

No. 22-121

In the
Supreme Court of the United States

—◆—
ML GENIUS HOLDINGS LLC,
Petitioner,

v.

GOOGLE LLC; LYRICFIND,
Respondents.

—◆—
**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

—◆—
**BRIEF OF *AMICUS CURIAE*
DIGITAL JUSTICE FOUNDATION
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

The Digital Justice Foundation, Inc. (DJF) is a Nebraska nonprofit dedicated to the preservation of individual rights in digital spaces. DJF focuses on the impact of digital technologies on civil liberties, personal privacy, individual intellectual-property rights, and individual economic well-being. DJF is also concerned with ensuring that decisions about digital spaces are made with proper consideration of underrepresented voices and persons with otherwise limited access to the law, including digital users, artists, creators, employees, and innovators.

To advance these values, DJF files amicus briefs in major cases about the Internet and property rights in digital media. *See, e.g.*, Brief of *Amicus Curiae* Digital Justice Foundation in Support of Affirmance, *Van Buren v. United States*, 141 S. Ct. 1648 (2021) (No. 19-783); Brief of *Amicus Curiae* Digital Justice Foundation in Support of Affirmance, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (No. 18-956); *see also, e.g.*, *Smith v. Thomas*, 911 F.3d 378, 382 (6th Cir. 2018) (agreeing with DJF amicus brief that the Copyright Act does not impose a “magic words” requirement to elect statutory damages).



¹ This amicus brief is filed with the consent of Petitioner and Respondents after timely notice to both. S. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part; nor has any person or any entity, other than Digital Justice Foundation, Inc. and its counsel, contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court has recognized “the Cyber Age” is “a revolution of historic proportions”—one with “vast potential to alter how we think, express ourselves, and define who we want to be.” *Packingham v. N. Carolina*, 137 S. Ct. 1730, 1736 (2017). A key part of this revolution has been crowdsourced platforms like Petitioner Genius that afford accurate information to the public for free and enable the public to grow this information and be recognized for doing so.

But these platforms have no chance of survival unless they can enforce their terms-of-use against competitors who “scrape” these platforms’ content without permission or attribution and then use what they scrape to lure away these platforms’ audience. For this reason, the Court should review the Second Circuit’s decision here, which finds the Copyright Act preempts efforts by platforms like Genius to enforce their terms-of-use against scrapers like Google.

This decision exacerbates a deep circuit split regarding the limits of copyright preemption. It also imposes grave uncertainties upon an innovative new economy that can least afford them. “The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.” *Packingham*, 137 S. Ct. at 1736. Ignoring this lesson, the Second Circuit’s decision risks the vital benefits that crowdsourced platforms afford the public.



ARGUMENT

I. **Genius’s free annotated online song-lyric encyclopedia benefits the public.**

Genius constitutes the “world’s biggest music encyclopedia”—a free online collection of song lyrics distinguished by two critical features.² First, Genius provides accurate transcriptions of lyrics to popular songs. Second, Genius provides annotations to song lyrics that illuminate a song’s cultural, social, and artistic context. The annotations are generated by a “passionate community of more than two million contributors”³ in a manner similar to Wikipedia and other well-established crowdsourced media.⁴ These features make Genius an invaluable Internet service, organizing people in a positive way while making vast amounts of content free to the public.⁵

A. **Accurate transcription**

Genius’s accurate transcription of song lyrics is a surprisingly important service. This is because of *mondegreens*, which are words or phrases “resulting from mishearing ... something recited or sung.”⁶

² *About Genius*, GENIUS, <https://bit.ly/3KZB3kw>.

³ *Id.*

⁴ Crowdsourcing involves “obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers.” See *Crowdsourcing*, MERRIAM-WEBSTER, <https://bit.ly/2GNOaXh>.

⁵ See, e.g., Ian Zelaya, *Genius & HP Give Music Newcomers Tools to Create Original Song With Established Talent*, ADWEEK, July 30, 2020, <https://bit.ly/3D454NS>.

