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2018

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Unconscionability 2.0 and the IP Boilerplate: A Revised Doctrine of Unconscionability for
the Information Age

By

Amit Elazari

A dissertation submitted in partial satisfaction of the
requirements for the degree of
Doctor of the Science of Law
in the
Graduate Division
of the
University of California, Berkeley

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Fall 2018

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the Information Age

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Abstract

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Doctor of the Science of Law

University of California, Berkeley

Professor Steven Davidoff Solomon, Chair

In the information age, where fewer goods and more innovations are produced, intellectual property law has become the most crucial governing system. Yet, rather than evolving to fit its purpose, it has seemingly devolved—standard form contracts, governing countless creations, have formed an alternative de facto intellectual property regime. The law governing the information society is often prescribed not by legislators or courts, but rather by private entities, using technology and contracts to regulate much of the creative discourse. The same phenomena persist in other emerging areas of information law, such as data protection and cybersecurity laws.

This dissertation offers a new analytical perspective on private ordering in intellectual property (IP) focusing on the rise of the *IP boilerplate*, the standard form contracts that regulate innovations and creations. It distinguishes between contracts drafted by the initial owners of the IP (such as EULAs) and contracts drafted by nonowners (such as platforms' terms of use), and highlights the ascendancy of the latter in the user-generated content era. In this era, the drafter of the contract owns nothing, yet seeks to regulate the layman adherent's creations, and sometimes even to redefine the contours of the public domain.

Private ordering is expanding its governing role in IP, creating new problems, undermining the rights that legislators bestow on creators and users. While scholars often discuss the problems caused by IP boilerplate, solutions are left wanting. Inter-doctrinal solutions have been unjustly overlooked. IP scholars reject general contract doctrines as ill-equipped. Contracts scholars discard IP considerations, perpetuating consumerist perspectives. This dichotomy, deepened by the preemption doctrine, has led to the underutilization of the prominent doctrine governing standard form contracts, Unconscionability. Yet, in the aftermath of ProCD, preemption has failed to solve problems created by contracts in IP settings, while Unconscionability has evolved from a legal marginality to a coherent concept.

Inspired by the Israeli purposive approach to unconscionability, this analysis aims to resurrect unconscionability as a pragmatic solution to problems created by IP boilerplate. According to this solution, the question of unconscionability is examined by asking, substantially, whether the provision benefits the relevant IP policies or negates them. Drawing on moral foundations, this solution seeks to avoid utilitarian biases and invites discourse between competing approaches. As a legal standard applicable to various relationships, even those that are nonconsumer based, it accommodates the dynamic adjustments often required when IP policies seek to address contemporary problems.

While IP scholarship has discarded unconscionability as ill-equipped, this dissertation suggests that it is an accessible solution that can accommodate extra-contractual notions. Precisely because the doctrine is rooted in contract law, its flexibility and broad applicability is why it could serve as a universal solution to myriad problems created by appropriating contracts. Adopting Unconscionability 2.0 would allow U.S. case law to align the roots of the doctrine with the needs of the information age.

To my family and my mentors.

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“[The] deployment of boilerplate to achieve widespread cancellation of user rights contributes to democratic degradation . . . the [E]U Directive can override . . . what the federal intellectual property regimes enacted as appropriate user rights.”¹

“[T]he rule-making process regarding the use of information is privatized, and the legal power to define the boundaries of public access to information is delegated to private parties.”²

“[T]he fine print is not a contract. . . . It is nothing but paperwork and should have the legal fortune of junk mail.”³

“[F]reedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract. . . .”⁴

I. INTRODUCTION

In early 2013, at the age of twenty-seven, an emerging creator from Jerusalem directed a video-clip of the famous Dylan song, “Like a Rolling Stone.”⁵ The video allowed viewers a unique interactive experience as they flipped between sixteen channels of a simulated TV and watch how characters of their choice “lip-synced” the lyrics of the song. The passive spectators became active creators, and millions began generating their own creative versions of the song via the innovative interactive platform. Time magazine declared, “[f]inally, a video worthy of the song,”⁶ and the young creator was selected as one of the fifty most creative people worldwide.⁷

Three years earlier, Vania Heymann, the creator of the video, began his visual communication studies at Bezalel, a renowned Israeli design academy. As part of his coursework, Heymann created videos and uploaded them to YouTube.⁸ His videos quickly

¹ MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 168–9 (2012).

² Niva Elkin-Koren, *A Public Regarding Approach to Contracting Copyrights*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 191, 211 (Rochelle Dreyfuss et al. eds., 2001) [hereinafter Elkin-Koren—*Contracting Copyrights*].

³ Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014) (reviewing RADIN, *supra* note 1) [hereinafter Ben-Shahar, *Regulation Through Boilerplate*].

⁴ Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 642 (1943).

⁵ Vania Heymann, *Bob Dylan “Like a Rolling Stone”*, INTERLUDE (Nov. 19, 2013), <https://interlude.fm/v/M3b5GV>.

⁶ Melissa Locker, *Watch: An Incredible New Video for Bob Dylan’s “Like A Rolling Stone”*, TIME (Nov. 19, 2013), <http://entertainment.time.com/2013/11/19/watch-an-incredible-new-video-for-bob-dylans-like-a-rolling-stone/>.

⁷ Alexandra Jardin, *Creativity 50 2014: Vania Heymann*, ADVERTISINGAGE (Dec. 29, 2014), <http://adage.com/article/creativity-50/creativity-50-2014-vania-heyman/296277/>. The video sparked a celebrated international career, and in 2016 Heymann co-directed MTV’s award-winning video “Up & Up” for the famous band, Coldplay.

⁸ Some of the videos were uploaded with a short subtitle, noting they were made as “homework assignments”. See, e.g., Vania Heymann, *my watering can*, YOUTUBE (Oct. 22, 2010),

became viral, as did his name. Little did Heymann know that according to Bezalel's intellectual property (IP) policy, he was infringing the academy's rights. The prior written consent of the academy president, accompanied by the recommendation of a designated committee, is required for such publication.⁹ That is, at least according to the general take-it-or-leave-it contract Heymann signed as a *sine qua non* for his admission.¹⁰

Were YouTube required to, it could have immediately, and "in its sole discretion," removed the allegedly infringing content, regardless of whether it was just or fair.¹¹ This, according to the broad prerogative YouTube retains under its Terms of Use (ToU), yet another standard form contract¹² creators often do not read.¹³

Luckily, this did not happen. Nor did Bezalel try to enforce the broad language under their policy, assigning (with no reward) all rights in Heymann's homework assignments to the academic institution.¹⁴ This young creator, much like many others, probably did not pay careful

www.YouTube.com/watch?v=SzzW1wm3qPg, titled: "My first homework assignment for Bezalel school of arts & design, Jerusalem".

⁹ According to Bezalel's IP Policy all of the IP rights of the student are assigned (with no reward) to the institution if the creation or the invention is conceived "as part of" or "during" her studies. In addition, the student is explicitly warned (although, theoretically, she is no longer the owner of the creation, and does not own such rights) not to present, publish, or copy the creation for a period of seven years following her graduation without the implicit consent of the academy president. *See* Bezalel Academy of Arts and Design, *Students' Regulations Including Discipline Rules and Copyright Annex B*, www.bezalel.ac.il/res/2012andupmisc/shnaton/2015/takanon.pdf § 1, 4 [hereinafter *Bezalel's Policy*] (translated from Hebrew).

¹⁰ The boilerplate specifically alerts the student that her agreement to the policy is "a pre-condition to her admission" and a signature is required "for the sake of good order". *Bezalel's Policy, id.*, at the preamble.

¹¹ Section 7.8 of YouTube's ToU stipulated, until May 25, 2018 that: "[o]n becoming aware of any potential violation of these Terms, YouTube reserves the right (but shall have no obligation) to decide whether Content complies with the content requirements set out in these Terms and may remove such Content and/or terminate a User's access for uploading Content which is in violation of these Terms at any time, without prior notice and at its sole discretion." YouTube, *Terms of Service* (June 9, 2010), www.YouTube.com/static?template=terms. For further discussion, see the discussion in *Song fi*, in ch. III(B)(ii) "The Preemption Doctrine and the Contract-IP "Dichotomy""". The updated version is discussed in ch. II(C)(iii) "Some other Adherent-Creators: Students, Artists, Consultants and Employees" and note 269.

¹² Standard form contracts (or boilerplate) are contracts that are offered to consumers with no room for negotiation, on a "take-it-or-leave-it" basis. The drafter enjoys supremacy in both negotiation power and information, and the consumer usually does not spend much time reading the agreement, prior to agreeing to it. *See, generally*, RADIN, *supra* note 1.

¹³ In general, users of social networks, similar to other non-drafters are "boundedly rational decisionmakers." They almost never read the platforms' ToUs. For further discussion see ch. II(C)(i) "Social Networks and User-Generated Content: Cognitively Overburdened Creators". Interestingly, one qualitative researcher suggests that even emerging artists who rely on social platforms to maintain exposure and attract new audiences are unaware of the terms and often have not "spent time considering" them. *See* Liz Dowthwaite et al., *How relevant is copyright to online artists? A qualitative study of understandings, coping strategies, and possible solutions*, 21 *FIRSTMONDAY* (2016), available at <http://firstmonday.org/ojs/index.php/fm/article/view/6107/5457>.

¹⁴ By, for example, issuing a takedown notice to YouTube under the DMCA (17 U.S.C § 512). For further discussion on the issue of takedown notices in the context of private ordering, and the unique challenges presented by this disturbing combination between the takedown regime, IP boilerplate and

attention to the boilerplate language purporting to govern his intellectual creations. He did not know that the fate of his innovative work of art—at least according to the contractual language—is not for him to decide. But, imagine a different scenario in which Heymann never uploaded his work, in fear of the boilerplate language prohibiting him from doing so. Would millions of viewers be denied the joy of interacting with Dylan’s song three years later? Would this innovative creation ever live to reach its audience?

In the information society, our thoughts have become a commodity; our ideas have become products and intangibles have become our most valuable resources. As a boundless discourse of ideation and response fuels creation on a multitude of platforms, an economy of innovation thrives—but who dictates the rules of the game? Although IP laws should guide society’s response to this evolution, reality proves that too often, these rules are ultimately not prescribed by courts and legislators, but rather by private entities.

The countless creations uploaded by users to social platforms such as YouTube, Instagram and Vimeo and the innovations created by students worldwide are just a partial list of intellectual resources governed by private ordering. The law of the platform,¹⁵ meaning, the terms of use drafted by a few lawyers, is the “private law”¹⁶ that governs most contemporary cultural discourse. Contracts, which no one reads, are probably the most prominent vessel used for the purpose of assigning and governing IP rights in the information age; they govern countless innovations and essentially have formed an alternative de facto IP regime. I call them, *IP boilerplate*: a form of “modern”¹⁷ standard form contract combined with a “core case of democratic derogation,”¹⁸ focusing on regulating innovations and creations in direct interaction with IP policies.

automatic filtering systems, see ch. II(D) “The Technological Boilerplate: Unconscionability by Design”.

¹⁵ This term was coined by Orly Lobel, who used it in order to define more broadly the new, unconventional regulatory theory that governs the platform economy. See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016). I focus on a specific aspect of this emerging field of law—the manner in which platforms use boilerplate language in order to by-pass traditional IP regimes. I further claim that existing legal regimes cannot continue to ignore the two fundamental, interdependent, features of the “law of the platform”: the ever-expanding use of standard form contracts as a regulation mechanism, and the fact that such contracts regulate more users-creators, innovations and creations than ever before. In Lobel’s terms, standard form contracts serve an integral part of the “regulation-innovation nexus,” and therefore should be used in order to promote innovations, not monopolize or stifle creativity, which is inconsistent with the purpose of IP laws. See *id.*, at 92.

¹⁶ See Kessler, *supra* note 4, at 640.

¹⁷ Four and a half decades ago, Slawson claimed, “[i]f contract law is to provide the basis for a democratic system of private law and for a competitive economy which works in the interests of consumers ...—it must take into account the ... conditions under which modern contracting takes place.” (W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 565–6 (1971). Since then modern contracting has, in fact, changed. Society is challenged by an evolving version of modern contracting—a new form of contract that seeks to assume control over expressions and content resources.

¹⁸ Indeed, as Radin noted, IP boilerplate are a troubling case where firms are handed the power to rewrite IP laws, a power that should be limited to courts and legislators. RADIN, *supra* note 1, at 169. Radin refers to EULAs, but her argument applies to IP boilerplate in general. She also suggests that “the large number of people affected seem to matter in this case”, aggravating the problem of democratic degradation (*id.*). In my opinion, the complexity and variety of rights regulated under contract, as well as the fact that IP rights confer monopolistic control and their entitlement affects society in general, matters as well.

The scope of innovations and the variety of legal matters governed by standard form contracts in IP settings is inconceivable. It ranges from multi-billion-dollar software codes¹⁹ to patients' recommendations on Yelp!;²⁰ from the ability of researchers to tinker, perform reverse engineering and test for vulnerabilities in products such as voting machines,²¹ to farmers right "to repair" and circumvent the software embedded in their own tractors;²² from Instagram's and Reddit ability to commercialize social-media content²³ to the ability of Lexmark consumers to resell, or dispose of, patented print cartridges.²⁴ These contracts determine whether Donald Trump Jr. had a legal right to tweet the famous Skittles picture created by the immigrant turned photographer, Kittos, accompanied by an anti-refugee political statement.²⁵

¹⁹ Much of the scholarship devoted to the contract/copyright interplay was focused on this type of IP boilerplate, the End-User-License Agreement (EULA) that accompanies software products. As will be explained, this is an adherent-user type of contract in which the drafter, the owner of the copyright, seeks to limit the ability of the user to access, use the product, reverse engineer the software or even resell the product.

²⁰ See further discussion in the famous Medical Justice case and anti-disparagement clauses, in ch. II(C)(ii) "'Gag' Boilerplate: Assignment of Copyright in Consumers' Reviews".

²¹ See, e.g., WORKSHOP CONVENED BY THE BERKELEY CENTER FOR L. & TECH., UC BERKELEY SCHOOL OF INFO. & THE INT'L COMPUTER SCIENCE INST., CYBERSECURITY RESEARCH: ADDRESSING THE LEGAL BARRIERS AND DISINCENTIVES 6 (Sep. 28, 2015), <https://www.ischool.berkeley.edu/sites/default/files/cybersec-research-nsf-workshop.pdf> (explaining that while "the urgency of the cybersecurity threat has grown to affect more types of products and services ... contractual prohibitions on reverse engineering have proliferated"). The report describes how private ordering affects essential research efforts, by limiting tinkering and testing. For example, contractual terms sought to limit most of the testing required for a research that exposed critical vulnerabilities in voting machines. *Id.* at 1, 23. See also the discussion in *Davidson* and *Baystate*, in ch. III(B)(ii) "The Preemption Doctrine and the Contract-IP 'Dichotomy'". While the Librarian of Congress recently exempted "good-faith security" research from the DMCA prohibitions on copyrighted systems circumvention, contractual language often continues to ban researches from doing so, subjecting them to breach of contract claims. See 17 U.S.C. § 1201(1)(A), (C) and Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 54026 (Oct. 26, 2018) (codified at 37 C.F.R. pt. 201). The exemption is "solely for the purpose of good-faith security research" that "does not violate any applicable law, including without limitation the Computer Fraud and Abuse Act of 1986". *Id.* Therefore, contractual limitations may frustrate the purpose of this exemption if they create a basis for liability under other laws.

²²For further discussion see ch. II(B)(i) ("Some Examples from Fair Use Waivers to the "Right-to-Repair" your Smartphone").

²³ Under Reddit previous ToS, users submitting content to the platform granted an irrevocable perpetual license to the platform (and "others" of its choice) to display and reproduce their creations "in any medium and for any purpose, including commercial purposes". Reddit, *Reddit User Agreement* § 18 (May 27, 2016), <https://web.archive.org/web/20180404004414/https://www.reddit.com/help/useragreement>. This agreement was effective at least until March 2018, when Reddit changed its ToS.

²⁴ See the discussion in ch. II(B)(ii) "The Rise (and fall?) of the "Patent-Wrap" Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham".

²⁵ Kittos, an immigrant turned photographer, created a photographic image of colored candies inside a white bowl and posted it on his Flickr account. Trump Jr. tweeted the image with the accompanying text: "If I had a bowl of skittles and I told you just three would kill you. Would you take a handful? That's our Syrian refugee problem." See Chiara Palazzo, *Donald Trump Jr compares Syrian refugees to a bowl of Skittles*, THE TELEGRAPH (Sep. 20, 2016), <http://www.telegraph.co.uk/news/2016/09/20/donald-trump-jr-compares-syrian-refugees-to-a-bowl->

Sometimes these contracts involve patents, such as the “patent-wrap” label agreement used to impose post-sale restrictions on secondary markets.²⁶ Other times they involve copyrighted creations, as in the case of social-media platforms’ ToU and software EULAs. They are the mechanism through which patentees expand their monopolistic control, beyond traditional patent law boundaries.²⁷ They range from blunt monopolization of traditional elements of the public domain, such as facts and data,²⁸ to what has become perhaps the broadest waiver of moral rights in the history of humanity.²⁹ Now, as digital society becomes

of-skittles/. Kittos filed a takedown notice under the DMCA, the tweet has been removed, and a copyright infringement suit is litigated in Illinois Northern District Court. *See Kittos v. Donald J. Trump For President, Inc*, No. 1:2016cv09818 (Ill. N. Dis. Ct. Oct. 18, 2016). Kittos alleges that the photo was published and used without his permission. The answer to this question partially depends on whether the platform to which Kittos originally uploaded the content allows the creators, under its ToUs, to choose the license they seek to grant in uploaded content. Flickr, luckily for Kittos—allows that. The platform supports a variety of licenses, from “All Rights Reserved” to “No Rights Reserved”, while using the former license as the default setting for uploaded photos. Under this license Kittos retained the rights in his creation, and other users have no publication rights. *See* Yahoo! Help, *Change your photo’s license in Flickr*, <https://help.yahoo.com/kb/flickr/SLN25525.html?impressions=true>. The scenario would end differently, if Kittos happened to upload his creation to a different platform, for example, Twitter. Under Twitter ToUs users waive their right to control their creations since “[b]y submitting, posting or displaying Content on or through the Services” they have granted the platform, inter alia, a worldwide, non-exclusive, royalty-free license to publish their creations in any and all media or distribution methods; a “license [which] authorizes [Twitter] to make your Content available to the rest of the world and to let others do the same”. *See* Twitter, *Twitter Terms of Service*, <https://twitter.com/tos>, § 3. If Kittos had chosen yet a different platform, Vimeo, he would have granted a similar license to the platform, while waiving “any so-called ‘moral rights’ in [his] non-video content”. *See* Vimeo, *Terms of Service* § 9.2 (Oct. 6, 2017), <https://vimeo.com/terms>. I discuss this paradox in ch. II(C)(i) “Social Networks and User-Generated Content: Cognitively Overburdened Creators”.

²⁶ The “patent-wrap” is my paraphrase of the famous “shrinkwrap” agreement (the paper agreements that accompany software CD packages, and unilaterally define the terms of the software IP license) (*see* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995)); the “clickwrap” agreement (the online version of such contracts, that requires the user to manifest “assent” by clicking “I accept”); the “browsewrap” agreements (similar licenses that are presented on web-sites and are “hyper-linked” to the service/product downloaded) and the latest addition—“tap-wraps,” which is the smartphone version of the clickwrap agreement. The “patent-wrap” is a “wrap contract” under Nancy Kim’s definition, since it is “a unilaterally imposed set of terms which the drafter purports to be legally binding and which is presented to the nondrafting party in a nontraditional format,” *see* NANCY KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 2 (2013). *See also* Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187 (2008) (describing wrap contracts and exploring, from a contractual standpoint, how unconscionability was analyzed in their context).

²⁶ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d 721 (Fed. Cir. 2016), *rev’d* in *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523 (2017).

²⁷ *See* the discussion on *Lexmark* and contractual opt-out from patent exhaustion doctrine, at ch. II(B)(i) “Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone”.

²⁸ *See* ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””.

²⁹ Under platforms such as Vimeo and Spotify terms-of-use users waive their moral rights. *See supra* note 25 and Spotify, *Spotify Terms and Conditions of Use* § 7 (Sep. 9, 2015), <https://www.spotify.com/us/legal/end-user-agreement/>. The author is currently involved in a different project aimed to empirically evaluate the salience of such terms and adherent-creators’ attitudes and perceptions towards them. Some early results from that survey published in a different paper (work in

more focused on data abuses amid news of data breaches and privacy violations that consume media headlines,³⁰ the effects of boilerplate controlling the use of information—operating in the shadow of the law, are garnering more scholarly and regulatory attention.³¹

Although widespread in both virtual and non-virtual realms, these contracts usually remain hidden on a deserted web page that creators and users never read.³² In some cases, they take the form of a clickwrap agreement that users spend less than one second reading before

progress), are briefly discussed in ch. II(C)(i) “Social Networks and User-Generated Content: Cognitively Overburdened Creators”.

³⁰ See, e.g., Daniel Solove & Danielle Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 744 (2018) (explaining how the issue of data breaches “cries out for attention,” how the number of breaches is on the rise, and proposing a conceptual framework for data-breach harms). See also Consumer Business Review, *6 Months, 945 Data Breaches, 4.5 Billion Records* (Oct. 9, 2018), <https://www.cbronline.com/news/global-data-breaches-2018> (explaining that “[t]he equivalent to 291 records were stolen or exposed every single second in the first half of 2018, Gemalto’s Breach Level Index shows”, a total of 4.5 Billion Records for the first half of 2018), and Troy Hunt, *‘--have i been pwned?’*, <https://haveibeenpwned.com/> (allowing every user, including the reader of this dissertation, to check if their account has been compromised in a data breach database encompassing 5,575,703,782 pwned [owned, in information security jargon] accounts, to date).

³¹ A prominent example is the EU General Data Protection Regulation (Regulation (EU) 2016/679, of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1) and the recently adopted California Consumer Privacy Act of 2018, Assembly Bill No. 375, ch. 55: An Act To Add Title 1.81.5 (commencing with Section 1798.100) to Part 4 of Division 3 of the Civil Code (Filed with Secretary of State June 28, 2018) (“CCPA”), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375&search_keywords=California+Consumer+Privacy+Act+of+2018. These laws include robust regulations as to how and what companies should disclose with respect to their information collection practices, but more importantly police certain prohibited practices regardless of disclosure and users’ consent. They embrace, to some extent, the notion of bounded rationality. See Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L.J. 115, 156 (2017) (“The real world is one of power imbalances and bounded rationality. In anticipation of bad results through borderless consent and contract, EU data protection law channels and restricts these doctrines.”). See also Chris Jay Hoofnagle, Bart van der Sloot, & Frederik Zuiderveen Borgesius, *The European Union General Data Protection Regulation: What It Is And What It Means* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254511 (providing a comprehensive overview of the GDPR). For an overview of CCPA, see, e.g., Michael L. Rustad & Thomas H. Koenig, *Towards a Global Data Privacy Standard*, 71 FLA. L. REV. 18, 37–44 (2018). The law enters to effect in January 2020 and is considered a “mini GDPR regime”, to the extent it seeks to grant users more control in their data and limit the collection and usage of data by corporations, as well as to equip regulators (and users) with more powerful remedies in the case of an abuse.

³² For example, Bakos et al. studied the browsing behavior of 48,154 consumers of 90 online software companies’ websites and found that 0.08% of consumers visited the EULA page of the software retailers and 0.22% of consumers visited the freeware companies’ EULA pages. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 19 (2014). See also ch. III(B)(iv) “The Dialogue of the Deaf”, discussing the additional findings of empirical scholarship analyzing users’ exposure to EULAs and ToUs. See also Motion of Consumers Union and Public Knowledge for Leave to File Brief of *Amici Curiae* in Support of Defendants-Appellants, at 1, *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (explaining that “every day consumers sign away important public rights as they rip and click through one-sided, non-negotiated shrink- and click-wrap contracts” and the public policy considerations underpinning such waivers).

they click on so they can use the “free” service of the platform.³³ In other cases, they are one of the many other agreements—a part of a vertical boilerplate³⁴ to which future creators and innovators are forced to agree as a pre-condition to their academic studies or employment.³⁵ Empirical research supports the proposition that “I accept” is, in fact, the biggest lie of the information age, showing that the absolute majority of users will go as far as assigning their first-born child to sign in and gain access to a fictitious social network.³⁶ And although form

³³ *Id.* Nevertheless, courts have generally enforced clickwrap agreements as long as the users had an ample opportunity to read them and the contract is clearly presented. See *Hancock v. AT&T Co.*, 701 F.3d 1248, 1256 (10th Cir. 2012) (“Courts evaluate whether a clickwrap agreement’s terms were clearly presented to the consumer, the consumer had an opportunity to read the agreement, and the consumer manifested an unambiguous acceptance of the terms.”); see also *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32–35 (2d Cir. 2002) (“[W]here consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms [R]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”) (footnote omitted); *Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012) (“In the context of agreements made over the internet, such ‘click-wrap’ contracts are enforced under New York law as long as the consumer is given a sufficient opportunity to read the end-user license agreement, and assents thereto after being provided with an unambiguous method of accepting or declining the offer.”). The Restatement reporters conducted a comprehensive empirical study finding 98 cases in which clickwrap contracts were enforced, in both federal and state courts. See THE RESTATEMENT OF THE LAW CONSUMER CONTRACTS, COUNCIL DRAFT NO. 5 (AM. LAW INST. 2018), on file with the author [hereinafter *The Restatement*] at 44. Recently in a notable case in California, discussing the distinction between browsewrap and clickwraps when it comes to contract enforceability and formation, one court enforced a browse wrap contract that “prominently informed [users] on at least two occasions prior [to the purchase]” since they clicked “Accept and Continue” or “Sign In”, and after that “Submit Order” and therefore they agreed to the ToS, “which were always hyperlinked and available for review”. See *Nevarez v. Forty Niners Football Co.*, 2017 U.S. Dist. LEXIS 131208, *20–22 (N.D. Cal. Aug. 15, 2017). As one recent decision noted, there is “no per se rule of validity or invalidity.” See *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 148489, *11 (C.D. Cal. August 29, 2018) citing *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1165 (N.D. Cal. 2016). The Restatement takes therefore the approach that focus should be on the conditions of the formation of the contract and not necessarily its type. See *The Restatement, id.* at 42. This approach is in line with the technological developments brought about with the age of connected devices, where consent will be obtained in a variety of novel ways via untraditional procedures, screens and devices.

³⁴ The fact that IP boilerplate contracts often accompany other contracts is problematic and affects the information costs imposed on adherents, see James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161 (2013) (performing a vertical study of boilerplate in consumer transactions in order to examine the information burden throughout the full transactional process, and finding that a computer purchase involves between 12 to 27 contracts, with a total word count ranging from 33,128 to 96,641 words, respectively). If in the “real-world” “transactions often involve multiple layers of contracts, each with its own information costs”, then in the connected world, in which adding another layer of information is nearly costless for the drafter, the problem is more severe. *Id.*

³⁵ See *supra* note 10 and Steven Cherenksy, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 595 (1993).

³⁶ See Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 2018 INFO., COMM’N & SOC. 1, 16 (noting that of more than 500 surveyed users accepted, 93% a “first-born child assignment” term and 98% ignored it). For further discussion, see ch. II(C)(i) “Social Networks and User-Generated Content: Cognitively Overburdened Creators.”

contracts and licenses are the lifeblood of any economy, especially that of instant “click-based” consumption of digital innovations and cultural assets, “[the] benefits of standard form contracting are not without risks”.³⁷ In other words, with great contracting power comes greater social responsibility.

While the problem of IP boilerplate and private ordering is not new to the IP discourse, solutions are wanting. IP scholars often reject general contract doctrines as ill-equipped, favoring ad hoc retrofitted doctrines and legislative solutions. Contracts scholars tend to discard IP considerations, thus perpetuating consumerist perspectives. Consumer-focused doctrines have yet to adequately accommodate the needs of the “new” consumers, who pay with data and IP rights for “free services.”³⁸ The preemption doctrine, which was supposed to be the main mechanism for policing boilerplate that undermined federal IP policies, at least in the copyright context, proved to be a double-edged sword in the aftermath of *ProCD*. If the contractual provision is not preempted by federal IP law, which is usually the case,³⁹ the question of enforceability is left solely to contract laws, where currently little, if any, attention is given to promoting the purposes of IP policies. Indeed, preemption has long deviated from its original purpose and has been reduced, as some claim, to “mechanically applying tests that, too often, have little to do with identifiable federal copyright policies.”⁴⁰

The result is that under U.S. law, private entities, acting as legislatures,⁴¹ are allowed to undermine IP policies prescribed by federal IP laws through the use of boilerplate, an action that even states’ legislatures are prohibited from taking.⁴² The same pattern of democratic

³⁷ The Restatement, *supra* note 33, at 1.

³⁸ See *infra* note 462, and the discussion in *Song Fi* as part of ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy”.”

³⁹ Professor Guy Rub recently conducted a comprehensive review of 288 court decisions that analyzed the application of copyright preemption and reached the conclusion that U.S. law broadly adopted the “No-Preemption Approach,” associated with the *ProCD* decision (see further discussion in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””). Under this approach, Boilerplate, as contracts, are not preempted by copyright law (17 U.S.C § 301(a)) by definition, regardless of the content of the provision, since contractual rights are rights in personam, not equivalent to copyrights, which are rights in rem, and they require the proof of one “extra element” to institute a claim—the contractual promise (Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contracts Conflict*, 103 VA. L. REV. 1141, 1164–67 (2017) [hereinafter Rub, *Copyright Survives*]. Rub found that the “the no-preemption approach is currently the dominant one”, and that “[t]he Sixth Circuit is the only federal appellate court in the last twenty years to find a contract actually preempted by the Copyright Act.” *Id.* at 1170, 1180 respectively.

⁴⁰ Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 327, 330 (2018), [hereinafter Rub — A Less-Formalistic Copyright Preemption].

⁴¹ RADIN, *supra* note 1, at 16, 213, explaining how boilerplate, in general, and specifically in the case of IP, are acts of democratic degradation; they employ mass systems of contracts to restructure and supersede the rights given by legislators, taking away rights granted by the democratic process. See also Kessler, *supra* note 4.

⁴² Under the copyright doctrine of preemption (see further discussion in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””), and the doctrine of Supremacy Clause preemption (see generally *Goldstein v. Cal.*, 412 U.S. 546 (U.S. 1973) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and explaining that the core concern under the Supremacy Clause preemption inquiry is to establish whether a state statute “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”)). See also, in context of patents, *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 160, 161 (1989) (voiding a Florida statute, as conflicting with federal patent law, under the supremacy clause of the U.S. Constitution since it prohibited “the entire public from engaging

degradation persists in data protection and privacy, where decades-long research has demonstrated the inability of consumers to comprehend lengthy privacy policies or notices and how this inability affects market competition over the quality of privacy-related contractual clauses.⁴³

Meanwhile, the role of private ordering in IP is gradually expanding and the U.S. standard form contracts body of law remains incoherent and unsettled.⁴⁴ As society shifts from the production of physical commodities to the creation of intellectual goods and advances in technology, and everything becomes interconnected,⁴⁵ both the complexity and the variety of procedures governed under private ordering in IP settings are increasing. Private ordering is affecting other areas of technology laws like security, algorithmic auditing and privacy-enhancing research.

Every day, proprietors devise innovative ways to commercialize the intangibles created by others, and the means allowing them to do so are often newly drafted contractual terms. Legislators are not able to address these developments in an efficient, coherent, and timely manner, and their failure creates the legal environment in which abusive private ordering prospers. Courts continue to struggle to address unique problems presented by non-negotiated contracts, as opposed to negotiated contracts with ill-equipped binary tools, such as preemption, misuse, and exhaustion that do not allow contextualization according to the type of contract in place.⁴⁶ In their despair, some turn to copyright and patent misuse, “capture-all” doctrines that are now being redesigned to address a variety of policy concerns but are not specifically tailored to mass-market consumer contracts, nor do they provide a firmer ground or certainty.⁴⁷

in a form of reverse engineering of a product in the public domain ... and “substantially [restricted] the public’s ability to exploit ideas that the patent system mandates shall be free for all to use”) and Rub — A Less-Formalistic Copyright Preemption, *supra* note 40, at 329. *Cf.* the discussion in *Baystate* and *Davidson*, under ch. III(B)(ii), illustrating how the court did not find copyright preemption, in a case where the drafter prohibited users from reverse engineering, a conduct that is permitted under fair use.

⁴³ See, e.g., Nathaniel Good, Rachna Dhamija, Jens Grossklags, David Thaw, Steven Aronowitz, Deirdre Mulligan, & Joseph Konstan, *Stopping spyware at the gate: A user study of privacy, notice and spyware*, 2005 PROCEEDINGS OF THE SYMPOSIUM ON USABLE PRIVACY AND SECURITY 43, and Alessandro Acquisti & Jens Grossklags, *Privacy and rationality in individual decision making*, 3.1 IEEE SECURITY & PRIVACY 26 (2005) (providing survey evidence as to how the bounded rationality of users affects their privacy decision-making processes and attitudes).

⁴⁴ In 1983, Rakoff noted that “the law currently governing contracts of adhesion is a jumble of different lines of analysis, contradictory outcomes, and convoluted expressions.” Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1197 (1983). This proposition was repeated by other scholars throughout the years, including in IP contexts. See Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 607 (1998).

⁴⁵ This “disruptive technological revolution” is commonly referred as the “Internet of Things,” where the “Internet [is able] to reach out into the real world of physical objects.” Mohamed Ali Feki et al., *The internet of things: the next technological revolution*, 46.2 COMPUT. 24 (2013). As connected devices operate on licensed software, this revolution also affects the proliferation of the IP boilerplate and introduces new challenges. See, for example, the discussion in the “connected” tractor, John Deere, at *supra* note 22.

⁴⁶ See ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to Lexmark and Exhaustion.”

⁴⁷ Albeit some scholars resorted to these doctrines as a primary solution. See, e.g., Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 157–58 (1999) [hereinafter Lemley—*Beyond Preemption*] (“Furthermore, because copyright misuse is

Misuse an equitable doctrine originating in the “unclean hands” doctrine, is a form of a defense and is focused on anti-competitive or otherwise abusive (to IP policies) behavior of the drafter that seeks to expand its monopolistic control.⁴⁸ It prevents copyright and patent holders “from leveraging their limited monopoly to allow them control of areas outside the monopoly”.⁴⁹ While Unconscionability 2.0 serves as a proposed solution applicable to all IP boilerplate types and is particularly well suited for the adherent-creator type of contract, misuse, as explained, can operate as a partial solution in the case of the adherent-creator type of contract.⁵⁰

As the interface between contract and IP continues to grow, and the use of IP boilerplate that undermine IP policies prevails, a critical question arises: Can contractual concepts accommodate IP notions? Can the normative origins of unconscionability facilitate reinterpretations reconciling freedom of contract with IP policies? Can U.S. law adopt an IP-contract’s *lex specialis* in order to address the problems created by the IP boilerplate in a contextualized manner?⁵¹ I claim that since the primary purpose of this emerging type of boilerplate is, in fact, to regulate innovations, U.S. law simply cannot continue to maintain the

a fact-specific doctrine tailored to the circumstances of individual cases, it may prove a better tool both for tailoring copyright incentives and for avoiding the reticence that surrounds coarser tools such as preemption.”). Others were less optimistic, noting that misuse “is primarily directed at combating particularly egregious contracts” and is ill-equipped to address such a “diffused” and widespread problem. See Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45 (2007), at n.257. For further discussion, see ch. II(B)(i) “Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone.”

⁴⁸ See generally Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 867–70 (2000) (explaining that misuse operates as a defense and is focused on antitrust principles, although there are instances where general public policy considerations are considered as well). See also *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) (applying copyright misuse “beyond the bounds of antitrust” in a case an owner persuades an infringement suit “to obtain property protection ... that copyright law clearly does not confer”), *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (explaining that “[t]he question is not whether the copyright is being used in a manner violative of antitrust law, ... but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright”), and more recently *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018), *17–18 (clarifying that “copyright misuse need not even be grounded in anti competitive behavior, and extends to any situation implicating ‘the public policy embodied in the grant of a copyright’”) (citing *Omega S.A. v. Costco Wholesale Corporation*, 776 F.3d 692, 699–700 (9th Cir. 2015)). See *infra* notes 293–306 and accompanying text for further discussion.

⁴⁹ *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001).

⁵⁰ Indeed, some scholars have proposed this doctrine as a solution to clauses that prohibit otherwise lawful reverse engineering or fair use. See Frischmann & Moylan, *supra* note 48, at n. 163 and p. 928. See also Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U.L. REV. 495 (2004) (suggesting that a broad public-policy based doctrine of copyright misuse, coupled with rebuttable presumption of misuse, could serve as a solution to cases in which copyright owners use contracts “to avoid the express statutory limitations on their rights”).

⁵¹ Cf. Giuseppina D’Agostino, *Contract lex rex: Towards copyright contract’s lex specialis*, in INTELLECTUAL PROPERTY AND GENERAL LEGAL PRINCIPLES: IS IP A LEX SPECIALIS? 4 (Graeme B. Dinwoodie ed., 2015) (articulating the concept of “copyright-contract *lex specialis*”, and claiming that there is “a need for a more copyright-contract-centric lex” and that “contract law should be more fully integrated into copyright in order to adequately serve the aims of copyright law”).

“ideological dissolution” between contracts and IP laws.⁵² I further claim that the unique problems presented by the intersection between standard form contracts and IP laws should be solved by a tool that is informed by both disciplines. Introducing: Unconscionability 2.0, an inter-doctrinal solution.

Unconscionability is the prominent doctrine used to perform judicial scrutiny of boilerplate contracts. If a court deems a contractual term unconscionable, it could refuse to enforce it.⁵³ While most IP scholars discarded this doctrine as ill-equipped, my analysis, informed by comparative insights from Israeli jurisprudence, suggests that it is an available solution that can accommodate extra-contractual notions. This view is also supported by the newly proposed Restatement of Consumer Contracts,⁵⁴ which as I explain, reformulates Unconscionability to some extent and detangles it from its stringent, procedural routes.

Under the proposed solution, Unconscionability 2.0, the critical question of unconscionability should be examined by asking, substantially, whether the term benefits the purpose of the relevant IP policies or negates them. Most importantly, this solution allows courts to consider both IP and contractual considerations under the same doctrine, taking into account, *inter alia*, the salience of the term, under the procedural analysis and externalities imposed on the public domain and displacement of IP policies, under the substantive analysis. These considerations are then balanced under unconscionability’s sliding scale approach, allowing the courts to reach one result for a negotiated contract and another in the context of boilerplate. It is a contextualized tool, based on a case-by-case analysis of contract enforcement coupled with general presumptions of unconscionability, as opposed to the “all or nothing”, categorical approach to IP boilerplate enforcement, which is currently the solution under the prevailing interpretation of preemption.⁵⁵ In IP terms, Unconscionability 2.0 allows courts to conduct a form of an implied conflict preemption analysis, under the substantive unconscionability prong, and void terms specifically in cases involving IP boilerplate that amounts to “private IP legislation”, under the procedural unconscionability’ nonsalience analysis.⁵⁶

⁵² ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? 202 (2015) (Drassinower suggests that in order to avoid such ideological dissolution between juridical orders, in instances where copyright claims encounter claims recognized in other juridical orders such as contract law—the law is required to mediate between competing claims through a structure of “proportionality” and “translation tools”). I elaborate on how Unconscionability 2.0 fits into Drassinower’s argument in Amit Elazari Bar On, *Copyright and the Greater System of Rights: Utilizing Contractual Concepts to Solve Intellectual Property Problems in Standard-Form Contracts*, 29 INTELL. PROP. L.J. 83 (2016).

⁵³The Restatement, *supra* note 33; U.C.C. § 2-302 and RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981). For further discussion see ch. III(A) “Why Unconscionability?”.

⁵⁴ The Restatement, *supra* note 33.

⁵⁵ Rub, *Copyright Survives*, *supra* note 39. *Cf.* Pamela Samuelson, *Possible Futures of Fair Use Symposium*, 90 WASH. L. REV. 815, 859–60 (2015) (noting that an “articulation of standards for determining under what circumstances fair use should override license or technical restrictions” might evolve, that “[i]t seems unlikely that courts would accept that fair use should either always or never override contractual restrictions” and that “[t]he most promising approach is one that would override mass-market license restrictions that interfere with copyright policy purposes”).

⁵⁶ See Robert P. Merges, *The End of Friction? Property Rights and Contract in the Newtonian World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 126 (1997) (“[A] dominant contractual form can operate as a form of ‘private legislation’ that restricts federally conferred rights every bit as much as a state statute.”). Indeed, Unconscionability 2.0 is a new tool to achieve what Professor Merges suggested twenty years ago: a “new doctrine of contract preemption [that] would apply only when the contract term rises to the level of private legislation.” (Robert P. Merges, *Intellectual Property and the Costs of*

Drawing on moral foundations, this solution seeks to avoid utilitarian biases, invites discourse between competing theoretical approaches, and facilitates “foundational pluralism.”⁵⁷ As a legal standard applicable to diverse relationships, even those that are nonconsumer based, it accommodates the dynamic adjustments often required when IP policies seek to address contemporary problems. Indeed, this is a tool that applies to all adherents: including users of free products and businesses. Unconscionability 2.0 is one suggested application of how an IP regime can operate within an existing contractual doctrine, and how the same framework can involve both contractual and IP considerations.

Precisely because the doctrine is deeply rooted in contract law, its flexibility and broad applicability is why it could serve as a universal solution to myriad problems created by appropriating contracts. Yet Unconscionability 2.0 cannot operate in a vacuum. While this suggested interpretation requires one bold U.S. judge for its adoption⁵⁸ and no legislative reform, other solutions I propose, some based on Israeli standard form contract law, will require broader legislative efforts.⁵⁹ I further explain how this type of solution can operate in some case studies, including the case of the student-creator. I lay a vision for Unconscionability 2.0, with application in various settings, from negotiated contracts to “technological boilerplate”, and cases of boilerplate language interacting with cybersecurity or algorithmic decision-making considerations.

The dissertation proceeds as follows: The second chapter focuses, in a nutshell, on the problem. It introduces the phenomenon of the IP boilerplate and the manner in which such boilerplate undermines IP policies, as part of the more general process of privatization of IP regulation as consumer culture changes and technology evolves. One potential reason why unconscionability has been underutilized in U.S. laws, in the IP setting, is that the doctrine has been sporadically discussed only in reference to selected types of contracts, alongside other

Commercial Exchange: A Review Essay, 93 MICH. L. REV. 1570, 1613 (1995)). Cf. Rub’s recent article, Rub — A Less-Formalistic Copyright Preemption, *supra* note 40, at 327, claiming that under its current interpretation preemption has failed to serve its function and “calling courts to routinely apply the principles of implied preemption when state law seems to conflict with or to stand as an obstacle to federal copyright policy.”

⁵⁷ On the importance of foundational pluralism in the conceptualization of IP regimes see, recently, Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN’S L. REV. 681 (2016) [hereinafter Merges, *Against Utilitarian Fundamentalism*]. Unconscionability 2.0 can facilitate such pluralism by focusing on the midlevel principles: proportionality, efficiency, nonremoval or the public domain, and dignity that provide “common conceptual vocabulary for conducting policy debates” in IP. These principles “create an overlapping consensus among people with differing beliefs about the ultimate normative foundations of IP law.” *Id.* at 702–3.

⁵⁸ See discussion in I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196 (S.D.N.Y. 2015), *infra* note 371.

⁵⁹ While Unconscionability 2.0 confers discretion upon courts, it is still an intermediary approach since it allows them to partially enforce or amend clauses. Radin, in contrast, at least in one occasion, suggests that boilerplate “should be declared invalid in toto, and recipients should instead be governed by the background legal default rules,” because “it [is] much harder for courts to sever and excise only certain clauses.” RADIN, *supra* note 1, at 213. Yet as she clarifies, this reference applies only to “‘offending’ boilerplate—meaning mass-market boilerplate that is bad enough to incur tort liability for intentional deprivation of core legal rights.” See Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)*, L. & ECON. WORKING PAPERS no. 98 (2014), https://repository.law.umich.edu/law_econ_current/98/, at n.7 [hereinafter Radin, *What Boilerplate Said*]. Arguably, the Israeli experience shows that courts can in fact police unconscionable terms efficiently. For further discussion, see ch. III.

solutions. Generally, the literature lacks a unified discussion of IP boilerplate,⁶⁰ yet such a comprehensive account is not the purpose of this dissertation—which focuses on the solution. Still, this chapter aims to provide the reader with an understanding of why the IP boilerplate pose a unique normative challenge that merits a unique solution. It further suggests a new paradigm to observe the IP boilerplate problem, a distinction between the adherent-user and the adherent-creator types of contracts.

Adherent-creator contracts are IP boilerplate contracts in which the adherent, the one who does not read the fine print and lacks bargaining power, is the original owner of the IP rights.⁶¹ The drafter owns nothing, yet seeks to assign or regulate the rights of the adherent in his creations. These contracts have received less attention in IP scholarship than EULAs, in which the drafter owns the IP. Nevertheless, in this highly technologically connected era, non-drafters are producing more innovations, and therefore these contracts are on the rise. While we often speak of the age of “user-generated content,”⁶² it might be more worthwhile to discuss the “adherent-generated content,” as this recent expansion mandates theoretical adaptations from both an IP and standard form contract perspective.⁶³ This chapter also briefly addresses the chief solutions that are currently used by courts and legislators to address the problems created by IP boilerplate, such as preemption, misuse, and ad-hoc legislative solutions. It further discusses some positive IP boilerplate that foster creativity as well as the rise of the technological IP boilerplate, that may give rise to “unconscionability by design”. Finally, this chapter describes the overall emerging narrative of a “game of catch” IP regulation has been playing with IP boilerplate, one in which the latter still seems to be winning.

The third chapter focuses on the current underutilization of unconscionability in the United States as a solution to the problems discussed in the second chapter. While courts in other jurisdictions, specifically Israel, have used unconscionability to prevent drafters from

⁶⁰ Scholarship, ever addressing the problems created by reality, has evolved step by step, usually focused on one or another strain of IP boilerplate, whether it was a pre-invention assignment contract signed by employees (*see, e.g.*, Cherenky, *supra* note 35), a shrinkwrap license seeking to limit the rights of the end user (*see, e.g.*, Lemley—*Shrinkwrap Licenses*, *supra* note 26), or an academic institution’s IP policy depriving students of rights in their creations (*see, e.g.*, Sandip H. Patel, *Graduate Students’ Ownership and Attribution Rights in Intellectual Property*, 71 IND. L.J. 481 (1996)). This has resulted, as claimed, in a scholarly literature that discusses only a part of the contracts, and therefore, often, only a part of the relevant purposes of IP law. For further discussion, see ch. III(B) “The Underutilization of the Unconscionability Doctrine in IP Settings.”

⁶¹In contrast, adherent-user types of contracts are IP boilerplate in which the offeror is both the creator and drafter of the contract, thereby enjoying supremacy in information and bargaining power, while the adherent is the user. *See* ch. II(A) “The Adherent-User and the Adherent-Creator Distinction.”

⁶² In the words of Pamela Samuelson: “Never before in human history has it been more possible for tens of millions of people around the world to express themselves in creative ways, including by tinkering with existing artifacts and sharing the fruits of their creativity with others.” Pamela Samuelson, *Freedom to Tinker*, 17 THEORETICAL INQUIRIES L. 563, 564 (2016) [hereinafter Samuelson, *Freedom to Tinker*]. *Cf.* Peter Menell noting that “[d]igital technology has empowered anyone to remix art and the Internet as opened vast content distribution channels. Creators no longer need to go through traditional professional gatekeepers — publishers, studios, broadcasters, and record labels. They can reach massive audience through all manner of user-generated content websites.” Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age.*, 61 J. COPYRIGHT SOC’Y U.S.A. 235, 313 (2014). *See also* Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 552 (2010) (“Technologically empowered individual creators are thus potential casualties of a regulatory regime that propertizes the ingredients of iterative creativity, but they are also among the beneficiaries of copyright law’s largess....”).

⁶³ *See* ch. II(A) “The Adherent-User and the Adherent-Creator Distinction.”

undermining IP policies, U.S. courts have not. Instead, U.S. courts have resorted to the doctrine of preemption. But in the aftermath of *ProCD*, preemption not only failed to solve the problem, but cultivated the ideological dissolution between U.S. contract laws (on the state level) and IP laws (on the federal level). This created a legal reality in which contractual doctrines are, by definition, uninformed by IP policies, even if the sole purpose of the contract is regulating IP rights. The second chapter further presents and critiques this underutilization of unconscionability in U.S. law. It exposes a long-dominating, yet unobserved narrative of an alienating discourse between IP and contracts regimes in the United States, one that applies in the context of first-sale and exhaustion cases well. It also discusses how courts resorted to misuse and first-sale in recent IP boilerplate cases, and how these doctrines fail to fully address boilerplate issues.

The fourth chapter focuses on the solution, Unconscionability 2.0. It aims to resurrect unconscionability as a pragmatic solution and is informed by comparative analysis, particularly Israeli jurisprudence’s purposeful approach to the doctrine. This chapter briefly presents the Israeli purposive approach to unconscionability and the manner in which Israeli case law has utilized unconscionability to solve problems created by the IP boilerplate. It discusses the proposed doctrine of Unconscionability 2.0 and its advantages, and its potential application in U.S. law. It lays a more robust vision for Unconscionability 2.0, and suggests mechanisms to increase clarity and certainty, such as presumptions of unconscionability. It further discusses Unconscionability 2.0 application on technological boilerplate, in negotiated contracts and demonstrates how Unconscionability 2.0 could be applied in various case studies, including the case of the student-creator. The chapter concludes by addressing some critiques of Unconscionability 2.0. The conclusion follows.

II. INTRODUCING IP BOILERPLATE: WHEN THE FINE PRINT UNDERMINES CREATIVITY AND INNOVATION

Boilerplate contracts are not a new societal phenomenon. In fact, humans, not just consumers, have been subjected to unliteral, “take-it-or-leave-it” contracts since the invention of contracts as a legal institution more generally, around the sixteenth century.⁶⁴ As the decades passed, and the need to facilitate transactions between large populations emerged with the advent of mass production,⁶⁵ the notion of “Freedom of Contract” developed hand-in-hand with its “nemesis” counterpart—unnegotiated standard form contracts, drafted by one but offered to many, many that ought to accept and have no negotiation power (or information). These contracts are otherwise known as “contracts of adhesion.”⁶⁶ As such, form contracts have been

⁶⁴ A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 CHI. L. REV. 533, 543 (1979) (explaining that “[i]t was settled in the sixteenth century that mutual promises could be consideration for each other” and providing an historical account of contract law theory). See also ch. III(A) “Why Unconscionability?” (tracing the roots of unconscionability).

⁶⁵ The development of standard form contracts as a transactional tool is often associated with the industrial revolution and the growing need to facilitate and scale commercial transactions that came about with the advent of the mass-production era. See Slawson, *supra* note 17.

⁶⁶ A term coined by Patterson in the course of discussing life insurance boilerplate. See Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (“Furthermore, ‘freedom of contract’ rarely exists in these cases. Life-insurance contracts are contracts of ‘adhesion.’ The contract is drawn up by the insurer and the insured, who merely ‘adheres’ to it, has little choice as to its terms.”).

thoroughly investigated by legal scholarship for centuries, with early scholarship tracing back to the first decades of the twentieth century.⁶⁷

In 1943 Kessler characterized this unique type of contract as “private law,” contracts that “[enable] enterprisers... to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms” thereby “impos[ing] a new feudal order of their own making upon a vast host of vassals.”⁶⁸ He was the first to distinguish between contracts, a legal tool that was perceived at the time as “a private affair and not a social institution,”⁶⁹ and form contracts that amount to a “living law,” a vessel to empower “industrial empires”⁷⁰ that must be kept in check, as it poses a threat to democratic systems, especially in the hands of monopolistic entities.⁷¹

This analytic framework for exploring the problematic nature of form contracts was later developed by Slawson in his seminal paper from 1971. Slawson explained that by virtue of their dominance in the market, form contracts became a *de facto* meaningful part of the applied body of law, but one that is not subjected to the same stringent requirements required from formal legislation in a well-functioning democratic society.⁷² His suggestion, decades ago, was that if contracts of adhesion do not rely on the meaningful consent of both private parties (one that is usually provided in democratic processes), the legitimacy of form contracts’ content must stem from another source: whether they reflect standards that comply with the public interest.⁷³ It is this conformity with “higher public laws” that allows privately made law to legitimately “govern the public” as an alternate, private mode of legislation. To effectively subject form contracts to this type of judicial review, “an ‘administrative law’ of contracts” must be developed.⁷⁴ As I will explore, that same principle is exhibited in the Israeli purposeful approach to unconscionability, which brings forth, under a specific law, a unique judicial review process to form contracts conducted by a designated tribunal.⁷⁵

Building on Slawson’s argument, Rakoff asserted that because of this nature of form contracts, “a different body of law” is needed to address the question of enforceability. For Rakoff, monopoly or preexisting market power should not be the focus of the inquiry, but rather was the adherent part of the drafting process. If not, this is a contract of adhesion, and the “invisible” terms contained in such a contract—the terms that go beyond the contents of

⁶⁷ See Karl N. Llewellyn, *What Price Contract—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Issacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917). See also OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (London, Sweet & Maxwell, 1937) reviewed by K.N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939).

⁶⁸ See Kessler, *supra* note 4, at 640 (coining the term “legislation by contract”). See also Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange*, *supra* note 56, at 1611–14 (discussing contracts as “private legislation” and applying Kessler’s argument to shrinkwraps, claiming “they have the same effect as offending state legislation”).

⁶⁹ *Id.* at 630.

⁷⁰ *Id.* at 632.

⁷¹ *Id.* at 641–2.

⁷² Slawson, *supra* note 17, at 535–7.

⁷³ *Id.* at 566. Such “non-authoritative standards” encompass the “reasons, principles, or considerations possessing no legal authority within the jurisdiction but of greater generality than the law being reviewed and serving to demonstrate that it is in the public interest.” *Id.* at 533, 538–9.

⁷⁴ *Id.* at 533.

⁷⁵ See *supra* discussion in ch. IV(B)(ii) “Creating an Affirmative Right of Action.”

“ordinary contracts” (such as the price)—are presumptively unenforceable,⁷⁶ and judges will need to apply the “background law” to establish the result. The legal system will therefore need to develop the body of terms that is best fitting to each and every transaction—a challenging, and costly task.⁷⁷ In 2003 Korobkin added another fundamental piece to the standard form contract enforcement debate, suggesting that the focal point of the analysis should rest on the notion of contractual terms’ “salience,” a term that will fifteen years later become the cornerstone of unconscionability analysis in the proposed Restatement.

According to Korobkin, buyers are “boundedly rational decisionmakers,”⁷⁸ and therefore their ability to price contractual terms in their entirety is limited. They simply do not have the economic incentive to invest the time required to understand and evaluate all terms. Because the market does not police the quality of potentially “socially inefficient” terms, these “nonsalient” terms, which are not evaluated by a significant number of buyers, must be subjected to judicial review. By adapting the procedural prong of the unconscionability test to address the question of salience, and spotting cases in which a significant number of buyers are rationally bounded, courts will be able to distinguish efficient terms from inefficient terms. Nonsalient terms should be evaluated with suspicion and policed *ex post*. *Ex ante* legislation should provide mandatory alternative terms that reflect socially desired, efficient results.⁷⁹

Other scholars put forth a variety of alternative solutions to the question of standard form contract enforceability,⁸⁰ but with the advent of the information age and the introduction of cheap electronic contract formation, form contracts expanded to all life’s domains, while U.S. laws, and courts, struggle to develop a comprehensive, systemic regime to address the question of enforceability. In fact, as many scholars previously claimed, the digital revolution exacerbated the problem, as a new type of information feudalism emerged.⁸¹

This chapter focuses on one particular aspect of the skirmish, the interaction between form contracts and IP policies and some of the specific issues they create. A full account of these problems is beyond the scope of this chapter. Yet this chapter proposes a new analytical framework to explore the variety of interactions between IP and contracts, one that focuses on the distinction between the adherent-creator and the adherent-user. It will also bring forth some of the thorniest examples of problems created by IP boilerplate in both virtual and real-world creative platforms. It will make the case that IP boilerplate are unique, and merit a unique solution. In a world governed by the “myth of free”⁸² and social media platforms, creative content became a commodity that users exchange for a variety of services. Meaningful innovations are created in collaborative, dialogical processes, bringing together creative minds from communities across territories. These innovations and creations and the processes that led to their creation are all governed by private rules, known as ToS (Terms of Service), ubiquitous

⁷⁶ Rakof, *supra* note 44, at 1251. *See also* K.N. Llewellyn, *Book Review*, *supra* note 67, at 704 (arguing that if the form terms are unreasonable, they should not be enforced).

⁷⁷ Rakof, *id.*, at 1258–9.

⁷⁸ Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204–06 (2003). In fact, it is because of the bounded rationality of consumers, the “market [] will often include terms that are socially inefficient, leav[ing] buyers as a class worse off.” *Id.* at 1206.

⁷⁹ *Id.* at 1206. This type of framework is provided by the U.C.C., for example.

⁸⁰ *See* ch. II(B)(i) “Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone.”

⁸¹ Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462 (1998).

⁸² *See* ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy” *infra* note 462.

to all websites and digital applications. The digital age changed the way we consume cultural assets and contribute to their creation. It also introduced a new type of form contracts focused on the regulation of this unique mode of creation and consumption.

