' omnipresence has the potential to intrude on the purposes of copyright protections, 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. This has effectively yielded a presumption that individuals are unaware of the terms while businesses are aware.¹⁰¹ Individuals by their nature are not repeat sophisticated players, and it is illogical—and debatably unconscionable—to enforce browsewrap contract terms against them if they are unaware. This is not true for businesses. Businesses are inherently more sophisticated and aware of the types of agreements that exist, such as browsewrap contracts. 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 presumption is strengthened when a business is larger and more sophisticated and when it has more experience in the field, such as if they are a competitor. Applied to *MLGenius Holdings LLC*, the browsewrap contract should be enforced. Google knew or should have known about the Terms and the accompanying commercial use provision. Even if Google was unaware, Genius raised this issue three times, and Google responded to those letters.¹⁰² Therefore, it is undebatable that Google had actual awareness of the Terms of the contract and (according to Genius) continued to use the site. That qualifies as contract acceptance.

¹⁰¹ 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 63.

¹⁰² *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).

This leads the analysis to copyright preemption of browsewrap contracts. As *ProCD, Inc.* discussed, even with the No Preemption Approach, just because something is a “contract” does not mean it should automatically bypass the preemption analysis.¹⁰³ Each contract should be analyzed independently because of its unique characteristics.

Clickwrap contracts are treated as regular paper contracts,¹⁰⁴ so they will be subject to whichever approach the circuit uses for their preemption analysis. But applying express and implied preemption to browsewrap contracts has more challenges. While the preemption analysis typically evaluates each case independently rather than deploying a categorical approach, these contracts present structural deficiencies that cannot be overlooked. The preemption of browsewrap contracts should (as with their enforceability) turn on the user’s awareness of the terms.

1. Preempted if Unaware of the Terms

Browsewrap contracts against unaware parties should be preempted by copyright because they, effectively, create *in rem* rights against the world. These contracts “cannot plausibly be described as fundamentally private” since they are designed to be binding without the user’s express consent.¹⁰⁵ 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.¹⁰⁶ An agreement is effectively turned into an exclusive right when the information behind the browsewrap contract is

¹⁰³ See *supra* note 36 and accompanying text.

¹⁰⁴ See *supra* text accompanying note 64.

¹⁰⁵ Julie E. Cohen, *Lockner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 485 (1998); see Moffat, *supra* note 60, 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).

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

only accessible by going through the contract.¹⁰⁷ Therefore, the low bar for “assenting” to browsewrap contracts makes their “provisions essentially equivalent to copyright protection.”¹⁰⁸

Browsewrap contracts in this instance should be preempted. The express preemption analysis is straightforward. From the start, as discussed in Section II, browsewrap contracts are unenforceable against unaware parties. Since the contract would be invalid, it would not be enforceable over copyright for either circuit split approach. 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. Similarly, the No Preemption analysis would not apply since the contract escapes a pure *in personam* categorization and moves toward *in rem*, and since the contract does not have an explicit promise.

Implied preemption should also preempt these browsewrap contracts when used against unaware individuals. The ubiquity of browsewrap contracts can conflict with the objectives of Copyright, including the uniformity motivation and fair use.¹⁰⁹ It is clear that § 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,”¹¹⁰ yet that is what these types of 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 Copyright Act by state and cut further against the uniformity motivation behind its creation. These contracts stray from negotiated agreements and veer into exclusive

¹⁰⁷ Moffat, *supra* note 60, 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.”).

¹⁰⁸ Elkin-Koren, *supra* note 106, at 106.

¹⁰⁹ Moffat, *supra* note 60, 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.

¹¹⁰ Cohen, *supra* note 105, at 485.

rights due to their one-sided construction, the lack of consent necessary, and their omnipresence.¹¹¹ 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. The teeth and litigated aspects of most browsewrap contracts target the commercial distribution or production of protected material.¹¹² These terms do not target casual users of the internet who have no interest in commercially reproducing the information.

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

Where a party is aware of the terms' existence and implicitly accepts them by continuing to use the website, the browsewrap contract should not be preempted by copyright. This agreement would be appropriately categorized as a valid contract under the current browsewrap analysis,¹¹³ and should be treated as a regular contract. Therefore, following the analysis recommended in Section IV.A, the contract should make it through the preemption analysis because it has assent and is enforceable *in personam* to those that agreed to abide by its terms.

Applied to *MLGenius Holdings LLC*, the contract should not be preempted. The claim is distinguishable from a copyright claim because Google voluntarily agreed to Genius's Terms, establishing an *in personam* claim, and because Genius did not assert exclusive rights over the lyrics. Consider if Google presented lyrics at the top of its webpage sourced from a different provider. Genius would not have a suit. Instead, Google allegedly continued scraping the lyrics even after the practice, and the rules it violated, were brought to their attention. The promise and

¹¹¹ Moffat, *supra* note 60, at 69.

¹¹² Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 493 (2002).

¹¹³ See *supra* Section II.

scope of enforcement is a significant enough element to distinguish the claim. Here, the browsewrap contract claim meaningfully differs from copyright and should not be expressly preempted. Implied preemption should also fail here since the commercial provision does not intrude upon public access, fair use, or other crucial objectives of the Copyright Act. Consequently, the contract in *MLGenius Holdings LLC* should be respected.

CONCLUSION

MLGenius Holdings LLC emphasized and widened the circuit split, but its impact should be limited: Most contractual rights are different from copyright rights in nature and scope and should not be preempted under § 301. 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.