⁶ *Mondegreen*, MERRIAM-WEBSTER, <https://bit.ly/3BILmfA>.

Author Sylvia Wright coined the term in a 1954 Harper’s Magazine essay entitled *The Death of Lady Mondegreen*.⁷ Wright explored her own persistent mishearing of a 17th century Scottish ballad called “The Bonnie Earl o’ Moray.” The last two lines of the ballad’s first verse read: “They have slain the Earl o’ Moray / **And laid him on the green.**” But Wright kept mishearing these lines as: “They have slain the Earl o’ Moray / **And Lady Mondegreen.**”

Mondegreens appear throughout popular music. One of the most famous examples appears in Jimmie Hendrix’s *Purple Haze*. As Genius’s transcription of *Purple Haze* explains, listeners have often misheard Hendrix’s lyric “Scuse me while I kiss **the sky**” as “Scuse me while I kiss **this guy**”:

The screenshot shows the lyrics for Jimmie Hendrix's "Purple Haze" on the Genius website. The lyrics are displayed in two verses. The line "Scuse me while I kiss the sky" is highlighted in orange. To the right of the lyrics is a "Genius Annotation" box, which contains the following text: "Hendrix's drug-induced perceptions are similar to an out of body experience where he can kiss the sky. However, this line is an extremely famous mondegreen, with being commonly misheard as 'excuse me while I kiss this guy.' There is even a website called kissthisguy.com specializing in mondegreens." The annotation is attributed to 14 contributors.

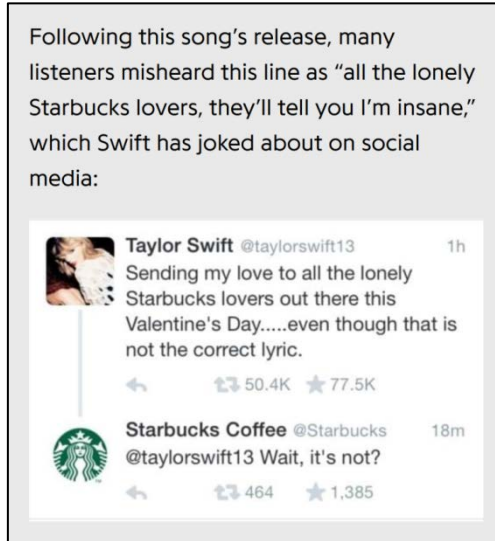
Screenshot of Purple Haze Lyrics on Genius⁸

A mondegreen familiar to younger generations may be found in Taylor Swift’s song *Blank Space*. One of the song’s repeated lyrics is: “**got a long list**

⁷ Sylvia Wright, *The Death of Lady Mondegreen*, HARPER’S, Nov. 1954, <https://bit.ly/3KRmuiG>.

⁸ *Purple Haze—Annotation to Lyric “Scuse Me While I Kiss the Sky,”* GENIUS, <https://genius.com/624357>.

of ex-lovers.” But listeners often mishear this line as: “all the lonely Starbucks lovers”:



*Screenshot of Genius Annotation for Blank Space*⁹

Genius catalogues mondegreens like this—a subject of great interest to neurology,¹⁰ linguistics,¹¹ psychology,¹² and classical studies.¹³ While it is easy to overlook this contribution (or take it for granted), Genius performs a key public service in undertaking the work of accurately transcribing song lyrics.

⁹ *Blank Space—Annotation to Lyric “Got a Long List of Ex-Lovers,”* GENIUS, <https://genius.com/4239198>.

¹⁰ See, e.g., Claudia Lidén, et al., *Neurobiology of Knowledge & Misperception of Lyrics*, 134 *NEUROIMAGE* 12 (2016).

¹¹ See, e.g., Michael Vitevitch, *Naturalistic & Experimental Analyses of Word Frequency and Neighborhood Density Effects in Slips of the Ear*, 45 *LANG. SPEECH* 407 (2002).


