

UNCONSCIONABILITY 2.0 AND THE IP BOILERPLATE: A REVISED DOCTRINE OF UNCONSCIONABILITY FOR THE INFORMATION AGE

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ABSTRACT

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 Article offers a new analytical perspective on private ordering in intellectual property (IP) focusing on the rise of 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 End-User-License-Agreements (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 and 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-

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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 non-consumer-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 Article 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 are 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.

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

— Margaret Jane Radin

“[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

— Niva Elkin-Koren

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

— Omri Ben-Shahar

“[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

— Friedrich Kessler

1. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 168–69 (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, 192 (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, 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).

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 watched 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 of 2014.⁷

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 became viral, as did his name. Little did Heymann know that according to Bezalel’s IP policy, he was infringing on 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-

5. Vania Heymann, *Bob Dylan “Like a Rolling Stone”*, EKO (Nov. 19, 2013), <https://interlude.fm/v/M3b5GV> [<https://perma.cc/TL8B-KANJ>].

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/> [<https://perma.cc/JCB4-QMPC>].

7. Alexandra Jardine, *Creativity 50 2014: Vania Heymann*, ADVERTISINGAGE (Dec. 29, 2014), <http://adage.com/article/creativity-50/creativity-50-2014-vania-heyman/296277/> [<https://perma.cc/4WJV-XQKK>]. 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 assignment[s].” See, e.g., Vania Heymann, *my watering can*, YOUTUBE (Oct. 22, 2010), <https://www.youtube.com/watch?v=SzzW1wm3qPg> [<https://perma.cc/2LT7-44XY>] (“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 not to present, publish, copy, or make commercial use of the creation (although, theoretically, she is no longer the owner of the creation, and does not own such rights), for a period of seven years following her graduation without the explicit consent of the academy president, accompanied by the recommendation of a designated committee. 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 [<https://perma.cc/J5BX-GDEN>] § 1, 4 [hereinafter *Bezalel’s Policy*].

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 Bezael try to enforce the broad language under their policy, which assigns (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 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 have been denied the joy of interacting with Dylan’s song three years later? Would this innovative creation have lived to reach its audience?

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.” *Id.* at pmbl.

11. Until May 25, 2018, section 7.B of YouTube’s ToU stated:
 YouTube reserves the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement, such as, but not limited to, pornography, obscenity, or excessive length. YouTube may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user’s account for submitting such material in violation of these Terms of Service.

Terms of Service, YOUTUBE (June 9, 2010), <https://web.archive.org/web/20130105115726/https://www.youtube.com/static?template=terms> [<https://perma.cc/XQ86-5JTN>].

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. 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* 5 (2016), <http://firstmonday.org/ojs/index.php/fm/article/view/6107/5457> [<https://perma.cc/VA33-QRD7>].

14. By, for example, issuing a takedown notice to YouTube under the DMCA. 17 U.S.C. § 512 (2018).

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

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, 87 (2016) (focusing on a specific aspect of this emerging field of law—the manner in which platforms use boilerplate language in order to bypass 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 user-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, 565–66 (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 bestows upon private parties the power to rewrite IP laws. 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.* 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.

interaction with IP policies.

The scope of innovation 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; from the ability of researchers to tinker, perform reverse engineering, and test for vulnerabilities in products such as voting machines,²⁰ to farmers' "right to repair" and circumvent the software embedded in their own tractors; from Instagram and Reddit's ability to commercialize social-media content²¹ to the ability of Lexmark consumers to resell or dispose of patented print cartridges. These contracts determine whether Donald Trump Jr. had a legal right to tweet the famous Skittles picture created by the photographer and refugee, Kittos, accompanied by an anti-refugee political statement.²²

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. 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, e.g., MULLIGAN ET AL., BERKELEY CTR. FOR LAW & TECH., UC BERKELEY SCHOOL OF INFO. & THE INT'L COMPUT. SCI. INST., CYBERSECURITY RESEARCH: ADDRESSING THE LEGAL BARRIERS AND DISINCENTIVES 6 (2015), <https://www.ischool.berkeley.edu/sites/default/files/cybersec-research-nsf-workshop.pdf> [<https://perma.cc/4JZX-JJ8Q>] (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 research that exposed critical vulnerabilities in voting machines. *Id.* at 1, 23. 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) (2018); 37 C.F.R. § 201 (2018). 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.

21. Under Reddit's 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 User Agreement* § 18, REDDIT (May 27, 2016), <https://web.archive.org/web/20180404004414/https://www.reddit.com/help/useragreement> [<https://perma.cc/G5M2-499W>] (effective until March 2018, when Reddit changed its ToS).

22. Kittos 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*, TELEGRAPH (Sep. 20, 2016), <http://www.telegraph.co.uk/news/2016/09/20/donald-trump-jr-compares-syrian-refugees-to-a-bowl-of-skittles/>

Sometimes these contracts involve patents, such as the “patent-wrap” label agreement used to impose post-sale restrictions on secondary markets.²³ 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.²⁴ They range from blunt monopolization of traditional elements of the public domain, such as facts and data, to what has become perhaps the broadest waiver of moral rights in the history of humanity.²⁵ Now, as digital society becomes more focused on data abuses amid news of data breaches and privacy violations that consume media headlines,²⁶ the effects of boilerplate

[<https://perma.cc/2P8R-FDNC>]. Kittos filed a takedown notice under the DMCA, the tweet has been removed, and a copyright infringement suit is being litigated in Illinois Northern District Court. *See* Complaint, *Kittos v. Donald J. Trump For President, Inc.*, No. 16-cv-9818, (N.D. Ill. 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 ToS, to choose the license they seek to grant in uploaded content.

23. 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); the “clickwrap” agreement (the online version of such contracts that require the user to manifest “assent” by clicking “I accept”); the “browsewrap” agreements (similar licenses that are presented on websites and are “hyper-linked” to the service/product downloaded); and the latest addition—“tap-wraps,” which is the smartphone version of the clickwrap agreement. *See* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CALIF. L. REV. 1239 (1995). 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).

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

25. Under platforms such as Vimeo and Spotify, users waive their moral rights under terms of use. *See Vimeo Terms of Service Agreement* § 9.2, VIMEO (Oct. 6, 2017), <https://vimeo.com/terms> [<https://perma.cc/8T52-S8FZ>]; *see also* *Spotify Terms and Conditions of Use* § 7, SPOTIFY (Sep. 9, 2015), <https://www.spotify.com/us/legal/end-user-agreement/> [<https://perma.cc/V5CA-ZQ3J>].

26. *See, e.g.*, Daniel J. Solove & Danielle Keats 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* *6 Months, 945 Data Breaches, 4.5 Billion Records*, CONSUMER BUS. REV. (Oct. 9, 2018), <https://www.cbronline.com/news/global-data-breaches-2018> [<https://perma.cc/J7FN-RS8C>] (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); Troy Hunt, “—have i been pwncd?,” <https://haveibeenpwned.com/> [<https://perma.cc/EWV3-V6RH>] (allowing

controlling the use of information—operating in the shadow of the law—are garnering more scholarly and regulatory attention.²⁷

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.²⁸ In some cases, they take the form of a clickwrap agreement that users spend less than one second reading before they click on so they can use the “free” service of the platform.²⁹ In other cases, they are one of many other

every user, including the reader of this Article, to check if their account has been compromised in a data breach database encompassing 6,729,238,699 pwned [owned, in information security jargon] accounts, to date).

27. A prominent example is EU General Data Protection Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and the recently adopted California Consumer Privacy Act. *See* General Data Protection Regulation, 2016 O.J. (L 119) (EU) (repealing Directive 95/46/EC (General Data Protection Regulation)); California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.100 (West 2018) (CCPA). The EU General Data Protection Regulation and the California Privacy Act of 2018 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); *see also* Chris Jay Hoofnagle et al., *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 [<https://perma.cc/FX5S-JXPY>] (providing a comprehensive overview of the GDPR); *see also* Michael L. Rustad & Thomas H. Koenig, *Towards a Global Data Privacy Standard*, 71 FLA. L. REV. 18, 37–44 (2018) (providing an overview of CCPA). CCPA enters into 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 limits 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.

28. For example, Bakos et al. studied the browsing behavior of 48,154 consumers of ninety 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* 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).

29. Bakos et al., *supra* note 28, at 1, 19. Nevertheless, courts have generally enforced clickwrap agreements as long as the users had 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 Comm’ns Corp.*, 306 F.3d 17, 32–35 (2d Cir. 2002); *Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012). The Restatement reporters conducted a comprehensive empirical study

agreements—a part of a vertical boilerplate³⁰ to which future creators and innovators are forced to agree as a pre-condition to their academic studies or employment.³¹ 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.³² And although form 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.”³³ In other words, with great contracting power comes greater social responsibility.³⁴

finding ninety-two cases in which clickwrap contracts were enforced, in both federal and state courts. *See* RESTATEMENT OF THE LAW CONSUMER CONTRACTS, COUNCIL DRAFT NO. 5 at 46 (AM. LAW INST. 2018) [hereinafter *The Restatement*], https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf [<https://perma.cc/U8DK-G4CH>]. 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 browsewrap 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.*, No. 16-CV-07013, 2017 U.S. Dist. LEXIS 131208, *20–22 (N.D. Cal. Aug. 15, 2017). The Restatement seems to focus on the conditions of the formation of the contract and not necessarily its type. *See* *The Restatement*, 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.

30. 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.*

31. *See Bezalet's Policy*, *supra* note 9; Steven Cherenksy, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 595, 595 (1993).

32. *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. & SOC'Y 1, 16 (noting that of more than 500 surveyed users, ninety-three percent accepted a “first-born child” assignment term and ninety-eight percent failed to spot (missed) the term in the ToS).

33. *The Restatement*, *supra* note 29, at 1.

34. 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

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.”³⁵ 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*, a notable case deciding that contractual expansions of copyright protections or scope in standard-form contract settings, enforced by state law, do not preempt federal law. If the contractual provision is not preempted by federal IP law, which is usually the case,³⁶ the question of enforceability is left solely to contract laws, where

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. See Merges, *Intellectual Property and the Costs of Commercial Exchange*, *infra* note 52; see also Merges, *The End of Friction? Property Rights and Contract in the Newtonian World of On-Line Commerce*, *infra* note 52. In as much as form contracts are critical to any industry, they are vital in a digital world of instant, “click-based” consumption. See Reichman & Franklin, *infra* note 106, at 876–78. 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. The notable examples in this regard are Creative Commons licenses and Open Source licensing. See Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, *infra* note 58; see also Menell, *Economic Analysis of Network Effects*, *infra* note 116, at 32; ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005) and STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* 213 (2004). In the context of security research, boilerplate contracts can be used to introduce protections from anti-hacking laws and foster research, while the legal landscape continues to be murky. See Amit Elazari Bar On, *Private Ordering Shaping Cybersecurity Policy: The Case of Bug Bounties*, in *REWired: CYBERSECURITY GOVERNANCE* (Ryan Ellis & Vivek Mohan Eds. 2019).

35. See *infra* note 352.

36. 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. 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.

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.”³⁷

The result is that under U.S. law, private entities, acting as legislatures,³⁸ are allowed to undermine IP policies prescribed by federal IP laws through the use of boilerplate, an action that even state legislatures are prohibited from taking.³⁹ The same pattern of democratic 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.⁴⁰

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.⁴¹ As society shifts from the production of physical commodities to

37. Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 327, 330 (2017), [hereinafter Rub, *A Less-Formalistic Copyright Preemption*].

38. 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.

39. Under the copyright doctrine of preemption, and the doctrine of Supremacy Clause preemption. *See generally* Goldstein v. Cal., 412 U.S. 546, 562 (1973) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (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”). In the context of patents, *see* Bonito Boats v. Thunder Craft Boats, 489 U.S. 141, 160–61 (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 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”); Rub, *A Less-Formalistic Copyright Preemption*, *supra* note 37, at 329; *cf.* Bowers v. Baystate Techs., 320 F.3d 1317 (Fed. Cir. 2003); Davidson & Assocs. v. Jung, 422 F.3d 630, 639 (8th Cir. 2005) (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).

40. *See, e.g.*, Nathaniel Good et al., *Stopping Spyware at the Gate: A User Study of Privacy, Notice and Spyware*, 2005 ASS’N COMPUTING MACHINERY: PROC. SYMP. ON USABLE PRIVACY & SECURITY 43; 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).

41. 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. 1173, 1197 (1983). This proposition was repeated by other scholars throughout the years, including in IP

the creation of intellectual goods and advances in technology, and everything becomes interconnected,⁴² 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 law 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. Furthermore, courts continue to struggle to address unique problems presented by non-negotiated contracts with ill-equipped binary tools, such as preemption, misuse, and exhaustion, which do not allow contextualization according to the type of contract in place. In their despair, some courts turn to copyright and patent misuse, which are “capture-all” doctrines that are now being redesigned to address a variety of policy concerns. However, these are not specifically tailored to mass-market consumer contracts, nor do they provide a firmer ground or certainty.⁴³

Misuse, an equitable doctrine originating from the “unclean hands” doctrine, is a form of defense that is focused on anti-competitive or otherwise abusive behavior of the drafter that seeks to expand its monopolistic control.⁴⁴

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).

42. This “disruptive technological revolution” is commonly referred to 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 COMPUTER 24 (2013). As connected devices operate on licensed software, this revolution also affects the proliferation of the IP boilerplate and introduces new challenges.

43. Nonetheless, 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 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, 103 n.257 (2007).

44. 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 in

IP misuse prevents copyright and patent holders “from leveraging their limited monopoly to allow them control of areas outside the monopoly.”⁴⁵ 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 also operate as a partial solution in the case of the adherent-creator type of contract.⁴⁶

As the interface between contract and IP continues to grow, and the use of IP boilerplate that undermines IP policies prevails, several critical questions arise: 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?⁴⁷ 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 “ideological dissolution” between contract and IP law.⁴⁸ I

which an owner pursues 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”); *Disney Enters. v. Redbox Automated Retail, LLC*, No. CV 17-08655 DDP (AGRx), 2018 U.S. Dist. LEXIS 69103, at *17–18 (C.D. Cal. Feb. 20, 2018) (citing *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 699–700 (9th Cir. 2015)) (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’ ”); *infra* notes 190–203 and accompanying text.

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

46. 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 44, at 928 n.163; 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”).

47. 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”).

48. ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? 202 (2015) (suggesting 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”); see also Amit Elazari Bar On, *Copyright and the Greater System of Rights: Utilizing Contractual Concepts to Solve Intellectual Property Problems in Standard-Form*

further claim that the unique problems presented by the intersection between standard form contracts and IP law 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.⁴⁹ While most IP scholars discarded this doctrine as ill-equipped, my analysis, informed by comparative insights from Israeli jurisprudence, suggests that it is a viable solution that can accommodate extra-contractual notions. This view is also supported by the newly proposed Restatement of Consumer Contracts,⁵⁰ which as I explain, reformulates unconscionability to some extent and untangles 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 purposes 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, considering, *inter alia*, the salience of the term under the procedural analysis as well as externalities imposed on the public domain, and the displacement of IP policies under the substantive analysis. These considerations are then balanced under unconscionability's sliding scale approach, which allows the courts to reach one result for a negotiated contract and another in the context of boilerplate. It is a contextual 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 that is currently the solution under the prevailing interpretation of preemption.⁵¹ 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

Contracts, 29 INTELL. PROP. L.J. 83 (2016) (elaborating how Unconscionability 2.0 fits into Drassinower's argument).

49. The Restatement, *supra* note 29; U.C.C. § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

50. The Restatement, *supra* note 29, at § 5.

51. Rub, *Copyright Survives*, *supra* note 36, at 1144, 1171 (Surveying 279 cases and proposing the "no-preemption" approach is the prevalent interpretation for copyright preemption in the United States); *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").

terms specifically in cases involving IP boilerplate that amounts to “private IP legislation,” under unconscionability’s nonsalience procedural analysis.⁵²

Drawing on moral foundations, this solution seeks to avoid utilitarian biases, invites discourse between competing theoretical approaches, and facilitates “foundational pluralism.”⁵³ As a legal standard applicable to diverse contractual relationships, even those that are non-consumer-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 way an IP regime can operate within an existing contractual doctrine, and how one framework can involve both contractual and IP considerations.

It is precisely because the doctrine is deeply rooted in contract law that its flexibility and broad applicability could well 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 just one bold U.S. court for its adoption,⁵⁴ and no legislative reform, other solutions I propose, some based on Israeli standard form contract law, will require broader legislative efforts.⁵⁵ I further explain how this type of solution

52. 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 Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1613 (1995); cf. Rub, *A Less-Formalistic Copyright Preemption*, *supra* note 37, 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”).

53. See Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN’S L. REV. 681 (2016) [hereinafter Merges, *Against Utilitarian Fundamentalism*] (discussing the importance of foundational pluralism in the conceptualization of IP regimes). Unconscionability 2.0 can facilitate such pluralism by focusing on the midlevel principles: proportionality, efficiency, nonremoval of 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 702–03.

54. See I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196 (S.D.N.Y. 2015); *infra* note 265.

55. 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, on at least 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

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 Article proceeds as follows: the second Part 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. IP law is that the doctrine has been sporadically discussed only in reference to selected types of contracts, alongside other solutions. Generally, the literature lacks a unified discussion of IP boilerplate,⁵⁶ yet such a comprehensive account is not the purpose of this Article, which focuses instead on the solution. Still, this Part aims to provide the reader with an understanding of why IP boilerplate poses a unique normative challenge that merits a unique solution. It further suggests a new paradigm to observe the IP boilerplate problem: a distinction between adherent-user and 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.⁵⁷ 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

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-Shabar (and a Diagnosis)*, L. & ECON. WORKING PAPERS no. 98, 3 n.7 (2014), https://repository.law.umich.edu/law_econ_current/98/ [https://perma.cc/9LZD-JHUM] [hereinafter Radin, *What Boilerplate Said*]. Arguably, the Israeli experience shows that courts can in fact police unconscionable terms efficiently.

