

# COPYRIGHT AND COPYING RIGHTS

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*Federal copyright law limits the copying of certain informational goods. But can state laws, and in particular state contract law, also do that? Until recently, the dominant approach was that they could. However, two recent Second Circuit decisions seem to suggest that only copyright law is allowed to do it. In other words, the Second Circuit assumes that copyright law is the only law that can regulate copying.*

*The Essay argues that the Second Circuit's approach, while shared by several other courts, is wrong. It is in tension with the text and history of the Copyright Act and with the desirable relationship between federal IP law and state commercial law. This relationship is best described as symbiotic, but the Second Circuit has put those laws on a collision course. In doing so, the Second Circuit has ignored the practices of multiple industries and the ways in which copyright law and contract law work together. Indeed, state laws, in general, and contract law, in particular, have always regulated copying. Those rights and those contracts play a crucial role in our economy. Holding them unenforceable, as the Second Circuit did, might therefore disrupt well-established legal mechanisms without promoting identifiable federal policies.*

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## INTRODUCTION

Copyright law, at its core and as its name suggests, limits the copying

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of certain informational goods. But can other laws also do so? Do all limitations on copying rest exclusively within the scope of copyright law, or can laws outside of copyright also place certain limitations on copying?

The rights that copyright law confers are often called exclusive. The Constitution, for example, states that in enacting copyright laws, Congress must “secure . . . to Authors . . . *the exclusive Right* to their . . . Writings.”<sup>1</sup> Congress, indeed, has included a list of exclusive rights within each copyright law it has enacted. For instance, the first federal copyright law, the Copyright Act of 1790, grants authors the “*sole* right and liberty of printing, reprinting, publishing and vending” their works.<sup>2</sup> The latest copyright law, the Copyright Act of 1976, gives copyright owners “exclusive rights” over the reproduction, adaptation, distribution, public performance, and public display of copyrighted works.<sup>3</sup>

But how are these rights exclusive? They are clearly exclusive in the sense that only the copyright owner may exercise them or authorize others to do so. But are they also exclusive in the sense that they are the sole legal rights that regulate the reproduction, adaptation, distribution, public performance, and public display of copyrighted and similar works? Is copyright the only right over copying?

This much broader view of exclusivity—one that perceives copyright law itself as having exclusivity over the legal regulation of copying—has sporadically appeared in case law, mostly in district court decisions.<sup>4</sup> However, two recent opinions from the influential Second Circuit have embraced and elevated it. This shift was accomplished through a broad interpretation of 17 U.S.C. § 301(a), the Copyright Act’s express preemption provision. Section 301(a) states that rights “equivalent to any of the exclusive rights” are preempted.<sup>5</sup> The Second Circuit held that bilateral contracts that limit actions that are also exclusive rights under copyright, specifically contractual limitations on copying, are preempted.<sup>6</sup>

This Essay explains that the shift towards preemption of state-law limitations on copying, especially by bilateral contracts, grants the exclusive rights under copyright law a form of exclusivity that they never had and were never intended to have. The exclusive rights under copyright are indeed exclusive in the sense that only the copyright owner may exercise them and

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

<sup>2</sup> Copyright Act of 1790 § 1, 1 Stat. 124 (current version at 17 U.S.C. § 106) (emphasis added).

<sup>3</sup> 17 U.S.C. § 106.

<sup>4</sup> See *infra* Part II (discussing the case law).

<sup>5</sup> 17 U.S.C. § 301(a).

<sup>6</sup> See *ML Genius Holdings LLC v. Google LLC*, No. 20-3113, 2022 WL 710744, at \*4 (2d Cir. Mar. 10, 2022) (holding that an owner of a website cannot contractually limit the mass copying of the website’s content, for which the owner did not own the copyright); *Universal Instruments Corp. v. Micro Sys. Eng’g, Inc.*, 924 F.3d 32, 48–49 (2d Cir. 2019).

that they prohibit states from creating their own copyright regimes. There is a real gap, however, between this understanding and a rule preventing states from placing *any* limitations on copying. Copyright law was not designed to be exclusive in this manner.

State laws, in general, and contract law, in particular, have always regulated copying, including with respect to information goods that are not protected by copyright. There are many examples of contracts that regulate copying. For instance, websites use contracts to prevent others from scraping their content, which can in itself facilitate unfair competition and undermine users' privacy; creators of databases use contracts to prevent free-riding by mass copying; and companies use non-disclosure agreements to restrict the free flow of factual information, which can facilitate trade. Those rights and those contracts, and many similar to them, play a crucial role in our economy. Preempting them will therefore disrupt well-established legal mechanisms without promoting identifiable federal policies.

This Essay proceeds as follows: Part I discusses the states' crucial, yet changing, role in our copyright law ecosystem. It explains that when Congress included the express preemption provision in the Copyright Act of 1976, it clearly meant to shrink some of the roles that states played, but likely not all of them. Part II explores the debate concerning the preemption of contracts. It shows that, until recently, the dominant approach among circuit courts was to shield contracts from preemption, partly because of the significant differences between the *in rem* nature of copyright and the *in personam* nature of contracts. However, recent decisions from the all-important Second Circuit might push the law in a different direction, setting copyright and contract on a collision course. Part III exposes weaknesses in the Second Circuit approach. That approach assumes that copyright law has a monopoly over the regulation of copying and distribution of information goods. That assumption is false. It is in tension with the text and history of the Copyright Act, the vital role that contracts play in limiting copying in various contexts, and the symbiosis between those contracts and copyright law.