¹² See, e.g., S. GRONDIN, *PSYCHOLOGY OF PERCEPTION* 35–51 (2016) (discussing mondegreens as part of “hearing”).

¹³ See, e.g., STEVE REECE, *HOMER’S WINGED WORDS* (2009).

B. Crowdsourced annotations

Numerous annotations accompany the lyrics of each song that Genius accurately transcribes. These annotations derive from a community of over two million contributors, enabling a deeper appreciation of artists and their music. Genius annotations afford the public three distinct types of insight.

First, Genius annotations clarify the meaning of each transcribed song. Consider Bob Dylan’s *Like a Rolling Stone*, which is replete with cryptic lyrics like: “You used to be so amused / At Napoleon in rags and the language that he used.” Genius annotations explain that Dylan is alluding to artist Andy Warhol and provide a link to an article on this point:

<p>[Verse 4] Aw, princess on the steeple and all the pretty people They're all drinkin', thinkin' that they got it made Exchangin' all precious gifts But you'd better take your diamond ring, ya better pawn it, babe You used to be so amused At Napoleon in rags and the language that he used Go to him now, he calls ya, ya can't refuse When ya ain't got nothin', you got nothin' to lose You're invisible now, ya got no secrets to conceal</p> <p>[Chorus] How does it feel? Aw, how does it feel? To be on your own With no direction home</p>	<p>Generally refers to the artsy crowd and glitterati in the 60s more beholden to style over substance and specifically refers to Andy Warhol.</p>  <p>To help enrich the metaphor it might be helpful to point out that “Napoleon in rags” is most likely an allusion to Napoleon’s exile. He went from being Emperor to being exiled to a tiny, distant island in very short order.</p>
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*Screenshot of Genius Annotation for Like a Rolling Stone*¹⁴

¹⁴ *Like a Rolling Stone—Annotation to Lyric “Napoleon in Rags,”* GENIUS, <https://genius.com/10131776>.

Second, Genius annotations provide cultural and artistic context. Consider the last stanza from Bob Dylan’s *Subterranean Homesick Blues*:

Better jump down a manhole, light yourself
a candle

Don't wear sandals, try to avoid the scandals

Don't want to be a bum, you better chew gum

The pump don’t work ‘cause the vandals
took the handles¹⁵

Genius annotations explain that these lines are an allusion to Robert Browning’s poem “Up at a Villa-Down in the City,” with Dylan mimicking the poem’s rhyme scheme and word selection.¹⁶ Genius annotations also observe that the lyric “Better jump down a manhole” may be an allusion to the ending of novelist Ralph Ellison’s *The Invisible Man*.¹⁷

Genius annotations finally provide historical and societal context. Returning to *Like a Rolling Stone*, Genius annotations discuss how the Court’s members have explained Article III standing through the use of Dylan’s lyric: “When you got nothing, you got nothing to lose.”¹⁸ *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting). Genius annotations also examine the

¹⁵ Bob Dylan, *Subterranean Homesick Blues—Full Lyrics*, GENIUS, <https://bit.ly/3RpQSDj>.

¹⁶ *Subterranean Homesick Blues—Annotation to Last Four Lines of Fourth Verse*, GENIUS, <https://genius.com/8610>.

¹⁷ *Id.*

¹⁸ *Like a Rolling Stone—Annotation to Lyric “When Ya Ain’t Got Nothin’”*, GENIUS, <https://genius.com/6281835>.

variance between the lyric’s published version and how it has been sung at live performances.¹⁹

In sum: Genius enriches the public by taking the unprecedented power of the Internet and using it to systematically catalogue and explore the meaning of song lyrics. Genius’s accurate song transcriptions and crowdsourced annotations provide invaluable historical, social, artistic, and cultural context to the litany of musical works that define our society.