56. Scholarship, ever addressing the problems created by reality, has evolved step-by-step, usually focused on one or another strain of IP boilerplate. See, e.g., Cherensky, *supra* note 31 (discussing whether a contract was a pre-invention assignment contract signed by employees); Lemley, *Shrinkwrap Licenses*, *supra* note 23 (analyzing a shrinkwrap license seeking to limit the rights of the end user); Sandip H. Patel, *Graduate Students’ Ownership and Attribution Rights in Intellectual Property*, 71 IND. L.J. 481 (1996) (discussing an academic institution’s IP policy depriving students of rights in their creations). 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.

57. In 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.

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,”⁵⁸ it might be more worthwhile to discuss “adherent-generated content,” as this recent expansion mandates theoretical adaptations from both an IP and standard form contract perspective. This Part 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 fosters creativity as well as the rise of some less positive technological IP boilerplate that may give rise to “unconscionability by design.” Finally, this Part describes the overall emerging narrative of the “game of catch” IP regulation has been playing with IP boilerplate, one in which the latter still seems to be winning.

The third Part focuses on the current underutilization of unconscionability in the United States as a solution to the problems discussed in the second Part. While courts in other jurisdictions, specifically Israel, have used unconscionability to prevent drafters from 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 has not only failed to solve the problem but has 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 third Part 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

58. In Samuelson’s terms: “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*]; see also 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, 347 (2014) (noting that “[d]igital technology has empowered anyone to remix art and the Internet has opened vast content distribution channels. Creators no longer need to go through traditional professional gatekeepers — publishers, studios, broadcasters, and record labels. They can reach a massive audience through all manner of user-generated content websites”); 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 proprietizes the ingredients of iterative creativity, but they are also among the beneficiaries of copyright law’s largess.”).

issues.

The fourth Part 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 Part briefly presents the Israeli purposive approach to unconscionability and the manner in which Israeli case law has utilized unconscionability to solve problems created by 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 applies Unconscionability 2.0 to 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 Part 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 unilateral “take-it-or-leave-it” contracts since the invention of contracts as a legal institution more generally around the sixteenth century.⁵⁹ As time passed, and the need to facilitate transactions between large populations emerged with the advent of mass production,⁶⁰ 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 negotiating power (or information). These contracts are otherwise known as “contracts of adhesion.”⁶¹ As such, form contracts have been thoroughly investigated by legal scholarship for centuries, with early scholarship tracing back to the first

59. A.W.B. Simpson, *The Hornvitz 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).

60. 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, at 530.

61. 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.”).

decades of the twentieth century.⁶²

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.”⁶³ 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,”⁶⁴ and form contracts that amount to a “living law,” a vessel to empower “industrial empires”⁶⁵ that must be kept in check as a threat to democratic systems, especially in the hands of monopolistic entities.⁶⁶

This analytic framework for exploring the problematic nature of form contracts was later developed by Slawson in his seminal 1971 paper. 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.⁶⁷ 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 by democratic processes—the legitimacy of form contracts’ content must stem from another source: whether they reflect standards that comply with the public interest.⁶⁸ It is this conformity with “higher public laws” that allows privately-made law to legitimately “govern the public” as an alternative, private mode of legislation. To effectively subject form contracts to this type of judicial review, “an

62. 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 K.N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939) (reviewing OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (London, Sweet & Maxwell, 1937)).

63. 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 52, 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”).

64. Kessler, *supra* note 4, at 630.

65. *Id.* at 632.

66. *Id.* at 641–42.

67. Slawson, *supra* note 17, at 535–37.

68. *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, 538–39.

‘administrative law’ of contracts”⁶⁹ must be developed.⁷⁰

Building on Slawson’s argument, Rakoff asserted that because of the nature of form contracts, “a different body of law” is needed to address the question of enforceability.⁷¹ For Rakoff, the adherent aspect of the drafting process should be the focus of the inquiry, rather than the presence of monopoly or preexisting market power. Contracts with an absent adherent are contracts of adhesion. The “invisible” terms contained in such a contract—the terms that go beyond the contents of “ordinary contracts,” such as the price—are presumptively unenforceable,⁷² and judges would therefore need to apply the “background law” to establish the result. The legal system therefore needs to develop the body of terms that is best fitting to each and every transaction—a challenging, and costly, task.⁷³ 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 the contractual terms’ “salience,” a term that would fifteen years later become the cornerstone of unconscionability analysis in the proposed Restatement.

According to Korobkin, buyers are “boundedly rational decisionmakers,”⁷⁴ 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 of the contract’s terms. Because a market does not form to police the quality of these 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*. Meanwhile, *ex ante* legislation should provide mandatory alternative terms that reflect socially desired, efficient results.⁷⁵

69. *Id.* at 533.

70. 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.

71. Rakoff, *supra* note 41, at 1175.

72. *Id.* at 1251; *see also* Llewellyn, *Book Review*, *supra* note 62, at 704 (arguing that if the form terms are unreasonable, they should not be enforced).

73. Rakoff, *supra* note 41, at 1258–59.

74. 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 that the “market will often include terms that are socially inefficient, leav[ing] buyers as a class worse off.” *Id.* at 1206.

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

Other scholars put forth a variety of alternative solutions to address the question of standard form contract enforceability, but with the advent of the information age and the introduction of cheap electronic contract formation, form contracts expanded to all of life's domains. Meanwhile, 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.⁷⁶

This Part 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 Part. Yet this Part 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 is unique and merits a unique solution. In a world governed by the “myth of free”⁷⁷ and social media platforms, creative content has become 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 Terms of Service (ToS), ubiquitous 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 contract focused on the regulation of this unique mode of creation and consumption.

These form contracts contain IP boilerplate language and 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, but companies also offer very similar terms⁷⁸ and

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

77. See *infra* note 352.

78. 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 et al., *Reality and Perception of Copyright Terms of Service for Online Content Creation*, PROC. 19TH ACM CONF. ON COMPUTER-SUPPORTED COOPERATIVE WORK & SOC. COMPUTING 1450, 1453 (2016). The author’s own coauthored research findings further suggest that very similar language exists in platforms’ ToS, 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 Part. The first Section proposes a new analytical perspective to facilitate the discussion of IP boilerplate according to the *adherent-user* and *adherent-creator* distinction. The following Section demonstrates the variety and complexity of problems created by IP boilerplate.⁷⁹ Examples will encompass fair use waivers of different kinds, post-sale restrictions on how users can dispose of and use artifacts that embody patents or copyright, and various assignments of, and other limitations on, creators' and inventors' rights. This Section also exposes an 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 Section briefly discusses the rising phenomena of technological boilerplate, code that operates as boilerplate and enforces boilerplate. The following Section introduces, in a nutshell, the rising opposition to IP boilerplate: the use of private-ordering mechanisms meant to achieve the depropriety of the public domain or the flexible assignment of IP rights (e.g., Creative Commons licenses and the GPL open-source license).⁸⁰

further provides survey evidence that users' attitudes towards these terms do not change significantly across platforms. Amit Elazari Bar On et al., *infra* note 82.

79. See Rub, *Copyright Survives*, *supra* note 36, at 1149 (conducting a comprehensive review of court decisions that analyzed preemption to reach the conclusion that "the horror scenarios that envisioned contractual arrangements running wild and trumping copyright law as we know it have not materialized" 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 case law or elsewhere"). Yet Rub focused only on litigated 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 v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015). 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 litigation barriers and increase judicial scrutiny of IP boilerplate, as this Article attempts. See Rub, *Copyright Survives*, *supra* note 36, at 1149.

80. 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's exclusive rights." *Id.* at 937. In other words, compliance with general copyright law would have imposed similar "information-intensive investigation" as complying with such

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.

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 a creative work.⁸¹ 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 also 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?⁸² 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, in which the drafter is the owner of copyright-protected software and the boilerplate is used to limit the contours of usage license given to an adherent as a user of the work. In patents and copyrights, EULAs can

licenses. *Id.* The costs associated with such positive IP boilerplate are also balanced against the positive externalities they impose. *Id.* at 949.

81. 17 U.S.C. § 201(a) (2018).

82. See Amit Elazari Bar On et al., *A Penny for Their Creations—An Empirical Study of Social Media User’s Awareness to Rights in Uploaded Creations* (forthcoming) (on file with author) (surveying different license terms of social media networks ToS and providing a detailed discussion).

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 in the Supreme Court. While, as I explain, it is this type of contract that has received most of the scholarly attention, in this highly technologically connected era, adherents are producing more creations and innovations,⁸³ and therefore adherent-creator 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. Software code is created in cumulative open-source processes regulated by standardized contractual terms. And participants in creative communities like Wikipedia produce content under a set of standardized terms establishing their rights in the mutual product.⁸⁴

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. They thereby limit the public, and future creators and innovators, access to the creation beyond the careful balance prescribed by law. Adherent-creator 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. They can also create inefficient lock-ins on innovations by assigning works to the drafter, who is sometimes not better positioned to make the work accessible to the public,⁸⁵ or by limiting the circulation of the work in secondary markets.

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

83. See, e.g., Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, *supra* note 58.

84. See *About Wikipedia*, WIKIPEDIA <https://en.wikipedia.org/wiki/Wikipedia:About> [<https://perma.cc/AG9A-73GL>] (last visited Sept. 2, 2019). Wikipedia contributors are also subjected to social norms. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

85. Leading Israeli design institutions broadly assign students' IP rights to the institution, although they rarely invoke their rights or commercialize the work or invention.

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.⁸⁶

Research conducted by Hoofnagle and Perzanowski⁸⁷ showed that consumers lack an understanding of what they are buying when purchasing online digital media and the boundaries of ownership of such products versus contractual licensing. This includes 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.⁸⁸ Consumers, as the authors explain, are also subjected to “mixed signals” that lead them to believe they are actually “buying” the product as opposed to licensing it (with the most notable example being the “Buy Now” button on Amazon).⁸⁹ From an empirical standpoint, the authors found that among eighty-three percent 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 eighty-six percent 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.⁹⁰ Sixteen percent of users thought they could resell the good.⁹¹

Thus, applying this distinction can lead to different results when reviewing IP boilerplate (when IP policies are grossly displaced); this is specifically because the creator of the work is the adherent, or in adherent-user 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-doctrinal 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, combines both, regulating the license granted by

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

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

88. 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.” Perzanowski & Hoofnagle, *supra* note 87, at 323.

89. *Id.* at 327–30.

90. *Id.* at 337–40.

91. *Id.* at 342.

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 dichotomic. Users, and the public domain at large, as scholarship articulated, are not just recipients of the creative work, but also serve as generators of meaning, taking a meaningful part in the creative process.⁹² The digital revolution also transformed the creative process, which is now fueled by platforms and social networks.⁹³ 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 dialoguing with others.⁹⁴ Works of authorship are viewed as communicative acts and expressions of the author's autonomy as a speaking being,⁹⁵ while a copyrighted work serves as a speech addressed to the other, "an invitation to dialogue about ideas."⁹⁶ Under this communicative and dialogical view of authorship, users and the public domain are elevated from listeners, to de facto creators.⁹⁷ 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 Parts.

92. 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 (2016) [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).

93. See Perzanowski & Hoofnagle, *supra* note 87, at 323 (explaining the effects of the transition from physical to digital on music, media, and cultural consumption in the context of consumers' perceptions).

94. DRASSINOWER, *supra* note 48, at 55 (arguing that, 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"); see also Lior Zemer, *Copyright, Otherness, Dialogues*, 29 INTELL. PROP. J. 155 (2016) (providing a comprehensive review of this concept in Drassinower's theory); *infra* note 168 and accompanying text.

95. DRASSINOWER, *supra* note 48, at ch. 2.

96. *Id.* at 225.

97. Drassinower is a vital contributor to the communicative discipline in copyright. See Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991 (2009); DRASSINOWER, *supra* note 48.

B. ADHERENT-USER 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,⁹⁸ and on the other hand, it subjects creative works to access limitations and restrictive terms, promulgated by form contracts and enforced by technological measures (Digital Rights Management Systems, or DRMs), a unique and powerful combination.⁹⁹ It is this shift into “cyberspace” that largely makes private ordering and contracts a dominant mode of IP regulation.¹⁰⁰

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 law) as an axe to grind—and began appropriating intangible resources, expressions, and content.¹⁰¹ 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

98. 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); Bell, *supra* note 41, at 561.

99. Bell, *supra* note 41, at 564. DRMs are technological protection measures used to control the access to, and restrict the use of, copyrighted materials to prevent infringing use. Sometimes they may also limit legitimate use.

100. Niva Elkin-Koren, *Copyrights in Cyberspace—Rights without Laws?*, 73 CHI.-KENT L. REV. 1155, 1156 (1998) [hereinafter Elkin-Koren, *Copyrights in Cyberspace*] (“Cyberspace 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.”).

101. See Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L.J. 1537, 1537–38 (2013) [hereinafter Elkin-Koren, *Can Formalities Save the Public Domain?*] (“There is a wide consensus that copyright law has become a barrier for exploiting the full potential of the online environment in promoting creativity and creators.”).

with “innumerable accretions, modifications, and revisions” magnifying copyright owners’ rights.¹⁰²

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:¹⁰³ just as the authors envisioned.¹⁰⁴ Form contracts have 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.

1. *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.”¹⁰⁵ Two decades ago, Franklin and Reichman were also of the opinion that in virtual platforms, standard form

102. David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 20 (1999). Nimmer et al. proposed to revise U.C.C. 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).

103. 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 DRMs.

104. Nimmer et al., *supra* note 102, at 20–21.

105. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 135 (1999) (suggesting that 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”). Although almost two decades have passed, these insights continue to ring true.

contracts have virtually already superseded IP law.¹⁰⁶ 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.”¹⁰⁷ Around that time, a substantial body of literature exploring how form contracts interact with copyright developed.¹⁰⁸

Prominent among this scholarship is Elkin-Koren,¹⁰⁹ 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).¹¹⁰ The at-scale deployment of restrictive terms means that the usage of copyrighted work in a manner that is consistent with fair use,¹¹¹ for example,

106. 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) (“In 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.”).

107. 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*].

108. See Cohen, *Lochner in Cyberspace*, *supra* note 76, at 538–59; Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 100, at 1187–99.

109. See, e.g., Niva Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 100, 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 work).

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

111. 17 U.S.C. § 107 (2018) (providing 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 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); 17 U.S.C. § 117 (2018); see also PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018, VOL II: COPYRIGHTS, TRADEMARKS & STATE IP PROTECTIONS* 752–811 (2018) (providing a detailed overview of fair use).

for pure academic research purposes¹¹² or uses which are not “personal use,”¹¹³ is limited under mass-market contracts and licenses, although it is generally allowed under copyright laws.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ It further undermines the democratic nature of

112. See, e.g., *Terms of Use*, FETLIFE (June 4, 2018), <https://fetlife.com/legalese/tou> [<https://perma.cc/8U2S-UM6V>] (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, however, is a very unusual term. See *Sandvig v. Sessions*, No. 16-1368 (JDB), 2018 U.S. Dist. LEXIS 54339 (D.D.C. Mar. 30, 2018) (providing additional examples in the context of scraping).

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

114. See, e.g., 17 U.S.C. § 107 (1994) at the preamble; see also Kenneth D. Crews, *The Law of Fair Use and The Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 607–37 (2001); THE COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS 294 (Oct. 2018), https://www.copyright.gov/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf [<https://perma.cc/T7E2-4LLB>] (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)) (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”); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215–16 (2d Cir. 2015) (“[G]ood-faith security research promotes several of the activities identified in section 107 as examples of favored purposes, including criticism, comment, teaching, scholarship, and research.”).

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

116. See 17 U.S.C. §§ 117(a), 1201(f); THE COPYRIGHT OFFICE, *supra* note 114, at 168–72, 322–24 (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 Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 598–99 (9th Cir. 2000); Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219, 244–52 (2019) (explaining that particular functional specifications, and processes and features “that affect access to or interoperability 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

societies built on the free exchange of information and ideas, and hinders free competition and innovation.¹¹⁷

Accordingly, scholarship explored the specific effects of contractual restrictions on reverse engineering and de-compiling 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.”¹¹⁸ Technologists warned, already in the early 2000s, that limiting the “the freedom to tinker,” and “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.¹¹⁹ Commentaries recognized that the same vital concerns raised against the introduction of anti-circumvention regulation under the Digital Millennium Copyright Act (DMCA),¹²⁰ including restrictions limiting security

interoperability purposes is just a “moderately transformative activity.” See *Oracle America, Inc. v. Google, Inc.*, Tr. at 40:08–25 (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).

117. See Menell, *Rise of the API Copyright Dead?*, *supra* note 116 at 318–22, 341–43; Menell, *Network Effects*, *supra* note 116 (explaining how section 102(b) limitations in appropriating functional elements needed for interpretability purposes serve the 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).

118. 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 (analyzing 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.” Samuelson & Scotchmer at 1630; see also Samuelson, *Freedom to Tinker*, *supra* note 58, at 582.

119. 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*, 27(6); in LOGIN: THE MAGAZINE OF USENIX & SAGE 64, 66 (2002).

120. 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).

testing,¹²¹ encryption research,¹²² and interoperability between systems, are relevant if contracts (instead of the DMCA) are used to enforce them at scale.¹²³

121. 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 researchers from academia, to adjust their research designs and methods, and in some occasions to avoid testing altogether. *See, e.g.*, CTR. FOR DEMOCRACY & TECH., TAKING THE PULSE OF HACKING: A RISK BASIS FOR SECURITY RESEARCH (2018) <https://cdt.org/insight/report-taking-the-pulse-of-hacking-a-risk-basis-for-security-research/> [<https://perma.cc/5HZJ-GRGZ>] (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 systems protected by access controls to eliminate the legal risks stemming from the DMCA”); *see generally* NAT’L TELECOMMS. & INFO. ADMIN. (NTIA), VULNERABILITY DISCLOSURE ATTITUDES AND ACTIONS: A RESEARCH REPORT FROM THE NTIA AWARENESS AND ADOPTION GROUP 2 (2015) (conducting a survey among 414 security researchers participating in coordinated disclosure, and finding that “[t]he threat of legal action was cited by sixty percent of researchers as a reason they might not work with a vendor to disclose”); *see also* Amit Elazari Bar On, *Private Ordering Shaping Cybersecurity Policy—The Case of Bug Bounties*, REWIRED: CYBERSECURITY GOVERNANCE (Ryan Ellis & Vivek Mohan Eds.) (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3161758 [<https://perma.cc/E2YJ-NB8R>]; *see also* Alexander Gamero-Garrido et al., *Quantifying the Pressure of Legal Risks on Third-party Vulnerability Research*, 2017 PROC. 2017 ACM SIGSAC CONF. ON COMPUTER AND COMM. SECURITY 1501, 1503 (sampling seventy-five 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 an 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 twenty-two percent of them mentioned they were in fact threatened with legal action. *Id.* at 1511.

