

**No. 04-3654**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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DAVIDSON & ASSOCIATES, INC.,  
D.B.A BLIZZARD ENTERTAINMENT,  
AND VIVENDI UNIVERSAL GAMES, INC.  
*Plaintiffs-Appellees,*

v.

INTERNET GATEWAY, INC., TIM JUNG,  
ROSS COMBS, AND ROB CRITTENDEN,  
*Defendants-Appellants.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION**

Honorable Charles A. Shaw, United States District Court Judge

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***AMICUS CURIAE BRIEF***  
**OF DATA TREE LLC, FIRST AMERICAN REAL ESTATE  
SOLUTIONS LLC, AND REED ELSEVIER INC. IN SUPPORT OF  
APPELLEE DAVIDSON & ASSOCIATES SUPPORTING AFFIRMANCE**

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March 3, 2005

**FILED WITH THE CONSENT OF ALL PARTIES**

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## **TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| CORPORATE DISCLOSURE STATEMENT.....  | i           |
| TABLE OF CONTENTS.....   | ii          |
| TABLE OF AUTHORITIES.....  | iii         |
| INTEREST OF THE AMICI.....   | 1           |
| SUMMARY OF ARGUMENT.....   | 4           |
| ARGUMENT.....  | 5           |
| I. APPELLANTS’ PRESENTATION OF THE LAW OF<br>CONFLICT PREEMPTION IS INCOMPLETE AND<br>DANGEROUS.....                               | 5           |
| A. <i>Express Preemption Provisions Limit the Scope of the<br/>Conflict Preemption Inquiry</i> .....                               | 6           |
| B. <i>Section 301 of the Copyright Act Makes the Scope of<br/>Contract Preemption Clear</i> .....                                  | 9           |
| II. THE CERTAINTY PROVIDED BY THE APPLICATION OF<br>SECTION 301 PROMOTES THE WIDESPREAD<br>DISSEMINATION OF COPYRIGHTED WORKS..... | 12          |
| A. <i>Conflict Preemption Ordinarily Does Not Apply to a<br/>Mass-Market License</i> .....   | 12          |
| B. <i>Preemption Analysis Limited to Section 301 Provides a<br/>Stable Market for Copyrighted Works</i> .....                      | 14          |
| CONCLUSION.....  | 17          |
| CERTIFICATE OF SERVICE.....  | 19          |
| CERTIFICATE OF COMPLIANCE.....   | 20          |

## **TABLE OF AUTHORITIES**

|   | <b><u>Page(s)</u></b> |
|---|-----------------------|
| <b><u>Federal Cases</u></b>   |                       |
| <i>American Airlines, Inc. v. Wolens</i> ,<br>513 U.S. 219 (1995) .....                                     | 11                    |
| <i>American Movie Classics Co. v. Turner Entertainment Co.</i> ,<br>922 F. Supp. 926 (S.D.N.Y. 1996) .....  | 14                    |
| <i>Asunto v. Shoup</i> ,<br>132 F. Supp. 2d 445 (E.D. La. 2000) .....                                       | 11                    |
| <i>Bateman v. Mnemonics, Inc.</i> ,<br>79 F.3d 1532 (11th Cir. 1996) .....                                  | 10                    |
| <i>Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.</i> ,<br>373 F.3d 296 (2d Cir. 2004) .....               | 10                    |
| <i>Brown v. Ames</i> ,<br>201 F.3d 654 (5th Cir. 2000) .....  | 9, 13                 |
| <i>Capital Cities Cable v. Crisp</i> ,<br>467 U.S. 691(1984) .....  | 12                    |
| <i>Carson v. Dynegy, Inc.</i> ,<br>344 F.3d 446 (5th Cir. 2003) .....                                       | 10                    |
| <i>Chesler/Perlmutter Prods. v. Fireworks Entm't, Inc.</i> ,<br>177 F. Supp. 2d 1050 (C.D. Cal. 2001) ..... | 11                    |
| <i>Cippollone v. Liggett Group</i> ,<br>505 U.S. 504 (1992) .....   | 7, 11                 |
| <i>Computer Assocs. Int'l v. Altai, Inc.</i> ,<br>982 F.2d 693 (2d Cir. 1992) .....                         | 11                    |
| <i>Downing v. Abercrombie &amp; Fitch</i> ,<br>265 F.3d 994 (9th Cir. 2000) .....                           | 10                    |