These form contracts create unique challenges. Empirical evidence suggests IP boilerplate language regulating IP rights is especially nonsalient. Not only is there no competition over the quality of the terms in the market, companies offer very similar terms⁸³ and users and consumers find them especially confusing, in the rare cases that they read the terms. As such, IP boilerplate often exhibits severe societal externalities as it regulates cultural assets and the public access to innovation, as well as what remains in the public domain. These issues are explored in this chapter. The first subchapter proposes a new analytical perspective to facilitate the discussion of IP boilerplate according to the *adherent-user* and *adherent-creator* distinction. The following subchapter demonstrates the variety and complexity of problems created by the IP boilerplate.⁸⁴ While traditionally the discussion of private ordering in IP was critiqued by “autonomists” focusing on the “ills of boilerplate as a process for contracting,”⁸⁵ I expand on the “apologists” critique as well, meaning “how [the boilerplate] affects the outcome of contracting” and “influence [consumers] well-being or satisfaction from the product to which the terms are attached”.⁸⁶ Examples will encompass fair use waivers of different kinds, post-sale restrictions on how users can dispose and use artifacts that embody patents or copyright, and various assignments of, and other limitations on, creators’ and inventors’ rights. Throughout the discussion this chapter also briefly reviews available solutions to problems currently created by IP boilerplate. This subchapter also exposes an

⁸³ See, e.g., Alison C. Storella, *It’s Selfie-Evident: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U. L. REV. 2045, 2064 (2014) (explaining that in social networks a phenomenon of “copycat boilerplate” persists, where the same licensing language is becoming “standard practice” that “makes it impossible for users to exit their contracts for more advantageous terms”). See also Casey Fiesler, Cliff Lampe, & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, 2016 PROCEEDINGS OF THE 19TH ACM CONFERENCE ON COMPUT.-SUPPORTED COOPERATIVE WORK & SOC. COMPUT. 1450, 1453. The author own coauthored research findings further suggests that very similar language exists in platforms’ ToS, and further provides survey evidence that users’ attitudes towards these terms do not change significantly across platforms (Amit Elazari Bar On, Uri Hacoen, & Talia Schwartz Maor, *A Penny for Their Creations—An Empirical Study of Social Media User’s Awareness to Rights in Uploaded Creations* (work in progress with the author)).

⁸⁴ See Rub, *Copyright Survives*, *supra* note 39, whom conducted a comprehensive review of court decisions that analyzed preemption, to reach the conclusion that “the horror scenarios that envisioned contractual arrangements running amok and trumping copyright law as we know it, did not materialize” and “[i]t is doubtful that contracts do, in fact, affect users’ behavior in a way that disturbs the arrangements set by copyright law without leaving a trace, in the caselaw or elsewhere.” *Id.* at 1149. Yet Rub focused only on litigated cases (while acknowledging the problems associated with that (*id.*)), only in cases which involved preemption (adherent-user types of contract), and the majority of the cases he examined did not involve boilerplate at all (*id.*). Interestingly, the most pressing and oppressive cases of adherent-creator types of contracts do not involve preemption at all. See, e.g., Solovsky, *supra* note 58; *infra* note 371; Song Fi, at ch. III(B)(ii)), and ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox.” Rub’s research suggests there is a need to address the manner in which non-litigated IP boilerplate undermines copyright policies, and most importantly, to offer solutions that will reduce the litigation barriers and increase judicial scrutiny of IP boilerplate, as this dissertation attempts.

⁸⁵ Ben-Shahar, *Regulation Through Boilerplate*, *supra* note 3, at 885.

⁸⁶ *Id.*

interesting narrative: traditional solutions such as preemption and misuse are specifically ill-equipped to address problems created by adherent-creator types of IP boilerplate.

The next subchapter briefly discusses the rising phenomena of the technological boilerplate, code that operates as boilerplate and enforces boilerplate. The following subchapter introduces, in a nut shell, the rising opposition to the IP boilerplate: the use of private-ordering mechanisms meant to achieve the de-propertyization of the public domain or flexible assignment of IP rights (e.g., Creative Commons licenses and the GPL opensource license).⁸⁷

A. *The Adherent-User and the Adherent-Creator Distinction*

The term “adherent” developed within the standard form contract literature concurrently with the conceptualization of contracts of adhesion. An adherent, simply put, is the “non-drafter” of the agreement, the party to the form-agreement who agrees to the terms, and often lacks negotiation power or full information regarding the contractual terms and the transaction. It is the party that *adheres* to the contractual terms offered by the drafter. Whether the adherent ought to be a consumer, or a “buyer” that exchanges money for the transaction or services, so as to trigger the application of standard form contract law depends on the jurisdiction. Israeli law defines the term “adherent” broadly to include essentially any non-drafter party, including employees, commercial parties and corporations, union members, and of course users of free services.⁸⁸

According to the proposed distinction, adherent-creator contracts are IP boilerplate in which the adherent, the one who does not read the fine print and lacks bargaining power, is also the original owner of the IP rights, for example, the author of the creative work.⁸⁹ The drafter owns nothing, yet seeks to assign or regulate the rights of the adherent in her creations. The most common example is social media platforms’ ToS, which will include copyright license language as to how the platform, and its affiliates, may use the content created by the adherent—the user of the platform, but the creator of the original work. Can this content be “sublicensed” to other entities, or can the platform make commercial use of user-generated content?⁹⁰ These are the rights regulated under this adherent-creator boilerplate. To clarify, although the adherent in our case is the user of the social media platform (thus, the commonly used term “user-generated content”), under this paradigm, she is an adherent-creator.

In contrast, adherent-user contracts are IP boilerplate in which the offeror is both the creator of the IP in the work or innovation and the drafter of the contract, thereby enjoying supremacy in information and bargaining power, while the adherent is the user of the work. The prominent example here is the “notorious” EULA, The End User License Agreement, in

⁸⁷ See Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 928–38 (2008) (describing such licenses that give users permission to perform what would be otherwise unlawful under copyright, as “new servitudes”). These emerging servitudes do involve notice and information costs, but such costs are balanced against the fact that they regulate uses which are already governed by copyright law, as opposed to “behavior outside the scope of copyright law.” In other words, compliance with general copyright law would have imposed similar “information-intensive investigation” as complying with such licenses. *Id.* at 937. The costs associated with such positive IP boilerplate are also balanced against the positive externalities they impose. *Id.* at 949.

⁸⁸ See ch. IV(A)(i) “Theoretical Background and Comparative Insights: Adopting A Purposive Approach to Unconscionability.”

⁸⁹ 17 U.S.C § 201(a).

⁹⁰ For a survey of different license terms of social media networks ToS and a detailed discussion, see *supra* note 25; ch. II(C)(i) “Social Networks and User-Generated Content: Cognitively Overburdened Creators.”

which the drafter is the owner of copyright-protected software and the boilerplate is used to limit the counters of usage license given to an adherent, as a user of the work.⁹¹ In patents and copyrights EULAs can also be used to impose restrictions on the manner in which the innovation is used, including circulation in secondary markets, a practice that was recently challenged by the Supreme Court.⁹² While, as I explain, it is this type of contract that received most of the scholarly attention, in this highly technologically connected era, adherents are producing more creations and innovations,⁹³ and therefore these adherent-creators' contracts are on the rise.

But boilerplate has become a prominent tool to regulate creative processes beyond the common example of social media. Creative Commons licenses, for example, are standardized contracts that allow authors to license their work to users in more favorable terms than copyright law's default regime, and even to waive all rights in the creation and donate it to the public domain.⁹⁴ Software code is created in cumulative open-source processes regulated by standardized contractual terms.⁹⁵ And participants in creative communities like Wikipedia produce content under a set of standardized terms establishing the rights in the mutual product.⁹⁶

With the proliferation of IP boilerplate, this analytical framework distinguishing adherent-creators and adherent-users enables us to explore the problem from a nuanced standpoint. Both types of contracts can create externalities. EULAs are often characterized as containing overreaching terms that limit users' rights, most notably fair use, thereby limiting the public, and future creators and innovators, access to the creation beyond the careful balance prescribed by law.⁹⁷ Creator-adherent contracts can affect the public domain differently, by depriving the original author of control and autonomy over the creation, stifling her future incentives to engage in creative work, and undermining the purposes of copyright protection.⁹⁸ They can also create inefficient lock-ins on innovations by assigning works to the drafter, which is sometimes not better positioned to make the work accessible to the public,⁹⁹ or limiting the circulation of the work in secondary markets.

⁹¹ For a detailed discussion, see ch. II(B)(i) "Some Examples from Fair Use Waivers to the "Right-to-Repair" your Smartphone."

⁹² See ch. II(B)(ii) "The Rise (and fall?) of the "Patent-Wrap" Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham."

⁹³ See, e.g., Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, *supra* note 62.

⁹⁴ See ch. II(E) "The Rising Opposition: When the Fine Print Supports Creativity and Innovation."

⁹⁵ See ch. II(E) "The Rising Opposition: When the Fine Print Supports Creativity and Innovation."

⁹⁶ See Wikipedia, *About Wikipedia*, <https://en.wikipedia.org/wiki/Wikipedia:About>. Wikipedia contributors are also subjected to social norms. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

⁹⁷ I explore examples in the following chapter.

⁹⁸ See, e.g., ch. II(C)(iii) "Some other Adherent-Creators: Students, Artists, Consultants and Employees" and the student-creator case study provided in ch. IV(A)(ii) "Unconscionability 2.0: The Advantages of the Purposive Approach."

⁹⁹ Leading Israeli design institutions broadly assign students' IP rights to the institution although they rarely invoke their rights or commercialize the work or invention. See the discussion in the student-creator in ch. II(C)(iii) Some other Adherent-Creators: Students, Artists, Consultants and Employees" and *infra* note 249 and accompanying text, as well as in ch. IV(A)(ii) "Unconscionability 2.0: The Advantages of the Purposive Approach."

From a consumer standpoint, the competition in the market over the quality of these terms (salience) is different, as is the level of consumers' (or users') knowledge of their fair use rights vis-à-vis ownership rights under the relevant IP mode. Users often lack understanding of both, but authorship or inventorship rights are uniquely complex and require further understanding of the monetary value of the work licensed, which is usually unknown at the moment of contract formation. Fair use rights are also unpredictable to some extent, so they raise different concerns with respect to users' ability to evaluate them.¹⁰⁰

Research conducted by Hoofnagle and Perzanowski¹⁰¹ showed that consumers lack an understanding of what it is they are buying when purchasing online digital media and the boundaries of ownership of such products versus contractual licensing, including which property restrictions are “attached” and apply to their use of the online product—restrictions that otherwise would not be applicable to the purchase of tangible cultural products like books and records under the first-sale doctrine.¹⁰² Consumers, as the authors explain, are also subjected to “mixed signals” that lead them believe they are actually “buying” the product as opposed to licensing it (with the most notable example being the “Buy Now” button on Amazon).¹⁰³ From an empirical standpoint, the authors found among that 83% of users who clicked a “Buy Now” button when purchasing a media product in the designed experiment believed they would own (as opposed to license) the digital good; that more than 86% of users believed they were entitled to keep the good bought forever, and that a large majority of users thought they could consume the media on any device they wanted to.¹⁰⁴ Sixteen percent (16%) of users thought they could resell the good.¹⁰⁵

Thus, applying this distinction can lead to different results in the judicial review of IP boilerplate, where other doctrines fall short or IP policies are grossly displaced, specifically because the creator of the work is the adherent, or in user-adherent IP boilerplate since contractual rights may be less salient to users as opposed to creators. The distinction also serves to highlight the rise of adherent-creator contracts, and the scarcity of legal and empirical scholarship focusing on the emerging type of the adherent-creator boilerplate from an inter-doctrinally perspective.

At first blush this distinction between adherent-users and adherent-creators of IP boilerplate seems straightforward. But some IP boilerplate, like social media platforms' ToS, combine both, regulating the license granted by users and the license users obtain to use the work of others. Therefore, under the same contract, different terms, of course, merit a different analysis.

Moreover, the distinction between users and creators is not as dichotomic. Users, and the public domain at large, as scholarship articulated, are not just recipients of the creative work, but serve also as generators of meaning, taking a meaningful part in the creative

¹⁰⁰ See, e.g., Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

¹⁰¹ Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315 (2017). See also AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* 83–101 (2016).

¹⁰² Consumers believe that when they “buy” digital media goods, they can “keep those goods permanently, lend them to friends and family, give them as gifts, leave them in their wills, resell them, and use them on their device of choice.” *Id.*; Perzanowski & Hoofnagle, at 323. I further discuss the first-sale doctrine in the following chapters.

¹⁰³ *Id.* at 327–330.

¹⁰⁴ *Id.* at 337–340.

¹⁰⁵ *Id.* at 342.

process.¹⁰⁶ The digital revolution also transformed the creative process, which is now fueled by platforms and social networks.¹⁰⁷ Works are created in *communion*, in a consistent dialogue, while monetary incentives are playing a less prominent role in incentivizing user-generated content, as opposed to communicating and dialoging with others.¹⁰⁸ Works of authorship are viewed as communicative acts, expressions of the author’s autonomy as a speaking being,¹⁰⁹ while a copyrighted work serves as a speech addressed to the other, “an invitation to dialogue about ideas.”¹¹⁰ Under this communicative and dialogical view of authorship, users and the public domain are elevated from listeners, to de facto creators.¹¹¹ As such, limitations on the ability of users to access the work promulgated under contract not only affect secondary creation and the circulation of the original work—but the societal meaning attributed to the original work. While recognizing these limitations, employing this distinction is still useful for the purpose of judicial review of IP boilerplate terms, and the application of this distinction in the context of Unconscionability 2.0 is explored further in the following chapters.

B. Adherent-Users IP Boilerplate

Society has shifted to the mass production of valuable digitized intangibles. IP is playing a more dominant role in the global economy and in promoting innovation than ever, a trend to be continued. Culture is created and disseminated on the cloud and the Web, cultivated by technological platforms. As digitized mass-production expands, so do form contracts that control the dissemination and commodification of valuable digital assets: regulating and assigning, and sometimes depriving one of, IP rights. When it comes to facilitating access to cultural assets, digitization can be a double-edged sword. On the one hand, it cultivates innovation and promotes dissemination by increasing access and reducing transactional costs,¹¹² and on the other hand, it subjects creative works to access limitations and restrictive terms, promulgated by form contracts and enforced by technological measures (DRMs), a

¹⁰⁶ See, e.g., CARYS J. CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 3 (2011). See also Lior Zemer, *Dialogical Transactions*, 95 OR. L. REV. 141 (2017) [hereinafter Zemer, *Dialogical Transactions*] (describing how authentic dialogue facilitates the creative process, and authorship operates as a dialogical act, as oppose to a communicative act).

¹⁰⁷ See Perzanowski & Hoofnagle, *supra* note 101, at 323, explaining the effects of the transition from physical to digital on music, media, and cultural consumption in the context of consumers’ perceptions.

¹⁰⁸ According to Drassinower, as a matter of copyright law, “[A]n author is and must be an author among others. She speaks in a context that ensures conditions for dialogue.” DRASSINOWER, *supra* note 52, at 55. For a comprehensive review of this concept in Drassinower’s theory, see Lior Zemer, *Copyright, Otherness, Dialogues*, 29 INTEL. PROP. J. 155 (2016). See also *infra* note 194 and accompanying text.

¹⁰⁹ DRASSINOWER, *supra* note 52, at ch. 2.

¹¹⁰ *Id.* at 225.

¹¹¹ Drassinower is a vital contributor to the communicative discipline in copyright. Among his other seminal scholarly works are Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991 (2009), Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3 (2003) and Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trademark*, 2008 MICH. SEE ST. L. REV. 1990.

¹¹² Scholars have viewed these benefits as suggesting that a contract-based “usage rights” model might be more efficient for consumers (than copyright law). See Maureen A. O’Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach Copyright Preemption*, 12 BERKELEY TECH. L. J. 53, 62, 70–71 (1997) and Bell, *supra* note 44, at 561.

unique and powerful combination.¹¹³ It is this shift into “cyberspace” that largely made private ordering and contracts a dominant mode of IP regulation.¹¹⁴

Scholarship has been exploring the interaction between form-contracts and IP from the dawn of the Internet age. Many shared the observation that to a great extent, the promise of “creativity’s prosperity” in the information age has gone unfulfilled since corporations decided to use contract law (and, naturally, copyright laws) as an axe to grind—and began appropriating intangible resources, expressions, and content.¹¹⁵ Some shared a “cautionary tale” about how copyright would die in 2010: a story in which all consumption of content is channeled and managed via one monopolistic technical system that requires users to click “I accept” on a strictly enforced form contract that displaced the legislative version of copyright law with a “pro-proprietor” version equipped with “innumerable accretions, modifications, and revisions” magnifying copyright owners’ rights.¹¹⁶

Was this a detached dystopian tale or a vision of today’s digital reality? Instead of one system that controls access to content, consumption is managed on a small number of centralized platforms, using a slightly increased number of apps, but often under very similar sets of contractual terms, partially enforced by technology:¹¹⁷ as the authors envisioned.¹¹⁸ Form contracts only proliferated since this tale was first published and they continue to create different problems for different contingencies: creators, secondary creators, users of technology, consumers of cultural assets, and the public domain at large. Their impact transcends well beyond core IP policies, affecting public interests such as users’ privacy, information security, and free expression.

¹¹³ Bell, *id.* at 564.

¹¹⁴ As Elkin-Koren puts it, “[c]yberspace facilitates such a regime by allowing information providers to distribute their works subject to contracts. The technical ability to make any access contingent upon accepting the terms of a license allows information providers to subject all users to standard terms of use.” Niva Elkin-Koren, *Copyrights in Cyberspace—Rights without Laws?*, 73 CHI.-KENT L. REV. 1155, 1156 (1998) [hereinafter Elkin-Koren, *Copyrights in Cyberspace*].

¹¹⁵ Niva Elkin-Koren has notably claimed that “[t]here is a wide consensus that copyright law has become a barrier for exploiting the full potential of the online environment in promoting creativity.” See Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L.J. 1537 (2013) [hereinafter Elkin-Koren, *Can Formalities Save the Public Domain?*].

¹¹⁶ David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 20 (1999). Nimmer et al. proposed to revise Article 2B in light of the then proposed Bill by Rep. Rick Boucher. According to this proposal, “non-negotiable” form-contracts are unenforceable if they: 1) license or limit the use of uncopyrightable information; or 2) “abrogate or restrict” fair use limitations. See *id.* at 72–73. One opponent to this approach suggested that relying on the “non-negotiability” distinction is unsustainable and that this approach will undermine the (unprotectable) information economy. See Joel Rothstein Wolfson, *Contract and Copyright are Not at War: A Reply to the Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 79 (1999). I further address this distinction in ch. IV, “Unconscionability 2.0—Towards A Revised Doctrine of Unconscionability Derived from Intellectual Property Rationales” claiming that *salience* could be a sustainable standard in this regard.

¹¹⁷ It is important to note though, that some IP boilerplate, mainly limitations on copying and modification by users, is not enforced at scale, unless enforcement is assisted by technological means such as Content ID and Digital Rights Management Systems. See ch. II(D) “The Technological Boilerplate: Unconscionability by Design.”

¹¹⁸ Nimmer et al., *supra* note 116, at 20–21.

i. Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone

Boilerplate has been displacing users’ rights for decades. As far back as 1999, when laying the theoretical foundations for ideas that ultimately developed into the “free culture” movement, Lessig observed that he might as well be barging through an open door, noting that “some will respond that I am late to the party: copyright law is already being displaced, if not by code then by the private law of contract.”¹¹⁹ Franklin and Reichman were also of the opinion, two decades ago, that in the virtual platforms, standard form contracts have virtually already superseded IP law.¹²⁰ In 2004, Radin claimed that “the widespread regulation of intellectual property rights by contract threatens, in principle, to undermine the official regime of intellectual property.”¹²¹ Around that time a substantial body of literature exploring how form contracts interact with copyright developed.¹²²

Prominent among this scholarship is Elkin-Koren,¹²³ who has dedicated a great deal of her scholarship to the problem of “private ordering” in IP. This scholarship articulates some key areas of concern. First IP boilerplate (of the adherent-user type) often includes restrictive contract terms that prohibit the uses of information products that are generally allowed by copyright laws (such as fair use).¹²⁴ The at-scale deployment of restrictive terms means that

¹¹⁹ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 135 (1999). This was done mainly through the use of clickwrap contracts, shrinkwrap contracts, and end-user licenses, whereby “authors are increasingly demanding that purchasers, or licensees, waive rights that copyright law gave them.” Since these contracts are enforced merely by being “attached” and “knowable” in Lessig’s words, then already “through contract law, copyright holders can defeat the balance that copyright law intends.” *Id.* Although almost two decades passed, these insights continue to ring true.

¹²⁰ J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 878 (1999) (claiming that “[i]n the networked environment ... routine validation of mass-market access contracts and of non-negotiable constraints on users would tend to convert standard form licenses of digitized information goods into functional equivalents of privately legislated intellectual property rights....”).

¹²¹ Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the “Law” of the Firm*, 1 U. OTTAWA L. & TECH. J. 173, 178 (2004) [hereinafter Radin—*Regime Change*].

¹²² See LUCIE M.C.R. GUIBAULT, *COPYRIGHT LIMITATIONS AND CONTRACTS: AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT* (2002); Cohen, *Lochner in Cyberspace*, *supra* note 81, at 538–59 and Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 114, at 1187–99.

¹²³ See, e.g., Niva Elkin-Koren, *Copyrights in Cyberspace*, *id.* at 1200 (“[P]rivate ordering should not be immune from government regulation under freedom of contract doctrine because, as a general matter, such arrangements do not satisfy the doctrine’s underlying assumptions.”). *Cf.*, Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 420 (2005) (challenging the ability of Creative Commons licenses to genuinely promote access to creative works, and claiming that “reliance on contracts alone is risky” since “[i]t entails support of strong copyrights and freedom of contract ... The legal regime that would validate Creative Commons’ licenses would also enforce contracts that restrict access to creative works”). See also JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011).

¹²⁴ Elkin-Koren, *Contracting Copyrights*, *supra* note 2.

the usage of copyrighted work in a manner that is consistent with fair use,¹²⁵ for example, for pure academic research purposes¹²⁶ or uses which are not “personal use”,¹²⁷ is limited under mass-market contracts and licenses, although it is generally allowed under the copyright laws.¹²⁸ Such limitation on fair use affects the copyright system in its entirety and society more generally: It prevents access to the work by secondary creators and the public, thwarts commentary and criticism, and de facto rewrites the law to remove this vital limitation on ownership rights, and the “cultural bargain” the law represents.¹²⁹ It also serves as a barrier to interoperability, innovation, and technical and scientific research, since restrictive terms often further limit the ability of the user to tinker with the work and perform actions such as decompiling, reverse engineering, and intermediate copying.¹³⁰ It further undermines the

¹²⁵ 17 U.S.C. § 107. This provision puts forward four non-exclusive factors for the courts to consider in determining whether a use of copyright protected-work is non-infringing. These include the purpose and character of the use, the nature of the copyrighted work, the amount of the copyrighted work used, and the effect on the market. For further discussion, see ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy.”” For example, the dissemblance of code for the purpose of allowing interface and interoperability is considered fair use. See, e.g., *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993) and 17 U.S.C § 117. For a detailed overview of fair use, see PETER S. MENELL, MARK A. LEMLEY, & ROBERT P. MERGES, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018, VOL II: COPYRIGHTS, TRADEMARKS & STATE IP PROTECTIONS* ch. iv (2018).

¹²⁶ See, e.g., *FetLife.com, Terms of Use* (June 4, 2018), <https://fetlife.com/legalese/tou> (stating under “Prohibited Conduct” that users might not “[u]se FetLife to do any academic or corporate research without the expressed written consent of BitLove [the owner]”). This is however, an untraditional term. See also *Sandvig v. Sessions*, 2018 U.S. Dist. LEXIS 54339 (D.D.C. March 30, 2018), Pls.’ Mem. at 17 (providing additional examples in the context of scraping).

¹²⁷ Bradley F. Abruzzi, *Copyright, Free Expression, and the Enforceability of Personal Use-Only and Other Use-Restrictive Online Terms of Use*, 26 SANTA CLARA COMPUTER & HIGH TECH. L. J. 85 (2009).

¹²⁸ See, e.g., 17 U.S.C § 107 (1994) at the preamble (“[T]he fair use of a copyrighted work including such use ... for purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”). See also Kenneth D. Crews, *The Law of Fair Use and The Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 607–637 (2001); THE COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS (October 2018), https://www.copyright.gov/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf, at 294 (explaining in the context of security research that “many of the activities involved in security research are likely to be transformative, as the copying and alteration of the programs are for the purpose of providing information about those works—their susceptibility to security breaches—and do not ‘merely supersede[] the objects’ of the original creation” (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) and *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215–16 (2d Cir. 2015)) and that “good-faith security research promotes several of the activities identified in section 107 as examples of favored purposes, including criticism, comment, teaching, scholarship, and research”).

¹²⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹³⁰ See 17 U.S.C. §§ 117(a), 1201(f); THE COPYRIGHT OFFICE, *id.* at 168–72, 322–324 (discussing a variety of interpretability and jailbreaking activities under fair use analysis and noting that among others “interoperability is favored under the law”). See also *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1514 (9th Cir. 1993); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 598–99 (9th Cir. 2000); Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, BERKELEY TECH. L. J. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072633, manuscript at 22–30 (explaining that particular functional specifications, and processes and features “that affect access to or interoperability

democratic nature of societies built on the free exchange of information and ideas, and hinders free competition and innovation.¹³¹

Accordingly, scholarship explored the specific effects of contractual restrictions on reverse engineering and de-complying and their effect on innovation, interoperability, and competition. Samuelson and Scotchmer noted that there is no “intrinsic reason” to allow contracts to circumvent “well-designed intellectual property regime[s]”, “especially in markets with strong network effects.”¹³² Technologists warned, already in the early 2000s, that limiting the “the freedom to tinker,” “the freedom to understand, discuss, repair, and modify technological devices that you own” using restrictive contract language will hinder the positive externalities associated with tinkering.¹³³ Commentaries recognized that the same vital concerns raised against the introduction of anti-circumvention regulation under the Digital Millennium Copyright Act (DMCA),¹³⁴ including restrictions limiting security testing,¹³⁵

with a system” are excluded from copyright protection under 17 U.S.C § 102(b) and the logic of *Baker v. Selden*, 101 U.S. 99 (1879), and that the Federal Circuit erred in *Oracle America, Inc. v. Google, Inc.*, 750 F.3d 1339 (Fed. Cir. 2014) in its analysis by subjecting the copying of functional specifications (in that case, Java APIs) to fair use analysis). In a later proceeding, the Federal Circuit further noted that verbatim copying for interoperability purposes is just a “moderately transformative activity.” See *Oracle America, Inc. v. Google, Inc.*, Tr. at 40:08–25 (Apr. 25, 2018) (Williams, Joint Creators II). See also Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software*, 31 HARV. J.L. & TECH. (SPECIAL ISSUE) 305 (2018).

¹³¹ Menell, *Rise of the API Copyright Dead?*, *id.* at 318–322, 341–343 and Menell, *Network Effects*, *id.* (explaining how section 102(b) limitations in appropriating functional elements needed for interpretability purposes serve sound policy of promoting free competition and innovation). See also Motion of Consumers Union and Public Knowledge for Leave to File Brief of *Amici Curiae* in Support of Defendants-Appellants, at 1–9, *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (explaining how reverse engineering and interoperability foster market competition and sound public policy).

¹³² See Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1661 (2001). In Europe since 1991, contract terms seeking to prevent decompilation have been considered void. See European Software Directive, *supra* note 178, art. 9(1), 1991 O.J. (L 122) at 45; see also Directive 2009/24/EC on the legal protection of computer programs and its implementation for example under German Copyright Act. Samuelson and Scotchmer further concluded that to “the extent that enforcement of anti-reverse-engineering clauses would have a detrimental effect on competitive development and innovation, legal decisionmakers may be justified in not enforcing them.” *Id.* at 1630. See also, more recently, Samuelson, *Freedom to Tinker*, *supra* note 62, at 582.

¹³³ Mainly innovation, education and competition. See Whitfield Diffie, *11th USENIX Security Symposium San Francisco, California, USA August 5–9, Keynote Address, Information Security in The 21st Century 2002*, 27(6) ;LOGIN: THE MAGAZINE OF USENIX & SAGE 64, 66 (2002).

¹³⁴ See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

¹³⁵ Recent empirical research conducted among security researchers shows that even though such restrictive terms are rarely enforced, they still create a chilling effect on research, causing “white-hat” security researchers, including from academia, to adjust their research designs and methods, and in some occasions avoid testing altogether. See, e.g., Center for Democracy and Technology, *Taking the Pulse of Hacking: A Risk Basis for Security Research*, <https://cdt.org/insight/report-taking-the-pulse-of-hacking-a-risk-basis-for-security-research/> (reviewing qualitative research conducted with twenty security researchers to explore their decision-making processes on whether to pursue security projects and activities, and finding that “[n]early half of the researchers interviewed mentioned the DMCA specifically as a source of legal risk ... In some cases, researchers avoided working with devices and

encryption research,¹³⁶ and interoperability between systems, are relevant if contracts (instead of the DMCA) are used to enforce them at scale.¹³⁷

systems protected by access controls to eliminate the legal risks stemming from the DMCA”). See generally The National Telecommunications and Information Administration (NTIA), *Vulnerability Disclosure Attitudes and Actions: A Research Report from the NTIA Awareness and Adoption Group* (September 2015), at 2 (conducting a survey among 414 security researchers participating in coordinated disclosure, and finding that “[t]he threat of legal action was cited by 60% of researchers as a reason they might not work with a vendor to disclose”). There were at least two well-documented and publicly reviewed cases in which the DMCA was specifically invoked against security researchers. In 2002, security researchers received a legal letter from Hewlett Packard, after disclosing the findings of security flaws in the Tru64 Unix operating system in an internet forum. See Declan McCullagh, *Security warning draws DMCA threat*, CNET (Aug. 1, 2002), <https://www.cnet.com/news/security-warning-draws-dmca-threat/>; *Felten v. RIAA* (in which esteemed academic researchers sought declaratory relief stating that publication of a paper discussing results of testing the encryption used for CD watermarking does not violate the DMCA, after they received a letter from the RIAA threatening legal action and withdrawing their peer-reviewed publication). See Compl. Declaratory J. and Injunctive Relief, *Felten v. Recording Indus. Ass’n (RIAA)* (D.N.J. Nov. 28, 2001) (No. CV-01-2669), available at [http://www.eff.org/Legal/Cases/Felten v RIAA/20010606_eff_felten_complaint.html](http://www.eff.org/Legal/Cases/Felten_v_RIAA/20010606_eff_felten_complaint.html). Both cases ended up with the organization withdrawing the threats. See Declan McCullagh, *HP Backs Down on Copyright Warning*, CNETNEWS.COM (Aug. 2, 2002), <http://news.com.com2100-10230947745.html> (describing how Hewlett-Packard backed off from its initial DMCA threat against researchers for publishing information on flaws in its operating system).

Although almost two decades since passed, companies still threaten legal action against white-hat researchers, often based on, among other issues, contract language, and as they face public media pressure, sometimes they withdraw their threats. For further discussion, see Amit Elazari Bar On, *Private Ordering Shaping Cybersecurity Policy—The Case of Bug Bounties*, forthcoming in *REWIRED: CYBERSECURITY GOVERNANCE* (Ryan Ellis & Vivek Mohan Eds., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3161758. See also Alexander Gamero-Garrido, Stefan Savage, Kirill Levchenko, & Alex C. Snoeren, *Quantifying the Pressure of Legal Risks on Third-party Vulnerability Research*, 2017 PROCEEDINGS OF THE 2017 ACM SIGSAC CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY 1501, 1503 (sampling 75 devices, sending the manufactures of these devices notices asking for permission to conduct security research on their products (one letter was from leading professors with tens of thousands of citations, one from independent security researcher), evaluating their responses and finding that “most [of them] are loathe to surrender legal recourse and either are unwilling to engage on questions of permission or impose significant restrictions on doing so”). The authors also found “a significant difference in the responsiveness afforded to academic vs. independent security researchers.” *Id.* at 1502. Moreover, the authors surveyed more than 100 security researchers, and noted that 22% of them mentioned they were in fact threatened with legal action. *Id.* at 1511.

¹³⁶Samuelson, *Intellectual Property and the Digital Economy*, *id.* at 536. See also Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501 (2003). Already since 1998, the DMCA had a narrowly defined exception for encryption security research. See 17 U.S.C.A. 1201(j). Recognizing the limitations of this exemption, the Copyright Office introduced a temporary good-faith security research exemption in 2015, which was recently renewed and expanded. For further discussion on the interaction between this specific exception and form-contracts, see *supra* note 21.

¹³⁷ See, e.g., Dan L. Burk, *Market Regulation and Innovation: Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 568 (2005) (noting that “[if use of mass-market licenses to prevent reverse engineering or interoperation of technically protected devices is] permissible, then boilerplate licenses might be employed to negate whatever limits have been placed on strategic overreaching by means of the DMCA anti-circumvention provisions”).

Other domains included the effects of contractual restrictions on various forms of fair use:¹³⁸ from parodying and criticism to academic research more generally.¹³⁹ For example, reviewing hundreds of terms, Moffat surveys a variety of contractual restrictions from limitations on modification of the work, limitation on commercial or “non-personal” use that might be covered under fair use,¹⁴⁰ and limitations on collection of non-protected material such as facts.¹⁴¹

In specific domains like information security, scholarship focused on concerns related to the ability of software licenses to limit disclosure of software security vulnerabilities,¹⁴² a matter that recently was addressed in federal law with the introduction of the Consumer Review Fairness Act. This body of scholarship recognized that such terms create specific negative externalities in the field of cybersecurity by shifting the risks associated with security flaws to consumers and society at large, allowing vendors to potentially prioritize the protection of their IP rights over the need to ensure information security.¹⁴³

¹³⁸ See, e.g., Moffat, *supra* note 47, at 45 (noting that “[a]dhesion contracts, many of them now in clickwrap or browsewrap form, proliferate and govern nearly every commercial transaction and most of the ways in which the modern consumer interacts with the world. Virtually every one of these contracts contains a limitation on copyright’s fair use doctrine”).

¹³⁹ Gove N. Allen, Dan L. Burk, & Gordon B. Davis, *Academic Data Collection in Electronic Environments: Defining Acceptable Use of Internet Resources*, 2006 MIS QUARTERLY 599. See also Liu, *supra* note 136.

¹⁴⁰ See Abruzzi, *supra* note 127.

¹⁴¹ *Id.*

¹⁴² See Jennifer A. Chandler, *Contracting Insecurity: Software License Terms that Undermine Information Security*, in HARBORING DATA: CORPORATIONS, LAW AND INFORMATION Security 159 (ANDREA M. MATWYSHYN ed., 2009). See also Jennifer Stisa Granick, *The Price of Restricting Vulnerability Publications*, 9 INT’L J. COMM. L. & POL’Y 10 (2005).

¹⁴³ See Chandler, *id.* at 176–77 (surveying among others, reverse-engineering limitations and anti-benchmarking clauses in this context). This tension was raised in the Sony rootkit fiasco, where a DRM software called XCP distributed by Sony created a vulnerability that allowed malicious actors to secretly get “root” access to users’ devices, without users’ knowledge and while compromising their systems. The company’s own efforts to remediate the situation and remove XCP also resulted in newly introduced vulnerabilities. See the FTC’s formal complaint in *In re Sony BMG Music Entertainment*, FTC File No. C-4195 (F.T.C. June 29, 2007), available at <http://www.ftc.gov/os/caselist/0623019/0623019cmp070629.pdf>. See also Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157 (2007). Mulligan & Perzanowski explored the various harms caused in this case, suggesting that in addition to the direct negative societal effects of decreased security, the case raised public attention to DRM technologies and corroded consumers’ trust in these systems, leading other vendors to reduce their investments in DRMs: a potential positive externality. See *id.* at 1166–1177. A similar effect occurred in the Cambridge Analytica data misuse case, in which the exploitation of data at large on the Facebook platform to manipulate election results, among others, by profiling, targeting, and influencing users led to a broader inquiry into the practices of social platforms and ad networks, and a consumer privacy global movement more generally. Still, this type of “consumer mistrust” externality could pose costs in areas like autonomous driving and medical connected devices, where there might be overall societal utility from using the device, yet one instance of a manufacturer’s negligence causes consumers to doubt the system’s integrity, thereby undermining its adoption in the market. For general discussion in the Cambridge Analytica scandal and its effects on data regulation, see Ido Kilovaty, *Legally Cognizable Manipulation* (forthcoming BERKELEY TECH. L. J., 2019), <https://ssrn.com/abstract=3224952>.

Another body of literature was particularly concerned strictly with software and EULAs, and primarily with the proposed reform of U.C.C. Article 2B.¹⁴⁴ This bill was initially drafted as a proposed amendment to the U.C.C. and eventually became the Uniform Computer Information Transactions Act, 2000 model law (UCITA), which was not widely adopted.¹⁴⁵ At the time, the American Law Institute and the National Conference of Commissioners on Uniform State Laws appointed a committee responsible for drafting a supplement to the U.C.C. § 2, in order to alleviate the uncertainty and confusion that gradually prevailed with respect to shrinkwrap licenses and their enforcement. To some extent, this reform compelled IP scholars to consider doctrinal solutions that are, in essence, contractual, inviting much-needed criticism of the contractual doctrines proposed under the bill.¹⁴⁶ It also inspired scholars to deeply consider the implications of EULAs, specifically on IP policies. Reichman and Franklin noted that an “unbalanced approach” traditionally manifested in form contracts becomes even greater “when the adhesion contracts in question routinely implement the legal monopolies of intellectual property rights.”¹⁴⁷ As far back as 1999, they envisioned that this “deadly combination” between IP’s monopolistic rights and standard form contracts would become the primary vehicle to balance private property rights in intangibles with the public interest.¹⁴⁸

But IP boilerplate also interacts with other doctrinal limitations on copyright ownership. Most prominently, the idea/expression and fact/expression dichotomies, which distinguish protectable expressive work from unprotected facts or ideas.¹⁴⁹ Copyright law excludes monopolistic protection in these elements, which serve as building blocks for future creativity and innovation. But form contracts can be used to undermine these distinctions by allowing drafters to appropriate essential building blocks, excluding the public access to these elements, thereby creating de facto property monopolistic rights. This type of externality on

¹⁴⁴ See Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium*, 87 CALIF. L. REV. 1 (1999). See also Nimmer, Brown, & Frischling, *The Metamorphosis of Contract into Expand*, *supra* note 116.

¹⁴⁵ See Unif. Computer Info. Transactions Act, 7 U.L.A. pt. II (Supp. 2001), <http://www.ucitaonline.com/ucita.html>, adopted in Virginia and Maryland. A later effort by the ALI to establish standards for software contracts was unsuccessful as well. See *id.* UCITA; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, PRELIMINARY DRAFT NO. 2 (Aug. 10, 2005), at p.1.

¹⁴⁶ See, e.g., Reichman & Franklin, *supra* note 120; see also Lemley—*Shrinkwrap Licenses*, *supra* note 26 and Samuelson, *id.*, and Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998).

¹⁴⁷ Reichman & Franklin, *supra* note 120, at 909.

¹⁴⁸ The duo also criticized the drafters of the Article 2B bill for failing to recognize that standard form contracts operate more like property (rather than contractual) arrangements by virtue of creating “rights against all the world” through mass application. *Id.* at 910. The *ProCD* Seventh Circuit court, as I explore, followed the same erroneous path. See ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’.”

¹⁴⁹ Codified in 17 U.S.C. § 102(b), and developed in the seminal case of *Baker v. Selden*, 101 U.S. 99 (1879) (holding that a while a textbook explaining a novel accounting might be protected under copyright, that protection does not grant the copyright holder a monopoly over the use of the accounting system described in that book). See also *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 831 F. Supp. 202 (D. Mass 1993), 831 F. Supp. 223 (D. Mass. 1993), *rev’d* 49 F.3d 807 (1st Cir. 1995), *aff’d* by an equally divided court, 516 U.S. 233 (1996) (discussing the question of copyrightability of software menu command hierarchy) and the discussion in *ProCD* and *Feist*, in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’.” See also Menell, *Economic Analysis of Network Effects*, *supra* note 130, at 22–33 (discussing the copyright unprotectability of functional and network features).

the public domain interacts with fair use limitations, but extends beyond fair use limitations since it limits the ability of the user to use unprotected elements. In 1996, when the courts were faced with the question of enforceability of such restrictive terms in the matter of *ProCD*, considerable scholarly attention was given to this specific problematic interaction of IP boilerplate and copyright.¹⁵⁰ Examples of these broader “public-domain” restrictive terms include limitations on scraping, copying, usage, modification and collection of unprotected data mainly from websites and databases,¹⁵¹ but also from journals and books, in library licensing contracts for example.¹⁵²

More recently, a new type of IP boilerplate problem re-sparked scholarly debates around the limitations of the concept of ownership in the digital arena. The digital and connected era reconceptualized consumer consumption, affecting the understanding of traditional concepts of property and ownership.¹⁵³ Purchasing a physical book on Amazon gives the user a very different bundle of rights than purchasing the electronic, “Kindle” e-book version. The electronic version comes with “strings attached,” all promulgated under the fine print language of the licensing contract.¹⁵⁴ The various limitations on the ability of users to enjoy the licensed copyrighted work are further enforced by technological measures. From a consumer standpoint, this type of IP boilerplate language raises unique questions since often such limitations go far beyond what a reasonable user would expect, as empirical research shows.¹⁵⁵

This at-scale transition from physical consumption to digital consumption introduced pro-copyright owner boilerplate, DRMs and TPMs to all segments of cultural consumption.¹⁵⁶ Even the consumption of tangibles and artifacts, like cars, mobile phones and toaster ovens, became entangled with licenses and IP boilerplate language, with the proliferation of connected devices. One specific type of boilerplate limitation in this domain sought to limit the right of the buyer of a connected product from repairing or inspecting the product or performing maintenance tasks on it. This type of limitation, that further gathered media attention, is deployed by John Deere, a leading tractors’ manufacturer that uses a combination of encrypted software and EULA language to “lock” consumers and mandate that they repair and diagnose malfunctions in their tractors only in authorized dealerships that charge inflated fees. The language of John Deere’s license agreement explicitly prohibits reverse engineering of the software or transmission of the software over “any network or via a hacking device,” for any

¹⁵⁰ For further discussion, see ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’.”

¹⁵¹ See the discussion in *supra* notes 125–131 and accompanying text.

¹⁵² See, e.g., the discussion in *Wright v. Warner Books, Inc.*, 953 F.2d 731, 741 (2d Cir. 1991) in *infra* note 313 and accompanying text.

¹⁵³ PERZANOWSKI & SCHULTZ, *supra* note 101.

¹⁵⁴ See Perzanowski & Hoofnagle, *supra* note 101 and Shaffer Van Houweling, *The New Servitudes*, *supra* note 87.

¹⁵⁵ Perzanowski & Hoofnagle, *id.*

¹⁵⁶ See, e.g., Deirdre K. Mulligan, John Han, & Aaron J. Burstein, *How DRM-based Content Delivery Systems Disrupt Expectations of Personal Use*, 2003 PROCEEDINGS OF THE 3RD ACM WORKSHOP ON DIGITAL RTS. MGMT. 77; Deirdre K. Mulligan, *Digital Rights Management and Fair Use by Design*, 46 COMM. ACM 30 (2003); Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1 (2006).

purpose.¹⁵⁷ These types of restrictions affecting users’ right-to-repair are widely adopted in connected devices, from smartphones and voice assistants to medical devices.¹⁵⁸ Recognizing the societal costs of these limitations, the Copyright Office recently exempted the circumvention of software for the purpose of “diagnosis, maintenance, or repair” of a “smartphone or home appliance or home system.”¹⁵⁹

Still, contractual limitations extend beyond mere repairing, to, more abstractly, limitations on the “right to tinker” with devices. Tinkering, as Samuelson explains, is a pillar of innovation and scientific progress.¹⁶⁰ Tinkering also helps one to establish relationships with property and the world more generally, to define one’s identity and personhood.¹⁶¹ In other cases tinkering could save people’s lives.¹⁶² But this type of tinkering is made more difficult as the “Internet of Bodies” culture expands and DRMs are deployed to limit patients’ access to

¹⁵⁷ See John Deere, *License Agreement for John Deere Embedded Software* § 4, https://www.deere.com/privacy_and_data/docs/agreement_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf. Notwithstanding the fact the Librarian of Congress exempted this circumvention from the DMCA under certain conditions already in 2015. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65955–56 (Oct. 28, 2015). In 2018 this exception was broadened. See *supra* note 21.

¹⁵⁸ In Massachusetts there is a specific law that supports consumers’ right-to-repair their cars. See Digital Right to Repair Act. In California and seventeen other states, right-to-repair bills have been introduced. See Chaim Gartenberg, *California becomes the 18th state to introduce right to repair bill*, THE VERGE (Mar. 8, 2018) <https://www.theverge.com/2018/3/8/17097256/california-right-to-repair-bill-apple-microsoft-service-replace-parts>. See also Susan Talamantes Eggman, *Eggman Introduces Legislation to Create a “Right to Repair” for Electronics*, <https://a13.asmdc.org/press-releases/20180307-eggman-introduces-legislation-create-right-repair-electronics>.

¹⁵⁹ THE COPYRIGHT OFFICE, *supra* note 128, at 13. The register specifically addressed “the frustration of at the notion that copyright should prevent owners of devices from repairing, tinkering with, or otherwise exercising control over their own property” raised by the commentaries. *Id.* at 3.

¹⁶⁰ Samuelson, *Freedom to Tinker*, *supra* note 62. See also William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1455–72 (2010).

¹⁶¹ See Samuelson, *Freedom to Tinker*, at 565. See also Edward Felten, *The New Freedom to Tinker Movement*, *Freedom to Tinker* (Mar. 21, 2013), <https://freedom-to-tinker.com/blog/felten/the-new-freedomto-tinker-movement/>. For further discussion on the connection between property and IP and the counters of defining one’s self and personhood, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). See also Meir Dan-Cohen, *The Value of Ownership*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=189830 (2000).

¹⁶² In one recent case, a white-hat hacker from Australia spent approximately 1,000 hours circumventing a “continuous positive airway pressure” medical device software DRM to allow the patients using it to access their medical information, creating an open source tool, “SleepyHead,” which enables patients to dramatically improve their medical situation. See Jason Koebler, *‘I’m Possibly Alive Because It Exists:’ Why Sleep Apnea Patients Rely on a CPAP Machine Hacker*, MOTHERBOARD VICE (Nov. 15, 2018), https://motherboard.vice.com/en_us/article/xwj4d4w/im-possibly-alive-because-it-exists-why-sleep-apnea-patients-rely-on-a-cpap-machine-hacker. This type of conduct is now exempted from the DMCA, see *supra* note 21, but is still often barred under EULA language. Perhaps such limitation constitutes copyright misuse under the *WireData* (*supra* note 48) decision logic, since that patients’ sleep data is only available on the device, and it is their own data. See *WireData*, *infra* note 311 and accompanying text.

their own medical information.¹⁶³ In the context of the freedom-to-tinker, form contracts are the main vessel to solidify what professor Ed Felten, a computer science professor, legal thinker, and “tinkerer”, called a “permission culture,”¹⁶⁴ in which tinkerers are punished for, threatened, or scared into avoiding tinkering, sometimes with no legal or societal justification.¹⁶⁵ If we are to create a “substantial zone of liberty” in which socially beneficial tinkering is allowed, as Samuelson suggested,¹⁶⁶ then we must limit the exercise of mass-market contractual limitations and “technological boilerplate”¹⁶⁷ in the IP realm.

ii. The Rise (and fall?) of the “Patent-Wrap” Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham

While IP boilerplate concerns are often discussed in the context of copyright, form-contracts significantly affect patent law and the market for innovations. In fact, consumers and users interact with licensed patents hundreds of times a day, even in their home environment. Patents maintain our health and keep us entertained. Many of these patents, are not acquired directly by the user from the patent owner (the patentee) or his manufacture (the manufacturing-licensee), but purchased in secondary markets (for example, when a consumer is buying a used product). Limitations on secondary markets represent a notable area of interaction between contracts and IP, namely, contractual limitations on the first-sale doctrine and exhaustion.

The first-sale and exhaustion doctrines long served the elaborate task of balancing the monopoly power given to patent and copyright holders as proper incentive and the public interest in free markets.¹⁶⁸ These doctrines limit the scope of the monopolistic rights granted to the owner of the innovation or creative work to the extent needed to serve the IP regime function — the point of the first sale of the artifact. By this virtue they reflect a fine balance, a “cultural” or “scientific” bargain between the creator and the public. The creator “exhausts” her monopolistic rights and ability to control the market in the work or artifact when she set a price for it and got it at the point of first-sale: equipping her with extended monopolistic rights beyond that point hinders consumers’ surplus and imposes an unjustified societal cost.

This notion of the “single-reward principle” is simple: the first authorized sale of the patented product exhausts the monopolistic power that is given to the patentee as a reward for her efforts and contribution to society’s advancement. Following the first-sale, the patentee can no longer control the manner in which the patented product is sold or used in secondary

¹⁶³ Andrea M. Matwyshyn, *The ‘Internet of Bodies’ Is Here. Are Courts and Regulators Ready?*, THE WALL ST. J. (Nov. 25, 2018), <https://www.wsj.com/articles/the-internet-of-bodies-is-here-are-courts-and-regulators-ready-1542039566>.

¹⁶⁴ In Felten’s own words, “permission culture tells us that we don’t own the things we buy, that we are bound by contracts we have never seen, and that breaching those contracts is a felony punishable by years in prison.” See Felten, *The New Freedom to Tinker Movement, Freedom to Tinker*, *supra* note 161. Here, Felten refers the potential interaction of the Computer Fraud and Abuse Act with the Terms of Use, a topic I explore on chapter II(D) “The Technological Boilerplate: Unconscionability by Design.”

¹⁶⁵ *Id.* (the permission culture is “punish[ing] [tinkerers] not for crossing boundaries or causing damage, but for acting ‘without authorization’”). The notion of “permission culture” is rooted in Lessig’s seminal work, LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 119.

¹⁶⁶ Samuelson, *Freedom to Tinker*, *supra* note 62, at 565.

¹⁶⁷ See ch. II(E) “The Technological Boilerplate: Unconscionability by Design”.

¹⁶⁸ See *Bloomer v. McQuewan*, 55 U.S. 539 (1852). The doctrine was applied in case law since the nineteenth century. The doctrine is codified in copyright laws under 17 U.S.C. § 109(a).

markets, either by downstream purchasers or sellers. The rationale is that the patentee is assumed to receive the requested reward by virtue of the price charged in the first sale, and after that the product is “carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it.”¹⁶⁹ Exhaustion and first-sale doctrines allow users to freely buy second-hand patented products (or products that contain patents), at a price that is not controlled by the patentee and is “restrictions free”. The patentee can impose contractual restraints on secondary markets, but she cannot use patent law for that purpose. This notion was reaffirmed by the Supreme Court decision in *Quanta*,¹⁷⁰ which clearly stated that “the authorized sale of an article that substantially embodies a patent exhausts the patent holder’s rights and prevents the patent holder from invoking patent law to control post-sale use of the article”.¹⁷¹

Still, the limiting doctrines of exhaustion and first-sale are often the subject of mass-market contractual abuse, as proprietors utilize form contracts, often enforced by technology to reinstate the monopolistic power they cannot obtain under the IP regime, pushing the limits and boundaries of IP protection. One such type of abuse recently garnered the attention of the U.S. Supreme Court in the matter of *Lexmark*, perhaps the most influential patent exhaustion case in decades.¹⁷² It is also the case that some hoped would finally cause the Supreme Court to clarify the legal basis of the doctrine.¹⁷³ And in fact, the Court adopted a relatively broad conception of patent exhaustion, clarifying its roots in the common law principle of restraints on alienation, and the public policy considerations underlining it.¹⁷⁴ This “judge-oriented public policy” conceptualization of exhaustion, as Duffy noted,¹⁷⁵ might set the stage for invalidation of contractual terms based on public policy grounds, a view that at least one court

¹⁶⁹ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 516 (1917).

¹⁷⁰ *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (U.S. 2008).

¹⁷¹ *Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (U.S. 2008). It is well established that patentees can attach contractual restrictions to their products. *Id.* at 637; *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 666 (1895). The novelty under *Lexmark* was the ability to use patent law to enforce it (meaning, a claim for patent infringement). It is still however questionable if these contractual restrictions are enforceable in consumer settings. I explore this question in the following chapters. See ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to *Lexmark* and Exhaustion.”

¹⁷² *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523 (2017).

¹⁷³ Or in Duffy & Hynes words: “[I]s the doctrine a common law rule based on judicial assessments of good public policy, or is it based on an interpretation of a particular statute?” See John F. Duffy & Richard M. Hynes, *Common Law vs. Statutory Bases of Patent Exhaustion*, 103 VA. L. REV. ONLINE 1, 2 (2017).

¹⁷⁴ See *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at 1532 (explaining that such restrictive conditions have been “‘hateful to the law from Lord Coke’s day to ours’ and are ‘obnoxious to the public interest’” (citing *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 501, 37 S. Ct. 412, 61 L. Ed. 866, 1917 Dec. Comm’r Pat. 403 (1917)) and that “[t]he inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration” (citing *Keeler*, 157 U. S., at 667, 15 S. Ct. 738, 39 L. Ed. 848, 1895 Dec. Comm’r Pat. 294)). The Supreme Court has also done so in the context of copyright first-sale doctrine. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U. S. 519, 133 S. Ct. 1351, L. Ed. 2d 392 (2013). See also ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to *Lexmark* and Exhaustion.”

¹⁷⁵ Duffy & Hynes, *supra* note 173, at 9 (“[I]f the [exhaustion] doctrine is based on an ‘affirmative policy’ of federal patent law favoring ‘the free movement of all patented goods’ ... then the doctrine should not only be mandatory but might also render post-sale restrictions on use and resale unenforceable more generally, not merely unenforceable through infringement actions.”).

already seems to have adopted,¹⁷⁶ and aligns well with the proposed Unconscionability 2.0 solution.

The facts of the case were straightforward. Lexmark sold, in the United States and abroad, its patented toner cartridges under two potential schemes: Consumers could buy the toner subject to an express “single-use” restriction, with a discount of 20% but with no option to resell or reuse, or they could pay the full price and enjoy unrestricted use (and sale) of the cartridges. The commercial logic behind this scheme is clear. The manufacturer sells the printers at a relatively low price, charges a premium for the toner cartridges, and incorporates patents in the sold “re-fill” product, in this case cartridges, so it can use monopolistic power to control the market. Lexmark wanted to further control secondary markets by drafting restrictions on resale or future use of the product, attaching labels to the cartridges’ packaging that limits consumers’ use of the product to “single use.”¹⁷⁷

Impression Products acquired these “single-use” discounted cartridges in the United States and abroad, after a third party replaced the Lexmark microchip that technically prevented the reuse and refilling of the cartridge. Impression then refilled the toners and resold these cartridges in the United States without regard for the “single use” restriction and obviously without the authorization of Lexmark. Impression (as opposed to the first consumers that bought the cartridges) had no contractual relationship with Lexmark. Under Lexmark’s end-user agreement for its single-use “Return Program,” the consumers were supposed to “return” the cartridge ‘only’ to Lexmark” and were not allowed to transfer it to someone else.¹⁷⁸

However, Impression got its hand on the cartridges, and as one could imagine, Lexmark is not in the habit of suing its own customers for contract infringement (nor would that help). Instead, Lexmark brought suit against Impression (among others) for patent infringement under 35 U.S.C. § 271. Impression claimed, inter alia, that once Lexmark sold its cartridges to the consumers, the first buyers, it exhausted the patent rights in the cartridges. Simply put, the post-sale restrictions on reuse and resale of cartridges under Lexmark’s end-user agreements, could not be enforced as a matter of patent law.

The court in Lexmark discussed two prominent questions. First, whether in light of *Kirtsaeng*, the authorized sale of a patent product outside of the United States does not exhaust the U.S. patent rights in the product.¹⁷⁹ Second, whether post-sale restrictions on downstream use and resale of a patented product could be enforced as a matter of patent law or, alternatively, if the patentee exhausted its claim in the first sale.¹⁸⁰ In the context of this discussion, the main question was whether the original patentee could—legally, and literally—attach restrictions to

¹⁷⁶ See *Disney*, in ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox.”

¹⁷⁷ The restriction reads: “RETURN EMPTY CARTRIDGE TO LEXMARK FOR RECYCLING — Please read before opening. Opening this package or using the patented cartridge inside confirms your acceptance of the following license agreement. The patented Return Program cartridge is sold at a special price subject to a restriction that it may be used only once. Following this initial use, you agree to return the empty cartridge only to Lexmark for recycling. If you don’t accept these terms, return the unopened package to your point of purchase. A regular price cartridge without these terms is available.” For a detailed description of the facts of the case, see Dennis Crouch, *Lexmark v. Impression: The Facts of the Case*, PATENTLYO (Apr. 15, 2015), <http://patentlyo.com/patent/2015/04/lexmark-impression-facts.html>. See also *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 830, 836 (E.D. Ky. Ap. 24, 2007).

¹⁷⁸ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 727–8.

¹⁷⁹ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (U.S. 2013).

¹⁸⁰ And therefore, the patentee should resort to contract law, in line with *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (U.S. 2008).

innovations sold in the market (via labels, stickers, and other sorts of agreements) pertaining to the manner that users use the patent, dispose of the products, or even resell the products, and enforce such restrictions on third parties as a matter of patent law. The risk was that restrictions buried in form contracts would “run with” the patented product,¹⁸¹ applying to secondary buyers, and a violation of such “post-sale” restrictions would constitute patent infringement.