122. Samuelson, *Intellectual Property and the Digital Economy*, *supra* note 120, at 535–36; *see also* Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501 (2003). Since 1998, the DMCA already had a narrowly defined exception for encryption security research. *See* 17 U.S.C.A. 1201(j) (2018). 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. *See supra* note 20 (providing further discussion on the interaction between this specific exception and form contracts).

123. *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:¹²⁴ from parodying and criticism to academic research more generally.¹²⁵ For example, reviewing hundreds of terms, Moffat surveyed a variety of contractual restrictions, from limitations on modification of the work, limitations on commercial or “non-personal” use that might be covered under fair use,¹²⁶ and limitations on collection of non-protected material such as facts.¹²⁷

In specific domains like information security, scholarship focused on concerns related to the ability of software licenses to limit disclosure of software security evaluations,¹²⁸ a matter that recently was addressed in federal law with the introduction of the Consumer Review Fairness Act.¹²⁹

124. See, e.g., Moffat, *supra* note 43, at 45 (“Adhesion 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.”).

125. See, e.g., Gove N. Allen et al., *Academic Data Collection in Electronic Environments: Defining Acceptable Use of Internet Resources*, 2006 MIS Q. 599 (2006); see also Liu, *supra* note 122.

126. See Moffat, *supra* note 43, at 59.

127. *Id.* at 60; see Abruzzi, *supra* note 113, at 102.

128. See Jennifer A. Chandler, *Contracting Insecurity: Software License Terms that Undermine Information Security*, HARBORING DATA: INFORMATION SECURITY, LAW, AND CORPORATIONS 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).

129. Consumer Review Fairness Act, 15 U.S.C. §§ 45b(b)(1), (3)(E) (2018); see Chandler, *supra* note 128, at 176–77 (surveying, among others, reverse-engineering limitations and anti-benchmarking clauses in this context). Mulligan & Perzanowski suggest 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 Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157, 1166–77 (2007); *In re Sony BMG Music Entertainment*, FTC File No. C-4195 (F.T.C. June 29, 2007) <http://www.ftc.gov/os/caselist/0623019/0623019cmp070629.pdf> [<https://perma.cc/7TPL-Z>]32]. 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 alleged negligence causes consumers to doubt the system’s integrity, thereby undermining its adoption in the market. See Ido Kilovaty, *Legally Cognizable Manipulation*, 34 BERKELEY TECH. L.J. 449, 466–68 (2019) (providing a general discussion about the Cambridge Analytica scandal and its effects on data regulation).

Another body of literature was particularly concerned strictly with software and EULAs, and primarily with the proposed reform of U.C.C. Article 2B.¹³⁰ 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.¹³¹ 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.¹³² 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.”¹³³ 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.¹³⁴

Thus far, we discussed how boilerplate interacts with fair use, 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.¹³⁵ Copyright law excludes monopolistic protection in these

130. 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 et al., *The Metamorphosis of Contract into Expand*, *supra* note 102.

131. See UNIF. COMPUT. INFO. TRANSACTIONS ACT, 7 U.L.A. pt. II (2001) (adopted in Virginia and Maryland); UCITA, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, at p.1 (AM. LAW INST., Tentative Draft No. 2, 2005) (providing a later unsuccessful effort by the ALI to establish standards for software contracts).

132. See, e.g., Reichman & Franklin, *supra* note 106; see also Lemley, *Shrinkwrap Licenses*, *supra* note 23; Samuelson, *supra* note 128; Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998).

133. Reichman & Franklin, *supra* note 106, at 909.

134. 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.

135. 17 U.S.C. § 102(b) (2018); *Baker v. Selden*, 101 U.S. 99 (1879) (holding that a while a textbook explaining a novel accounting system might be protected under copyright, that protection does not grant the copyright holder a monopoly over the use of the accounting

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 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. 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,¹³⁶ but also from journals and books, in library licensing contracts, for example.¹³⁷

More recently, a new type of IP boilerplate problem reignited 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.¹³⁸ Purchasing a physical book on Amazon gives the user a very different bundle of rights than purchasing the electronic “Kindle” ebook version. The electronic version comes with “strings attached,” all promulgated under the fine print language of the licensing contract.¹³⁹ 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.¹⁴⁰

This at-scale transition from physical consumption to digital consumption introduced pro-copyright owner boilerplate, DRMs, and Technological

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*, 516 U.S. 233 (1996) (discussing the question of copyrightability of software menu command hierarchy); Menell, *Economic Analysis of Network Effects*, *supra* note 116, at 22–33 (discussing the copyright unprotectability of functional and network features).

136. *See supra* notes 111–117 and accompanying text.

137. *See, e.g.*, *Wright v. Warner Books, Inc.*, 953 F.2d 731, 741 (2d Cir. 1991); *infra* note 210 and accompanying text.

138. PERZANOWSKI & SCHULTZ, *supra* note 87.

139. *See* Perzanowski & Hoofnagle, *supra* note 87; Shaffer Van Houweling, *The New Servitudes*, *supra* note 80.

140. *See, e.g.*, Perzanowski & Hoofnagle *supra* note 87.

Protection Measures (TPMs) to all segments of cultural consumption.¹⁴¹ 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, which further gathered media attention, is deployed by John Deere, a leading tractor manufacturer that uses a combination of encrypted software and EULA language to “lock” consumers in 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 purpose.¹⁴² These types of restrictions affecting users’ right-to-repair are widely adopted in connected devices, from smartphones and voice assistants to medical devices.¹⁴³ 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.”¹⁴⁴

141. See, e.g., Deirdre K. Mulligan et al., *How DRM-based Content Delivery Systems Disrupt Expectations of Personal Use*, 2003 PROC. 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).

142. See *License Agreement for John Deere Embedded Software* § 4, JOHN DEERE https://www.deere.com/privacy_and_data/docs/agreement_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf [https://perma.cc/9DUL-BVGZ]. This, 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, 37 C.F.R. pt. 201 (2015). In 2018, this exception was broadened. See THE COPYRIGHT OFFICE, *supra* note 20.

143. Some states have advanced legislation to protect against these right-to-repair restrictions. See, e.g., Digital Right to Repair Act (providing an example of a specific law that supports consumers’ right-to-repair their cars in Massachusetts); Chaim Gartenberg, *California becomes the 18th state to introduce right to repair bill*, VERGE (Mar. 8, 2018) <https://www.theverge.com/2018/3/8/17097256/california-right-to-repair-bill-apple-microsoft-service-replace-parts> [https://perma.cc/BF7H-XQMD] (providing examples of right-to-repair bills that have been introduced in California and seventeen other states); 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> [https://perma.cc/AUW8-Q6CP].

144. THE COPYRIGHT OFFICE, *supra* note 114, at 13; see *id.* at 3 (specifically addressing “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).

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.¹⁴⁵ Tinkering also helps one to establish relationships with property and the world more generally to define one’s identity and personhood.¹⁴⁶ In other cases, tinkering could save people’s lives.¹⁴⁷ 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 their own medical information.¹⁴⁸ 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,”¹⁴⁹ in which tinkerers are punished for, threatened, or scared into avoiding tinkering, sometimes with no legal or

145. Samuelson, *Freedom to Tinker*, *supra* note 58, at 567; *see also* William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1455–72 (2010).

146. *See* Samuelson, *Freedom to Tinker*, *supra* note 58, at 565; 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/> [<https://perma.cc/K44Y-B3SR>]; *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (providing further discussion on the connection between property and IP and the counters of defining one’s self and personhood); Meir Dan-Cohen, *The Value of Ownership* (2000) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=189830 [<https://perma.cc/L2SU-E5DF>].

147. *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/xwjd4w/im-possibly-alive-because-it-exists-why-sleep-apnea-patients-rely-on-a-cpap-machine-hacker [<https://perma.cc/6LPQ-JFVE>] (discussing a recent case in which a white-hat hacker from Australia spent approximately 1,000 hours circumventing “continuous positive airway pressure” medical device software DRM to allow the patients using it to access their medical information. The resulting open source tool, “SleepyHead,” enables patients to dramatically improve their medical situation). This type of conduct is now exempted from the DMCA but is still often barred under EULA language. *See supra* note 20. Perhaps such a limitation constitutes copyright misuse under the *WIREDATA* decision logic, since that patients’ sleep data is only available on the device, and it is their own data. *See* Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 640 (7th Cir. 2003); *infra* note 208 and accompanying text.

148. Andrea M. Matwyshyn, *The ‘Internet of Bodies’ Is Here. Are Courts and Regulators Ready? A network of smart devices attached to or implanted in bodies raises a host of legal and policy questions*, WALL ST. J. (Nov. 25, 2018), <https://www.wsj.com/articles/the-internet-of-bodies-is-here-are-courts-and-regulators-ready-1542039566> [<https://perma.cc/U53J-ZWCK>].

149. *See* Felten, *The New Freedom to Tinker Movement*, *supra* note 146 (“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.”). Here, Felten refers the potential interaction of the Computer Fraud and Abuse Act with the Terms of Use. *Id.*

societal justification.¹⁵⁰ If we are to create a “substantial zone of liberty” in which socially beneficial tinkering is allowed, as Samuelson suggested,¹⁵¹ then we must limit the exercise of mass-market contractual limitations and “technological boilerplate” in the IP realm.

2. *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 per 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 manufacturer (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.¹⁵² They are based on the “single-reward principle,” according to which 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 markets, either by downstream purchasers or by sellers. 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 resections on secondary markets, but she cannot use patent law for that purpose. This notion was reaffirmed by the Supreme Court decision in *Quanta*, 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

150. *Id.* (arguing that 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 105.

151. Samuelson, *Freedom to Tinker*, *supra* note 58, at 565.

152. *See, e.g.*, *Bloomer v. McQuewan*, 55 U.S. 539 (1852) (providing an example of how the doctrine has been applied in case law since the nineteenth century). The doctrine is codified in copyright laws under 17 U.S.C. § 109(a) (2018).

to control post-sale use of the article.”¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ This “judge-oriented public policy” conceptualization of exhaustion, as Duffy noted,¹⁵⁶ might set the stage for invalidation of contractual terms based on public policy grounds, a view that at least one court already seems to have adopted, and aligns well with the proposed Unconscionability 2.0 solution.

The facts are 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 twenty percent and a requirement to return to *Lexmark* when empty, or they could pay the full price and enjoy unrestricted use (and sale) of the cartridges. The manufacturer sells the printers at a relatively low price, charges a premium for the toner cartridges, and incorporates patents in the sold “refill” product, in this case cartridges, so it can use monopolistic power to control the market.

153. *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 637–38 (2008) (noting that it is well established that patentees can attach contractual restrictions to their products); *see also 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 Sections.

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

155. *See id.* at 1532 (citing *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 501 (1917); *Keeler*, 157 U. S. at 667 (1895)) (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’” and that “[t]he inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration”). 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 (2013).

156. John F. Duffy & Richard M. Hynes, *Common Law vs. Statutory Bases of Patent Exhaustion*, 103 VA. L. REV. ONLINE 1, 9 (2017) (“[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.”).

Impression Products acquired these “single-use” discounted cartridges, refilled the toners, and resold the cartridges in the United States without regard for the “single use” restriction or the authorization of Lexmark.

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 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.¹⁵⁷ The Federal Circuit allowed a patent owner to impose post-sale restrictions on downstream use and resale of a patented product: printer 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 effectively “opt-out” from this fundamental doctrine by attaching a contract to the patented product. Simply put, patent laws established “historic” boundaries to the monopolistic right of the IP owner,¹⁵⁸ which could be redefined through a unilaterally drafted contract.¹⁵⁹

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 thirty amicus briefs) and numerous critiques, including from the government,¹⁶⁰

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

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

159. See Molly Shaffer Van Houweling, *Exhaustion and the Limits of Remote-Control Property*, 93 DENV. L. REV. 951, 973 (2016) (“[T]he 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.”)

160. 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

leading scholars,¹⁶¹ and retailers such as Costco.¹⁶²

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 was 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,”¹⁶³ 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 resale of patents in every secondary market, by any user or reseller,¹⁶⁴ 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

from domestic exhaustion. See Brief for the United States as Amicus Curiae, *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189), https://cdn.patentlyo.com/media/2017/01/15-1189_amicus_reversal_united_states.pdf [<https://perma.cc/W3K9-ZM5R>] (supporting reversal in part and vacatur in part).

161. Leading scholars have prepared and signed amicus briefs, written blogs, and published articles pertaining to the matter. See, e.g., Dennis Crouch, *Can Your Patent Block Repair and Resale and Prevent Arbitrage?*, PATENTLY-O (Jan. 31, 2017), <http://patentlyo.com/patent/2017/01/resale-prevent-arbitrage.html> [<https://perma.cc/P9WH-XEG8>] (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); Brief of Amici Curiae Intellectual Property Professors and American Antitrust Institute in Support of Petitioner, *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189) (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); PERZANOWSKI & SCHULTZ, *supra* note 87, at 155, 177–78 (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 159; Ariel Katz et al., *The Interactions of Exhaustion and the General Law: A Reply to Duffy and Hynes*, 102 VA. L. REV. ONLINE 8 (2016).

162. On Writ of Certiorari *Impression Prods. v. Lexmark Int’l, Inc.*, Brief of Costco Wholesale Corporation et al. as Amici Curiae in Support of the Petitioner, https://patentlyo.com/media/2017/01/15-1189_amicus_pet_costco_wholesale_corporation.pdf [<https://perma.cc/4BMG-N8ME>].

163. 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) (2018).

164. See Petition for a Writ of Certiorari at 22, *Lexmark*, 137 S. Ct. 546 (2016) (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”).

resellers.¹⁶⁵

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.

C. ADHERENT-CREATOR IP BOILERPLATE

We create all the time. From reviews posted on Yelp to applications and innovative fashion designs submitted for the purpose of fulfilling academic commitments, to “forks” of software code posted on GitHub that are developed in commons, copyright-protected content¹⁶⁶ and innovations are created daily, by many, and they are regulated by form contracts in the absolute majority of cases.¹⁶⁷ 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 Part 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 Part 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 of all types of these contracts.

1. *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 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 understanding of copyright.¹⁶⁸ Users often

165. 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.

166. 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) (2018) (“original works of authorship fixed in any tangible medium of expression”).

167. See Moffat, *supra* note 43, at 45.

168. See Elazari Bar On et al., *supra* note 82 (providing preliminary survey results of the author's research showing that from a sample of over 1,000 social media users, around sixty-

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.”¹⁶⁹

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. Accordingly, scholarship has been raising some concerns addressing both the exploitation of user-generated content and users’ creativity by platforms, and the unreadability and complexity of these terms coupled with users’ bounded rationality.¹⁷⁰ A recent survey from 2017 found that 543 participants who joined a fictitious social network spent fifty-one seconds on average reading the ToU, with a ninety-three percent acceptance rate.¹⁷¹ In a survey conducted with the users later, researchers found that participants felt the policies are a “nuisance,” and ninety-eight percent 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.”¹⁷² and that users’ first-born child will be assigned to the platform as payment for accessing the network.¹⁷³

While users care about their rights in user-generated content, 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 “user-generated content 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.

five percent mentioned that they upload originally created content for “social interaction” purposes only).

169. 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) (“[User-generated content] 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> [https://perma.cc/2DPR-AP3S].

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

171. Obar & Oeldorf-Hirsch, *supra* note 32, at 1.

172. *Id.* at 7.

173. *Id.*

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,¹⁷⁴ by various modes of technology, architecture, and system 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 DRMs and TPMs enforcing IP rights holders' licenses, 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.¹⁷⁵

A common example here is DRMs, TPMs, or other anti-circumvention technologies 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 contours of ToS, it moves from the first category to the second. Both categories undermine the statutory 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 Section 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 the platform. Once content is uploaded, it is examined, and YouTube alerts the (alleged) owner about any (alleged) infringement and entrusts her with 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

174. See LESSIG, *supra* note 105, at 20–21; see also Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-by-Design*, 106 CALIF. L. REV. 697 (2018) (providing a comprehensive account of scholarship on governance by design from law, computer science, engineering, "socio-technical systems" 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).

175. 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. *Id.*

under a Creative Commons license or even to receive payments.¹⁷⁶

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.¹⁷⁷ Formalities maintain a 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.¹⁷⁸ 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.¹⁷⁹

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.”¹⁸⁰ But the ToS do not explicitly prohibit users from engaging in fair use activity, nor is it clear if such a term could be enforced.¹⁸¹ In fact, the ToS refer to YouTube’s policy guidelines,

176. See *How Content ID Works*, YOUTUBE (Sep. 28, 2010), <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/9LG5-PPCC>]; 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).

177. See Elkin-Koren, *Can Formalities Save the Public Domain?*, *supra* note 101, at 1538, 1551.

178. See *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).

179. *Takedown Hall of Shame*, ELEC. FRONTIER FOUND., <https://www EFF.org/takedowns> [<https://perma.cc/NC42-JX5H>].

180. *Terms of Service*, YOUTUBE §§ 6(G), 7(B) (May 25, 2018), <https://www.youtube.com/static?template=terms> [<https://perma.cc/4RSA-LN4C>].

181. 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 (2018)). 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 litigation, Lenz indeed got compensated. In one of the later proceedings, the Ninth Circuit adopted a broad conception of fair use, explaining

which allow users to engage in authorized copyright activity.¹⁸² When YouTube's Content ID takes down fair use-protected content beyond what is permissible under the ToS, its technology moves 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.¹⁸³ In this case, at least one proposed doctrinal solution should be looking at this *technology* as presumptively unconscionable, as if it was the boilerplate language itself. In Part IV, I discuss how Unconscionability 2.0 should be applied in this context.