II. Google’s scraping of Genius’s encyclopedia implicates the future of the Internet.

The Second Circuit describes this case as being about the mere copying of Genius’s transcriptions by a Google intermediary and Google’s use of the copied transcriptions to answer user searches. *See* Pet. App. 4a. But this description neglects the extraordinary platform that Genius built and how Google’s abuse of this platform—in violation of Genius’s terms-of-use—now threatens the future of the Internet.

Genius built a collection of accurate song lyrics by working with and compensating the musicians involved. *See* Pet. 7. Genius next earned the loyalty of over two million users who annotated these lyrics. *See* Pet. 7–8. Genius finally afforded the public free access to all of this material, subject to terms-of-use binding all Genius users—including Google. *See id.* Google then scraped Genius’s song transcriptions²⁰

¹⁹ *Id.*

²⁰ *See* Robert McMillan, *Genius Media Sues Google, Alleging Anticompetitive Use of Lyrics*, WALL ST. J., Dec. 3, 2019, <https://on.wsj.com/3eugPTM>.

while discarding all the user annotations, giving the public every reason to “stop producing annotat[ions].” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1522–23 (2020) (Thomas, J., dissenting).

Compare Google’s transcription of Bob Dylan’s song *I Contain Multitudes* to Genius’s transcription (and annotation) of the same song:

The screenshot shows the Google Music interface for the song "I Contain Multitudes" by Bob Dylan. It features a navigation bar with tabs for Overview, Lyrics, Videos, Listen, and Analysis. The Lyrics tab is selected, displaying the full lyrics of the song. To the right, there is an "About" section with details: Artist: Bob Dylan, Album: Rough and Rowdy Ways, Released: 2020, and Genres: Classic Rock, Singer-Songwriter.

*Screenshot of Google Transcription*²¹

The screenshot shows the Genius website for the song "I Contain Multitudes" by Bob Dylan. The lyrics are displayed on the left, with some lines highlighted in orange and grey. On the right, there is a "Genius Annotation" section with a grey background and a speech bubble icon. The annotation reads: "This echoes Macbeth's famous soliloquy at the end of Shakespeare's play of the same name: 'Tomorrow, and tomorrow, and tomorrow, Creeps in this petty pace from day to day To the last syllable of recorded time, And all our yesterdays have lighted fools The way to dusty death.'" Below the annotation, it says "4 contributors".

*Screenshot of Genius Transcription*²²

²¹ *I Contain Multitudes* (Lyrics Tab), GOOGLE (SEARCH), <https://bit.ly/3D6p7vq>.

²² *I Contain Multitudes—Annotation to Lyric “The Flowers Are Dyin,’”* GENIUS, <https://genius.com/19632919>.

While Google relates the bare lyrics of *I Contain Multitudes*, Genius strives to show the meaning and context of Dylan's work. Genius annotations situate Dylan's lyrics within the world of literature, noting allusions to Shakespeare and Walt Whitman. Genius annotations also situate Dylan's lyrics in Dylan's own oeuvre, noting allusions to Dylan's 1964 song *To Ramona*. In essence, Genius annotations, fueled by two million users, make Dylan's lyrics *sing*.

Genius also gives credit where credit is due, attributing annotations to the users who created them. The public can up-vote helpful annotations; look up all of a given user's annotations; and view any given lyric's annotation history. Genius even helps its users craft effective annotations:²³

The Annotation Commandments

✧ Here are the rules you should always follow when annotating:

1. **Don't Restate The Lyric** → [Click here to learn more](#)
2. **Write Like A Human** → [Click here to learn more](#)
3. **Watch Grammar & Spelling** → [Click here to learn more](#)
4. **Do Research & Hyperlink Sources** → [Click here to learn more](#)
5. **Highlight All Relevant Lyrics** → [Click here to learn more](#)
6. **Master Formatting** → [Click here to learn more](#)
7. **Include Media That Adds Depth** → [Click here to learn more](#)
8. **Be Objective** → [Click here to learn more](#)
9. **Be Concise & Specific** → [Click here to learn more](#)
10. **Be Evergreen** → [Click here to learn more](#)

²³ *How to Annotate & Edit [Song Lyrics] on Genius*, GENIUS, <https://bit.ly/3RG7Dd3>.