## I

### THE STATES' EVOLVING ROLE IN THE PROTECTION OF CREATIVE WORKS

The Constitution envisions a national copyright system by empowering Congress to enact copyright statutes.<sup>7</sup> As James Madison stated in Federalist Paper No. 43, state laws alone “cannot separately make effectual provision[s]” sufficient for protecting copyright, and it is therefore necessary

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<sup>7</sup> U.S. CONST. art. I, § 8, cl. 8.

for Congress to pass laws for this purpose.<sup>8</sup> And indeed, shortly after the ratification of the Constitution, the first Congress passed the Copyright Act of 1790.<sup>9</sup>

Early federal statutes only covered a limited subset of what is now considered to be the scope of copyright law. As a result, states were given significant room to regulate copying. The most important example of this power had to do with unpublished work. As the Supreme Court also noted in its first copyright decision, *Wheaton v. Peters*, federal law protection was only triggered upon the publication of works.<sup>10</sup> Before publication, it was the responsibility of the states to protect those works through what is often referred to as common law copyright.<sup>11</sup>

In addition, states were also permitted to enact copyright-like laws to protect works that federal copyright did not protect. The Supreme Court clarified this issue in its last major decision concerning copyright preemption to date,<sup>12</sup> decided on the eve of the passage of the Copyright Act of 1976. In this decision, *Goldstein v. California*, the Court held that a California statute that made it illegal to copy sound recordings, which were not protected by federal copyright law at the time, was not preempted.<sup>13</sup> The Court held that the Constitution does not prohibit states from creating their own copyright-like laws and that Congress did not intend to occupy the field.<sup>14</sup> As a result, the Court continued, states were free to grant exclusive rights to authors.<sup>15</sup>

The role of states within the copyright law ecosystem did not end there. Both the federal copyright system and the states' copyright-like schemes heavily relied on and interacted with various state commercial laws.<sup>16</sup> Indeed, while copyright law creates certain property rights in information goods, the legal norms regarding the transactions that can be made with these rights are largely found outside of copyright law and usually outside of federal law altogether. Terms of art like “licenses” and “mortgages” are

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<sup>8</sup> THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).

<sup>9</sup> Copyright Act of 1790 (current version at 17 U.S.C.).

<sup>10</sup> 33 U.S. 591, 597–98 (1834) (“The states have not surrendered to the union their whole power over copyrights, but retain a power concurrent with the power of congress; so far, that an author may enjoy his common law property, and be entitled to common law remedies, independently of the acts of congress.”).

<sup>11</sup> *Id.*

<sup>12</sup> The Court mentioned copyright preemption, almost in passing, in *Capital Cities Cable v. Crisp*, 467 U.S. 691, 709–11 (1984). In that decision, the Court did not even mention the Copyright Act’s express preemption provision.

<sup>13</sup> 412 U.S. 546, 571 (1973).

<sup>14</sup> *Id.* at 567–68.

<sup>15</sup> *Id.* An even more famous example, although a much older one, is *International News Service v. Associated Press*, 248 U.S. 215 (1918), where the Supreme Court created the hot news doctrine by recognizing a “quasi property” right to prevent misappropriation through copying of certain factual information that was, of course, not protected by copyright. *Id.* at 236.

<sup>16</sup> See *infra* notes 17–18 and accompanying text.

mentioned in the Copyright Act but are not defined by federal law.<sup>17</sup> Moreover, transactions in the physical objects in which creative works are embodied (e.g., books and CDs) are governed exclusively by state personal property laws and contract laws, primarily the Uniform Commercial Code.<sup>18</sup> Indeed, core principles of state commercial law, mainly contract and property laws, have always been used in the exploitation of copyright and have played a critical role in the success of the federal scheme.

When Congress passed the current copyright statute, the Copyright Act of 1976, it decided to narrow the role of states in regulating information goods. It used its express preemption power and enacted Section 301(a), which reads:

[A]ll 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 . . . 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.<sup>19</sup>

Section 301(a) had a major effect on the relationship between federal copyright law and various state laws, although it is possible that Congress's main motivations for enacting it were more modest. The problems with the dual copyright systems—where state laws protected pre-publication works and federal law protected post-publication works—were discussed at length during the legislative process of the Copyright Act of 1976.<sup>20</sup> Following those discussions, Congress decided to abolish that system and provide federal copyright protection as early as the work is fixed (meaning, typically,

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<sup>17</sup> See Ariel Katz, Aaron Perzanowski & Guy A. Rub, *The Interaction of Exhaustion and the General Law: A Reply to Duffy and Hynes*, 102 VA. L. REV. ONLINE 8, 21 (2016) (“Federal IP laws rely on state law definitions of those terms. This symbiosis between federal IP law and general commercial law cuts across many IP doctrines.” (footnote omitted)); David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 24–29 (1999) (discussing the role of state contract law within federal copyright law).

<sup>18</sup> See Guy A. Rub, *Against Copyright Customization*, 107 IOWA L. REV. 677, 709 (2022) (discussing the role of state property and contract laws in transactions over copyrighted goods).

<sup>19</sup> 17 U.S.C. § 301(a).

<sup>20</sup> See, e.g., COPYRIGHT L. REVISION., H.R. DOC. NO. 94-1476, at 81–83 (1976) (describing some of the arguments and changes in the Copyright Office's approach toward the abolition of the dual system and referring to this question as “[p]erhaps the most fundamental issue underlying the entire revision [of the Copyright Act]”).

written down).<sup>21</sup> Section 301 was first and foremost designed to achieve that goal, as the House Report accompanying that bill explained:

Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of a dual system . . . the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is “created” . . . . Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance . . . .<sup>22</sup>

Section 301(a), therefore, was primarily enacted to eliminate common law protection for unpublished works. However, it was more broadly drafted to prohibit any equivalent legal regime. As such, it prohibited states from adopting any copyright-like legal scheme.