|  |           |
|--|-----------|
| <i>Eldred v. Ashcroft</i> ,<br>537 U.S. 186 (2003) .....   | 14        |
| <i>Feist Pubs. v. Rural Telephone</i> ,<br>499 U.S. 340 (1991) .....                                   | 1         |
| <i>Fid. Fed. Sav. &amp; Loan Ass'n v. De La Cuesta</i> ,<br>458 U.S. 141 (1982) .....                  | 6         |
| <i>Foley v. Luster</i> ,<br>249 F.3d 1281 (11th Cir. 2001) .....                                       | 13        |
| <i>Forest Park II v. Hadley</i> ,<br>336 F.3d 724 (8th Cir. 2003) .....                                | 8         |
| <i>Freightliner Corp. v. Myrick</i> ,<br>514 U.S. 280-87 (1995) .....                                  | 6         |
| <i>Harolds Stores v. Dillard Dep't Stores</i> ,<br>82 F.3d 1533 (10th Cir. 1996) .....                 | 10        |
| <i>Hines v. Davidowitz</i> ,<br>312 U.S. 52 (1940) .....   | 7         |
| <i>Jones v. Roth Packing Co.</i> ,<br>430 U.S. 519 (1977) .....  | 6         |
| <i>Jones v. Vilsack</i> ,<br>272 F.3d 1030 (8th Cir. 2001) .....                                       | 7         |
| <i>Kerns v. Capital Graphics, Inc.</i> ,<br>178 F.3d 1011 (8th Cir., 1999) .....                       | 8         |
| <i>Lipscher v. LRP Pubs., Inc.</i> ,<br>266 F.3d 1305 (11th Cir. 2001) .....                           | 10        |
| <i>Matthew Bender &amp; Co. v. Jurisline.com LLC</i> ,<br>91 F. Supp. 2d 677 (S.D.N.Y. 2000) .....     | 15        |
| <i>National Car Rental Sys. v. Computer Assocs. Int'l Inc.</i> ,<br>991 F.2d 426 (8th Cir. 1993) ..... | 4, 10, 12 |

*Nordgren v. Burlington N. RR Co.*,  
101 F.3d 1246 (8th Cir. 1996).....8

*Orson, Inc. v. Miramax Film Corp.*,  
189 F.3d 377 (3rd Cir. 1999).....13

*ProCD, Inc. v. Zeidenberg*,  
86 F.3d 1447 ..... 10, 12

*Register.com v. Verio, Inc.*,  
356 F.3d 393 (2d Cir. 2004) .....16

*Saturday Evening Post Co. v. Rumbleseat*,  
816 F.2d 1191 (7th Cir. 1997).....13

*Selby v. New Line Cinema Corp.*,  
96 F. Supp. 2d 1053 (C.D. Cal. 2000).....14

*Stromback v. New Line Cinema*,  
384 F.3d 283 (6th Cir. 2004).....10

*T.B. Harms v. Eliscu*,  
339 F.2d 823 (2d Cir. 1964) .....13

*Ticketmaster v. Tickets.com*,  
2000 U.S. Dist. LEXIS 12987 (C.D. Cal. 2000) .....15