Genius thus exemplifies the Internet working at its best. Accurate information (song transcription) is made freely available to the public. Members of the public are invited to contribute their own knowledge and insights in the form of annotations. Contributors are positively recognized for their work. A history of edits is made available for public supervision. And, most importantly, artistic works of great value in our society are presented in their rich historical, artistic, and cultural context for everyone to explore.

Google’s “scraping” of Genius’s platform harms all of this. Imagine a museum organizes a collection of paintings, verifying each painting’s authenticity and creating plaques that explain each painting’s historical, cultural, and artistic context. The museum allows the public to view the paintings for free on the condition that visitors take no photos—a term-of-use printed on each free ticket. Nevertheless, a shopping mall sends an intermediary to photograph all the paintings and then displays the photos in a gallery that draws traffic from the museum. The mall does not provide any plaques or context for the photos, nor any attribution to the original museum.

That is the true big picture of this case. When companies like Google engage in scraping, the public loses—especially contributors to crowdsourced spaces like Genius. “An amazing number of people offer an amazing amount of value over networks.”²⁴ These contributing members are denied the fruit of their labor insofar as companies like Google may scrape information and route traffic away from what these

²⁴ JARON LANIER, WHO OWNS THE FUTURE? 9 (2013).

members build. Worse still, such scraping chills the incentive for members of the public to contribute to crowdsourced platforms like Genius. Other members of the public have no reason to look past the ‘scraped’ answers that Google-like services provide.

In a world that condones such conduct, there is no incentive to invest the kind of time and effort that Genius invested here. Nor is there any incentive to make works like song lyrics freely available to the public in the encyclopedic manner that Genius does. The public then loses access to information that the Internet was meant to liberate. With this in mind, the question becomes: does it make any sense to view copyright in a way that causes these harms by preempting platforms like Genius from enforcing their terms-of-use against scrapers like Google?

From “the infancy of copyright protection,” the purpose of copyright has been the promotion of “the Progress of Science and useful Arts.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8). Copyright laws are meant “primarily for the benefit of the public” to “stimulate ... invention.” *Eldred v. Ashcroft*, 537 U.S. 186, 247 (2003) (Breyer, J., dissenting). “[C]opyright statutes must serve public, not private, ends” *Id.*; *see id.* (copyright meant “to secure for the public the benefits derived from ... authors’ labors”).

Here, application of copyright preemption serves Google’s own private ends at the expense of a free song-lyric encyclopedia and future innovations like it. Google’s scraping of Genius’s song transcriptions deprives the public of the knowledge that Genius and

its users have accumulated over time. In the same breath, Google’s scraping deters others from building the next Genius or contributing to Genius’s platform. Unless this Court acts to settle the proper scope of copyright preemption—and Genius’s ensuing ability to defend itself—digital innovation will suffer.

III. Ongoing division among the circuits over the breadth of copyright preemption risks chilling digital innovation.

Genius relied on its terms-of-use to make its platform and services freely available to the public while safeguarding against free-riding competitors. Just so: “terms of use ... have their most significant impact ... on businesses.”²⁵ “[V]irtually all the courts that have enforced browse-wrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license.”²⁶

This makes sense. Nearly every professionally-maintained website has terms-of-use. Companies that rely on their own terms-of-use can therefore be reasonably expected to respect others’ terms-of-use.²⁷ “[W]ebsites of all stripes, commercial and nonprofit alike, commonly post ‘terms of use’ to govern their [digital] relationships with web browsers.”²⁸

²⁵ Mark Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 462 (2006), <https://bit.ly/3x20c8e>.

