

No. 22-121

In the Supreme Court of the United States

ML GENIUS HOLDINGS LLC,
PETITIONER,

v.

GOOGLE LLC, LYRICFIND INC.,
RESPONDENTS.

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

The government’s invitation brief confirms that Genius’s petition should be denied for multiple reasons. As the government explains, Genius’s contract claims are “atypical” because they are premised on a so-called “browsewrap” agreement that Genius alleges is automatically enforceable against anyone who visits its website, “without regard to any express manifestation of consent.” U.S. Br. 7, 14. Given the peculiar nature of Genius’s claims, “this case would be a poor vehicle for clarifying [17 U.S.C. §] 301(a)’s application to breach-of-contract claims generally.” *Id.* at 7. And there “is little indication that any other court of appeals would reach a different outcome in this case.” *Id.*

Respondents Google LLC and LyricFind Inc. fully agree with the government that the petition should be denied for the reasons above, among others. Respondents submit this short supplemental brief to address four points raised in the government's brief.

1. First, Respondents agree with the government (at 7) that Genius presents an “atypical” contract claim, though Genius now takes issue with that characterization. In a supplemental filing, Genius protests that its claim stems from a conventional implied-in-fact contract. Pet. Supp. Br. 2. Genius now asserts that its breach claim turns on Google’s “actual knowledge of Genius’s terms of service prohibiting that conduct.” *Id.* (emphasis omitted). And Genius adds that it has “never asserted” that it can enforce its terms of service against “any person who visits its website ... whether or not the visitor is aware” of its terms of service. *Id.* at 4.

That, however, is precisely what Genius pleaded. In its complaint, Genius alleges that “[a]ll users that visit Genius’s website ... are bound by its Terms of Service,” regardless of whether a user even “registers for an account.” Pet.App.71a (emphasis added). Similarly, in its terms of service, Genius asserts that users automatically are “bound” by its terms simply “[b]y accessing or using” the website. Pet.App.127a. And as to Respondents in particular, Genius alleges that Google and LyricFind became “bound by [Genius’s] Terms of Service” merely by “access[ing] Genius’s website.” Pet.App.103a, 107a.¹

¹ Similarly, in its Petition, Genius argued that Respondents were “bound by its Terms of Service” simply because they allegedly “accessed Genius’s website.” Pet. 33 (quoting Pet.App.103a, 107a). Genius further asserted that “Google had been violating terms of service

Thus, in its complaint, Genius's theory was not that Respondents "knowingly manifest[ed]" any intent to be bound by Genius's terms of service. *Contra* Pet. Supp. Br. 1-2. Instead, as the government observes, Genius's theory was that "any person who visits its website *automatically* becomes a contractual counterparty who is deemed to have agreed to petitioner's terms of service." U.S. Br. 14. Genius's contract claims "therefore are similar to a 'right against the world'" and "are substantially different from more typical contracts that involve express manifestations of consent from both parties." U.S. Br. 18. This case thus is "an unsuitable vehicle" for addressing "Section 301(a)'s application to contract claims generally." *Id.*

Nor are these vehicle problems resolved by Genius's contention that its browsewrap terms of service are simply an "implied in fact" contract. Pet. Supp. Br. 1. To begin with, Genius never pleaded the existence of any implied in fact contract, which must "rest[] upon the conduct of the parties and not their verbal or written words." *Watts v. Columbia Artists Mgmt.*, 591 N.Y.S.2d 234, 236 (3d Dep't 1992). Instead, Genius alleged that its terms of service constituted a written agreement, which is inconsistent with any (belated) claim of an implied contract. *See id.* ("[T]he theories of express contract and of contract implied in fact are mutually exclusive."). Moreover, regardless of how Genius's claim is characterized, it is unclear whether Genius can prove that Respondents ever assented to its terms of service, given that those terms are inconspicuously tucked behind a tiny link at the bottom of

to which it agreed," before Genius ever contacted Google to inform it of the alleged copying. Pet. 9-10; *contra* Pet. Supp. Br. 2.

