

# COPYRIGHT PREEMPTION OF CONTRACTS

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## I. INTRODUCTION

For more than ten years, a debate has been raging in copyright law over the enforceability of contractual license agreements that alter the “delicate balance” of rights that the Copyright Act strikes between owners and users of works of authorship.<sup>1</sup> The debate initially focused primarily on so-called “shrinkwrap licenses” that accompanied computer software. Owners of copyrighted software were using the shrinkwrap licenses to prohibit licensees from using the software in ways that were permitted—even encouraged—by the Copyright Act, including reverse engineering the software to learn how it works and copying the software for archival and other purposes.<sup>2</sup> Since then, technology has improved, facilitating the formation of contracts to cover many uses previously governed by copyright. Today, people contract away statutory rights—including their rights to use uncopyrighted public domain material as well as their fair use rights—with a single click of the mouse. This contract regime threatens to supplant a sizeable portion of the copyright regime.

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1. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (addressing whether the terms of a software license are preempted by the Copyright Act); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l*, 991 F.2d 426 (8th Cir. 1993) (same); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995) [hereinafter Lemley, *Intellectual Property*] (discussing the growing importance of contract law, as opposed to the Copyright Act, in the allocation of rights in computer software); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999) (addressing the ways contract law is interacting and interfering with rights under the Copyright Act and suggesting ways to regulate contracts dealing with software licensing); Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995) (same); Joel Rothstein Wolfson, Comment, *Contract and Copyright Are Not at War: A Reply to "The Metamorphosis of Contract into Expand,"* 87 CAL. L. REV. 79 (1999) (same).

This debate continues today. E.g., Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953 (2005) [hereinafter Easterbrook, *Contract and Copyright*]; Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL'Y 83, 84 (2006).

2. See Lemley, *Intellectual Property*, *supra* note 1, at 1241–48 (discussing the uses and contents of shrinkwrap licenses).