E. A GAME OF CATCH? SOME EXISTING SOLUTIONS AND THE IP
BOILERPLATE PARADOX

This Article 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.¹⁸⁴ 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' copyrights¹⁸⁵ and state laws voiding assignment of employees' inventions that exceed the scope of works-made-for-hire. 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 sometimes used 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.

The preemption doctrine,¹⁸⁶ which is discussed at length in the next Part, assures that the prerogative to further IP policy is vested in federal law, in order

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).

182. *Policies—YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/policies/> [<https://perma.cc/P6JF-SJPK>] ("Only upload videos that you made or that you're authorized to use.").

183. *See* THE COPYRIGHT OFFICE, *supra* note 114; *see also* 17 U.S.C. § 1201(f) (2018).

184. *See* 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 paper.

185. 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, rather than traditional IP policies.

186. 17 U.S.C. § 301(a) (2018).

to promote uniformity and prevent state laws from upsetting the fine balance dictated by Congress under federal law.¹⁸⁷ Preemption could have been the main way to address the tension between contract enforcement and IP policies at the federal level. Yet as I explain in the next Part, 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.¹⁸⁸ First-sale and misuse, two other common law doctrines geared to prevent overexpansion of IP monopolistic rights that upsets the IP regime's fine balance, seem to have taken the front seat, both separately and combined, with the demise of preemption. 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.

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.¹⁸⁹ While misuse was originally focused on anti-competitive behavior, courts have recently expanded this traditional view to include essentially any violation of the public policy embodied in the grant of a copyright.¹⁹⁰

187. It draws its origins from the constitutional supremacy clause, U.S. CONST. art. VI, cl. 2. 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.” 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 H.R. REP. NO. 94-1476 (1976), at 114; see also Lemley, *Beyond Preemption*, *supra* note 43; 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*] (providing an elaborate discussion). In the context of patents, the doctrine developed under case law. See *Sears, Roebuck & Co v. Stiffel Co.*, 376 U.S. 225 (1964); *Compro Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

188. See Rub, *Copyright Survives*, *supra* note 36, 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”).

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

190. See *id.* 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 *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792 (5th Cir. 1999) (internal citations omitted) (holding that misuse is an “unclean hands defense” that “forbids the use of the [copyright] to secure an exclusive

In fact, almost a decade has passed since the Ninth Circuit noted that “the contours of [misuse] are still being defined,”¹⁹¹ and it still is 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.¹⁹² Misuse is thus becoming the de facto prominent vessel to keep boilerplate language in check. One recent case, *Disney v. Redbox*,¹⁹³ particularly illuminates this trend, discussing both misuse and first-sale while shedding light on some of the limitations of both these doctrines.

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, both separately and together in similar “combo packs.”¹⁹⁴ 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”¹⁹⁵

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

right or limited monopoly not granted by the [Copyright] Office and which is contrary to public policy to grant”); *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003); *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.”).

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

192. *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. Suppiger*, 314 U.S. 488 (1942) (refusing to enforce a patent license requiring a patented article to be used only 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 ninety-nine years, beyond copyright’s protection period); *DSC Commc’ns 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).

193. *Disney Enters. v. Redbox Automated Retail, LLC*, No. CV 17-08655 DDP (AGRx), 2018 U.S. Dist. LEXIS 148489 (C.D. Cal. Aug. 29, 2018).

194. *Id.* at *2–3.

195. *Id.* at *4.

copyright holders by § 109(a) [codified copyright first-sale doctrine],”¹⁹⁶ 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.”¹⁹⁷ This “improper leverage” of copyrights to restrict secondary transfers “directly implicates and conflicts with public policy enshrined in the Copyright Act” and therefore “constitutes copyright misuse.”¹⁹⁸

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 Section IV(B)(i). One might claim that it takes this proposal even further, since the Disney court applied misuse in this manner where the “adherent” was a sophisticated commercial entity (Redbox) and not the typical adherent-user.¹⁹⁹

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 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 was no longer misuse), since “Combo Pack purchasers and recipients continue to enjoy digital access regardless whether they keep or dispose of the physical discs.”²⁰⁰ 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.”²⁰¹

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 fewer people own a DVD player, the digital copy is much more valuable in 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

196. *Id.* at *18–19.

197. *Id.*

198. *Id.*

199. Similar to the Israeli court application of unconscionability in the matter of *Jobmaster*.

200. *Disney Enters. v. Redbox Automated Retail, LLC*, No. CV 17-08655 DDP (AGRx), 2018 U.S. Dist. LEXIS 148489 at *21–22 (C.D. Cal. Aug. 29, 2018).

201. *Id.* at 23.

physical and digital, are constantly blurred.²⁰²

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, *Omega S.A. v. Costco Wholesale Corp.*,²⁰³ 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,”²⁰⁴ and that the misuse at case was an “attempt to expand the scope of [the copyright owner’s] statutory monopoly” in a manner that upsets that balance.²⁰⁵

The recent application of the misuse and first-sale doctrines unveils an interesting narrative: U.S. IP regimes have been playing a game of catch with 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 as 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-for-hire” in the 1980s and 1990s,²⁰⁶ and Disney changed its ToS in 2018 to limit 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.²⁰⁷

202. See PERZANOWSKI & SCHULTZ, *supra* note 87; 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) (“[A]n 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.”); *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 659 (2d Cir. 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”).

203. *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 699–700 (9th Cir. 2015), *cert. dismissed*, 136 S. Ct. 445 (2015).

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

205. *Omega*, 776 F.3d at 705–06.

206. See 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).

207. 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

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, such as phone records, from the public domain and prevent their copying, years later, in the misuse case *WIREData*,²⁰⁸ another court noted that limiting users' ability via contractual or technological means from accessing their own data, which is not protected under copyright, is "absurd" and may constitute copyright misuse.²⁰⁹ 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."²¹⁰ 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).²¹¹ While misuse is getting closer in function and scope to what preemption was perhaps 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.²¹²

preventing reverse engineering and jail breaking, and more. *See* THE COPYRIGHT OFFICE, *supra* note 20.

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

209. *WIREData, Inc.*, 350 F.3d at 645 (holding 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 to requesters such as WIREData 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 misuse . . .").

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

211. *Disney Enters. v. Redbox Automated Retail, LLC*, No. CV 17-08655 DDP (AGRx), 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018).

212. *See I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015); *infra* note 265; *see also* *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 450 (Cal. App. 4th Dist.

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 users, which rarely happens. Here, unconscionability and misuse share the same critique. Still, as explained in the following Part, 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: the application of the decision is not fact-dependent on the conduct and its purposes, or even on the specific adherent—only the boilerplate language.²¹³

Finally, the misuse and first-sale doctrines do not bar contractual enforcement of terms, just enforcement under IP laws.²¹⁴ 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”) stating “[c]odes are not for sale or transfer” and that “[the] product . . . cannot be resold or rented individually” could constitute an enforceable contract. Among other considerations,²¹⁵ the court 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

1986); *Reach Music Publ’g, Inc. v. Warner/Chappell Music, Inc.*, No. 09 Civ. 5580(KBF), 2014 WL 5861984 (S.D.N.Y. Nov. 10, 2014); *Song Fi, Inc. v. Google Inc.*, No. 14-1283 (RMC), 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014).

213. See Part IV.

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

215. Like the fact that Disney “ma[de] no suggestion that opening the box constitutes acceptance of any further license restrictions.” *Disney Enters.*, 2018 U.S. Dist. LEXIS 69103, at *11.

behavior, rather than the existence of a binding agreement.”²¹⁶ In *WIREData*,²¹⁷ 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.”²¹⁸

Contrary to these opinions, the Supreme Court clarified that contractual limitations on the patent exhaustion doctrine are purely a question of contract law (and not patent law),²¹⁹ in line with decades-long precedent.²²⁰ The result is that even in the aftermath of *ProCD*, there is still an unclear picture as to what portions of IP law could be displaced by negotiated contracts or form contracts, under different doctrines, absent a clear provision in the law on inalienability.²²¹

I addressed *Lexmark* at length in Section II(B)(ii), and yet the apparent discrepancy in the application of first-sale doctrine in patents and copyright in the contractual context still 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.”²²² The statutory language of both doctrines is focused on the “authorization” of the owner.²²³ Does it matter that sources of “restraints” and limitations on

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

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

218. *Id.* at 646–47.

219. *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.”).

220. *Bloomer v. McQuewan*, 55 U.S. 539 (1853).

221. *See* the discussion with respect to the “dispositive” nature of fair use under U.S. law in the aftermath of *Baystate* in Section III(B)(ii) “The Preemption Doctrine and the Contract-IP ‘Dichotomy.’”

222. *Lexmark*, 137 S. Ct. at 1527 (citing *Bauer & Cie v. O’Donnell*, 229 U. S. 1, 13, (1913)) (internal quotation marks omitted). The Court also clarified that “many everyday products are subject to both patent and copyright protections.” *Id.*

223. 35 U.S.C. § 271(a) (2018) and 17 U.S.C. § 109 (2018) (“[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.*, 568 U.S. 519 (2013).

“authorization” originate from boilerplate contract or IP laws,²²⁴ where centuries ago, common law seemed to disfavor these restrictions even under negotiated contracts, as the Supreme Court observed in *Lexmark*.²²⁵ What will be the result if *Lexmark* actually decides to sue its consumers under contract law? The Supreme Court left open the question, which already had been left unanswered for centuries.²²⁶ Soon enough, courts will need to decide these questions again, and IP doctrines do not provide them with the 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 blurred, with some courts introducing IP policy into the discussion and some refusing to. I discuss this tension further in the following Part.

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

A. WHY UNCONSCIONABILITY?

The doctrine of unconscionability has been used for centuries to void contractual “unconscientious bargains.”²²⁷ In fact, some scholars trace the roots of unconscionability even prior to English law and Roman or Greek

224. See Shaffer Van Houweling, *The New Servitudes*, *supra* note 80.

225. *Lexmark*, 137 S. Ct. at 1532 (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)) (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 [sic]’”) (“A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty [sic] is as void as if attached to a fee simple in land.”).

226. See *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 637, n.7 (2008) (“[The patent owner’s] 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, (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.”).

227. See Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 16 B.Y.U. L. REV. 427 (2016); Colleen McCullough, *Comment: Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 787 (2016) (providing a comprehensive review of the origins of unconscionability).

traditions to the Torah and Jewish law, and notions of justice and reciprocity.²²⁸ As years passed, unconscionability became commonly used to mitigate the dangers that arise when one party to a contract enjoys supremacy of negotiating power and information—and the other is forced to “take it or leave it.”²²⁹ As Gibson mentioned, “[w]hen concerns about boilerplate arise, contract law turns to the unconscionability doctrine.”²³⁰

The origins of unconscionability in U.S. common law lay in England’s courts of equity,²³¹ and it was generally introduced in the United States in a Supreme Court decision from 1889.²³² It gained prominence in the United States 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*.²³³ Since then, it evolved into a fundamental part of U.S. contract law,²³⁴ an underlining principle,²³⁵ and “[o]ne of the most important developments in modern contract law.”²³⁶

228. Scott C. Pryor, *Revisiting Unconscionability: Reciprocity and Justice* (Sept. 14, 2018), <https://ssrn.com/abstract=3249449> [<https://perma.cc/EGK7-94YZ>].

229. *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).

230. Gibson, *supra* note 30, at 218.

231. It was later adopted in English common law, as well. See *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82, 100 (defining 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 the U.S. Supreme Court. See *Hume v. United States*, 132 U.S. 406, 411 (1889).

232. *Hume*, 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).

233. *Thomas Furniture Co.*, 350 F.2d at 445.

234. See RESTATEMENT (SECOND) OF CONTRACTS § 208.

235. Keren, for example, uses the term “Unconscionability principle.” See Keren, *supra* note 227, 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”).

236. 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).

The unconscionability doctrine includes two components.²³⁷ The first component is procedural unconscionability, which pertains to inequality in bargaining power. Purportedly, 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 that causes unfair surprise or that deprives the consumer of meaningful choice is procedurally unconscionable. This is determined by analyzing consumer awareness of terms in a market environment and establishing whether the term actually affects consumers’ contracting decisions.²³⁸ 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 for courts to intervene via the unconscionability doctrine.²³⁹ 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.”²⁴⁰ In other words, the reporters of the Restatement clarify, courts have long been inquiring whether terms are salient 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,

237. According to the official comments to the U.C.C., case law has established a high threshold for both procedural and substantive 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 substantive level. *See, e.g.*, Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1158, 1162 (1976); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160 (2005); *see also* Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967)), (proposing that 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); *Industralease Automated & Sci. Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482 (App. Div. 1977). These are two cumulative conditions, judged according to a “sliding scale” approach. *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000) (quoting 15 WILLISTON ON CONTRACTS 226–27 (3rd ed. 1972)).

238. The Restatement, *supra* note 29, at 94.

239. *Id.* at 94–95.

240. *Id.* at 95.

nonsalience.²⁴¹

Moreover, the Restatement holds the view that most terms are nonsalient (meaning they do not affect consumers' decisions).²⁴² 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, rather than on technical elements like disclosure, they would be able to avoid undesirable circumvention of the unconscionability test,”²⁴³ and that “[t]he salience criterion restores harmony between doctrine and policy.”²⁴⁴ 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’).”²⁴⁵ This has led courts to “set aside” the procedural prong of the test, emphasizing the substantive element instead under a sliding scale approach.²⁴⁶

This second component, substantive unconscionability, pertains to the question of whether the enforcement of the term would be “shocking to the conscience,”²⁴⁷ and addresses the one-sidedness of a term that unreasonably undermines “the consumer’s benefit from the bargain.”²⁴⁸

241. *Id.* (clarifying further that salience is also the test adopted by the U.C.C. and the test used to evaluate warranty disclaimers); see U.C.C. § 2-316(2), cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N) (defining the terms “conspicuous” and “unexpected and unbargained language of disclaimer”).

242. The Restatement, *supra* note 29, 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.”).

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

244. *Id.* at 96.

245. *Id.* at 94.

246. *Id.*

247. *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605 (E.D. Pa. 2007) (citing *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002)) (“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.’”). However, as noted, courts have invoked a higher standard for procedural unconscionability, requiring “oppression” or an “unfair surprise.”

248. The Restatement, *supra* note 29, at 51.

Under the Restatement, since terms “are prima facie nonsalient, courts adjudicating an unconscionability claim can focus their attention on the substantive inquiry.”²⁴⁹ This focus on the substantive inquiry and the notion of salience “more closely tracks the doctrine’s normative underpinnings.”²⁵⁰ 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.”²⁵¹ Scholarship warned courts about paternalism and judicial activism, and courts responded by rarely invoking the doctrine.²⁵² But this trend is shifting. Unconscionability is becoming more prominent and predictable. The Restatement reconceptualized the doctrine, and it is becoming a “coherent legal concept” that could be applied in a foreseeable manner, with lower thresholds.²⁵³ 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.”²⁵⁴

249. *Id.* at 94.

250. *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, at *56–57 (N.D. Cal. June 25, 2014) (“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.”).

251. Keren, *supra* note 227, at 428; *see id.* at 432 (providing a useful summary of this debate in the context of unconscionability).

252. *Id.* at 444–49 (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 74.

253. McCullough, *supra* note 227, at 803–23.

254. *Id.* at 825.

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.²⁵⁵ Litigants are gradually increasing their use of the doctrine.²⁵⁶ Landrum, who examined unconscionability case law in twenty states from 1980 to 2012, found that courts voided terms as unconscionable in twenty percent of the non-arbitration cases, and that there is now a more sophisticated understanding of unconscionability law.²⁵⁷ McCullough found that in the short period from 2012 to 2014, supreme courts in nine states invalidated terms as unconscionable.²⁵⁸ 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.²⁵⁹

Unconscionability is no longer a “legal marginality”²⁶⁰ but has reemerged as a concept with a role to play both in the common law and statutory regulation.²⁶¹ It is the most appropriate doctrine for policing terms in adhesion contracts, as opposed to negotiated contracts that violate public policy in general.²⁶² The moral and equitable origins of unconscionability²⁶³ are familiar

255. These contexts obviously include arbitration and class-action waiver clauses, but are not limited to that. *See id.* at n.40; *see also id.* at 785 (providing analysis of the rise of unconscionability).

256. *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.”).

257. 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).

258. For a total of twelve times. McCullough, *supra* note 227, at 786.

259. This is an increase from 16 in 1990 to 155 in 2008. *See* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622–23 (2009).

260. 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).

261. *Id.* This role “both predates and transcends” the U.C.C., sale-of-goods law aspect of unconscionability. *See* Part IV.

262. This 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).

263. *See* Keren, *supra* note 227, at 448–49 (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).

to IP discourse.²⁶⁴ 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 prong. The latest *Lexmark* decision and the debate about using 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.

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.²⁶⁵ 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 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.

Unconscionability does not have to be an ambiguous “wild card.”²⁶⁶ 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 the two.²⁶⁷ Unconscionability 2.0 could be accompanied by

264. See *infra* notes 494–496 and accompanying text (discussing the moral foundations of IP theory).

265. See *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. Miss Matched later developed the student’s design to a full, successful line of clothing. The minor argued in her complaint that no contract was formed. The unconscionability claim was not pursued. Still, in a preliminary hearing 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.

266. RADIN, *supra* note 1, at 124 (claiming that “[t]he doctrine of unconscionability is a particularly salient kind of wild card”).

267. For example, the analysis does not ignore the critique of economics jurists who argue that courts should not interfere the market by voiding terms. It addresses them by explaining how nonsalient IP boilerplate creates market failures in this context. These failures are

mechanisms such as presumptions of unconscionability, and court preapproval of contracts, which will offer drafters more certainty. The time has come for U.S. law to reconsider its position regarding the feasibility of this doctrine in IP contexts. There is no reason to assume it will operate less effectively than the current “solutions.”²⁶⁸

B. THE UNDERUTILIZATION OF THE UNCONSCIONABILITY DOCTRINE
IN IP SETTINGS

1. *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 IP owner, and in particular, to the 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,”²⁶⁹ and that such expansions might undermine IP law’s purposes. 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.²⁷⁰ Others proposed various adaptations for ad hoc contractual tools that had been retrofitted to suit the virtual era.²⁷¹ 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.²⁷²

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 expands his monopolistic right.