its webpage. *See* Br. in Opp. 5-6, 28.² And if Genius “cannot prove that a valid contract exists,” then “the preemption question would not be outcome-determinative.” U.S. Br. 20. Thus, as the government observes, a “case involving a contract that is clearly valid” would be a much better vehicle for deciding Section 301(a)’s application to contract claims. *Id.*

2. The government suggests that the Second Circuit might have endorsed a rule that “sweep[s] too broadly.” U.S. Br. 11. The government focuses on two sentences in the court’s opinion and asserts that those sentences, “[a]t least viewed in isolation,” could “suggest that the court understood Section 301(a) as categorically preempting all breach-of-contract claims in which the contractual term that is alleged to have been violated is a promise not to copy portions of a work of authorship.” *Id.*

The Second Circuit, however, did not purport to adopt any such categorical rule in its nonprecedential opinion. To start, the two sentences in question come from a *Sixth Circuit* opinion that the Second Circuit quoted only within a parenthetical appearing after a “*see also*” citation. Pet.App.11a-12a (citing *Wrench Ltd. Liab. Co. v. Taco Bell Corp.*, 256 F.3d 446, 457-58 (6th Cir. 2001)).

Furthermore, those sentences should be viewed in context, not “in isolation.” U.S. Br. 11. The Second Circuit proceeded to explain that it did not adopt any categorical

² There also is an unresolved question whether Google accessed Genius’s website in any way relevant to this case. At various points, Genius has seemed to accept that Google received lyrics from LyricFind rather than obtaining them directly from Genius’s website—in which case there would be no basis for asserting that Google somehow accepted Genius’s terms of service. Br. in Opp. 26-27.

rule that “contract claims concerning copyrighted material are *never* preempted.” Pet.App.12a. Nor did it adopt the opposite categorical rule that such claims are *always* preempted. *Id.* Instead, as the government (at 12) acknowledges, the court held “only that, *given the specific facts Genius pleaded in its complaint*, its breach of contract claim is not qualitatively different from a copyright claim and is therefore preempted.” Pet.App.12a-13a (emphasis added). In reaching that holding, the Second Circuit applied its longstanding precedent that courts should conduct a “holistic evaluation” to determine whether a plaintiff’s specific claims are “qualitatively different” from copyright claims. Pet.App.10a (quoting *In re Jackson*, 972 F.3d 25, 44 n.17 (2d Cir. 2020)); see *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 431-33 (2d Cir. 2012).

Thus, far from adopting any broad rule, the Second Circuit expressly limited its holding to the particular facts alleged here concerning Genius’s browsewrap agreement. That fact-bound holding does not warrant further review.

3. With respect to the alleged circuit split, the government notes that there is some tension in how the courts of appeals have applied Section 301(a) to ordinary contract claims. U.S. Br. 13. In particular, the government observes that courts have “disagree[d]” over the “significance” of the “distinction” that copyrights are “right[s] against the world,” whereas contracts generally bind only their parties. *Id.* As Respondents explained, however, any abstract disagreement on that theoretical point does not rise to the level of a circuit split, as the cases turn on their facts and no circuit has adopted a categorical rule that contract claims always survive preemption. Br. in Opp. 13-20.

Moreover, Respondents agree with the government that any such disagreement “is not meaningfully implicated here,” “due to the atypical nature of [Genius’s] asserted contract rights.” U.S. Br. 13. As noted, Genius asserts that its browsewrap terms of service automatically bind any visitor to its website—which is tantamount to asserting a right against the world. *Id.* at 15. This case thus does not implicate an issue on which there is any disagreement among the circuits. Indeed, Genius does not cite any case (and Respondents are not aware of any) in which another circuit has addressed whether Section 301(a) preempts a claim based on a browsewrap agreement.