**Federal Statutes**

15 U.S.C. § 7001 .....16

17 U.S.C. § 301 .....3, 4

29 U.S.C. § 1144(a) .....8

**Other Authorities**

H.R. Rep. No. 94-1476 ..... 9, 12

## **INTEREST OF THE AMICI**<sup>1</sup>

*Amici* are copyright owners and publishers who invest billions of dollars in the creation and dissemination of a variety of copyrighted works. Many of *amici*'s information products and services are compilations of factual data, which receive thin copyright protection.<sup>2</sup> Through the efforts of their employees and the implementation of sophisticated digital technology, *amici* add enormous value to a variety of data and copyrighted works, permitting public authorities, businesses, news agencies and consumers productively and efficiently to search through otherwise impenetrable masses of information. To protect their investment, and to make their products widely available, *amici* use standard-form license agreements with the consumers of their information products. The flexibility afforded by these contractual practices has enabled *amici* to respond effectively to the needs and demands of different markets, for example, allowing them to grant more favorable terms to students in a nonprofit institution than a pharmaceutical company. Standard-form contracts also enable *amici* to make their products available to millions of consumers, and are a key method of protecting the massive investments

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<sup>1</sup> No one other than counsel for the entities listed on this brief has authored any portion of this brief or has contributed to its preparation. Counsel for the parties in this case have not authored any portion of this brief, in whole or in part. The parties have consented to the filing of this brief.

<sup>2</sup> See *Feist Pubs. v. Rural Telephone*, 499 U.S. 340 (1991).

*amici* make in gathering, organizing, and maintaining useful databases of public records and legal and real estate information. Such restrictions on use facilitate the distribution of these products to law enforcement, higher education, financial services firms, medical professionals, and the like.

*Amici's* need to rely on contract to protect their products against unwarranted copying and use is heightened by the uncertainty over whether a particular database would qualify for copyright protection coupled with the "thin" protection that copyright provides even to protected databases. *Amici* are gravely concerned that Appellants' position, if adopted, would lead to market-destructive commercial uncertainty, consumer price, and widespread commercial misappropriation of *amici's* products.

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Amicus **Data Tree LLC**, provides its customers with access to image-based databases of a variety of real estate documents, including those containing the data mentioned above.

## **SUMMARY OF ARGUMENT**

Appellants' argument that claims a breach of mass market contracts must be routinely subjected to *both* express preemption under 17 U.S.C. § 301 and conflict preemption is both wrong and dangerous. In copyright cases, rights arising under contracts consistently have been analyzed solely under section 301; conflict preemption has not entered the judicial equation. This Circuit, most prominently in *National Car Rental Sys. v. Computer Assocs. Int'l Inc.*, 991 F.2d 426 (8th Cir. 1993), has adhered to the section 301-only approach in contract cases. *Amici* respectfully urge this Court to follow that tradition, rejecting the radical change in preemption analysis advocated by Appellant.

In *amici*'s view, this Circuit should be extremely reluctant to depart from its long-standing tradition for a number of reasons. This approach would (1) improperly diminish the significance of Congress's considered decision to adopt section 301 to define the limit of preemption of state law under the Copyright Revision Act of 1976; (2) ignore settled judicial precedent governing the deference to be accorded to an express statutory preemption provision; and (3) cause harm to the ability of copyright owners like *amici* to continue to make their works available to their customers.

## **ARGUMENT**

### **I. APPELLANTS' PRESENTATION OF THE LAW OF CONFLICT PREEMPTION IS INCOMPLETE AND DANGEROUS.**

Appellants argue that mass-market contract provisions should be routinely subjected to *both* statutory preemption analysis under 17 U.S.C. § 301, and “conflict” preemption. *Amici* urge this court to reject Appellants’ argument and adhere to longstanding precedent both in this Circuit and elsewhere, in which the question of whether a contract right existing under state law is preempted is limited to section 301 and does not extend to an analysis under conflict preemption. Appellants’ position (1) ignores the weight accorded to Congress’s statutory preemption language; (2) disregards the extraordinary importance that section 301 plays in the 1976 Act’s revision of copyright law; and (3) fails utterly to take into account the fact that courts have consistently limited their preemption analysis to section 301 without also engaging analysis under conflict preemption principles. Appellants want each defendant in a contract action to have two bites at the proverbial apple: one under the section 301 and one under their vague and far less certain test of “conflict preemption.” Adoption of that view would inject an unacceptable level of uncertainty into the copyright marketplace and drastically limit the flexibility of copyright owners to make their works widely accessible to their customers. This Court should be extremely reluctant to break

from this precedent and to embrace a conflict preemption analysis in contract cases.