268. See Rub, *supra* note 36 (providing discussion about 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 107, at 184 (claiming that “[p]re-emption is a very difficult and inconsistent area of doctrine”); Lemley, *Beyond Preemption*, *supra* note 43, at 113 (predicating that “preemption is unlikely to provide significant protection for the established rules of intellectual property law”). Lemley was right. See Rub, *supra* note 36.

269. See, e.g., Lemley, *Shrinkwrap Licenses*, *supra* note 23, at 1246.

270. IP scholars have suggested numerous legislative solutions, inviting legal reforms that regretfully have failed to come about. See Pallas Loren, *supra* note 46, at 535 (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).

271. Pallas Loren, *supra* note 46 (proposing a revised misuse doctrine).

272. See, e.g., Reichman & Franklin, *supra* note 106; see also Lemley, *Shrinkwrap Licenses*, *supra* note 23. 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 *supra* notes 130–132.

Prominent among the early proponents of disciplining IP boilerplate, as mentioned, were Reichman and Franklin.²⁷³ They were also among the first to discard the general doctrine of unconscionability as inadequate. Unconscionability, they argued, rests too heavily on consumer perceptions, and therefore is of no use when seeking to achieve the elaborate balance required by IP law.²⁷⁴ At most, it could be used to address problems of information asymmetry between parties—and these are not the most critical issues created by such contracts.²⁷⁵

Other scholars shared their concerns, and many offhandedly announced the demise of unconscionability, dubbing it ineffective and inappropriate for accommodating IP policies. This is true regardless of the general focus of the policy solution-oriented discussion on the contractual arena.²⁷⁶ 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 intellectual property law.”²⁷⁷ 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,”²⁷⁸ it is “poorly positioned to address questions of federal policy” as a primarily state-law tool, focused on procedural issues and assent, as opposed to federal copyright policy.²⁷⁹

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

273. Reichman & Franklin, *supra* note 106.

274. *Id.* at 927–28 (“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.”).

275. *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.

276. See, e.g., Lemley, *Beyond Preemption*, *supra* note 43, at 102–03 (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”).

277. Lemley, *Beyond Preemption*, *supra* note 43, at 151.

278. Moffat, *supra* note 43, at n.257; see Nimmer, *Breaking Barriers*, *supra* note 184, at 873 (further noting that “[u]nconscionability as a theory lacks substantive or thematic focus”).

279. An assertion that could be challenged in light of the newly adopted Restatement. See *supra* note 29.

the UCITA,²⁸⁰ was not perceived as a suitable tool, as experience shows that the courts do not tend to void terms as unconscionable.²⁸¹ 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 to not only be unreasonable, but also to be “shockingly oppressive.”²⁸²

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.²⁸³ Furthermore, the doctrine was presented as “useless” and meaningless in real-world business environments.²⁸⁴ Others

280. See *supra* note 272. 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.”)

281. See, e.g., Lemley, *Beyond Preemption*, *supra* note 43, at 163 (“[E]ven 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 [and 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 184, 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.”).

282. Samuelson & Opsahl, *supra* note 281, at 386.

283. See, e.g., Pallas Loren, *supra* note 46, 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).

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

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.²⁸⁵

Elkin-Koren thoroughly analyzed unconscionability, along with other contractual doctrines, and reached the conclusion that “these doctrines are likely to offer only limited help in policing restrictive terms.”²⁸⁶ 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.²⁸⁷ 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 objects²⁸⁸—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.²⁸⁹ 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 an unfair surprise, bizarre, or oppressive.²⁹⁰ 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.²⁹¹ 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. 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.

unconscionable under the doctrine. *See* U.C.C. § 2-105 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM’N, Proposed Discussion Draft 1997), www.uniformlaws.org/shared/docs/ucc2and2a/ucc2am97.pdf [<https://perma.cc/WBA6-JHLJ>].

285. *See* Oakley, *supra* note 284, at 1064.

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

287. *Id.*

288. *Id.*

289. *Id.* (adding 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 43, at 56 (noting that “it would rarely be rational for consumers to bargain over super-copyright clauses”). Elkin-Koren uses the term “super-copyright” clauses to describe contractual terms that limit fair use terms. *Id.*

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

291. *Id.* at 202–03.

[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.²⁹²

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.”²⁹³ 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.²⁹⁴

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, which did not materialize.²⁹⁵ According to this proposed doctrine: “All mass-market contracts, non-negotiable access contracts, and contracts imposing non-negotiable restrictions on uses of 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.”²⁹⁶

292. *Id.* at 204.

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

294. *See* Reichman & Franklin, *supra* note 106, 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.

295. *See supra* note 131.

296. Reichman & Franklin, *supra* note 106, at 930.

A more general vision of unconscionability was imported from the U.C.C. and specifically adopted in the ALI Principles of Software Contracts,²⁹⁷ 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,²⁹⁸ 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.²⁹⁹

Yet this list is focused on contractual unfairness, procedure and formation, not pure IP matters.³⁰⁰ 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.³⁰¹ 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.

Several commentators dispute this view. They have refused to lose hope and 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.³⁰²

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

298. *Id.* at 1.11 cmt. c.

299. *Id.*

300. 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 [<https://perma.cc/U5ZB-WW5T>] (providing further discussion and a comparative analysis to the EU Directive list of restrictive terms (also focused on matters of procedure)).

301. See *In re Sony BMG Music Entertainment*, FTC File No. C-4195 (F.T.C. June 29, 2007); see also The Restatement, *supra* note 29, at 65, 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 are "unconstrained by the good faith obligation").

302. See, e.g., Cherenksy, *supra* note 31; Reichman & Franklin, *supra* note 106.

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 in the first place, instead of rebutting it. Lacking the attention of such scholars, courts have been left 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 Part, 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. The Restatement also facilitates such interpretations, focusing on the substantive inquiry that "applies to the contract as a whole."³⁰³

As some scholars admit, this doctrine could partially aid in cases of "extreme and unfamiliar contractual provisions" such as "no criticism" or "no parody";³⁰⁴ I claim further that it has a more substantial role to play in the IP realm, especially in light of the Restatement. As discussed in the next Section, 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."³⁰⁵ It provides a standard by which one may "distinguish between 'good' and 'bad' terms."³⁰⁶ Contract law simply suffers from a formalistic interpretation that has led, prematurely as argued, to the abandonment of the powerful doctrine of unconscionability. In fact, a "[c]loser examination of the doctrine of

303. See The Restatement, *supra* note 29, at 63.

304. Rub, *Copyright Survives*, *supra* note 36, at 1217–18.

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

306. *Id.*

unconscionability³⁰⁷ leads to the conclusion that it could be applied to IP boilerplate, and may even emerge as an effective solution.

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

Thus far, the discussion focused on the underutilization of unconscionability in U.S. literature. This Section 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 *ProCD*, a landmark case that profoundly influenced the analysis of IP boilerplate in U.S. law.

In *ProCD*,³⁰⁸ which is notably recognized for addressing the question of 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 would dominate U.S. laws for the following years.³⁰⁹

As explained, according to the preemption doctrine,³¹⁰ 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.³¹¹ In *ProCD*, the plaintiff invested millions of dollars in the creation of a telephone book that contained more than 95,000,000 records.³¹² 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

307. Paraphrasing Pallas Loren, *supra* note 46, at 509.

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

309. *See* Rub, *Copyright Survives*, *supra* note 36.

310. 17 U.S.C. § 301(a) (2018).

311. *Id.* (“[L]egal 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 also* Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, *supra* note 187, at 102.

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

any “other networked or time-shared environment.”³¹³ 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,³¹⁴ which allowed Internet users direct access to the records for a more competitive 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.³¹⁵

The trial court sought to prevent drafters from rewriting IP laws under contracts, monopolizing what the law left to 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*.”³¹⁶ 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 should thereafter deny others a similar right.³¹⁷ 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,”³¹⁸ and clarified that U.S. federal copyright law preempts the

313. *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.”).

314. 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: phone records which, according to *Feist*, are not protected under copyright laws. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Likewise, ProCD also acted exactly to the degree *Feist* allowed it, in harvesting the data from 3,000 other telephone books. *See ProCD, Inc.*, 908 F. Supp. at 659–60; *see also* DAVID MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.04 (2015).

315. *See ProCD, Inc.*, 908 F. Supp. at 647.

316. *Id.* at 657, 659 (concluding 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”); *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.”).

317. *Id.* at 659.

318. *Id.*

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 on fair use,³¹⁹ 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.³²⁰ 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.³²¹ This argument is further illustrated by the discussion of the Seventh Circuit in *ProCD*:

319. See Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, *supra* note 187, at 101.

320. See NIMMER & NIMMER, *supra* note 314, at n.97 and accompanying text (criticizing 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).

321. See, e.g., Lemley, *Beyond Preemption*, *supra* note 43, at 151. Some scholars argue that there is also an inter-contractual dichotomy pertaining to the question of contract enforceability, whereby the courts are willing to reach binary results, concluding that the contract is either formed—and is therefore 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 23, 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 non-drafting 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 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).

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.³²²

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.³²³

The majority opinion in *Baystate* followed the same path.³²⁴ The heart of the legal dispute was a shrinkwrap contract that prohibited reverse engineering. *Baystate* argued that its right to reverse engineer the product is covered by the

322. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448–49 (7th Cir. 1996); *see also ProCD, Inc.*, 908 F. Supp. at 650 (differentiating 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. The court held: “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”).

323. *ProCD, Inc.*, 86 F.3d 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.’”). *But see* Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, *supra* note 187, at 102–04 (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”); NIMMER & NIMMER, *supra* note 314, at § 1.01, § 19D.3 (explaining that 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).

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

fair use protection under copyright law,³²⁵ 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 a contract cannot create “exclusive rights” as required by the preemption doctrine.³²⁶

Among other cases cited by the court was the decision in *Canal Electric*,³²⁷ 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”³²⁸ and only when the waiver does not harm the purposes of the relevant legislative enactment.³²⁹ It is this reference from which the court in *Baystate* derived 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.”³³⁰

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.³³¹ The court in *Davidson* sided with the majority opinion in *Baystate*,³³² and its decision further demonstrates the dichotomy created by the current use of the preemption doctrine in case law concerning IP boilerplate.

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

325. 17 U.S.C. § 107 (2018); *see, e.g.*, *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 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, 1527–28 (9th Cir. 1992).

326. *Baystate*, 320 F.3d, at 1325.

327. *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182 (Mass. 1990).

328. *Id.* at 378.

329. *Id.* (“A statutory right may not be disclaimed if the waiver could ‘do violence to the public policy underlying the legislative enactment.’”).

330. *Baystate*, 320 F.3d at 1325–26.

331. *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. *Baystate*, 320 F.3d at 1337.

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

the agreement, and the court must enforce the waiver.³³³ 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,” and therefore created an “extra element”³³⁴ that distinguished between the contractual right and the exclusive right. A reasonable consumer, the defendants argued, would not pay \$50.00 for a game that he cannot use.³³⁵ 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.³³⁶

333. *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.”).

334. *Id.* at 1175 (quoting *Nat’l Car Rental Sys. v. Comput. Assocs. Int’l*, 991 F.2d 426, 433 (8th Cir. Minn. 1993)) (“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.’ Therefore, the Court finds that the EULA and TOU are not statutorily preempted by the Copyright Act 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.”).

335. *Id.* at 1179.

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

The Eight Circuit, reviewing the case *de novo*, agreed.³³⁷ The court cited *Baystate*,³³⁸ 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*.”³³⁹ Signing a EULA, the court clarified, falls under “freely negotiating” a contract.³⁴⁰ 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.”³⁴¹

This is, therefore, the dichotomy at its worst, characterized by two stages. First, the court must determine that the contemplated rights are not IP by nature, or do not affect third parties so that it can overcome preemption, and find the contract as a whole enforceable. Second, 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). 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*.³⁴²

The following example reviews a adherent-creator type of contract, where unconscionability was still underutilized: 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 is still underutilized because 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.

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

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

339. *Davidson*, 422 F.3d at 639 (emphasis added).

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

341. *Baystate*, 320 F.3d at 1337 (Dyk, J., dissenting).

342. *Cf.* D’Agostino, *supra* note 47, at 4–5 (explaining further that 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”).

In *Song Fi*,³⁴³ 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" 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 the video violated 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.³⁴⁴

Confident in their position, Song Fi, alongside other plaintiffs, sued YouTube for defamation, breach of contract, and other claims. One of the plaintiffs' arguments was that the YouTube's ToS was, in general, an unconscionable contract.³⁴⁵ In regards to procedural unconscionability, the court inquired as to whether the plaintiffs lacked significant ability to choose the terms of the contract.³⁴⁶ 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.³⁴⁷ The court also rejected the substantive unconscionability argument. The plaintiffs argued that the contract includes several adhesive provisions, including the provision whereby YouTube can completely (and immediately) remove any user content at YouTube's own exclusive discretion.³⁴⁸ This is the same provision through which YouTube legitimizes, at least on a contractual level, *ex ante*, the

343. *Song Fi, Inc. v. Google Inc.*, No. 14-1283 (RMC), 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014).

344. *Id.* at *5–6.

345. *Id.* at *15.

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

347. *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." *Id.* (quoting *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002)).

348. According to section 7.8 of YouTube's ToU. *See supra* note 11.

possibility of removing legitimate content that constitutes fair use, through, for example, its Content ID automatic copyright infringement identification system.³⁴⁹ The court 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.³⁵⁰

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.³⁵¹

349. 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." Zimmerman, *supra* note 178, at 272. Instead of relying on the legislature, YouTube uses 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 silencing it. *See* Zimmerman, *supra* note 178, at 272–73. Arguably, this is one result of the fact that "[f]air use bec[ame] subject to private gain." LESSIG, *supra* note 105, at 135.

350. *Song Fi, Inc. v. Google Inc.*, No. 14-1283 (RMC), 2014 U.S. Dist. LEXIS 153436 at *20 (D.D.C. Oct. 29, 2014) ("[N]one 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).

351. 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 [<https://perma.cc/8FU3-UYEW>]. Similar results were reached in a recent case. *See* *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 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.*

Arguably, in a world governed by myth of “free,”³⁵² 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. In this respect, even the Restatement puts excessive focus on the issue of the service or product “price” and less on “free” services.³⁵³

Courts clearly are still unequipped to address IP boilerplate under the current interpretation of unconscionability in a manner that regulates IP rights in an *ex-consumerist* setting, but does not involve payment.³⁵⁴ Yet, in reality, popular platforms offer no-cost services, and their use often leads to severe IP problems.³⁵⁵ This issue will be addressed under the proposed

352. 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).

353. See, e.g., The Restatement, *supra* note 29, at 51. Although it does apply its principles to privacy policies as well, to some extent.

354. Not surprisingly, this narrative is also evident in case law addressing unconscionability claims of adherent-creators in non-virtual realms. See, e.g., *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 450 (Cal. App. 4th Dist. 1986) (providing an example of unconscionability claims in employment relationships. 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”); see also *Reach Music Publ'g, Inc. v. Warner/Chappell Music, Inc.*, No. 09 Civ. 5580(KBF), 2014 WL 5861984 (S.D.N.Y. Nov. 10, 2014) (providing a more recent example. 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 bankrupt, 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 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”). 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. See GIUSEPPINA D’AGOSTINO, COPYRIGHT, CONTRACTS, CREATORS: NEW MEDIA, NEW RULES 72–75, 135–37 (2010) (reporting 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”).

355. See, e.g., Elkin-Koren, *Can Formalities Save the Public Domain?*, *supra* note 101, at 1550, 1561.

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 ToU, where preemption and misuse are not claimed but unconscionability is.

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

The *Lexmark* case discussed earlier exposes another dimension of inconsistency in how U.S. IP laws treat the IP boilerplate problem and emphasizes the need for a nuanced tool situated between form contracts and IP laws that can also 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.³⁵⁶

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.”³⁵⁷ The Court devoted a kernel of its reasoning to discussing the longstanding common law principle against restraints on alienation and the underpinning principles of the exhaustion rule: a sound public policy principle.³⁵⁸

The Court reasoned that allowing restraints on trade would result in “inconvenience and annoyance to the public.”³⁵⁹ 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,”³⁶⁰ especially in light of advances in technology and the growing complexity of supply chains.³⁶¹

Still, if the legal system 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? Should

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

357. *Id.* at 1531.

358. *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.”).

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

360. *Id.*

361. *Id.*

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 limits “the scope of the patentee’s rights” and “extinguish[es] that exclusionary power.”³⁶² In the information age, IP boilerplate is often used for wholesale “contracting” of such post-sale restrictions that share the same characteristics of traditional servitudes and restraints on alienation, which creates similar exclusionary rights.

Almost a decade ago, Van Houweling demonstrated how contemporary licensing practices operate similarly to servitudes³⁶³ and create the same challenges with which the *Lexmark* Supreme Court is concerned: notice and information costs and negative externalities.³⁶⁴ 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.³⁶⁵ IP boilerplate creates a similar shade and “legal cloud on [a] title as [it] move[s] through the marketplace” that exhaustion seeks to eliminate.³⁶⁶

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 the ability of the licensee, often a consumer, to otherwise use the patent. They are used in the exchange of goods and are not merely rights.³⁶⁷ If the Court is truly motivated by the common law’s longstanding resistance toward restraints on alienation, not enabling post-sale restrictions under patent law does not solve the issue of boilerplate-based contractual restrictions, which 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,”³⁶⁸ but such a statement is somewhat detached from the reality of mass-market licenses.

362. *Id.* at 1534.

363. *See* Van Houweling, *supra* note 80, at 903 (clarifying that not all servitudes are concerned with restraints on alienation).

364. *Id.* at 949–50 (“[T]hese 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. . . . [E]ach of the paradigmatic licenses that I have examined exhibits a different mix of problematically servitude-like features.”).

365. *Id.*; *see also* Korobkin, *supra* note 74.