## II

### ARE STATES’ COPY RIGHTS EQUIVALENT TO COPYRIGHT? THE CONTRACT PREEMPTION DEBATE

The Copyright Act of 1976 preempts rights established by state laws that are “equivalent” to the exclusive rights under copyright.<sup>23</sup> But what are equivalent rights? Obviously, states cannot create their own broad intangible property regime over the reproduction and distribution of fixed original works of authorship. That is the heart of federal copyright law, and states are not allowed to mimic it. But, at the other extreme, are states completely excluded from prohibiting copying and distribution? Decisions concerning the preemption of breach of contract claims—including the recent decisions of the Second Circuit—address this issue.<sup>24</sup>

The contract preemption case law considers whether the Copyright Act’s express preemption mechanism applies to contractual restrictions on copying information goods. There is arguably a significant tension between copyright law and contract law.<sup>25</sup> When buyers purchase copyright-protected

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<sup>21</sup> See 17 U.S.C. § 102(a) (providing that “[c]opyright protection subsists . . . in original works of authorship *fixed* in any tangible medium of expression” (emphasis added)). The Copyright Act further states that a work is fixed “when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101.

<sup>22</sup> COPYRIGHT L. REVISION, H.R. REP. NO. 94-1476, at 129 (1976).

<sup>23</sup> 17 U.S.C. § 301(a).

<sup>24</sup> See *infra* notes 40–43.

<sup>25</sup> This tension has been extensively discussed in the literature. See, e.g., MARGARET J. RADIN,

goods, federal law dictates certain things they can and cannot do with it. They can, for example, sell the goods to another or create a parody thereof,<sup>26</sup> but they cannot create multiple copies for commercial exploitation.<sup>27</sup> The Supreme Court noted that this regime creates a delicate balance between the rights of owners and users to “promote the Progress of Science.”<sup>28</sup>

Contract law operates differently. At its core, and subject to minimal limitations, contract law is not designed to create specific arrangements that will balance the conflicting interests of various groups. Instead, it just enforces the contracting parties’ own arrangements.<sup>29</sup> The driving force of contract law is consent and nothing more. When it comes to information goods, as far as contract law is concerned, the parties can create their own allocation of rights. Therefore, they are free to contractually prohibit actions that copyright law does not prohibit, such as the copying of unprotected works, or permit actions that copyright law prohibits, such as commercial translation.

This alleged tension between the perception of copyright law as promoting Congress’s delicate balance and contract law’s deeply rooted laissez-faire philosophy can raise the possibility of preemption. And indeed, since Congress enacted the Copyright Act of 1976, in more than 350 decisions, courts ruled on whether and when the Copyright Act expressly preempts a breach of contract claim.<sup>30</sup>

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BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 39–50, 168–76 (2013); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 429–35 (1999); John F. Duffy & Richard Hynes, *Statutory Domain and the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1, 74–75 (2016); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 496–98 (2010); Katz et al., *supra* note 17; Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 128–33, 147–50 (1999); Nimmer et al., *supra* note 17; Guy A. Rub, *Contracting Around Copyright: The Uneasy Case for Unbundling of Rights in Creative Works*, 78 U. CHI. L. REV. 257 (2011).

<sup>26</sup> See 17 U.S.C. § 109(a) (providing that the owner of a copy of a work may transfer it); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding a parody non-infringing as fair use).

<sup>27</sup> See 17 U.S.C. § 106 (providing that the *owner* of the copyright has the exclusive right to reproduce copyrighted works in copies or phonorecords).

<sup>28</sup> See, e.g., *Kirtsaeng v. John Wiley & Sons*, 579 U.S. 197, 204 (2016) (citing U.S. CONST. art. I, § 8, cl. 8) (discussing the balance between promoting authors creations and enabling others to build upon such creations).

<sup>29</sup> See, e.g., *Kendzierski v. Macomb Cnty.*, 931 N.W.2d 604, 612 (Mich. 2019) (“[T]he bedrock principle of American contract law [is] that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.”); *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 421 (N.Y. 1995) (“Freedom of contract prevails in an arm’s length transaction between sophisticated parties such as these, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain.”).

<sup>30</sup> See generally Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*,

Until recently, the dominant approach among federal circuit courts—the Supreme Court has never addressed the Copyright Act’s express preemption provision—was to hold contracts as categorically not preempted. Courts reasoned that contracts are bilateral arrangements between contracting parties, while copyright is a property right enforceable against the world.<sup>31</sup> Therefore, the two are not equivalent. While this approach is mostly identified with the Seventh Circuit’s decision in *ProCD v. Zeidenberg*,<sup>32</sup> it was first articulated by the Fifth Circuit and later explicitly adopted by the Eleventh Circuit and the Federal Circuit.<sup>33</sup> Three additional circuit courts—the Fourth Circuit, the Eighth Circuit, and the extremely important Ninth Circuit—came very close to fully embracing this approach, although, at times, their reasoning was less unambiguous than the other four circuit courts mentioned above.<sup>34</sup>

A conflicting approach always existed at the margin, nevertheless. That approach, expressed in several district court opinions and by one circuit court—the Sixth Circuit—held that a breach of contract claim is preempted if it only limits actions that are exclusive rights, such as copying and distribution of information goods.<sup>35</sup> But the Sixth Circuit and the district courts within its jurisdiction hear relatively few copyright-related cases,<sup>36</sup> and therefore this approach was not often followed. Recent Second Circuit decisions, however, created a deep circuit split concerning contract preemption and might mark a significant shift in the law’s trajectory. The Second Circuit is one of the two most important federal circuit courts in our copyright law ecosystem (the Ninth Circuit being the other), especially due to its appellate jurisdiction over the influential Southern District of New York.<sup>37</sup> However, until recently, the Second Circuit did not express any clear

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103 VA. L. REV. 1141 (2017) (exploring the case law).