***A. Express Preemption Provisions Limit the Scope of The Conflict Preemption Inquiry.***

Preemption of state claims by the Copyright Act is analyzed just like preemption under any other statute passed pursuant to one of Congress's enumerated powers. The principles of a federal-state system require that the general police powers of the state initially be given substantial deference. If the field which Congress has allegedly preempted has been traditionally occupied by the States, analysis starts with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Jones v. Roth Packing Co.*, 430 U.S. 519, 525 (1977) (internal quotation omitted). Federal law may, of course, supersede State regulation in two ways. The first, applicable to the Copyright Act, is express statutory preemption, which applies when Congress has expressed its intent to displace state law as it has in section 301. The second involves so-called "conflict preemption," which arises when compliance with both federal and state regulations is a "physical impossibility," or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280-87 (1995); *Fid. Fed. Sav. &*

*Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940).

Crucial, however—and effectively ignored in Appellants’ discussion of the relevant law—is the effect that an express statutory preemption provision has on conflict preemption analysis:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

*Cippollone v. Liggett Group*, 505 U.S. 504, 517 (1992) (plurality opinion) (internal citation and quotation omitted).<sup>3</sup>

The Appellants, however, would have this Court believe that conflict preemption applies in copyright-related contract cases as if section 301 did not exist.<sup>4</sup> See Br. of Appellants at 32.<sup>5</sup> Few preemption provisions provide a more

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<sup>3</sup> This Circuit has applied the same principle. See *Jones v. Vilsack*, 272 F.3d 1030, 1034 (8th Cir. 2001) (finding that preemptive provisions of the federal tobacco labeling statute formed the beginning and end of the analysis) cited in *Davidson & Assoc. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1174 (E.D. Mo. 2004).

<sup>4</sup> *Amici* note that in one sense this is true, as Appellants have not raised a 301 issue and therefore have waived it. See Br. Of Appellants at 1-2 (appealing on conflict preemption grounds only). That argument is abandoned if not raised on

“reliable indicium” of the scope of Congress’s intent than section 301 of the Copyright Act. The application of section 301 should be the terminus of

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appeal. *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1118 (8th Cir., 1999) (citing Fed. R. App. P. 28(a)(4)).

<sup>5</sup> The cases that Appellants cite to support applying conflict preemption of contract terms under the Copyright Act do not support that proposition; they are not copyright cases, and the preempting federal statutes in those cases all explicitly preempted contract actions. For example, in *Nordgren v. Burlington N. RR Co.*, 101 F.3d 1246 (8th Cir. 1996), this Court considered whether, under the Federal Employer Liability Act (FELA), a railroad could counterclaim for property damage against an employee that had sued it for negligence. *See id.* at 1247. The statute there expressly prohibited the railroads from attempting to avoid liability as a common carrier based on any “contract” or “device.” *See id.* at 1250. Not only did that statute expressly mention contracts, but the court upheld the railroad’s counterclaim in spite of the statutory language because a counterclaim was not a “device.” *See id.* Similarly, in *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003), this Court addressed a government program that offered private developers the opportunity to receive low-interest mortgages in exchange for providing affordable housing. *See id.* at 728-29. The program also limited the ability of private developers to prepay their mortgage for the first twenty years of ownership. *Id.* Once again, Congress passed a statute that expressly prevented states from enacting their own rules about prepayment in mortgage contracts. *See id.* That statutory provision was held to preempt state laws that added additional requirements on the private developer. *See id.* at 732-33. Finally, Appellants’ analogies to the Earned Retirement Income Security Act (ERISA) preemption provisions are inapposite. ERISA’s extremely broad preemption provision affects “any and all State laws insofar as they *may* now or *hereafter* relate to any employee benefit plan,” namely, a series of contractual relationships between employer and employee. 29 U.S.C. § 1144(a) (emphasis added). The language is far broader than section 301’s reference to “equivalent rights.” In contrast, section 301 does not mention contracts, and the legislative history of the 1976 Act evinces Congressional understanding that contracts would continue to be used in the contract area.