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

367. *Id.*

368. *Id.*

In that respect, both the en banc decision³⁶⁹ 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.³⁷⁰ Among the cases in which this was established is a 1938 Supreme Court exhaustion case, *General Talking Pictures*, which greatly influenced the en banc *Lexmark* decision. Yet *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.³⁷¹

Ordinary consumers have no incentive to read the fine print, and as discussed, empirical research in fact shows they almost never do so. Regardless, *General Talking Pictures*, even under the Supreme Court *Lexmark* decision, continues to guide courts and provide supportive reasoning for the purpose of answering the exact question the court then explicitly avoided: how to determine the enforceability of wholesale post-sale contractual restrictions on licensees under patent law. Using Van Houweling’s framing, the Federal Circuit in *Lexmark* took a case where the informational burden was limited,³⁷² and applied its reasoning to a general case where information costs constrain ordinary consumer behavior.³⁷³ The Federal Circuit, though it had the opportunity, did not differentiate between the actual knowledge that the manufacturing licensee had, such as in *General Talking Pictures*, and the knowledge that ordinary consumers, such as *Lexmark*’s consumers, usually have.

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

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

371. 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 that 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*, 816 F.3d at 728.

372. See Van Houweling, *supra* note 80, at 920 (providing 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”).

373. *Id.*

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 re-purchasers “acquired a patented article with less than actual knowledge of such a restriction.”³⁷⁴ Nor did courts address this issue in the *Mallinckrodt* or *Quanta* decisions,³⁷⁵ or in the Supreme Court *Lexmark* decision.

The *Lexmark* en banc decision did not pay much attention to the enforceability of Lexmark’s restrictions from the contractual perspective, since this matter was supposedly already settled in *Static*.³⁷⁶ Although the court in *Static*³⁷⁷ compared Lexmark restrictions to the *ProCD* shrinkwrap license and found it enforceable,³⁷⁸ the court did not address more important questions of exhaustion and effects on public policies. Courts have yet to solve the problem of non-negotiated licenses that merely provide notice of such restrictions, where actual knowledge is not proven and informational costs exist.

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 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 arrive at a different result where the contract could not be enforced.

Yet exhaustion in the *Lexmark* 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

374. *Lexmark*, 816 F.3d at 729. 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.*

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

376. *Lexmark*, 816 F.3d at 728.

377. *See, e.g., Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 830, 845 (E.D. Ky. 2007) (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996)) (enforcing Lexmark’s labels under contract law, albeit emphasizing these are adhesion contracts offered to consumers on a “take-or-leave-it” basis 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’”). Shrinkwrap licenses in which consumers “Pay Now” but see the “Terms Later” are enforceable contracts in the United States following *ProCD*.

378. *Id.* at 845, 847.

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.³⁷⁹ And not all standard form contracts raise the same concerns.³⁸⁰ Exhaustion must operate as a clear rule as to where that owner’s monopolistic rights and her ability to bring a patent infringement suit ends. That is the point of the first sale. This does not mean the exact same normative results are warranted 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 both disciplines must inform a tool that solves it. Indeed, exhaustion, like preemption and misuse, is not geared to inquire into the salience of terms—but unconscionability is. The unconscionability inquiry traditionally did not account for the harmful externalities that may be caused to society by such restrictions from an IP perspective.³⁸¹ 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.*,³⁸² *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*,³⁸³ and *General Talking Pictures Corp. v. Western Electric Co.*³⁸⁴ It now includes licenses 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. The transaction between the manufacturing-licensee and the patentee, as opposed to the one with consumers, will necessarily be “information-intensive.”³⁸⁵ Therefore, we need a tool that accounts for that shift, since exhaustion, as the *Lexmark* Supreme Court decision might suggest, 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

379. *Id.* at 933.

380. *Id.* at 935–37 (explaining how the GPL and Creative Commons licenses, standardized contracts by all accounts, do not exhibit the same notice and information cost concerns as the Microsoft EULA).

381. *See id.* at 331 (“[T]ird-party harm could arise from the enforcement of restrictions that effectively waive public-regarding limitations built into intellectual property law.”).

382. *United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926).

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

384. *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124 (1938).

385. *Van Houweling*, *supra* note 80, at 917.

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*, 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*³⁸⁶ case involved copyrighted works and was framed around preemption,³⁸⁷ at least two important commonalities exist between *Lexmark* and *ProCD*. First, 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 was explicitly permitted under IP law. In *ProCD*, it was harvesting data not protected under copyright law (phone records). In *Lexmark*, it was the post-sale restriction. Second, in both cases, the owners of the IP-protected products offered the consumers a choice. In *Lexmark*, consumers could choose between buying regular cartridges and the return-program cartridges, which cost 20% less but were 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.³⁸⁸ 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.³⁸⁹ 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.”³⁹⁰ However, twenty years of experience with *ProCD* has demonstrated how contractual

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

387. 17 U.S.C. § 301(a) (2018).

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

389. See Rub, *Copyright Survives*, *supra* note 36.

390. *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d 721, 752 (Fed. Cir. 2016).

restrictions may limit users' rights to fair use and access to creative building blocks³⁹¹—regardless of the price charged (or not). Often these restrictions do not translate automatically to an “immediate up-front benefit.”³⁹² 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 can be traced to courts' willingness to generally allow negotiated contracts, which will facilitate price discrimination and enable the owner to control arbitrage that contributes to market efficiency.³⁹³ But in reality, the courts did not account for the contracts' economic and societal costs in a world flooded by unnegotiated standard form contracts and inhabited by real consumers. These consumers value 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.”³⁹⁴ 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 a post-sale use/re-sale restriction, prevent the patent from being adequately valued in the marketplace. Consumers often struggle to adequately differentiate between a sale and a license, especially when they buy a tangible good, and receive mixed signals from the seller.³⁹⁵ 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. While *Lexmark* was clearly a sale, a more indistinct case would require courts to inquire what the consumers' expectations and perceptions of their rights

391. See, e.g., the discussion in the *Baystate* and *Davidson* cases, under Section 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).

392. *Lexmark*, 816 F.3d at 752.

393. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450, 1454–55 (“[T]erms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets.”); *Lexmark*, 816 F.3d at 752; see also Brief of 44 Law, Economics and Business Professors as Amici Curiae in Support of Respondent, *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 546 (2016).

394. See Korobkin, *supra* note 74.

395. Cf. Perzanowski & Hoofnagle, *supra* note 87, at 320 (providing an example in the context of digital media, as opposed to physical products: “[w]hile 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.* at 327–30.

were, perhaps even taken into account empirical evidence.³⁹⁶

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 remain scattered. A more nuanced tool such as Unconscionability 2.0 can allow such contextualization, thus 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 whether the market can solve the problem.

4. *The Dialogue of the Deaf*

IP scholars were not the only ones concerned about 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.³⁹⁷ Marrota-Wurgler, for example, examined 647 end-user licenses drafted by 598 software companies in different market segments.³⁹⁸ The study proposed using the “Bias Index,” by which the usage frequency of some twenty-three recurring provisions was mapped as benefiting the user, or alternatively, the supplier. The benchmark used was the standards incorporated under the Article 2 of the U.C.C. default rules. The conclusions of Marrota-Wurgler’s study indicated that the contracts were characterized by a unilateral bias in favor of the supplier.³⁹⁹

396. The Restatement, *supra* note 29, at 82; *see also* Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753, 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”).

397. Paradoxically, despite the growing prevalence of such contracts, there is still little legal empirical literature at hand. *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) (providing further criticism); *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?*].

398. Marotta-Wurgler, *What’s in a Standard Form Contract?*, *supra* note 397, at 679.

399. *Id.* 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.”).

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,⁴⁰⁰ which leads to the conclusion that there is no connection between the price of the product and the clear preferences of the consumers.⁴⁰¹ An additional study that examined the browsing pattern of nearly 50,000 users 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.⁴⁰² This 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.⁴⁰³ It essentially proved the nonsalience of EULA terms, and the inevitable conclusion is that the de facto informed minority cannot affect the willingness of suppliers to change the contract terms in real market conditions.⁴⁰⁴

A series of additional empirical studies led Marrota-Wurgler to the conclusion that there is no point to the significant disclosure requirements pertaining to EULAs;⁴⁰⁵ on the contrary, such requirements only burden the

400. *Id.* at 708.

401. Zamir & Farkash, *supra* note 397, at 139–40.

402. Bakos et al., *supra* note 28, at 3.

403. According to that argument, a minority of consumers who do read the terms and conditions is sufficient for the suppliers to adjust themselves to consumers’ preferences 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* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981); 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 43, at 56–57.

404. Bakos et al., *supra* note 28, at 3.

405. Florencia Marotta-Wurgler, *Even More Than You Wanted to Know About the Failures of Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 63, 65 (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,*

users and confuse them, and thus the focus should be on whether terms are an appropriate outcome of competitive market forces.⁴⁰⁶

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.”⁴⁰⁷ It follows from the conclusions of contractual-consumerist studies at the forefront of the literature⁴⁰⁸ 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 find new doctrinal solutions.⁴⁰⁹ Economists recognized that since consumers have bounded rationality, they often don’t translate the quality of the contract terms to the price.⁴¹⁰ This focus on the efficiency of courts’ interference in the case of nonsalient terms influenced the Restatement, and is key in the case of understanding terms pertaining to IP rights, which are more complex, especially for ordinary consumers.⁴¹¹

In a recent empirical research done by Hoofnagle and Perzanowski,⁴¹² the authors found not only that merely 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

Terms Later” Contracts Worse for Buyers?]; Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240 (2013).

406. See Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers?*, *supra* note 406, at 431; see also 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) (reaching the same conclusion).

407. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 746 (2011); 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 id.* at 665.

408. 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 397, at 138.

409. *Id.* at 170.

410. See Korobkin, *supra* note 74; see also Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 545 (2014) (“Instead 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.”).

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

412. Perzanowski & Hoofnagle, *supra* note 87.

restrictions apply to the product.⁴¹³ 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.⁴¹⁴ Moreover, the authors argue that lowering the information costs associated with rights understanding could promote competition with respect to the licensed rights.⁴¹⁵ Similar results were reached in other empirical studies, dating as far back as 2007, showing that providing a simplified notice on EULA rights (prior to installation, and after installation, allowing a user 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).⁴¹⁶ This is an example of inter-doctrinal 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 inefficient dialogue between the IP and contract scholars 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.⁴¹⁷ This further affects the perception of the entire unconscionability doctrine.

Interestingly enough, this “dialogue of the deaf” led a number of IP commentators to propose solutions that are based on “clear

413. *Id.*

414. *Id.* at 349–50.

415. *Id.* at 376 (“[L]owering the information costs associated with understanding the rights consumers acquire, short notices might create incentives to offer more attractive bundles of rights.”).

416. *See id.*; *see also* Nathaniel S. Good et al., *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.

417. 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 Marotta-Wurgler argues,

Numerous 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.

Marotta-Wurgler, *What's in a Standard Form Contract?*, *supra* note 397, at 690.

communication”⁴¹⁸ and disclosure⁴¹⁹ 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.

As I explained in the previous Section, boilerplate, by definition, will almost never give raise to “actual knowledge.” Nor is it an adequate tool to “clearly communicate.” 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 *Lexmark* decision, the enforceability of these “otherwise-lawful” post-sale resections should be decided, inter alia, as a matter of contract law.⁴²⁰

IV. UNCONSCIONABILITY 2.0—TOWARDS A REVISED DOCTRINE OF UNCONSCIONABILITY DERIVED FROM INTELLECTUAL PROPERTY RATIONALES

In this Article, 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 raises fundamental questions concerning consumer and contract laws, IP boilerplate raises questions deeply rooted in the core of IP law—from regulating user rights to the legal status of students’ creations and employees’ inventions. Thus far it has been 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

418. See Brief of 44 Law, Economics and Business Professors as Amici Curiae in Support of Respondent, *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 546 (2016) (No. 15-1189).

419. 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 addressed the problem of students who are required to assign all rights in their creations pursuant to an academic institution’s standard policies. Collins agreed that such assignment might be held unconscionable, yet she offered 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 browsewrap. See, e.g., Amit Elazari, *Position Paper: The Legal Status of Students’ Intellectual Property Rights in Academic Design Institutions* (Oct. 2012), <http://din-online.info/pdf/std7.pdf> [<https://perma.cc/ND9W-GJFE>] (in Hebrew).

420. *Lexmark Int’l, Inc. v. Impression Prods.*, 816 F.3d 721, 735 (2016).

discussed under the auspice of copyright preemption doctrine.”⁴²¹

I have thus far tried to explain how this result has come about and devoted much of the discussion to the various facets of the problem—I shall now 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 under a substantive analysis, by asking, generally, if the provision benefits the purposes of the relevant IP policies, or does it, 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 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 Sections, I will explain the advantages of this Israeli purposive interpretation of unconscionability and address 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 will further lay a more robust vision for Unconscionability 2.0, and suggest mechanisms to increase its clarity and certainty, such as presumptions of unconscionability. Then I will discuss the application of Unconscionability 2.0 through case studies. Next, I will discuss the application of Unconscionability 2.0 to technological boilerplate in negotiated contracts in various other case studies. I conclude this Part by addressing some critiques of Unconscionability 2.0.

A. THE PROPOSED DOCTRINE OF UNCONSCIONABILITY 2.0

1. *Theoretical Background and Comparative Insights: Adopting a Purposive Approach to Unconscionability*

The Section 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

421. Rub, *A Less-Formalistic Copyright Preemption*, *supra* note 37, at 338.

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 a wide range of non-contractual notions within the boundaries of unconscionability.

The first Israeli law that pertains to this issue was the “Standard Contracts Law” of 1964,⁴²² which applied only to consumer transactions.⁴²³ Before then, boilerplate was addressed under general contract laws.⁴²⁴ The 1964 law enabled courts and the “Board”⁴²⁵ to invalidate unconscionable terms in standard form contracts. This law met great scholarly resistance.⁴²⁶ 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.⁴²⁷ Alas, this avant-garde law, originally considered as a pioneering legal novelty unheard of in global

422. THE ISRAELI STANDARD CONTRACTS LAW, 5724–1964, (1964) § 18 LSI 51; *see generally* Aubrey L. Diamond, *The Israeli Standard Contracts Law, 5724–1964*, 14 INT’L & COMP. L.Q. 1410 (1965) (providing a general review); *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).

423. 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 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 422, 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.”).

424. For example, through the Israeli doctrines of public policy and good faith. *See* CA 461/62 Zim Israeli Navigation Co. Ltd. v. Maziar 17 PD 1319 (1963).

425. 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 423, at 473; *see also* Diamond, *supra* note 422, at 1415.

426. 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 423, at 466.

427. CA 280/71 Gideon v. Kadisha Soc’y 27(1) PD 10 (1972) (ruling unenforceable 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 id.*

terms,⁴²⁸ had been narrowly interpreted by the Supreme Court and was eventually disregarded.⁴²⁹

The question of unconscionability was reduced to a formalistic and conservative analysis that considered only two questions, limited in scope: (i) does the term in question constitute a waiver that exempts the supplier from liability for bodily injury?; and (ii) does the supplier hold a monopolistic power and provide a vital service?⁴³⁰ Even though the law's failure was generally attributed to the ineffective enforcement of its provisions, Deutsch noted that, in his view, the law's ineffectiveness stemmed 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's 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.⁴³¹

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, rendering seemingly powerful tools, such as unconscionability, ineffective. This is the state of affairs in the United States 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.⁴³² The doctrine was developed in too narrow a fashion and was not adaptable to changes in the settings and environments that pertain to the evolution of IP boilerplate. On the other hand, when the shortcomings of the 1964 law and the doctrine of unconscionability were finally acknowledged by

428. 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 423, at 460; *cf.* Berg, *supra* note 422, 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.”).

429. *See* Deutch, *Controlling Standard Contracts*, *supra* note 423, at 461 (“Two decades of conservative interpretation by the courts almost reduced the statute to a ‘dead letter.’”); *see also* Berg, *supra* note 422, at 573.

430. CA 285/73 Lagil Trampolines and Sports Equip. 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, 115–21 (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. *See, e.g.*, Deutch, *Controlling Standard Contracts*, *supra* note 423, at 461.

431. Deutch, *Standard Contracts Act*, *supra* note 423, at 64.

432. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

Israeli law,⁴³³ 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.⁴³⁴ 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.⁴³⁵ Unlike the 1964 law, the application of the 1982 law is broad and encompasses relationships that are not necessarily consumerist in nature.⁴³⁶ Thus, the existence of an unconscionable term is no longer conditional on a monopolistic relationship between supplier and customer.⁴³⁷ The 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.⁴³⁸

433. Deutch, *Controlling Standard Contracts*, *supra* note 423, at 475–76.

434. The Standard Contracts Law, 5743-1982, § 37 LSI 6. The Tribunal, a successor of the Board, was granted extensive authority. *See supra* note 425; Deutch, *Controlling Standard Contracts*, *supra* note 423, at 475.

435. The Israeli unconscionability doctrine is incorporated under section 3 of the 1982 Standard Contracts Law. The Standard Contracts Law, 5743-1982, § 3 LSI 6 (“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.”).

436. *See* CA 294/91 Jerusalem Chevra Kadisha v. Kestenbaum, 46(2) PD 464 (1992).

437. *Id.* The definitions used by the new Standard Contracts Law specifically avoid using the term “consumer,” and instead substitutes the word “client” (or “customer”). The formalistic requirement conditioning the law’s applicability upon the “supply” of a service or product was omitted, and the definitions used for the terms “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, 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.

438. *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).

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 seeks 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.⁴³⁹ 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 refers to “an unfair advantage obtained through the dictation of conditions.” . . . [W]hen 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.⁴⁴⁰

In Israeli law, unconscionability is a standard, an instance of a “valve concept” (*Ventilbegriffe, concetti volvoli*),⁴⁴¹ 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.⁴⁴² This is a flexible judicial norm that can be adjusted to meet the needs of the time and the place, and is shaped by the courts.⁴⁴³ It draws to

439. CA 1185/97 Milgrom v. Mishan Ctr. 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. Attorney Gen. 34(3) PD 365, 375 (1980).

440. CA 294/91 Jerusalem Chevra Kadisha v. Kestenbaum, 46(2) PD 464, 529 (1992).

441. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 74 (2015).

442. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (“[T]he 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 622–23.