The government also notes that certain courts of appeals have disagreed over whether a “commercial-use element of a state law claim is relevant to preemption analysis under Section 301(a).” U.S. Br. 16. But none of the cited cases involved a browsewrap agreement, much less did any hold that a claim based on such an agreement survives preemption. Furthermore, Genius did not raise any argument based on the commercial-purpose language of its terms of service in the Second Circuit, and the Second Circuit accordingly did not have any occasion to address that issue. *See* Br. in Opp. 30 n.4. This Court generally does not address issues where, as here, they were neither pressed nor passed upon in the appellate court. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

What is more, the government agrees that it is not apparent that this case would come out differently in other circuits, including those that give weight to whether a contract has a commercial-use element. U.S. Br. 7, 18-20. Indeed, the government observes that even the “shrink-wrap” contract at issue in Genius’s leading case, *ProCD*

Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), had marked “differences” from Genius’s browsewrap agreement. U.S. Br. 18. There, the existence of a contractual relationship “was apparent,” given that the “customer had paid money and received . . . in return” a CD whose external “packaging indicated that the CD ‘c[ame] with restrictions stated in an enclosed license.’” *Id.* at 19 (quoting *ProCD*, 86 F.3d at 1450). The license terms were “inside the packaging and ‘appear[ed] on a user’s screen every time” the CD was used. *Id.* Such indicia of assent differ greatly from the circumstances here, where users can view lyrics on Genius’s website for free without ever reviewing or even being aware of its terms of service. *See* Br. in Opp. 28. It thus is “not clear how the Seventh Circuit would resolve this case.” U.S. Br. 18.

Nor is it clear how the Eleventh Circuit would resolve this case. Contrary to the selective quotation in Genius’s supplemental brief (at 9), the Eleventh Circuit has explained that courts only “*generally* read preemption clauses to leave private contracts unaffected.” *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1318 (11th Cir. 2001) (emphasis added). And the contract in *Lipscher* was wholly unlike Genius’s terms of service. There, the plaintiff sold subscriptions to a legal bulletin, and the defendant “signed” two subscription agreements prohibiting copying. *Id.* at 1309. This case, in contrast, involves no comparable indicia of assent. It thus is far from apparent how the Eleventh Circuit would decide this case. Indeed, no other circuit has encountered a purported contract like the one Genius seeks to foist upon every visitor to its site.

The government's brief, in short, confirms that this case does not implicate any disagreement among the circuits, given the unusual nature of Genius's contract claims and the Second Circuit's fact-bound, unpublished ruling.

4. The government also notes that a "potential jurisdictional issue" might complicate this Court's review. U.S. Br. 22. Specifically, the government observes that the district court exercised removal jurisdiction based on the Second Circuit's longstanding holding that Section 301 is a complete preemption statute. *See Briarpatch Ltd., L.P. v. Phx. Pictures, Inc.*, 373 F.3d 296, 304-05 (2d Cir. 2004).

The exercise of such jurisdiction was correct. The "proper inquiry" for determining complete preemption is "whether Congress intended the federal cause of action to be exclusive." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003). Applying that test in *Briarpatch*, the Second Circuit held that the Copyright Act creates "an exclusive federal cause of action" because it "lays out the elements, statute of limitations, and remedies for copyright infringement," and that section 301(a) is therefore completely preemptive. 373 F.3d at 305. As the government (at 21) notes, every other court of appeals to address this issue in a published opinion has agreed. *See GlobeRanger Corp. v. Software AG*, 691 F.3d 702, 705-06 (5th Cir. 2012); *Ritchie v. Williams*, 395 F.3d 283, 285-87 (6th Cir. 2005); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 230-33 (4th Cir. 1993). Genius likewise agrees that these cases were correctly decided, Pet. Supp. Br. 10-11, and neither party takes issue with the exercise of jurisdiction by the courts below.

If, however, the Court has any concerns about this jurisdictional issue, Respondents agree with the govern-

ment that those concerns would provide yet another reason to deny review, as this issue hypothetically could prevent the Court from reaching the question presented. U.S. Br. 22. No party has suggested that the complete-preemption issue independently warrants certiorari, especially when all published circuit decisions agree. And this case would be a poor vehicle for addressing that question, as Genius does not dispute that jurisdiction was proper. Jurisdiction aside, Respondents agree with the government that this case presents a host of other vehicle problems weighing against review. U.S. Br. 17-20.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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