preemption analysis, as it has been in virtually every reported case addressing preemption under the Copyright Act of 1976.<sup>6</sup>

***B. Section 301 of the Copyright Act Makes the Scope of Contract Preemption Clear.***

Copyright preemption analysis of contract claims, such as that at issue in this case, does not involve conflict preemption issues. Section 301, which the Appellants deride as “limited language” (Br. of Appellants at 32) formed one of the “bedrock provisions” of the 1976 revision. H.R. Rep. No. 94-1476, at 129 (1976). That provision, which preempts all state laws that grant “rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106” abolished the dual system of federal/state copyright that had existed in the United States since the first copyright act in 1790 and replaced it with a uniform federal law. *Id.* at 130. The statute expressly states that no person is entitled to assert any rights equivalent to those protected by copyright under the “common law or statutes of any state.” *See id.* (“The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are

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<sup>6</sup> Appellants cite no copyright cases in which a *contract* claim was reviewed under both section 301 and conflict preemption. In fact, in contrast to the long list of cases cited *infra* note 7, appellants cite only a single copyright case in which a court subjected a state claim to both section 301 and conflict preemption analysis, *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000), and there the court found that the state misappropriation claim was not preempted under either analysis. Importantly, *Brown* was a non-contract case.

equivalent to copyright and that extend to works coming within the scope of the Federal copyright law.”)

Like every other recent court to consider this issue, the District Court followed this court’s analysis in *National Car Rental v. Computer Associates*, 991 F.2d 426, 431-32 (8<sup>th</sup> Cir. 1993), and applied section 301’s “extra element” test under section 301 to determine whether the contract granted an “equivalent right.” *Davidson*, 334 F. Supp. 2d at 1175; accord *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447. Consistent with these other rulings, it limited its inquiry to whether the state cause of action contained an extra element that rendered it distinctive from a copyright claim, and, after finding the presence of an extra element, did not subject the state claim to a “conflict” preemption analysis.<sup>7</sup> This application of section

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<sup>7</sup> See also, e.g., *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306–07 (2d Cir. 2004) (holding that an unjust enrichment claim and declaratory judgment claim were preempted by the Copyright Act but that a claim based on a breach of fiduciary duty contained an extra element and thus was not preempted), *petition for cert. filed*, No. 04-984 (Jan. 14 2005); *Stromback v. New Line Cinema*, 384 F.3d 283, 301–07 (6th Cir. 2004) (holding that a state commercial misappropriation claim and tortious interference claim were preempted by the Copyright Act but that a state trade secrets claim contained an extra element and thus was not preempted); *Carson v. Dynegy, Inc.*, 344 F.3d 446, 455–58 (5th Cir. 2003) (holding that a declaratory judgment claim was preempted by the Copyright Act but a state conversion claim contained an extra element and thus was not preempted); *Lipscher v. LRP Pubs., Inc.*, 266 F.3d 1305, 1318–19 (11th Cir. 2001) (contract claim not preempted); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2000) (right of publicity claim not preempted); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454–55 (7th Cir.1996) (contract claim not preempted); *Harolds Stores v. Dillard Dep't Stores*, 82 F.3d 1533, 1542–44 (10th Cir. 1996) (state anti-trust claim not preempted); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532,



301's "extra element test" accords with the intention of the drafters of the 1976 Copyright Act in preserving the traditional role of state contract law in the federal system. As an express statement of congressional intent, section 301 deserves the judicial deference properly accorded such provisions,<sup>8</sup> not the dismissive treatment accorded it by Appellants.<sup>9</sup>