<sup>31</sup> See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (“[A] simple two-party contract is not equivalent to any of the exclusive rights within the general scope of copyright and therefore may be enforced.” (quotation marks omitted)).

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., *Real Est. Innovations, Inc. v. Houston Ass’n of Realtors, Inc.*, 422 F. App’x 344, 349 (5th Cir. 2011); *Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys. LLC*, 596 F.3d 1313, 1326 (11th Cir. 2010); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990).

<sup>34</sup> See *Rub*, *supra* note 30, at 1171–72, 1179–80, 1183–84 (describing how the Fourth, Eighth, and Ninth Circuit courts have grappled with the *ProCD* no-preemption approach).

<sup>35</sup> See *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 454–58 (6th Cir. 2001).

<sup>36</sup> See William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTEL. PROP. L. 1, 12, 42 (2006) (noting that in the early years of the 21st century the Sixth Circuit heard 6.5%–8.5% of copyright cases, and even a lower share at the end of the 20th century, and discussing the court’s limited impact on copyright law).

<sup>37</sup> See *id.* at 41 (noting that the Second Circuit and the Ninth Circuit together render about half of all appellate copyright decisions); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 161 (1998) (exploring the importance of the Second and Ninth Circuits in developing copyright law).



view on the preemption of contracts. The views in the district courts within its jurisdiction—those courts having issued more than 50 decisions on this matter—were split, with some judges adopting the common approach among circuit courts and others embracing an approach similar to that of the Sixth Circuit.<sup>38</sup> But the Second Circuit stayed out of this debate. In fact, in 2012, in its most in-depth treatment of the issue, the Second Circuit analyzed the conflicting approaches in depth only to avoid choosing one by noting that both would reach a similar result on the case before it.<sup>39</sup>

But the Second Circuit recently changed its course. In two opinions, the court adopted the minority view—the one advanced by the Sixth Circuit—and held two contracts preempted. The first of those decisions came in *Universal Instruments Corp. v. Micro Systems Engineering Inc.*<sup>40</sup> The case involved a dispute between two software companies. The plaintiff sold its software for the first phase of the defendant’s automatization program under a contract that, among other things, arguably implicitly prohibited the defendant from adapting the software.<sup>41</sup> When the defendant picked one of the plaintiff’s competitors to complete the program’s second phase, it needed to adapt the software in a way that arguably breached the contract. The plaintiff sued for copyright infringement and breach of contract. After a long discussion concerning copyright infringement, the court spent just a few paragraphs on the breach of contract claim. It ruled, possibly without appreciating the importance of this precedent, that “[b]ecause this portion of Universal’s breach of contract claim seeks solely to vindicate an exclusive right [i.e., adaptation] under the Copyright Act, it is preempted.”<sup>42</sup> In 2022, in *ML Genius Holdings LLC v. Google LLC*, the Second Circuit once again held a contract preempted.<sup>43</sup> The plaintiff published the lyrics of popular songs on its website with permission from the copyright owners.<sup>44</sup> Google (also with the copyright owners’ permission) allegedly copied the content of

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<sup>38</sup> The two leading decisions in the Southern District of New York were delivered a few months apart. *Compare* *Architectronics, Inc. v. Control Sys., Inc.*, 935 F. Supp. 425, 438–41 (S.D.N.Y. 1996) (holding that contracts are never equivalent to copyright), *with* *Am. Movie Classics Co. v. Turner Ent. Co.*, 922 F. Supp. 926, 930–32 (S.D.N.Y. 1996) (holding that contract over the copying and distribution on information goods are preempted). *See also* *Canal+ Image UK Ltd. v. Lutvak*, 773 F.Supp. 2d 419, 441–46 (S.D.N.Y. 2011) (exploring the conflicting approaches among judges in the Southern District).

<sup>39</sup> *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 434–36 (2d Cir. 2012) (holding that an implied promise to compensate plaintiff if its idea for a TV series is later used by the defendant is enforceable).

<sup>40</sup> 924 F.3d 32 (2d Cir. 2019).

<sup>41</sup> *Id.* at 37, 49.

<sup>42</sup> *Id.* at 49.

<sup>43</sup> *ML Genius Holdings LLC v. Google LLC*, No. 20-3113, 2022 WL 710744, at \*4 (2d Cir. Mar. 10, 2022), *cert. denied*, No. 22-121, 2023 WL 4163205, at \*1 (U.S. 2023).

