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### [C] Conflict Preemption Under the Supremacy Clause

**USAGE:** On page 1006, SUBSTITUTE the following for the second paragraph of Note (9):

First, however, we should point out that conflict preemption analysis under the Supremacy Clause, of the kind involved in the cases just reviewed, is still a potential part of the overall picture of preemption analysis. Theoretically, at least, some state laws that do not technically fall within the scope of § 301’s provisions nevertheless might operate to frustrate the policies behind the copyright system, which are rooted in Article I, § 8, cl. 8 of the Constitution. In such a situation, courts would still engage in conflict preemption analysis. An instructive case is *In re Jackson*, 972 F.3d 25 (2d Cir. 2020), involving a “remix” by rapper Rick Ross, “in which [Ross] performs his own new lyrics over audio samples of popular songs by well-known recording artists,” including one by rapper Curtis “50-Cent” Jackson. The Second Circuit held that “implied preemption may bar the claim unless the state-created right vindicates a substantial state law interest,” such as false endorsement, privacy, or reputational interests. *Id.* at 37. Noting that the copyrights were owned by a third party, the court concluded that the lawsuit was preempted, as “a thinly disguised effort by the creator and performer of a work within the subject matter of copyright — who owns no copyright interest in the work — to nonetheless exert control over its distribution.” *Id.* at 41.

## § 11.03 RELATED BODIES OF STATE AND FEDERAL LAW

### [C] The Right of Publicity

**USAGE:** On page 1064, SUBSTITUTE the following for the text of Note (12):

(12) *Preemption.* The courts remain divided as to whether and when the right of publicity is preempted by the Copyright Act. Although courts finding no preemption are still in the majority, recent cases are trending in favor of preemption. *See Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000); *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997), *rehearing en banc denied*, 197 F.3d 1284 (9th Cir. 1999) (actors’ claims against the use of animatronic figures representing characters in the TV series *Cheers* were not preempted, despite a sharp dissent by Judge Kozinski). *But see Dryer v. National Football League*, 814 F.3d 938 (8th Cir. 2016) (former football players’ claims for use of likenesses in highlight videos were preempted); *Maloney v. T3 Media, Inc.*, 853 F.3d 1004 (9th Cir. 2017) (college athletes’ claims for sale of game photos were preempted); *In re Jackson*, 972 F.3d 25 (2d Cir. 2020) (rapper’s right of publicity claim for unauthorized use of sound recording was preempted because copyright belonged to a third party).