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1549–50 (11th Cir. 1996) (state trade secret law not preempted); *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 719–20 (2d Cir. 1992) (trade secret claim not preempted); *Hotsamba, Inc. v. Caterpillar Inc.*, 2004 U.S. Dist. LEXIS 4882, \*13–\*14 (N.D. Ill. 2004) (contract claim not preempted); *Groubert v. Spyglass Entm't Group*, 2002 U.S. Dist. LEXIS 17769, \*11–\*12 (C.D. Cal. 2002) (implied contract claim not preempted); *MCS Servs. v. Johnsen*, 2002 U.S. Dist. LEXIS 16910, \*18–\*19 (E.D. Pa. 2002) (contract claim not preempted); *Chesler/Perlmutter Prods. v. Fireworks Entm't, Inc.*, 177 F. Supp. 2d 1050, 1058–59 (C.D. Cal. 2001) (contract claim not preempted); *Asunto v. Shoup*, 132 F. Supp. 2d 445, 452 (E.D. La. 2000) (contract claim not preempted).

<sup>8</sup> This is especially true, *amici* believe, given the Supreme Court's recognition that "[a]s we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause." *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

<sup>9</sup> A reasonable argument could be made that given the express language of section 301, contracts—private agreements between parties—should be completely immune from section 301 preemption review. Ordinarily, a statute that preempts state laws, rules, or regulations does not apply to contracts. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228–29 (1995) (stating that federal provision prohibiting any enforcement of any state law, rule or regulation affecting airline services did not preempt enforcement of private agreements because judicial enforcement of parties' bargains is not a requirement imposed under state law); *Cipollone*, 505 U.S. at 526 ("A common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law' [within the meaning of Federal Cigarette Labeling and Advertising Act] § 5(b)."). Thus, a fair interpretation of section 301 would be that, like the statute at

## II. THE CERTAINTY PROVIDED BY THE APPLICATION OF SECTION 301 PROMOTES THE WIDESPREAD DISSEMINATION OF COPYRIGHTED WORKS.

### A. *Conflict Preemption Ordinarily Does Not Apply to a Mass-Market License.*

As the cases overwhelmingly demonstrate, contract restrictions are routinely challenged only under section 301, and it is rare that a court addresses the doctrine of conflict preemption in such cases.<sup>10</sup> *Amici* do not suggest that conflict preemption may not have some role to play in an unrelated copyright context: where, for example, a state *statute* interferes with the ability of a copyright owner to participate in a statutory licensing scheme, *see Capital Cities Cable v. Crisp*,

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issue in *Wolens*, section 301 does not affect contract claims because the enforcement of parties' bargains is not enforcement of any state law, rule or regulation. This Circuit (and every other) has applied the "extra element" test in analyzing whether contract claims are preempted by the Copyright Act. *See Nat'l Car Rental*, 991 F.2d at 433 (stating that breach of contract cases are not preempted unless contract claim provides "equivalent rights," and rejecting the pre-enactment deletion of a savings clause (301(b)(3)) explicitly exempting contracts from preemption as evidence of Congressional intent to preempt all contract claims). Rather than robotically applying *Wolens*, this Circuit examines specifically "whether... [the] cause of action seeks to protect rights equivalent to the exclusive copyright rights." *See id.* at 432. This Court has never gone beyond section 301 in a contract case, and Appellants have offered no plausible reason to do so. *Cf. ProCD*, 86 F.3d at 1454-55 (applying *Wolens* as the ordinary rule, but leaving open the idea that some contracts may be preempted under 301); H. Rep. No. 94-1476, at 80 (stating that "[a]cquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privilege to dispose of the copy under section 109(a) or to display it publicly under section 109(b)"); *id.* at 79 (expressing similar sentiment).

<sup>10</sup> *See* cases cited *supra* note 7.