<sup>44</sup> *Genius Media Group Inc. v. Google LLC*, No. 19-CV-7279, 2020 WL 5553639, at \*1 (E.D.N.Y. Aug. 10, 2020).

the plaintiff's website.<sup>45</sup> Once the lyrics were copied, they were displayed on Google's website when users searched for them, thus eliminating the need to visit the plaintiff's website. The plaintiff's user agreement, however, requires visitors to its site to promise not to do just that. It thus sued Google for a breach of contract. The Second Circuit held that because the plaintiff was trying to prevent Google from copying information and creating derivative works, "the right [the plaintiff] seeks to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material," and the contract was thus preempted.<sup>46</sup> On June 26, 2023, the Supreme Court denied the plaintiff's petition for a writ of certiorari.<sup>47</sup>

The significance of this recent surprising trend is still unknown. However, because of the centrality of the Second Circuit, its recent holdings may play a significant role in the development of the law. In fact, since the passage of the Copyright Act of 1976, circuit courts have only held three contracts preempted. The Sixth Circuit did it once in 2005.<sup>48</sup> And the Second Circuit did it twice in recent years.<sup>49</sup> It is possible that following the Second Circuit's recent decisions, copyright preemption will expand to possibly preempt many state laws regulating the copying and distribution of information goods. Specifically, contracts that limit copying and distribution of information, particularly if litigated in the Second Circuit jurisdiction (which, of course, prominently includes New York), will face a significant

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<sup>45</sup> *Id.* (explaining how Google contracted with database LyricFind to provide licensed lyrics for display in Google's search results).

<sup>46</sup> *ML Genius Holdings LLC*, 2022 WL 710744, at \*4 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 201 (2d Cir. 1983)).

<sup>47</sup> *See ML Genius Holdings LLC v. Google LLC*, No. 22-121, 2023 WL 4163205 (U.S. 2023). Prior to denying the plaintiff's petition, the Supreme Court invited the U.S. Solicitor General to submit a brief on this matter. The Solicitor General's brief rejected the Second Circuit approach as "sweep[ing] too broadly." Brief for the United States as Amicus Curiae at 11, *ML Genius Holdings LLC v. Google LLC*, No. 22-121 (U.S. filed May 23, 2023). It nevertheless recommended the Court to reject the plaintiff's petition because it claimed that the case is not a proper vehicle for addressing the issue. The Solicitor General focused on the nature of the contract in question—a browsewrap that was allegedly accepted by merely using the plaintiff's website—as creating unique legal difficulties, both as a matter of contract law and as a matter of copyright preemption law. *Id.* at 17–21. A full analysis of the Solicitor General's approach and its implications on online contracting is beyond the scope of this work. *See* Guy Rub & Jeremy Telman, *Guest Post from Guy Rub on Federal Law and Browsewrap Agreements*, L. PROFESSORS BLOG NETWORK: CONTRACTSPROFBLOG (June 2, 2023), [https://lawprofessors.typepad.com/contractsprof\\_blog/2023/06/guest-post-from-guy-rob-on-federal-law-and-browsewrap-agreements.html](https://lawprofessors.typepad.com/contractsprof_blog/2023/06/guest-post-from-guy-rob-on-federal-law-and-browsewrap-agreements.html) [<https://perma.cc/MG8W-LXPM>].

<sup>48</sup> *Ritchie v. Williams*, 395 F.3d 283, 287–88 (6th Cir. 2005) (holding that breach of contract claims were preempted as "'equivalent' to infringement claims [without a] meaningful 'extra element,' . . . that removes the reformulated claims from the policy of national uniformity established by the preemption provisions of § 301(a)").

<sup>49</sup> *ML Genius Holdings LLC*, 2022 WL 710744, at \*4; *Universal Instruments Corp. v. Micro Sys. Eng'g, Inc.*, 924 F.3d 32, 48–49 (2d Cir. 2019).

risk of preemption.

### III

#### THE COPYING MONOPOLY FALLACY: THE FEDERAL-STATE LAWS SYMBIOSIS IN REGULATING COPYING

The Second Circuit's approach, holding a contract preempted if it limits any action that is an exclusive right, can be justified only if the Copyright Act is supposed to be the sole law concerning such actions: copying, distribution, public performance, and public display of information goods. In other words, this approach implies that copyright law has a monopoly on restraints on copying (and other exclusive rights) and that it trumps all other laws that attempt to regulate that action.<sup>50</sup> But that is a fallacy. The relationship between federal and state law is much better described as a symbiosis: One completes the other. This section explains that the copyright monopoly assumption makes little sense. The text of the Copyright Act and its history certainly do not advance such an approach. Moreover, it conflicts with the policies and practices of both federal copyright law and commercial law.

Starting with the text, the Copyright Act preempts rights that are "equivalent to any of the exclusive rights."<sup>51</sup> For the Second Circuit, this reference to the "exclusive rights" was enough to adopt a test that only inquires whether an act that is an exclusive right was restricted. But the text requires an analysis of the equivalency requirement as well. Holding contracts equivalent to copyright is problematic because there are significant differences between an *in rem* right like copyright and an *in personam* right like a contractual one. Copyright can apply between strangers, but contracts apply between parties who have previously interacted with one another.<sup>52</sup> Contracts require assent and consideration,<sup>53</sup> and copyright does not. The remedies for violating property rights are typically much broader and harsher, which is also the case with copyright law.<sup>54</sup> And copyright law

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<sup>50</sup> This part of the essay explains that the Second Circuit approach, as it appears in its recent case law, is erroneously overbroad. *See also* Brief for the United States as Amicus Curiae, *supra* note 47, at 11 (suggesting that the approach "sweep[s] too broadly"). However, this essay does not suggest that every contract over information goods should always be enforceable, as a matter of federal or state law. *See infra* notes 83, 84.

<sup>51</sup> 17 U.S.C. § 301(a) (2022).

<sup>52</sup> *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) ("A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please . . .").