The majority opinion in the *Lexmark* en banc decision at the Federal Circuit did not agree with *Impression*. It held that patent owners could impose restrictions on downstream use, resale of the patented products, and buyer’s post-purchase use—in other words *Lexmark* could control the secondary market of the patent through unilaterally drafted restrictions—and they can use patent law to enforce these restrictions.¹⁸² The Federal Circuit allowed a patent owner to impose post-sale restrictions on downstream use and resale of a patented product, printers’ cartridges. These restrictions could be “communicated” through a standard form contract (package label), but enforced on third parties as a matter of patent law. For centuries, the application of the exhaustion doctrine balanced between the monopolistic right of the IP owner and public interest in market competition. Nevertheless, in *Lexmark* the Federal Circuit allowed the rights’ owner to effectually “opt-out” from this fundamental doctrine, by attaching a contract to the patented product. Simply put—patent laws established fine boundaries to the monopolistic right of the IP owner, and according to the Federal Circuit such boundaries, articulated in “impeccable historic pedigree”,¹⁸³ could be redefined through a unilaterally drafted contract.¹⁸⁴

While U.S. patent law litigation frequently produces controversial decisions, it is not often that the prevalence of a centuries-old legal doctrine such as “exhaustion” is debated. As such, much ink (and printer toner) has been spilled on the Federal Circuit’s en banc decision in *Lexmark*. The case was granted certiorari following an animated public discussion (with over

¹⁸¹ Shaffer Van Houweling, *supra* note 87.

¹⁸² *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d 721 (Fed. Cir. 2016). *See* ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to *Lexmark* and Exhaustion.”

¹⁸³ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1353 (U.S. 2013) (referring to copyright first-sale doctrine).

¹⁸⁴ *See* Molly Shaffer Van Houweling, *Exhaustion and the Limits of Remote-Control Property*, 93 DENV. U.L. REV. 951, 973 (2016) (noting that “the proper reach of the exhaustion doctrine is thus a question for IP policy—in Congress and the courts—not for IP owners unilaterally deciding that exhaustion should not apply to them, either by unilaterally placing post-sale conditions, re-characterizing sales as licenses, or imposing nominally contractual restrictions that are so adhesive and ubiquitous that they function like property rights.”)

thirty amicus briefs) and numerous critiques, from such as the government,¹⁸⁵ leading scholars,¹⁸⁶ and retailers such as Costco.¹⁸⁷

The Lexmark case uniquely affected users as frequent consumers of patented products beyond the anticompetitive implications of imposing restrictions on secondary markets. This is because the main mechanism for imposing post-sale restrictions is not ordinary contracts, but rather standard form contracts. In other words, attention must be given not only to the question of what is an “authorized sale,”¹⁸⁸ but also what is the manner of authorization in which the restrictions are “communicated.” If the Supreme Court sustained the decision and allowed any patentee to impose contractual restrictions on the future use and re-sale of patents in every secondary market, by any user or reseller,¹⁸⁹ it would have provided patentees with incentives to draft longer form contracts with broader contractual restrictions for the sole purpose of invoking these restrictions in patent infringement cases against resellers.¹⁹⁰

The market’s ability to police the quality of these contractual terms is limited due to the limited rationality of consumers, and consumers would be subjected to the informational burden associated with more disclosure, beyond the mere fact that private entities would now be allowed to use such contracts to re-write patent law’s monopolistic limits. I further discuss the Supreme Court decision in *Lexmark* in Chapter II(B)(ii), but it is important to recognize

¹⁸⁵ The government filed a brief urging U.S. Supreme Court to review the case, and an additional amicus brief supporting reversal of the holding pertaining to contractual opt-outing from domestic exhaustion. See Brief for the United States as *Amicus Curiae* Supporting Reversal in part and Vacatur in Part, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189)), available at https://cdn.patentlyo.com/media/2017/01/15-1189_amicus_reversal_united_states.pdf.

¹⁸⁶ Leading scholars have prepared and signed amicus briefs, written blogs and published articles pertaining to the matter. See Dennis Crouch, *Can Your Patent Block Repair and Resale and Prevent Arbitrage?*, PATENTLYO (Jan. 31, 2017), <http://patentlyo.com/patent/2017/01/resale-prevent-arbitrage.html> (summarizing a number of additional amicus briefs filed, and claiming that the Federal Circuit’s approach could undermine the market for the repair and reselling of goods). See also a brief prepared by Stanford’s Intellectual Property Clinic, (explaining how the court in *Lexmark* strayed from 150 years of precedent, by reframing exhaustion as a form of a default arrangement, the patentees can simply contractedly opt-out from) (Brief of *Amici Curiae* Intellectual Property Professors and American Antitrust Institute in Support of Petitioner, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189)) and PERZANOWSKI & SCHULTZ, *supra* note 101, at 155, 177–8 (discussing the manner in which contractual restrictions on the patent exhaustion doctrine have been historically treated in U.S. case law, analyzing *Lexmark* and critiquing it for radically rewriting the nature of consumer property interests in purchased chattels). See also Molly Shaffer Van Houweling, *Exhaustion and the Limits of Remote-Control Property*, *supra* note 184, and Ariel Katz, Aaron Perzanowski, & Guy A. Rub, *The Interactions of Exhaustion and the General Law: A Reply to Duffy and Hynes*, 102 VA. L. REV. ONLINE 8 (2016).

¹⁸⁷ On Writ of Certiorari *In Re* *Impression Prods. v. Lexmark Int’l, Inc.*, Brief of Costco Wholesale Corporation et al. as *Amici Curiae* in Support of the Petitioner, available at https://patentlyo.com/media/2017/01/15-1189_amicus_pet_costco_wholesale_corporation.pdf.

¹⁸⁸ Naturally, much of the discussion remained focused on property theory, legal precedents concerning the exhaustion doctrine and the proper interpretation of the language of 35 U.S.C. § 271(a).

¹⁸⁹ See petition to the Supreme Court for a Writ of Certiorari of the defendant, *Impression*, noting that the Federal Circuit’s *en banc* decision in *Lexmark* “permits any patentee to foreclose the secondary market for any patented good ... and enable[s] patentees to extract unjustified rents from downstream users.”

¹⁹⁰ Moreover, the case is the cornerstone of a number of landmark decisions of the Federal Circuit and the Supreme Court pertaining to the principle of exhaustion.

that boilerplate (“patent-wrap”) interactions with patented innovations do occur, and they raise unique concerns. Scholars have been addressing these concerns for decades,¹⁹¹ yet Unconscionability, as the next chapter suggests could also be reutilized as a purposeful solution.

C. Adherent-Creators IP Boilerplate

We create all the time. From a review posted on Yelp! to applications and innovative fashion designs submitted for the purpose of fulfilling academic commitments (and this dissertation), to “forks” of software code posted on Git-hub that is developed in commons, copyright-protected content¹⁹² and innovations are created, daily, by many, and they are regulated by form contracts in the absolute majority of cases.¹⁹³ In these cases, the boilerplate language is drafted by the nonowner of the content, and the adherent that accepts the terms is the original creator of the work. I have termed this contract the adherent-creator type of contract. This chapter provides a brief overview of this type of contract. There is a vast literature encompassing the various types of such contracts and the implications of boilerplate in their context. Yet the literature neither addresses adherent-creator boilerplate as a category nor distinguishes it categorically from adherent-user boilerplate. The purpose of this chapter is to shed light on some particular manifestations of adherent-creator boilerplate and explain why I claim they warrant this categorical distinction, which will further affect the application of Unconscionability 2.0 in their context. As such this is not an exhaustive discussion in all types of these contracts.

i. Social Networks and User-Generated Content: Cognitively Overburdened Creators

As social media platforms proliferate and gain popularity, users continue to generate more content fueling these networks. This content, also known as UGC (User-Generated Content), ranges from selfies to mash-ups and mixes, and is created for a variety of motivations that often depart from the traditional monetary incentive-based utilitarian understating of copyright.¹⁹⁴ Users often upload original content to express themselves and connect with others, as a form of an extension of the self and its personality; they want to engage in communication and dialogue with others, and take part in a social community; they want to share their “stories.”¹⁹⁵

¹⁹¹ See, e.g., Samuelson, *Freedom to Tinker*, *supra* note 62, at 572 (explaining that the “[t]he most significant IP rule that facilitates the freedom to tinker is known as the ‘first-sale’ or ‘exhaustion’ limit on IP rights”).

¹⁹² Much of the content being shared online satisfies copyright’s low threshold to establish protection. These include the statutory requirements of originality and fixation set forth in 17 U.S.C. § 102(a) (2013) (“original works of authorship fixed in any tangible medium of expression”).

¹⁹³ See Moffat, *supra* note 47, at 45.

¹⁹⁴ Preliminary survey results of the author’s research showed that from a sample of over 1,000 social media users around 65% mentioned they upload originally created content for “social interaction” purposes only. See Elazari Bar On, Hacoheh and Schwartz, *supra* note 83.

¹⁹⁵ See, e.g., Jordan Sundell, *Tempting the Sword of Damocles: Reimagining the Copyright/DMCA Framework in a UGC World*, 12 MINN. J.L. SCI. & TECH. 335, 337 (2011) (“UGC is creative content and published, usually by individuals who possess limited technical expertise, out of a desire to share, connect with others, or simply to express oneself.”). The popular social media network Instagram allows users to compile pictures and edit them into “stories.” See Instagram, *Stories | Instagram Help Center*, <https://help.instagram.com/1660923094227526>.

But users not only create content with a click of a button, they also license and assign IP rights in their content with one click of a button, on the “clickwrap” or “browsewrap” ToS of the platform. Users click once, still the terms apply to all of their created content uploaded to the platform. These terms will establish the copyright license the platform (and its affiliates and partners) will obtain in users’ creations and the extent to which other users’ can interact with their work.¹⁹⁶ While users retain their ownership rights in the creation the breadth of the license they give in their work is inconceivable, and in many cases goes way beyond what is reasonably needed for the purposes of operating the platform.¹⁹⁷ Platforms obtain a “perpetual” and sub-licensable, irrevocable license, that will sometimes extend after a user deletes her account, to perform essentially any use of the work, even commercial, and modify the content and create derivative works.

In some cases, the terms extend to waiver of moral rights (if applicable), and allow the use of “ideas” submitted to the platform with no compensation.¹⁹⁸ These broad licenses would allow a platform to share content in any manner, including sublicensing it to third parties for commercial use. Legally, as one scholar noted, Facebook could “surreptitiously sublicense user content to porno.com” and “this would fall squarely within the license Facebook purports to be granted by users.”¹⁹⁹ That is, at least according to its ToS. One platform, LinkedIn made that

¹⁹⁶ See Elazari Bar On, Hacoheh and Schwartz, *supra* note 83, and Fiesler et al. *supra* note 83.

¹⁹⁷ See, e.g., the examples provided in *supra* note 25. For a very long time, for example, Reddit retained a right for any use, including commercial, in users’ content. See Reddit, *Reddit User Agreement*, *supra* note 23. LinkedIn had a similar provision until 2018, noting that “[LinkedIn retains the] right to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered ... without any further consent, notice and/or compensation.” See LinkedIn, *LinkedIn Terms of Service* (June 16, 2011), <https://web.archive.org/web/20130429153448/https://www.linkedin.com/legal/user-agreement> [hereinafter LinkedIn, *LinkedIn Terms of Service*, 2011].

LinkedIn ToS have changed recently in June 7, 2017. The current version states: “We will not include your content in advertisements for the products and services of third parties to others without your separate consent (including sponsored content).” See LinkedIn, *User Agreement* (May 8, 2018), <https://www.linkedin.com/legal/user-agreement>. For a survey of these terms, see Elazari Bar On, Hacoheh and Schwartz, *supra* note 83, and Fiesler et al. *supra* note 83. Scholars have been noting this trend. See also G. Ross Allen, Francine D. Ward, *Things Aren’t Always as They Appear: Who Really Owns Your User-Generated Content?*, 3 LANDSLIDE 49, 50 (2010) (“Membership in these sites is not free, albeit no fee or tax penalty is required. In return for membership, most social media sites require that the user grant the site and its third-party affiliates, now known or later established, a nonexclusive license to any UGC posted by the user.”).

¹⁹⁸ See, e.g., Reddit, *Reddit User Agreement* § 4 (Sept. 24, 2018), <https://www.redditinc.com/policies/user-agreement-may-25-2018-2> (“Any ideas, suggestions, and feedback about Reddit or our Services that you provide to us are entirely voluntary, and you agree that Reddit may use such ideas, suggestions, and feedback without compensation or obligation to you.”). In the United States only limited protection is granted to moral rights in creative works. See Visual Artists Rights Act of 1990 (VARA) and 17 U.S.C. § 106A(a)(3), granting moral rights protection to “work of visual art” under certain limitations. Such rights can in fact be waived, but not transferred (17 U.S.C. § 106A(b), (e)). In Europe and under international law moral rights provide broader protection. See Article 6(1) of the Berne Convention; ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009). See also MENELL, LEMLEY, & MERGES, *supra* note 125, at ch. IV.

¹⁹⁹ Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 848 (2008).

specifically clear to users noting in its ToU until June 2017,²⁰⁰ that “[a]ny information you submit to us is at your own risk of loss.”²⁰¹ In two cases similar practices were the subject of users’ class actions. One case involved users’ right of publicity and usage of their names and profile pictures for advertising purposes, without explicit prior consent.²⁰² In another case the addition of a term allowing Instagram to make commercial use of users’ content and IP in its ToU on December 2012 sparked a law suit.²⁰³ The first case was settled, and in the second case, although plaintiffs raised some contractual claims including unconscionability, the court found no implied breach of contract because the plaintiff had an opportunity to “opt-out” after the change of terms but decided to agree to them, while continuing to use Instagram.²⁰⁴

In 2017 and 2018 several platforms revised their terms and introduced more user-friendly and favorable IP clauses, limiting the use of UGC including modification to what is functionally needed,²⁰⁵ and specifically addressing the issue of commercial use. Yet these platforms still retain a broad sub-licensable license to share content with their partners and affiliates (for their use).

Accordingly, scholarship has been raising some concerns addressing both the exploitation of UGC and users’ creativity by platforms, and the unreadability and complexity

²⁰⁰ LinkedIn, LinkedIn Terms of Service, 2011, *supra* note 197. The revised terms note that LinkedIn “will not include your content in advertisements for the products and services of third parties to others without your separate consent (including sponsored content) ... and While we may edit and make formatting changes to your content (such as translating it, modifying the size, layout or file type or removing metadata), we will not modify the meaning of your expression.” See LinkedIn, *User Agreement* (May 8, 2018), <https://www.linkedin.com/legal/user-agreement> at § 3.1. See also LinkedIn’s instructive manual to these changes, LinkedIn, *LinkedIn User Agreement | Who owns your content? You do*, <https://www.youtube.com/watch?v=ha7ASaPnjbA>.

²⁰¹ LinkedIn, LinkedIn Terms of Service, 2011, *supra* note 197.

²⁰² *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011). This class action later settled. For further discussion see Jesse Koehler, *Fraley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963 (2013).

²⁰³ See *Rodriguez v. Instagram L.L.C.*, No. 3:12-cv-06482-WHA (N.D. Cal. Mar. 6, 2013); *Rodriguez v. Instagram*, CGC-13-532875 (San Francisco Sup. Ct. Feb 28, 2014). In this case the plaintiff brought an unconscionability claim (that was not discussed by the court) (“The New [Instagram] Terms violate the implied covenant of good faith and fair dealing by being unconscionable, because inter alia, Class members are not able to avoid the New Terms because all Property previously uploaded to Instagram cannot be retrieved, and Instagram claims rights to commercially exploit such Property, and sub-license it, even after customers cancel their Instagram account... The inability to obtain an injunction is oppressive considering that Plaintiff and Class members forfeit all Property to Instagram even upon cancellation, while the New Terms grant Instagram a “transferable and sub-licensable” worldwide license to commercially exploit Class members’ Property in perpetuity.”). See Lucy Rodriguez, Individually, and on behalf of all other similarly situated California residents, Plaintiff, v. Instagram, LLC, a Delaware LLC, Defendant., 2013 WL 3714022 (Cal. Super.), complaint at count 42.

²⁰⁴ *Rodriguez v. Instagram, LLC*, No. CGC-13-532875, 2014 WL 895438, at *3–4 (Cal. Super. Feb. 28, 2014).

²⁰⁵ See, e.g., Tumblr’s ToU (“The rights you grant in this license are for the limited purposes of allowing Tumblr to operate the Services in accordance with their functionality, improve the Services, and develop new Services ... The reference in this license to ‘creat[ing] derivative works’ is not intended to give Tumblr a right to make substantive editorial changes or derivations.”); Tumblr, *Terms of Service* (May 15, 2018), <https://www.tumblr.com/policy/en/terms-of-service>.

of these terms coupled with users' bounded rationality.²⁰⁶ Empirical research on copyright ToS among thirty websites including leading social media platforms showed that on 2013, the average readability of ToU evaluated by the commonly used Flesch-Kincaid Grade was a college sophomore reading level of 14.8 (in a range of 8.4 to 19.8), a similar result to one often found in studies conducted on privacy policies.²⁰⁷ The higher this score, the more likely a user will not understand the terms.

A more recent survey from 2017 found that 543 participants who joined a fictitious social network spent 51 seconds on average reading the ToU, with a 93% acceptance rate.²⁰⁸ In a survey conducted with the users later, researchers found that participants felt the policies are a "nuisance", and 98% of participants missed the intentional "gotcha clauses" the researchers implemented in the terms specifically mentioning users' data will be shared for the purpose of assessing eligibility for "employment, financial service (bank loans, insurance, etc.), university entrance, international travel, the criminal justice system, etc."²⁰⁹ and that users' first-born child will be assigned to the platform provided as payment for accessing the network.²¹⁰

Finally, empirical research conducted by the author among 1,033 users of social media platforms who upload copyrighted UGC to platforms,²¹¹ generally reached the same results, finding that users fail to grasp the complexity of copyright-related ToS. Among the preliminary results is that when users were asked the meaning of a term suggesting the user "waive[s] [their] so-called moral rights," the majority of users answered the question wrong with 21.18% admitting they do not know what moral rights are, and 22.14% believing the meaning of this term is that they waive all copyrights in their work. But when asked which IP rights the user values most, 41.05% of users ranked a moral right (attribution and that the work will be associated with their name) as the most important right, and 47% of users noted they are extremely unlikely to use a platform that under the ToS is allowed to present their work without their name. Another surprising similar finding on the matter of salience, and the effect IP terms on users' decision-making is that while 43% of users noted they are extremely unlikely to use a platform whose ToS allow the platform to modify their work, this type of term is prevalent across almost all social networks.²¹²

This survey further supports the intuition of many scholars, that while users care about their rights in UGC, the information overload and complexity of ToS, as well as users' dependence on social networks (that exhibit monopolistic features) leads them to waive their rights regardless of their values and concerns. This could be characterized as the "UGC copyright paradox," a phenomenon similar to the "digital privacy paradox" that persists in security and privacy—while users specifically report they deeply care about the privacy of their information, their actions—just minutes after reporting this—suggest otherwise. For example,

²⁰⁶ Elizabeth Townsend Gard & Bri Whetstone, *Copyright and Social Media: A Preliminary Case Study of Pinterest*, 31 MISS. C. L. REV. 249 (2012).

²⁰⁷ Fiesler et al., *supra* note 83, at 1454.

²⁰⁸ Obar & Oeldorf-Hirsch, *supra* note 36, at 1.

²⁰⁹ *Id.* at 7.

²¹⁰ *Id.*

²¹¹ See Elazari Bar On, Hacoheh and Schwartz, *supra* note 83. We screened users to ensure users surveyed in fact uploaded content to at least one of the social media platforms surveyed. Our original sample was 1,100 participants.

²¹² The full results of the survey will be published in a different paper and are beyond the scope of this dissertation.

research found that users who mentioned they feel strongly about not sharing their contacts' information were happily willing to do just that moments later when offered a free pizza slice in exchange for their friends' email addresses (a small incentive).²¹³ Another study with a smaller sample of participants found that users shared nearly twice as more personal information than what they stated they were willing to share.²¹⁴

Although less experimental work explored IP perceptions (among users) compared to privacy stances, it is reasonable to assume that users' underestimation of the value of their rights (or personal information) persists in this field as well.²¹⁵ The scholarly concerns surrounding the "true cost of free services" provided online, similarly carry weight in the case of paying with "content," as opposed to personal information.²¹⁶

ii. "Gag" Boilerplate: Assignment of Copyright in Consumers' Reviews

One unique case of copyright abuse affecting consumers' rights at their core involved the assignment of copyrights in future consumer reviews and "non-disparagement" boilerplate provisions. In the notorious Medical Justice case, around 2,000 healthcare providers used boilerplate "anti-review" clauses to either completely ban consumer reviews or assign the copyright rights in future consumer reviews written by patients, so they would be able to initiate a DMCA takedown notice, if and when such reviews were published. Recently, and partially as a direct consequence of this case, a new federal law, the Consumer Review Fairness Act of 2016, was passed. The act outlaws this practice, specifically voiding a form contract that prohibits or restricts reviews and "performance assessments or analyses" or seeks to assign any IP rights in the review.²¹⁷

Yet for a certain period some doctors utilized this contractual boilerplate language to remove unflattering reviews, stifling free expression and competition and engaging in consumer deception. A class action filed by some of the complaining patients²¹⁸ describes how doctors issued take-down notices on users' reviews and sent letters to patients alleging copyright infringement and purporting to charge them \$100 a day for each day the review was

²¹³ Susan Athey, Christian Catalini, & Catherine Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, MIT SLOAN RESEARCH PAPER NO. W23488 (2017), https://www.ftc.gov/system/files/documents/public_comments/2017/09/00010-141392.pdf.

²¹⁴ Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFF. 100, 110–13 (2007).

²¹⁵ The author is now in the process of conducting this experiment.

²¹⁶ See Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606 (2014); John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513 (2018) (explaining how "The Myth of Free" has misled courts into granting protected legal status to free-product suppliers, who have received favorable treatment in cases, and discussing *Song Fi* (*Song Fi, Inc. v. Google Inc.*, 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014)) in this context).

²¹⁷ See Consumer Review Fairness Act of 2016, H.R. 5111, 114th Congress (2015–2016) codified at U.S.C. 15 § 45b(a); Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMM. & TECH. L. REV. 1 (2017); see also Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer "Gag" Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59 (2016); Clay Calvert, *Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship*, 24 WIDENER L. REV. 203 (2018).

²¹⁸ See *Lee v. Makhnevich*, 2013 U.S. Dist. LEXIS 43760 (S.D.N.Y. Mar. 27, 2013).

not removed.²¹⁹ In 2015, in a short decision that predated the Consumer Review Fairness Act prohibition of such assignment, this attempt to silence patients was found to constitute a breach of fiduciary duty, and to trigger the equitable defenses of unclean hands and copyright misuse.²²⁰ The court further granted the patient declaratory relief, noting that such use of the so-called assigned reviews is fair use and that on several grounds the assignment contract was void, including on the grounds of unconscionability.²²¹

Still, one can find similar provisions limiting the publication of reviews in the aftermath of the Consumer Review Fairness Act.²²² Even established companies like Google and Amazon still seek to limit the ability of users to publish “performance or functional evaluations” of Internet of Things-connected devices and cameras, which are widely (and justifiably) researched by academics and security researchers looking for vulnerabilities and covert channels for surveillance in the wild,²²³ regardless of the fact that these limitations are in potential violation of the Consumer Review Fairness Act. The law does not have a private right of action; it is enforced by the FTC and state attorney generals, with their understandably limited resources, which might suggest why this type of language is still used by some of the most informed and sophisticated of actors. In July 2018 the FTC brought the first case that addresses a non-disparagement provision limiting consumers’ ability to review a product,²²⁴ and it remains to be seen whether this case will foster compliance with the law.

Moreover, the definition of a form-contract under the law limits its application to contracts used “in the course of selling or leasing [] goods or services,”²²⁵ reinforcing the problematic conception that only “paid” consumers warrant protection in some cases under the law. This conception also persists in other contexts such as privacy and copyright, where

²¹⁹ Lee v. Makhnevich, 2013 U.S. Dist. LEXIS 43760, compliant, at count 4.

²²⁰ Lee v. Makhnevich, Civil Action No. 11-civ-8665 (S.D.N.Y. Feb. 27, 2015), available at <https://casewatch.net/civil/makhnevich/judgment.pdf>.

²²¹ *Id.*; see also Restatement, *supra* note 33, at 79, 92 (referencing to such antidisparagement clauses).

²²² See, e.g., Select Music Library, *User License Agreement*, <https://Selectmusiclibrary.Com/User-License-Agreement>.

²²³ See, e.g., Nest, *End User License Agreement*, <https://nest.com/legal/eula/> at § 2 (noting that “[users] may not release the results of any performance or functional evaluation of any of the Product Software [software embedded in the device] to any third party without prior written approval of Nest Labs for each such release”). The exact same language is being used by other companies producing baby sleep monitors, medical devices and other sensitive devices. See, e.g., Happiest Baby, *End User License Agreement*, <https://www.happiestbaby.com/pages/end-user-license-agreement> (“To the fullest extent permitted by law, you are prohibited from releasing the results of any performance or functional evaluation of any of the Product Software to any third party without prior written approval of HBI for each such release.”). See also Lumithera, *End User License Agreement*, <https://www.lumithera.com/eula/>.

²²⁴ *In re Sellers Playbook, Inc. et al.*, F.T.C. file no. C-02207 (F.T.C. July 30, 2018), available at https://www.ftc.gov/system/files/documents/cases/sellers_playbook_complaint.pdf at paras. 95–96, 146.

²²⁵ See U.S.C 15 § 45b(a)(3) (“[F]orm contract’ means a contract with standardized terms— (i) used by a person in the course of selling or leasing the person’s goods or services and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.”). Employer-employee or independent contractor contracts are excluded from this definition. The reference to “meaningful opportunity” draws its roots from the definition of adhesion contracts and unconscionability, and specifically the notion of procedural unconscionability. See ch. III(A) “Why Unconscionability?”; Restatement, *supra* note 33, at 5.

consumers that do not “pay” for services are still disfavored in courts and laws, although the nature of transactions in the information age long ago departed from the traditional currency-based model.²²⁶

In fact, arguably, “free” services are raising the thorniest of consumer law questions concerning information abuse in the digital age, from surveillance to algorithmic discrimination—to privacy and information security. “Free” services are the cornerstone of digital advertising, online manipulation, and monetization of users’ data.²²⁷ As such, it is particularly concerning that for this type of service, consumers who pay with their information (and researchers accepting the software EULA or ToS) will be limited, or chilled, from publishing benchmark tests or other evaluations concerning the performance and security of free products and services.²²⁸ While other notable laws such as the EU General Data Protection Regulation (GDPR) and the recently adopted California Consumer Privacy Protection Act adopt a broader view of consumer protection encompassing all users, those who pay or not,²²⁹ perhaps the most important segment of consumer law, that of contracts, is trailing behind, sometimes remaining entrenched with obsolete perceptions of “transactions.”²³⁰

This begs the question, what is the underlying reasoning for cementing an outdated conception of *quid pro quo*, when even the holy grail of consumer protection, Section 5 of the FTC Act, long ago departed from the notion that only paying consumers are worth protecting.²³¹ The Restatement seeks to remedy to some extent this omission, specifically addressing in its scope of contractual analysis ToS and privacy policies regardless of whether they affect the specific terms of the transaction.²³² The issue will be directly addressed in the context of Unconscionability 2.0 in the following chapters.

iii. Some other Adherent-Creators: Students, Artists, Consultants and Employees

²²⁶ This argument is explored in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy”.”

²²⁷ Hoofnagle & Whittington, *supra* note 216.

²²⁸ The law allows companies to limit the publication of various content, including “content that contains any computer viruses, worms, or other potentially damaging computer code, processes, programs, applications, or files.” See U.S.C 15 § 45b(b)(3)(E). Yet the publication of an evaluation that does not allow exploitation will often still spark a public debate and even a regulatory investigation. Moreover, one can imagine a security or software evaluation that will not fall under this exception since it does not include the actual exploit or because the vulnerability was patched.

²²⁹ See Chris Jay Hoofnagle, Bart van der Sloot, & Frederik Zuiderveen Borgesius, *supra* note 31, at 11 (citing Article 3(2)(a) and recitals 22–24 of the GDPR).

²³⁰ Newman, *supra* note 216.

²³¹ CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016); Hoofnagle & Whittington, *supra* note 216 (providing a comprehensive account on how the FTC regulates “free” services and products under its unfairness authority).

²³² See, e.g., The Restatement, *supra* note 33, at 12 (“Specifically, if the data and privacy terms are presented to consumers in a manner that satisfies the definitions of ‘contract’ and ‘consumer contract,’ courts should apply the rules of this Restatement (as well as other contract-law rules, but subject to specific rules of data-privacy law) to determine the formation, scope, and consequences of an agreement over data.”). The definition of consumer under the Restatement follows the U.C.C. definition, “an individual acting primarily for personal, family, or household purposes.” *Id.* at 8.

Contracts of adhesion first developed in an analog world and so did IP boilerplate proliferate well before the digital revolution. Private ordering in copyright, although garnering recent attention in the age of shrinkwrap and “I accept,” regulated creations of employees, artists, students, and many other creative individuals who were asked to license and assign their rights by “signing here” (and right now) since the dawn of copyright and patent laws.²³³ An exhaustive account of these types of adherent-creator IP boilerplate is beyond the scope of this dissertation but it is useful to provide a brief overview.

Perhaps the most prominent example of an adherent-creator is the employee, assigning ownership in all of her future creations under the typical boilerplate pre-assignment language. Granted, the dispositive default legal regime of work-made-for-hire or service invention applies in this case,²³⁴ and yet as Merges observed, it is a regime of an “(almost complete) primacy of contract”, in which contracts ever expand the boundaries of employer ownership in employees’ creations and inventions. Some of these types of boilerplate contracts were termed “cube-wraps” because after an employee joins a company suddenly, and on the first day of employment, a draft of an “intellectual property” policy agreement appears in her cubical.²³⁵

IP employment policies are rarely negotiated and routinely enforced.²³⁶ As Orly Lobel noted, these unnegotiated contracts have been the main instrument for facilitating the

²³³ See Patel, *supra* note 60; Cherensky, *supra* note 35. See also the discussion in Reeves and Cubic in *infra* note 464, explaining how unconscionability was applied in adherent-creator cases involving a creator and an employee-inventor.

²³⁴ See most notably 17 U.S.C. § 101 defining work-made-for-hire as (a) “a work prepared by an employee within the scope of his or her employment”, or (b) a “work specially ordered or commissioned for use as [alterative categories]: a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas,” coupled with a signed written express agreement agreeing the work is made for hire. Section 201(b) further establishes the employer or the commissioner of the work as its original owner, absent any written express agreement to the contrary. See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (applying agency law common law principles of “right to control the manner and means by which a product is accomplished” and listing a variety of factors (such as the source of tools and location of the work) that apply once considering whether a work was made within the “scope of employment” or by an independent contractor).

In patents, case law developed to establish the ownership rights of employees distinguishing between employees “hired to invent”, cases in which the invention was conceived during employment and by using the employer resources and therefore the employer had a “shop right” license to practice the invention, and totally independent inventions. See Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1, 5–7 (1999). See also PETER S. MENELL, MARK A. LEMLEY, & ROBERT P. MERGES, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018, VOL I: PERSPECTIVES, TRADE SECRETS, AND PATENTS* ch. II(F)(2) (2018). The desire to avoid litigating inventions under an uncertain common law climate is perhaps one reason that assignment contracts are so prevalent.

²³⁵ See Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 641 (2007).

²³⁶ Merges, *The Law and Economics of Employee Inventions*, *id.* at 8; see also *Brown v. Alcatel USA, Inc.*, No. 05-02-01678-CV, 2004 WL 1434521 (Tex. App. 2004); Arnow-Richman, *id.* at 978; Allison E. McClure, Note, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 CIN. L. REV. 1497, 1498 (2005–2006); see also, more recently, *Newell Rubbermaid, Inc. v. Storm*, 2014 Del. Ch. LEXIS 45 (Mar. 27, 2014), at *22–27 and n.44 (enforcing a postemployment clickwrap boilerplate noncompete agreement that was bundled with other contracts and rejecting an unconscionability claim although noting that clickwrap contract model is “certainly [is not the] model of transparency and

“dangerous expansion of controls over cognitive capacities, far beyond the bargain struck in IP law”.²³⁷ This expansion spans perhaps the most profitable kinds of innovation and creativity of all—that created by human capital in the daily course of employment and consulting. Lobel discusses some of the prominent contractual interactions in which human capital is appropriated in a manner that displays IP laws’ delicate balance, including by pre-invention assignment terms that exceed IP’s default subject matter and scope; nondisclosure agreements that go beyond the definition of what is considered a trade secret; general noncompetition and nonsolicitation clauses, and “antipoaching” agreements stifling free competition.²³⁸

Considering the prevalence of these boilerplate provisions and contracts in the modern employment, consultancy, and “gig-economy” landscape,²³⁹ they represent a prominent area of private ordering in IP. A few states in the U.S. have limited drafters’ abilities to appropriate employees’ inventions that clearly fall beyond the scope of work-made-for-hire,²⁴⁰ and scholars have suggested reform is needed to address the issue.²⁴¹

Still, more generally under U.S. laws, unconscionability claims pertaining to IP rights assigned by employees in a form contract, even in cases in which the contract goes beyond the default IP regimes for works made for hire are commonly rejected.²⁴² But in other jurisdictions such as Germany and Japan, the law requires employers to grant the employee “fair compensation” and limits the ability of the drafter to assign rights.²⁴³

openness with [] employees” (*Id.* at *22)). Yet in some rare cases in which the facts concerned a “non-professional” employee courts were more willing to find the terms unconscionable. *See* Paul Spiel, *Express Employee Patent Assignments: Staying True to Intellectual Property’s Credo of Rewarding Innovation*, 99 J. PAT. & TRADEMARK OFF. SOC’Y 79, 90–92 (2017). But this distinction does not hold true to the nature of creativity and innovation, which is often “accidental” and not predicated as Spiel explains. *Id.* at 92 (“[B]ecause inventors probably do not consciously consider IP assignments before it is too late, professional inventors should not be given the presumption that they have equal bargaining power.”).

²³⁷ Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 794 (2015).

²³⁸ *Id.* at 797. “Antipoaching” agreements are signed between companies and aimed at preventing the parties from hiring or soliciting employees of the other parties to the agreement. This practice is considered illegal in cases in which it is not “reasonably necessary to any separate, legitimate business collaboration between the employers,” and was the subject of a number of investigations by the Department of Justice on antitrust grounds. *See* Department of Justice, *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute “No-Poach” and Wage-Fixing Agreements* (Apr. 10, 2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements>.

²³⁹ Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017).

²⁴⁰ *See, e.g.*, Cal. Lab. Code § 2870(a) (voiding contractual assignment of IP rights to inventions that the “employee developed entirely on his or her own time without using the employer’s equipment, supplies, facilities, or trade secret information” with certain exceptions). *See also* Minn. Stat. Ann. § 181.78 (1980); N.C. Gen. Stat. § 66–57.1 to 57.2 (1981); Wash. Rev. Code Ann. § 49.44.140 (1987).

²⁴¹ *See, e.g.*, Henrik D. Parker, *Reform for Rights of Employed Inventors*, 57 S. CAL. L. REV. 603 (1984).

²⁴² *See supra* note 236 and further discussion in *infra* note 464.

²⁴³ *See* Morag Peberdy & Alain Strowel, *Employee’s Rights to Compensation for Inventions—A European Perspective*, in PLC CROSS-BORDER LIFE SCIENCES HANDBOOK 63, 63 (2009–2010); Vai Io Lo, *Employee Inventions and Works for Hire in Japan: A Comparative Study Against the U.S., Chinese, and German Systems*, 16 TEMP. INT’L & COMP. L.J. 279, 306 (2002).

Israel's Supreme Court was recently asked to chime in on the question of whether an employee can waive her statutory right to compensation for an assigned invention conceived during her employment.²⁴⁴ The Patent Law Compensation and Royalties Committee, a special body established under Israeli Patent Law that is tasked with resolving service invention compensation disputes, found that generally this right is dispositive, and could be waived under contract.²⁴⁵ The employee raised an unconscionability claim as well, but the Committee found that it lacks substantive jurisdiction to “actively intervene” in a purely contractual employment matter, which is a matter for the Israeli specialized labor court to decide on.

Israel's Supreme Court found that there is no room to intervene in the Committee's decision. Yet the Court added that in a “dynamic world,” with “changing” employment models and increasing “technological creativity of employees,” there could be room to introduce regimes (either private or regulatory) that support the compensation of employees for service inventions. This is what “justice” and “common sense” considerations entail, the Court explains.²⁴⁶ Because the question of unconscionability of compensation waivers remained unsettled, some employees raised a similar unconscionability claim as an “employment dispute,” asking the specialized labor court to resolve the question. In one decision, the regional labor court found that in the aftermath of the Supreme Court decision, this authority is now vested in the specialized labor courts—and under Israeli Civil Procedure laws, this means the labor court will be able to decide the invention-related dispute in its entirety.²⁴⁷ Thus, soon enough Israeli labor courts, considered to be pro-employee in some disputes,²⁴⁸ will decide on core patent law matters such as the appropriate amount of royalties for an employee's service invention assignment, and the unconscionability of such waivers.

An interesting edge case of IP boilerplate involves undergraduate students who assign or license rights in their creations and innovations via browserwraps and even signed form contracts, once admitted to the university. I address this case study at length in a different chapter, yet it is interesting to note that unlike employees, students who are not employed by the university will often develop a creation or invention on his own dime, time, and resources. In Israel, leading design institutions assign rights in those creations to the institution, yet the contract is rarely invoked to commercialize the IP rights. In fact, in a 2012 survey conducted by the author encompassing six of the major academic design institutions in Israel, some funded

²⁴⁴ Patents Law, 5727–1967, § 134(b) (Isr.) (“If there is no agreement that prescribes whether, and to what extent and on what conditions, the employee is entitled to compensation for a service invention [work made for hire], then the matter shall be decided by the Compensation and Royalties Committee established under Chapter Six.”). Israel has a unique model in which a special committee decides the appropriate compensation. Yet employees in Israel commonly waive their right for compensation and the right to petition to the committee, a practice that was questioned by *Barzani*.

²⁴⁵ *Barzani v. Iscar* (May 4, 2014) (decision by The Patent Law Compensation and Royalties Committee), paras. 20–34.

²⁴⁶ HCJ 4353/14 *Barzani v. Iscar* (July 8, 2015).

²⁴⁷ LC (TA) 53043-06-14 *Berliner v. Adama Makhteshim Inc.* (Sept. 11, 2016), at para. 23. This case is still litigated as of December 2018 and the court has yet to decide on this specific issue. Interestingly in a dramatic turn of events, and since the invention in question is a matter of a major patent dispute litigated in the United States between two competitors, the Labor Court was also asked by the defendant to handle some of the proceedings in confidence, and to issue a protective order barring the disclosure of some of the complaints, as is customary, in the proceedings handled by the Patent Committee, after their competitor filed a petition to the Labor Court to review the documents.

²⁴⁸ The same courts found employment contracts to be unconscionable in various other cases. See Hani Ofek-Gandler, *Employment Contract as an Unconscionable Contract*, 33 EIONEI MISHPAT LG 51 (2010) (In Hebrew).

by the government, five of the institutions assigned to themselves, under a browsewrap or a signed contract, full IP ownership of the creations of their thousands of undergraduate students, but there was only one reported case known to the author in which an academic institution commercially exploited students' creation.²⁴⁹

And of course, students are just one example of another creative population that is routinely deprived of its rights under form contracts. Professional artists, authors, and designers, and others that heavily rely on creativity for their livelihood, are routinely subjected to unnegotiated contracts.²⁵⁰ In the recording industry, prior to the age of Spotify and YouTube, some have described this reality as an “oppressive and unjust” contractual culture in which musicians are forced into “professional slavery,” as they are forced to hand over most of their future royalties and earnings to the label.²⁵¹ Questions of unconscionability in these settings have been mainly left unanswered in courts,²⁵² as record labels were quick to settle lawsuits. With the advent of digital consumption and services like iTunes, Pandora, Amazon Music, YouTube, Spotify, and the like, platform intermediaries disrupted this traditional model, bringing about a promise of a new future in which artists may cut out the “middle man” and enjoy the lion's share of the fruits of their labor.²⁵³

Still, contracts, now mostly clickwraps, continue to violate artists' rights by allowing the platform, for example, to remove content at its sole discretion.²⁵⁴ Authors are (still) often deprived of elementary rights such as the ability to edit, amend, correct, or omit something from their own creations.²⁵⁵ With emerging initiatives seeking to empower authors to negotiate their basic rights and the rise of self-publication, one may hope that this culture will diminish,

²⁴⁹ Amit Elazari, *Position Paper: The Legal Status of Students' Intellectual Property Rights in Academic Design Institutions* (Oct. 2012), available at <http://din-online.info/pdf/std7.pdf> (in Hebrew). In this case students were surprised to learn that design jewelry prepared by them for a final project and displayed in exhibition, were offered to sale and auctioned to the highest bidder. The students quickly protested and the auction was cancelled.

²⁵⁰ See D'Agostiono, *supra* note 51; see also Authors Alliance, *Understanding and Negotiating Book Publication Contracts* (2018), https://www.authorsalliance.org/wp-content/uploads/2018/10/20181003_AuthorsAllianceGuidePublicationContracts.pdf.

²⁵¹ See Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739 (2003); Phillip W. Jr. Hall, *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189 (2002). See also Ian Brereton, *The Beginning of a New Age: The Unconscionability of the 360-Degree Deal*, 27 CARDOZO ARTS & ENT. L.J. 167 (2009); Brief *Amicus Curiae* of the Motown Alumni Association in *F.B.T. Productions v. Aftermath*, No. 09-56069 (9th. Cir. 2010).

²⁵² Hall, *id.* at 191. With some exceptions, see the discussion in Reeves, *infra* note 464. See also *Buchwald v. Paramount Pictures Corp.*, No. C 706083, 1990 Cal. App. LEXIS 634 (Cal. App. Dep't Super. Ct. 1990).

²⁵³ See Menell, *This American Copyright Life*, *supra* note 62, at 313.

²⁵⁴ See *Song Fi* in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy”.”

²⁵⁵ For an historic overview, see, e.g., Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y USA 425 (2002). See also Molly Van Houweling, *Authors versus Owners*, 54 HOUS. L. REV. 371 (2016) (proposing revisions to copyright rules of ownership and transfer to allow more “author-centric” copyrights that enable authors to revise and revisit their work).

yet it is hard to imagine it will entirely disappear.²⁵⁶ In fact, recognizing that contracts could often displace copyright purposes, section 203(a) of the Copyright Act allows the owner of copyrighted work to terminate the transfer of the copyright, through a five-year period starting thirty-five years after the transfer of the copyright.²⁵⁷ Most importantly, and after lessons from decades of experimenting where a different “rights reclaiming” regime that was introduced under the old law was displaced by contracts were learned, Congress made this right inalienable and immune from contractual interventions.²⁵⁸ Here Congress recognized that the law must

“safeguard[] authors against unremunerative transfers . . . needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s prior value until it has been exploited.”²⁵⁹

Record companies and other proprietors sidestepped the hurdle by categorizing these works as work-made-for-hire *ab initio*, which are not subjected to the statutory termination right using—naturally—boilerplate contract language used across the industry.²⁶⁰

If there is a key lesson to be learned from the overview provided in this Chapter, it is that the interaction between contracts, and specifically form contracts and IP was, and continues to be, a matter of concern, yet the law is still falling behind. Did legal scholarship, surrender to the “I accept” culture or is less worried for the future of IP in a world governed by wrap-contracts? Did contracts stop posing a serious problem as some scholars have suggested?²⁶¹ With the exception of the Restatement, the debates concerning Lexmark, and work conducted in the field of digital ownership, this interaction, which has been a minefield of literature and debate between in the 1990s and early 2000s, seem to be receiving less

²⁵⁶ See, e.g., Authors Alliance, *supra* note 250. See also The Authors Guild, *The Authors Guild Fair Contract Initiative: A Preview* (June 17, 2015), <https://www.authorsguild.org/industry-advocacy/the-authors-guild-fair-contract-initiative-a-preview/>.

²⁵⁷ 17 U.S.C. § 203(a).

²⁵⁸ See 17 U.S.C. § 203(a)(5) (“Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”). Under the old law, authors had the ability to reclaim their licensed copyright when renewing the copyright. But the exercise of this right was undermined when publishers used contracts to assign copyrights through the entire duration of the work (initial and the renewal term), and the Court found this type of clause enforceable. See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943); see also David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y U.S.A. 387 (2001).

²⁵⁹ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 124 (1976).

²⁶⁰ See Nimmer & Menell, *id.*, at 396 (“[V]irtually all contracts that artists signed with record companies from 1972 onwards have contained (1) an acknowledgement that the contribution constitutes a work made for hire, and (2) in case that characterization fails, a backup assignment.”). See also Memorandum from Howard Coble to Members of the Subcommittee, May 23, 2000 (companies have “inserted boilerplate language in all recording contracts which specified that the sound recordings were works for hire”); See Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law’s “Inalienable” Termination Rights*, 57 J. COPYRIGHT SOC’Y 799 (2010).

²⁶¹ See Rub, *Copyright Survives*, *supra* note 39 (“[T]he horror scenarios that envisioned contractual arrangements running amok and trumping copyright law as we know it, did not materialize” and “[i]t is doubtful that contracts do, in fact, affect users’ behavior in a way that disturbs the arrangements set by copyright law without leaving a trace, in the caselaw or elsewhere.”) (*id.* at 1149).

attention from scholars for the past decade and a half, in the aftermath of Article 2B proposed reform and *ProCD*.

Still the question remains, if unnegotiated contracts are deployed in the wild to displace IP laws, causing employees, authors, artists, investors, and creative beings of all kinds to “forego their statutorily-guaranteed right[s],”²⁶² and for over decades the phenomenon persists (and even increases), what could be done to ensure the policies behind IP laws are not grossly displaced? It seems that legislative solutions that guarantee some statutory rights, like the termination rights regime or the new Consumer Review Fairness Act, combined with doctrines such as misuse, preemption, and first-sale, have sporadically been used by courts trying to limit this displacement. Contractual solutions like unconscionability, which are sometimes cited as accessible tools, were last prominent in the “battle.” The following subchapters will review another form of a prevalent IP boilerplate, the technological boilerplate and another form of IP boilerplate, one that generally fosters creativity. These sub-chapters will be followed by a brief overview of solutions used by courts and legislators in the context of IP boilerplate, describing the overall emerging narrative of a “game of catch” that IP regulation has been playing with IP boilerplate, one in which the latter still seems to be winning. I explain later that with the reformulation of the Restatement, there is an opportunity to reconsider unconscionability and repurpose it, perhaps utilizing a novel tool that is, finally, specifically tailored for boilerplate.

D. *The Technological Boilerplate: Unconscionability by Design*

Private ordering in IP is not only accomplished through mass deployment of industry-wide boilerplate language. It is also facilitated, as scholarship has long observed,²⁶³ by various modes of technology, architecture and systems’ design, that could give rise to potentially unconscionable technology. This prominent mode of regulation in IP operates in at least two prominent fashions: (i) technology that serves to enforce boilerplate language at scale, like the notable example of Digital Rights Management Systems (DRM) and Technological Protection Measures (TPM) enforcing IP rights holders’ licensees, and (ii) technology that serves as boilerplate: enforcing rights and limiting statutory rights de facto, although there is no specific contractual arrangement in place. By virtue of this, technology could operate like *in rem* servitude-like property rights, since it operates against the world, without any contractual relations in place.²⁶⁴

A common example here is DRMs, TPMs or other anti-circumvention technology used in physical products (like CDs), printer cartridges, or other connected devices sold on secondary markets—where there is no direct contractual relation to the secondary buyer. And if technology is being used to enforce, limit, or deprive a statutory right beyond the counters of ToS, it moves from the first category to the second. Both categories undermine statutory

²⁶² A term used in the matter of *Disney* in which such practice led the court to find that the drafter of the contract, Disney, engaged in copyright misuse. See ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox.”

²⁶³ See LESSIG, *supra* note 119, at 20–21; see also Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-by-Design* (forthcoming CALIF. L. REV., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175017 (providing a comprehensive account of scholarship on governance by design from law, computer science, engineering, “socio-technical systems (STS)” and other disciplines, and surveying the rich literature in this field in a variety of contexts and case studies from privacy and cybersecurity to copyright and DRMs).

²⁶⁴ See, e.g., RADIN, *supra* note 1, at 46–51 (explaining how TPMs operate as boilerplate). For Radin, TPMs are the successors of boilerplate, they operate as the “machine rule” that replaces boilerplate.

rights of users and creators, and when they are nonsalient and deployed at scale, may give rise to unconscionability by design.

Consider Content ID, a technology further discussed in Chapter III(B)(ii). In a nutshell, YouTube’s Content ID system allows certain copyright owners to identify potential violations of copyright-protected content uploaded to YouTube. Once content is uploaded, it is examined, and YouTube alerts the (alleged) owner about any (alleged) infringement and entrusts in her hands the full prerogative to determine the fate of the (allegedly) infringing content. Simultaneously, a Content ID claim is opened against the (alleged) offender, which consequently affects the ability of the “offender” to license his content under a Creative Commons license or even to receive payments.²⁶⁵

This system was characterized by Elkin-Koren as an example of a private mechanism for implementing “formalities,” meaning a procedural mechanism necessary for acquiring a valid copyright, such as registration, notice, and the like.²⁶⁶ Formalities maintain the fine balance within the copyright regime—between the monopolistic rights of the current creator, and the remaining resources in the public domain, that serve as building blocks for future creators. Content ID was heavily criticized by scholars as lacking transparency and due process.²⁶⁷ It was also criticized for its lack of (technological) ability to distinguish between infringing content and content that is covered under copyright’s fair use doctrine.²⁶⁸

YouTube’s ToS allows the streaming giant to decide if content is infringing copyright and remove such content without prior notice. YouTube also reserves the right to decide more generally if content violates the ToS “for reasons other than copyright infringement.”²⁶⁹ But the ToU do not explicitly prohibit users from engaging in fair use activity, nor is it clear if such a term could be enforced.²⁷⁰ In fact, the ToS refer to YouTube’s policy guidelines, which allow

²⁶⁵ See YouTube, *How Content ID works* (Sep. 28, 2010), <https://support.google.com/youtube/answer/2797370?hl=en>. See also Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: Youtube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 69 (2014).

²⁶⁶ See Elkin-Koren, *Can Formalities Save the Public Domain?*, *supra* note 115, at 1538, 1551.

²⁶⁷ See Elkin-Koren—*Can Formalities Save the Public Domain?*, *id.* at 1560. Although YouTube revised the process to include a counter-notice (processed within the DMCA standard procedure), there is still room for change. See Diane Leenheer Zimmerman, *Copyright and Social Media: A Tale of Legislative Abdication*, 35 PACE L. REV. 260, 272 (2014). See also Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499 (2017) (explaining how the DMCA notice-and-takedown regime, coupled with the emergence of automatic mechanisms such as Content ID and private agreements, render the importance of substantive copyright in the context of online expression).

²⁶⁸ Electronic Frontier Foundation, *Takedown Hall of Shame*, <https://www.eff.org/takedowns>.


²⁶⁹ YouTube, *Terms of Service*, <https://www.youtube.com/static?template=terms> (May 25, 2018) at §§ 6(G), 7(B).

²⁷⁰ It is questionable if that would have been possible (regardless of the tremendous reputational costs) in the aftermath of *Lenz*. In *Lenz* YouTube removed a video uploaded by Stephanie Lenz, in which her toddler son was filmed dancing to the song “Let’s Go Crazy” by the artist Prince. The content was reported by Universal as infringing, although it is covered by the fair use protection under copyright law (17 U.S.C § 107). The trial court held that in light of the purpose of Article 17 U.S.C § 512 (f) Universal should have considered, in good faith, whether a particular use constitutes fair use prior to initiating the DMCA takedown process. Moreover, the court noted that that such an “unnecessary removal of non-infringing material causes significant injury to the public” (*Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008)). After lengthy litigations, Lenz indeed got compensated. In one of the later proceedings, the Ninth Circuit adopted a broad conception of fair use,

users to engage in authorized copyright activity.²⁷¹ When YouTube’s Content ID takes down fair use-protected content beyond what is permissible under the ToS, its technology moved inside the second category to a design that displaces statutory rights, even though it does so without any contractual “anchor.” Of course, there are other examples, like TPMs used to prevent reverse engineering for the purposes of achieving interoperability, a fair use practice that is also exempted from the DMCA’s anti-circumvention provisions.²⁷² In this case at least one proposed doctrinal solution, should be looking at this *technology* as presumed to be unconscionable, as if it was the boilerplate language itself. Under chapter IV I discuss how Unconscionability 2.0 should be applied in this context.

E. The Rising Opposition: When the Fine Print Supports Creativity and Innovation

As mentioned in previous chapters, boilerplate, and even technological boilerplate, does not just operate as a negative force in IP property and creative regimes. First, it is important to recognize that contracts, including and especially standardized ones, serve a critical function in the IP realm; they facilitate transactions and allow innovations and cultural products to be disseminated and commodified. Licensees are the lifeblood of digital (and tangible) technology and as such they (and the rights they facilitate) are praised by scholarship and protected by courts.²⁷³ In as much as form contracts are critical to any industry, they are vital in a digital world of instant, “click-based” consumption.²⁷⁴ But beyond that, boilerplate language could be used to foster innovation and creativity by displacing, at scale, IP laws’ default restrictive regime (of all rights reserved) with a more flexible (some rights or no rights reserved) regime that supports secondary creativity, commentary, access, and interoperability.

If EULAs and ToS often cause users to waive statutory rights, Creative Commons and open-source licenses allow the owner of the IP to use the boilerplate to expand the rights that users, secondary creators (or contributors to code), and the public at large will enjoy beyond the legal default. Under a Creative Commons CC0 license, for example, owners can waive all rights in their creations and donate them to the public domain, by simply adopting a standardized, pre-prepared boilerplate license language accompanied with a recognized label: .²⁷⁵ They can allow others to remix their work, copy it and modify it, and prepare

explaining that “[f]air use is not just excused by the law, it is wholly authorized by the law”. *See* *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2015). Yet in *Baystate* a court in another Circuit discussed fair use as “statutory right” and still enforced a waiver of such right (to reverse engineer). *See* the discussion in *Baystate* in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’”.

²⁷¹ YouTube, *Policies—YouTube*, <https://www.youtube.com/yt/about/policies/> (“Only upload videos that you made or that you’re authorized to use.”).

²⁷² *See* THE COPYRIGHT OFFICE, *supra* note 128. *See also* 17 U.S.C § 1201(f).

²⁷³ *See, e.g.*, Merges, *Intellectual Property and the Costs of Commercial Exchange*, *supra* note 56 and Merges, *The End of Friction? Property Rights and Contract in the Newtonian World of On-Line Commerce*, *supra* note 56. *See also* most notably, the discussion in *ProCD* in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’.”

²⁷⁴ *See, e.g.*, Reichman & Franklin, *supra* note 120, at 876–878.

²⁷⁵ Creative Commons, *Public Domain Mark*, <https://creativecommons.org/share-your-work/public-domain/pdm/>; Creative Commons, *CC0 “No Rights Reserved”*, <https://creativecommons.org/share-your-work/public-domain/cc0/>.

derivative work thereof.²⁷⁶ Here, boilerplate language serves as a guardian of the public domain, securing growing repertoires of, and access to, creative building blocks for decades to come, within the law boundaries (but without the need to rely on its default regime), “partially alleviat[ing] the costs associated with atomistic copyrights with ceding control to a consolidating intermediary”.²⁷⁷

Another vibrant innovative community that depends on boilerplate licenses is the Open Source and Free Software community, without which the internet as we know it would not exist.²⁷⁸ To be more accurate, all of us, as users of technology, use open source software throughout our daily lives, clicking on devices that execute code and software that is created in cumulative open source processes regulated by standardized contractual terms that depart from copyright’s legal default.²⁷⁹ For example, the commonly used GNU-GPL license grants users (and contributors) the rights to use, modify, and share the software, but requires any derivative work to be shared under the same conditions.²⁸⁰ In its third variation the GPL license was extended to prevent the deployment of TPMs and DRMs in a manner that would trigger the DMCA anti-circumvention provisions, or the deployment of other hardware means that prevent users from deploying modified software versions on their device (Tivoization).²⁸¹ In this regard, GPL is operating as an opposition that liberates users from technological boilerplate that limits their legitimate rights as users of open source, free software.

In another place I expanded on how another form of a (sometimes) positive boilerplate serves to facilitate security testing at scale, on propriety software and even governmental assets, by creating explicit safe harbors from the Computer Fraud and Abuse Act and the DMCA.²⁸²

²⁷⁶ For a description of the different licenses see: Creative Commons, *Licensing Types*, <https://creativecommons.org/share-your-work/licensing-types-examples/>.

²⁷⁷ Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, *supra* note 62, at 636, 633.

²⁷⁸ See, e.g., Menell, *Economic Analysis of Network Effects*, *supra* note 130, at 32. See also ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005); Eric von Hippel & Georg von Krogh, *Open source software and the “private-collective” innovation model: Issues for organization science*, 14.2 *ORG. SCI.* 209 (2003) (explaining that the “private-collective” model of innovation that contains elements of both the private investment and the collective action models and can offer society the ‘best of both worlds’ under many conditions”).

²⁷⁹ See STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* 213 (2004). Some notable examples of widely deployed open source software include the Linux Kernel operating system, WordPress and Mozilla products (like fire fox).

²⁸⁰ What is also known as a “copy left” license. See Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, *supra* note 62, at 634.

²⁸¹ GNU Operating System, *GNU General Public License*, <https://www.gnu.org/licenses/gpl-3.0.en.html>, § 3 (“[W]hen you convey a covered work, you waive any legal power to forbid circumvention of technological measures to the extent such circumvention is effected by exercising rights under this License with respect to the covered work, and you disclaim any intention to limit operation or modification of the work as a means of enforcing, against the work’s users, your or third parties’ legal rights to forbid circumvention of technological measures.”); § 6 (requirement to provide installation information needed to installed modified versions).