467 U.S. 691, 709-11(1984) (holding that conflict preemption voided an Oklahoma law that prohibited the retransmission of out-of-state alcoholic beverage commercials by cable television systems operating in the state), or where a state statute limits the copyright owner's exercise of his exclusive right to control the length of an exclusive license agreement. *See Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3rd Cir. 1999) (preempting state-imposed 42-day time limit on exclusive theatrical engagements of motion pictures).<sup>11</sup> Neither *Crisp* nor *Orson* needed to engage in a section 301 preemption analysis in holding that the state statutes impermissibly interfered with Congress's objective of facilitating the distribution of copyrighted works on a national basis.<sup>12</sup> No such ownership interest is implicated in this case or by contracts generally. *Cf. T.B. Harms v. Eliscu*, 339 F.2d 823, 826 (2d Cir. 1964) ("Just as with western land titles, the federal grant of a patent or copyright has not been thought to infuse with any national interest a dispute as to ownership or contractual enforcement turning on the facts or on ordinary principles of contract law."); *Saturday Evening Post Co. v. Rumbleseat*, 816 F.2d 1191, 1200 (7th Cir. 1997) (stating that copyright "no challenge" clause

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<sup>11</sup> Compare *Foley v. Luster*, 249 F.3d 1281, 1284 (11th Cir. 2001) (holding that conflict preemption did not invalidate indemnity suit between users of copyrighted works found jointly and severally liable for infringement).

<sup>12</sup> Accord *Brown*, 201 F.3d at 661 ("[B]ecause the tort [of right of publicity] would currently not be sustainable against valid copyright holders, allowing the claim in this context does not impede the transfer of copyrights or the uniformity of the copyright system").

is enforceable because defendant is free to make its own expressive equivalent under copyright law, and the scope of the statutory grant of market power is far smaller than that of a patent).<sup>13</sup>

***B. Preemption Analysis Limited to Section 301 Provides a Stable Market for Copyrighted Works.***

Today, copyright owners know that their contracts are likely to be upheld if they contain an “extra element.”<sup>14</sup> Section 301’s general deference to contract terms reflects a recognition that historically contracts and copyright have co-existed and that Congress has long understood the importance of freedom of contract in the copyright marketplace. As the Supreme Court made clear in *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003), “copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will

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<sup>13</sup> Similarly, *amici* do not dispute that doctrines of unconscionability or state public policy, *see* Restatement (2d) of Contracts § 172, may invalidate contract terms under certain circumstances.

<sup>14</sup> Although the overwhelming majority of those challenges have been unsuccessful, section 301 is not a paper tiger. Some contracts may still be preempted. *See, e.g., Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061–62 (C.D. Cal. 2000) (“Defendants’ alleged promise ...[did not] prohibit any conduct beyond that prohibited by the Copyright Act” and was preempted); *Endemol Entertainment, B.V. v. Twentieth TV*, 1998 U.S. Dist. LEXIS 19049, at \*17 (D. Cal., 1998) (“[Implied contract] claim assert[ed] no violation of rights separate from those copyright law was designed to protect and, consequently, is preempted by federal law.”); *American Movie Classics Co. v. Turner Entertainment Co.*, 922 F. Supp. 926, 931 (S.D.N.Y. 1996) (“[A] breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff....”).

redound to the public benefit by resulting in the proliferation of knowledge . . . .  
The profit motive is the engine that ensures the progress of science.” (Emphasis in original). If copyright owners had to contend on a regular basis with Appellants’ vague conflict preemption approach in addition to section 301, an unprecedented degree of uncertainty would be injected into the marketplace and the celebration would be suppressed, if not halted.