<sup>53</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

<sup>54</sup> *Compare* 17 U.S.C. §§ 502–06 (stating the remedies for copyright infringement, including injunctions, impounding of infringing articles, actual damages, accounting, statutory damages,

includes a host of doctrines to capture indirect infringers, such as those who helped or benefited from the infringement,<sup>55</sup> while contract law has no similar mechanism.

Historically, the inclusion of the express preemption provision in the Copyright Act of 1976 does not show that states were left with no role to play in regulating the copying of information goods.<sup>56</sup> As noted in Part I, prior to the enactment of the Copyright Act of 1976, states played a large part in granting rights, including copyright-like rights, over information goods. Congress clearly wanted to expand the scope of federal copyright law and shrink states' involvement within that area. Specifically, as noted, Congress's desire to federalize the protection of non-published works is thoroughly documented in the Act's legislative history.<sup>57</sup> However, there is no indication that Congress ever intended to eliminate states' role in regulating the copying and distribution of information goods.

Eliminating the role of state laws, and in particular contract law, in regulating copying seems illogical. Copying and distributing information goods can be done in a large variety of contexts, some with very little to do with copyright law, even in its broadest sense. Copyright law, as a statutory regime, simply does not (and cannot) address all of those contexts. Property law typically provides rigid, generally-applicable regulatory schemes.<sup>58</sup> In fact, their broad applicability, including against remote third parties, is one of the main justifications for their inflexibility.<sup>59</sup> But such an inelastic scheme is rarely suitable for all situations—one size rarely fits all (and sometimes fits none).

Therefore, property regimes invite bilateral modifications. Indeed, because property law impacts third parties and their ability to use the property in question, the law limits customization. Real property law, for example, limits the creation of idiosyncratic property rights in a way that contract law does not. Thus, property law might prevent Alice and Bob, two neighbors, from creating an easement that would require Bob, and any

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attorney's fees, and criminal sanctions), *with* RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981) (noting that equitable remedies for breach of contract are unavailable if expectation damages are adequate).

<sup>55</sup> See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (holding defendant liable for contributing copyright infringements of its users).

<sup>56</sup> Interestingly, in the past, the Second Circuit recognized that, under certain circumstances, states were allowed to regulate the reproduction of factual information, even by quasi property rights. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 852–53 (2d Cir. 1997) (holding that a narrow prohibition on the copying of “hot-news” by state law is not preempted by copyright).

<sup>57</sup> See H.R. DOC. NO. 94-1476, *supra* note 20 and accompanying text.

<sup>58</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–4 (2000) (explaining why the limitation on property rights are needed to minimize the costs of third parties).

<sup>59</sup> *Id.* at 3 (noting that property conveyances must conform to specific forms to define a cognizable property right).

successor in interest in his land, to take Alice's dog for a walk every day,<sup>60</sup> but a contract that creates such an arrangement between neighbors would be unproblematic and enforceable.<sup>61</sup> If the Second Circuit's copyright monopoly assumption is correct, copyright law would be quite unusual in being a property law regime that does not allow the creation of different bilateral arrangements.

Preventing states from regulating copying would also be inconsistent with common practices, where copying is often limited by contracts and other state laws, often when copyright law is inapplicable. A few examples might clarify this point, starting with the contract that the Second Circuit found preempted in *ML Genius v. Google*. As noted, that contract prohibited commercial copying of the content of the plaintiff's website.<sup>62</sup> Such an agreement is not unusual. Multiple websites include similar terms within their users' agreements. Their goal is to prevent automatic extraction of their content, also known as data scraping.

There are many reasons why websites might fight data scraping. For example, like Genius, many websites collect and manage information for which they do not own the copyright—for example, websites devoted to sporting results, the weather, users' reviews, or statistics. Scraping those websites, especially if a giant like Google does it, can foster free riding and undermine the continued existence of those websites, a concern that was also raised in congressional discussions in recent years.<sup>63</sup> Other websites attempt to prevent scraping for different reasons, such as protecting their users' privacy or even undermining price competition. Consider, for example, the high-profile, long-lasting legal dispute between LinkedIn and hiQ Labs.<sup>64</sup>

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<sup>60</sup> See *id.* at 17 (suggesting that American courts enforce promises as property rights only if the promise benefits an interest in the land). See also *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243, 246–48 (Mass. 1979) (discussing the unenforceability of certain real property covenants); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 894–95 (2008) (explaining how and why property law restricts the creation of servitudes on land).

<sup>61</sup> Merrill & Smith, *supra* note 58, at 3.

<sup>62</sup> See *ML Genius Holdings LLC v. Google*, No. 20-3113, 2022 WL 710744, at \*4 (2d Cir. Mar. 10, 2022) (noting that the contract sought to protect the plaintiff's control over reproduction of the copyrighted material).

<sup>63</sup> See STAFF OF H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REP. & RECOMMENDATIONS 153 (Comm. Print 2022) (warning of “instances in which Google has intercepted traffic from third-party websites by forcibly scraping their content and placing it directly on Google's own site”).