²⁶ *Id.*

²⁷ See Bradley Abruzzi, *Copyright, Free Expression, & the Enforceability of Personal Use-Only and Other Use-Restrictive Online Terms of Use*, 26 SANTA CLARA HIGH TECH. L.J. 85, 86 (2009), <https://bit.ly/3x43JCV>.

²⁸ *Id.*

Reliance on terms-of-use to bar unauthorized use by competitors enables companies to make their online services and content available to the public for free. This phenomenon is a remarkable development that advances the fundamental purposes of copyright law. The Second Circuit's decision here, by contrast, turns copyright law on its head. The Second Circuit held that the Copyright Act barred Genius—a freely-available song-lyric encyclopedia—from enforcing its terms-of-use to discourage a competitor's free-riding and therefore protect the interests of Genius's over two-million users. *See* Pet. App. 8a–13a.

Regardless of how the Court views the merits of Genius's breach-of-contract claim, the circuit split identified by Genius over whether the Copyright Act may be applied in this way is an extremely important question. Pet. 15–23. Websites—for-profit and non-profit alike—rely on terms-of-use and contract-based claims to protect their platforms against competitors while affording the public valuable free information. Clarity in this area is crucial. Without it, the creators of innovative platforms and services like Genius have no choice but to guess about whether their terms-of-use are enforceable—a gamble that may force them to err on the side of caution and deprive the public of access to information that should be free to all.

IV. Left in place, the Second Circuit's decision imperils novel models for licensing the use of artistic works on the Internet.

The Second Circuit's approach to Copyright Act preemption risks not only crowdsourced platforms like Genius but also millions of other digital licenses

that rely on innovative terms-of-use to govern the use of copyrighted artistic works. The Internet has ushered remarkable creativity in licensing models for the public's benefit. These models reinvent licensing for the digital age, embracing technologies pioneered in the early 2000s that are now ubiquitous.

Creative Commons is the best example of this. Creative Commons is a nonprofit that provides free legal tools to creators through a broad assortment of customizable licenses.²⁹ These licenses “encourage reuse of [copyrighted] works by offering them for use under generous, standardized terms,” helping “those who want to make creative uses of works” and “those who want to benefit from this symbiosis.”³⁰

Creative Commons (CC) licenses rely on a small menu of machine-readable licensing provisions, each written in language that search engines and other systems can easily comprehend and obey.³¹ There are six basic types of CC license. One license permits anyone to “distribute, remix, adapt, and build upon the material in any medium or format, so long as attribution is given to the creator.”³² Another license, called “shared alike,” permits the public to make any use of a work, including commercial uses, so long as the user of the material licenses the modified work “under identical terms” as the original.³³

²⁹ *Frequently Asked Questions (FAQ)*, CREATIVE COMMONS, <https://bit.ly/3L8qtrz>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

Creative Commons has achieved remarkable growth. In 2003, one million works were subject to CC licenses.³⁴ Five years later, “close to 100,000,000 works” were licensed under various CC licenses. *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008). By 2018, over 1.4 billion works were subject to CC licenses.³⁵ These licenses run the gamut, covering “educational resources, data compilations, museum collections, music, video, and photography.”³⁶

As a result, now is a bad time for courts to impede the enforceability of innovative terms-of-use. But the Second Circuit does just this in holding that the Copyright Act precludes Genius from enforcing its terms-of-use against Google’s wrongful scraping. The Second Circuit’s subjective and amorphous test for copyright preemption risks unraveling a novel tapestry of technology-responsive licensing schemes that the public has successfully embraced in the still-early days of “the Cyber Age.” *Packingham v. N. Carolina*, 137 S. Ct. 1370, 1736 (2017).

CONCLUSION

Genius’s petition affords the Court a chance to settle a question that not only divides the circuits but matters to the future of the Internet: can platforms like Genius rely on their terms-of-use to protect all the ways the platform benefits the public?

³⁴ See PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 189 (2019).

³⁵ *Id.*

³⁶ *Id.*

The Court should accept the invitation.

Respectfully submitted,

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