²⁸² See 18 U.S.C. § 1030(a)(2) (The Computer Fraud and Abuse Act limitation on unauthorized access to a protected computer); 17 U.S.C. § 1201(1)(a)(1)(A) (DMCA’s anti-circumvention provisions discussed in *supra* note 21). See Amit Elazari Bar On, *Private Ordering Shaping Cybersecurity Policy*, *supra* note 135. The author has helped to create a set of standardized terms to facilitate adoption of such “safe harbors” that was adopted by Tesla, Dropbox and Mozilla, among others. See, e.g., Patrick Howell O’Neill, *Dropbox revamps vulnerability disclosure policy, with hopes that other companies follow suit*,

These boilerplate support a growing “bug bounty” economy of crowd-sourced security testing, in which external white-hat hackers report security vulnerabilities to companies and organizations of all sizes and from all industry segments, including the Pentagon, for monetary and reputational rewards. Recently one innovating car company, Tesla, has extended this safe harbor to include a specific waiver from car warranty limitations for researchers engaging in good-faith security testing in compliance with the bug bounty program rules, removing a critical barrier to research of expansive devices, and taking the “right-to-repair” a step further than the DMCA’s exemption default regime.²⁸³

While the above contracts are notably just one example from a broad category, they serve to recognize the positive role that boilerplate can play in this economy. Under Unconscionability 2.0, these contracts will not raise suspicion, as they are generally promoting IP policies.

F. A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox

This dissertation has already surveyed some of the existing IP solutions used to limit how private ordering using boilerplate language displaces or abuses IP policies, a question explored by many scholars.²⁸⁴ These tools include specific rights that are inalienable, such as termination rights, as well as statutory limitations on certain IP rights assignments such as the new Consumer Review Fairness Act language barring assignment of consumer reviews’ copyrights²⁸⁵ and state laws voiding assignment of employees’ inventions that exceed the scope of works-made-for-hire.²⁸⁶ But perhaps the most common way to protect IP from contractual abuse is judicial application of the overarching doctrines of preemption, misuse, and first-sale. Fair use is also used sometimes to that effect, but some courts have been willing to prioritize contracts, even standard form contracts, over IP law and enforce contractual restrictions on fair use.²⁸⁷

The preemption doctrine,²⁸⁸ which is discussed at length in the next chapter, assures that the prerogative to further IP policy is vested in federal law, in order to promote uniformity and prevent state laws from upsetting the fine balance dictated by Congress under federal law.²⁸⁹ Preemption could have been the main way to address this tension between contract

CYBERSCOOP (March 21, 2018), <https://www.cyberscoop.com/dropbox-vulnerability-disclosure-policy-cybersecurity-researchers/>. See also the terms repositories in LEGAL BUG BOUNTY, <https://github.com/EdOverflow/legal-bug-bounty> and DISCLOSE.IO (<https://disclose.io/>).

²⁸³ Bugcrowd, *Tesla*, <https://bugcrowd.com/tesla> (“Tesla will not consider software changes, as a result of good-faith security research performed by a good-faith security researcher, to a security-registered vehicle to void the vehicle warranty of the security-registered vehicle”).

²⁸⁴ See, most notably, Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998). A full account of these solutions is beyond the scope of this dissertation.

²⁸⁵ Still one could claim this tool is in fact contractual in its essence, and is geared towards securing the rights of consumers and free competition, and not traditional IP policies.

²⁸⁶ See ch. II(C)(iii) “Some other Adherent-Creators: Students, Artists, Consultants and Employees.”

²⁸⁷ See the discussion in *Baystate* and *Davidson*, in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’.”

²⁸⁸ 17 U.S.C § 301(a).

²⁸⁹ It draws its origins from the constitutional supremacy clause, U.S. Const., art. VI, cl. 2. In copyright subsection 301(a) provides that: “legal or equitable rights that are equivalent to any of the exclusive

enforcement, and IP policies at the federal level. Yet as I explain in the next chapter—the opportunity was missed in the case of *ProCD*, and since then, as empirical research shows, courts have been unwilling to use preemption to void contracts.²⁹⁰ With the demise of preemption, first-sale and misuse, two other common law doctrines geared to prevent overexpansion of IP monopolistic rights that upsets IP regime’s fine balance, seem to be taken the front-seat, separately and combined. The first-sale doctrine (or exhaustion in patent law), played a dominant role in limiting post-sale boilerplate restrictions on how consumers use innovations and cultural artifacts.²⁹¹

Misuse, an affirmative defense to copyright or patent infringement, is aimed at preventing IP owners from exercising their monopolistic rights beyond or “outside” of IP’s legal scope. Such practice would be deemed a “misuse” of the owner’s right.²⁹² While originally misuse was focused on anti-competitive behavior, courts have recently expanded this traditional view, to essentially any violation of the public policy embodied in the grant of a copyright.²⁹³

In fact, almost a decade has passed since the Ninth Circuit noted that “the contours of [misuse] are still being defined,”²⁹⁴ and it still very much the case. As such, courts have been using misuse to refuse to enforce (under copyright and patent law) a variety of contractual restrictions on IP rights.²⁹⁵ Misuse is thus becoming the de facto prominent vessel to keep

rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.” The Copyright Bill of the 1979 act noted that “[t]he intention of §301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law.” See Report No. 94-1476 (1976), at 114. For an elaborate discussion, see Lemley, *Beyond Preemption*, *supra* note 47; Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 102 (1997) [hereinafter Elkin-Koren—*Copyright Policy and the Limits of Freedom of Contract*]. In patents the doctrine developed under case law. See *Sears, Roebuck & Co v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

²⁹⁰ See Rub, *Copyright Survives*, *supra* note 39, at 1180, reviewing 288 decisions of copyright preemption and finding that “[t]he Sixth Circuit is the only federal appellate court in the last twenty years to find a contract actually preempted by the Copyright Act”.

²⁹¹ See *supra* ch. II(B)(ii) “The Rise (and fall?) of the “Patent-Wrap” Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham.”

²⁹² *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990).

²⁹³ *Lasercomb Am., Inc.*, 911 F.2d at 978 (“The question is not whether the copyright is being used in a manner violative of antitrust law, ... but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.”). See also in the Fifth Circuit (misuse is an “unclean hands defense” that “forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which is contrary to public policy to grant”). *Alcatel USA, Inc. v. DGI Techs, Inc.*, 166 F.3d 772, 792 (5th Cir. 1999) (internal citations omitted), *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) and in the Ninth Circuit *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 699 (9th Cir. 2015) (“The defense of copyright misuse, however, is not limited to discouraging anti-competitive behavior.”).

²⁹⁴ *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 941 (9th Cir. 2010).

²⁹⁵ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917) (refusing to enforce restrictions on the machines could be used beyond the point of the first sale); *Morton Salt Co. v. G.S.*

boilerplate language in check. One recent case, discussing both misuse and first-sale, particularly illuminates this trend, while shedding light on some of the limitations of both these doctrines. The case discussed is the recent decision in *Disney v. Redbox*.²⁹⁶

Disney sells combo packs with a DVD/Blu-ray disc version of its blockbuster movies alongside a download code that allows users digital access to the movie. Redbox operated a secondary market for Disney movies, renting DVDs and codes in kiosks, separately and together in similar “combo packs.”²⁹⁷ Disney sought to limit Redbox’s ability to sell the codes as a standalone product. Originally Disney’s ToS, referred to in fine print at the bottom of the package and accessible online, prohibited the “sale, distribution, purchase, or transfer of Digital Copy codes . . .”.²⁹⁸

Based on that language, in February 2018 the court found that Disney engaged in copyright misuse. Specifically, the court found misuse in the fact that Disney’s ToS required a user redeeming the code to represent that she is the current owner of the physical disc copy (when entering the code to download or stream the online version) as a condition to the online license. The terms therefore “purport[ed] to give Disney a power *specifically denied* to copyright holders by § 109(a) [codified copyright first-sale doctrine],”²⁹⁹ causing users who want to enjoy the license to “forego their *statutorily-guaranteed right* to distribute their physical copies of that same movie as they see fit.”³⁰⁰ This “improper leverage” of copyrights restricting secondary transfers “directly implicates and conflicts with public policy enshrined in the Copyright Act” and therefore “constitutes copyright misuse.”³⁰¹

This broad conception of copyright misuse as essentially extending to any contractual language that places conditions on IP rights provided under the statute resembles to some extent the proposed model of presumptions of Unconscionability 2.0 discussed in Chapter IV(B)(i). One might claim it takes this proposal even further since the Disney court applied misuse (in this manner) where the “adherent” was a commercial, sophisticated entity (Redbox) and not the typical user-adherent.³⁰²

Disney changed their ToS to remove the above representation while still limiting the sale of the code separately and stating that only users who bought the code in a combo pack

Suppiger, 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363 (1942) (reusing to enforce a patent license requiring a patented article only to be used with another non-patented artifact produced by the patentee (salt tablets)); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990) (refusing to enforce a software license provision limiting (in some manners) the use of the software and the development of a competing product, for 99 years, beyond copyright’s protection period); *DSC Communs. Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 601 (5th Cir. 1996) (refusing to enforce a copyright license requiring licensees to use only the copyright owner unprotected “microprocessor cards” on its phone switch operating system, thereby asserting protection over unprotected elements required for the development of interoperable cards).

²⁹⁶ *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 148489 (C.D. Cal. August 29, 2018).

²⁹⁷ *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018), at *2–3.

²⁹⁸ *Id.* at *4.

²⁹⁹ *Id.* at *18–19. (emphasis added).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Similar to the Israeli court application of unconscionability in the matter of *Jobmaster*. See ch. IV(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”.

can redeem it, tying the code to the physical copy of the disc—but using different language. And so, in August 2018, the same court found that the misuse was “cured” (or there is no longer misuse), since “[c]ombo Pack purchasers and recipients continue to enjoy digital access regardless whether they keep or dispose of the physical discs.”³⁰³ The court concluded that the “right to transfer a separate [c]ode” is not protected by the first-sale doctrine, and “[a] copyright misuse defense, therefore, is unlikely to succeed.”³⁰⁴

This interesting distinction between physical copies and digital copies raises concerns since the sale of the code and the sale of the disc are essentially the same: In both cases the user performs an action (inserting a disc into the DVD player or providing a code to a computer) to get access to the work. For users, this extra copy they bought via code was rendered useless, and for Disney the same result was achieved by limiting the secondary market of digital, and not physical, copies. Arguably, in today’s world where less people own a DVD player, the digital copy is much more valuable in the secondary markets. Enforcing the first-sale doctrine in this manner does little to ensure that Disney’s monopoly does not extend beyond the law’s well-intended boundaries, especially in an era where the lines between sale and license, and physical and digital, are constantly blurred.³⁰⁵

Still copyright misuse seems to be reconceptualized in *Disney* to extend to well beyond antitrust and anti-competitive effects to essentially a case that “upsets” the fine balance between owners and users under the law. In another case involving *Omega S.A. v. Costco Wholesale Corp.*,³⁰⁶ the court explained that “[t]he limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts[.]”³⁰⁷ and that the misuse at case, as an “attempt to expand the scope of [the copyright owner’s] statutory monopoly” in a manner that upsets that balance.³⁰⁸

The recent application of misuse and first-sale doctrines unveils an interesting narrative: U.S. IP regimes have been playing a game of catch with the boilerplate. In certain cases, they seem to be particularly concerned with a specific displacement (for example, waivers of rights to reclaims of licenses or limitations on first-sale), in as much they will specifically address the abusive practice via statutory limitations or specific case law. Then drafters of boilerplate quickly adapt: The record labels changed their boilerplate to categorize artists’ works as “made-

³⁰³ *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 148489 *21–22 (C.D. Cal. August 29, 2018).

³⁰⁴ *Id.* at 23.

³⁰⁵ See PERZANOWSKI & SCHULTZ, *supra* note 101. See also Robert A. Hillman & Maureen A. O’Rourke, *Principles of the Law of Software Contracts: Some Highlights*, 84 TUL. L. REV. 1519, 1523 (2009) (noting that “an end user’s right to ignore a term forbidding reverse engineering of the software should not depend on whether the parties labeled their transaction a sale or a license, but on the true substance of the deal and the term itself, including whether the term contradicts, for example, federal intellectual property law, state public policy or whether it is unconscionable”). See also the recent decision in the manner of *Capitol Records, LLC v. ReDigi Inc.*, Docket No. 16-2321, at *22 (2d Cir. Dec. 12, 2018) (finding that copyright first sale doctrine does not apply to digital files, but could be applicable to thumb drives with loaded digital files and that “other technology may exist or be developed that could lawfully effectuate a digital first sale.”).

³⁰⁶ *Omega S.A. v. Costco Wholesale Corporation*, 776 F.3d 692, 699–700 (9th Cir. 2015), cert. dismissed, 136 S. Ct. 445, 193 L. Ed. 2d 345 (2015).

³⁰⁷ Citing *Twentieth Century Music Corp.*, 422 U.S. at 156.

³⁰⁸ *Id.* at 705–6.

for-hire” in the 1980s and 1990s,³⁰⁹ and Disney changed its ToS in 2018 to limit the circulation of the access code and to bar the “separation” of combo packs. But drafters are not just changing contracts—they use technology to prevent users from engaging in legally permissible activities like fair use, copying and access to unprotected data.³¹⁰

And as drafters adapted, misuse (instead of preemption) became a more accessible tool to limit their abuse. While in *ProCD* the court allowed boilerplate language to exclude unprotected elements, phone records, from the public domain and prevent their copying, years later in the misuse case *WireData*,³¹¹ another court noted that limiting the users’ ability via contracts (or technological means) from accessing their own data, which is not protected under copyright, is “absurd” and may constitute copyright misuse.³¹² In another case involving contractual limitations on how authors use library materials (such as manuscripts), the court interpreted the contract specifically in light of copyright policies, the subject matter of the contract at hand. The court noted that “to read the [contract] as absolutely forbidding any quotation, no matter how limited or appropriate, would severely inhibit proper, lawful scholarly use and place an arbitrary power in the hands of the copyright owner going far beyond the protection provided by law.”³¹³ Finally, in *Disney* a court in California expanded misuse to encompass terms that cause users to “forego their statutorily-guaranteed right,” (in that case, the right of first-sale).³¹⁴ While misuse is getting closer in its function and scope to perhaps what preemption was meant to achieve, under some interpretations, it still has some notable limitations.

First, misuse is an affirmative defense that is only used by a user accused of patent or copyright infringement. As such misuse is ill-equipped to address a core category I identified: the prominent case of the adherent-creator. Similar to first-sale and preemption doctrines (even under the broader conception), misuse is focused on cases that involve abuse and unwarranted expansion of the monopolistic rights of the *owner* of the IP right. It therefore comes as no surprise that even in the most egregious of cases involving IP assignments, preemption or misuse were not invoked by the plaintiffs as a claim, but unconscionability was.³¹⁵

Granted, these doctrines serve to secure the rights of secondary creators, but in the case of the original creator who is deprived of her rights they offer little support. Second, because they are raised as a defense on a case-by-case basis, they still depend on litigation initiated by

³⁰⁹ See Nimmer & Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, *supra* note 258.

³¹⁰ The latest 2018 DMCA exemption triennial proceedings provide a variety of examples of technological tools that do just that and at scale: technological measures preventing educators and commentators from using short-clips of motion pictures, DRMs preventing reverse engineering and jail breaking and more. See THE COPYRIGHT OFFICE, *supra* note 21.

³¹¹ *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. Wis. 2003).

³¹² Interestingly, the court further noted that limiting access via other means (including technological) would be misuse: “We emphasize this point lest AT [Assessment Techs.] try to circumvent our decision by reconfiguring Market Drive in such a way that the municipalities would find it difficult or impossible to furnish the raw [unprotected, public domain] data...in any format other than that prescribed by Market Drive [the proprietary software]. If [the owner] did that with that purpose it might be guilty of copyright” *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d at 645.

³¹³ *Wright v. Warner Books, Inc.*, 953 F.2d 731, 741 (2d Cir. 1991).

³¹⁴ *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018).

³¹⁵ See *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015); *infra* note 371; see also *Cubic, Reeves, infra* note 464; *Song Fi, infra* note 453.

users, which rarely happens. Here unconscionability and misuse share the same critique. Still, as explained in the following chapters, unconscionability is somewhat limited by the narrow vision the United States has adopted for it, a vision that seems to be changing. Applying presumptions of unconscionability, creating affirmative rights, and encouraging (via fee-shifting) a consumer or a nonprofit advocacy group to petition for declaratory relief holding that a certain IP boilerplate term widely used in the industry is unconscionable could have a broader impact as the application of the decision is not fact-dependent on the conduct and its purposes, or even the specific adherent—only the boilerplate language.³¹⁶

Finally, misuse and first-sale doctrines do not bar contractual enforcement of terms, just enforcement under IP laws.³¹⁷ But as some cases have shown, achieving the exact same perverse result using contracts, enforced at scale, could render IP limitations on monopolistic rights meaningless. Therefore, in some cases courts have been willing to stretch the application of misuse or first-sale to creatively weigh in on core matters of contract enforcement. In *Disney*, the court invoked such considerations in deciding whether a label on a box (a “box-top license”, if you will) stating “[c]odes are not for sale or transfer” and that “[the] product . . . cannot be resold or rented individually” constitute an enforceable contract. Among other considerations,³¹⁸ the court also noted that these statements provide the user with a “prescription [that] is demonstrably *false*, at least insofar as it pertains to the Blu-ray disc and DVD portions of the Combo Pack,” because “[t]he Copyright Act explicitly provides that the owner of a particular copy ‘is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy’”, and therefore “the *clearly unenforceable* ‘cannot be resold individually’ language conveys nothing so much as Disney’s preference about consumers’ future behavior, rather than the existence of a binding agreement.”³¹⁹ In *WireData*³²⁰ the court noted that although the copyright owner did not sue for contract infringement, if it were to hypothetically “try by contract or otherwise to prevent the [defendants] from revealing their own data. . . . [this] might constitute copyright misuse.”³²¹

Contrary to these opinions, on matters of patent exhaustion the Supreme Court clarified that contractual limitations on the exhaustion doctrine are purely a question of contract law (and not patent law),³²² in line with decades-long precedent.³²³ The result is that even in the aftermath of *ProCD* there is still an unclear picture as to what portions of IP laws could be

³¹⁶ See ch. IV.

³¹⁷ See ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to Lexmark and Exhaustion”.

³¹⁸ Like the fact that Disney “ma[de] no suggestion that opening the box constitutes acceptance of any further license restrictions.” *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018), at *11.

³¹⁹ *Id.* at *12–13. (emphasis added).

³²⁰ *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. Wis. 2003).

³²¹ *Id.* at 646–7.

³²² See *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at 1531 (“The single-use/no-resale restrictions in Lexmark’s contracts with customers may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain patent rights in an item that it has elected to sell.”). See also *id.* at 1526 (“If the patentee negotiates a contract restricting the purchaser’s right to use or resell the item, it may be able to enforce that restriction as a matter of contract law, but may not do so through a patent infringement lawsuit.”). See also ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to Lexmark and Exhaustion”.

³²³ *Bloomer v. McQuewan*, 55 U.S. 539, 14 How. 539, 14 L. Ed. 532 (1853).

displaced by negotiated contracts or form-contracts, under different doctrines, absent a clear provision in the law on inalienability.³²⁴

I address Lexmark at length in a different chapter, and yet the apparent discrepancy in the application of first-sale doctrine in patents and copyright in the contractual context raises questions. The Lexmark Court clarified that both doctrines have their “roots in the common law principle against restraints on alienation,” and that “[d]ifferentiating between the patent exhaustion and copyright first-sale doctrines would also make little theoretical or practical sense” as the “two share a strong similarity . . . and identity of purpose.”³²⁵ The statutory language of both doctrines is focused on the “authorization” of the owner.³²⁶ Does it matter that sources of “restraints” and limitation on “authorization” originate from boilerplate contract or IP laws,³²⁷ where centuries ago even under negotiated contracts common law seems to disfavor these restrictions, as the Supreme Court in *Lexmark* observed.³²⁸ What will be the result if Lexmark actually decides to sue its consumers under contract law? The Supreme Court left the question, which was already left unanswered for centuries, unanswered again.³²⁹ Soon enough courts will need to decide these questions again, and IP doctrines do not provide them with tools to distinguish between negotiated and unnegotiated contracts. In fact, some recent misuse cases suggest that the lines between contract and IP laws are unintentionally becoming blurry, with some courts introducing IP policy into the discussion and some not. I further discuss this tension in the following chapter.

³²⁴ See the discussion on the right to terminate a transfer, which is inalienable under the law in ch. II(C)(iii) “Some other Adherent-Creators: Students, Artists, Consultants and Employees”. See also the discussion with respect to the “dispositive” nature of fair use under U.S. law in the aftermath of *Baystate* in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy”.”

³²⁵ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at 1527, citing *Bauer & Cie v. O’Donnell*, 229 U. S. 1, 13, 33 S. Ct. 616, 57 L. Ed. 1041 (internal quotation marks omitted). The Court also clarified that “many everyday products are subject to both patent and copyright protections.” *Id.*

³²⁶ § 35 U.S.C. 271(a) and 17 U.S.C. § 109 (2012) (“[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”); see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

³²⁷ See Shaffer Van Houweling, *The New Servitudes*, *supra* note 87.

³²⁸ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523, 1532 citing seventeenth-century sources, stating that “if an owner restricts the resale or use of an item after selling it, that restriction ‘is void, because . . . it is against Trade and Traffique, and bargaining and contracting between man and man.’” [quoting Lord Coke in 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628) and J. Gray, *Restraints on the Alienation of Property* § 27, p. 18 (2d ed. 1895) (“A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land.”)].

³²⁹ See *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 637, n.7 (U.S. 2008) (“[The patent owner] complaint does not include a breach-of-contract claim, and we express no opinion on whether contract damages might be available even though exhaustion operates to eliminate patent damages.”). See also *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 666, 15 S. Ct. 738, 39 L. Ed. 848, 1895 Dec. Comm’r Pat. 294 (1895) (“Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent law.”); ch. III(B)(iii) “A Limited Tool Set: From ProCD and Preemption to Lexmark and Exhaustion”.

III. UNCONSCIONABILITY 1.0—A BRIEF HISTORY OF AN ALIENATING DISCOURSE BETWEEN CONTRACTS AND IP LAW

This chapter offers a critical review of the manner in which U.S. law has underutilized unconscionability to solve problems created by IP boilerplate. The analysis unveils a disturbing narrative, one of alienation and ideological dissolution between contract and IP regimes in U.S. law.³³⁰ I claim that this narrative, which is reinforced by the preemption doctrine, cannot accommodate the needs of the information age. In the following chapter, I explain why a doctrine that accommodates both contractual and IP considerations, Unconscionability 2.0, is a better fit.

The first sub-chapter provides a brief background to unconscionability and explains why it serves as the focal point of my analysis. The following sub-chapters review the unjust systematic disregard of unconscionability in IP contexts in U.S. law. First, IP Scholars were quick to dismiss the doctrine of unconscionability as ill-equipped, ineffective, and contractually focused. However, their core argument for such dismissal was the failure of existing consumer-focused U.S. case law to properly enact the doctrine and the high-threshold for unconscionability. Lacking the needed attention of such scholars, courts have remained with an ineffective unconscionability, issuing ill-advised rulings, even when addressing provisions in IP boilerplate with the sole purpose of regulating IP rights. This is another manifestation of the paradoxical situation from which unconscionability generally suffers, where although there is a “need for a new conceptual synthesis of the doctrine in light of recent changes,” “[b]esides criticizing unconscionability’s vagueness, most scholarship ignores the doctrine, thereby failing to connect with the tools courts have to respond to [adhesion] contracts.”³³¹

Second, the preemption doctrine has created a dichotomy between IP and contract law policies, a division that has led to the unjust retreat of IP considerations from the doctrine. Third, I suggest the *Lexmark* and *ProCD* decision added another dimension to this problem, exposing the limited tool set courts were left with to handle matters of IP boilerplate once discarding preemption. Fourth, I explain there is a lack of sufficient discourse between IP and contract law scholarship exploring the problems of IP boilerplate. This “dialogue of the deaf” is demonstrated, on one hand, by the lack of theoretical attention to IP policies in consumer scholarship that discusses the prominent IP boilerplate; and on the other, by the failure of IP scholarship and case law to address the empirical findings proposed by contract scholars. It manifests in case law, like *Lexmark*, in which the court failed to consider the nature of how post-sale restrictions are communicated in the market. This inadequate dialogue further contributes to the underutilization of unconscionability. Finally, I briefly address the shortcomings of some other limitations of proposed inter-doctrinal solutions. I claim these solutions were tainted by a utilitarian bias, seeking to address IP boilerplate in the light of utilitarian approaches alone, ignoring other essential theoretical perspectives. This, I claim, is a result of the lack of a harmonized discussion on the various types of IP boilerplate and the focus on the adherent-user type of contracts, such as EULAs.

A. *Why Unconscionability?*

³³⁰ DRASSINOWER, *supra* note 52, at 202.

³³¹ Colleen McCullough, *Comment: Unconscionability as A Coherent Legal Concept*, 164 U. PA. L. REV. 779, 785 (2016).

The doctrine of unconscionability has been used for centuries to void contractual “unconscientious bargains”.³³² In fact some scholars trace the roots of unconscionability even prior to English Law and Roman or Greek traditions to the Torah and Jewish law, and notions of justice and reciprocity.³³³ As years passed, unconscionability became commonly used for mitigating the dangers that arise when one party to the contract enjoys supremacy of negotiating power and information—and the other is forced to “take it or leave it.”³³⁴ As Gibson mentioned: “When concerns about boilerplate arise, contract law turns to the unconscionability doctrine.”³³⁵

The origins of unconscionability lay in England’s courts of equity,³³⁶ and it was generally introduced in the United States in a Supreme Court decision from 1889.³³⁷ In the United States it became prominent in the late 1950s and early 1960s following the adoption of the Uniform Commercial Code § 2-302 (U.C.C.) and the case of *Williams v. Walker*.³³⁸ Since then, it evolved into a fundamental part of U.S. contract law,³³⁹ an underlining principle,³⁴⁰ and “[o]ne of the most important developments in modern contract law.”³⁴¹

The unconscionability doctrine includes two components.³⁴² The first component is procedural unconscionability, which pertains to inequality in bargaining power. Purportedly,

³³² See Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 16 B.Y.U. L. REV. 427 (2016); McCullough, *id.*, at 787 (providing a comprehensive review of the origins of unconscionability).

³³³ Scott C. Pryor, *Revisiting Unconscionability: Reciprocity and Justice* (Sept. 14, 2018), <https://ssrn.com/abstract=3249449>.

³³⁴ *Id.* Yet, the application of Unconscionability is not limited to standard form contracts, nor to transactions that are governed under the U.C.C. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

³³⁵ Gibson, *supra* note 34, at 218.

³³⁶ It was later adopted in English common law as well, in the case of *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82 (Ch). There the court defined an unconscionable term as one that “no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other”. This affirmation was later adopted by U.S. Supreme court, in *Hume v. United States*, 132 U.S. 406, 411 (1889).

³³⁷ *Hume v. United States*, 132 U.S. at 406. Although, in essence, it was also applied in a Tennessee state court case from 1834. *King v. Cohorn*, 14 Tenn. 74 (Tenn. 1834). See 1 WILLIAM FREDERICK ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS 280 (1913).

³³⁸ *Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

³³⁹ See also RESTATEMENT (SECOND) OF CONTRACTS, at § 208.

³⁴⁰ Keren for example uses the term “Unconscionability principle”. See, Keren, *supra* note 332, at 432, (explaining that she uses “the term ‘principle’ rather than ‘doctrine’ to adopt Professor Eisenberg’s important argument that the unconscionability idea is broader than what arises from black-letter law and is a fundamental principle of modern contract law.”).

³⁴¹ Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, in FAULT IN AMERICAN CONTRACT LAW 82, 83 (Omri Ben-Shahar & Ariel Porat eds., 2010).

³⁴² According to the official comments to the U.C.C., case law has established a high threshold for both procedural and substantial unconscionability, requiring that the unconscionable term must amount to “oppression” or “unfair surprise” on the procedural level and “shocking the conscience” (in its one-sidedness) on the substantial level. (See, e.g., Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1158, 1162 (1976); *Discover Bank v. Superior Court*, 36 Cal. 4th 148,

when a standard form contract is offered on a “take it or leave it” basis, the contract is presumed to be procedurally unconscionable. Under the Restatement, a term amounting to unfair surprise or that deprives the consumer of meaningful choice is procedurally unconscionable. This is determined by analyzing consumer awareness’ to terms in a market environment, establishing whether the term actually affects consumers’ contracting decisions.³⁴³ Simply put, if terms affect the decisions of enough consumers, they are salient, and the market disciplines their quality since drafters are incentivized to provide better terms—or consumers will choose the competition. Therefore, it would be harmful and redundant to intervene with unconscionability.³⁴⁴ Similarly, standard terms are not salient, even if they are properly disclosed and affirmed by signatures, clicks, or other methods, “because it is cognitively impossible to process and comprehend dense quantities of information packaged in standard forms”.³⁴⁵ In other words, the Reporters of the Restatement clarify, courts have been inquiring whether terms are salient for a while under the procedural prong of unconscionability, without explicitly using the term:

The concept of salience underlies the metrics regularly used by courts to evaluate the procedural-unconscionability claim. For example, a “lack of meaningful choice” occurs when the terms do not affect consumers’ contracting decisions. Similarly, an “unfair surprise” occurs only when the terms were not salient. Other tests, such as “hidden” or “unduly complex” contract terms, or “uneven bargaining power” are either synonymous with, or direct results of, nonsalience.³⁴⁶

Moreover, the Restatement holds the view that most terms are nonsalient (meaning they do not affect consumers’ decisions).³⁴⁷ Indeed, after decades of mixed results, the Restatement finally leans towards adopting a view of unconscionability that moves beyond the issue of mere disclosure and procedure, clarifying that “[i]f courts were to focus on the criterion of salience,

160, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005)). Generally, according to this analysis, originally proposed by Leff (Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967)), procedural unconscionability pertains to the contract formation process, while substantive unconscionability pertains to the content of the terms of the contract *per se* and their unreasonableness. (*See* *Industrialease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482 (N.Y. App. Div. 2d Dep’t 1977)). These are two cumulative conditions, judged according to a “sliding scale” approach. (*See, e.g.*, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), quoting 15 WILLISTON ON CONTRACTS 226–227 (3rd ed. 1972)).

³⁴³ The Restatement, *supra* note 33, at 94.

³⁴⁴ *Id.* at 94–95.

³⁴⁵ *Id.* at 95.

³⁴⁶ *Id.* The Restatement further clarifies that salience is also the test adopted by the U.C.C. and test used to evaluate warranty disclaimers. *See* U.C.C. § 2-316(2) usage of the term “conspicuous” and “unexpected and unbargained language of disclaimer” U.C.C. § 2-316, cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N). *Id.*

³⁴⁷ *Id.* at 82; *see also id.* at 94 (“The great majority of standard terms are not salient, and such nonsalience alone—without additional procedural flaws—ought to meet the minimum quantum necessary for the procedural test. Accordingly, if standard terms are *prima facie* nonsalient, courts adjudicating an unconscionability claim can focus their attention on the substantive inquiry. And yet, if the standard form presentation of the term and its nonsalience are the only grounds for procedural unconscionability a greater quantum of substantive unconscionability would be required.”).

rather than on technical elements like disclosure, they would be able to avoid undesirable circumvention of the unconscionability test,”³⁴⁸ and that “[t]he salience criterion restores harmony between doctrine and policy.”³⁴⁹ Moreover, as the Restatement suggests, courts have been recognizing that form contracts are “procedural[ly] flaw[ed]” at their core. Their inherent flaw “is nothing more than the delivery of the terms in a nonnegotiable, standard-term document (sometimes labeled derogatorily ‘contract of adhesion’)”.³⁵⁰ This has led courts to “set aside” the procedural prong of the test, emphasizing the substantive element instead, under a sliding scale approach.³⁵¹

This second component, the condition of substantive unconscionability, pertains to the question of whether the outcome of the term enforcement is “shocking to the conscience”,³⁵² and addresses the one-sidedness of a term that unreasonably undermines “the consumer’s benefit from the bargain”.³⁵³

Under the Restatement, since terms “are prima facie nonsalient, courts adjudicating an unconscionability claim can focus their attention on the substantive inquiry.”³⁵⁴ This focus on the substantive inquiry and the notion of salience, “more closely tracks the doctrine’s normative underpinnings.”³⁵⁵ To summarize: The Restatement focuses on salience and the substantive inquiry, thereby bridging the gap between the Israeli and U.S. approaches, and laying the foundations to adopt Unconscionability 2.0.

Nevertheless, unconscionability has long been treated with hostility in U.S. law, by courts and scholars alike. This is but a part of the larger “ongoing debate regarding the desirability of utilizing this judicial power in a capitalist society.”³⁵⁶ Scholarship warned courts

³⁴⁸ *Id.* at 95. The Restatement adopted the notion of salience in the Reporters’ notes and not the “black letter” or commentary parts.

³⁴⁹ *Id.* at 96.

³⁵⁰ *Id.* at 94.

³⁵¹ *Id.* at 94.

³⁵² *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605 (E.D. Pa. 2007) (“A contract or clause is procedurally unconscionable if it is a contract of adhesion, A contract of adhesion, in turn, is a ‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’”) (citing *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002)). However, as noted, courts have invoked a higher standard for procedural unconscionability, requiring “oppression” or an “unfair surprise.”

³⁵³ The Restatement, *supra* note 33, at 51.

³⁵⁴ *Id.* at 94.

³⁵⁵ *Id.* A similar departure from the procedural inquiry under unconscionability may be noticed in a series of recent cases from California, where courts have emphasized the substantive inquiry instead of questions of consent and procedure. One district court noted that “whether a customer agreed to the terms had nothing to do with whether the terms were enforceable.” *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 U.S. Dist. LEXIS 88068 (N.D. Cal. June 25, 2014), at *56–57 (“23andMe [the drafter] contends that the arbitration provision cannot be procedurally unconscionable because the named Plaintiffs actually agreed to the TOS... This conflates the requirements for contract formation with the question of unconscionability... If 23andMe were correct that notice is ‘legally irrelevant’ to procedural unconscionability when the customer in fact agrees... then no disputed agreement could ever be procedurally unconscionable”).

³⁵⁶ *Keren*, *supra* note 332, at 428. For a useful summary of this debate in the context of unconscionability, *see, id.* at 432.

about paternalism and judicial activism, and courts responded by rarely invoking the doctrine.³⁵⁷ But this decline is shifting. Unconscionability is becoming more prominent and less unpredictable. The Restatement reconceptualized the doctrine, and its forming into a “coherent legal concept” that could be applied in a foreseeable manner,³⁵⁸ with lower thresholds. Unconscionability was given a “‘normative meaning’ which is consistent with the law and economics scholarship,” and a “jural meaning” which is aligned with the reasonable expectations of consumers.³⁵⁹

Empirical research also shows that unconscionability is on the rise. Courts are receptive to the doctrine, finding more terms to be unconscionable, while expanding the various contexts in which the doctrine is analyzed.³⁶⁰ Litigants are gradually increasing their use of the doctrine.³⁶¹ Landrum, who examined unconscionability case law, in twenty states, from 1980 to 2012, found that courts voided terms as unconscionable in 20% of the non-arbitration cases, and that there is a more sophisticated understanding of unconscionability law.³⁶² McCullough found that in the short period from 2012 to 2014, supreme courts in nine states invalidated terms as unconscionable.³⁶³ Knapp surveyed over 750 reported cases involving unconscionability in both state and federal courts, from 1990 to 2008, and found a nearly tenfold increase in unconscionability claims, and growth in the relative rate of success of unconscionability claims.³⁶⁴

Unconscionability is no longer a “legal marginality”³⁶⁵ but has reemerged as a concept with a role to play both in the common law and statutory regulation.³⁶⁶ It is the most appropriate

³⁵⁷ *Id.* at 444–9 (summarizing the “Anti-Conscience Approach” and the “free-market attacks” on the unconscionability doctrine following the *Williams v. Walker* decision in 1965). Keren focuses on two main arguments presented by law and economics jurists. First, courts should not intervene in market behaviors as long as both parties agreed to the contract, regardless of the exploitation of the offeree or notions of fairness or justice. Absent market failure, no legal intervention is required. Second, that consumers will be actually worse-off if contractual terms would be voided, since drafters will only draft sterner terms and raise the contract price. As Keren noted, behavioral law and economics literature exposed the market failures embedded in the bounded rationality of consumers, thereby supporting a more active use of unconscionability. *Id.* See also Korobkin, *Bounded Rationality*, *supra* note 78.

³⁵⁸ McCullough, *supra* note 331.

³⁵⁹ *Id.* at 825.

³⁶⁰ These contexts obviously include arbitration and class-action waiver clauses but are not limited to that. See *id.* at n.40. See McCullough analysis of the rise of Unconscionability, *id.* at 785.

³⁶¹ *Id.* at 787 (“From 2002 to 2012, state courts considered an average of 28.3 claims annually, compared to just 8.67 between 1980 and 2001”).

³⁶² Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 779, 803 (2014).

³⁶³ For a total of twelve times. McCullough, *Id.* at 786.

³⁶⁴ This is an increase from 16 in 1990 to 155 in 2008. See Charles I. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622–3 (2009).

³⁶⁵ Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First Century Survey*, in COMMERCIAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 309, 335 (Larry A. DiMatteo et al. eds., 2014)).

³⁶⁶ *Id.* at 335. This role “both predates and transcends” the U.C.C., sale-of-goods law aspect of unconscionability. See also ch. IV.

doctrine for policing terms in adhesion contracts, as opposed to negotiated contracts that violate public policy in general.³⁶⁷ The moral and equitable origins of unconscionability³⁶⁸ are familiar to IP discourse.³⁶⁹ Unconscionability allows a more nuanced analysis of appropriating terms, one that considers information asymmetry and bounded rationality of users (salience), alongside IP considerations under the substantive prone. The latest *Lexmark* decision and the debate concerning the ability to use contracts with “informed” consumers, vis-à-vis licenses with sophisticated commercial entities in order to opt-out from patent exhaustion illustrate why this nuanced analysis is useful.³⁷⁰

Moreover, unconscionability is already invoked in IP contexts by litigators who ask courts to explicitly address IP policies when courts struggle to decide whether a term is unconscionable.³⁷¹ Unconscionability is already being used, in other jurisdictions, like Israel, to solve similar problems in IP contexts. Indeed, unconscionability is a standard, and as such it allows the flexibility required in order to analyze the variety and complexity of unexpected

³⁶⁷This is usually governed under the Public Policy exception. See Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685 (2016).

³⁶⁸ See Keren, *supra* note 332, at 448–9, (explaining how, under the Pro-Conscience approach to unconscionability, the concept draws on judges’ moral sense or “moral conscience” and claiming that even the economic approach to unconscionability, inherently, rests its arguments on a moral basis). Cf. the analysis regarding the Israeli moral foundations of the doctrine at ch. III(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”.

³⁶⁹ See the discussion alongside *infra* notes 658–660, discussing, briefly, the moral foundations of IP theory.

³⁷⁰ See further discussion at ch. II(B)(ii) “The Rise (and fall?) of the ‘Patent-Wrap’ Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham” and ch. III(B)(iv) “The Dialogue of the Deaf”.

³⁷¹ See the discussion in *Song Fi* and *Davidson*, in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””. See also the case of *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015). In this case, a second-grade student participated in a competition conducted by a children clothing company, Miss Matched, in collaboration with her elementary school. She submitted an “Hi/Bye” T-shirt design in got in return a \$100 gift card and five t-shirts. Miss Matched later developed this design to a full, successful line of clothing. The contest terms stipulated that “by entering, you irrevocably assign to [MissMatched] all right, title, and interest in your Content, design and entry (including, without limitation, the copyright) to [MissMatched], including in any and all media whether now known or hereafter devised, in perpetuity, anywhere in the world, with the right to make any and all uses thereof, including, without limitation, for purposes of advertising or trade.” *Id.*, at 202–3. Solovsky claimed that the contest rules should be voided as unconscionable. Later in the case the minor changed the complaint to focus on matters of contract formation (claiming that no contract was formed. The unconscionability claim was not pursued. Still in the preliminary hearing, while discussing MissMatched motion to dismiss, the court struggled with the substantive unconscionability analysis. Solovsky claimed that term was unconscionable since “she was not provided compensation for sales of merchandise featuring the Hi/Bye design” (*id.*). The court noted that Solovsky’s “simple drawing” creation “was prompted by the contest itself—rather than a design supporting an entire catalogue of merchandise” and therefore it is “has doubts as to whether plaintiff can demonstrate substantive unconscionability”. Clearly, the court could have benefited from an analysis which is more informed by IP policies. Separately, the design raised another legal question of whether such a simple drawing is even protected under copyright. The Copyright Office position was that it is not. See Statement of interest on behalf of the U.S. Copyright Office in *I.C. ex rel. Solovsky v. Delta Galil USA* (July 5, 2016), available at <https://www.copyright.gov/rulings-filings/411/solovsky-v-delta-galil-usa-no-14-cv-7289--sdny-july-5-2016.pdf>. The court disagreed (*id.* at 213–15).

terms that drafters use in order to regulate new technologies. Yet, IP is a dynamic field. The majority of the problems that are caused by IP boilerplate require long-term regulatory solutions, but in the meantime, a standard will enable courts to provide a purposive answer that is based on the proper balance dictated by IP policies.³⁷²

Unconscionability does not have to be an ambiguous “wild card.”³⁷³ Courts can tailor unconscionability to operate as a flexible standard, with clear boundaries, and use it in a coherent manner, similar to other standards used such as patent and copyright misuse. The difference will be that Unconscionability 2.0 is rooted in both contractual and IP regimes, and reconciles them.³⁷⁴ Unconscionability could be accompanied by mechanisms such as presumptions of unconscionability,³⁷⁵ and courts preapproval of contracts,³⁷⁶ which will offer drafters more certainty. The time has come for U.S. law to reconsider its position regarding the unfeasibility of this doctrine in IP contexts. There is no reason to assume it will operate less effectively than the current “solutions”.³⁷⁷

B. *The Underutilization of the Unconscionability Doctrine in IP Settings*

i. The Chicken and the Egg: The Dismissal of Unconscionability in IP Scholarship

The various problems created by IP boilerplate have not escaped the scrutiny of legal scholars, although the lion’s share of their attention has been directed at IP boilerplate in which the drafter of the contract—is the owner of IP, and in particular, to the end-user license agreement (EULA), an adherent-user type of boilerplate. Scholars noted that IP owners “who draft shrinkwrap license provisions often seek to expand their rights and limit the rights of users”,³⁷⁸

³⁷² One example is the Consumer Review Fairness Act of 2016, discussed in ch. II(C)(ii) ““Gag” Boilerplate: Assignment of Copyright in Consumers’ Reviews”. While one plaintiff claimed already in 2011 that a term that seeks to assign the copyrights in reviews is unconscionable (*see* Lee v. Makhnevich, 2013 U.S. Dist. LEXIS 43760, (S.D.N.Y. Mar. 27, 2013)), it took five additional years until the enactment of the law that finally voided such provisions.

³⁷³ Paraphrasing Radin, that claimed that “[t]he doctrine of unconscionability is a particularly salient kind of wild card.” RADIN, *supra* note 1, at 124.

³⁷⁴ For example, the analysis does not ignore the critique of economics’ jurists which argue that courts should not interfere the market by voiding terms. It addresses them by explaining how nonsalient IP boilerplate create market failures in this context. These failures are externalities which the parties impose on society as a whole, when a user waives her right to perform a fair use in a copyrighted work or a patentee expand his monopolistic right. See further discussion in ch. IV(E) “Unconscionability 2.0: A “Wild Card” or a Winning Hand—Some Objections and Responses”.

³⁷⁵ See ch. IV(B)(i).

³⁷⁶ See ch. IV(B)(ii).

³⁷⁷ See the discussion in ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox”. See also the discussion in Rub’s findings, *supra* note 39, on the application of preemption as a “solution.” It should be noted that preemption also had its fair share of critiques. See, e.g., Radin—*Regime Change*, *supra* note 121, at 184 (claiming that “[p]re-emption is a very difficult and inconsistent area of doctrine”), and Lemley—*Beyond Preemption*, *supra* note 47, at 113 (predicating that “preemption is unlikely to provide significant protection for the established rules of intellectual property law”). Lemley was right. See Rub, *id.*

³⁷⁸ See, e.g., Lemley—*Shrinkwrap Licenses*, *supra* note 26, at 1246.

and that such expansions might undermine IP Laws purposes.³⁷⁹ As such, IP scholars devised a wide variety of solutions to the problem of appropriating contracts. Many relied heavily on regulation-based solutions, and firmly rejected any contractual solutions as insufficient.³⁸⁰ Others proposed various adaptations for ad hoc contractual tools that had been retrofitted to suit the virtual era. Even though the issue does not apply to virtual realms alone, most of the literature was concerned with software and EULAs, and as mentioned, primarily with the proposed reform of U.C.C. Article 2B.³⁸¹

Prominent among the early proponents of disciplining IP boilerplate, as mentioned, were Reichman and Franklin.³⁸² They were also among the first to discard the general doctrine of unconscionability as inadequate. Unconscionability, it was argued, rests too heavily on consumer perceptions, and therefore is of no use when seeking to achieve the elaborate balance required by IP law.³⁸³ At most, it could be used to address problems of information asymmetry between the parties—and these are not the most critical issues created by such contracts.³⁸⁴

Other scholars shared their concerns, and many offhandedly announced the demise of unconscionability, dubbing it ineffective and inappropriate for accommodating IP policies. This regardless of the general focus of the policy solution-orientated discussion on the contractual arena.³⁸⁵ Lemley noted that “[c]ertain shrinkwrap license terms... may well be held unconscionable. But unconscionability is rarely used, and it is not well-tailored to the needs of

³⁷⁹ See the discussion in ch. II(B)(i) “Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone” and sources provided therein.

³⁸⁰ See the discussion in *supra* note 122 and ch. II(B). IP scholars have suggested numerous legislative solutions, inviting legal reforms that regrettably have failed to come about. See also Pallas Loren proposing that where a shrinkwrap or clickwrap agreement seeks to impose copyright limitations on ownership by restricting users’ rights, courts should presume that the relevant term constitutes copyright misuse. Pallas Loren, *supra* note 50, at 535.

³⁸¹ See, e.g., Reichman & Franklin, *supra* note 120; see also Lemley—*Shrinkwrap Licenses*, *supra* note 26. The bill was initially drafted as a proposed amendment to the U.C.C. and eventually became the Uniform Computer Information Transactions Act, 2000 model law (UCITA); a model law that has been later abandoned. See the discussion in ch. II(B)(i) “Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone” and *supra* notes 144–146.

³⁸² Reichman & Franklin, *supra* note 120.

³⁸³ Reichman & Franklin, *id.*, at 927–8. (“Conversely, the unconscionability doctrine... is too consumer-driven to play the mediatory role between private and public interests that we envision. As formulated in Article 2 of the U.C.C., unconscionability directs judicial attention to surprising or oppressive terms in the context of specific transactions... While proposed reforms of the unconscionability doctrine applicable to sales of goods merit careful attention, we doubt they would provide the kind of doctrinal tool needed to help courts preserve the dialogue between public and private interests in the digital environment that Article 2B is supposed to govern.”).

³⁸⁴ *Id.* at 928. The critical issues are the use of such contract to waive and re-draft IP regimes as formulated by courts and regulations, a use which undermines IP policies.

³⁸⁵ See, e.g., Lemley, *Beyond Preemption*, *supra* note 47, at 102–103, noting that the “policy-driven debates [around copyright restrictive terms] have focused on issues surrounding contract law and theory” and that “the focus has been on contract law” while “[t]hose skeptical of “freedom of contract” above all’ also focus[ed] on contract law, relying primarily on state law doctrines to police the terms.” See also Cohen, *supra* note 94, at 475 (describing Professors Maureen O’Rourke and Tom Bell as viewing “contract as presumptively more efficient than copyright at promoting the dissemination of creative works”).

intellectual property law.”³⁸⁶ Moffat asserted, in the specific context of fair use limiting doctrines, that although unconscionability (alongside the public policy limitation) could be “capable of addressing the issues raised by super-copyright provisions”,³⁸⁷ it is “poorly positioned to address questions of federal policy” as primarily state-law tool, focused on procedural issues and assent, as opposed to federal copyright policy.³⁸⁸

Even the designated doctrine of unconscionability presented in the draft amendment to the U.C.C. Article 2B, and later codified under Section 105 of the UCITA,³⁸⁹ was not perceived as a suitable tool, as experience shows that the courts do not tend to void terms as unconscionable.³⁹⁰ Samuelson and Opsahl observed that not only did case law rarely invoke the doctrine of unconscionability, but the standard imposed by the doctrine of unconscionability is too stringent, since it requires adhesive terms not only to be unreasonable, but also “shockingly oppressive.”³⁹¹

This approach was reflected in later works as well, and many of the scholars who considered utilizing the doctrine as a possible solution for voiding IP boilerplate terms were also notably skeptical about the practical value of this proposition.³⁹² Furthermore, the doctrine was presented as “useless” and meaningless in real-world business environments.³⁹³ Others

³⁸⁶ Lemley—*Beyond Preemption*, *supra* note 47, at 151.

³⁸⁷ Moffat, *supra* note 47, at n.257. Nimmer further noted that “Unconscionability as a theory lacks substantive or thematic focus”. See Nimmer, *Breaking Barriers*, *supra* note 284, at 873.

³⁸⁸ An assertion that could be challenged in light of the newly adopted Restatement, *supra* note 33, as discussed in ch. III(A) “Why Unconscionability?”.

³⁸⁹ See *supra* note 381. Pursuant to subsection 105(b), the court may refuse to enforce a provision that is detrimental to fundamental public policies. (“If a term of a contract violates a fundamental public policy... the court may refuse to enforce the contract... to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.”)

³⁹⁰ See, e.g., Lemley—*Beyond Preemption*, *supra* note 47, at 163, noting that “even though Article 2B provides that substantively unconscionable contract terms will not be enforced, our experience with Article 2 cases makes it clear that courts rarely invoke the unconscionability doctrine to strike terms. The same will undoubtedly continue to be true in Article 2B cases.” It should be noted that the drafters of the bill envisioned a narrowly defined doctrine, which critically differs from Unconscionability 2.0. In this respect, Nimmer commented that exceptions to enforcement should be allowed only in the event that “the competing public interest has sufficient strength and clarity to preclude the exercise of transactional choice by the parties.” Nimmer, *Breaking Barriers*, *supra* note 284, at 860. Cf. Pamela Samuelson & Kurt Opsahl, *Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy*, 21 EUR. INTEL. PROP. L. 386 (1999) (providing an extensive discussion of the section’s legislative history). Elkin-Koren has notably dismissed the UCITA doctrine as too narrow and inadequate, as it was based on contractual solutions. See Elkin-Koren—*Contracting Copyrights*, *supra* note 2, at 211 (“The narrow limits on enforcement of contracts recognized by UCITA for protecting consumers and licensees are weak.”)

³⁹¹ Samuelson & Opsahl, *id.*, at 386.

³⁹² See, e.g., Pallas Loren, *supra* note 50, at 510. See also David P. Sheldon, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 776–77 (2007) (“Virtual-world participants may also try to protect their interests in virtual items by attacking the terms of the EULAs under contract theories... Existing case law tends to weigh against parties attacking EULAs on grounds of unconscionability.”); Bobby Glushko, *Tales of the Virtual City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507, 516 (2007).

³⁹³ Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1062 (2005) (“potential is not realized, however, because in most

expressed doubts that courts would find terms that are at odds with the purposes of IP policies, such as terms that prevent fair use, to be “shocking” enough to meet the high standard imposed by the doctrine of unconscionability.³⁹⁴

Elkin-Koren thoroughly analyzed unconscionability, along with other contractual doctrines, and also reached the conclusion that “these doctrines are likely to offer only limited help in policing restrictive terms.”³⁹⁵ In her view, there are multiple grounds to support this conclusion. First, virtual realms are characterized by advanced distribution systems aimed to ensure that users shall have the required “opportunity to read”. Therefore courts are unlikely to challenge disclosed terms.³⁹⁶ Second, since users fail to comprehend the extent of rights that copyright law affords them with respect to intellectual goods—in contrast, for example, to physical objects—³⁹⁷ and are unable to predict the future use or revenue they will derive from them, users do not have sufficient incentive to read the terms.³⁹⁸ Third, since the use of “restrictive terms” is prevalent in contemporary practices, they fall under the definition of users’ “reasonable expectations,” and therefore courts will not regard such terms as unfair surprise, bizarre, or oppressive.³⁹⁹ Fourth, it is difficult to meet the strict standards imposed by unconscionability, and to prove that an adhesive term is “so one-sided as to be unjust towards the user”. Therefore, if a user pays less for a product under a contract that includes a restrictive term, the transaction would be regarded as fair, despite the fact that this term negates values crucial to society as a whole.⁴⁰⁰ Elkin-Koren further concludes that this contractual solution is to be discarded, as it concerns procedural terms that are irrelevant to the matter at hand.

cases the courts look only at the issue of unconscionability, which has a high threshold—much higher than ‘unfair’ or ‘indecent.’ Some have said that the threshold is either such a high bar or so vague or both that it is relatively useless in achieving a fair result.”). It is hard to blame the disheartened scholars, considering that even the U.C.C. Drafting Committee members noted that in ten years (from 1987 to 1997), U.S. courts found only fourteen clauses as unconscionable under the doctrine. *See* U.C.C. § 2-105 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM’N, Proposed Discussion Draft 1997), *available at* www.uniformlaws.org/shared/docs/ucc2and2a/ucc2am97.pdf.

³⁹⁴ *See* Oakley, *Id.*, at 1064: “Although unconscionability is an available doctrine and is occasionally used, in fact the number of cases in which it has actually been found is relatively small. Moreover, it is an open question whether the issues raised in information contracts, for instance an asserted denial of a fair use, would shock the conscience ... where the public expects the law to protect them from unreasonable terms unconscionability may just be too high of a standard to do the job.” Ultimately, Oakley is driven to the conclusion that none of the currently available doctrines, let alone the doctrine of unconscionability, are suitable for the task: “As a general matter then, under the doctrines of American law as they stand today, there is no good mechanism for protecting the customer against unfair or oppressive terms in end user license agreements (EULAs)... unconscionability is an unwieldy and uncertain standard.” *Id.*

³⁹⁵ Elkin-Koren—*Contracting Copyrights*, *supra* note 2, at 200.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* She adds that therefore “contract rules that ask whether the user has had an opportunity to read the contract seem beside the point if users do not understand it.” This insight was raised by other scholars as well. *See, e.g.,* Moffat, *supra* note 47, at 56, noting that “[c]onsumers may search for price terms, and for type and quality of service or product, but, on an individual basis, it would rarely be rational for them to bargain over super-copyright clauses”. She uses the term “super-copyright” clauses to describe contractual terms that limit fair use terms. *Id.*

³⁹⁹ Elkin-Koren—*Contracting Copyrights*, *Id.*

⁴⁰⁰ *Id.* at 202–203.

Contractual doctrines, in her view, lack the means that are required to solve the arduous problems created by restrictive terms in IP boilerplate. Therefore, we must abandon all hope of finding solutions in contractual disciplines, and look for answers beyond contract laws.

[C]ontract law in the United States seems ill-equipped to address the problem of restrictive terms. . . . It is concerned with protecting the expectations of the parties or aiding a party who is structurally disadvantaged in the bargaining process. It is not geared to protect public interest. . . . Classic contract doctrine recognizes no universal or social values beyond “freedom of contract” and the procedural safeguards are designed to secure it . . . contract doctrine does not provide a standard for distinguishing “good” terms from “bad” ones. . . . Consequently, one must look outside contract law for justifications permitting intervention in the allocation of risks fixed by the parties.⁴⁰¹

Joining the commentators, recently Radin noted that because the application of Unconscionability “is a process of relentless case-by-case adjudication, with many discretionary judgment calls” and “the outcomes are extremely unpredictable. . . [the doctrine] is not . . . well suited to evaluating and limiting large-scale boilerplate rights deletion schemes.”⁴⁰² And so, despairing of the limited tools afforded by existing contract laws, some scholars abandoned the general doctrine of unconscionability, and moved to devise innovative doctrinal tools more suited to tackling the issue.⁴⁰³

Reichman and Franklin, for example, proposed a legislative solution—a revised “Doctrine of Public-Interest Unconscionability,” designated for transactions governed by the proposed U.C.C. Section 2B, to be codified in the framework of reform, that did not materialize.⁴⁰⁴ According to this proposed doctrine: “All mass-market contracts, non-negotiable access contracts, and contracts imposing non-negotiable restrictions on uses of

⁴⁰¹ *Id.* at 204. Pallas Loren also has claimed that contractual solutions, and specifically the doctrine of unconscionability, are inadequate to tackle challenges created by restrictive terms in wrap contracts. She posits that “a closer examination of the doctrine of unconscionability reveals the difficulty with using the adhesive nature of the contracts in the shrinkwrap or clickwrap contracts to prove unconscionability. . . .” Since the doctrine of unconscionability is concerned only with gross inequality of bargaining power and terms unreasonably favorable to the stronger party, and an “adhesion contract is suspect only because it can confirm indications of required infirmities, such as deception or compulsion, the kinds of shrinkwrap and clickwrap contracts containing the types of terms which overreach from a copyright standpoint, actually do not provide evidence of these more basic infirmities. . . .” “[r]elying on the doctrine of unconscionability to guard against overreaching by copyright owners in their shrinkwrap and clickwrap licenses presents several problems.” See Pallas Loren, *supra* note 50, at 509–510.

⁴⁰² Moreover, she notes that “[a]lthough thousands . . . of people may be subject to such a boilerplate scheme, only a few will bring suit challenging it . . .”. See RADIN, *supra* note 1, at 128–30.