Contracts are often the only way to protect valuable information products against unfairly competitive or other destructive practices. In 1999, for example, *amicus* Reed Elsevier Inc. found that one of its LexisNexis subscribers had taken all of its case law on CD-ROM in direct violation of a standard-form license, eliminated any copyrightable expression such as headnotes or case synopses, and offered a competing service called Jurisline that was available without charge. *See Matthew Bender & Co. v. Jurisline.com LLC*, 91 F. Supp. 2d 677, 678 (S.D.N.Y. 2000) (claims for breach of contract and fraud not jurisdictionally preempted by the Copyright Act). Had its contract claim been preempted, Reed Elsevier would have been hard-pressed to prevent the wholesale commercial piracy of one of its flagship products. *Cf. Ticketmaster v. Tickets.com*, 2000 U.S. Dist. LEXIS 12987, \*12 (C.D. Cal. 2000) (applying reverse engineering precedent to excuse wholesale extraction and deletion of protected expression through use of software “scraper”),

*aff'd without opinion*, 248 F.3d 1173 (9th Cir. 2001).<sup>15</sup> *Amici* respectfully submit that such activity is not “innovation”; it is piracy, and, given the limitations of copyright law, the only thing that can stop it is agreement between contracting parties.

If Appellants’ test were routinely applied to contract suits, *amici* would be faced with a series of Hobson’s choices. First, they would have to attempt to negotiate face to face contracts. Not only would that conflict with another federal policy permitting most contracts to be formed by electronic means, *see* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.* (preempting most state laws banning electronic contract formation), but it would render digital and internet distribution of information prohibitively expensive and unnecessarily cumbersome. *Amici* could not make their materials available through Internet means, often to users they never previously dealt with, if they had to haggle with each of their many users over the terms and conditions under which that material could be used; “fair use” of such material cannot be determined *ex ante*. Advertising-based web sites would similarly be in jeopardy, as none of the terms of use of these services would be enforceable to the extent that they sought to protect compilations or their contents. *Cf. Register.com v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (affirming breach of contract claim based on terms of use). In

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<sup>15</sup> *Amici* believe that *Ticketmaster* was incorrectly decided.

short, the only viable alternative for *amici* and similarly situated entities would be to substantially raise prices to offset increased transaction costs and the risk of wholesale misappropriation, and to adopt user-unfriendly technological restrictions on their fixed media and online services. The cost of accessing their materials would become prohibitive to many users who now have access to these materials on flexible, practical terms, and sometimes even for free. Although the Appellants' interests in avoiding liability may be furthered by placing such arrangements in jeopardy, the policies of the Copyright Act are not.

### **CONCLUSION**

For the foregoing reasons, the decision of the District Court should be  
AFFIRMED.

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Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of AMICUS CURIAE BRIEF OF DATA TREE LLC, FIRST AMERICAN REAL ESTATE SOLUTIONS LLC, AND REED ELSEVIER INC. IN SUPPORT OF APPELLEE DAVIDSON & ASSOCIATES SUPPORTING AFFIRMANCE, was duly served upon the following, by forwarding two copies of the Brief and a 3.5” floppy diskette containing a .pdf version of the Brief, via U.S. mail, first class, postage prepaid:

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Additionally, the original and ten copies of the foregoing Brief, and one 3.5” floppy diskette containing a .pdf copy of the Brief, have been sent via U.S. mail, first class, postage prepaid, to:

Clerk of the Court  
U.S. Court of Appeals for the Eighth Circuit  
Thomas F. Eagleton Courthouse  
Room 24.329  
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This 3rd day of March, 2005.

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Michael J. Hickey

## **CERTIFICATE OF COMPLIANCE**

COMES NOW counsel for Amicus Curiae and certifies the following:

1. The Amicus Curiae Brief complies with the type-volume limitation set forth within Fed. R. App. P. 29(d) and Fed. R. App. P. 32(7)(B)(i), in that the Brief contains 4,317 words.
2. The word processing software used to prepare the Amicus Curiae Brief was Microsoft Word, Version 8.0.
3. The attached 3 ½” computer diskette contains the Amicus Curiae Brief. This disk has been scanned by Symantic AntiVirus Corporate Edition, Version 8.1.1.323 and was found to be free of any virus.

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Michael J. Hickey