<sup>64</sup> *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180 (9th Cir. 2022). For multiple reasons, some of which are beyond the scope of this work, this dispute was closely followed by legal and technology commentators. See, e.g., Andrea Vittorio, *LinkedIn Reaches Deal in Data-Scraping Feud with Analytics Firm*, BLOOMBERG (Dec. 7, 2022, 10:27 AM), <https://news.bloomberglaw.com/privacy-and-data-security/linkedin-reaches-deal-in-data-scraping-feud-with-analytics-firm> [https://perma.cc/SX8A-3WCW]; Andrew Chung, *U.S. Supreme Court Revives LinkedIn Bid to Shield Personal Data*, REUTERS (June 14, 2021, 10:11 AM), <https://www.reuters.com/technology/us-supreme-court-revives-linkedin-bid-shield->

HiQ Labs scraped LinkedIn profiles, which, according to LinkedIn, hurt its users, including by undermining their privacy.<sup>65</sup> In November 2022, after more than five years of litigation, the District Court for Northern California ruled that, subject to certain equitable defenses, hiQ Labs breached LinkedIn's terms of service in scraping publicly available information.<sup>66</sup> The parties settled the case shortly thereafter.<sup>67</sup>

LinkedIn is not alone. Many other companies have in recent years brought comparable breach of contract lawsuits against those who scraped their websites, including Facebook, American Airlines, Southwest Airlines, and Craigslist.<sup>68</sup> In July 2023, X Corp., the owner of the platform previously known as Twitter, threatened to sue Meta (the owner of Facebook and Instagram) over its new service, Threads, alleging, among others, that Meta has scraped Twitter's data in violation of its terms of service.<sup>69</sup> Those claims are likely to become even more important in the near future as companies try to combat the harm, especially privacy harm, that artificial intelligence-based tools might cause using mass-scale data scraping.<sup>70</sup>

All those lawsuits and all those claims rely on contracts that prohibit reproduction.<sup>71</sup> Thus, those claims also implicitly assume that non-copyright

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personal-data-2021-06-14 [https://perma.cc/CL6A-SL42].

<sup>65</sup> *hiQ Labs, Inc.*, 31 F.4th at 1189.

<sup>66</sup> *hiQ Labs, Inc. v. LinkedIn Corp.*, No. 17-cv-03301, 2022 WL 18399982, at \*10–14 (N.D. Cal. Nov. 4, 2022).

<sup>67</sup> Jeffrey D. Neuburger, *hiQ and LinkedIn Reach Proposed Settlement in Landmark Scraping Case*, NAT'L L. REV. (Dec. 8, 2022), <https://www.natlawreview.com/article/hiq-and-linkedin-reach-proposed-settlement-landmark-scraping-case> [https://perma.cc/JFL9-CSW6].

<sup>68</sup> *See, e.g., Meta Platforms, Inc. v. BrandTotal Ltd.*, 605 F.3d 1218, 1258 (N.D. Cal. 2022) (ruling in favor of the plaintiff on its breach of contract claim because the defendant “accessed and collected data from Facebook and Instagram using automated means”). *See also* Complaint & Demand for Jury Trial, *Meta Platforms, Inc. v. Bright Data, Ltd.*, No. 3:23-cv-00077 (N.D. Cal. Jan. 6, 2023); Amended Complaint, *Am. Airlines, Inc. v. Red Ventures LLC*, No. 4:22-cv-0044, 2022 WL 6713481 (N.D. Tex. Sept. 2, 2022); *Sw. Airlines Co. v. Kiwi.com, Inc.*, No. 3:21-cv-00098, 2021 WL 4476799 (N.D. Tex. Sept. 30, 2021), *appeal dismissed*, No. 21-11095, 2022 WL 1259114 (5th Cir. Jan. 3, 2022); *Craigslist, Inc. v. 3taps, Inc.*, No. 3:12-cv-03816, 2015 WL 5921212 (N.D. Cal. Oct. 11, 2015).

<sup>69</sup> E-mail from Alex Spiro, Partner, Quinn Emmanuel, to Mark Zuckerberg, Chairman and CEO, Meta Platforms (July 5, 2023) (on file with author).

<sup>70</sup> *See* Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105, 1121–22 (2021) (discussing the actions of Clearview AI, which scraped billions of face images); Benjamin L.W. Sobel, *A New Common Law of Web Scraping*, 25 LEWIS & CLARK L. REV. 147, 161–63 (2021) (exploring the use of contract to protect users' privacy against scraping).

<sup>71</sup> While the lawsuits discussed in this part of the essay are for breach of the relevant websites' terms and conditions, in other cases, data scraping can engender other causes of action. *See* Sobel, *supra* note 70 (discussing the various causes of action for data scraping). However, in most of those cases, the website does not have a cause of action under copyright law because the information being copied is often factual, and as such it is not protected by copyright. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding that as a matter of both constitutional law and statutory law, facts can never be protected by copyright).

laws, especially contracts, can limit copying. In fact, in its recent blockbuster decision in *hiQ v. LinkedIn*, the Ninth Circuit stated in passing that victims of scraping can use state laws, including contract law, in this very way.<sup>72</sup> Indeed, it is hard to see why copyright law would have a monopoly over the regulation of this type of data scraping.

The debate over the protection of databases similarly exemplifies the symbiosis between copyright law and state laws, and in particular contract law, in regulating copying. Until the Supreme Court's 1991 decision in *Feist*,<sup>73</sup> databases, even non-creative ones, were often protected by copyright under the sweat of the brow doctrine.<sup>74</sup> When the Supreme Court abolished that doctrine, many databases were left without protection under copyright law, which arguably put the economic viability of their production into question.<sup>75</sup> Facing similar challenges, the European Union enacted a *sui generis* mechanism protecting databases.<sup>76</sup> A campaign for similar measures in the United States ultimately failed.<sup>77</sup> Studies, however, show that database production in the United States remained strong even without copyright protection.<sup>78</sup> One of the primary explanations for this phenomenon is that other legal mechanisms, including bilateral contracts, stepped in and filled the gap that the Supreme Court decision left by providing databases with limited but sufficient protection against free copying to incentivize their creation.<sup>79</sup> However, this solution to the database production problem relies

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<sup>72</sup> See *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1201 (9th Cir. 2022) (rejecting LinkedIn's claim under the Computer Fraud and Abuse Act (CFAA) but noting that "state law trespass to chattels claims may still be available. And other causes of action, such as copyright infringement, misappropriation, unjust enrichment, conversion, breach of contract, or breach of privacy, may also lie.").