⁴⁰³ See, most notably, Reichman & Franklin, *supra* note 120, at 920: “The common-law ‘public policy’ exception to the enforceability of contracts would, of course, logically apply to digital transactions, as would the doctrine of unconscionability codified in Article 2 of the U.C.C. In our view, however, these doctrines as currently administered give courts no solid foundation for coping with the downside social risks inherent in an unprecedented meshing of federal intellectual property policies with state-enforced contracts of adhesion.” As an alternative, Reichman & Franklin have proposed a legislative solution—a revised “Doctrine of Public-Interest Unconscionability.” *Id.* at 930. See further discussion ch. II(B)(i) “Some Examples from Fair Use Waivers to the “Right-to-Repair” your Smartphone.”

⁴⁰⁴ See *supra* note 145.

computerized information goods must be made on fair and reasonable terms and conditions, with due regard for the public interest in education, science, research, technological innovation, freedom of speech, and the preservation of competition”.⁴⁰⁵

A more general vision of unconscionability was imported from the U.C.C and specifically adopted in the ALI Principles of Software Contracts,⁴⁰⁶ coupled with a very limited version of presumption of unconscionability, manifested by the Reporters’ reference to the EU Directive on Unfair Contract Terms (93/13/EEC) as potentially informative for courts for purpose of the unconscionability analysis,⁴⁰⁷ and the inclusion of a list of suspected terms:

[T]erms that authorize the licensor to add spyware to the licensee’s computer, that allow the licensor to modify the contract without notice or an opportunity to contest, that extend obligations automatically and without notice, that allow the licensor to change the nature of the software unilaterally, and that authorize cancellation without notice are suspect under [the] Principles.⁴⁰⁸

Yet this list is focused on contractual unfairness, procedure and formation, not pure IP matters.⁴⁰⁹ In fact, many of these practices are already unenforceable under general contract theory, have been found to be unconscionable by courts, and one of them (inclusion of spyware) is considered an unfair practice under the FTC Act.⁴¹⁰ By this virtue this initiative missed a unique opportunity to provide courts with a more purposeful vision on how to apply the substantive prong of unconscionability in purely copyright-related clauses.

Disputing this view are several commentators who have refused to lose hope and who envision the doctrine of unconscionability as a solution to the problem. However, even these scholars have persistently held certain reservations, and have presented unconscionability sporadically, with additional contractual tools to support the doctrine.⁴¹¹

⁴⁰⁵ Reichman & Franklin, *Id.* at 930.

⁴⁰⁶ Section 1.11 of the ALI, PRINCIPLES OF THE LAW: SOFTWARE CONTRACTS (2010). At cmt. 1 the reports state that Section 1.11 “reproduces § 2-302 of the U.C.C”.

⁴⁰⁷ *Id.* at 1.11 cmt. c.

⁴⁰⁸ *Id.* See further discussion in ch. IV(B)(i) “Presumptions of Unconscionability 2.0”.

⁴⁰⁹ For further discussion and a comparative analysis to the EU Directive list of restrictive terms (also focused on matters of procedure), see Michael L. Rustad & Maria Vittoria Onufrio, *The Exportability of the Principles of Software: Lost in Translation?* STETSON UNIVERSITY COLLEGE OF LAW RESEARCH PAPER NO. 2009-03, http://www.kentlaw.edu/faculty/rwarner/classes/internetlaw/2011/materials/rustad_onufrio_software_contracting.pdf.

⁴¹⁰ See *In re Sony BMG Music Entertainment*, *supra* note 143. See also The Restatement, *supra* note 33, at 79 explaining the application of substantive unconscionability in the context of unfairness or deceptive practices and the doctrine of “Discretionary Obligations” that limits the enforceability of terms that “purports to grant the business absolute and unlimited discretion to determine its contractual rights and obligations” and is “unconstrained by the good faith obligation.” *Id.* at 65.

⁴¹¹ See, e.g., Cherensky, *supra* note 35, and Reichman & Franklin, *supra* note 120. While such proposals brought forth a revised unconscionability doctrine, Unconscionability 2.0 differs in numerous aspects. First, it is an interpretation of the existing doctrine and it does not require any legislative reform; rather, it requires that a purposeful juridical decision be made within existing paradigms. Second, Unconscionability 2.0 is applicable to diverse relationships, even those that are not consumer based, and aims to address all types of appropriating standard form contracts (as opposed to transactions

Hundreds of pages of scholarly literature have reviewed thousands of pages of U.S. case law, all leading to the ultimate conclusion that unconscionability is ill-equipped, ineffective, and contractually focused. But the lion's share of scholars' arguments for such dismissal originated in the narrow interpretation applied to the doctrine in U.S. case law. Discouraged by existing case law, scholars discarded this powerful doctrine as unhelpful, thus perpetuating the very same formalistic approach that dominated the doctrine at the first place, instead of rebutting it. Lacking the attention of such scholars, courts have remained with ineffective tools to face the problems at hand, issuing ill-advised rulings when required to address adhesive terms in IP boilerplate. This "chicken and egg" paradox, accounts for one of the reasons as to why the doctrine of unconscionability was firmly rejected as a feasible solution in U.S. law.

While the dismissal of the doctrine might be understandable at the time, such arguments, do not indicate that the doctrine is *prima facie* unsuitable. As suggested in the following chapter, the sources of U.S. unconscionability were never grounded strictly in "an opportunity to read"; they never stipulated that only a "shocking" term merits voiding; and they were willing to acknowledge that a term of which an adherent is cognizant and to which she specifically agreed, and which comes as no surprise to her in any way whatsoever, shall be voided, provided that it is, in fact, unfair. They also acknowledged that the type of commerce that pertains to the contract shall determine the suitable and relevant expectations of the adherent. In the context of IP boilerplate, the relevant "type of commerce" concerns the policies of IP.⁴¹² The Restatement also facilitates such interpretations, focusing on the substantive inquiry that "applies to the contract as a whole".⁴¹³

In 2017, as some scholars admit this doctrine could partially aid in cases of "extreme and unfamiliar contractual provisions" such as "no criticism" or "no parody",⁴¹⁴ I claim it has a more substantial role to play in the IP realm, especially in light of the Restatement. As discussed in the next chapter, contract law, and unconscionability in particular, allows for the application of extra-contractual considerations, including IP policies. Contract law certainly recognizes social values that go "beyond freedom of contract."⁴¹⁵ It provides a standard by which one may "distinguish between 'good' and 'bad' terms."⁴¹⁶ Contract law simply suffers from a formalistic interpretation that has led, prematurely as argued, to the abandonment of this powerful doctrine of unconscionability. In fact, a "[c]loser examination of the doctrine of unconscionability"⁴¹⁷ leads to the conclusion that it could be applied to IP boilerplate, and may even emerge as an effective solution.

exclusively governed by a specific article of the U.C.C. (or a model act)). Third, it allows for a wider integration of theoretical approaches concerning IP policies. Lastly, it is inspired by the Israeli purposeful interpretation of the doctrine. See further discussion in ch. IV.

⁴¹² For a detailed discussion, see *infra* ch. IV(A)(iii) "The Adoption of Unconscionability 2.0 in U.S. Law."

⁴¹³ See the discussion in ch. III(A)(ii) "Unconscionability 2.0: The Advantages of the Purposive Approach". See also The Restatement, *supra* note 33, at 63.

⁴¹⁴ Rub, *Copyright Survives*, *supra* note 39, at 1217–18.

⁴¹⁵ Paraphrasing Elkin-Koren—*Contracting Copyrights*, *supra* note 2, at 204.

⁴¹⁶ *Id.*

⁴¹⁷ Paraphrasing Pallas Loren, *supra* note 50, at 509.

ii. The Preemption Doctrine and the Contract-IP “Dichotomy”

Thus far the discussion focused on the underutilization of unconscionability in U.S. literature. This chapter focuses on U.S. case law pertaining to IP boilerplate. Through a critical review of cases discussing both the *adherent-creator* and the *adherent-user* types of contract, I explain how an opportunity to utilize unconscionability from an IP perspective was missed, even when the contract in question pertained solely to IP rights. I further explain how the preemption doctrine contributed to this omission. To illustrate I review landmark cases that profoundly influenced the analysis of IP boilerplate in U.S. law. These cases, which focus on the adherent-user type of contracts, are *Davidson*, *ProCD*, and *Baystate*. Additionally, I’ll review one recent case discussing YouTube’s ToUs, an adherent-creator type of contract.

In *ProCD*,⁴¹⁸ notably recognized for addressing the question of the enforceability of shrinkwrap contracts, the United States Court of Appeals for the Seventh Circuit avoided a material discussion on drafters’ abilities to rewrite IP laws and appropriate the public domain. It also established the “No-Preemption” approach to contracts, one that will dominate U.S. laws for the following years.⁴¹⁹

As explained, according to the preemption doctrine,⁴²⁰ the prerogative to regulate copyright is vested in federal law, in order to induce uniformity and prevent state laws from upsetting the fine balance dictated by federal law.⁴²¹ In *ProCD*, the plaintiff invested millions of dollars in the creation of a telephone book that contained more than 95,000,000 records.⁴²² Had this book been printed, it would have required tens of thousands of pages; therefore, the plaintiff chose to market it as a CD. The CD was accompanied by a standard form contract of the shrinkwrap type. This contract included various provisions that prohibited users from harvesting the records in the CD, copying them, or making them accessible to other users on the internet or on any “other networked or time-shared environment.”⁴²³ The defendant, Zeidenberg, purchased a copy of the CD and in March 1995 began producing a virtual phone database using the records of ProCD and records derived from an additional company’s directory. This newly created online database was later integrated with software created by Zeidenberg,⁴²⁴ which allowed internet users direct access to the records for a more competitive

⁴¹⁸ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

⁴¹⁹ See Rub, *Copyright Survives*, *supra* note 39.

⁴²⁰ 17 U.S.C § 301(a).

⁴²¹ Subsection 301(a) provides that: “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.” See Niva Elkin-Koren—*Copyright Policy and the Limits of Freedom of Contract*, *supra* note 289, at 102.

⁴²² *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996).

⁴²³ *Id.* at 645: “You will not make the Software or the Listings in whole or in part available to any other user in any networked or time-shared environment, or transfer the Listings in whole or in part to any computer other than the computer used to access the Listings.”

⁴²⁴ The only component of the CD that was effectively protected under copyright law was the proprietary software created by ProCD; however, this software was not copied by the defendant in a commercial manner, but only in a manner protected under 17 U.S.C § 117. See *id.*, at 648–50. Ostensibly, Zeidenberg copied exactly what he was allowed to copy under the *Feist* ruling (*Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (U.S. 1991)) phone records which, according to *Feist*, are not protected under copyright laws. Likewise, ProCD also acted exactly to the degree *Feist* allowed it, in

price compared with that offered by ProCD. The problem began when the ProCD database was found to be excluded from the protection of copyright law in the post-*Feist* era.⁴²⁵

The trial court sought to prevent drafters from rewriting IP laws under contracts, monopolizing what the law left at the public domain. It found that the purpose of the restrictions under the EULA, limiting the harvesting of data, was in fact “an attempt to avoid the confines of copyright law and of *Feist*.”⁴²⁶ It further concluded that as copyright policies, and more particularly the *Feist* ruling, actually enable the plaintiff to create the database by harvesting information from 3,000 other databases—it is inconceivable that the plaintiff shall thereafter deny others a similar right.⁴²⁷ In other words, if you used building blocks that are in the public domain for your own creation, you cannot deny others the right to act likewise. Just as copyright law allowed you access to the public domain, you cannot use contract law to deny that access to others. The court therefore emphasized that “the rules of the game have not changed,”⁴²⁸ and clarified that U.S. federal copyright law preempts the provisions of this IP boilerplate.

This outcome is, of course, desirable. However, to a certain extent, it is such use of the preemption doctrine in early case law that contributed to the underutilization of unconscionability in IP. It allowed the courts to use the hammer (preemption) in order to avoid the enforcement of the contract, instead of the chisel (unconscionability). By leaving the question of enforcement to contract law, a division was created between IP law (on the federal level) and contract and consumer law (on the state level). And so, as the division between the two deepened, a dichotomy emerged. In other words: if copyright law preempts state legislation, when a matter pertaining to federal copyright law is concerned and the contemplated contractual provision pertains to copyright, such as restrictions of fair use,⁴²⁹ then state contract law doctrines are deemed no longer necessary. Presumably, this solves the problem; difficulties that are created by adhesive provisions that seek to disrupt and negate the purposes of IP policies are solved by the most appropriate tools of all—IP law doctrines.

Alas, the preemption doctrine was interpreted in this respect as a double-edged sword.⁴³⁰ If the contractual provision was not preempted by federal law, then the question of enforceability is left solely to contract laws, where little, if any, attention is given to promoting the purposes of IP policies.⁴³¹ This argument can be further illustrated by the discussion of the Seventh Circuit in *ProCD*:

harvesting the data from 3,000 other telephone books. *See id.*, at 659–60; *see also* DAVID MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 3.04 (2015), LexisNexis.

⁴²⁵ *See ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, at 647.

⁴²⁶ *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, at 657. The court further concluded that “[this] prohibition on the distribution of public information cannot be squared with the purposes of copyright law or with plaintiff’s own compilation of data.” *Id.* at 659. *See also id.* at 658 (“Contracts that seek to protect reproduction and distribution rights step into territory already covered by copyright law. It would alter the ‘delicate balance’ of copyright law to allow parties to avoid copyright law by contracting around it.”).

⁴²⁷ *Id.* at 659.

⁴²⁸ *Id.*

⁴²⁹ *See Elkin-Koren—Copyright Policy and the Limits of Freedom of Contract*, *supra* note 289, at 101.

⁴³⁰ Nimmer & Nimmer criticize such narrow usage of Section 301, proposing instead to examine, in a broader sense, whether or not the contract at hand seeks to undermine copyright law. *See NIMMER & NIMMER*, *supra* note 424, at n. 97 and accompanying text.

⁴³¹ *See, e.g., Lemley—Beyond Preemption*, *supra* note 47, at 151. Some scholars argue that there is also an inter-contractual dichotomy pertaining to the question of contracts enforceability, whereby the courts are willing to reach binary results, concluding that the contract is either formed—and is therefore

Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside [Contract law] second, federal law forbids enforcement even if the licenses are contracts [Preemption Doctrine] ... we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable) [Contract laws]. Because no one argues that the terms of the license at issue here are troublesome [from a contract law perspective], we remand with instructions to enter judgment for the plaintiff.⁴³²

The Seventh Circuit in *ProCD* changed the rules of the game on two levels. First, it ruled that a shrinkwrap contract is in fact contractually valid and second, it laid down the prevalent interpretation of the preemption doctrine, an erroneous interpretation later adopted in *Baystate*. Rights that are created by a contract, the court argued, affect no one but the parties thereto, and they prevent nothing on the part of the general public, which is why they are not exclusive rights in terms of the preemption doctrine.⁴³³

enforceable—or was not formed, and therefore is unenforceable. On the other hand, courts are unwilling to analyze the fairness of the transaction or whether the consideration, in the relevant circumstances, is adequate. See KIM, *supra* note 26, at 192: “Under current law, contractual assent is an ‘all-or-nothing’ proposition—either a contract is formed in its entirety or it is not. A finding of contract formation means that the nondrafting party has the burden of raising a contract defense, such as unconscionability, to escape enforcement. But as previously noted, courts are generally reluctant to evaluate the fairness of a bargain or the adequacy of consideration. The battle then is often lost at the formation stage—a properly formed contract will be enforced unless the terms are so egregious that it outweighs judicial reluctance to evaluate terms.” See also more recently James Gibson, *Boilerplate’s False Dichotomy*, 106 GEO. L.J. 249 (2017) (explaining how “courts and commentators alike view boilerplate as necessary to the modern transaction. When asked to set boilerplate aside, then, they confront a dichotomy: either enforce boilerplate terms or wreak havoc on the consumer economy.” Gibson claims this dichotomy is false.).

⁴³² *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, at 1448–49. See also *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, at 650, at the district level, where Judge Crabb differentiates between questions pertaining to the enforcement of the contract on the grounds of the adherent’s lack of bargaining power, and questions arising from the fact that the contract at hand seeks to replace federal copyright law with private ordering. (“In addition to raising issues of enforceability, shrinkwrap licenses also pose important questions about the extent to which individual contract provisions can supplement or expand federal copyright protection. It is important to analyze these licenses carefully, not only to determine their validity but also to ascertain whether they are preempted by the Copyright Act”).

⁴³³ *Id.* at 1454: “A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’” Elkin-Koren rebuts this argument, claiming that private ordering produces rights with outcomes similar to rights *in rem* and that “the introduction of new distribution technologies blurs the distinction between rights in personam and rights in rem.” See, e.g., Elkin-Koren—*Copyright Policy and the Limits of Freedom of Contract*, *supra* note 289, at 102–04. Generally, there are two conditions for applying the doctrine. The first requires that the right pertains to copyright “subject matter,” meaning an intangible asset such as a work of art that is protected under copyright laws, but also including intellectual resources that remain in the public domain, such as ideas. The other requires that the claim concern rights that are equivalent to the exclusive rights of copyright. See NIMMER & NIMMER, *supra* note 424, at § 1.01, § 19D.3.

The majority opinion in *Baystate* followed the same path.⁴³⁴ *Baystate* concerned an invention named Cadget that was intended to assist users of CAD software through the presentation of the software's menus in a convenient interface. This invention was patent protected. Computer software that added icons to the interface, Designer's Toolkit, was marketed by Bowers bundled together with the Cadget invention. The Designer's Toolkit software is protected by copyright. *Baystate* purchased a number of copies of the product and the attached software and three months later began marketing an updated version of the software, which included many characteristics of the Bowers software. The heart of the legal dispute was therefore a shrinkwrap contract that prohibited reverse engineering. *Baystate* argued that its right to reverse engineer the product is covered by the fair use protection under copyright law,⁴³⁵ and therefore the restricting contract should be preempted. This argument was rejected by the court, which based its ruling, inter alia, on *ProCD*. The court ruled that a license that denies fair use is, by its nature, a contract, and such contract cannot create "exclusive rights" as required by the preemption doctrine.⁴³⁶

Among other cases cited by the court was the decision in *Canal Electric*,⁴³⁷ where the court agreed to recognize a contractual modification of a statutory right only when the purpose of the right is "protection of the property rights of individual parties . . . rather than . . . the protection of the general public"⁴³⁸ and only when the waiver does not harm the purposes of the relevant legislative enactment.⁴³⁹ It is this reference from which the court in *Baystate* derives its conclusion that "case law indicates the First Circuit would find that private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act."⁴⁴⁰

It follows that in the majority's opinion, not only does a shrinkwrap contract constitute a properly executed contract, and users' waivers of fair use are considered knowing and voluntary, but likewise, the fair use protection regulates the rights of individuals and has nothing to do with the general public.⁴⁴¹ The court in *Davidson* sided with the majority opinion in *Baystate*,⁴⁴² and its decision further demonstrates the dichotomy created by the current use of the preemption doctrine in case law concerning IP boilerplate.

⁴³⁴ *Bowers v. Baystate Techs.*, 320 F.3d 1317 (Fed. Cir. 2003).

⁴³⁵ 17 U.S.C §107, *see, e.g.*, *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 24 U.S.P.Q.2D (BNA) 1015 (Fed. Cir. 1992); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1539 (11th Cir. 1996); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527–1528 (9th Cir. 1992).

⁴³⁶ *Baystate*, *supra* note 434, at 1325.

⁴³⁷ *Canal Electric Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 548 N.E.2d 182 (Mass. 1990).

⁴³⁸ *Id.* at 378.

⁴³⁹ *Id.* "A statutory right may not be disclaimed if the waiver could 'do violence to the public policy underlying the legislative enactment'".

⁴⁴⁰ *Baystate*, *supra* note 434, at 1325–26.

⁴⁴¹ *Cf.* Motion of Consumers Union and Public Knowledge for Leave to File Brief of *Amici Curiae* in Support of Defendants-Appellants, *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (explaining, in detail, how restrictions on reverse engineering and fair use are harmful to public policy and competition, and displace core IP policies). In addition, the majority opinion did not consider at all the fact that this waiver was done via a standard form contract, while the minority opinion emphasized the adhesive nature of the contract, and noted that a situation whereby the standard form contract preempts copyright law and restricts fair use is both absurd and unjust. *Id.* at 1337.

⁴⁴² *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164 (E.D. Mo. 2004) (*aff'd* in 422 F.3d 630 (8th Cir. 2005)).

In *Davidson*, several users who purchased computer games were sued. The suit was based, inter alia, on the argument that they violated the EULA that was attached to the game, by reverse engineering the software and publishing the source code online. Here too, the defendants argued that the provisions of federal law concerning fair use should preempt the contractual arrangement and that a waiver of their right to fair use—a statutory right that is vested in copyright laws—is invalid.

The district court sided with the majority opinion in *Baystate*. The defendants, it was argued, waived their right to fair use when they entered into the agreement, and the court must enforce the waiver.⁴⁴³ The court further ruled that the preemption doctrine does not apply, specifically because the parties created, through the contract, another right that is not an existing right in copyright law, i.e., “the right to restrict the use of the software through the EULAs and TOU,”⁴⁴⁴ and therefore created an “extra element” that distinguished between the contractual right and the exclusive right. It follows that for the preemption doctrine to not apply to the said contract, the court had to determine that it was not a provision pertaining to IP rights. Having so determined, the court was now required to address an alternative argument raised by the defendants, that the contract is unenforceable on the grounds of unconscionability. A reasonable consumer, the defendants argued, would not pay \$50.00 for a game that he cannot use.⁴⁴⁵ And so it comes as no surprise that the court, having based its entire reasoning for the non-applicability of the preemption doctrine on the fact that the parties created in the license other rights that do not pertain to the purposes of copyright, avoided addressing the purposes of IP policies in its narrow analysis of unconscionability.⁴⁴⁶

⁴⁴³ *Id.* at 1181: “The Court finds the reasoning in *Bowers* persuasive. The defendants in this case waived their ‘fair use’ right to reverse engineer by agreeing to the licensing agreement. Parties may waive their statutory rights under law in a contract... In this case, defendants gave up their fair use rights and must be bound by that waiver.”

⁴⁴⁴ *Id.* at 1175: “The Court agrees that the contractual restriction does create a right not existing under copyright law. The right created is the right to restrict the use of the software through the EULAs and TOU. ‘Absent the parties’ agreement, this restriction would not exist. The contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively different from one for copyright.’ (citing *Nat’l Car Rental Sys. v. Computer Assocs. Int’l*, 991 F.2d 426, 433 (8th Cir. Minn. 1993)). Therefore, the Court finds that the EULA and TOU are not statutorily preempted by the Copyright Act.” According to the court: “If an extra element is required, instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie ‘within the general scope of copyright’ and there is no preemption.”

⁴⁴⁵ *Id.* at 1179.

⁴⁴⁶ The *Davidson* district court found that the contract is not procedurally unconscionable, since the defendants had a choice whether to purchase another game, or to decline the license and return the game to the store. In addition, the defendants are sophisticated consumers; they are software programmers who understand the legal language included in the contract. Finally, the terms and conditions of the contract lack a surprise element: the defendants knew that using the game would be subject to their consent to the end-user license, and had thirty days in which to review the agreement and return the game. The court determined that the contract is not substantively unconscionable, as the terms and conditions of the license, which restrict the users’ right to fair use, “do not impose harsh or oppressive terms.” *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, at 1180. *Cf.* Motion of Consumers Union and Public Knowledge for Leave to File Brief of *Amici Curiae* in Support of Defendants-Appellants, at 21, *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (explaining why such a provision should be deemed unconscionable, since, among others, the “Blizzard EULA and TOU demand the waiver of important and well-established rights that benefit the public” and “enforcement of the reverse engineering and matchmaking clauses would preclude ... innovative and competitive behavior... [and] interoperable competitive services... [a] result [that] would profoundly

The Eight Circuit reviewing the case *de novo* agreed.⁴⁴⁷ The court cited *Baystate*,⁴⁴⁸ and found that “[p]rivate parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act[,]” and so can “a state [] permit parties to contract away a fair use defense or to agree not to engage in uses of copyrighted material that are permitted by the copyright law if the contract is *freely negotiated*.”⁴⁴⁹ Signing a EULA, the court clarifiers, falls under “freely negotiating” a contract.⁴⁵⁰ Here the court cited the dissent from *Baystate*, but failed to recognize its critical point, the distinction between “freely negotiated contracts” from contracts of adhesion which are “no different in substance from a hypothetical black dot [state] law” and that can “extensively undermine the protections of the Copyright Act”.⁴⁵¹

This is, therefore, the dichotomy at its worst, characterized by a first stage at which the court is required to determine that the contemplated rights are not IP by nature, or affect third parties, so that it can overcome preemption, thus finding the contract as a whole enforceable. Then, at the second stage, the court is required to address unconscionability and the question of enforcement in terms of contract law, and it therefore refrains from turning to the purposes of IP law (on the federal level), and the answer is therefore left to contract and consumer law (on the state level). Given this dichotomy, the purposes of IP law yield to the contractual doctrine, and the narrow approach to unconscionability in case law prevails. D’Agostino characterized this phenomenon more broadly as the general principle of freedom of contract, or contract law *lex rex* as hindering copyright’s *lex specialis*.⁴⁵²

Thus far, I have discussed cases wherein U.S. case law was required to handle adherent-user types of IP boilerplate. Most of these rulings were decided within a consumerist context, and handled users, at times even “recalcitrant” users, who purchased software and sought to make use of it that according to them, and to copyright laws, is fair, and the boilerplate prohibited them from doing so. In that context, courts were required to address, often within the same case, the issue of the contractual enforcement of these licenses and the preemption doctrine.

The following example reviews a creator-adherent type of contract. Yet, even in this type of contract: A contract that seeks to regulate the IP rights of the non-drafter, and is perhaps one of the world’s most influential IP boilerplate, impacting the copyrights of billions of users—unconscionability was underutilized. The reason, it appears, is since the adherent in this case, is not an “ordinary” consumer—he does not pay (money) for the product. He uses the platform “free” service, paying with his “IP rights”.

In *Song Fi*,⁴⁵³ a number of plaintiffs, including Song Fi, an artist named Brotherton, and Brotherton’s six-year-old son, sued YouTube for unlawfully removing the video “Luv Ya”

affect the marketplace for software products and services and disrupt the public policy objectives underlying intellectual property law...”).

⁴⁴⁷ *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

⁴⁴⁸ *Bowers v. Baystate Techs, Inc.*, 320 F.3d 1317, 1325–26 (Fed. Cir. 2003).

⁴⁴⁹ *Davidson & Assocs. v. Jung*, 422 F.3d 630, at 639. (emphasis added).

⁴⁵⁰ “By signing the TOUs and EULAs, Appellants expressly relinquished their rights to reverse engineer.” (*Id.*).

⁴⁵¹ *Bowers v. Baystate Techs.*, 320 F.3d 1317, 1337 (Dyk, J., dissenting).

⁴⁵² *Cf. D’Agostino*, *supra* note 51, at 4. D’Agostino further explains this could result in “copyright law [] objectives [are] undermined as authors go unrewarded and unprotected, left to their own devices to engage in protracted litigation with symbolic results.” *Id.* at 5.

⁴⁵³ *Song Fi, Inc. v. Google Inc.*, 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014).

from its platform. Song Fi, a small Washington, D.C. corporation holding distribution rights of independent creators, uploaded to the YouTube sharing platform a video in which a band of artists named Rasta Rock Opera, as well as Brotherton and his son, all appear. After two months, YouTube removed the video, arguing that it violates its terms of use, since the user allegedly committed various manipulations of the video's view-counting system through electronic means. Song Fi argued that this was untrue, and appealed YouTube's decision to remove the video, but YouTube refused to put the video back online.⁴⁵⁴

Confident in their position, Song Fi, alongside other plaintiffs, sued YouTube for defamation, breach of contract, and other claims. One of the arguments raised by the plaintiffs was that the YouTube's ToS is, in general, an unconscionable contract.⁴⁵⁵ In regards to procedural unconscionability, the court inquired as to whether the plaintiffs lacked significant ability to choose the terms of the contract.⁴⁵⁶ The plaintiffs argued that given the market power of YouTube as a video-sharing platform, and the fact that Song Fi is a small, independent corporation in the music business, they had no choice but to accept the terms and conditions of YouTube's contract.

The court rejected this argument completely. It found that the fact that the platform is popular does not demonstrate a lack of choice by its users—they can, for example, upload the video on an independent website.⁴⁵⁷ The substantive unconscionability argument was also rejected by the court. The plaintiffs argued that the contract includes several adhesive provisions, including the provision whereby YouTube can completely (and immediately) remove any content that is uploaded by users, according to its own exclusive discretion.⁴⁵⁸ This is the same provision through which YouTube legitimizes, at least on a contractual level, *ex ante*, the possibility of removing legitimate content that constitutes fair use, through, for example, its Content ID automatic copyright infringement identification system.⁴⁵⁹ The court

⁴⁵⁴ *Id.* at 5–6.

⁴⁵⁵ *Id.* at 15.

⁴⁵⁶ *Id.* at 17, citing *White v. Four Seasons Hotels & Resorts*, 999 F. Supp. 2d 250, 257 (D.D.C. 2013).

⁴⁵⁷ *Id.* at 18: “Though YouTube is undoubtedly a popular video-sharing website, it is not the case that Plaintiffs lacked any kind of meaningful choice as to whether to upload their video to the YouTube website and agree to the conditions set forth by YouTube.” Moreover, it was further emphasized that the fact that the users lack bargaining power does not *prima facie* indicate that the contract is unconscionable. In this respect the court noted that “[a] contract is no less a contract simply because it is entered into via a computer” (quoting *Forrest v. Verizon Communs., Inc.*, 805 A.2d 1007, 1011 (D.C. 2002)).

⁴⁵⁸ According to Section 7.8 of YouTube's ToU, *see supra* note 11.

⁴⁵⁹ See the discussion in ch. II(D) “The Technological Boilerplate: Unconscionability by Design”. The contractual consent of the adherent-creator to YouTube's ToU combined with YouTube's Content ID system enables YouTube (and alleged owners) to remove legitimate content and expression *ex ante*, rather than relying on the DMCA procedures for removal of infringing content *ex post*. *See* 17 U.S.C § 512 (c)(1)(A)(1998). As Zimmerman argued, “instead of relying on the notice and takedown system, the *ex post* remedy stipulated by the DMCA, YouTube now allows content owners to engage in a priori control of what can appear on the site.” *Id.* at 272. Instead of relying on the legislator, YouTube is utilizing private ordering mechanisms (the IP boilerplate and the Content ID system) to formulate an alternative removal regime. YouTube's motivations for this are clear. First, it allows YouTube to enjoy the protection of the Safe Harbor defense under the DMCA (*see Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012)), but it also enables YouTube to increase profits when the alleged owner chooses to utilize the “infringing” content as a creative publishing platform rather than silence it. *See* Zimmerman at 272–3. Arguably, this is one result of the fact that “[f]air use bec[ame] subject to private gain.” LESSIG, *supra* note 119, at 135.

firmly denied the plaintiffs' claims, emphasizing that if users "take advantage" of the sharing platforms' "free services," they "cannot complain" that the terms of these platforms are unconscionable.⁴⁶⁰

In the eyes of the court, so it seems, if you did not pay for the product, meaning you received a free "service," then you are not a consumer under the classic interpretation of this term, and you are unqualified to argue for unconscionability. The court failed to acknowledge that in the era of Web 2.0 and user-generated content, if you do not pay for the product, you—or the IP you create—may very well become the actual product.⁴⁶¹

Arguably, in a world governed by myth of "free",⁴⁶² consumers have changed. They are no longer ordinary consumers, they pay a high price for their use of "free" services and platforms—the price of their information, their innovations and their IP rights. The legal regime which facilitates this emerging quid pro quo, should change as well. If the currency has changed, contractual doctrines, such as unconscionability, cannot continue to focus on the product monetary "price", as it will fail in most frequent adhesive transaction of all, the one which is allegedly "free". In this respect, even the Restatement puts excessive focus on the issue of the service or product "price" and less attention to "free" services.⁴⁶³

Courts clearly are still unequipped to address IP boilerplate that regulate IP rights in an *ex-consumerist* setting, one that does not involve payment, under the current interpretation to unconscionability.⁴⁶⁴ Yet, in reality, popular platforms offer no-cost services, and their use

⁴⁶⁰ Song Fi, Inc. v. Google Inc., 2014 U.S. Dist. LEXIS 153436 at *20. (None of these terms, nor the contract as a whole, is "so outrageously unfair as to shock the judicial conscience" ... Indeed, courts routinely enforce such terms in form contracts ... Unless there is some evidence of "egregious" tactics, of which there is none here, "the party seeking to avoid the contract will have to show that the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place." ... Having taken advantage of YouTube's *free services*, Plaintiffs cannot complain that the terms allowing them to do so are unenforceable). (emphasis added).

⁴⁶¹ The saying "If you are not paying for it, you're not the customer; you're the product being sold" is attributed to the blogger blue_beetle. blue_beetle, *User-Driven Discontent*, METAFILTER, (Aug. 26, 2010, 1:41 PM) www.metafilter.com/95152/Userdriven-discontent#32560467. Similar results were reached in a recent case (*Darnaa, LLC v. Google, Inc.*, 2015 U.S. Dist. LEXIS 161791 (N.D. Cal. Dec. 2, 2015)). In *Darnaa*, the plaintiff argued that several provisions of YouTube's ToU, including, *inter alia*, the terms that allow YouTube broad discretion over content removal, are unconscionable. The court found that YouTube's ToU "involve only a marginal degree of procedural unconscionability," and are not "one-sided as to be substantively unconscionable." *Id.* at 8. Moreover, the court emphasized, in the framework of the unconscionability analysis, that "[b]ecause YouTube offers its hosting services at no charge, it is reasonable for YouTube to retain broad discretion over those services...". *Id.*

⁴⁶² See Hoofnagle & Whittington, *supra* note 216 and Newman, *supra* note 216.

⁴⁶³ See, e.g., The Restatement, *supra* note 33, at 51. Although it does apply its principles to privacy policies as well, to some extent. See the discussion in ch. II(C)(ii) "'Gag' Boilerplate: Assignment of Copyright in Consumers' Reviews".

⁴⁶⁴ Not surprisingly, this narrative is also evident in case law addressing unconscionability claims of creators-adherents in the non-virtual realms. See, e.g., in employment relationships, the case of *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438 (Cal. App. 4th Dist. 1986) [hereinafter *Cubic*]. The court rejected the claim that the invention assignment provision is unconscionable on the grounds that the "[inventor] was adequately compensated through the terms of his employment." *Marty*, the inventor, claimed that a payment of \$75.00 was "unreasonably low compensation for the [i]nvention." *Id.* at 450. See also, more recently, *Reach Music Publ'g, Inc. v. Warner/Chappell Music, Inc.*, 112 U.S.P.Q.2D (BNA) 1896 (S.D.N.Y. Nov. 10, 2014). The matter concerned David Reeves' rights in some of the famous songs of the band Run-DMC. Reeves, who contributed to the creation of the band's songs, assigned his rights in them to a distributor, in return for royalties' revenues. Rush Groove, the distributor who later went

often leads to severe IP problems.⁴⁶⁵ This issue will be addressed under the proposed Unconscionability 2.0. Moreover, the *Song Fi* decision demonstrates that the underutilization of unconscionability is particularly problematic when considering a case involving an adherent-creator type of contract, such as the YouTube ToUs, where preemption and misuse are not claimed, but unconscionability is.⁴⁶⁶

iii. A Limited Tool Set: From *ProCD* and Preemption to *Lexmark* and Exhaustion

The *Lexmark* case discussed in previous chapters exposes another dimension of inconsistency in U.S. IP laws' treatment of the problem of IP boilerplate and the need for a nuanced tool situated between form-contracts and IP laws, one that can distinguish between contracts. In a concise opinion, the Supreme Court in *Lexmark* articulated a bright-line rule for the patent/contract interaction, without accounting for the nature of the "communication" involved or distinguishing between standard form and negotiated contracts.⁴⁶⁷

The Court clarified that "single-use/no-resale restrictions in *Lexmark*'s contracts with customers may have been clear and enforceable under contract law, but they do not entitle *Lexmark* to retain patent rights in an item that it has elected to sell."⁴⁶⁸ The kernel of the Court's reasoning was devoted to discussing the longstanding common law principle against restraints on alienation and the underpinning principles of the exhaustion rule: a sound public policy principle.⁴⁶⁹ It was emphasized that since "the purpose of the patent law is fulfilled . . . when the patentee has received his reward for the use of his invention, that law furnishes no basis for restraining the use and enjoyment of the thing sold,"⁴⁷⁰ and that the logic offered by

bankrupt, respectively assigned these distribution rights to Protoons Inc. Alas, according to the terms of the contract, Reeves was only entitled to claim royalties from Rush Groove, which ceased to exist (or pay). Furthermore, Reeves had explicitly waived any right of action against Protoons Inc. Years passed, and while Run-DMC became a resounding commercial success, Reeves became homeless. Reeves claimed, *inter alia*, that the contract was unconscionable, arguing that when he signed the contract, he had little understanding of the significance of the assignment. He further alleged that he was not provided with a copy of the contract or the opportunity for a legal consultation. Reeves did not even pass the hurdle of procedural unconscionability. The court found that "one cannot generally avoid the effect of a release upon the ground that he or she did not read it or know its contents." *Id.* at 1902. The problem is not the specific outcome of these rulings, but the fact that courts are focused *only* on the contractual setting in their analysis of unconscionability, and fail to address the relevant purposes of IP laws pertaining to the matter at hand. D'Agostino reports a similar approach in Canada, in which "courts' equitable jurisdiction provides the judicial capacity to strike down contracts in whole, or in part, on the basis of unconscionable terms or conduct, though equity has seldom been used." GIUSEPPINA D'AGOSTINO, COPYRIGHT, CONTRACTS, CREATORS: NEW MEDIA, NEW RULES 72–75, 135–137 (2010).

⁴⁶⁵ See, e.g., Elkin-Koren—*Can Formalities Save the Public Domain?*, *supra* note 115, at 1550, 1561.

⁴⁶⁶ See ch. II(A) "The Adherent-User and the Adherent-Creator Distinction."

⁴⁶⁷ *Impression Prods. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017).

⁴⁶⁸ *Impression Prods. v. Lexmark Int'l, Inc.*, 137 S. Ct. at 1531.

⁴⁶⁹ *Id.*; see also *id.* at 1534 ("A patentee can impose restrictions on licensees because a license does not implicate the same concerns about restraints on alienation as a sale.")

⁴⁷⁰ *Id.* at 1532 (quotations marks omitted) (quoting *United States v. Univis Lens Co.*, 316 U. S. 241, 251 (1942)).

Lord Coke in the seventeenth century, according to which post-sale restrictions on artifacts are “against Trade and Traffique, and bargaining and contracting between man and man,” still applies.⁴⁷¹

The Court further reasoned that allowing such restraints would result in “inconvenience and annoyance to the public.”⁴⁷² This reflected the Court’s growing concern about creating a legal reality in which “[the] smooth flow of commerce would sputter” since “companies that make the thousands of parts that go into a [product] could keep their patent rights after the first sale... restrict resale rights and sue the shop owner for patent infringement,”⁴⁷³ especially in light of advances in technology and the growing complexity of supply chains. Indeed, “extending the patent rights beyond the first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain.”⁴⁷⁴

Still, if the legal system is concerned with the fact that post-sale restrictions are undermining the purposes of patent law, and strives to eliminate restraints on alienation that grant the patentee unwarranted monopolistic rights and “control” over the patent, why should courts enable a contractual claim that arises from such restrictions and might result in the same “clog” of commerce channels? If the wholesale employment of restrictions using standard form contracts is exhibiting “servitude-like features”⁴⁷⁵ and creating de facto restraints on alienation, should this result be allowed just because such restraints generate a different type of suit (a contractual one as opposed to a patent one) to fear?

The core logic of exhaustion is limiting “the scope of the patentee’s rights” and “extinguish[ing] that exclusionary power” so “buyer [will be] free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.”⁴⁷⁶ In the information age, IP boilerplate is often used for wholesale “contracting” of such post-sale restrictions that share

⁴⁷¹ 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628). Arguably, this interest stems not only from general property theory (which relates to the tangible article in which the patent is embodied) and patent law policy (promoting dissemination of innovations and maintaining free competition) but also from a social justice perspective. (See, e.g., Laurence R. Helfer, *Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines*, in *TRANSNATIONAL LEGAL ORDERS* 311 (Terence C. Halliday & Gregory Shaffer eds., 2015), [available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6119&context=faculty_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6119&context=faculty_scholarship)). A lot of the patented innovations which reach economically disadvantaged groups are not bought directly from the patent owner (or his authorized licensees) but on secondary markets. Allowing the patentee to impose restrictions which go far beyond the limitations carefully articulated by 150 years of case law, would be especially harmful to these communities—and could potentially even promote more piracy and copycatting. It will create additional access barriers to innovations and deepen inequality, in life-saving industries, such as medical devices, which already greatly suffer from these problems. When the patented product discussed is print cartridges, the problematic effect of post-sale restrictions is less clear than in medications or agriculture technologies. Regardless, especially when it comes to highly-priced patents, we should be mindful to how contractually enforced restrictions, not just patents, could affect social justice in this context.

⁴⁷² *Id.* at 1532, quoting *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 667 (1895).

⁴⁷³ *Id.* at 1532.

⁴⁷⁴ *Id.*

⁴⁷⁵ See Shaffer Van Houweling, *supra* note 87, at 950.

⁴⁷⁶ *Id.* at 1534.

the same characteristics of traditional servitudes and restraints on alienation, creating similar exclusionary rights.⁴⁷⁷

Almost a decade ago, Van Houweling demonstrated how contemporary licensing practices operate similarly to servitudes imposed on tangible personal property and often (but not always)⁴⁷⁸ create the same challenges with which the *Lexmark* Supreme Court is concerned, namely, notice and information costs and negative externalities.⁴⁷⁹ IP boilerplate, like servitudes, often enforces restrictions that are nonsalient or ubiquitous across entire markets, meaning they are not subjected to competitive market forces that regulate the quality of the terms.⁴⁸⁰ IP boilerplate create a similar shade and “legal cloud on [a] title as [they] move[] through the marketplace” that exhaustion seeks to eliminate.⁴⁸¹

These boilerplate, as opposed to the utopian license envisioned by the court, often do not seek to “expand[] the club of authorized producers and sellers” but rather to limit them, or to limit the ability of the licensee, often a consumer, to otherwise use the patent. They are used in the exchange of goods and not merely rights.⁴⁸² If the Court is truly motivated by the common law’s longstanding resistance toward restraints on alienation, then not enabling post-sale restrictions under patent law only solves half of the problem—it does not solve the issue of boilerplate-based contractual restrictions that generate the very same concerns. The Court discounts such concerns, stating that “a license does not implicate the same concerns about restraints on alienation as a sale,”⁴⁸³ but such statement is somewhat detached from the reality of mass-market licenses.

In that respect, both the en banc decision⁴⁸⁴ and the Supreme Court decision missed a unique opportunity to clarify the essence of the sale/license dichotomy and limit the servitude-like costs associated with IP boilerplate. As mentioned, it is well established that the patentee can impose contractual restrictions on secondary markets, but she cannot use patent law for that purpose.⁴⁸⁵ Among the cases in which this was established is a 1938 Supreme Court exhaustion case, *General Talking Pictures*,⁴⁸⁶ which greatly influenced the en banc *Lexmark* decision. *General Talking Pictures* also involved contractual restrictions imposed by the

⁴⁷⁷ See *infra* ch. II(B)(ii) “The Rise (and fall?) of the “Patent-Wrap” Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham”.

⁴⁷⁸ Indeed, as Van Houweling clarifies not all servitudes are concerned with restraints on alienation. See Van Houweling, *supra* note 87, at 903.

⁴⁷⁹ Van Houweling elaborates on how “these concerns arise from specific characteristics of servitudes including: the remote relationship between the burdened and benefited parties, the durability and ubiquity of the restrictions imposed, the fragmentation of rights to control use of a single resource, the potential lack of salience to purchasers, and the insulation from effective competition where servitudes are attached to goods with unique qualities or are ubiquitous across entire markets.” The author also clarifies that “each of the paradigmatic licenses that I have examined exhibits a different mix of problematically servitude-like features”. *Id.* at 949–50.

⁴⁸⁰ *Id.*; see also Korobkin, *supra* note 78.

⁴⁸¹ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at 1531, at 1534.

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d 721 (Fed. Cir. 2016).

⁴⁸⁵ See *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 666 (1895) and *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 638 (U.S. 2008).

⁴⁸⁶ See *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124 (U.S. 1938).

patentee, but restrictions on sale by a manufacturing licensee, and ones about which the “infringer” had actual knowledge.⁴⁸⁷

According to the majority opinion in the *Lexmark* en banc decision, post-sale restrictions should be “clearly communicated” to consumers⁴⁸⁸ and “known” at “the time of sale.”⁴⁸⁹ Absent “some other law or policy,” the court reasoned, “private parties retain the freedom to contract concerning conditions of sale.”⁴⁹⁰ This emphasis seems to be influenced by the court analogy to the restrictions applied in *General Talking Pictures*. The Supreme Court’s opinion further clarified that such interpretation of *General Talking Pictures* could not be sustained, but rather *General Talking Pictures* “stands for the modest principle that, if a patentee has not given authority for a licensee to make a sale [in the license], that sale cannot exhaust the patentee’s rights.”⁴⁹¹ The Supreme Court and the Federal Circuit therefore disagreed on the implications of such lack of authorization, but both have failed to address the manner in which such authorization was given and failed to distinguish the nature of the license discussed in *General Talking Pictures* and the one often used in today’s world: a boilerplate nonsalient license.

In fact, the Federal Circuit in *General Talking Pictures* emphasized that it did not address in its opinion the question of whether the patentee can impose post-sale restrictions on the use of the patented product that is “passed into the hands of a purchaser in the ordinary channels of trade” by means of an attached “license notice.”⁴⁹² In other words, *General Talking Pictures* specifically distinguished the circumstances of the case from those discussed in *Lexmark*, in which the post-sale restrictions are communicated to consumers on labels or other forms of “take-it-or-leave-it” adhesive contracts used in ordinary commerce, but where actual knowledge is not guaranteed.⁴⁹³

Ordinary consumers have no incentive to read the fine print, and as discussed, empirical research in fact shows they almost never do so.⁴⁹⁴ Regardless, *General Talking Pictures*, even under the Supreme Court *Lexmark* decision, continues to guide courts and provide supportive

⁴⁸⁷ See *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. at 126: “Transformer Company [the manufacturing licensee] was guilty of an infringement when it made the amplifiers for, and sold them to, Pictures Corporation. And as Pictures Corporation ordered, purchased and leased them *knowing the facts*, it also was an infringer.” (emphasis added). See also *id.* at 126 (“[A]s Pictures Corporation ordered, purchased and leased them knowing the facts, it also was an infringer.”).

⁴⁸⁸ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 735, 742, and 761. See also *id.* at 753 (“A patentee already may preserve its patent rights against downstream buyers (*with notice*) through otherwise-lawful restrictions, by licensing others to make and sell its patented articles.”) (emphasis added).

⁴⁸⁹ *Id.* at 726, 743.

⁴⁹⁰ *Id.* at 737 (citing *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d at 708).

⁴⁹¹ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at 1535.

⁴⁹² *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. at 125.

⁴⁹³ There is no dispute that the “package restriction” discussed in *Lexmark* is an adhesion contract, which is offered to consumers on a “take-or-leave-it” basis. In fact, the *Lexmark* “single-use” label restriction was explicitly challenged in U.S. case law, prior to this patent case. Courts enforced these restrictions under contract law, albeit emphasizing these are adhesion contracts. Accordingly, the fact that the *Lexmark*’ “patent-wrap” label agreement (as I call it) was an enforceable agreement, was undisputed in the present decision. See *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 728.

⁴⁹⁴ See ch. II(B)(ii) “The Rise (and fall?) of the “Patent-Wrap” Boilerplate: Limitations on the First-Sale Doctrine, Ownership, and the Sale/License sham”.

reasoning for the purpose of answering the exact question the court then explicitly avoided: determining the enforceability under patent law of wholesale post-sale contractual restrictions on licensees. Using Van Houweling framing, the Federal Circuit in *Lexmark* took a case where the informational burden was limited,⁴⁹⁵ and applied its reasoning to a general case where information costs constrain ordinary consumer behavior.⁴⁹⁶ It did not differentiate between the actual knowledge that the manufacturing licensee had (in *General Talking Pictures*) and the knowledge that ordinary consumers, such as Lexmark’s consumers, usually have, although it had the opportunity to clarify this question that has gone unanswered for centuries.

Moreover, the majority in the *Lexmark* en banc decision specifically noted that the opinion does not address situations where end-users, bona fide purchasers, or downstream repurchasers “acquired a patented article with less than actual knowledge of such a restriction.”⁴⁹⁷ Nor was this issue addressed in *Mallinckrodt* or *Quanta* decisions,⁴⁹⁸ or in the Supreme Court *Lexmark* decision.

The *Lexmark* en banc decision didn’t pay much attention to the enforceability of Lexmark’s restrictions from the contractual perspective, since this matter was supposedly already settled in previous a case, *Static*, and therefore remained undisputed.⁴⁹⁹ Although the court in *Static*⁵⁰⁰ compared Lexmark restrictions to the *ProCD* shrinkwrap license thereby finding it enforceable,⁵⁰¹ the more important questions of exhaustion and effects on public policies were not addressed. In contrast, in *General Talking Pictures* the Court enforced such restrictions since they were proven to be actually known by the purchaser.⁵⁰² It did not explicitly solve the problem of non-negotiated licenses that merely provide notice of such restrictions, where actual knowledge is not proven and there are in fact informational costs.

And thus, a *ProCD*-moment in time was missed—a moment in which the court could have clarified how much room is given to form-contractors to displace IP policy. Currently, at least according to the recent *Lexmark* Supreme Court decision, exhaustion will fail to curtail the various costs associated with mass-market unnegotiated contractual restrictions attached to

⁴⁹⁵ A case “in which the chattel purchaser [the manufacturing-licensee, Pictures Corporation] could not plausibly claim that it (or any other purchaser similarly situated) could have been confused by, inattentive to, or otherwise cognitively burdened by the existence of a running restriction on its ability to use its personal property.” See Van Houweling, *supra* note 87, at 920.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 729. That’s because the parties agreed that “both the first purchaser and Impression as a repurchaser had adequate notice of the single-use/no-resale restriction before they made their purchases” and therefore “the adequacy of that notice [was] unchallenged.” *Id.*

⁴⁹⁸ *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 708 (Fed. Cir. 1992).

⁴⁹⁹ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 728.

⁵⁰⁰ See, e.g., *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 830, 845 (E.D. Ky. 2007) where the court in enforced Lexmark’s labels under contract law, albeit emphasizing these are adhesion contracts offered to consumers on a “take-or-leave-it”, and further comparing them to the notorious “shrinkwrap licenses”, “in which a vendor’s written license becomes ‘effective as soon as the customer tears the wrapping from the package.’” (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d, at 1449). Shrinkwrap licenses which in which consumers “Pay Now” but see the “Terms Later”, are enforceable contracts in the U.S., following *ProCD*.

⁵⁰¹ *Id.*, *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d at 845, 847.

⁵⁰² And in Van Houweling terms, do not impose the traditional information costs associated with servitudes. See Van Houweling, *supra* note 87, at 919–921.

innovations. The post-sale restrictions will remain enforceable (or at least are not unenforceable) under contract law. At least one conflicting decision has already used misuse, in the context of copyright, to get to a different result, one in which the contract could not be enforced.⁵⁰³ The Supreme Court struggled as well to distinguish *General Talking Pictures* from a situation in which regular consumers are bound by contract to a restrictive license:

A license may require the licensee to impose a restriction on purchasers, like the license limiting the computer manufacturer to selling for non-commercial use by individuals. But if the licensee does so—by, perhaps, having each customer sign a contract promising not to use the computers in business—the sale nonetheless exhausts all patent rights in the item sold... The purchasers might not comply with the restriction, but the only recourse for the licensee is through contract law.... *General Talking Pictures* involved a fundamentally different situation: There, a licensee “knowingly ma[de] . . . sales . . . outside the scope of its license.” ... We treated the sale “as if no license whatsoever had been granted” by the patentee, which meant that the patentee could sue both the licensee and the purchaser—who knew about the breach—for infringement. This does not mean that patentees can use licenses to impose post-sale restraints on purchasers. Quite the contrary: The licensee infringed the patentee’s rights because it did not comply with the terms of its license, and the patentee could bring a patent suit against the purchaser *only because the purchaser participated in the licensee’s infringement*.⁵⁰⁴

Indeed, the only difference between the purchaser-infringer in *General Talking Pictures* and the ordinary consumer in the Court’s computer license example above is that the former knew about the restriction—⁵⁰⁵ and from this knowledge stems his “participation” in the patent infringement—while the latter is only presumed to have knowledge. Exhaustion in this case cannot provide a contextualized solution to the intuition that we should differentiate between actual knowledge and “presumed” knowledge of restrictions communicated by notice. It also cannot account for the “servitude-like” costs associated with wholesale standardized restrictions. The reason is that exhaustion does not, and is not geared to, differentiate between negotiated and standard form contracts.

It is the very fundamental features of standardized contracts (as opposed to negotiated ones) that often give rise to the “servitude-like” notice and informational costs: “the remoteness between the parties, the durability and ubiquity of restrictions that run automatically to everyone who acquires a type of good, and the special lack of salience of restrictive features bundled with possession of inexpensive objects.”⁵⁰⁶ And not all standard form contracts raise the same concerns.⁵⁰⁷ Exhaustion must operate as a clear rule as to where that owner’s

⁵⁰³ See discussion in Disney, ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox”.

⁵⁰⁴ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at 1535. (emphasis added).

⁵⁰⁵ Van Houweling, *supra* note 87, at 920. See also *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 181–182 (1938) (“By knowingly making the sales to petitioner outside the scope of its license, the Transformer Company infringed the patents embodied in the amplifiers”).

⁵⁰⁶ *Id.* at 933.

⁵⁰⁷ *Id.* at 935–937 (explaining how the GPL and Creative Commons licensees, standardized-contracts by all accounts, do not exhibit the same notice and information-cost concerns as the Microsoft EULA).

monopolistic rights and her ability to bring a patent infringement suit ends, and that is the point of the first sale. Yet, this does not mean we should accept the costs associated with wholesale post-sale contractual restrictions on innovations or license-based restrictions that operate as de-facto restraints on alienation or resource use. It also does not mean we must “settle” for the same normative result for negotiated and unnegotiated contracts.

Conversely, in these situations, Unconscionability 2.0 offers a unique contribution. It is the intersection between standard form contracts and IP laws that created the problem, and therefore a tool that solves the problem must be informed by both disciplines. Indeed, exhaustion, like preemption and misuse, is not geared to inquire into the salience of terms—but unconscionability is. And traditionally, the unconscionability inquiry did not account for the harmful externalities that may be caused to society by such restrictions, from an IP perspective.⁵⁰⁸ But Unconscionability 2.0 can.

Today’s commercial world has long departed from a reality where restrictions on licensees attached to innovations are only bargained for, and contracted with, well-informed manufacturing licensees, as was envisioned by early exhaustion cases such as *United States v. General Electric Co.*,⁵⁰⁹ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*⁵¹⁰ and *General Talking Pictures Corp. v. Western Electric Co.*⁵¹¹ It now includes licensees that “govern” (as opposed to contract with) consumers who have very limited information about the post-sale or usage restrictions attached to the product or any incentive to learn about them. In essence, it is expected that manufacturing-licensees read the contracts and negotiate a price that fully internalizes and reflects these restrictions.⁵¹² The manufacturing licensee enjoys the so-called freedom to contract, in the words of the *Lexmark* en banc decision, which ordinary consumers simply do not.⁵¹³ The transaction between the manufacturing-licensee and the patentee, as opposed to the one with consumers, will necessarily be “information-intensive.”⁵¹⁴ Therefore we need a tool that accounts for that shift since exhaustion, as the *Lexmark* Supreme Court decision might teach us, does not. Enter Unconscionability 2.0.

Moreover, drawing some commonalities between the *Lexmark* en banc decision (and exhaustion) and *ProCD* (and preemption) helps to illuminate why we need a doctrine such as Unconscionability 2.0 that allows for contextualization and accounts for different types of contracting mechanisms and the costs associated with them. Two decades ago, the Court of Appeals for the Seventh Circuit faced a similar situation as the Federal Circuit in *Lexmark*,

⁵⁰⁸ See *id.* at 331. For example, “third-party harm could arise from the enforcement of restrictions that effectively waive public-regarding limitations built into intellectual property law.”

⁵⁰⁹ 272 U.S. 476 (1926).

⁵¹⁰ 243 U.S. 502 (1917).

⁵¹¹ 305 U.S. 124 (U.S. 1938).

⁵¹² Shaffer Van Houweling, *supra* note 87, at 918–21 (analyzing another meaningful U.S. decision in this context, the case of *United States v. General Electric Co.*, 272 U.S. 476 (U.S. 1926), and noting that “[a] manufacturer who produces patented articles can reasonably be expected to pay attention to the terms of his manufacturing license ... A purchaser of a patented chattel, by contrast, might reasonably focus on the tangible object she is acquiring and be inattentive to restrictions on her subsequent use and sale of that thing.”)

⁵¹³ It is well established that the notion of freedom of contract does not manifest in contracts of adhesion such as the *Lexmark* labels which restrict post-sale use. Instead, these restrictions are freely and unilaterally drafted by the patent owner, and by definition are not negotiated by consumers.

⁵¹⁴ Shaffer Van Houweling, *supra* note 87, at 917.

where the court had the unique opportunity to establish how IP owners would be able to restrict the manner in which consumers who purchase software products use such products.