443. *Id.* at 75; cf. AHARON BARAK, THE JUDGE IN A DEMOCRACY 71 (2006) [hereinafter BARAK, THE JUDGE IN A DEMOCRACY]; BARAK, PURPOSIVE INTERPRETATION, *supra* note 438, at 199. In Deutch’s words, in the context of consumer protection policies (originally, in Hebrew):

some extent from the moral conception of contracts rooted in Hebrew law.⁴⁴⁴

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.⁴⁴⁵ 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.”⁴⁴⁶ Such meanings are ever-changing and ever-evolving, and are constantly affected by what is perceived as proper conduct at any given time.⁴⁴⁷ 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,⁴⁴⁸ insurance,⁴⁴⁹ contract work, the sale of apartments,⁴⁵⁰ and

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).

444. CSC 1/79 Keshet Dry Cleaning Factories Ltd. v. The Attorney General 34(3) PD 365 (1980).

445. *Id.* at 373.

446. 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.

447. CA 294/91 Jerusalem Chevre Kadisha v. Kestenbaum, 46(2) PD 464, 528–29 (1992).

448. CA 6916/04 Bank Leumi Le-Isr. Ltd. v. Attorney Gen. (Feb. 18, 2010); *see also* CA 232/10 The First Int’l Bank of Isr. v. the Israeli Supervisor of Banks, para. 28 (2012).

449. CA 11081/02 Dolev Ins. Co. Ltd. v. Sigalit Kadosh, 62(2) PD 573 (2007).

450. CA 1632/98 Arbus v. Abraham Rubinstein & Co.—A Contracting Co. 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 Attorney Gen. v. Hous. and Dev. for Isr. Ltd., para. 9 (2011).

employment.⁴⁵¹

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 one hand, and to facilitate public policies on the other.⁴⁵² Accordingly, this was also the case in which 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 that its sole consideration stemmed from the relevant policies that copyright laws seek to facilitate.

In this case, *Jobmaster*,⁴⁵³ 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 was forbidden to copy the want ads published on the website's platform.⁴⁵⁴ 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."⁴⁵⁵ 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 was therefore "allowed to make use of the [data] as it

451. CA 1795/93 Egged Members Pension Fund Ltd. v. Jacob 51(5) PD 433, 451 (1997); see DMS (Regional TA) 8693-09 White Snow (1986) Ltd. v. Eliyahu, p. 3–5 (2011); KG (Regional BS) 3217/09 White Snow (1986) Ltd. v. Lorbrt (2014).

452. SC (Standard Form Contracts) 2016-01 Granot Agric. Coop. Soc'y Ltd. v. Isr. Land Admin., para. 35–45 (2010).

453. HF (Central District) 11359-03-09 Job Master Ltd. v. All You Need Ltd. (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.

454. *Id.* at 8–9. When accessing the website, the user is required to confirm that he has read, and has agreed 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).

455. *Id.* at 4. Substantively, this is 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.

deems fit,”⁴⁵⁶ and that Jobmaster could not, by means of a contractual arrangement, namely, the terms of use in its standard form agreement, “create a right out of nothing.”⁴⁵⁷ 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.”⁴⁵⁸ 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 Copyright law provides protection to a creative work only when such protection serves the interests of society as a whole 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.⁴⁵⁹

To clarify, I do not argue that the particular outcome of *Jobmaster*, under which a term 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. 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.⁴⁶⁰ Neither was the court troubled by

456. *Id.* at 11–12 (citing TA (TA District) 1074-05 Ma’ariv Modi’in Publ’g Ltd. v. All You Need Ltd. (July 11, 2010); OCR (TA District) 2018/05 Ma’ariv Modi’in Publ’g Ltd. v. All You Need Ltd. (Mar. 3, 2005)) (holding specifically that the content of want ads is not protected by copyright).

457. *Id.*

458. *Id.*

459. *Id.*

460. As previously mentioned, U.S. courts, when applying the unconscionability doctrine to IP boilerplate, have on more than one occasion been interested specifically in the adherent’s level of sophistication, her understanding of the language, whether the adherent is a person or

the fact that Alljobs and other users do not pay for the use they make of the information compiled by Jobmaster.⁴⁶¹ 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."⁴⁶²

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.

2. *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" (*Ventilbegriff*), not only accommodates IP policies within its framework, but also confers other advantages that are especially suited to its application to IP boilerplate. Moreover, this doctrine enables us to address problems created by the contemporary adherent-creator type of contract. This Section 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 example of the student-creator to this end.

One of the difficulties that previously arose is that IP boilerplate often governs relationships that are not pure-consumerist in nature. This trend, as previously noted, is expected only to increase, and in this context, U.S.

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, 1179 (E.D. Mo. 2004) *aff'd*, 422 F.3d 630 (8th Cir. 2005); *Song Fi, Inc. v. Google Inc.*, No. 14-1283 (RMC), 2014 U.S. Dist. LEXIS 153436 (D.D.C. Oct. 29, 2014); *see also* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 462–63 (2006) ("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 browsewrap license have done so to protect consumers. Conversely, virtually all the courts that have enforced browsewrap 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.").

461. *See Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 64 (D.D.C. 2014) (holding that "[h]aving taken advantage of YouTube's free services, Plaintiffs cannot complain that the terms allowing them to do so are unenforceable").

462. 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.

unconscionability failed to provide adequate solutions.⁴⁶³ 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.⁴⁶⁴ 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.⁴⁶⁵

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.⁴⁶⁶ On the contrary, it recognizes the fact that, as explained in Part II, at present IP boilerplate seeks 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

463. 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—they have continued to consider the doctrine as though the relationship in question is *essentially* a consumerist one. *See, e.g., supra* note 354.

464. *See, e.g.,* TA (Jerusalem District) 109/94 Isr. Student Ass’n v. Hebrew Univ. of Jerusalem (June 3, 1996).

465. 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 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.

466. *See* Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231 (2014) (providing a discussion on assumptions such as these in the context of IP law).

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 also 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. 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.⁴⁶⁷ 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.⁴⁶⁸

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. 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 that 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.⁴⁶⁹ It is able to do so because it is rooted in the Israeli interpretation of the doctrine, because it is a “valve concept” (*Ventilbegriffe*), because it is dynamic, and because it is based on a broad doctrine of unconscionability that enables the introduction of judicial legislation.⁴⁷⁰ Moreover, if unsolvable problems are found—as it is

467. See CA 294/91 Jerusalem Chevra Kadisha v. Kestenbaum, 46(2) PD 464, 492 (1992). 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 of by institutions that are functioning as hybrid entities.

468. *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. See CA 2687/92 Geva v. Walt Disney, 48(1) PD 251, 266 (1993); CA 563/11 Adidas Salomon A.G. v. Yassin at 10 (2012).

469. 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.”).

470. See CA 294/91 Jerusalem Chevra Kadisha v. Kestenbaum, 46(2) PD 464, 492 (1992); 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) [sic], whether through the force of the principle of stare decisis, or other recognized [techniques] that obligates not only the parties to the dispute,

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.⁴⁷¹

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.⁴⁷² 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.”⁴⁷³ IP boilerplate takes 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.⁴⁷⁴ 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

but all branches of the government and members of the public.”); cf. BARAK, *THE JUDGE IN A DEMOCRACY*, *supra* note 443, at 71.

471. Alfred W. Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178, 1186 (1964).

472. 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*, ELEC. FRONTIER FOUND. (Dec. 18, 2012), www.eff.org/deeplinks/2012/12/instagrams-new-terms-service-sell-your-photos [<https://perma.cc/GC7V-42F7>].

473. VARDA LUSTHAUS & TANA SPANIC, *STANDARD CONTRACTS* 37 (1994) (translated from Hebrew).

474. *Id.* at 38; see also BARAK, *THE JUDGE IN A DEMOCRACY*, *supra* note 443, 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 . . .”).

between the various purposes of IP laws.

In previous Parts, 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 “moral or social consideration.”⁴⁷⁵ Furthermore, as a “balance-based”⁴⁷⁶ approach, 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’ creations. 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.⁴⁷⁷

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 law. 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.⁴⁷⁸ 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

475. *Kadisha*, *supra* note 436, at 529 (translated from Hebrew).

476. See, e.g., Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1491–94 (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).

477. Seminar Hakibbutzim, *Students Regulations for the Academic Year of 5775 (2014–2015)—Annex 7 Copyrights* 56 (2014), www.smkb.ac.il/filehandler.ashx?fileid=546887 [hereinafter *Seminar Hakibbutzim’s Policy*] (translated from Hebrew).

478. Such a restriction is also included under *Bezalel’s Policy*, *supra* note 9, at §§ 1, 4.

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?⁴⁷⁹

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.⁴⁸⁰ It can therefore be described as an arithmetic model:⁴⁸¹ if we subtract “pain” and add “pleasure,” we will eventually arrive at the cumulative happiness of individuals, which is expressed by “maximum utility.”⁴⁸² 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.⁴⁸³

479. 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 U.S. 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 U.S. Supreme Court has emphasized in a number of significant opinions the “substantive” and “true” purpose of IP laws, in the spirit of the U.S. Constitution. See also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“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.”); *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’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985).

480. JEREMY 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*.”).

481. 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.”).

482. 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.*

483. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2–3 (2011).

Against the creator's social contributions 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.⁴⁸⁴ Therefore, IP laws are designed so as to create a formula that produces an optimum (in terms of quality and quantity) of intellectual goods.⁴⁸⁵

The economic approach subsequently replaced the term "utility" with social "welfare,"⁴⁸⁶ but whether we are engaged in maximizing utility or in maximizing cumulative welfare, both of 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.⁴⁸⁷ An exhaustive discussion of these approaches lays beyond the scope of this Article, but the main point here is that these approaches will always consider the individual as a tool who is to 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.⁴⁸⁸ These approaches assume that, in the absence of reward, and in the absence of property protection, the individual would simply

484. *Id.*

485. *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.

486. Posner, *supra* note 482.

487. Palmer argues that despite the methodological distinction proposed by Posner in his scholarship, the economic approach to IP still draws on Benthamite 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 Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 *BERKELEY TECH. L.J.* 229 (2014) (reconciling consequence-sensitive theories of copyright with moral theories).

488. 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 492 for a discussion), 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) ("[T]reating 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 a consensus on the operation of midlevel principles, but do not solve the fundamental problem of what should be done in other cases where social welfare would be maximized by *not* adhering to deontological principles. See Merges, *Against Utilitarian Fundamentalism*, *supra* note 53.

avoid creating. Or, at the very least, her creations would be of poorer quality,⁴⁸⁹ and in this respect creative activity is regarded as a demanding or even “unpleasant”⁴⁹⁰ 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.⁴⁹¹ 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,⁴⁹² at least when it comes to the discussion of IP boilerplate.

489. MERGES, *supra* note 483, 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).

490. Hughes, *supra* note 479, 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.”).

491. This principle affords a great amount of flexibility to the utilitarian approach in shaping the rights of individuals. 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. 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. 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 argued that the allocation of a certain right to one comes at the expense of the other. *Id.* 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). *Id.* at 78.

492. The 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. This balancing point ensures that enough remains in the hands of the public so as to reward the authors and creators of the future, while incentivizing the authors and creators of today. 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 53. 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 paper, as are those of the scholarly debate as to whether tangible private property justifications

This advantage allows 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 primarily for money—but for other purposes.⁴⁹³

Therefore, according to the proposed solution, the pathological provision cited above would always be considered from the moral-deontological standpoint as well, which acknowledges the fact that students must be rewarded for their contributions to society.⁴⁹⁴ 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 privatize 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.⁴⁹⁵ 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.⁴⁹⁶

IP boilerplate tends 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 practice is justified.⁴⁹⁷ The proposed solution forces us to engage in a moral-deontological debate that acknowledges the creator’s

are applicable to IP, and vice versa. *See, e.g.*, PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 5 (1996); *cf.* MERGES, *supra* note 483, at 4.

493. *See, e.g.*, YOCHAI BENKLER, *supra* note 84; *see also* WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 67–68 (2009) (providing more on the assertion that historically, in general, creators do not engage in creation because of the proprietary protection of copyrights).

494. The roots of the deontological approach can 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. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 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 483, at 32; LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (2007).

495. Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891 (2005).

496. 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 479, at 330. One finds an instance of this provision in Instagram’s terms of use, which enabled the platform, for a short period, to commercialize the images produced by adherent-creators. *See supra* note 472 (providing more detail about this issue).

497. It could be argued that given the vast knowledge maintained by academic institutions, they could make creations and patents accessible to the public in a more proper fashion.

autonomy in a manner that, as Merges put it, “[allows] individuals to control the works they create.”⁴⁹⁸

But the proposed solution also incorporates other theories. Some recent cases indicate that courts have begun to consider rival theories in deciding IP issues.⁴⁹⁹ The utilitarian approach has begun to give way to personality-focused approaches on the one hand, and culturally-focused approaches on the other. Both approaches acknowledge the significant role of the public domain, not only as the recipient of the creative work, but also as a generator of meaning.⁵⁰⁰ This shift mandates a pluralistic, inclusionary approach to the purposes of IP law, which fosters a theoretical discourse that relies on a broad assortment of theories, and on the existence of a dialogue and interrelationships between policies.⁵⁰¹ The proposed solution allows us to readily incorporate such a pluralistic approach. Being as it is a flexible and balance-based tool, it not only encourages, but requires, a discourse of varying 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 a “common space” or “place of engagement,”⁵⁰² since it operates on the doctrinal level on which consensus can be found as to the “operational details of the IP system”⁵⁰³ while putting aside foundational disagreements.⁵⁰⁴

IP boilerplate, and in particular the adherent-creator type of contract, present us with issues and difficulties whose solutions mandate a broad, purposive approach. For example, in the case of user-generated content, some claim 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

498. MERGES, *supra* note 483, at 289.

499. *See, e.g.*, *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015) (citing *NIMMER & NIMMER*, *supra* note 314, 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.”); *see also* *CA 5097/11 Tiran Communications (1986) Ltd. v. Charlton* (2013) (providing an example in Israeli law).

500. *See, e.g.*, CRAIG, *supra* note 92, at 3; Zemer, *Dialogical Transactions*, *supra* note 92; *see also* DRASSINOWER, *supra* note 48; ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); *OCR (TA District) 11646/08 The Football Ass’n Premier League Ltd. v. John Doe* (2009) (providing an Israeli copyright law example).

501. *Cf.* Merges, *Against Utilitarian Fundamentalism*, *supra* note 53.

502. MERGES, *supra* note 483, at 10.

503. Merges, *Against Utilitarian Fundamentalism*, *supra* note 53, at 706.

504. *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.*

rights that are more personal are harder to alienate and subject to stricter judicial scrutiny.”⁵⁰⁵ 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 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.”⁵⁰⁶ 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 about her potential ideas for creations or inventions, be it in class or elsewhere at the college. 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.⁵⁰⁷ Furthermore, they prevent the basic dialogue on which human creativity is founded.⁵⁰⁸ 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.⁵⁰⁹

3. *The Adoption of Unconscionability 2.0 in U.S. Law*

The Israeli solution can be implemented in U.S. law. As demonstrated in the previous Section, the doctrine’s inefficacy as a solution to the IP boilerplate problem is chiefly caused by a formalistic consumer-oriented interpretation.⁵¹⁰ The legislative history of the U.S. unconscionability doctrine is extensive; a full account of such history is beyond the scope of this Section. However, a brief

505. Storella, *supra* note 78, at 2048 (explaining that if the personal nature of a work implicates personhood concerns, a stricter scrutiny for users’ waivers is required).

506. *Seminar Hakibbutzim’s Policy*, *supra* note 477, at 56 (translated from Hebrew).

507. Lior Zemer, *Towards a Conception of Authorial Knowledge in Copyright*, 3 BUFF. INTELL. PROP. L.J. 83, 85 (2006) (“Manifestations 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.”).

508. *See* Zemer, *Dialogical Transactions*, *supra* note 92; *cf.* DRASSINOWER, *supra* note 48 (suggesting a communicative account to copyright).

509. *Cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (proposing a democratic paradigm to copyright).

510. *See also* Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 152 (2005) (stating that, in the contractual context, “[c]ourts 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”).

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.

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 issues of power inequality, bargaining power, and “the opportunity to read.” The situation was quite the contrary: “[n]o doubt the overall drift of the section was that contracts ought to be ‘fair and balanced’ no matter how the parties bargained.”⁵¹¹

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.⁵¹² 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”),⁵¹³ if the outcome of the contract is unbalanced or unfair according to the needs of the relevant trade, the contract would not be enforced.⁵¹⁴ Under this perception, not only provisions that “shock the conscience” would be subject to invalidation.⁵¹⁵ Indeed, the Official Comments to the U.C.C. set a high substantive and procedural bar for unconscionability⁵¹⁶ that courts followed. But as the recent Restatement suggests,⁵¹⁷ and as 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.”⁵¹⁸ Since then, scholarship has showed, on multiple occasions, that unconscionability could be used to serve its purpose and should be better

511. Leff, *supra* note 237, 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.”).

512. *Id.*

513. *Id.*

514. *Id.*

515. *See supra* note 247; *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.”).

516. *See supra* note 237.

517. Although not explicitly acknowledging that, the Restatement did reformulate the doctrine and effectively lowered the thresholds. *See* Section III(A) “Why Unconscionability?”

518. SINAI DEUTCH, UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY 55–56 (1977).

aligned with its origins.⁵¹⁹

While it could be claimed that most 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 those realms. In the absence of such a 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 “copyright and contract [to] work better together, towards a more copyright-contract-centric [regime],” one in which “freedom of contract needs to be in check.”⁵²⁰ 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.”⁵²¹ Knapp also joins this view, suggesting “a possibly wider and more significant role for the concept of unconscionability as the new century unfolds.”⁵²² I propose this role promises a more prominent impact in the realm of IP through Unconscionability 2.0.

4. *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.⁵²³ 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 prefer to use another purposeful and robust mechanism under Israeli contract law: the public policy exception. However, some cases cited both doctrines to void an unconscionable term.⁵²⁴

Ad hoc negotiated contracts can also include terms that undermine and displace IP policies. The best example is the long tradition of misuse cases

519. See Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011 (2014).

520. D’Agostino, *supra* note 47, at 29.

521. Beh, *supra* note 519, at 1033.

522. Knapp, *supra* note 260, at 326.

523. The Standard Contracts Law § 2 (1982) (defining “condition” as a “stipulation in a standard form contract . . . but does not include a stipulation specially agreed upon by a supplier and a customer for the purposes of a particular contract”).