<sup>73</sup> 499 U.S. 340 (1991).

<sup>74</sup> The sweat of the brow doctrine provided protection for non-creative yet labor-intensive works, which made it especially suitable for databases. See *Feist*, 499 U.S. at 352–53.

<sup>75</sup> See, e.g., Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 349 (1992) ("Justice O'Connor's opinion [in *Feist*] appears to enshrine a policy of free-riding in the Constitution. Use of the fruit of the compiler's labor without compensation, her opinion declares, is 'the essence of copyright' . . .") (quoting *Feist*, 499 U.S. at 349) (citation omitted); Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343, 1374–75 (1991) (questioning effectiveness of the *Feist* decision in achieving its constitutional goals).

<sup>76</sup> Council Directive 96/9, art. 3, 1996 O.J. (L 77) 20, 25 (EC).

<sup>77</sup> See KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 163–64 (2012).

<sup>78</sup> See *id.*

<sup>79</sup> *Id.* at 165 ("[C]opyright is not the only thing that database producers can rely on to discourage copying . . . Database makers use contract law to bind users to terms of use that forbid or limit copying."); Miriam Bitton, *A New Outlook on the Economic Dimension of the Database Protection Debate*, 47 IDEA 93, 147–68 (2006) (exploring how certain norms of, *inter alia*, criminal law, trade secret, trademark, unfair competition, tort, and, of course, contract law, allow creators to prevent some forms of free riding and thus collect a reasonable return on their investment in

on state laws that limit free copying, which directly conflicts with the Second Circuit's copyright monopoly approach. If state laws cannot limit copying, databases might be significantly under-incentivized.

Contracts that limit the reproduction and distribution of information are common in multiple other parts of our economy. Consider standard non-disclosure agreements. The heart of such agreements is a limitation on the reproduction and distribution of certain information, often factual. In fact, trade secret laws themselves are, at their core, an area of the law—until recently, exclusively under state laws<sup>80</sup>—that limits the reproduction and distribution of certain factual information.<sup>81</sup> The Supreme Court held that trade secrets are not preempted by patent law because they provide a different—a weaker—form of protection.<sup>82</sup> The same is true for copyright law. Non-disclosure agreements can play an important role in other contexts. Companies might desire to disclose sensitive information to one another to foster relationships and promote various transactions, from exclusivity agreements to mergers; a creator might need to pitch a valuable idea to a movie producer; inventors might want to tell an investor about their initial discoveries; and two individuals might agree to settle disputes outside of court to prevent sensitive information from being released to the public. In all those contexts, and in many more like them, parties have a legitimate interest in keeping sensitive information secret, and they do it by contractually limiting its reproduction and distribution. Why would copyright law desire to undermine such common bilateral arrangements?<sup>83</sup>

#### CONCLUSION

The relationship between federal IP law—specifically copyright—and state commercial laws is complex. However, for the most part, they complement each other. By enacting the Copyright Act, Congress aimed to create a nationwide property law system to protect certain fixed works of authorship. By federalizing this system, and especially by enacting an

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collecting data).

<sup>80</sup> See David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105, 113–20 (2018) (describing the move of trade secrets from being protected exclusively by state law to being protected by federal law as well).

<sup>81</sup> See UNIF. TRADE SECRETS ACT § 1(2)(ii) (UNIF. L. COMM'N 1985) (defining misappropriation of trade secrets as, *inter alia*, “disclosure or use of a trade secret of another . . .”).

<sup>82</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484–91 (1974).

<sup>83</sup> This is not to say that all non-disclosure agreements, or all contracts over information goods, should be automatically enforceable. Some of those contracts, for example, might be unenforceable due to public policy concerns such as conflicting with the freedom of the press. See, e.g., David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (discussing the tension between non-disclosure agreements and public policy). However, not only are those concerns relatively rare, but they also have little to do with copyright policy.



express preemption provision, states were denied the ability to create their own copyright-like property rights. But they were left with significant room to operate, including by limiting copying, as long as their regulatory scheme is not equivalent to copyright.<sup>84</sup> The Second Circuit's recent decisions, suggesting that contracts restricting the copying or distributing of information goods are expressly preempted by copyright, erroneously assume that copyright law forcefully monopolizes a large field within our legal system and trumps all other copying laws. That assumption is inconsistent with commercial law's historical and current role within our copyright law system. The federal government has exclusivity over copyright, but states do—and should be able to—regulate copying.

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<sup>84</sup> The Copyright Act only expressly prohibits states from enacting “equivalent” schemes. 17 U.S.C. § 301(a). The Second Circuit's recent case law relies on this provision. However, the power of the states to operate in this space might be limited in other ways, which is rarely discussed in the case law, such as the implied preemption doctrine. See Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 329, 345–47 (2017) (discussing the role of implied preemption); Guy A. Rub, *Moving from Express Preemption to Conflict Preemption in Scrutinizing Contracts over Copyrighted Goods*, 56 AKRON L. REV. 301, 317–20 (2023) (explaining how implied preemption can apply to breach of contract claims). A full analysis of this doctrine and its applicability is beyond the scope of this work.