Although the *ProCD*⁵¹⁵ case involved copyrighted works and was framed around preemption,⁵¹⁶ there are at least two important commonalities between *Lexmark* and *ProCD*: (i) In both cases, the owner tried to use contractual limitations in order to bypass the IP regime and limit the user from doing something that is explicitly permitted under IP Law. In *ProCD*, it was harvesting data that is not protected under copyright law (phone records) and in *Lexmark* it was the post-sale restriction. (ii) In both cases, the owners of the IP-protected products offered the consumers a choice. In *Lexmark*, costumers could choose between buying regular cartridges and the return-program cartridges, which cost 20% less but are subject to the single-use restriction. In *ProCD*, the owner offered the software at two prices: one for personal use and a higher price for commercial use. In both cases, the court used this fact to justify why IP owners should be able to contractually limit consumers from doing something that IP legal doctrine explicitly deems lawful.⁵¹⁷ The *ProCD* and *Lexmark* circuit courts both believed that benefits that stem from this commercial conduct surpass the importance of the IP legal doctrine discussed. Twenty years have passed since *ProCD* and we now know that the *ProCD* holding is being used for a wide range of circumstances that do not involve consumer choices.⁵¹⁸ The Supreme Court had a chance to clarify, at least in dictum, the question of contractual enforcement of post-sale restrictions in consumerist settings and it did not do so.

The *Lexmark* en banc decision was not limited to cases in which consumers presumably have a choice—and inevitably, if that holding survives Supreme Court review, post-sale restrictions may expand to all commercial relations, including perhaps even products that are “free,” pending users’ assent.

The majority in the *Lexmark* en banc decision found that no reliable evidence was given as to the widespread problems that post-sale restrictions could pose, problems that are not “solved in the marketplace.” However, twenty years of experience with *ProCD* has demonstrated how, if the opportunity presents itself, IP owners will draft their own de facto IP regimes. Restrictions are being used to limit users’ rights to fair use and to limit their access to creative building blocks—⁵¹⁹all of this regardless of the price charged (or not). The vast majority of these restrictions do not translate automatically to an “immediate up-front benefit.”⁵²⁰ Instead, they impose costs—on the specific user, and on society as a whole—and they serve to further perpetuate the permission culture in IP realms. Both courts erred in making a general decision about the appropriate boundaries of the relevant IP doctrine that affected how private ordering, and specifically standard form contracts, may rewrite IP laws.

This mistake may be traced to courts’ willingness to generally allow negotiated contracts that will facilitate price discrimination and enable the owner to control arbitrage that

⁵¹⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

⁵¹⁶ 17 U.S.C § 301(a). See ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””.

⁵¹⁷ If they breach such limitations, consumers could be sued for contract infringement Under *ProCD*, and for patent infringement under *Lexmark* en banc decision.

⁵¹⁸ See Rub, *Copyright Survives*, *supra* note 39.

⁵¹⁹ See, e.g., the discussion in *Baystate* and *Davidson* cases, under ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy”” (enforcing the contractual waiver of a fair use, reverse engineering, communicated to consumers in a standard form contract).

⁵²⁰ *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 752.

contributes to the efficiency of the market.⁵²¹ But in reality, these courts did not account for the economic and societal costs that will result from applying their decisions in a world flooded by unnegotiated standard form contracts and inhabited by real consumers. These consumers price a limited number of the product attributes, and such contractual restrictions are usually not among them. Thus, drafters (or patentees in our case) have an inherent “market incentive to include terms... [that] favor themselves, whether or not such terms are efficient.”⁵²² In simple terms, since post-sale “fine print” restrictions will not affect the price, there will be no market competition over these restrictions. These sorts of market failures, which relate to the bounded rationality of consumers and asymmetric information regarding a key feature of the product such as post-sale use/re-sale restriction, prevent the patent from being adequately valued in the marketplace.

Paradoxically, for a short while, it seemed that even Lexmark lawyers were not sure whether the print cartridges are *sold* to consumers or *licensed*. While the Lexmark’ agreement was presented to consumers as a “license agreement,”⁵²³ in court, Lexmark claimed the arrangement is not a lease, but a sale.⁵²⁴ If the drafters are confused, how can we expect consumers to adequately differentiate between a sale and a license, especially when they buy a tangible good, and receive mixed signals from the seller?⁵²⁵

If consumers do not read and understand labels on the food they eat, why should we expect that they will fully comprehend the restrictions on patented articles? These will be the considerations at hand when the question of the contractual enforcement of post-sale restrictions in form-contracts will, inevitably, be raised once again, a question that could be answered under Unconscionability 2.0. While Lexmark was clearly a sale, a more indistinct case would require courts to inquire what were consumers’ expectations and perceptions of their rights, perhaps even taken into account empirical evidence.⁵²⁶

In some respects, this was a result of the limited toolset available to the courts in *ProCD* and *Lexmark*. Both preemption (under the existing interpretation) and exhaustion allow only for a binary result: Either we allow contracts to override the relevant limitations on monopolistic rights that the IP regime imposes, or we do not. Courts do not have the ability to screen the type of contract at issue, therefore they are forced to use the tools they have to reach their conclusions. Misuse allows for some more discretion but its results remained scattered. A

⁵²¹ See, e.g., in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, at 1450, 1454, 1455 (“Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets”) and *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d at 752. See also Brief of 44 Law, Economics and Business Professors as *Amici Curiae* in Support of Respondent, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 546 (2016).

⁵²² See Korobkin, *supra* note 78.

⁵²³ See *supra* note 177: “[o]pening this package or using the patented cartridge inside confirms your acceptance Please read before opening of the following *license agreement*.”

⁵²⁴ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. at n.1.

⁵²⁵ Cf. in the context of digital media (as opposed to physical products), Perzanowski & Hoofnagle, *supra* note 101, at 320 (“While lawyers might comprehend the difference between a license and a traditional sale, there are good reasons to doubt that the average consumer appreciates this distinction.”). See also *id.* 327– 330.

⁵²⁶ The Restatement, *supra* note 33, at 82. See also Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U.L. REV. 1753 (2017) (proposing the “survey interpretation method” — “in which [contract] interpretation disputes are resolved through large surveys of representative respondents, by choosing the meaning that a majority supports.”).

more nuanced tool such as Unconscionability 2.0 can allow such contextualization, enabling courts to reach different results according to the contract at hand, and distinguishing negotiated contracts from unnegotiated ones, while accounting for the salience of terms and inquiring if the market can solve the problem.

iv. The Dialogue of the Deaf

IP scholars were not the only ones concerned about the IP boilerplate; contract law scholars also began studying the prevalent phenomenon of software licenses, and the empirical literature in this field actually focuses on the consumer perspective.⁵²⁷ One of the leading scholars in this area, Marrota-Wurgler, examined 647 end-user licenses that were drafted by 598 software companies in different market segments.⁵²⁸ The study proposed using the “Bias Index,” by which the usage frequency of some 23 recurring provisions was mapped (quantitatively), classifying them (in a binary manner, 0 or 1) as benefiting the user, or alternatively, the supplier. The benchmark used for such classification was the standards incorporated under the default rules set forth in Article 2 of the U.C.C. The conclusions of Marrota-Wurgler’s study, which were extensively discussed by Zamir and Farkash,⁵²⁹ naturally indicated that the contracts were characterized by a unilateral bias in favor of the supplier.⁵³⁰

The most interesting insight is that no correlation was found between the price of the product and the severity of the bias in favor of the supplier,⁵³¹ which leads to the conclusion that there is no connection between the price of the product and the clear preferences of the consumers.⁵³² An additional study that examined the browsing pattern of nearly 50,000 users who visited software websites of some 90 software companies revealed that only 1 to 2 per 1,000 users browses through the internet page displaying the end-user license for longer than one second.⁵³³ This empirical study proved that in practice, consumers do not read these contracts, thus empirically rejecting the “informed minority” argument of the economic school of contract law analysis.⁵³⁴ It essentially proved that nonsalience of EULA terms and the

⁵²⁷ Paradoxically, despite the growing prevalence of such contracts, there is still little legal empirical literature at hand. For further criticism, see Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 JERUSALEM REV. LEGAL STUD. 137, 148 (2015); see also Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 678 (2007) [hereinafter Marotta-Wurgler—*What’s in a Standard Form Contract?*].

⁵²⁸ *Id.* at 679.

⁵²⁹ Zamir & Farkash, *supra* note 527.

⁵³⁰ *What’s in a Standard Form Contract?*, *supra* note 527, at 713: “An immediate conclusion is that the vast majority of the contracts in our sample are more pro-seller relative to the default rules of Article 2 of the UCC.”

⁵³¹ *Id.* at 708.

⁵³² Zamir & Farkash, *supra* note 527, at 139–40.

⁵³³ Bakos et al., *supra* note 32, at 3.

⁵³⁴ According to that argument, a minority of consumers who do read the terms and conditions is sufficient for the suppliers to adjust themselves to the preferences of consumers, in view of the market forces—hence the market will in any event create fair contracts and no external juridical interference is required. See Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979). Since the supplier is not able to distinguish between this informed minority and the uninformed majority of consumers, it will offer all consumers identical terms. See also Howard Beales et al., *The Efficient Regulation of Consumer*

inevitable conclusion is the de facto informed minority cannot affect the willingness of suppliers to change the contract terms in real market conditions.⁵³⁵

A series of additional empirical studies led Marotta-Wurgler to the conclusion that there is no point to the significant disclosure requirements pertaining to EULAs,⁵³⁶ on the contrary, such requirements only burden the users and confuse them. She therefore concludes that “[t]he current normative discussions on EULAs should shift from whether disclosure is adequate or should be required to whether terms in standard form contracts are an appropriate outcome of competitive market forces.”⁵³⁷ The same conclusion was drawn by Becher and Zarsky, two of the most prominent writers on the informed minority argument.⁵³⁸

These ideas have been extensively researched by Ben-Shahar and Schneider, who surveyed empirical findings from various sectors—ranging from food labels to credit terms—and reached the conclusion that “the empirical history of mandated disclosure is a history of failure”.⁵³⁹ It follows from the conclusions of contractual-consumerist studies at the forefront of the literature,⁵⁴⁰ that despite the many words written about the lack of necessity of interference in boilerplate enforcement, the empirical reality proves otherwise and it is time to

Information, 24 J.L. & ECON. 491 (1981) and ELENA D’AGOSTINO, CONTRACTS OF ADHESION BETWEEN LAW AND ECONOMICS RETHINKING THE UNCONSCIONABILITY DOCTRINE 62 (2015). One scholar, Moffat, specifically rejected the application of the informed minority argument in the context of contractual fair use limitations. She noted that even the informed minority (the so-called “readers”) “are unlikely to negotiate or shop for super-copyright provisions because the provisions generally are too minor on an individual basis—their effects are problematic in the aggregate...” and that “[t]o the extent that the behavior of the readers influences the behavior of the non-readers, the effects will only be compounded.” Moffat, *supra* note 47, at 56–57.

⁵³⁵ Bakos et al., *supra* note 32, at 3.

⁵³⁶ Florencia Marotta-Wurgler, *Even More Than You Wanted to Know About the Failures of Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 63 (2015). This is the result, *inter alia*, of extensive disclosure requirements imposed on drafters. These requirements, which were perceived as an effective solution to information asymmetry, paradoxically contributed to the problem. *See, id.*, at 65: “[I]ncreases in disclosure may have allowed firms to put forth more restrictive contracts and, at the same time, enforce them more effectively”. *See also* Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309 (2009) [hereinafter Marotta-Wurgler—*Are “Pay Now, Terms Later” Contracts Worse for Buyers?*] and Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U L. REV. 240 (2013).

⁵³⁷ *See* Marotta-Wurgler—*Are “Pay Now, Terms Later” Contracts Worse for Buyers?*, *supra* note 537, at 431.

⁵³⁸ Shmuel I. Becher & Tal Zarsky, *Online Consumer Contracts: No One Reads, But Does Anyone Care: Comments on Florencia Marotta-Wurgler’s Studies*, 12 JERUSALEM REV. LEGAL STUD. 105, 120 (2015).

⁵³⁹ *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 746 (2011) and OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014). According to the authors, this is a three-fold failure, (i) even if disclosure of information is required, in reality consumers don’t receive the information; (ii) consumers don’t read the disclosed information, and even if they do—they often don’t understand it, and if they understand it—they don’t use it and most importantly (iii) disclosure does not improve consumers’ decision-process making. *See* Ben-Shahar & Schneider, *id.*, at 665.

⁵⁴⁰ Zamir and Farkash, for example, presented Marotta-Wurgler’s empirical scholarship as “arguably the most important contribution to contract law theory in the past decade.” Zamir & Farkash, *supra* note 527, at 138.

find new doctrinal solutions.⁵⁴¹ In this regard, even the prominent scholars of this discipline agree that “regulators should perhaps focus on solutions that increase the role of reputation and litigation . . . to curb seller abuse”.⁵⁴² They recognize that since consumers have bounded rationality, they often don’t translate the quality of the contract terms to the price, thus drafters have an inherent “market incentive to include terms . . . [which] favor themselves, whether or not such terms are efficient”.⁵⁴³ Indeed, this focus on the efficiency of courts interference in the case of nonsalient terms, influenced the Restatement, and is especially relevant in the case of understating terms pertaining to IP rights, which are more complex, especially for ordinary consumers.⁵⁴⁴

In a recent empirical research done by Hoofnagle and Perzanowski,⁵⁴⁵ the authors found not only that a minority of consumers read the terms, but that online digital media consumers are often confused about whether they are actually buying the product or licensing it, and which IP and property restrictions apply to the product.⁵⁴⁶ In addition, Hoofnagle and Perzanowski found that simplified disclosure mechanisms enhance consumers’ comprehension of the rights they obtain under the restrictive license language used in digital media transactions.⁵⁴⁷ Moreover, the authors argue that lowering the information costs associated with rights understanding could promote competition with respect the licensed rights.⁵⁴⁸ Similar results were reached in other empirical studies, dating as far back to 2007, showing that providing a simplified notice on EULA rights (prior to installation, and after installation, allowing to uninstall the program) will reduce the number of software installations in a significant manner, meaning it will increase terms’ salience (affecting users’ decision-making).⁵⁴⁹ This is an example of an inter-doctrinally research which seeks to address consumer law, as well IP related concerns.

An additional explanation for the underutilization of the unconscionability doctrine could be inferred from the above discussion. The problem begins with the sometimes

⁵⁴¹ *Id.* at 170.

⁵⁴² Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. THEO. INST. ECON. 94, 96 (2012); Becher & Zarsky, *supra* note 538, at 120; *see also* Bakos et al., *supra* note 32, at 9: “we note that other mechanisms may incentivize sellers to offer terms preferred by buyers even if none read. Sellers might be constrained by reputation or the threat of litigation . . .” Unconscionability 2.0 therefore aims to allow adherents, users, and creators to seek a remedy by means of litigation.

⁵⁴³ *See* Korobkin, *supra* note 78. *See also* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 545 (2014) (claiming that “[i]nstead of promoting informed consumer assent through quixotic attempts to have consumers read ever-expanding disclosures, . . . consumer protection law should focus on ‘term optimism’-situations in which consumers expect more favorable terms than they actually receive.”)

⁵⁴⁴ Elkin-Koren—*Contracting Copyrights*, *supra* note 2 at 200.

⁵⁴⁵ Perzanowski & Hoofnagle, *supra* note 101.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 349–50.

⁵⁴⁸ *Id.* at 376 (“lowering the information costs associated with understanding the rights consumers acquire, short notices might create incentives to offer more attractive bundles of rights”).

⁵⁴⁹ *See id.* Nathaniel S. Good, Jens Grossklags, Deirdre K. Mulligan, & Joseph A. Konstan, *Noticing Notice: A Large-Scale Experiment on The Timing of Software License Agreements*, 2007 PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS ACM 612. Yet the researchers still found that even users that installed the software regardless of the EULA notice regretted it later on in the process. *Id.* at 614.

insufficient dialogue between the IP and contract scholarship who explore the IP boilerplate problem. Contract scholarship often lacks the required attention to the nature of the contract at hand, as one that seeks to regulate IP rights. This naturally derives from the consumerist perspective from which these contracts are viewed—and the fact that the focal point for analysis of these adhesive terms is rooted in the U.C.C.⁵⁵⁰ This further affects the perception of the entire unconscionability doctrine.

For instance, Marrota-Wurgler’s work, previously discussed, lacks reference to IP policies and public interest considerations (in the ex-consumerist context); nor are they concerned with the fact that the goods traded under such contract are in fact monopolistic rights for which society (rather than the contractual parties) bears the cost. The author focuses instead on consumerist preferences and uses the U.C.C. default rules as a benchmark for determining the contract terms’ quality,⁵⁵¹ thereby ignoring the fact that EULAs (rather than a usual consumer contract), enables the drafter—the software owner—to impose limitations on the IP rights of users.⁵⁵²

Another consequence of this insufficient dialogue, is that even when contract scholarship addressed the IP boilerplate and discussed unconscionability, the discussion has been limited to resolving consumerist problems. For example, one of the prominent scholars on the comprehensive study of wraps contracts, Nancy Kim, sought to address the limitations of unconscionability, that include in her opinion unpredictable and subjective outcomes, “high burdens” and a general reluctance to use the doctrine in cases were users’ are offered an opportunity to read.⁵⁵³ To address the problem, Kim offers a solution that resembles the Israeli law concept of presumptions of unconscionability,⁵⁵⁴ whereby generally unconscionability should be presumed (switching the burden to the drafter), with the exception of two situations. The first exception is the case in which a certain provision was specifically permitted by a statutory act or by law (e.g., exemptions prescribed under the U.C.C.). The second exception occurs when the drafter can demonstrate—for example, through providing examples of standard

⁵⁵⁰ U.S. courts have considered a transaction involving a software license to be a sale of goods, often looking to the U.C.C. for answers to questions related to contract enforcement. As Marrota-Wurgler argues, “[n]umerous courts have held that the sale (or licensing) of software should be interpreted as the sale of a good within the meaning of the U.C.C. Consequently, when faced with a dispute over the validity of a software EULA or a particular term contained therein, courts have relied on Article 2 of the U.C.C. (and relevant U.C.C. Article 1 provisions) to determine its enforceability.” Florencia Marrota-Wurgler—*What’s in a Standard Form Contract?*, *supra* note 527, at 690.

⁵⁵¹ This argument may be illustrated by the following paragraph, in which Marrota-Wurgler argues that sometimes users are less concerned with their rights (as copyright *users*) than with warranty protection, neglecting to observe that users’ rights are mostly the concern of all of society: “[b]uyers of certain products might not care about whether they are allowed to modify the software, but be more concerned about warranty protection; on the other hand, it is possible to imagine certain buyers having the opposite preference.” Florencia Marrota-Wurgler—*What’s in a Standard Form Contract?*, *supra* note 527, at 691. The problem is that the question of whether these modifications are restricted by license, and what are the appropriate boundaries of fair use limitations—especially when imposed by boilerplate—is not merely a question of consumer preferences; rather, it is a core concern of copyright policies.

⁵⁵² See, e.g., Jean Braucher, *Contracting out of Article 2 Using a “License” Label: A Strategy That Should Not Work for Software Products*, 40 LOY. L.A. L. REV. 261, 271 (2007) (“The main reason for licensing is to try to limit the rights that customers get under intellectual property law...”).

⁵⁵³ KIM, *supra* note 26, at 87–89.

⁵⁵⁴ See *supra* note 375.

form contracts of other offerors in the relevant market sector—that alternative conditions are in fact offered in the market.⁵⁵⁵

Such solutions are detached from the IP context of these contracts and fail to address potential externalities. Is there true consolation for an independent, beginning artist seeking exposure, in the fact that the terms of a private server offering video-sharing services are more favorable than those of YouTube? Is it proper to deny a student who wishes to study in the design department of a certain institution, the IP in his creation, just for choosing to study in an academic institution that appropriates less of his rights relative to another institution?⁵⁵⁶ Indeed, this is why Unconscionability 2.0 requires both the procedural analysis, that focuses on salience and competition over the terms' quality, and the substantive analysis, that considers IP policies.

Interestingly enough, the dialogue of the deaf also lead a number of IP commentators to propose solutions that are based on “clear communication”⁵⁵⁷ and disclosure,⁵⁵⁸ in order to mitigate some of the problems created by IP boilerplate, although empirical contractual-consumerist research indicates that such disclosure is not necessarily effective.

Another noticeable example of the dialogue of the deaf, comes from case law and the Lexmark en banc decision, discussed above.⁵⁵⁹ The en banc decision was clearly based on the notion of “clear communication” of post-sale restrictions.⁵⁶⁰ Yet it bluntly ignored the empirical evidence showing that disclosure mechanisms usually fail. This decision emphasized notions of “clear communication”, which empirical work found to be insufficient, instead of patent policy, thereby further perpetuating the “[t]he great paradox of the disclosure empire.”⁵⁶¹ As I explained, in the previous chapter, boilerplate, by definition, will almost never give raise to “actual knowledge” nor do they are an adequate tool to “clearly communicate”.

⁵⁵⁵ According to Kim, pursuant to this solution: “[t]he drafters can... presen[t] evidence that its competitors in the same or similar business offered different terms. In addition, drafters can themselves offer alternative terms and rebut the claim that there was an absence of meaningful choice. The provision of a choice of terms does not mean that the drafting company must provide only consumer-friendly terms and eschew self-interested ones; rather, it means that it cannot threaten the consumer with nonparticipation by proposing an all-or-nothing format with respect to the product or service offered.” KIM, *supra* note 26, at 208.

⁵⁵⁶ See ch. IV(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”.

⁵⁵⁷ See Brief of 44 Law, Economics and Business Professors as Amici Curiae in Support of Respondent, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189).

⁵⁵⁸ See, e.g., Lisamarie A. Collins, *Copyrightable Works in the Undergraduate Student Context: An Examination of the Issues*, 17 MARQ. INTELL. PROP. L. REV. 285, 297 (2013). Collins addresses the problem of students who are required to assign all rights in their creations pursuant to an academic institution's standard policies. Collins agrees that such assignment might be held unconscionable, yet she offers legislative and disclosure-based solutions to accommodate the problem. *Id.* at 302: “If legislative action is not feasible, then universities, at minimum, should seek to inform students as early as possible of their intellectual property policies...”. Although students are not typical consumers, experience shows that they too are often unaware of their rights, and they avoid reading browserwrap. See, e.g., Elazari, *Position Paper: The Legal Status of Students' Intellectual Property Rights in Academic Design Institutions*, *supra* note 249.

⁵⁵⁹ *Lexmark Int'l, Inc. v. Impression Prods.*, 816 F.3d 721 (Fed. Cir. 2016).

⁵⁶⁰ *Lexmark Int'l, Inc. v. Impression Prods.*, 816 F.3d, at 735, 742, 761, 753 (“A patentee already may preserve its patent rights against downstream buyers (*with notice*) through otherwise-lawful restrictions”) (emphasis added).

⁵⁶¹ Ben-Shahar & Schneider, *supra* note 539, at 652.

Second, the rationale for imposing the “clearly communicated” threshold and the “actual knowledge” requirement cannot be reconciled with the fact that according to the majority in the en banc decision, the enforceability of these “otherwise-lawful” post-sale resections should be decided, *inter alia*, as a matter of contract law.⁵⁶²

The reason is that, in general, the threshold under U.S. standard form contract law for enforceability of this type of contracts is much lower. It does not require actual knowledge of the restrictions but rather assumes it, and focuses on the mere opportunity to read. For example, it is not clear whether these restrictions could be imposed in a form of “Pay Now Terms Later” type of contract. Will the patentee adequately “give notice” by subjecting the purchase to the terms of the agreement which appears inside the package (similar to enforceable, shrinkwrap agreements), or should the restrictions be presented on the package? Arguably, according to the “clearly communicated prior to the purchase” threshold the Federal Circuit required in *Lexmark*,⁵⁶³ these types of restrictions should be voided, as they are not visible to consumers at the time of purchase.

This discrepancy could have created a whole category of post-sale restrictions which are presumably enforceable under contract law but not under the “clearly communicated” or “known” threshold required in *Lexmark*. The paradoxical results would have been inevitable. Consumers that buy the product online, would have received adequate notice depending on how the specific website communicated the restrictions, if it requires the customer to click on some virtual “patent-wrap” agreement, or if the package pictures are clearly apparent. Obviously, the interfaces providing this information vary from one online seller to the other. Moreover, it is not clear if online consumers should be treated differently from of-the-shelf customers, who can see the restrictions printed on the package, or vice-versa? If online customers will be subjected to the “patent-wrap” agreement, how can we be sure that of-the-shelf consumers receive similar notices?

Patentable innovations—as opposed to software products—do not always have the interface which facilitates adequate “labeling.”⁵⁶⁴ Moreover, what happens if the product, much like the majority of the products used in the technological era, encompasses more than one patent? Should we expect consumers to read all of the restrictions of all of the patentees? And what happens if the product is given for “free” in the secondary market? Paradoxically, consumers who actually paid for the product could be sued under *Lexmark*, while consumers who somehow got the product for free couldn’t.⁵⁶⁵

⁵⁶² *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d 721 at 735.

⁵⁶³ *Cf. id.* at 728, where the court noted that: “it is undisputed that all [of *Lexmark*] end users receive adequate notice of the restriction supporting the discounted price *before* they make their purchases.” (emphasis added).

⁵⁶⁴ *See, e.g.*, professor Dennis Crouch, noting with respect to *Lexmark* en banc decision that “personal property moves and is often transferred without substantial paperwork or record-keeping, and allowing a set of unique restrictions has the potential of gumming up the marketplace.” *Crouch, supra* note 186.

⁵⁶⁵ *Cf. UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011), where the court refused to enforce label restrictions on the first-sale doctrine (in the copyright context), since there was no indication that the recipients, who received the records free of charge have agreed to the restrictions. *See id.* at 1183: “UMG has virtually no control over the unordered CDs it issues because of its means of distribution, and it has no assurance that any recipient has assented or will assent to the creation of any license or accept its limitations.”

Scholars who favor freedom of contract, in this respect,⁵⁶⁶ should consider the transactions costs imposed by the behavioral limitations of consumers, as well as “even more” disclosure, on contractual opt-out from patent exhaustion.⁵⁶⁷ Luckily the Supreme Court overturned the decision,⁵⁶⁸ and did not adopt the view some freedom of contract proponents advocated for.⁵⁶⁹ Still the decision highlights this dimension of the dialogue of the deaf exhibited by the Federal Circuit and some of the amici.

The solution proposed in the following chapter seeks to avoid such dialogue of the deaf by incorporating literature pertaining to nonsalient terms to IP discourse on appropriating contracts. It’s in essence inter-doctrinal, but offers limited help with the dialogue of the deaf problem. One can only hope that since IP boilerplate create complications that are endemic to both consumer, contract, and IP laws, and considering that scholarly literature from both “sides of the barricade” is helpful and even essential for the discussion, a more substantial dialogue will be held between the disciplines.⁵⁷⁰

v. Theoretical Tendentiousness—The Utilitarian Bias

As mentioned, there were some scholars that suggested other inter-doctrinal solutions for the problem of the adherent-user IP boilerplate. Yet, such commentators addressed adhesive terms in the light of utilitarian approaches alone, ignoring other essential theoretical perspectives such as the deontological and cultural approaches. I claim that such bias derives from the lack of a harmonized discussion on the various types of IP boilerplate and the fact that the focal point of scholarship and case law was the adherent-user type of contract.⁵⁷¹ The first Chapter and the proposed Unconscionability 2.0 aims to address this problem and avoid such bias. To

⁵⁶⁶ See Brief of 44 Law, Economics and Business Professors as *Amici Curiae* in Support of Respondent, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189).

⁵⁶⁷ Shaffer Van Houweling specifically addresses “the information costs imposed on the purchasers of burdened [patented] chattels”. See Shaffer Van Houweling, *supra* note 87, at 920.

⁵⁶⁸ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523 (2017).

⁵⁶⁹ Brief of 44 Law, Economics and Business Professors as *Amici Curiae* in Support of Respondent, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189).

⁵⁷⁰ Indeed, two examples of such substantial dialogue is the scholarship of Molly Shaffer Van Houweling, which emphasis information burdens in her analysis of IP boilerplate (see Shaffer Van Houweling, *supra* note 87) and Perzanowski & Hoofnagle research, *supra* note 101, as explained in *supra* note 545.

⁵⁷¹ See, e.g., Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–460 (2006) [hereinafter Lemley—*Terms of Use*]. Cf., Reichman & Franklin, *supra* note 120, at 877: “With the convergence of digital and telecommunications technologies, creators and innovators who distribute computerized information goods online can increasingly combat the causes of market failure directly—even in the absence of statutory intellectual property rights—by recourse to standard form contractual agreements that allow access to electronically stored information only on the licensor’s terms and conditions.” Regarding the context of their proposed solution, see *id.* at 928: “We advocate especially strict scrutiny of socially questionable terms and conditions that result when *licensors* combine the enhanced power of standard form contracts with the exercise of federally created exclusive property rights in information good”. (emphasis added).

illustrate, I will review the inter-doctrinal solution offered by Kaiser. Kaiser, like many others, is concerned with two disputed decisions, *Baystate*⁵⁷² and *Monsanto*.⁵⁷³

In his view,⁵⁷⁴ the court erred in its formalistic analysis of the contract at the heart of the dispute. He asserts that in reviewing contracts pertaining to IP rights, courts should address the various objectives of IP laws. Therefore, Kaiser proposes a multi-factor test that is not based on the unconscionability doctrine, but rather on a comprehensive review of the adhesive provision at question under other common law doctrines developed to address contracts, such as the shifting of burden of proof, the fairness and reasonableness test, and the interpretation against the drafter.

Kaiser emphasizes that the courts should address the circumstances of the relevant transaction. He proposes that the courts should examine, as a decisive factor in the proposed test, whether the adhesive term promotes the purposes of IP laws.⁵⁷⁵ Alas, since his proposal originated as a solution to the adherent-user contract, he further emphasizes that only some IP that purposes should be considered, while firmly rejecting other purposes.⁵⁷⁶ Therefore, Kaiser suggests that in patent law, for example, the only purpose relevant to the question of enforcement is providing sufficient incentives to encourage creation of novel advances.

Of the three policies sought to be advanced in patent law, only the policy of encouraging large and novel advances in the state of the art is always important in the context of contract enforcement... [w]ith respect to relevant patent policy, the patent statutory system seeks to encourage large advances in the state of the art by providing inventors with an incentive to invent, in the form of a right to exclude others from nearly any use of their invention. This policy is advanced by strict enforcement of contractual terms when they are drafted by the patentee, since any limit on the ability of a patentee to make commercial use of his invention lessens the value of his exclusive rights and reduces the invention incentive.⁵⁷⁷

⁵⁷² *Baystate*, *supra* note 434. For a detailed discussion, see ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””.

⁵⁷³ *Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir 2002). The case concerned patent-protected seeds sold to farmers that were obliged to enter into a IP boilerplate. Monsanto sued the farmer, claiming he kept the seeds of soybeans for future planting. McFarling challenged the validity of the jurisdiction clause, claiming that he neither read it nor agreed to it. The majority opinion ignored the disparity between the parties, arguing that the farmer erred by failing to read the agreement signed by him, and thus cannot claim lack of knowledge. *Id.* at 1295. Judge Clevenger’s dissenting opinion suggests that this is an unconscionable term in an adhesion contract, and therefore the court should refrain from enforcing it. Clevenger’s opinion highlighted the inequity in bargaining power between the parties and the farmer’s lack of ability to negotiate the terms of the agreement. Clevenger further noted that the court should be particularly careful in its examination of the jurisdiction clause, since it pertains to McFarling’s constitutional right to due process. *Id.* at 1301–07.

⁵⁷⁴ Christopher M. Kaiser, *Take It or Leave It: Monsanto v. McFarling, Bowers v. Baystate Technologies, and the Federal Circuits Formalistic Approach to Contracts of Adhesion*, 80 CHI-KENT L. REV. 487 (2005).

⁵⁷⁵ *Id.* at 502–500, 512.

⁵⁷⁶ For a critical review of this theoretical tendentiousness, and a proposal for an alternative interpretation that seeks to avoid the negative results of utilitarian biases and allow for a wider integration of theoretical considerations, see ch. IV(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”.

⁵⁷⁷ Kaiser, *supra* note 574, at 502.

This approach suffers from utilitarian bias. Kaiser further argues that a contractual provision that limits the right of a user to fair use should not be enforced, but the only explanation provided therefor is utilitarian in essence—to incent “secondary creativity.”⁵⁷⁸ The utilitarian approach leads him to the ultimate conclusion that “rigid enforcement” is required when a standard form contract is drafted by the owner of copyright.⁵⁷⁹

In his view this is what copyright policy dictates. If we are to strongly encourage primary creativity, we must allow copyright owners “...to dictate their own licensing terms,” in order to further “increas[e] the value of the exclusive rights the author is granted.”⁵⁸⁰ Naturally, a utilitarian analysis could also, in other circumstances, lead to another result, one that does not favor necessarily the IP owner but the user, the public domain or a secondary creator. The application of fair use or first-sale for example, is not necessarily “exutilitarian” because it secures the rights of users as opposed to owners.⁵⁸¹ The focus is still the maximization of the welfare of society as a whole, and in the fair use case, it is achieved by facilitating secondary creativity and public access to the work. But where Kaiser errs is not in his so-called “pro-IP owner” view, but in its exclusive focus on utilitarian justifications that fail to address other vital IP purposes. As the discussion in the next chapter demonstrates, such a utility-oriented tendency is perilous. Therefore, the proposed solution attempts to address this problem as well.

IV. UNCONSCIONABILITY 2.0—TOWARDS A REVISED DOCTRINE OF UNCONSCIONABILITY DERIVED FROM INTELLECTUAL PROPERTY RATIONALES

In this dissertation, I focus on a new legal phenomenon that has emerged in today’s information society: the rise of the IP boilerplate. These contracts seek to regulate, control, and appropriate intellectual products, content, resources, and expressions. While “traditional” boilerplate raise fundamental questions concerning consumer and contract laws, IP boilerplate raise questions deeply rooted in the core of IP laws—from regulating user rights to the legal status of students’ creations and employees’ inventions. Thus far it was argued that while the problems created by these contracts have long been recognized by scholars, unconscionability was unjustly overlooked as a potential inter-doctrinal solution. Indeed, “while [the] tension [between contracts and copyright law] can, at least in theory, be addressed using various doctrinal vehicles... under state contract law, in practice, it has almost exclusively been discussed under the auspice of copyright preemption doctrine.”⁵⁸²

I tried to explain how this result has come about. I argued that IP scholars, disappointed with current case law, quickly abandoned the doctrine as unsuitable, thus creating a chicken and egg paradox that produced an ill-equipped doctrine. I explained how the preemption doctrine created a dichotomy between IP law and contract law considerations in U.S. case law,

⁵⁷⁸ *Id.* at 503: “[C]opyright policy can argue for strict enforcement of contract terms when they are drafted by the copyright holder. However ... As explained above, the doctrine of fair use is an important part of the statutory scheme that preserves this dichotomy and encourages secondary creativity. Thus, when a copyright holder drafts its contract terms in such a way as to undermine the principles of fair use, copyright policy strongly militates against enforcing the terms of the contract at issue.”

⁵⁷⁹ For Kaiser’s exclusive review of utilitarian approaches, *see, id.*, at 498–99.

⁵⁸⁰ *Id.* at 503.

⁵⁸¹ Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229 (2014).

⁵⁸² Rub — A Less-Formalistic Copyright Preemption, *supra* note 40, at 338.

further causing the underutilization of unconscionability and leaving courts with a limited tool kit to address IP boilerplate. I further illustrated that a “dialogue of the deaf” exists between contracts and IP scholars exploring the phenomenon of IP boilerplate. Finally, I claimed that even proposed inter-doctrinal solutions were occasionally tainted with utilitarian biases. Therefore, after devoting much of the discussion to the various facets of the problem, I shall turn to the solution.

According to this solution, Unconscionability 2.0, IP boilerplate should be examined by the unconscionability doctrine, but through the prism of IP theories, as their essence is to regulate IP rights. I suggest that the critical question of whether or not a provision is unconscionable should be examined, namely, under the substantive analysis, by asking, generally, if the provision benefits the purposes of the relevant IP policies, or does, in fact, negate them.

This solution originates in the Israeli purposive interpretation to unconscionability—an approach that led Israeli courts, in the one case in which they were required to do so, to recognize the doctrine as a versatile, pragmatic solution and to analyze an IP boilerplate, via unconscionability—but strictly by way of examining the purposes of the relevant IP laws to the term in question. In so doing, the Israeli courts achieved something that many U.S. courts have failed to achieve. Adopting this purposive approach, will allow us to discard the literal consumer-oriented interpretation of the doctrine, which is clearly ill-equipped to accommodate the challenges presented by the information age. In the following chapters, I will explain the advantages of this Israeli purposive interpretation to unconscionability, and how Unconscionability 2.0 could be reconciled with the Restatement, the current U.S. approach to unconscionability, as well as with the doctrine’s origins. I’ll further lay a more robust vision for Unconscionability 2.0, and suggest mechanisms to its increase clarity and certainty, such as presumptions of unconscionability. Finally, I’ll discuss Unconscionability 2.0 application on technological boilerplate, in negotiated contracts in various other case studies. I conclude this chapter by addressing some critiques of Unconscionability 2.0.

A. The Proposed Doctrine of Unconscionability 2.0

i. Theoretical Background and Comparative Insights: Adopting A Purposive Approach to Unconscionability

The subchapter focuses on the purposive development of the Israeli unconscionability doctrine. While U.S. law remained focused on protecting the narrow financial-consumerist interests of the contractual parties, the Israeli doctrine was liberated from this burden by a series of precedents by former Supreme Court President Barak that adopted the purposive approach. This interpretation has enabled Israeli courts to utilize the doctrine as a purposeful solution applicable to diverse relationships, not only those that are consumer based, and to accommodate within the boundaries of unconscionability, a wide range of non-contractual notions.

The first Israeli law that pertains to this issue was the “Standard Contracts Law” of 1964,⁵⁸³ which applied only to consumer transactions.⁵⁸⁴ Before then, boilerplate were

⁵⁸³ The Israeli Standard Contracts Law, 5724–1964, 18 LSI 51. For general review, see Aubrey L. Diamond, *The Israeli Standard Contracts Law, 5724–1964*, 14 INT’L & COMP. L.Q. 1410 (1965). See also Kenneth Frederick Berg, *The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts*, 28 INT’L & COMP. L.Q. 560 (1979).

⁵⁸⁴ The legislative history of this law reveals that in the discussions preceding the law’s enactment, the U.C.C. doctrine of unconscionability was viewed as similar to the Israeli unconscionability doctrine

addressed under general contract laws.⁵⁸⁵ The 1964 law enabled courts and the “Board”⁵⁸⁶ to invalidate unconscionable term in standard form contracts. This law was met with great scholarly resistance.⁵⁸⁷ By the end of the 1970s, it was found that only one provision in a single standard form contract had been invalidated by the application of the 1964 law.⁵⁸⁸ Alas, this avant-garde law, originally considered as a pioneering legal novelty unheard of in global terms,⁵⁸⁹ had been narrowly interpreted by the Supreme Court and eventually disregarded.⁵⁹⁰

The question of unconscionability was reduced to a formalistic and conservative analysis that considered just two questions, limited in scope: 1) Does the term in question constitute a waiver that exempts the supplier from liability for bodily injury?; and 2) Is the supplier holds monopolistic power and provides a vital service?⁵⁹¹ Even though the law’s failure was generally attributed to the ineffective enforcement of its provisions, Deutsch noted

under the proposed bill. *See* Sinai Deutch, *Standard Contracts Act: Failure and Recommendation*, 1 BAR-ILAN L. STUD. 62, 126 (1980) (in Hebrew) [hereinafter Deutch—*Standard Contracts Act*]. *Cf.* Sinai Deutch, *Controlling Standard Contracts—The Israeli Version*, 30 MCGILL L. J. 458, 569 (1984) [hereinafter Deutch—*Controlling Standard Contracts*]. *See also* Berg, *supra* note 583, at 562: “In her preparation of the I.S.C.L. [the law], Israel drew upon the limited experiences of other countries, notably the United States, Great Britain and Italy.”

⁵⁸⁵ For example, through the Israeli doctrines of public policy and good faith. *See* CA 461/62 Zim Israeli Navigation Company Ltd. v. Maziar 17 PD 1319 (1963).

⁵⁸⁶ The Board, which eventually evolved into the Standard Contracts Tribunal, is a designated tribunal – a “control system” – that allows drafters to submit standard form contracts for pre-approval. If the terms are found reasonable, the contract will be “immune” from future judicial intervention. *See* Deutch, *Controlling Standard Contracts*, *supra* note 584, at 473. *See also* Diamond, *supra* note 583, at 1415.

⁵⁸⁷ Critics argued that the legal outcome resulting from the 1964 law, namely, that standard form contracts that are not intended for the purpose of supplying a commodity or service are excluded from the law, had rendered the law generally inapplicable and redundant. This result, clearly incongruent with the legislature’s original intentions, has forced courts to inquire whether the contract in question is indeed a contract for the supply of a commodity or service, in order to apply the law. *See* Deutch, *Controlling Standard Contracts*, *supra* note 584, at 466.

⁵⁸⁸ CA 280/71 Gideon v. Kadisha society 27(1) PD 10 (1972). In the matter concerned, the court refused to enforce a provision restricting consumers from including the Georgian dates of the birth and death of their loved ones on tombstones purchased from Kadisha, on the grounds of unconscionability. Interestingly enough, what became arguably one of the most prominent precedents in Israeli Standard Form Contracts law also involved the adherents’ right to honor the memory of their loved ones, by including Georgian dates and Latin characters on tombstones (*see Kadisha*, *infra* note 597).

⁵⁸⁹ Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, n. 56 (2014) (describing the 1964 law as the “the first of its kind in the world”). *See also* Deutch, *Controlling Standard Contracts*, *supra* note 584, at 460. *Cf.* Berg, *supra* note 583, at n. 5 (“The Israeli Parliament was a pioneer by its early efforts.”); *see also id.* at 561 (“The Israeli Standard Contracts Law 5724–1964 ... creatively combined judicial and administrative controls to adjust the imbalances which result from the superior position of the stipulating party.”).

⁵⁹⁰ *See* Deutch—*Controlling Standard Contracts*, *supra* note 584, at 461: “Two decades of conservative interpretation by the courts almost reduced the statute to a ‘dead letter.’” *See also* Berg, *supra* note 583, at 573.

⁵⁹¹ CA 285/73 Lagil Trampolines and Sports Equipment Israel Ltd. v. Nahmias 29(1) PD 63, 75 (1974); CA 764/76 Shimoni v. Ashdod Automobile Factories (M.L.) Ltd., 31(3) PD 113, 115–121 (1977). Scholars have criticized court rulings for being unclear and inconsistent, claiming that the ambiguous and indecisive wording of the Standard Contracts Law further contributed to the problem. Deutch—*Controlling Standard Contracts*, *supra* note 584, at 461.

that, in his view, the law's ineffectiveness stems from a reluctance to deviate from the legal rules of traditional contract laws, and from the difficulty of altering legal perspectives to accommodate such deviation. In his view, those responsible for the law enforcement failed to fully understand the philosophy that produced this avant-garde act and had never actually agreed with such philosophy, inevitably leading to this unfortunate outcome.⁵⁹²

Past experience with the flawed application of the Standard Contracts Law of 1964 shows that sometimes courts issued rulings that actually counteracted the purpose of the law, seemingly rendering powerful tools, such as unconscionability, ineffective. This is the state of affairs in the U.S. today, where the debate over unconscionability remains fixated on consumer-oriented perceptions that originated in the age of traditional standard form contracts, which dealt mostly with traditional services, banking and physical commodities.⁵⁹³ The doctrine developed in too narrow a fashion which was not adaptable to changes in the settings and environments that pertain to the evolution of the IP boilerplate. On the other hand, when the shortcomings of the 1964 law and the doctrine of unconscionability were finally acknowledged by Israeli law,⁵⁹⁴ such recognition led to legislative amendments enabling the rise of the Israeli purposive approach to unconscionability.

And so, in 1982 the new Standard Contracts Law was enacted and the Tribunal for Standard Contracts was established.⁵⁹⁵ The law greatly facilitated the ability of the Tribunal to intervene in standard form contracts. The new law additionally allowed the courts, and particularly the Tribunal for Standard Contracts, a special designated court, to invalidate any unconscionable terms found in standard form contracts, or to decree their amendment.⁵⁹⁶ Unlike the 1964 law, the application of the 1982 law is broad and encompasses relationships that are not necessarily consumerist in nature.⁵⁹⁷ Thus, the existence of an unconscionable term is no longer conditional on a monopolistic relationship between supplier and customer.⁵⁹⁸ The

⁵⁹² Deutch—*Standard Contracts Act*, *supra* note 584, at 64.

⁵⁹³ *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

⁵⁹⁴ Deutch—*Controlling Standard Contracts*, *supra* note 584, at 475–476.

⁵⁹⁵ The Standard Contracts Law, 5743–1982, 37 LSI 6. The Tribunal, a successor of the Board (*see supra* note 586) was granted extensive authority. *See* Deutch, *Controlling Standard Contracts*, *supra* note 584, at 475.

⁵⁹⁶ The Israeli unconscionability doctrine is incorporated under Section 3 of the 1982 Standard Contracts Law. According to the current wording of the law: “A Court and the Tribunal shall—according to the provisions of this Law—annul or modify any condition of a standard form contract which—having taken into account the conditions of the contract as a whole as well as other circumstances—is oppressive to clients or grants the supplier an unfair advantage, which is likely to result in clients’ oppression.”

⁵⁹⁷ *See* CA 294/91 Jerusalem Chevra Kadisha v. Kestenbaum, 46(2) PD 464 (1992) [hereinafter *Kadisha*].

⁵⁹⁸ *Id.* The definitions used by the new Standard Contracts Law specifically avoid using the term “consumer,” using the word “client” (or customer) instead. The formalistic requirement conditioning the law’s applicability upon the “supply” of a service or product was omitted, and the definitions used for the term “supplier” and “client” were broadened. The client is defined under Section 2 as “a person to whom a supplier proposes that an engagement between them be in accordance with a standard form contract, irrespective of whether he is the recipient or provider of anything.” Thus, the “supplier” may very well be the *recipient* of the product or service with which the contract is concerned. As previously illustrated, this is the case of the adherent-creator type of contract, whereby the drafter is the recipient of the service or product, when the service or product is the adherent’s IP rights (such as ownership,

classic literalist approach has been cast aside in favor of a purposive approach. This is only one aspect of a philosophical change that has affected the entire Israeli legal system.⁵⁹⁹

The general test used in Israel for unconscionability is the “fairness and reasonability test.” Pursuant to this test, a term is considered unconscionable if it is seeking to protect the interests or values of one of the contractual parties (namely, the “supplier”) beyond what is perceived as fair in this type of agreement.⁶⁰⁰ The cornerstone of this approach was laid in the Court’s ruling on the *Kadisha* case, where Barak described the unconscionability test as follows:

What is “unconscionability”? It is a very vague term indeed. It reflects a negative social value the legal content of which must be determined by the purpose of the legal norm associated with that term... It refers to “an unfair advantage obtained through the dictation of conditions.” This advantage is determined on the basis of an overarching perception of the contract as a whole, and in view of the identification of all the obligations and rights stipulated thereunder. . . . Naturally, broad judicial discretion is granted on the nature of unconscionability. Indeed, when employing the term “unconscionability,” as expressed by the legislature, the court is tasked with introducing social value into what seems to be a form of improper conduct in Israeli society at a given time. The court must determine—based on its understanding of the nature of the contract between the parties on the one hand, and the nature of Israeli social values on the other, whether the contract is fair, or whether it overprotects the supplier’s interests. This process of examination is twofold. First, the relationship between the parties and their typical interests is examined. At the same time, the court considers the social perception of our system with respect to what is regarded as fair and reasonable in a particular type of relationship.⁶⁰¹

It follows, then, that in Israeli law unconscionability is a standard, an instance of a “valve concept” (*Ventilbegriffe, concetti volvola*),⁶⁰² the contents of which change with time and according to circumstances and ever-evolving worldviews, and are determined by the interpreter, whose opinion is based on the fundamental principles of the system.⁶⁰³ This is a

derivative rights, or economic rights). This situation could also occur in the adherent-user type of contract, where the adherent’ rights of fair use are often restricted or waived.

⁵⁹⁹ See, AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2007) [hereinafter BARAK—PURPOSIVE INTERPRETATION]. See also Gabriela Shalev, *Forty Years of Contract Law*, 24 ISR. L. REV. 657 (1990) (explaining how the good faith doctrine was broadened to focus on notions of trust, honesty and fairness, and was applied “widely and generously” by courts).

⁶⁰⁰ CA 1185/97 Milgrom v. Mishan Center 52(4) PD 145 (1998). The principles of the fairness and reasonability test were first introduced in the monumental case of CSC 1/79 Keshet Dry Cleaning Factories Ltd. v. The Attorney General 34(3) PD 365 (1980) [hereinafter *Keshet*].

⁶⁰¹ *Kadisha*, *supra* note 597, at 528–529.

⁶⁰² AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 74 (2015).

⁶⁰³ See, e.g., Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (“the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act.”). Intellectual property regimes often do exhibit unforeseen circumstances in which, “[d]etermining the appropriate content of the law for all such contingencies would be expensive, and most of the expense would be wasted.” (*id.* at 622–3).

flexible judicial norm that can be adjusted to meet the needs of the time and the place, and is shaped by the courts.⁶⁰⁴ It draws to some extent from the moral conception of contracts rooted in Hebrew Law.⁶⁰⁵

This test confers a great deal of discretion, which at times involves financial considerations, but is primarily driven by moral and social considerations—especially because we are dealing with financial relationships.⁶⁰⁶ This forces us to attribute meanings to a wide variety of rather recondite terms, such as “particular type of relationship,” “the nature of the contract between the parties,” and “the overarching perception of the contract as a whole.”⁶⁰⁷ Such meanings are ever-changing and ever-evolving, and are constantly affected by what is perceived as proper conduct at any given time.⁶⁰⁸ Put simply, an unconscionable condition under Israeli law bespeaks an improper norm.

According to this purposive-interpretative approach, the Israeli doctrine of unconscionability often focuses not only on the nature of the relationship in question, but primarily on the purposes of the laws that pertain to the reviewed contract, as well as the purposes such laws seek to facilitate, beyond the mere interests of the contractual parties.

This was the case in several cases that addressed contracts in the field of banking,⁶⁰⁹ insurance,⁶¹⁰ contract work, the sale of apartments,⁶¹¹ and employment.⁶¹²

This was also the case when the court examined a standard form contract that was drafted by a government institution and sought to establish ordinary pecuniary rights on the

⁶⁰⁴ *Id.* at 75. Cf. AHARON BARAK, THE JUDGE IN A DEMOCRACY 71 (2006) [hereinafter BARAK—THE JUDGE IN A DEMOCRACY] and BARAK—PURPOSIVE INTERPRETATION, *supra* note 599 at 199. In Deutch’s words, in the context of consumer protection policies (originally, in Hebrew): “Similar to other ‘basket’ provisions or valve concepts [Ventilbegriffe], the unconscionability test incorporated under the Standard Contracts Law is a ‘fluid’ test, which requires the court to take into account broad policy considerations, and a wide system of balances. Therefore, upon determining the application of this concept, one is required to address the fundamental policies underlying consumer laws, within the framework of revealing the appropriate balance between the relevant policies pertaining to the matter.” ORNA DEUTCH, THE LEGAL STATUS OF CONSUMERS 458 (2002).

⁶⁰⁵ *Keshet*, *supra* note 600.

⁶⁰⁶ *Keshet*, *supra* note 600, at 373.

⁶⁰⁷ The unconscionability analysis applies to the content of the term itself, but also considers the “entire contract terms and all the other circumstances”. These “other circumstances” include, *inter alia*, the nature of the contract, the scope of the contract’s use, and the special characteristics that signify the relationship between the contractual parties. *Id.* at 375.

⁶⁰⁸ *Kadisha*, *supra* note 597, at 528–529.

⁶⁰⁹ CA 6916/04 Bank Leumi Le-Israel Ltd. v. The Attorney General (Feb. 18, 2010). *See also The First International Bank*, *supra* note 132.

⁶¹⁰ CA 11081/02 Dolev Insurance Company Ltd v. Sigalit Kadosh, 62(2) PD 573 (2007).

⁶¹¹ CA 1632/98 Arbus v. Abraham Rubinstein & Co.—A Contracting Company Ltd. 55(3) PD 913, 922 (2001). *See also*, a ruling by the Tribunal for Standard Contracts (Standard Contracts), SC (Standard Form Contracts) 702/06 The Attorney General v. Housing and Development for Israel Ltd., para. 9 (Dec. 6, 2011).

⁶¹² CA 1795/93 Egged Members Pension Fund Ltd. v. Jacob 51(5) PD 433, 451 (1997). *See more recently*, DMS (Regional TA) 8693-09 White Snow (1986) Ltd. v. Eliyahu, p. 3–5 (Nov. 13, 2011) and KG (Regional BS) 3217/09 White Snow (1986) Ltd. v. Lorbrt (March 10, 2014).

one hand, and to facilitate public policies on the other.⁶¹³ Accordingly, this was also the case when the court reviewed an IP boilerplate.

In the one unambiguous case involving an allegedly unconscionable term in an IP boilerplate, the court acknowledged that the term in question was indeed unconscionable, and the its sole consideration stemmed from the relevant policies that copyright laws seek to facilitate.

In this case, Jobmaster,⁶¹⁴ the plaintiff sought to restrict users' rights through the terms of use published on its website. These terms constituted a standard form contract under which it is forbidden to copy the want ads published on the website's platform.⁶¹⁵ Under the ToS, the user "undertakes to make use of the information made available on the website strictly for personal purposes, and to avoid publishing said information or making any commercial use thereof."⁶¹⁶ Alljobs, the defendant, argued that the want ads consist of a compilation of facts and data, which are not protected by copyright laws. Alljobs argued that it is therefore "allowed to make use of the [data] as it deems fit,"⁶¹⁷ and that Jobmaster cannot, by means of a contractual arrangement, namely, the terms of use in its standard form agreement, "create a right out of nothing."⁶¹⁸ The court found that a "provision in the agreement which limits the right of the defendant to make use of the data included in the ads is a restrictive provision in a standard form contract and is therefore invalid."⁶¹⁹ In other words, the court found this provision to be unconscionable—and did so strictly based on the purposes of copyright laws:

In view of the provisions of the Copyright Law and the above cited case law, it is clear that the information included in these ads is not protected under copyright laws, and it is even expressly excluded from them. We must ask the question of

⁶¹³ SC (Standard Form Contracts) 2016-01 Granot Agricultural Cooperative Society Ltd. v. The Israel Land Administration, para. 35–45 (Dec. 28, 2010).

⁶¹⁴ HF (Central District) 11359-03-09 Job Master Ltd. v. All You Need Ltd. (Dec. 28, 2010). The case concerned two claims filed by Jobmaster and the Drushim websites against Alljobs, a company that managed a database of job offers. Alljobs "compiles want ads published in various sources and publishes them on the website it operates." *Id.* at 3, (translated from Hebrew). One of these sources is Jobmaster. Jobmaster alleged, among other things, that Alljobs, in copying its want ads, violated the terms of use published on the website. On these grounds, Jobmaster made several demands, including that the terms of the agreement be enforced against Alljobs, and that Alljobs be prevented from copying these ads. *Id.* at 4.

⁶¹⁵ *Id.* at 8–9. When accessing the website, the user is required to confirm that he has read, and agrees to, the website's ToU. It is not possible, without providing confirmation, to continue accessing the website or to view the ads in question. Section 15 of the terms stated that: "The information published on this website is [Jobmaster's] sole property and [Jobmaster] owns the full extent of the proprietary rights thereto." *Id.* at 11 (translated from Hebrew).

⁶¹⁶ *Id.* at 4. Substantively, we are dealing with a provision that is similar in essence to the provision considered in the *ProCD* case, where a term restricted the publication and copying of telephone records, information which is not protected under copyright laws (in the post-*Feist* era) and should be left in the public domain.

⁶¹⁷ *Id.* at 11–12. The court cited the cases of TA (TA District) 1074-05 Ma'ariv Modi'in Publ'g Ltd. v. All You Need Ltd. (July 11, 2010) and OCR (TA District) 2018/05 Ma'ariv Modi'in Publ'g Ltd. v. All You Need Ltd. (Mar. 3, 2005), where it was specifically determined that the content of want ads is not protected by copyright.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

whether, in cases where copyright laws expressly exclude the protection of information such as facts and data, [Jobmaster] is allowed to restrict the use of the information in its possession by means of an agreement. . . . I believe that, with regard to our present case, the answer to that question is “No.” . . . Copyright laws seek to achieve balance between various interests, including the public interest. On the one hand, they seek to provide an incentive to advancing creation and on the other, they seek to protect the public’s right to make use of these creations in the name of culture and the promotion of knowledge. . . . Copyright law provides protection to a creative work only when such protection serves the interests of society as a whole. . . . An express instruction providing that information of a certain kind is excluded from the application of the law means that we must favor the public’s interest in making use of that information without any restriction, and that we must do so at the expense of any other interests. A restriction on the legitimate use of information that belongs to the public, by means of an agreement which is, in fact, a standard form contract, cannot be permitted.⁶²⁰

In this context, two things should be taken into account: I don’t argue that the particular outcome of *Jobmaster*, under which a provision that restricts harvesting information is invalid simply because copyright laws do not protect this type of information, is prima facie a justified one. Neither is it argued that the purposes of relevant IP laws are the only considerations that must be taken into account when applying the unconscionability doctrine, as they were in the *Jobmaster* case. The goal is to demonstrate that the court, when it examined an unconscionable provision in an IP boilerplate, used the unconscionability analysis, while at the same time considering the purposes of IP laws.

This clearly differs from the application of the doctrine of unconscionability in U.S. case law, which focuses, to date, almost exclusively on the consumer-contractual analysis, even when considering a term that pertains strictly to IP rights.⁶²¹ Furthermore, in this context, the Israeli court was not at all troubled by the fact that the defendant, Alljobs, is not an ordinary consumer, but rather a sophisticated corporation that provides services that compete with *Jobmaster*’s, and that Alljobs’ lawyers were entirely familiar with the terms of use and their significance.⁶²² Neither was the court troubled by the fact that Alljobs and other users do not

⁶²⁰ *Id.*

⁶²¹ See the discussion in *Davidson and Song Fi*, in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””.

⁶²²As previously mentioned, U.S. courts, when applying the unconscionability to IP boilerplate, on more than one occasion have been interested specifically in the adherent’s level of sophistication, her understanding of the language, whether the adherent is a person or a corporation, whether or not she is engaged in the same business as the offeror, and even whether or not she is receiving the service for free. See, e.g., *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, at 1179 and *Song Fi, Inc. v. Google Inc.*, 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014). See also Lemley—*Terms of Use*, *supra* note 571 at 462–463: “The law has paid some attention to the impact of terms of use on consumers: virtually all of the courts that have refused to enforce a browserwrap license have done so to protect consumers. Conversely, virtually all the courts that have enforced browserwrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license . . . courts presume that businesses know what they are doing when they access another company’s Web site and are therefore more likely to bind them to that site’s terms of use. Sophisticated economic entities are unlikely to persuade a court that a term is unconscionable.”

pay for the use they make of the information compiled by Jobmaster.⁶²³ On the contrary, the first words that appear in the court’s decision concerning this matter, in the paragraph dedicated to the unconscionability analysis, are “In view of... Copyright Law.”⁶²⁴

It therefore follows that the purposive approach adopted in Israeli case law enables us—and even obligates us—to consider the purposes of IP laws that pertain to the contractual term under unconscionability. Moreover, this obligation originates from the Israeli standard form contract law, not IP law. Although these are not the *only* purposes that must be taken into account, these are the ones whose consideration we cannot, and must not, avoid.

ii. Unconscionability 2.0: The Advantages of the Purposive Approach

The fact that Unconscionability 2.0 originates in the Israeli unconscionability doctrine, one that is perceived as a “valve concept” (*Ventilbegriffe*), not only accommodates IP policies within its framework, but also confers other advantages that are especially suited to its application on the IP boilerplate. Moreover, this doctrine enables us to address problems created by the contemporary adherent-creator type of contract. This chapter presents a brief outline of these advantages. As is the case in any theoretical discussion, a practical example will undoubtedly prove beneficial. I will employ the explore of the student-creator to this end.

One of the difficulties that previously arose is that IP boilerplate often govern relationships that are not pure-consumerist in nature. This trend, as previously noted, is expected only to increase, and in this context, U.S. unconscionability failed to provide adequate solutions.⁶²⁵ However, the proposed Unconscionability 2.0 enables us to accommodate a broad variety of relationships, including extra-consumer relationships, or, at the very least, relationships that are not consumer-oriented in the classical sense, such as those formed between employers and employees, students and academic institutions, creators and YouTube, etc.

To illustrate this argument, Unconscionability 2.0 could be applied to the IP policies of art and design institutions, which seek to appropriate the IP rights of students. Israeli courts have on more than one occasion analyzed the practices and policies promulgated by academic institutions as standard form contracts.⁶²⁶ Although courts have done so in other contexts that do not concern IP rights, it is clear that the main arguments for judicial intervention in standard form contracts apply to such relationships between students and academic institutions as well.⁶²⁷

⁶²³ See the discussion in *Song Fi, Inc. v. Google Inc.*, 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014), where the court argued that “[h]aving taken advantage of YouTube’s free services, Plaintiffs cannot complain that the terms allowing them to do so are unenforceable.”

⁶²⁴ Of course, this outcome is made possible in part by the fact that Israeli courts, naturally, are not required to tackle issues that pertain to the relationship between federal and state laws that stem from the doctrine of preemption. For a detailed discussion, see the discussion at ch. IV(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”.

⁶²⁵ One of the reasons for this is that even though, theoretically, the courts have applied the doctrine to non-consumer relationships—such as contracts governing the transfer of IP rights between an employee and his employer (*see, e.g., supra* note 464)—they have continued to consider the doctrine as though the relationship in question is *essentially* a consumerist one.

⁶²⁶ *See, e.g.,* TA (Jerusalem District) 109/94 *The Israeli Student Association v. The Hebrew University of Jerusalem* (June 3, 1996).

⁶²⁷ None dispute that there exists a certain dependency between the student and the academic institution. Institutions continuously provide a vital service. They do not function as absolute monopolies, but it most certainly cannot be argued that students enjoy a great deal of bargaining power in choosing their

Another key problem of IP boilerplate was that scholars consistently focused on one or another type of contract. Consequently, no literature could be found that suggests comprehensive solutions to the problem of the IP boilerplate in general. In contrast, Unconscionability 2.0 allows us to address this issue. First, the proposed interpretation does not assume a “one-size-fits-all” approach.⁶²⁸ On the contrary, it recognizes the fact that, as explained in Chapter II, at present IP boilerplate seek to govern more IP related issues than ever before, and as such contracts proliferate, they will do so even more. Because each of the many varieties of IP boilerplate merits a different approach, the proposed solution is both purposive and broad—it enables us to consider the contract not only as one that regulates IP rights in general but according to the particular rights in question.

For example, Unconscionability 2.0 allows us to differentiate between the adherent-creator type of contract and the adherent-user type of contract.⁶²⁹ It also enables us, under Israeli law, to address the fact that the “supplier” (or offeror) in question is not necessarily an “ordinary” supplier, but may be a hybrid entity or governmental body, as are the academic design institutions.⁶³⁰ In this context, Unconscionability 2.0 also incorporates constitutional considerations, in that any provision that restricts the rights of the adherent in terms of her IP is to be regarded with particular suspicion.⁶³¹

The proposed Unconscionability 2.0 does not seek to replace legislative solutions. Quite the contrary: it is intended to solve, among others, the problems produced by private ordering in IP in the absence of relevant legislation, and provides a solution that can be utilized until a time that more suitable regulation is established to redress the matter.⁶³² This solution would allow the average student to claim ownership over her IP rights in court, notwithstanding the IP boilerplate that assigned her rights, until the legislature restores her students’ ownership by rule of law. The proposed solution enables courts to provide a purposive answer for burning problems, that is based on the proper balance dictated by IP policies.⁶³³ It is able to do so because it is rooted in the Israeli interpretation of the doctrine, because it is a “valve concept”

particular academic institution. The student cannot negotiate the provisions in agreements that assign pre-invention (or pre-creation) rights. *See, e.g., Bezalel’s Policy, supra* note 9. Additionally, the academic institute enjoys a superior position in this regard. While the academic institute employs an army of IP lawyers, an ordinary student is unable to understand the legal significance of the terms and conditions imposed on her. She could not reasonably assess the financial consequences of waiving her IP rights, both because she is unaware of her rights to begin with, and because the relevant creation or invention has not yet been created.

⁶²⁸ For a discussion on assumptions such as these in the context of IP law, *see* Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231 (2014).

⁶²⁹ *See supra* note 63 and ch. II(A) “The Adherent-User and the Adherent-Creator Distinction.”

⁶³⁰ *See Kadisha, supra* note 597, at 492. When a hybrid entity of this sort enters into a standard form contract, the circumstances mandate a higher standard of fairness compared to private suppliers. This is actually the disturbing case of students being taken advantage by institutions that are functioning as hybrid entities.

⁶³¹ *Id.* at 531; In Israeli law, IP has been recognized as a constitutional right pursuant to the Basic Law: Human Dignity and Liberty, 1992–5752 § 3, 45 LSI 150 (CA 2687/92 Geva v. Walt Disney, 48(1) PD 251, 266 (1993) and CA 563/11 Adidas Salomon A.G. v. Yassin (Aug. 27, 2012), at 10).

⁶³² *See* the example of the Consumer Review Fairness Act of 2016, discussed in ch. II(C)(ii) ““Gag” Boilerplate: Assignment of Copyright in Consumers’ Reviews”.

⁶³³ As technology rapidly evolves, this balance changes all the time. *See* Miriam Bitton, *Modernizing Copyright Law*, 20 TEX. INTELL. PROP. L.J. 65, 72 (2011) (“With the advent of digital technologies, the balances struck by copyright law are also changing.”)

(*Ventilbegriffe*), because it is dynamic, and because it is based on a broad doctrine of unconscionability that enables the introduction of judicial legislation.⁶³⁴ Moreover, if unsolvable problems are found—as it is impossible to provide a regulatory solution to every imaginable unconscionable situation—Unconscionability 2.0 can serve as a complementary solution. Indeed, contract law experts have pointed this out on more than one occasion:

When an abuse is well-defined and identified with a particular economic activity, the remedy may require an invasion of freedom of contract... By contrast, when an abuse is not confined to any one particular activity and cannot be defined except in such general terms as overreaching or unconscionability, the judicial sanction of unenforceability is a more fitting solution. This technique has been legislatively adopted in that section of the Uniform Commercial Code which authorizes courts to refuse enforcement of “unconscionable” clauses in contracts of sale.⁶³⁵

These insights are particularly useful in the IP setting, when we are often challenged by new versions of IP boilerplate in the aftermath of technological advancements or new innovations.⁶³⁶ The most notable advantage of a valve concept is the fact that it “accommodates cases where a flexible legislative arrangement is required, which can be adapted to the needs of the time and place, and hence allows us to avoid a strictness that could potentially lead to arbitrariness.”⁶³⁷ IP boilerplate take many forms, they constantly evolve, and they regularly present us with additional challenges that are brought about by the advent of new technologies. This naturally prevents us from predicting the nature of obstacles yet to come.

Indeed, some may argue that the use of valve concepts serves only to spread uncertainty in the world of law.⁶³⁸ It is true that the proposed solution is flexible by nature, and even, some might say, unpredictable. But it is this flexibility that makes it so potent allowing it to uphold the proper balance between the various purposes of IP laws.

In previous chapters, I demonstrated how some inter-doctrinal solutions suffered from a utilitarian bias. Unconscionability 2.0 allows us to address this on a number of levels. First, according to the purposive approach, courts analyzing unconscionability must be guided by a

⁶³⁴ See *Kadisha*, *supra* note 597, at 527. See also Aharon Barak, *On Society, Law, and Judging*, 47 TULSA L. REV. 297, 299 (2011) (“The judge does not merely declare what the existing law is; he creates new law. In such cases, the judge engages—incidentally to deciding the case—in judicial lawmaking. Such lawmaking... creates a general legal norm (ergo omnes), whether through the force of the principle of stare decisis, or other recognized [techniques] that obligates not only the parties to the dispute, but all branches of the government and members of the public.”). Cf. BARAK—THE JUDGE IN A DEMOCRACY, *supra* note 604, at 71.

⁶³⁵ Alfred W. Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178, 1186 (1964).

⁶³⁶ For example, Instagram—the popular content-sharing platform—included, for a certain period, a provision under its terms of use that enabled it (and even *other* third parties) to distribute and publish content uploaded by users for *commercial purposes*, without any compensation guaranteed to the user. See Kurt Opsahl, *Instagram’s New Terms of Service to Sell Your Photos*, ELECTRONIC FRONTIER FOUNDATION (Dec. 18, 2012), www.eff.org/deeplinks/2012/12/instagrams-new-terms-service-sell-your-photos.

⁶³⁷ VARDA LUSTHAUS & TANA SPANIC, STANDARD CONTRACTS 37 (1994) (translated from Hebrew).

⁶³⁸ *Id.* at 38. See also BARAK—THE JUDGE IN A DEMOCRACY, *supra* note 604, at 71 (“The decision to resort to a vague concept... means taking the risk, *ex ante* that uncertainty will result from the need to assign weight to clashing values. Moreover, he who desires to refrain from granting discretion to judges should not resort to vague concepts...”).

“moral or social consideration.”⁶³⁹ Furthermore, as a “balance-based”,⁶⁴⁰ Unconscionability 2.0 facilitates the accommodation of a wide variety of competing considerations. A narrow analysis of a particular unconscionable provision could potentially lead to judicial challenges. To illustrate, consider the adherent-creator contract that governs students’ creation. The IP policy of Seminar Hakibbutzim, an Israeli academic institution, stipulates:

Copyrights, as well as any other intellectual property rights, to any work, and to the imprint or the fixation of any [work based on] such intellectual property rights (hereafter a “Creation”) created by students in the course of or pursuant to their academic education, or in the course of utilizing the College’s resources, including the ownership over any object in which the original Creation is fixed or incorporated, constitutes the sole property of the College throughout the period of [duration of the] rights, and anywhere in the world.⁶⁴¹

Such a provision, or any provision, that seeks to transfer ownership over an invention or a creation from the student to an academic institution serves as a pathological example of an unconscionable provision. It does not seem to support the purposes of IP laws. Indeed, it actually fails to give students the proper incentive to engage in creative art. On the contrary, such a provision actively discourages creative undertakings. Consider, for example, the case of a student who has never bothered to read the institution’s policy, and who creates an invention or an original work of art—only to learn later that this invention or work of art now fully belongs to the institution, and that she is strictly forbidden from using or publishing it.⁶⁴² Such a student might find herself so utterly frustrated by the arbitrariness of this state of affairs, that she might decide to discontinue any creative-inventive efforts not only during her academic career, but later in her life, as well. However, is it reasonable to consider this limiting provision only from the vantage point of the utilitarian approach?⁶⁴³

⁶³⁹ *Kadisha*, *supra* note 597, at 529 (translated from Hebrew).

⁶⁴⁰ *See, e.g.*, in copyright laws: Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1491–1494 (2007); Lior Zemer, *The Conceptual Game in Copyright*, 28 HASTINGS COMM. & ENT. L.J. 409 (2006), Lior Zemer, *Authors and Users: Lessons from Outre-Mer*, 25 INTELL. PROP. J. 231 (2013).

⁶⁴¹ Seminar Hakibbutzim, *Students Regulations for the Academic Year of 5775 (2014–2015)—Annex 7 Copyrights* 56 (2014), available at www.smkb.ac.il/filehandler.ashx?fileid=546887 (translated from Hebrew) [hereinafter *Seminar Hakibbutzim’s Policy*].

⁶⁴² Such a restriction is also included under *Bezalel’s Policy*, *supra* note 9.

⁶⁴³ Expressions of the utilitarian approach can be found in a wide variety of historical sources, and it is primarily associated with Anglo-American traditions. Notable among the sources found in literature is the Statute of Anne, which granted authors the right to publish and copy books, thus for the first time acknowledging authors as the legal owners of the IP rights to their work. Another prominent source is, of course, the United States Constitution (U.S. Const. art. I, § 8, cl. 8). *Cf.* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 303 (1988). The United States Supreme Court has emphasized in a number of significant opinions the “substantive” and “true” purpose of IP laws, in the spirit of the United States Constitution. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (U.S. 1991), the court clarified: “The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’ ... To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *See also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’

The utilitarian approach primarily focuses on society as a whole, rather than the individual. It concerns itself, then, with the total sum of utilities—the individual, and even the law, are instrumental to this equation, which seeks to facilitate the cumulative utility of all members of society.⁶⁴⁴ It can therefore be described as an arithmetic model:⁶⁴⁵ if we subtract the “pain” and add the “pleasure,” we will eventually arrive at the cumulative happiness of the individuals, which is expressed by “maximum utility.”⁶⁴⁶ Given the many advantages of encouraging individuals to produce original creations and inventions, it behooves the law to acknowledge IP rights to the extent necessary to maximize the public interest, and, necessarily, to do so irrespective of the considerations relating to individual creators and inventors.⁶⁴⁷

Against the social contribution of the creator to the welfare and prosperity of society through its creation of intellectual goods, one weighs the social loss reflected in monopolies, namely, the loss suffered by consumers owing to the fact that the goods in question are sold at a price that exceeds the marginal cost entailed in their production.⁶⁴⁸ Therefore, IP laws are so designed as to create a formula that produces an optimum (in terms of quality and quantity) of intellectual goods.⁶⁴⁹

The economic approach subsequently replaced the term “utility” with social “welfare,”⁶⁵⁰ but whether we are engaged in maximizing utility or in maximizing cumulative welfare, these approaches are concerned with society rather than the individual, with the facilitation of public interests as opposed to an outcome that promotes particular justice.⁶⁵¹ An exhaustive discussion of these approaches lays beyond the scope of this dissertation, but the main point here is that these approaches will always consider the individual as a tool who is to

creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); Harper & Row, *Publrs. v. Nation Enters.*, 471 U.S. 539, 558 (U.S. 1985).

⁶⁴⁴JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION xlvi (1879) (“The consequences of any Law, or of any act which is made the object of a Law, the only consequences that men are at all interested in, what are they but *pain* and *pleasure*”).

⁶⁴⁵ Bentham asserts that the law is a simple mathematical calculation whose result is certain, and that, even though concerned with morality, the law is no different from any other mathematical calculation. JEREMY BENTHAM, PRINCIPLES OF LEGISLATION 32 (1830) (“...These are the elements of moral calculation; and legislation thus becomes a matter of arithmetic. The *evil* produced is the outgo, the *good* which results is the income”).

⁶⁴⁶ Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111 (1979). And what about happiness? Happy individuals are those who can achieve their wishes according to a hierarchy of preferences that maximizes their utility. *Id.*

⁶⁴⁷ ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2–3 (2011).

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* This pretense, some may argue, of the utilitarian approach is one of the most notable objections raised by its critics. Can we really assess the social contribution of works of art and inventions using estimates? Is there such a thing as “an optimal quantity of social goods”? Merges asserts that “we will never identify the ‘optimal number’ of patented, copyrighted, and trademarked works.” *Id.* at 3.

⁶⁵⁰ Posner, *supra* note 646.

⁶⁵¹ Palmer argues that despite the methodological distinction proposed by Posner in his scholarship, the economic approach to IP still draws on Benthamic discourse, and that despite the use of the term “welfare” rather than “utility,” its normative roots have remained the same. See Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLIN L. REV. 261, 262 (1988). Yet, the interest of society in general could be aligned with moral or social driven consequences. See, generally, Bracha & Syed, *supra* note 581.

be rewarded in order to provide her with an incentive to enrich our world with her products and creations—all in the name of progress, expression, and diversity.⁶⁵² These approaches assume that, in the absence of reward, and in the absence of property protection, the individual would simply avoid creating. Or, at the very least, her creations would be of poorer quality,⁶⁵³ and in this respect creative activity is regarded as a demanding or even “unpleasant”⁶⁵⁴ pursuit. These approaches assume that efficient allocation means that society benefits as a whole, even if the individual suffers or endures injustice, that is to say, even if he is oppressed and mistreated.⁶⁵⁵ Therefore, the proposed solution does not allow us to address purely utilitarian considerations, as it is based on a moral foundation and fosters conceptual pluralism.

In that sense, the proposed solution tries to shatter the utilitarian hegemony as well,⁶⁵⁶ at least when it comes to the discussion of IP boilerplate. This advantage allows

⁶⁵² At the backdrop of the utilitarian and non-utilitarian “skirmishes” that are taking place in IP scholarship in the last decades (and have recently somewhat reached a peak, see *supra* note 656) some scholars tried to ease the debate by suggesting that empirical evidence proves that treating creators morally maximizes the social welfare. Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1531 (2017) (“treating creators fairly results in real efficiency gains by motivating creative behaviors, enhancing the quality of creative output, and bringing copyright policy in line with the moral intuitions of legal decision makers and the general public”). These findings (and arguments) help us reach to a consensus on the operation of midlevel principles (see, Merges, *Against Utilitarian Fundamentalism*, *supra* note 57) but don’t solve the fundamental problem of what should be done in other cases where clearly the social welfare would be maximized by *not* adhering the deontological principles.

⁶⁵³ MERGES, *supra* note 647, at 2 (“Society offers above-market rewards to creators of certain works that would not be created, or not created as soon or as well, in the absence of reward.”); see also Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

⁶⁵⁴ Hughes, *supra* note 643, at 304 (“The wide acceptance of the instrumental argument suggests wide acceptance of the premise that idea-making is a sufficiently unpleasant activity to count as labor that requires the inducement of reward”).

⁶⁵⁵ This principle affords a great amount of flexibility to the utilitarian approach in shaping the rights of individuals. Cf. Guy Pessach, *Justifying Copyright Law*, 31 MISHPATIM 359, 363 (2000) (in Hebrew). It is also one of the foremost critiques of the moral aspect of the utilitarian approach, in view of its indifference to means that have maximized happiness (in this context, the “sadism example” merits our attention in particular); See Eli Salzberger, *The Normative Approach to Economic Analysis of Law*, 22 MISHPATIM 261, 270 (1993) (in Hebrew). On the other hand, according to the financial approach to IP, we could argue that this state of affairs is not Pareto preferable, and certainly not Pareto efficient, as even though society benefits, and the happiness of others can be improved, at least one individual would suffer as a result of the allocation of rights. See Andreas Rahmatian, *A fundamental critique of the law-and-economics analysis of intellectual property rights*, in *METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY* 71, 77 (Graeme B. Dinwoodie ed., 2013). Clearly, policymaking under this criterion creates difficulties, since it could be easily argued that the allocation of a certain right to one comes at the expense of the other. Rahmatian, at 77. Therefore, the economic approach relies primarily on the criterion put forth by Kaldor-Hicks, according to which an effective policy allows the “beneficiaries” to compensate the “injured” for the allocated right, and most importantly, increases the aggregate welfare (through the beneficiaries’ excess revenue). Rahmatian, at 78; see also Salzberger, at 278.

⁶⁵⁶The term “utilitarian hegemony” means that, despite the extensive theoretical body of literature on personality-based theories of copyright, and the views furthered by cultural-modern approaches, the main argument remains that the allocation of rights to IP is designed to serve *society as a whole*, and from this Archimedean view we derive the proper balancing point that demarcates the scope of monopolistic rights—so that enough remains in the hands of the public so as to reward the authors and creators of the future, and so as to leave enough incentive for the authors and creators of today. This

Unconscionability 2.0 to surmount the transition to the adherent-creator type of contracts, and to adapt itself to the age of user-generated content, in which creations are not produced for money—but primarily for other purposes.⁶⁵⁷

Therefore, according to the proposed solution, the pathological provision cited above would always be considered from the standpoint of moral-deontological approach as well, that acknowledge the fact that students must be rewarded for their contributions to society.⁶⁵⁸ This perception also allows us to address more ambiguous cases as well, such as that of the provision considered in *Jobmaster*, in which a drafter sought to propertize information that belongs to the public. A moral analysis of this provision would not permit its enforcement. Instead, it would require the offeror to leave these objects as they are.⁶⁵⁹ It would also invalidate a provision in a sharing platform ToU that prevents users, without justification, from deciding the fate of their own creations, in view of the special connection that is formed between creators and their creations—as an integral part of one’s personality.⁶⁶⁰

IP boilerplate tend to deprive original creators of control over their own creations. At times, in difficult cases, a utilitarian analysis would seemingly lead us to conclude that this

“hegemony” recently manifested in a controversial article by Lemley, suggesting that basically all non-utilitarian approaches which are not grounded on empirical evidence are akin to faith-based beliefs and are therefore irrational. See Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015). But see, Merges, *Against Utilitarian Fundamentalism*, *supra* note 57. The utilitarian approach draws in part on theoretical and philosophical justifications for granting private property protection, in general. The details of the theories that justify private property are beyond the scope of this dissertation (See, e.g., PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 5 (1996)), as are those of the scholarly debate on the question of whether or not justifications taken from the world of tangible private property are applicable to IP, and *vice versa* (Cf. MERGES, *supra* note 647, at 4). However, the argument furthered in this dissertation, and the examples presented, are in line with Becker’s assertion that reality may teach us that we must ascribe greater weight to realistic, behavior-based approaches and to the empirical results of private property protection. See Lawrence C. Becker, *Too Much Property*, 21 PHIL. & PUB. AFF. 196, 206 (1992) (“perhaps we should dispense with the search for a deep justification for property rights ... and focus on the behavioral surface: the observed, persistent, robust behavioral connections between various property arrangements and human well-being, broadly conceived.”)

⁶⁵⁷ See, e.g., YOCHAI BENKLER, *supra* note 96. For more on the assertion that historically, in general, creators do not engage in creation because of the proprietary protection of copyrights, see WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 67–68 (2009).

⁶⁵⁸ The roots of the deontological approach could be found in John Locke’s notions known as the “labor theory of property.” Under that approach, the natural right of a person to the fruits of her labor is based on the idea that, just as her body is her own, so are her creations. The invention or creation that one fashions and creates with one’s hands and mind is also one’s property. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, ch. ii, 134–438 (Peter Laslett ed., Cambridge Univ. Press, 2nd ed. 1988) (1689); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1992), Cf. MERGES, *supra* note 647, at 32 and LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007).

⁶⁵⁹ Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891 (2005).

⁶⁶⁰ According to personality-based theories, the creative work, being as it is an expression of one’s personality, endows the creative author with control over the creation’s fate. Hughes, *supra* note 643, at 330. One finds an instance of this provision in Instagram’s terms of use, which enables the platform to commercialize the images produced by the *adherents-creators*. For more on this issue, see *supra* note 636.

practice is justified.⁶⁶¹ The proposed solution forces us to engage in a moral-deontological debate that acknowledges the creator's autonomy, in a manner that, as Merges put it, "[allows] individuals to control the works they create."⁶⁶²

But the proposed solution also incorporates other theories. Some recent cases indicate that courts have begun to consider rival theories in deciding IP issues.⁶⁶³ The utilitarian approach begun to give way to personality-focused approaches on the one hand, and culturally-focused approaches on the other, approaches that acknowledge the significant role of the public domain, not only as the recipient of the creative work, but also as a generator of meaning.⁶⁶⁴ This shift mandates a pluralistic approach to the purposes of IP laws, which fosters a theoretical discourse that relies on a broad assortment of theories, and on the existence of a dialogue and interrelationships between policies.⁶⁶⁵ The proposed solution allows us to readily incorporate such a pluralistic approach. Being as it is a flexible and balances-based tool, it not only encourages, but requires, a discourse of purposes.

Moreover, even without agreeing on the foundational justification for each particular result, be it utilitarian, deontological or dialogical, Unconscionability 2.0 invites debaters to meet on "common space" or a "place of engagement",⁶⁶⁶ since it operates on the doctrinal level on which consensus can be found as to the "operational details of the IP system",⁶⁶⁷ while putting aside foundational disagreements.⁶⁶⁸

IP boilerplate, and in particular the adherent-creator type of contract, present us with issues and difficulties whose solution mandates a broad, purposive approach. For example, in the case of user-generated content, some claimed that because of the personhood and personality-based motivations to engage in these creations that reflect one's identity, there is a need to evaluate users' waivers of copyrights in their creations in ToU on a spectrum, "where rights that are more personal are harder to alienate and subject to stricter judicial scrutiny".⁶⁶⁹ Unconscionability 2.0 can accommodate this type of nuanced analysis.

This can also be demonstrated by the problem of the student-creator. Many policies define the term "College Resources" exceedingly broadly, so as to allow the institution to secure (and appropriate) as many creations as possible. For example, Seminar Hakibbutzim's

⁶⁶¹ It could be argued that given the vast knowledge maintained by academic institutions, they could make the creations and patents accessible to the public in a more proper fashion.

⁶⁶² MERGES, *supra* note 647, at 289.

⁶⁶³ See, e.g., *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. Cal. 2015) (citing *NIMMER & NIMMER*, *supra* note 424, at § 19E.04[B]) ("[F]ree access to ideas is vital not only for copyright law but also for the maintenance of the democratic dialogue"). In Israeli law, see *CA 5097/11 Tlran Communications (1986) Ltd. v. Charlton* (Sept. 2, 2013).

⁶⁶⁴ See, e.g., CRAIG, *supra* note 106, at 3 and Zemer, *Dialogical Transactions*, *supra* note 106. See also DRASSINOWER, *supra* note 52, and ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998). In Israeli copyright law, see, e.g., Judge Michal Agmon-Gonen's decision in the Premier League case. See OCR (TA District) 11646/08 *The Football Association Premier League Limited v. John Doe* (Sept. 2, 2009).

⁶⁶⁵ Cf. Merges, *Against Utilitarian Fundamentalism*, *supra* note 57.

⁶⁶⁶ MERGES, *supra* note 647, at 10.

⁶⁶⁷ Merges, *Against Utilitarian Fundamentalism*, *supra* note 57, at 706.

⁶⁶⁸ *Id.* In Merges terms argumentation on the application of Unconscionability 2.0 can operate on "levels 1 and 2 without the need for deep agreement, all the way down to level 3". *Id.*

⁶⁶⁹ Storella, *supra* note 83, at 2048 (explaining that if the personal nature of a work implicates personhood concerns a stricter scrutiny for users' waivers is required).

Policy stipulates that these resources include “all of the resources made available to the students by the College, including instruction and teaching sessions, as well as physical means and resources.”⁶⁷⁰ Therefore, a student who has read the policy, and who wishes to retain her IP rights, will most likely avoid conversing with other students or teachers, be it in class or elsewhere at the college, about her potential ideas for creations or inventions. Such provisions are detrimental to IP purposes, not only on utilitarian grounds, but because they inhibit the sort of interpersonal interactions that serve as the breeding ground for intellectual activity.⁶⁷¹ Furthermore: they prevent the basic dialogue on which human creativity is founded.⁶⁷² Unconscionability 2.0 would void such terms, not only because they fail to provide adequate incentives for creators, but also because they fail to encourage discourse and a healthy exchange of ideas and opinions.⁶⁷³

iii. The Adoption of Unconscionability 2.0 in U.S. Law

Thus far I have presented Unconscionability 2.0 and its advantages as a solution that originates from the Israeli purposeful approach to unconscionability. Indeed, the proposed solution originates in Israeli law, it is derived from Israeli Standard Contracts law, and it is heavily predicated on Israeli precedents that shaped the unconscionability doctrine in a manner that is distinctly different from the manner in which the U.S. doctrine of unconscionability is currently interpreted. Thus, this solution is particularly well suited to the State of Israel—and as previously demonstrated, in Israel too, IP boilerplate create problems that certainly merit attention.

But the Israeli solution can also be implemented in U.S. law. As demonstrated in the previous chapter, the doctrine’s inefficacy as a solution to the IP boilerplate problem is chiefly caused by a formalistic consumer-oriented interpretation.⁶⁷⁴ The legislative history of the U.S. unconscionability is extensive; a full account of such history is beyond the scope of this chapter. However, a brief review discloses no fundamental principles that would appear to prevent the implementation of the proposed solution by U.S. courts. And as mentioned, the Restatement also accommodates a broader application of unconscionability.⁶⁷⁵

As Leff has noted in his monumental article on the doctrine, the intentions and concerns of the drafters of the U.C.C. unconscionability doctrine were not solely affected by the issues of power inequality, bargaining power, and “the opportunity to read.” The situation was quite

⁶⁷⁰ *Seminar Hakibbutzim’s Policy*, *supra* note 641, at 56 (translated from Hebrew).

⁶⁷¹ Lior Zemer, *Towards a Conception of Authorial Knowledge in Copyright*, 3 *BUFF. INTELL. PROP. L.J.* 83, 85 (2006) (claiming that “[m]anifestations of authorial knowledge, however, are socially and culturally constructed. They are not created from thin air and are products of social interaction and collective cultural collaborations.”)

⁶⁷² *See*, Zemer, *Dialogical Transactions*, *supra* note 106. *Cf.* DRASSINOWER, *supra* note 52 (suggesting a communicate account to copyright).

⁶⁷³ *Cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283 (1996) (proposing a democratic paradigm to copyright).

⁶⁷⁴ *See also*, in the contractual context, Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 *LA. L. REV.* 123, 152 (2005): “Courts emphasize the flexibility of the concept, but remain centered on the concepts of unfairness in the bargaining process and unfairness in the result reached by the bargaining parties.”

⁶⁷⁵ *See* the discussion in ch. III(A) “Why Unconscionability?”.

the contrary: “No doubt the overall drift of the section was that contracts ought to be ‘fair and balanced’ no matter how the parties bargained.”⁶⁷⁶

The purpose of the U.C.C. section on the unconscionability doctrine, it was argued, was to replace unconscionable terms with more balanced and fair ones—according to the specific needs of the transaction or the trade in question.⁶⁷⁷ Therefore, even if the adherent is completely conscious, and the parties have engaged in negotiations (in other words, there has been “considered and deliberate action”),⁶⁷⁸ if the outcome of the contract is unbalanced or unfair according to the needs of the relevant trade, it would not be enforced.⁶⁷⁹ Under this perception, not only provisions that “shock the conscience” are invalidated.⁶⁸⁰ Indeed, the Official Comments to the U.C.C. set a high substantive and procedural bar for Unconscionability,⁶⁸¹ that courts followed. But as the recent Restatement suggest,⁶⁸² and Deutch claimed 40 years ago, such comments should be put in context: “[i]t would be wrong to regard the Official Comments as more than a general explanation only partially covering the scope of the doctrines.”⁶⁸³ Since then scholarship has showed, on multiple occasions, that unconscionability could be used to serve its purpose and should be better aligned with the its origins.⁶⁸⁴

The starting points of the Israeli and U.S. unconscionability doctrines are similar—they both give the courts the prerogative to incorporate, and shape the concept of unconscionability, and by so doing to invalidate unconscionable provisions.⁶⁸⁵ Just as the Israeli legislature was among the first to comprehensively tackle the issue of traditional standard form contracts, so could an Israeli judge be the first to assume a more proper doctrine for dealing with IP boilerplate. Or, to put it in more modest terms, even if it is unlikely that U.S. case law would

⁶⁷⁶ Leff, *supra* note 342, at 491. *See also id.* at 490 (“[T]here were hints that perhaps there were some contracts or clauses which, under the general rubric of ‘unconscionability,’ would not be enforced regardless of what the bargaining process was like.”).

⁶⁷⁷ *Id.* at 490.

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *See supra* note 352. *See also* James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 172 (2003) (“If the American system is less ambitious than its European counterparts and is largely limited to striking down terms that ‘shock the conscience,’ it has not been by design. When American legislatures enacted U.C.C. section 2-302, they adopted a provision that its drafters hoped would allow American courts to develop ‘machinery’ for ‘policing’ contract terms.”)

⁶⁸¹ *See supra* note 342.

⁶⁸² Although not explicitly acknowledging that, the Restatement did reformulate the doctrine and effectually lowered the thresholds. *See* ch. III(A) “Why Unconscionability?”.

⁶⁸³ SINAI DEUTCH, UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY 55–56 (1977).

⁶⁸⁴ *See* Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011 (2014).

⁶⁸⁵ For a similar argument in the context of German courts, *See* Maxeiner, *supra* note 680, at 172–73. The author argues that Germany enjoys a notable advantage in seeking to develop the doctrine, owing to the fact that “it has one Supreme Court that could and did develop and direct evolution of judge-made law,” and because relevant legislation that governs the German doctrine of unconscionability is established at the federal level. Similar advantages exist in Israel Law. The author further mentions the Achilles heel of the U.S. method in this context, which has led to the formalistic approach to unconscionability, in his opinion, is that in the U.S. legal system, “fifty different courts are the sources for interpretation and application of [Section 2-302].” *Id.*

ever replace its approach to the doctrine with the proposed solution, Unconscionability 2.0 would at least help demonstrate how things could be different. Maxeiner explains:

Reform begins with the conception that things can be otherwise. . . . Reform of existing law is limited by one's ability to conceive of alternatives. Through examination of how other legal systems treat similar problems, one can not only conceive of new alternatives, one can see how they work. One need not adopt or even adapt foreign models to learn from them; comparative examination puts one's own law in a critical light.⁶⁸⁶

IP doctrines, such as preemption, misuse and exhaustion, are not the only solutions that may be employed to prevent the enforcement of unconscionable terms that undermine IP policies. The fact that IP laws are usually applied at the federal level should not affect the efficacy of state doctrines, when they serve to protect the purposes of IP laws. On the contrary, "state IP policies are entitled to just as much deference as any other state public policy, and perhaps as much as federal policies."⁶⁸⁷ However, the fact that IP laws are usually applied at the federal level should also not affect the efficacy of the contractual doctrines applied at the state level in order to protect the purposes of IP laws. In 1999, Lemley observed that there are two categories of rules applied at the state level that restrict the freedom of contract, when it comes to software contracts.

State law and public policy also place limits on the freedom of contract afforded in state contract law. These limits are of two types .First, contract law itself typically will refuse to enforce certain types of contract terms, such as those that are unconscionable A second set of state law public policy restrictions on contractual freedom comes from sources external to contract law, such as state intellectual property statutes or decisions.⁶⁸⁸

These categories should not be viewed as distinct from one another. I've showed that courts have already invoked IP policies while considering "core" contractual questions of contract interpretation, infringement, and enforcement.⁶⁸⁹ There is no reason why we should regard the existing solutions in contract law as diametrically opposed to the solutions found in IP laws. The fact that "there [is] still plenty of room for contract law to operate"⁶⁹⁰ does not perforce mean that "its operation will not be unfettered by intellectual property policy."⁶⁹¹ While it could be claimed that most of de facto IP regulation is conducted via boilerplate, and not negotiated contracts or law, we have yet to devise a tool that operates exactly in that realm. In the absence

⁶⁸⁶ *Id.* at 175. Maxeiner criticizes the flawed development of U.S. unconscionability from a consumerist perspective, relying on conclusions from German law and European directives. In an age of global electronic commerce, he argues, the U.S. unconscionability cannot prevail in its present form. *Id.* at 175–76: "For more than forty years the United States has denied itself the benefit of foreign experiences with standard terms... Today, thanks to global electronic commerce, European and other foreign standard terms law are on American laptops. And American licenses are on European laptops. The United States can afford to ignore foreign law no longer."

⁶⁸⁷ Lemley—*Beyond Preemption*, *supra* note 47, at 167.

⁶⁸⁸ *Id.* at 163–164.

⁶⁸⁹ *See, e.g.*, the discussion in *Disney, WireData* and more generally ch. II(F) "A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox".

⁶⁹⁰ Lemley—*Beyond Preemption*, *supra* note 47, at 151.

⁶⁹¹ *Id.*

of such tool courts have resorted to creative solutions, adapting misuse to address the gap. Meanwhile, scholars have long suggested (and continue to suggest) that “we need a copyright and contract [to] work better together, towards a more copyright-contract-centric lex,” one in which “freedom of contract needs to be in check.”⁶⁹² But the Restatement brings about a new opportunity to use an existing doctrine to that effect, with a refreshing view that aligns (as much as possible) unconscionability with its normative purpose. Moreover, as Beh explains, the animated debates around unconscionability of arbitration clauses have revived the judicial application of unconscionability in the United States. This awakening, Beh asserts, “reveals that, at least with regard to arbitration, judges have reached a tipping point”.⁶⁹³ Knapp also joins this view, suggesting “a possibly wider and more significant role for the concept of unconscionability as the new century unfolds.”⁶⁹⁴ I propose this role includes a more prominent impact in the realm of IP, through Unconscionability 2.0.

iv. Unconscionability 2.0 in Negotiated Contracts and Between Sophisticated Parties

Under Israeli law a term that is negotiated for a specific transaction, in a specific contract, and agreed upon by the parties is explicitly excluded from the application of the law of Standard Form Contracts and the doctrine of unconscionability.⁶⁹⁵ The law specifically requires both parties to consent to such excluded term. This definition has not been tested in courts because in cases that involve a term that undermines public policy, courts have been using another purposeful and robust mechanism under Israeli contract law: the public policy exception, while some cases cited both doctrines to void an unconscionable term.⁶⁹⁶

Ad hoc negotiated contracts could also include terms that undermine and displace IP policies. The best example is the long tradition of misuse cases involving sophisticated commercial parties in negotiated licenses.⁶⁹⁷ Another example is the rights of authors, freelancers, and artists that are often coerced in negotiated contracts, in which the adherent has very little (but some) negotiating power.⁶⁹⁸

In this context it is important to draw a clear distinction between a negotiated contract and boilerplate offered to sophisticated parties who may use the product for commercial and business purposes and other boilerplate. Sometimes the same boilerplate is offered to users in the market, and the user just happens to be a sophisticated player. That was the case in *Disney*, *Lexmark*, *ProCD*, and the Israeli case of *Jobmaster*. Sometimes the boilerplate is offered on a take-it-or-leave-it manner only to businesses. In both cases, under the Israeli approach and the proposed Unconscionability 2.0, there is no reason not to apply unconscionability. The same approach could be applied in U.S. law: Under the Restatement, “[a] finding of procedural unconscionability based solely on the fact that a contract was in standard, non-negotiable form, without more, constitutes the lowest quantum of procedural unconscionability and would have

⁶⁹² D’Agostino, *supra* note 51, at 29.

⁶⁹³ Beh, *supra* note 684, at 1033.

⁶⁹⁴ Knapp, *supra* note 365.

⁶⁹⁵ See section 2 defining “term” as a “term in a standard form contract ... except a term that the parties agreed upon especially for a specific contract”.

⁶⁹⁶ *Kadisha*, *supra* note 597.

⁶⁹⁷ See, e.g., *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124 (U.S. 1938).

⁶⁹⁸ D’Agostino, *supra* note 51 (discussing the case of coerced freelancers in creative industries).

to be matched with a high degree of substantive unconscionability to render the contract or term unenforceable”.⁶⁹⁹ In this case, the main concern is not the level of the parties’ sophistication but rather whether the terms are offered on a take-it-or-leave-it basis and their salience.

More importantly, even if the adherent is a so-called sophisticated party, terms could be nonsalient, because there is no market competition over the quality of such terms that could discipline the drafter, because there is no “market” for these specific terms (as opposed to the warranty, price, etc.). In IP, each and every innovation or creation is unique and often so is the market the comment on, use, resell, tinker with, perform fair use on the work or innovation, and the externalities created by over-monopolization of such work.⁷⁰⁰

Can Impression Products “shop” for better post-sale restrictions (or a contract with no post-sale restrictions at all) in the “contractual market” and still perform its function as a facilitator of a meaningful secondary market for the world’s most popular printers without supporting Lexmark’s (or HP’s) printers? Should creators be barred from using YouTube or Spotify and instead forced to use “competing,” smaller platforms that limit exposure and access to their work? And should a company seeking to perform reverse engineering for interoperability purposes just find another product to work with, because that product’s EULA is more favorable? Can an admitted student apply to a different university, because it has more favorable IP licensing terms that do not appropriate her work?

It follows that in most cases IP subject-matter terms are nonsalient *ab initio* because of the nature of the rights they seek to control. These contracts reflect a situation in which “external circumstances (not created by the business) [] compelled consumers to execute the contract” and consumers “are compelled to transact with the business regardless of the standard contract term.”⁷⁰¹ Moreover, if all the drafters in a relevant market (even if we could identify such a market) have “similar pro-business terms,” “that does not negate a finding of procedural unconscionability” as long as the term does not affect the decisions of a large group of consumers.⁷⁰²

This suggests that since the procedural prong of unconscionability is addressed through the consideration of salience, the focus of the inquiry should be the substantive prong: in which the level of sophistication of the parties is less of a concern, and there is no reason why not to consider the relevant IP policies at hand. Moreover, under a sliding-scale approach, a higher “quantum” of substantive unconscionability could be inferred in cases where public policy considerations are undermined, which is often the case in IP.

Still there is a catch. The Restatement and the U.C.C. Doctrine of Unconscionability both follow a different definition of adherent, one that is limited to consumers, in their traditional sense: “[a]n individual acting primarily for personal, family, or household purposes”.⁷⁰³ Courts would be reluctant to apply unconscionability in cases involving sophisticated parties. In this context I would argue that differentiating between consumers and commercial parties makes little sense from both a contract and IP perspective.

⁶⁹⁹ See The Restatement, *supra* note 33, at 80.

⁷⁰⁰ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

⁷⁰¹ The Restatement, *supra* note 33, at 82.

⁷⁰² *Id.* at 81.

⁷⁰³ *Id.* at 8, 14. See also the definition used under the U.C.C § 2-104 (AM. LAW INST. & UNIF. LAW COMM’N).

From a contract perspective, as some scholars claim, a standard form contract offered to a small business could exhibit the same asymmetric disparities of a consumer contract.⁷⁰⁴ Small businesses cannot simply negotiate a contract just because the product is offered to a business, rather than a household, use. Also, consumers are not affected by IP policies in the same manner as are businesses and expecting them to “make decisions” based on the quality of these terms in a manner that polices the term is unrealistic. In any event, in most cases the boilerplate in question is in fact a “consumer contract” (it is offered also to consumers, even if these consumers are not the litigants in the case brought to the court), and therefore courts should assume terms are nonsalient.

From an IP perspective, this distinction does not bring us closer to disciplining IP boilerplate and preventing their abusive effects. That is perhaps why courts seem to be in need of a more nuanced tool to allow them to refuse to enforce mass-market terms in some cases involving commercial parties (like Disney, Baystate, or Lexmark), and reach different results in other cases. Because Unconscionability 2.0 enables the court to consider the servitude-like nature of a term and its salience as part of its application, it serves as that tool, where the traditional doctrine of misuse could be used to police negotiated egregious contracts on a case-by-case basis.⁷⁰⁵ Most importantly Unconscionability 2.0 could be used to refuse enforcement of the contract, not just as a defense from copyright or patent infringement. The distinction between misuse and Unconscionability 2.0 becomes clearer when considering a more proactive and robust application of unconscionability than is currently available in the United States, one that is proposed in the following chapters.

v. Unconscionability 2.0 in “Unconscionable Technology”

In previous chapters I identified how design and technology can operate as a de facto boilerplate displacing IP policy or limiting users’ and creators’ rights in an unconscionable (2.0) manner. How should Unconscionability 2.0 be applied in these situations? One could argue that the deployment of a restrictive technology could be challenged in court on the basis of Unconscionability 2.0. First technology or designs or almost exclusivity offered in the market on a non-negotiable, non-tailored, take-it-or-leave-it manner which is nonsalient and opaque “by design”.⁷⁰⁶ Consumers cannot police the “quality” or “scrutinize” technology and should not be expected to understand the complex limitations and restrictions that technology invokes because of their bounded rationality and the costs associated with understating said technology.

Put simply, if we do not expect (for the purpose of unconscionability and salience) “rational”⁷⁰⁷ consumers to read contractual terms in plain English or “legalese” how can we expect them to evaluate the implications of complex restrictive technologies—let alone algorithms and “black boxes” that experts do not understand—,⁷⁰⁸ on their (also complex) legal

⁷⁰⁴Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295 (2005).

⁷⁰⁵ See also ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox”.

⁷⁰⁶ See RADIN, *supra* note 1, at 48.

⁷⁰⁷ In terms of behavioral economics considerations.

⁷⁰⁸ Jenna Burrell, *How the Machine ‘Thinks’: Understanding Opacity in Machine Learning Algorithms*, 3.1 BIG DATA & SOC. 1 (2016); see generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015). Still it could be claimed that since the limiting effects of TPMs and DRMs are immediately noticeable to the user, they are relatively

IP rights, at the point in time they click “I accept,” prior to engaging in a transaction, and sometimes prior to using the technology or device at hand. The answer is that we probably cannot rely on users to police the quality of technological boilerplate (its “salience”). In fact, empirical research suggests consumers often fail to grasp the implications of using different technologies (like “Kindle”) on their users’ rights.⁷⁰⁹

This presumed level of procedural unconscionability is even higher than a traditional boilerplate and implies a lower quantum of substantive unconscionability is needed under a sliding-scale approach. Since the results of the deployment of technology coupled with stringent enforcement on all users (as opposed to contract language, which is rarely enforced) is more detrimental to IP policies, a greater quantum of substantive unconscionability could be found as well. This combination of terms and unconditioned enforcement also causes unconscionable technology to affect companies and users more adversely than boilerplate.

Consider the researcher, or even a commercial entity, who seeks to scrape a website for fair use matters, perform reverse engineering for security research, or simply repair a product or otherwise access it for usability or interoperability purposes. Since TPMs, DRMs, and a variety of other technical barriers are deployed to prevent her from doing so, not just contractual language, a researcher is “forced” to circumvent a technological barrier,⁷¹⁰ a practice that in the best case is exempted from the DMCA anti-circumvention provisions but may still give rise to potential CFAA liability, only to exercise a right given to her by law.⁷¹¹

more salient compared to contractual buried terms. The salience of technology could vary by case and type of rights concerned.

⁷⁰⁹ Perzanowski & Hoofnagle, *supra* note 101. *See also* Mulligan, Han, & Burstein, *supra* note 156, at 30 (exploring DRM behavior of six music, and two film online distribution services and finding that “the services examined do not accord with [consumers’] expectations of personal use”).

⁷¹⁰ Or an authentication barrier like in the matter of *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005) (whereby a maintenance company bypassed a password barrier to repair an automated data storage machine).

⁷¹¹ Certainly, under the broader “contract-based” interpretation of U.S.C. 18 §1030(2)(a), adopted in some Circuits under which a violation of contracts “exceeds” authorization (*see, e.g.*, *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); *United States v. John*, 597 F.3d 263 (5th Cir. 2010)), but even under the narrower interpretation focusing on technical barriers (*see United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)). This specific matter of scraping under the CFAA is now debated in two critical cases, in the matter of *Sandvig v. Sessions*, 2018 U.S. Dist. LEXIS 54339 (D.D.C. March 30, 2018) and *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099 (N.D. Cal. Aug. 14, 2017), appeal docketed, No. 17-16783 (9th Cir. Sept. 6, 2017). In *Sandvig* the facts presented to the court resembled to some extent to our hypothetical scenario. In effort to provide more legal clarity for algorithmic auditors, the ACLU joined forces with auditors from academy and a media organization, to directly challenge the CFAA in the realm of auditing, in which researchers scrape and use “IP rotation” and other measures to by-pass technological measures. The court interpreted the CFAA narrowly noting that scraping a website, that is otherwise open to the public (does not require authentication), while using bots or crawlers, is not a CFAA violation even if it is in violation of ToS (and usually, it is). *See Sandvig v. Sessions*, 2018 U.S. Dist. LEXIS 54339 (D.D.C. March 30, 2018), at *48 (“scraping or otherwise recording data from a site that is accessible to the public is merely a particular use of information that plaintiffs are entitled to see. The same goes for speaking about, or publishing documents using, publicly available data on the targeted websites. The use of bots or sock puppets is a more context-specific activity, but it is not covered in this case. Employing a bot to crawl a website or apply for jobs may run afoul of a website’s ToS, but it does not constitute an access violation when the human who creates the bot is otherwise allowed to read and interact with that site.”)). The Court in *hiQ* reached the same conclusion (now pending appeal in the Ninth Circuit) (*see hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d, at 1114 n.12).

This shift of legal liability and the chilling effect created by the potential application of anti-hacking laws, beyond contract law and the mere costs of finding the “suitable key” to unlock the digital lock to engage in protected activity should be taken under account in the unconscionability analysis. Indeed, I would claim this provision amounts to the “expansion of the consumer’s liability” and thus is substantively unconscionable.⁷¹² In this respect applying unconscionability would resemble the application of a broader “anticircumvention misuse”, that does not require copyright infringement necessarily, but allows a more nuanced look into the consumerist implications of the case.⁷¹³

Can courts “void” a design and issue an order requiring a company (or an entire sector) to stop deploying a certain “unconscionable” technology? Can society regulate design and code as it regulates (or better yet should regulate) contract? If design is regulating, and “code is law”⁷¹⁴ or at least boilerplate,⁷¹⁵ then I would claim that we certainly should and perhaps we could.⁷¹⁶ Courts have been willing to issue “technological” remedies,⁷¹⁷ and have suggested that the deployment of a certain technology amounts to copyright misuse in some cases.⁷¹⁸ Technology and algorithms have been the subject of civil litigation on multiple grounds, from discrimination to deception under Section 5 of the FTC Act.⁷¹⁹

Recently one court in California issued an order preventing LinkedIn from deploying technological measures that limit its competitor, hiQ, from scraping the publicly accessible portions of the LinkedIn website, and ordered LinkedIn to remove any existing barriers within twenty-four hours.⁷²⁰ Secondary creators, researchers, companies, and nonprofits can seek declaratory relief that their access or use to technology is protected under the antitrust grounds or First Amendment, is fair use, does not violate anti-hacking laws such as the DMCA and the CFAA, or that technology used amounts to copyright or patent misuse, or an antitrust

⁷¹² See The Restatement, *supra* note 33, at 76.

⁷¹³ Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1131 (2003).

⁷¹⁴ LESSIG, *supra* note 119.

⁷¹⁵ RADIN, *supra* note 1, at 46–51.

⁷¹⁶ Radin suggests that TPMs operating as boilerplate could be regulated under tort law and product liability as well. *See Id.* at 199.

⁷¹⁷ For an overview see Mulligan & Bamberger, *supra* note 263. *See also* Maayan Perel Filmar, *Technological Reliefs: The Devil is in the Technological Details* (Mar. 18, 2018), <https://ssrn.com/abstract=3143039>.

⁷¹⁸ *See, e.g.,* Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 645 (7th Cir. Wis. 2003).

⁷¹⁹ One of the very early cases involved SABRE, a system geared to enable airline agents instantaneous flight reservations. The system prioritized in display the flights provided by its airline creators (although it dominated the travel market more generally). The court found that “[t]he biasing of computerized reservation systems is a problem of deception.” *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1113. For an overview of more recent cases see AI Now, *Litigating Algorithms* (Sept. 24, 2018), <https://ainowinstitute.org/announcements/litigating-algorithms.html>.

⁷²⁰ *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d, at 1120. The court also clarified (although in preliminary hearing) that such bypassing is not a violation of the CFAA (“hiQ’s circumvention of LinkedIn’s measures to prevent use of bots and implementation of IP address blocks does not violate the CFAA because hiQ accessed only publicly viewable data not protected by an authentication gateway.”). *Id.* at 1113, citing Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143, 1170 (2016).

violation.⁷²¹ Adherents can seek declaratory relief that a certain contract is unenforceable as unconscionable, and a few courts have even entertained the possibility that unconscionability could be an affirmative cause of action, one that may even entitle the adherent to restitution.⁷²² This suggests that potentially consumers can perhaps seek a declaratory relief that a certain technology or an algorithm, operating as boilerplate, is in fact unconscionable.

B. *A Robust Vision for Unconscionability 2.0*

i. Presumptions of Unconscionability 2.0

One of the key shortcomings of unconscionability and other equitable defenses is that they are costly to litigate, and impose the burden of proof on the adherent (or defendant in the context of misuse).⁷²³ As a litigation-based tool, unconscionability could not serve as a comprehensive solution to this problem nor will it fully internalize the costs that harmful appropriating contracts impose on society. Scholars have recognized this specific potential shortcoming of unconscionability also in the context of private ordering and IP, noting that relying on a few users to bring suits that will shape policies is, in general, problematic.⁷²⁴

Yet case law, including landmark and strategic litigation, has always been instrumental to the adaption of IP laws, as technology has developed and new challenges have presented themselves. That has been the case in critical junctions of IP, such as fair use, first-sale, preemption, misuse, and copyrightability of software.⁷²⁵ Sometimes it even involved the “little guy or gal” challenging well-resourced giants, supported by amici from nonprofit organizations and academia.⁷²⁶ In the context of unconscionability, much like fair use, establishing precedent

⁷²¹ See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (exploring DMCA and antitrust issues), in the context of CFAA, DMCA and first amendment: *Sandvig v. Sessions*, 2018 U.S. Dist. LEXIS 54339 (D.D.C. March 30, 2018) and *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099 (N.D. Cal. Aug. 14, 2017). See also in the context of fair use, THE COPYRIGHT OFFICE, *supra* note 21.

⁷²² For an overview of cases and discussion see Beh, *supra* note 684, at 1024, n.64. The case discussed is *In re Checking Overdraft Litigation*, 694 F. Supp. 2d 1302 (S.D. Fla. 2010), in which the court allowed the consumer to pursue an unconscionability claim and seek restitution damages recognizing that since “the bank [drafter] is never required to file suit because it is already in possession of the customer’s money, and simply collects the fee by debiting the customer’s account ... the customer never has the opportunity to raise unconscionability as a defense for nonpayment.” *Id.* at 1318–19. But see The Restatement, *supra* note 33, at 86, noting that an “unconscionability claim can be made by the consumer as a plaintiff, if, for example, an unconscionable charge was already collected by the business, and the consumer is suing to recover it. In this procedural posture, it is sometimes said that the unconscionability claim is used as a ‘sword.’ This description is misleading. The unconscionability claim is used to challenge the business’s exercise of an alleged contractual right, as in the traditional ‘shield’ cases. A true ‘sword’ application would arise if the consumer has a cause of action for the mere inclusion of an unconscionable term in the contract.”

⁷²³ See the discussion in ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox”. See also Pallas Loren, *supra* note 50; RADIN, *supra* note 1, at 128–30.

⁷²⁴ *Id.*

⁷²⁵ See, e.g., Menell, *This American Copyright Life*, *supra* note 62. See also Menell, *Rise of the API Copyright Dead?*, *supra* note 130.

⁷²⁶ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008).

on a case-by-case basis could influence all segments of boilerplate, bringing a sea change to a specific industry and its abusive practices.

Yet there are ways to reformulate unconscionability into a more effective tool, by imposing the burden of proof on the drafter, and potentially shifting the cost of litigation as well. According to this principle, adopted under Israeli law, if a term in a standard form contract meets the criteria of unconscionability presumptions, the burden of proof is borne by the drafter, who must prove that, in view of the contract as a whole and its particular circumstances, the condition in question is justified and reasonable.⁷²⁷

In the United States, a few states have enacted unfair and deceptive practices statutes adopting this principle, setting forth factors that are presumed to be unconscionable.⁷²⁸ The U.C.C. also incorporates presumptions of unconscionability.⁷²⁹ So does the Restatement to a limited extent.⁷³⁰ Still these presumptions are used narrowly and in egregious cases.⁷³¹ They serve to codify existing case law, as opposed to setting a policy agenda for what is normatively desired, taking into consideration the litigation costs imposed on consumers. Moreover, the ALI Principles of Software Contracts adopted a limited “gray list” of terms that should be looked at with suspicion as part of the unconscionability analysis, yet as explained, that list is focused more on matters of contractual unfairness, and less on matters of IP abuse.⁷³²

In a contrary manner, Israel has taken a proactive approach to unconscionability, adding multiple presumptions to the law to set a policy agenda of deterrence, setting new limitations on what drafters may do with contract. The new amendment introduced on 2014 to the Standard Form Contracts Law for example, did not seek to codify or restate existing case law—but rather to expand the list of prima facie voidable terms, enabling consumers to swiftly resolve cases.⁷³³ As such, under Israeli law, among others, arbitration clauses, or other terms that limit the consumer’s available remedies or rights under law are presumed to be unconscionable.⁷³⁴

How can presumptions of Unconscionability 2.0 advance IP policies? Presumably one potential doctrinal solution would be including a presumption whereby a term in an IP boilerplate that limits, restricts, or conditions a right (or privilege) assigned to the user or the creator under IP laws (a statutory right), is presumed to be unconscionable—shifting the burden to the drafter to show otherwise. For example, a term resulting in the transfer or assignment of ownership over IP rights that are bestowed upon the original creator, who is also the adherent, would be presumed to be unconscionable. Another example would be a term that implicitly restricts a use that is fair. The list of terms that are presumed to be unconscionable could further mirror terms that were found to constitute misuse, or preempted.

This proposal seeks to remedy the previously critiqued interpretation proposed by the *Baystate* court decades ago to a guiding principle that courts invoke when considering whether to enforce a statutory waiver. According to this principle waivers are enforceable only when

⁷²⁷ See ch. IV(B)(i) “Presumptions of Unconscionability 2.0”.

⁷²⁸ See, e.g., Ohio Rev. Code § 1345.031; Mich. Comp. Laws § 445.90.

⁷²⁹ U.C.C. § 2-719(3) (a term that limits business liability to death or personal injury of consumers).

⁷³⁰ The Restatement, *supra* note 33, at 88.

⁷³¹ *Id.* at 73 (Including limiting consumer’s remedies in personal injury cases or in cases the business was negligent).

⁷³² Section 1.11 of the ALI, PRINCIPLES OF THE LAW: SOFTWARE CONTRACTS (2010). At cmt. 1 the reporters state that § 1.11 “reproduces § 2-302 of the U.C.C”. See the discussion in ch. III(B)(ii) “The Chicken and the Egg: The Dismissal of Unconscionability in IP Scholarship”.

⁷³³ Israeli Standard Contracts Law, § 4.

⁷³⁴ *Id.* at §§ 4(6), 8.

the term at hand is concerned with “protection of the property rights of individual parties . . . rather than . . . the protection of the general public.”⁷³⁵ In other words “‘parties may waive statutory rights granted solely for the benefit of individuals,’ but rights enacted for the benefit of the public may not be waived.”⁷³⁶ It cannot be disputed that fair use is a right for the benefit of the public, one that serves a clearly identifiable public policy, as do the other limiting doctrines encompassing IP’s different modes, like the idea/expression, fact/expression and first-sale. Thus, this presumption views wholesale (as opposed to “knowing, intelligent, and voluntary”)⁷³⁷ waivers of IP with suspicion, in line with the commonly applied principles suspicious of other waivers of statutory rights.

In fact one court has already incorporated a similar vision under misuse, noting that a contractual term that causes users to “forego their statutorily-guaranteed right to distribute their physical copies of that same movie as they see fit” is an “improper leverage” of copyrights that “conflicts with public policy enshrined in the Copyright Act” and therefore “constitutes copyright misuse.”⁷³⁸ Arguably, presumptions of Unconscionability 2.0 would provide drafters with more certainty than the current regime under copyright misuse, by explicitly stating the legal regime and listing terms that warrant a higher burden of reasonableness (what Radin termed “gray listing”).⁷³⁹

Moreover, in the one case the Israeli Supreme Court was asked to decide if a term that conditions a dispositive statutory right, favoring the adherent, should be presumed to be unconscionable,⁷⁴⁰ while the general question remained unsettled, the Court did note that in circumstances where *multiple* provisions of *one* specific law were conditioned in a manner that negates a right given to the adherent under law, negatively affecting her position: the court should be more suspicious in its inquiry of unconscionability.⁷⁴¹

Indeed, similar solutions aimed at lowering litigation costs have been suggested by scholars in the context of misuse. Pallas Loren, for example, has that a term that implicitly restricts a use that is fair would shift the burden of proof.⁷⁴² More broadly Radin has suggested

⁷³⁵Canal Electric Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 548 N.E.2d 182 (Mass. 1990), at 378.

⁷³⁶ CSA 13-101 Loop, LLC v. Loop 101, LLC, 236 Ariz. 410, 412 citing Holmes v. Graves, 83 Ariz. 174, 178, 318 P.2d 354, 357 (1957) and Elson Dev. Co. v. Ariz. Sav. & Loan Ass’n, 99 Ariz. 217, 224, 407 P.2d 930, 935 (1965) (internal quotations omitted). *See also* California, DeBerard Properties v. Lim, 20 Cal. 4th 659, 661 (June 3, 1999): “It is true that a party may waive a statutory provision if the statute does not prohibit a waiver, the statute’s public benefit is merely incidental to its primary purpose, and waiver does not seriously compromise any public purpose that the statute was intended to serve”.

⁷³⁷ Bickel v. City of Piedmont, 16 Cal. 4th 1040, 1043 (Nov. 20, 1997).

⁷³⁸ *Id.*

⁷³⁹ RADIN, *supra* note 1, at 231–2.

⁷⁴⁰ *Cf.* CA 232/10 The First International Bank of Israel v. the Israeli Supervisor of Banks, para. 28 (Sept. 19, 2012) [hereinafter The First International Bank].

⁷⁴¹ *Id.* at para. 28.

⁷⁴² Pallas Loren, *supra* note 50, at 535. Similarly, the notion of Immunity under the recently adopted Whistleblower Immunity in the Defend Trade Secret Act entails a shift in the burden of proof, imposing the cost to prove that allowed disclosure of a trade secret was not in furtherance of an investigation of a potential violation of the law on the trade secret owner (18 U.S.C. § 1833(b)). *See* Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 37–43 (2017)

that terms that exclude users' rights (in the information made available to them) should be either subjected to "heightened scrutiny" (gray listed) or even deemed void (black-listed), depending on extent of "social dissemination of the clauses."⁷⁴³

ii. Creating an Affirmative Right of Action

Israel is considered a leader in policing unconscionable terms also because of its innovative judicial policing model adopted decades ago: the institutionalization of a special court designated for matters of standard form contract laws.⁷⁴⁴ The tribunal, mentioned in previous chapters, has authority to invalidate unconscionable terms or order that they be amended. The same authority is granted to any other civil court in Israel.⁷⁴⁵ But the tribunal is also granted broader authority: once the tribunal deems a term unconscionable (or amends the term thereof) the term is considered void (or amended) in the entire class of contracts offered by the same supplier.⁷⁴⁶

Moreover, consumer organizations and governmental bodies approved the by the Israeli Attorney General, or preapproved under specific regulations,⁷⁴⁷ as well as the Israeli Consumer Authority, can all petition to the tribunal, requesting the review of a certain standard form contract, seeking a declaration that a term is void or should be amended.⁷⁴⁸ The tribunal, can of course, impose all litigation costs on the drafter, as it sees fit.⁷⁴⁹

Finally, two of the twelve tribunal judges are designated representatives of consumer organizations, ensuring that consumers' organizations are not only able to bring contracts to the tribunal for approval and seek declaratory relief that a certain class of contracts, or their terms, are unconscionable; they also directly weigh in on decisions and how case law is shaped, from the judge's seat.⁷⁵⁰

Equipped with presumptions of unconscionability, Israel's comprehensive and purposeful application of unconscionability as a doctrine, and the tribunal's broad authorities, Israeli consumers and the organizations protecting them have a broad mandate to prevent drafters from enforcing unconscionable terms. While a similar regime could be suggested in the United States that would be probably an impractical proposal (since contracts are matters of state and not federal law).⁷⁵¹ Still there are some ways to bridge the gaps between U.S. and Israeli laws. First, as other scholarship suggests and some courts have as well, unconscionability could be reformulated as an affirmative cause of action.

Recently, Beh suggested a framework to "fortify and invigorate the unconscionability doctrine in order to promote contracting fairness in an era where one-sided, adhesionary contracts abound", explaining that "the actual language of section 2-302 does not insist that

and Peter S. Menell, *Misconstruing Whistleblower Immunity under the Defend Trade Secrets Act*, 1 NEVADA L. J. FORUM. 92, 94 (2017).

⁷⁴³ RADIN, *supra* note 1, at 230.

⁷⁴⁴ Section 6 of the 1982 Standard Contracts Law.

⁷⁴⁵ Section 3 of the 1982 Standard Contracts Law.

⁷⁴⁶ Section 18 of the 1982 Standard Contracts Law.

⁷⁴⁷ That have yet to be enacted.

⁷⁴⁸ Section 16(a) of the 1982 Standard Contracts Law.

⁷⁴⁹ Section 27 of the 1983 Standard Contracts Law Regulations (Isr.).

⁷⁵⁰ Section 6(d) of the 1982 Standard Contracts Law. This provision was added to the law on 2014.

⁷⁵¹ *Cf.* RADIN, *supra* note 1, at 227–229.

unconscionability be merely defensive.”⁷⁵² The author makes suggestions and surveys other scholarly proposals to resuscitate unconscionability. These include expanding unconscionability’s remedies to include restitution and reframing it as an affirmative cause of action, empowering courts to invoke unconscionability *sua sponte*,⁷⁵³ shifting the burden of proof, fee-shifting and even establishing a tort-based claim, a proposal that was recently explored by Radin as well.⁷⁵⁴ I agree with Beh and Radin that fine-tuning unconscionability could enable it to fulfill its purpose. I suggested that one such fine-tuning may include considering the policies of the contract at hand, in the application of the substantive unconscionability prong.

More concretely in matters of IP boilerplate, the arguments raised by Beh and other scholars stand on firm grounds. The costs on society imposed by contractors justifies a more lenient regime and stronger deterrents, including robust remedies. In IP, courts have been using fee-shifting in copyright misuse cases to impose costs on owners who abuse their monopolistic rights,⁷⁵⁵ and more generously to police abuse (sometimes amounting to “trolling”) of overarching patentees’ claims, including by non-practicing entities.⁷⁵⁶ They should be able to reach similar results in cases involving unconscionability. Consumer organizations and even administrative bodies entrusted with promoting consumer protection, like the FTC as well as bodies entrusted with promoting IP policies, such as the Copyright Office and the USPTO, should have an efficient procedure to bring forth IP boilerplate for judicial review, without relying on end-users or other entities to initiate litigation. At a minimum, boilerplate affecting a certain number of users or creators could be brought to review by these administrative bodies.

Transparency could be fostered by simply creating a database encompassing misuse, first-sale, and Unconscionability (2.0) cases affecting end-users and the language of the term in question (including a form of an accessible and searchable “black list” or “hall of shame”).⁷⁵⁷

⁷⁵² Beh, *supra* note 684, at 1023. As she explains “The distinction between defensive and offensive use is illogical and should be discarded because it may well result in only one of two similarly situated parties being unable to make use of the unconscionability doctrine.” *Id.*

⁷⁵³ An authority that according to Beh they hold under the U.C.C., although courts are undecided on the matter. *Id.* at 1028–30. *But see* The Restatement, *supra* note 33, at 86.

⁷⁵⁴ *Id.* at 1032–45. Radin brings forth a potential solution of a “tort of intentional deprivation of basic legal rights”. RADIN, *supra* note 1, at 198–99.

⁷⁵⁵ See, e.g., *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 695–6. See also 17 U.S.C § 505 (interpreted at *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994)), allowing the court discretion in awarding attorney fees to the prevailing party under certain standards.

⁷⁵⁶ *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), and Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C. L. REV. 1443 (2014). See also in the context of “Patent Trolls”, *Small v. Implant Direct Mfg. LLC*, 2014 U.S. Dist. LEXIS 154468, *9–10 (S.D.N.Y. Oct. 22, 2014) (“[T]he need for the deterrent impact of a fee award is greater where there is evidence that the plaintiff is a ‘patent troll’ or has engaged in extortive litigation. (citing *Lumen View Tech*, 2014 U.S. Dist. LEXIS 74209, 2014 WL 2440867 at *7 (S.D.N.Y. May 30, 2014)) and *Yufa v. TSI Inc.*, 09-CV-01315-KAW, 2014 U.S. Dist. LEXIS 113148, 2014 WL 4071902, at *4 (N.D. Cal. Aug. 14, 2014). See overview in Hannah Jiam, *Fee-shifting and Octane Fitness: An Empirical Approach Toward Understanding “Exceptional”*, 30 BERKELEY TECH. L.J. 611 (2015).

⁷⁵⁷ See, e.g., Michael, *infra* note 812, at 91–93 (suggesting to adopt in Israel the publication of guidance on terms presumed to be unconscionable, by market sectors, building on the UK model, and adding a simplified disclosure solution where drafters who adopt a term which is “grey listed” will need to separately disclose it in the boilerplate in a meaningful, salient way). Since the United States is yet to adopt a comprehensive model of presumptions of unconscionability I suggest, at the first stage, building

This will bring abusive terms to the attention of consumer advocacy groups, secondary creators, and users—truly increasing terms’ salience.⁷⁵⁸

One can even envision how such a database could be used to train machine-learning algorithms to highlight and spot unconscionable terms in the wild, and flag terms for review by consumers, regulators, and lawyers—fighting boilerplate with code if you will. One can also envision how in the future these tools will also help to spot unconscionable technological boilerplate.⁷⁵⁹ And while this may sound utopian, in privacy, in the wake of public outrage over data breaches, and with the introduction of robust regulations like GDPR, similar machine-learning tools flagging overreaching terms have surfaced, as well as toll enabling users to look into the actual information collection practices of some apps.⁷⁶⁰

a database that will include terms that were already voided by courts (and also include in the database terms that were voided in misuse, first-sale and preemption cases).

⁷⁵⁸ Cf. RADIN, *supra* note 1, at 243 (noting that “NGO can organize publicity campaigns to make known to the public what some of the onerous terms in the fine print actually mean. The can take the lead in organizing a rating site that will advise consumers which firms are using reasonable terms and which are not...”). See also the NGO “Ranking Digital Rights” (<https://rankingdigitalrights.org/>) (rating leading internet companies human rights accountability posture (on a variety of topics from free expression to privacy) based on their ToS and Privacy Policies, *inter alia*). Compare also to the regime in the UK, where Section 6 to the UTCCR and the Consumer Rights Act 2015 enables certain “regulators” to initiate enforcement action (a complaint) with respect to unconscionable terms. See COMPETITION & MARKETS AUTHORITY, UNFAIR CONTRACT TERMS GUIDANCE 5.7 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf. See also Michael, *infra* note 812, at 91. These bodies as well as the UK Competition & Markets Authority publish “Guidance” with lists of potentially unfair terms, in addition to the grey list the law provides of terms that are presumed to be unconscionable (Schedule 2 of the Consumer Rights Act 2015. 2015 c. 15 (UK)). See for example, in gambling contracts, (Gambling Commission, *Time to take action on unfair terms says Gambling Commission* (Nov. 22, 2017)), <https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Time-to-take-action-on-unfair-terms-says-Gambling-Commission.aspx>. (e.g., “terms which assume consumers have consented to the use of any personal information (including their name) for promotional purposes for the benefit of the operator”).

⁷⁵⁹ Like machine learning is being used to spot other abusive bot-initiated behavior such as the spread of fake news or fake endorsements. See, e.g., U.C. Berkeley’s students developed tool—SurfSafe—“a machine learning tool that helps people identify when an online photo has been doctored or is fake news”. Berkeley Engineering, *Fighting fake news* (Nov. 14, 2018), <https://engineering.berkeley.edu/magazine/fall-2018/fighting-fake-news>. See also Josh Constine, *Instagram kills off fake followers, threatens accounts that keep using apps to get them*, TECHCRUNCH (Nov. 19, 2018), <https://techcrunch.com/2018/11/19/instagram-fake-followers/> (Noting Instagram states they “built machine learning tools to help identify accounts that use [third-party apps for boosting followers] and remove the inauthentic activity.”).

⁷⁶⁰ For an overview of a tool enabling so in the context of privacy policies see Andy Greenberg, *An AI That Reads Privacy Policies So That You Don’t Have To*, WIRED (Feb. 9, 2018), <https://www.wired.com/story/polisis-ai-reads-privacy-policies-so-you-dont-have-to/> (Polisis, <https://pribot.org/>). For a tool allowing users to search a name of a mobile app and learn about its actual information collection practice. See APPCENSUS, <https://appcensus.mobi/> (reviewed in Irwin Reyes, Primal Wijesekera, Joel Reardon, Amit Elazari Bar On, Abbas Razaghpanah, Narseo Vallina-Rodriguez and Serge Egelman, *Won’t Somebody Think of the Children?* “Examining COPPA Compliance at Scale, 2018(3) PROCEEDINGS ON PRIVACY ENHANCING TECHNOLOGIES 63 and developed by the author’s co-authors on this research).

C. Some Case Studies—The Application of Unconscionability 2.0

In previous chapters I illustrated how Unconscionability 2.0 and presumptions of Unconscionability 2.0 could be applied to commonly used IP boilerplate language. In this chapter I will explore some additional cases studies.

If the broader reform proposals for the adoption of presumptions of unconscionability are implemented, than any term that limits a statutory right of the user, creator, or inventor under federal IP law, in a standard form contract, is presumed to be unconscionable and therefore the burden will shift to the drafter to show that it is not unconscionable.⁷⁶¹

But even under the limiting existing framework of *Baystate* and *ProCD*, the application of Unconscionability 2.0 could garner different results. Under the first prong of procedural unconscionability, courts will inquire as to the nature of the contract and the circumstances of the parties' bargaining. As the Restatement clarifies, this is not necessarily a procedural inquiry per se focusing on notice and formation, but one that focuses also on matters of consumer awareness and issues of salience. As explained, terms relating to IP rights are often nonsalient—in other words, they do not garner the attention of consumers' in a manner sufficient to affect the decision making of a substantial number of consumers. This is supported not only by empirical evidence but also by the fact that IP terms are “non-core” deal terms, as opposed to price,⁷⁶² and because often there is no competition in the market over the quality of IP terms.⁷⁶³ Moreover, a form contract, because of its very nature as boilerplate, is procedurally unconscionable—and the only question remaining is what level of additional “quantum” of substantive unconscionability will render it unconscionable in general.⁷⁶⁴ Under the sliding-scale approach this will focus much of the inquiry on the substantive prong, a normatively desired result.⁷⁶⁵ In the context of IP policies, this means that a term that displays a gross violation of IP objectives, like a fair use “no-parody” waiver, is unconscionable: regardless if its level of salience. By this virtue the Israeli application of unconscionability is very much consistent with its potentially U.S. counterpart.

Applying the salience principle in IP contexts will already be a step forward in reducing what I call the “dialogue of the deaf”: situations where IP scholars (or courts) seeking to promote contractual enforcement in the name of “freedom of contract” ignore the absence of such freedom in form contracts and form contract theory.⁷⁶⁶ Put simply, if consumer contract law finally has come to recognize the risks imposed by form contracts and their nature, IP jurisprudence cannot continue to ignore them.

In the substantive inquiry the court should focus on the relevant IP policies at hand and whether the term at hand displaces such policies, and may take into account other neighboring (or “core” according to some accounts) policy considerations such as free competition, free

⁷⁶¹ See ch. IV(B)(i) “Presumptions of Unconscionability 2.0”.

⁷⁶² See The Restatement, *supra* note 33, at 82.

⁷⁶³ See the discussion in ch. IV(A)(iv) “Unconscionability 2.0 in Negotiated Contracts and Between Sophisticated Parties”.

⁷⁶⁴ *Id.* at 87 (“Put differently, presenting standard contract terms in a long ‘boilerplate’ may be sufficient to satisfy the procedural unconscionability prong, when a strong showing of substantive unconscionability is made”). See also the discussion in *supra* note 769 and accompanying text.

⁷⁶⁵ *Id.* at 94 (“Courts have used the ‘sliding scale’ approach to minimize the procedural unconscionability requirement and emphasize the substantive-unconscionability requirement. To maintain the dual-test doctrine, but rest it on a more coherent conceptual framework that more closely tracks the doctrine’s normative underpinnings”).

⁷⁶⁶ See *supra* ch. III(B)(iv) “The Dialogue of the Deaf”.

expression, or—more generally—sound public policy.⁷⁶⁷ Courts must look into the contract as a whole, “and the context surrounding the contract.”⁷⁶⁸ This type of (perhaps vague) inquiry is not novel or new. It is perhaps familiar to the reader, but under a different label or term: copyright and patent misuse or more generally “implied preemption.”⁷⁶⁹

Indeed, this dissertation does not seek to directly address the question of what should be the correct result of applying Unconscionability 2.0 to each and every case study discussed or IP boilerplate term, a question on which courts and scholars alike continue to grapple, and to which the answer might (and should) change with facts, time and place. And as one might claim, this proposal does in fact simply shifts the ground of the debate, from traditional limiting doctrines into unconscionability.

The novelty of Unconscionability 2.0 is that it suggests the current conception of the substantive unconscionability test can accommodate an inquiry into the purposes of IP policies, and that even a term that is not considered misuse or as amounting to exhaustion in a negotiated setting, could be considered unconscionable once applied in at scale form contracts. Once considered at scale, a lower quantum of substantive unconscionability is combined with an additional quantum of the procedural unconscionability that under a sliding scale-approach will render such term unconscionable. This combination allows a contextual solution to the consumer post-sale contractual enforcement question that will surely reach the courts, which explicitly takes into account the nature of boilerplate, under a doctrine that is uniquely situated to evaluate boilerplate: unconscionability.

Contract law facilitates the application of other laws and policies under the substantive prong of the unconscionability analysis, although courts have yet to explicitly acknowledge that in the IP context. For example, the Restatement clarifies that “the substantive unconscionability standard may capture contract terms that are considered ‘unfair acts or practices’ under the Federal Trade Commission (FTC) Act and state Unfair and Deceptive Acts 25 and Practices (UDAP) statutes,” and these statutory standards are not purely confined to policies of consumer contract law.⁷⁷⁰ This direct import of Section 5 into the substantive inquiry allows the FTC to take a broader role in shaping the IP boilerplate landscape within the boundaries of existing law, by bringing action under the law against drafters and deployers of either IP boilerplate or unconscionable technology under the FTC’s authority.⁷⁷¹ The ability of users and businesses to bring forth unconscionability claims against other drafters based on past complaints can complement the FTC’s enforcement power, which is often limited to egregious cases.⁷⁷²

⁷⁶⁷ Of course, these are some of the overarching policies of IP regimes. See Menell, *Economic Analysis of Network Effects*, *supra* note 130, and an overview in MENELL, LEMLEY, & MERGES, *supra* note 234, at ch. I.

⁷⁶⁸ The Restatement, *supra* note 33, at 75.

⁷⁶⁹ See Rub, *Copyright Survives*, *supra* note 39, Rub — A Less-Formalistic Copyright Preemption, *supra* note 40, Merges, *Intellectual Property and the Costs of Commercial Exchange*, *supra* note 56, at 1613.

⁷⁷⁰ See FEDERAL TRADE COMMISSION, FTC POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>. See also HOOFNAGLE, *supra* note 231; The Restatement, *supra* note 33, at 79–80.

⁷⁷¹ Yet as the reporters explain, in compliance with standards does not necessarily means a term is unconscionable and compliance with standards does not necessarily mean a term is conscionable. An analysis is needed is each case. *Id.* at 79–80.

⁷⁷² HOOFNAGLE, *supra* note 231.

Finally, if one compares Unconscionability 2.0 to Radin’s recently proposed envisioned model of unconscionability, a few resemblance points arise. Radin brings forth an improved “tripartite evaluation” model of unconscionability that takes into account: “(1) the nature of the right; (2) the quality of consent; and (3) the extent of social dissemination of the boilerplate scheme (how many recipients are subject to it).” The third prong, she explains, is geared to ensure courts take into account that “recipients of boilerplate do not consider [some kinds of rights] important to them personally, but [these rights] are really important to civil society and the rule of law, so that the more people are burdened with deletion of such rights, the more it becomes an issue for the rule of law and for equality before the law.”⁷⁷³ While the second prong is considered, under Unconscionability 2.0, as part of the procedural inquiry, the first and third prongs are addressed through the substantive inquiry. One potential difference is that under Unconscionability 2.0 the core of the analysis focuses on the level of democratic degradation of IP rights (in other words displacement of IP policies), which could be facilitated, even if a very small number of recipients is subjected to the boilerplate. This is because the effects or “social dissemination” of IP boilerplate “schemes” extends well beyond the recipients (to, for example, the potential users of a fair use or commentary which is prohibited under boilerplate, or the potential secondary market of the patent or copyrighted work in case of post-sale restrictions).

Let us further consider a number of case-studies, some of which I already mentioned in previous chapters to illustrate the application of Unconscionability 2.0. Our first example is a “Single Use Only” label attached to a patent-incorporating medicine (and accompanying applicator). Below that label this text appears in fine print (on the package): “Opening this package or using the patented medicine inside confirms your acceptance of the license agreement. Following this initial use, you agree to return the empty medicine applicator only to [X-Corp] for recycling.”⁷⁷⁴ The medicine is sold in the market for over \$1,000. Another manufacturer, Y-Corp, figured a method to replace the medicine but reuse and refurbish X-Corp applicators (disposed by consumers) in an FDA-approved non-hazardous manner. Because Y-Corp uses second-hand applicators it can sell its medicine in a substantially lower price. But alas, the amount of available disposed applicators is limited, since consumers of X-Corp medicine are motivated (by the contract) to return them to X-Corp.

The future of Y-Corp secondary market is now at flux. A socially-aware groups of consumers of X-Corp medicine is becoming gradually concerned with the fact the medicine, not covered by all insurers, is sold in a high-price and many patients cannot offered it. Meanwhile it’s unclear if Y-Corp can continue to operate in this market amid the diluting supply of applicators. Since these consumers insurance only covers X-Corp medicine they continue to buy it, but they also decide to join hands with Y-Corp in helping Y-Corp to collect applicators directly from X-Corp users, so Y-Corp can continue to operate in the market. They start to collectively collect applicators in community meetings across the country, backed by a nation-wide online media campaign calling users to bring the applicators to Y-Corp.

Following the Supreme Court decision in *Lexmark*,⁷⁷⁵ Y-Corp cannot be liable under patent law for this practice. Under the broader role of exhaustion, X-Corp cannot sue its consumers under patent law. But another potential claim could be tortious interference with

⁷⁷³ Radin, *What Boilerplate Said*, *supra* note 59, at 5.

⁷⁷⁴ The language above is the combination of the EULA Label language used in *Lexmark* (see *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 830, 836 (E.D. Ky. Ap. 24, 2007)) and in *Mallinckrodt* (*Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 at 701).

⁷⁷⁵ *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523 (2017).

prospective economic relations or contractual relations against Y-Corp,⁷⁷⁶ and of course, X-Corp can try to bring a contractual cause of action against its consumers. The question of enforceability of post-sale restrictions as a matter of contract law against consumers, is one that is still open, as I explained. Here the application of Unconscionability 2.0 would provide the following results: on the procedural inquiry, the question of the term salience should be evaluated. The disposal, single-use, term seems like a non-core term for consumers. There is no competition of the quality of the term in the market since there is no other equivalent market for this medicine that allows disposal. It seems like consumers in this case must agree to terms, it is therefore nonsalient. On the question of substantive unconscionability, given that the purpose of this “patent-wrap” contracts is to limit the exhaustion doctrine and the manner consumers can use and re-sell a patented article—patent policy should inform the analysis whether or not such term is unconscionable. Clearly this term once employed in a whole-sale manner displaces the exact same policies exhaustion seeks to advance. It’s also contrary to other principles public policies seek to advance, including free competition, social justice and access to medicine.⁷⁷⁷ But because this contractual language does not fall in the contours of exhaustion, courts might be reluctant to void it in a commercial, negotiated setting.⁷⁷⁸ Even so, the added quantum of procedural unconscionability would render the term unconscionable in a boilerplate setting, as in the case our medicine.

Another interesting case study involves the student-(adherent)-creator. Contrary to Israeli universities, some leading world academic institutions regulate student-created innovations a slightly more lenient regime. Among others, copyrighted software or inventions created through “significant use of funds or facilities”⁷⁷⁹ of the institution, will be owned by the institution. Some institutions define significant use to exclude usage of facilities like libraries, computers, or general distribution of funds to students,⁷⁸⁰ other use the term more loosely to include student stipends and “university-owned audio/visual equipment” and even “extensive use of such customarily used resources [such as library, university-owned computers, whiteboards, photocopiers, pencils, desks, and telephones]” (as opposed to routine use of such resources).⁷⁸¹ When the student invention is created through significant use of the institution facilities, the institution may consider it owned by the institution.⁷⁸²

⁷⁷⁶ See, e.g., *Disney Enters. v. Redbox Automated Retail, LLC*, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018).

⁷⁷⁷ See the discussion in *supra* note 471.

⁷⁷⁸ See the discussion in ch. (III)(B)(iii) “A Limited Tool Set: From ProCD and Preemption to Lexmark and Exhaustion”.

⁷⁷⁹ MIT Technology Licensing Office, *Guide to The Ownership, Distribution and Commercial Development of MIT Technology*, https://tlo.mit.edu/sites/default/files/MIT-TLO-ownership-guide_0.pdf, at p. 6,8.

⁷⁸⁰ *Id.* at 8 (“MIT does not construe the use of office, library, machine shop or Project Athena personal desktop work stations and communication and storage servers as constituting significant use of MIT space or facilities, nor construe the payment of salary from unrestricted accounts as constituting significant use of MIT funds, except in those situations where the funds were paid specifically to support the development of certain materials”).

⁷⁸¹ William & Mary University, *Intellectual Property Policy* (March 9, 2016), https://www.wm.edu/offices/compliance/policies/intellectual_property/index.php.

⁷⁸² See, e.g., Wentworth Institute of Technology, *Intellectual Property Policy*, <https://wit.edu/policies/intellectual-property> (defining “Institute-Owned Intellectual Property” in a policy that applies to students to include “significant use of WIT facilities, resources or equipment”,

A broad definition of what is considered “significant use of the institution facilities” is in fact a term that could be evaluated under Unconscionability 2.0, where courts can invoke IP purposes, as discussed, for example, in work-made-for-hire case law to decide the justified scope if such assignment, in a boilerplate setting. Since this term is nonsalient, the focus of the inquiry would be under the substantive prong.

In other case studies such as waivers of fair uses, the terms should be presumed to be unconscionable, under this proposed framework, since they limit a statutory right. The burden of proof will then reside with the drafter to show that the term is unconscionable. It is indeed, hard to imagine a limitation on fair use that is conscionable in a boilerplate, nonsalient setting. Even so courts should use their amending prerogative under unconscionability to ensure the term is only enforced to the extent its conscionable, in cases when a compromise is needed. To illustrate, various limitations on “tinkering” in boilerplate, could be enforced only to the extent they are consistent with the DMCA good-faith security exemption limitations (that one can claim, give rise to a “statutory right” to perform security research similar to fair use).⁷⁸³ This interpretation would harmonize the DMCA exemption with the CFAA and contractual “anti-tinkering” regime, since once the language of an overreaching term (or deployment of blocking technology) is unconscionable it cannot give rise to a potential CFAA liability.⁷⁸⁴ The following subchapter will discuss the application of Unconscionability 2.0 in the common setting in which other regimes (and policies are invoked).

D. Unconscionability 2.0 in Other Technological Realms

from which “use of an office, library, or desktop computer” is excluded). *See also* William & Mary University, *id.*, the definition of “University Work”.

⁷⁸³ That is “solely for purposes of good-faith testing, investigation, and/or correction of a security flaw or vulnerability, where such activity is carried out in an environment designed to avoid any harm to individuals or the public, and where the information derived from the activity is used primarily to promote the security or safety of the class of devices or machines on which the computer program operates, or those who use such devices or machines, and is not used or maintained in a manner that facilitates copyright infringement”. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 540305 (Oct. 26, 2018) (to be codified at 37 C.F.R. pt. 201). The Register clarifies that the term “solely” refers to “the researcher’s purpose at the time of circumvention”. While post-circumvention activities (like publication in academic papers or otherwise of the research results, would not exceed “the bounds of the exemption.”). THE COPYRIGHT OFFICE, *supra* note 21, at 304–5.

⁷⁸⁴ In fact, in whistleblower cases courts have been invoking contractual language, in employment and consultancy Confidentiality Agreement, as void against public policy in a manner that could prevent potential a CFAA liability, after the defendant (in the Qui tam case) brought a CFAA civil counterclaim against the whistleblower. *See, e.g.,* Erhart v. Bofi Holding, Inc., 2017 U.S. Dist. LEXIS 20959, *16–22 (S.D. Cal. Feb. 14, 2017). In other cases, they interpreted the CFAA access provisions narrowly to only apply to exceeding technological barriers. *See, e.g.,* Siebert v. Gene Sec. Network, 2013 U.S. Dist. LEXIS 149145 (N.D. Cal. Oct. 16, 2013), at *32–35, finding that the whistleblower did not violate § 1030(a)(2)(C), in accessing the defendant’s computer network to copy the information since the defendant’s allegations “go beyond the scope of the CFAA”, and citing Nosal, 676 F.3d 854, 863 (9th Cir. 2012) (stating that “exceeds authorized access” “does not extend to violations of use restrictions”). For further discussion see Amit Elazari Bar On & Peter S. Menell, *Promoting Responsible Whistleblowing: Reconciling and Reforming CFAA Liability in the Information Age* (work in progress presented at the Intellectual Property Scholars Conference, 2018) (on file with the author).

Unconscionability 2.0 is not limited to IP. Boilerplate are commonly used to displace other regimes and policies, from privacy to information security and free expression. Technology can also be unconscionable, and there is a growing body of specifically opaque machine-learning and algorithmic applications that meaningfully shape, potentially in an unconscionable manner, all aspects of people's life, sometimes perpetuating inequality and social injustices.⁷⁸⁵ As discussed, this technology operates instead of boilerplate and in conjunction with boilerplate, sometimes to enforce rights beyond what is disclosed in the ToS or even legal. If boilerplate, or technological boilerplate, is supporting unwarranted deployment of biased or deceptive machine learning processes, consumers may find additional recourse within consumer contracts law. Amid the public debate on facilitating transparency, accountability and explainability of machine learning processes,⁷⁸⁶ unconscionability could serve as complimentary solution to police the manner boilerplate and technological boilerplate may be deceptive, biased, operating in a socially undesired manner or creating barriers for research and auditing.⁷⁸⁷

Such barriers may include limitations on scraping, crawling, deployment of automatic tools, use of the site or services for non-personal use or research, and the like. These limitations have been the subject of at least two recent CFAA cases where courts noted that this type of barriers to vital research could be detrimental to public policy, and rise first amendment concerns.⁷⁸⁸ These considerations led at least two courts to decide the such limitations are unenforceable under the CFAA if they seek to limit (according to one court even through technology) access to public websites.

⁷⁸⁵ Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016). See also AI Now, *supra* note 719.

⁷⁸⁶ Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines* (FORDHAM L. REV., forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126971. See also Bryan Casey, Ashkon Farhangi, & Roland Vogl, *Rethinking Explainable Machines: The GDPR's 'Right to Explanation' Debate and the Rise of Algorithmic Audits in Enterprise* (forthcoming BERKELEY TECH. L. J., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143325&download=yes (claiming that "data auditing methodologies designed to safeguard against algorithmic bias throughout the entire product life cycle will likely become the new norm for promoting compliance in automated systems" and explaining how this approach is supported by the GDPR and specifically, the newly codified "right to explanation" (citing General Data Protection Regulation, 2016 O.J. (L 119) 1, Art. 22, Recital 71) (Manuscript at 11)). See also Bryce Goodman & Seth Flaxman, *EU Regulations on Algorithmic Decision Making and "a Right to an Explanation"*, 38 AI MAGAZINE 50 (2017).

⁷⁸⁷ Algorithmic Auditors are a growing discipline of researchers in computer science and human-computer interaction (HCI) that employ a variety of methods to tinker and uncover how algorithms work. Their work has already sparked public discussions and regulatory investigations into the most dominant and powerful Algorithms of the information age. See Christian Sandvig, Kevin Hamilton, Karrie Karahalios, & Cedric Langbort, *Auditing algorithms: Research methods for detecting discrimination on internet platforms*, 2014 DATA AND DISCRIMINATION: CONVERTING CRITICAL CONCERNS INTO PRODUCTIVE INQUIRY 1. See also Amit Elazari Bar On, *We Need Bug Bounties for Bad Algorithms*, MOTHERBOARD VICE (May 3, 2018), https://motherboard.vice.com/en_us/article/8xkyj3/we-need-bug-bounties-for-bad-algorithms.

⁷⁸⁸ See *supra* note 711 and the discussion in Sandvig v. Sessions, 2018 U.S. Dist. LEXIS 54339 (D.D.C. March 30, 2018) and hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099 (N.D. Cal. Aug. 14, 2017), appeal docketed, No. 17-16783 (9th Cir. Sept. 6, 2017). See also specifically the plaintiffs' motion at 17 for examples of scraping limiting ToS provision. For a discussion in the interaction of algorithmic auditing with first amendment concerns and the CFAA, see Komal Patel, *Testing the Limits of the First Amendment: How a CFAA Prohibition on Online Antidiscrimination Testing Infringes on Protected Speech Activity* (Oct. 2, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046847.

Still, the contractual enforceability question remains, and it warrants a more nuanced and purposeful judicial review, that can be done through unconscionability. The reason why courts might seek to resort to unconscionability is the need to limit the question of enforceability strictly to boilerplate settings. Private parties might still agree, in truly freely negotiated contracts and commercial settings, they want to limit reverse engineering, tinkering, decompiling and other research activities.⁷⁸⁹ While these provisions may limit the ability of competitors (that sometimes emerge as potential whistleblowers and perform effective auditing),⁷⁹⁰ to contribute to the auditing efforts, or even expose potential illegal activity facilitated through technology, there could be reasonable business rationales, such as trade secrecy protection, for their enforcement in negotiated, salient contracts. Still these provisions effect is less impactful than overreaching boilerplate applying to all users of a service, platform or technology, including academic researchers. Moreover, there are other tools that could be applied to prevent negotiated contracts from stifling whistleblowing or competition.⁷⁹¹

Unconscionability 2.0 can be used in this context to allow different results for different contracts, in cases that will not fit under the contours of clear statutory limitations such as the new anti-disparagement Consumer Review Fairness Act on boilerplate. It can also be used to evaluate technology, as discussed in previous chapters.

Moreover, the same Unconscionability 2.0 framework can be applied to provisions that undermine cybersecurity and privacy policies. These may include boilerplate allowing the manufacturer, the website or an app unlimited permissions, well beyond what users expect needed to operate the service or other practices that were found to be “unreasonable” under the FTC Act.⁷⁹² The added value from disciplining such provisions under unconscionability is the ability to bring forth a private right of action for a broader set of practices that may not be covered under existing regulation. The core function of Unconscionability 2.0 in these contexts, is to ensure courts consider the purposes of these regimes when inquiring into the substantive unconscionability prong, and not be limited to questions of “price” and “meaningful choice”.

The courts should also be mindful to the fact that one provision (for example “no bots or automatic tools allowed”),⁷⁹³ or technology (blockers that enforce this example of anti-bot ToS provision),⁷⁹⁴ may interact with more than one regime, and all such policies should be considered, even if they do not arise from the factual circumstances at hand. For example, an

⁷⁸⁹ See the discussion in Davidson and Baystate in ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP “Dichotomy””.

⁷⁹⁰ See the discussion in the *Sabre* case, in *supra* note 719. See also Annie Lee, *Algorithmic Auditing and Online Competition Under the CFAA: The Revocation Paradigm of Interpreting Access and Authorization* (forthcoming BERKELEY TECH L. J., 2018) (on file with the author).

⁷⁹¹ Such as the Defend Trade Secret Act Whistleblower immunity discussed in *supra* note 742. Yet this provision does not provide immunity from the CFAA. See 18 U.S. Code § 1833(b)(5). See also Peter S. Menell, *The Defend Trade Secrets Act Whistleblower Immunity Provision: A Legislative History*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 399, 422 (2017), and Elazari Bar On & Menell, *supra* note 784. Antitrust also provide a variety of tools. See, e.g., Maureen A. O’Rourke, *Striking a Delicate Balance: Intellectual Property, Antitrust, Contract, and Standardization in the Computer Industry*, 12 HARV. J.L. & TECH. 1 (1998).

⁷⁹² See, e.g., *In re Goldenshores Technologies LLC & Erik M. Geidl*, FTC File No. C-4446 (F.T.C. April 9, 2014) and HOOFNAGLE, *supra* note 231, at ch. 6, 8. See also RADIN, *supra* note 1, at 176–179.

⁷⁹³ See *Sandvig v. Sessions*, 2018 U.S. Dist. LEXIS 54339 (D.D.C. March 30, 2018), at *27, 48.

⁷⁹⁴ *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099 at 1103.

anti-bots' boilerplate in a public website can limit privacy, security and algorithmic auditing, but it can also limit transformative fair use.⁷⁹⁵

Finally, as explained, the application of competing values and policies could be done under Unconscionability 2.0 and within its boundaries. In fact, that is how Israeli courts have been evaluating unconscionability for the past four decades, as part of the Israeli application of the purposive approach.⁷⁹⁶

E. Unconscionability 2.0: A “Wild Card” or a Winning Hand—Some Objections and Responses

Throughout this dissertation at various junctions I raised some potential arguments that could be claimed against the proposed application of Unconscionability 2.0.⁷⁹⁷ I attempted to address them as they arose, and in the context discussed, but still it is useful to summarize some of the core critiques and potential responses.

One prominent critique that proposed application of unconscionability raises, especially in cases that leave unfettered discretion for courts to consider public policy considerations within its boundaries, is its uncertainty and vagueness. Indeed, opponents of unconscionability have been voicing such concerns for decades.⁷⁹⁸ But as I mentioned, and other scholars (and courts) have argued at length—⁷⁹⁹it is exactly that flexibility and vagueness that allows unconscionability to operate effectively.

Unconscionability, like other common law doctrines such as the duty of good faith, public policy exception, and equitable defenses such as misuse and unclean hands are tools geared to deal with uncertain circumstances, changes (including technological ones) and shifting cultural and society perceptions.⁸⁰⁰ The common law relies on their application as such.⁸⁰¹ Specifically, unconscionability potency lays in its vagueness because it is unreasonable to assume any regulator or legislator can anticipate all forms and shapes of private parties potentially abusive drafting and contracting behaviors to the extent needed to create specific rules against them.⁸⁰² In fact, given their prominence, it is unreasonable even to assume any regulator can read or collect these contracts, let alone scrutinize them in a comprehensive manner. Ellinghaus foreseen this reality, noting as far back as 1969 that “[u]nconscionability is a ‘standard’ which awaits, and is designed to encourage, organic development by the courts,”

⁷⁹⁵ See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

⁷⁹⁶ See ch. IV(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”.

⁷⁹⁷ See ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox”.

⁷⁹⁸ Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 293 (2000).

⁷⁹⁹ M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 795 (1969) (explaining that unconscionability is part of contract law’s “residual categories”, categories of doctrines that operate under necessary vagueness such as “reasonableness,” “due care,” and “good faith.” Israeli unconscionability is also considered a standard, an indented instance of a “valve concept” (Ventilbegriffe), which content is always changing with time and according to circumstances and ever-evolving worldviews. See *supra* notes 636–638 and accompanying text.

⁸⁰⁰ Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

⁸⁰¹ *Id.*

⁸⁰² See RADIN, *supra* note 1, and the discussion in ch. III(A) “Why Unconscionability?”.

a necessary category of “shifting content and expansible nature”, that “[w]e cannot do without.”⁸⁰³

The core hostility towards unconscionability raised by the Chicago school of law and economics theorists is that such uncertainty may interfere in what would otherwise be an efficient economy, facilitated by freedom of contracts and competition.⁸⁰⁴ But as I have shown, even under this (arguably narrow) vision of unconscionability, such considerations are taken into account under the procedural inquiry as to the salience of the term. The consideration of procedural unconscionability (even to a minimal extent and under a sliding scale approach), allows a court to decide whether there is, in fact, a need to intervene and police terms (that are not policed in the market). To some extent this combination makes Unconscionability 2.0 more sensitive to these arguments than doctrines such as copyright misuse, that are not focused on such considerations.

Still, and as I explained, IP boilerplate terms are not ordinary commercial terms. They create externalities, displace IP policies and impose societal costs. In this context, Radin’s arguments against reduction of “all human activity to private market activity,[] all values to price,” “and all ordering [] to private ordering” ring true.⁸⁰⁵ In fact, Unconscionability 2.0 reaches beyond traditional economic analysis, and accounts for what Radin calls the “normative degradation” effect of boilerplate.⁸⁰⁶ Matters of price and efficiency, are not identical to matters of autonomy, personhood and justice, and the displacement of IP policies has a cost that cannot simply be reduced to matters of efficiency. That is why, in IP—scholars are still debating what is the correct framework (or better yet frameworks) to apply, irrespective to questions of contract enforcement.⁸⁰⁷

While a full discussion in these two philosophical debates, the one between so-called “Chicagoans” and “autonomists” in boilerplate theory⁸⁰⁸ and the one between so-called “utilitarian” and “exutilitarian” in IP policies,⁸⁰⁹ is beyond the scope of this dissertation, Unconscionability 2.0 seems to be able to accommodate both frameworks, as even those taking a narrower view on boilerplate enforceability would agree that at the minimum, the nature of the contract (as regulating IP rights) should be taken into account, that some market failures are not solved in the market,⁸¹⁰ and that IP regimes, jurisprudence and tradition are better

⁸⁰³ Ellinghaus, *supra* note 799, at 814–5.

⁸⁰⁴ See the discussion in *supra* note 357. The argument is colorfully summarized by Radin: “[T]he business will save money by deleting its consumers’ legal rights; the business will pass on these savings to the consumer; the consumer who buys the product or service necessarily values her legal rights less than the amount of the price reduction; therefore the consumer is choosing (or should be assumed to be ‘rational’ and therefore hypothetically to choose) to sell off her individual rights for the price reduction.” See Radin, *What Boilerplate Said*, *supra* note 59, at 8.

⁸⁰⁵ *Id.* at 10, 11.

⁸⁰⁶ See *supra* note 773, and accompanying text.

⁸⁰⁷ See *supra* discussion in ch. III(B)(V) “Theoretical Tendentiousness—The Utilitarian Bias”.

⁸⁰⁸ Omri Ben-Shahar, *Regulation Through Boilerplate*, *supra* note 3, and Radin, *What Boilerplate Said*, *supra* note 59.

⁸⁰⁹ See the discussion in *supra* note 656 and accompanying text. Still I discussed, briefly, the IP philosophical debate in ch. III(B)(iv) “Theoretical Tendentiousness—The Utilitarian Bias” and ch. IV(A)(ii) “Unconscionability 2.0: The Advantages of the Purposive Approach”, and applied it in the context of Unconscionability 2.0.

⁸¹⁰ The Restatement, *supra* note 33, at 94. See also Korobkin, *supra* note 78.

equipped to recognize market failures that fall within their realms than vaguely applied concepts of price and sale that have little to do with the facts or contract at hand.⁸¹¹

Finally, it is important to recognize that the concerns voiced by those opposing to vague application of unconscionability seems to not be supported by empirical evidence.⁸¹² In other words, the so-called costs of said uncertainty do not seem to limit the application of boilerplate or hinder their economic benefits. Boilerplate are very much “alive and kicking,” including in jurisdictions with a robust black letter law vision of unconscionability, such as Israel. It could be claimed that the low probability (P) of litigation serves as balancing criteria against the costs of an unjustified unconscionable judicial decision (L).⁸¹³ In other words, drafters are not really policed even in these jurisdictions that adopted a robust view of unconscionability from including unconscionable terms in their contracts, because the only remedy is unenforceability (and in Israel, for example, fee shifting), and low probability of litigation or regulatory enforcement. That is why I (and others) suggested that P should be increased by adopting a more robust model of unconscionability, and more remedies should be considered to create a deterrent effect. Furthermore, the costs of market uncertainty in the context of IP policies ought to be considered against the societal costs imposed by IP boilerplate abusive to IP rights and the broader societal uncertainty from failing to police such abuses. These uncertainties should also be evaluated against the currently available solutions, most prominently—misuse.

While I don’t have empirical evidence to support this proposition, I would argue that some limited uncertainty experienced by private parties as to their ability to enforce their unilaterally drafted rights is better than the uncertainty of society at large as to the rule of law and the broader application of IP laws, and uncertainty about whether the market policies adequately IP boilerplate or not.⁸¹⁴ Maybe that is why, even though misuse is also often critiqued for its “uncertainties” and vagueness⁸¹⁵ it still applied by courts, and recently even more rigorously.⁸¹⁶ Put simply reality proves that we still need common law vague concepts to deal with contractual abuse (and the boilerplate drafters who contributed to it) in the IP setting, and if we still need such concepts, we might as well adopt them to better fit their purpose in the boilerplate setting.

I also suggested pathways to mitigated such uncertainty, including by incorporating presumptions of unconscionability and creating databases of unconscionable terms. One can even envision a procedure that will allow an especially risk-averse private party to petition for

⁸¹¹ See ch. III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy’” for some examples.

⁸¹² If anything, evidence is showed to the contrary: that some “exculpatory clauses [eliminating tort claims] create a massive moral hazard problem,” that is not controlled by the market. See Radin, *What Boilerplate Said*, *supra* note 59, at n.11, and RADIN, *supra* note 1, at 139–140.

⁸¹³ Liran Michael, *Getting to the Trough but not Drinking the Water: The Failure of the Standard Contracts Law and Proposals For Change*, 5 HUKIM (LAWS) 59, 73 (2013) (In Hebrew) (the title is a paraphrase on an old Hebrew dictum, “You can get the horses to the trough, you cannot force them to drink the water”—in other words while the law has robust provisions, it does not guarantee consumers while actually make use of such provisions).

⁸¹⁴ Cf. RADIN, *supra* note 1, at 164 (“Even if people do mean to assume the risks posed by boilerplate clauses, we should understand the they are likely to be mistaken about the level of risk that they face...”).

⁸¹⁵ See *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 973 (4th Cir. 1990). See also Troy Paredes, *Copyright Misuse Tying: Will Courts Stop Misusing Misuse*, 9 HIGH TECH. L.J. 271 (1994) and Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2004) (discussing such arguments).

⁸¹⁶ See ch. II(F) “A Game of Catch? Some Existing Solutions and the IP Boilerplate Paradox”.

a declaratory relief that its contract is enforceable.⁸¹⁷ In Israel such procedure existed, for decades, until 2014. The tribunal could have “preapproved” a standard form contract, granting the boilerplate almost immunity from unconscionability claims for a five-year period, and removing any uncertainty as to the enforceability of the term.⁸¹⁸ The “proud” drafter could even label its form-contract as “approved” by the tribunal. This procedure was canceled and removed from the law on 2014, after it was found to be ineffective.⁸¹⁹ Empirical research showed that over a period of 15 years (1996–2011) on average only two approval requests were filed in Israel a year, a total of 30 requests over a decade and a half.⁸²⁰ At least in Israel, or so it seems, boilerplate drafters preferred to remain uncertain than risk terms would be voided or changed.

Another potential critique could be that other doctrines might better serve the purpose of policing boilerplate terms that are abusive to IP policies. These doctrines include the public policy exception in contract law, and misuse, implied preemption and in some cases, first-sale or exhaustion in IP. I discussed this critique in ch. II(F). In a nut shell, this critique is warranted. Unconscionability 2.0 is not an exclusive solution. As explained, Unconscionability 2.0 is best equipped to cabin questions of boilerplate enforceability (such as salience) and IP policies within the same doctrine, and therefore allows a contextual approach that can distinguish between negotiated and unnegotiated contracts. Moreover, as I claimed, at least in its modest version, Unconscionability 2.0 is an accessible solution that does not further require reform. With the adoption of the Restatement, and the proliferation of IP boilerplate, courts will be invited to apply the reconceptualized vision of unconscionability in IP cases. They can use this opportunity to adopt a purposeful of unconscionability that cabins IP considerations, Unconscionability 2.0. This path to police contracts seems more sustainable than hoping that the “no-preemption” vision of contracts, applied in almost all circuits of the United States,⁸²¹ would be reversed in these circuits.

Finally, another critique could be that Unconscionability 2.0 would invite conflicting applications across the United States since contracts are a matter of Contract Law, while IP is governed under Federal Law. Already unconscionability has different interpretations in different states, under contracts,⁸²² which makes the doctrine potentially unstable to deal also with matters of IP. But misuse also has different interpretations, and so does preemption. That is the nature of common law, to create different results until coherency is achieved, reality (and technology) warrants a different result, and again the viscous cycle repeats.⁸²³ Usually

⁸¹⁷ Cf. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975 (2005) (suggesting a pre-approval process for “contracts” to be administrated by a federal agency) and RADIN, *supra* note 1, at 227–229 (discussing this proposal).

⁸¹⁸ See ch. C, the 1982 Standard Contracts Law (Isr.), §§ 12–15. Under unique justified circumstances and the request of the Israeli Attorney General, the tribunal could still void a term in a preapproved contract. Section 14(c) of the 1982 Standard Contracts Law. See also Deutch, *Controlling Standard Contracts*, *supra* note 584.

⁸¹⁹ Proposed Bill to amend the Standard Form Contract Law, 2014 (Amendment n. 5) (in Hebrew) at p. 296–97. Cf. Gillette, *supra* note 817, noting that “sellers will not necessarily take advantage of the [pre-approval] process”.

⁸²⁰ Michael, *supra* note 813, at 72.

⁸²¹ Rub, *Copyright Survives*, *supra* note 39.

⁸²² See The Restatement, *supra* note 33.

⁸²³ Balganes, *supra* note 800, at 1615 (“the method of lawmaking that common law [in IP] emphasizes the virtues of beginning the process without looking to an abstract theory to justify the outcome, of focusing on the context for a rule, of understanding the short- and long-term consequences of a rule,

Unconscionability 2.0 claims, similar to misuse claims would be litigated in Federal Courts (because another IP claim would be raised) that are well-equipped to decide on both matters of IP policy and unconscionability. In the rare case that they not one can suggest that Unconscionability 2.0 claims would be litigated in federal courts.

and of proceeding with caution, one case at a time.”). *See also* Shyamkrishna Balganes, “*The Common Law*” *In the Law and Economics of Intellectual Property*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (VOL. I, THEORY) (Peter S. Menell & Ben Depoorter eds., forthcoming 2019).

V. CONCLUSION

The year is 2040. Code is law, design is “governing”⁸²⁴ and all contracts are “smart.”⁸²⁵ Almost everything is intangible, connected, or “intellectual”. All U.S. Law Schools teach Intellectual Property and Technology Law in multiple core mandatory classes, alongside coding, since it is the most prominent legal regime affecting commerce and economic growth across the globe. The traditional mode of contracting is displaced by digital handshakes rigorously enforced by technology. Society is struggling to keep technology at checks and accountable. Is this a dystopian vision or one grounded in reality? This dissertation suggested that the law is still failing to address problems created by boilerplate in IP realms and that unconscionability could be an accessible solution if interpreted purposefully to accommodate IP considerations under the substantive prong.

Currently private ordering, facilitated by either contract or technology is rarely regulated in the context of IP. Arguably we might have more boilerplate regulation of creations and innovations than statutory rights. We enforce boilerplate that limit fair use rights, and allow the deployment of algorithms to falsely remove content and code that limits users’ access, copying or scraping across every dark corner of the web and the connected world.

Lessig once spoke of the astounding irony that often characterizes the struggles within IP realms, claiming that we “move through this moment of an architecture of innovation to, once again, embrace architecture of [] control ... without resistance.”⁸²⁶ He further notes that “[t]hose threatened by this technology of freedom have learned how to turn the technology off.” He asserts that “[t]he switch is now being thrown” and “[w]e are doing nothing about it.”⁸²⁷

If the law cannot develop to limit the abusive application of boilerplate how can it develop to deal with boilerplate’s more developed and powerful successor, code?⁸²⁸ And if already law is displaced by contracts that we can read, how can we prevent a reality in which opaque technology is not displacing it? Unconscionability 2.0 is not a panacea and has its limitations. But as Radin puts it, “doing nothing about the current [boilerplate] situation is not a panacea either”.⁸²⁹ If we are not willing to pull the switch on contractual boilerplate, we will find it harder to regulate technology when it is operating as boilerplate, a future that is unclear if society can afford.⁸³⁰ Our hand is on the switch, and in Unconscionability 2.0 we have an accessible solution at hand. We just need to replace the formalistic and ineffective doctrine of Unconscionability 1.0 with the inter-doctrinal, flexible, and purposeful solution of Unconscionability 2.0.

⁸²⁴ Mulligan & Bamberger, *supra* note 263.

⁸²⁵ Adam J. Kolber, *Not-So-Smart Blockchain Contracts and Artificial Responsibility*, 21 STAN. TECH. L. REV. 198 (2018) (outlining the “broader danger lurking in the code-is-the-contract view”). *See also* Kieron O’hara, *Smart Contracts-Dumb Idea*, 21.2 IEEE INTERNET COMPUT. 97, 100 (2017), (explaining that “[j]ust because we can imagine different types of mechanisms being used to constrain behavior, it doesn’t follow, as many assume, that these mechanisms are interchangeable” and reviewing some consequences of replacing law with software).

⁸²⁶ LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 267–268 (2002).

⁸²⁷ *Id.*

⁸²⁸ RADIN, *supra* note 1, at 46.

⁸²⁹ RADIN, *supra* note 1, at 229.

⁸³⁰ Mulligan & Bamberger, *supra* note 263.

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