524. CA 294/91 Jerusalem Chevre Kadisha v. Kestenbaum, 46(2) PD 464, 538 (1992).

involving sophisticated commercial parties in negotiated licenses.⁵²⁵ Another example is the rights of authors, freelancers, and artists who are often coerced in negotiated contracts, in which the adherent has very little (but some) negotiating power.⁵²⁶

In this context, it is important to draw a clear distinction between a negotiated contract, a 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, *Jobmaster*. Sometimes the boilerplate is offered on a take-it-or-leave-it manner only to businesses. In both cases, under the Israeli and the proposed Unconscionability 2.0 approaches, there is reason 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 to be matched with a high degree of substantive unconscionability to render the contract or term unenforceable.”⁵²⁷ In this case, the main concern is not the level of parties’ sophistication but rather the salience of the terms and whether they are offered on a take-it-or-leave-it basis.

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 to comment on, use, resell, tinker with, and perform fair use on the work or innovation, as well as the externalities created by over-monopolization of such work.⁵²⁸

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

525. See, e.g., *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124 (1938).

526. D’Agostino, *supra* note 47, at 10 (discussing the case of coerced freelancers in creative industries).

527. See The Restatement, *supra* note 29, at 80.

528. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); 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).

contract term.”⁵²⁹ 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.⁵³⁰

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 to neglect consideration of 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.”⁵³¹ 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.

From a contract perspective, as some scholars claim, a standard form contract offered to small businesses could exhibit the same asymmetric disparities of a consumer contract.⁵³² Small businesses cannot simply negotiate a contract just because the product is offered for business use, rather than for household use. Also, consumers are not affected by IP policies in the same manner as are businesses, and it is unrealistic to expect small businesses to “make decisions” based on the quality of these terms in a manner that polices such terms. 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 its 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 *Lexmark*), and reach different results in other cases. Because Unconscionability

529. The Restatement, *supra* note 29, at 82.

530. *Id.* at 81.

531. *Id.* at 8, 14; *see also* U.C.C. § 2-104 (AM. LAW INST. & UNIF. LAW COMM’N) (providing the definition used by the U.C.C.).

532. Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 386 (2005).

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. Most importantly, Unconscionability 2.0 could be used to refuse enforcement of the contract, and 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 Sections.

B. A ROBUST VISION FOR UNCONSCIONABILITY 2.0

1. *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).⁵³³ 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 also recognized this specific potential shortcoming of unconscionability 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.⁵³⁴

Yet case law, including landmark and strategic litigation, has always been instrumental to the adaptation 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.⁵³⁵ Sometimes it even involved the “little guy or gal” challenging well-resourced giants, supported by amici from nonprofit organizations and academia.⁵³⁶ In the context of unconscionability, much like fair use, establishing precedent 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,

533. See Pallas Loren, *supra* note 46, at 531; RADIN, *supra* note 1, at 128–30.

534. See Pallas Loren, *supra* note 46, at 520.

535. See, e.g., Menell, *This American Copyright Life*, *supra* note 58; see also Menell, *Rise of the API Copyright Dead?*, *supra* note 116.

536. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008).

who must prove that, in view of the contract as a whole and its particular circumstances, the condition in question is justified and reasonable.

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.⁵³⁷ The U.C.C. also incorporates presumptions of unconscionability.⁵³⁸ So does the Restatement, to a limited extent.⁵³⁹ Still, these presumptions are used narrowly and in egregious cases.⁵⁴⁰ 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.⁵⁴¹

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 in 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.⁵⁴² 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.⁵⁴³

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

537. *See, e.g.*, Ohio Rev. Code § 1345.031; Mich. Comp. Laws § 445.90.

538. *See* U.C.C. § 2-719(3) (providing a term that limits business liability to death or personal injury of consumers).

539. The Restatement, *supra* note 29, at 88.

540. *See id.* at 73 (including limiting consumer’s remedies in personal injury cases or in cases the business was negligent).

541. PRINCIPLES OF THE LAW: SOFTWARE CONTRACTS § 1.11 at cmt. 1 (AM. LAW INST. 2010) (stating that § 1.11 “reproduces § 2-302 of the U.C.C.”).

542. ISRAELI STANDARD CONTRACTS LAW, § 4.

543. *Id.* at §§ 4(6), 8.

terms that were found to constitute misuse, preempted under federal law.

This proposal seeks to remedy the previously critiqued guiding principle the *Baystate* court invoked to enforce a statutory waiver. According to this principle, waivers are enforceable only when the term at hand is concerned with “protection of the property rights of individual parties . . . rather than . . . the protection of the general public.”⁵⁴⁴ 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.”⁵⁴⁵ 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 doctrines. Thus, this presumption views wholesale (as opposed to “knowing, intelligent, and voluntary”)⁵⁴⁶ 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.”⁵⁴⁷ 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”).⁵⁴⁸

Moreover, in 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.⁵⁴⁹ While the general question remains 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

544. *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 378 (1990).

545. *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 412 (2014) (citing *Holmes v. Graves*, 318 P.2d 354, 357 (Ariz. 1957); *Elson Dev. Co. v. Ariz. Sav. & Loan Ass’n*, 407 P.2d 930, 935 (Ariz. 1965)) (internal quotations omitted); *see also DeBerard Props. v. Lim*, 20 Cal. 4th 659, 661 (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.”).

546. *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1043 (1997).

547. *Id.*

548. RADIN, *supra* note 1, at 231–32.

549. *Cf. CA 232/10 First Int’l Bank of Isr. v. Israeli Supervisor of Banks*, para. 28 (2012).

more suspicious in its inquiry of unconscionability.⁵⁵⁰

Indeed, similar solutions aimed at lowering litigation costs have been suggested by scholars in the context of misuse. Pallas Loren, for example, has proposed that a term that implicitly restricts a use that is fair would shift the burden of proof.⁵⁵¹ More broadly, Radin has suggested that terms that exclude users' rights (in the information made available to them) should be either subjected to "heightened scrutiny" (graylisted) or even deemed void (blacklisted), depending on extent of "social dissemination of the clauses."⁵⁵²

2. *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.⁵⁵³ The tribunal, mentioned in previous Sections, has authority to invalidate unconscionable terms or order that they be amended. The same authority is granted to any other civil court in Israel.⁵⁵⁴ 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.⁵⁵⁵

Moreover, consumer organizations and governmental bodies approved by the Israeli Attorney General, or preapproved under specific regulations,⁵⁵⁶ as well as the Israeli Consumer Authority, can file all petitions to the tribunal, requesting the review of a certain standard form contract, seeking a declaration that a term is void or should be amended.⁵⁵⁷ The tribunal can, of course, impose all litigation costs on the drafter as it sees fit.⁵⁵⁸

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

550. *Id.* at para. 28.

551. Pallas Loren, *supra* note 46, 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) (2018); see Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 37–43 (2017); Peter S. Menell, *Misconstruing Whistleblower Immunity under the Defend Trade Secrets Act*, 1 NEV. L.J. F. 92, 94 (2017).

552. RADIN, *supra* note 1, at 230.

553. The Standard Contracts Law § 6 (1982).

554. *Id.* at § 3.

555. *Id.* at § 18.

556. The regulations have yet to be enacted.

557. The Standard Contracts Law at § 16(a).

558. *Id.* at § 27.

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.⁵⁵⁹

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. Suggesting a similar regime in the United States would probably be an impractical proposal (since contracts are matters of state and not federal law).⁵⁶⁰ 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 unconscionability be merely defensive.”⁵⁶¹ 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*,⁵⁶² shifting the burden of proof, fee-shifting, and even establishing a tort-based claim (a proposal that was recently explored by Radin) as well.⁵⁶³ I agree with Beh and Radin that fine-tuning unconscionability could enable it to fulfill its purpose. I suggest that one such improvement 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 justify 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,⁵⁶⁴ and

559. *Id.* at § 6(d) (added to the law in 2014).

560. *Cf.* RADIN, *supra* note 1, at 227–29.

561. Beh, *supra* note 519, at 1023 (“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.”).

562. An authority that, according to Beh, they hold under the U.C.C., although courts are indecisive on the matter. *Id.* at 1028–30. *But see* The Restatement, *supra* note 29, at 86.

563. Beh, *supra* note 519, at 1032–45; *see also* RADIN, *supra* note 1, at 198–99 (bringing forth a potential solution of a “tort of intentional deprivation of basic legal rights”).

564. *See, e.g.*, Omega S.A. v. Costco Wholesale Corp., 776 F.3d 692, 695–96; *see also* 17 U.S.C. § 505 (2018) (allowing the court discretion in awarding attorney fees to the prevailing

more generously to police abuse (sometimes amounting to “trolling”) of overarching patentees’ claims, including by non-practicing entities.⁵⁶⁵ 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”).⁵⁶⁶ This will bring abusive terms to the attention of consumer advocacy groups, secondary creators, and users—truly increasing terms’ salience.⁵⁶⁷

party under certain standards); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (interpreting 17 U.S.C. § 505).

565. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C. L. REV. 1443 (2014); *see also* *Small v. Implant Direct Mfg. LLC*, No. 06 Civ. 683 (NRB), 2014 U.S. Dist. LEXIS 154468, *9–10 (S.D.N.Y. Oct. 22, 2014) (providing an example in the context of patent trolls: “the 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., LLC v. Findthebest.com, Inc.*, No. 13 CIV. 3599(DLC), 2014 WL 2440867 at *7 (S.D.N.Y. May 30, 2014)); *Yufa v. TSI Inc.*, No. 09–cv–01315–KAW, 2014 WL 4071902, at *4 (N.D. Cal. Aug. 14, 2014); *see generally* Hannah Jiam, *Fee-shifting and Octane Fitness: An Empirical Approach Toward Understanding “Exceptional”*, 30 BERKELEY TECH. L.J. 611 (2015) (providing an overview).

566. *See, e.g.*, Michael, *infra* note 611, at 91–93 (suggesting that Israel adopt 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 “gray listed” will need to separately disclose it in the boilerplate in a meaningful, salient way). Since the United States has yet to adopt a comprehensive model of presumptions of unconscionability, I suggest, at the first stage, building a database that will include terms that were already voided by courts (and also include terms that were voided in misuse, first-sale, and preemption cases).

567. *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* RANKING DIGITAL RIGHTS, <https://rankingdigitalrights.org/> [<https://perma.cc/75WY-2BXZ>] (last visited July 6, 2019) (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*); *cf. UTCCR AND THE CONSUMER RIGHTS ACT AT* § 6 (2015) (enabling certain “regulators” in the United Kingdom to initiate enforcement action (a complaint) with respect to unconscionable terms);

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.⁵⁶⁸ And while this may sound utopian, in privacy, in the wake of public outrage over data breaches and the introduction of robust regulations like the General Data Protection Regulation (GDPR), innovators have developed machine-learning tools to flag overreaching terms and other tolls, enabling users to uncover the actual information collection practices of apps.⁵⁶⁹

3. *Some Case Studies—The Application of Unconscionability 2.0*

In previous Sections, I illustrated how Unconscionability 2.0 and presumptions of Unconscionability 2.0 could be applied to commonly used IP

see also 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 [<https://perma.cc/WYL6-ZGHG>]; *see also* Michael, *infra* note 611, at 91. These bodies, as well as the UK Competition & Markets Authority, publish “Guidance” with lists of potentially unfair terms, in addition to the gray list the law provides of terms that are presumed to be unconscionable. CONSUMER RIGHTS ACT at Schedule 2, c. 15 (2015) (UK). *See, e.g.*, 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> [<https://perma.cc/3HXZ-5X3Z>] (providing an example in gambling contracts: “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”).

568. For example, 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.*, *Fighting fake news*, BERKELEY ENGINEERING (Nov. 14, 2018), <https://engineering.berkeley.edu/magazine/fall-2018/fighting-fake-news> [<https://perma.cc/YU82-J8V6>] (describing U.C. Berkeley’s student-developed tool, SurfSafe, “a machine learning tool that helps people identify when an online photo has been doctored or is 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/> [<https://perma.cc/3M57-5D27>] (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”).

569. *See, e.g.*, 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/> [<https://perma.cc/6FV8-JTYW>] (providing an overview of a tool called “Polisis” that enables such in the context of privacy policies); APPCENSUS, <https://appcensus.mobi/> [<https://perma.cc/FMB2-FTFG>] (reviewed in Irwin Reyes et al., “*Won’t Somebody Think of the Children?*” *Examining COPPA Compliance at Scale*, 2018(3) PROC. ON PRIVACY ENHANCING TECHS. 63 and developed by the author’s co-authors on this research) (providing an overview of a tool allowing users to search a name of a mobile app and learn about its actual information collection practices).

boilerplate language. In this Section, I will explore some additional cases studies.

If the broader reform proposals for the adoption of presumptions of unconscionability are implemented, then 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.

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 also focuses 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 them. 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,⁵⁷⁰ and because often, there is no competition in the market over the quality of IP terms. 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.⁵⁷¹ Under the sliding scale approach, this will focus much of the inquiry on the substantive prong, a normatively desired result.⁵⁷² 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 of its level of salience. By this virtue, the Israeli application of unconscionability is very much consistent with its potential 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

570. See The Restatement, *supra* note 29, at 82.

571. *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 *supra* note 575 and accompanying text.

572. *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.”).

and form contract theory. Put simply, if consumer contract law has finally 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 expression, or—more generally—sound public policy.⁵⁷³ Courts must look into the contract as a whole, “and the context surrounding the contract.”⁵⁷⁴ This type of (perhaps vague) inquiry is not novel. It is perhaps familiar to the reader, but under a different label or term: copyright and patent misuse, or more generally, “implied preemption.”⁵⁷⁵

Indeed, this Article 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 or IP boilerplate term discussed, a question with which courts and scholars alike continue to grapple, and to which the answer might (and should) change with facts, time, and place.

The novelty of Unconscionability 2.0 is that it suggests that 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 will render such term unconscionable under a sliding scale-approach. 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 and Practices

573. Of course, these are some of the overarching policies of IP regimes. See Menell, *Economic Analysis of Network Effects*, *supra* note 116.

574. The Restatement, *supra* note 29, at 75.

575. See Rub, *Copyright Survives*, *supra* note 36; Rub, *A Less-Formalistic Copyright Preemption*, *supra* note 37; Merges, *Intellectual Property and the Costs of Commercial Exchange*, *supra* note 52, at 1613.

(UDAP) statutes,” and these statutory standards are not purely confined to policies of consumer contract law.⁵⁷⁶ This direct import of section 5 of the FTC Act 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.⁵⁷⁷ 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.⁵⁷⁸

Finally, if one compares Unconscionability 2.0 to Radin’s recently proposed envisioned model of unconscionability, a few points of resemblance 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.⁵⁷⁹

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 are 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).

576. See FEDERAL TRADE COMMISSION, FTC POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> [<https://perma.cc/32FZ-UFM3>]; see also CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016); The Restatement, *supra* note 29, at 79–80.

577. Yet as the reporters explain, in compliance with standards does not necessarily mean a term is unconscionable and compliance with standards does not necessarily mean a term is conscionable. An analysis is needed in each case. The Restatement, *supra* note 29, at 79–80.

578. HOOFNAGLE, *supra* note 576.

579. Radin, *What Boilerplate Said*, *supra* note 55, at 5.

Let us further consider a number of case-studies, some of which I already mentioned in previous Parts, 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.”⁵⁸⁰ The medicine is sold in the market for over \$1,000. Another manufacturer, Y-Corp, figured out 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 at 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’s secondary market is now in flux. A socially-aware group of consumers of X-Corp medicine is becoming gradually concerned with the fact the medicine, not covered by all insurers, is sold at a high price and many patients cannot afford it. Meanwhile, it is 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 collect applicators in community meetings across the country, backed by a nationwide online media campaign calling users to bring the applicators to Y-Corp.

Following the Supreme Court decision in *Lexmark*,⁵⁸¹ 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 prospective economic relations or contractual relations against Y-Corp,⁵⁸² 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 still open, as explained earlier. Here, the application of Unconscionability 2.0 would provide the following results: on the procedural

580. The language above is the combination of the EULA label language used in *Lexmark* and in *Mallinckrodt*. See *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 830, 836 (E.D. Ky. 2007); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 701 (Fed. Cir. 1992).

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

582. See, e.g., *Disney Enters. v. Redbox Automated Retail, LLC*, No. CV 17-08655 DDP (AGRx), 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. 2018).

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 these “patent-wrap” contracts is to limit the exhaustion doctrine and the manner consumers can use and resell a patented article, patent policy should inform the analysis whether or not such a term is unconscionable. Clearly, this term, once employed in a wholesale manner, displaces the exact same policies exhaustion seeks to advance. It is also contrary to other principles public policies seek to advance, including free competition, social justice, and access to medicine. 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. Even so, the added quantum of procedural unconscionability would render the term unconscionable in a boilerplate setting, as in the case of our medicine.

Another interesting case study involves the student-(adherent)-creator. Contrary to Israeli universities, some leading world academic institutions regulate student-created innovations under a slightly more lenient regime. Among others, copyrighted software or inventions created through “significant use of funds or facilities”⁵⁸³ 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,⁵⁸⁴ while others 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).⁵⁸⁵ When the student invention is created through significant use of the institution facilities, the institution may consider it owned by the

583. *Guide to The Ownership, Distribution and Commercial Development of MIT Technology*, MIT TECH. LICENSING OFF. 6, 8, https://tlo.mit.edu/sites/default/files/MIT-TLO-ownership-guide_0.pdf [<https://perma.cc/B9T8-8A4P>].

584. *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.”).

585. *Intellectual Property Policy*, WILLIAM & MARY UNIV. (Mar. 9, 2016), https://www.wm.edu/offices/compliance/policies/intellectual_property/index.php [<https://perma.cc/2PZX-4PY9>].

institution.⁵⁸⁶

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. Using this doctrine, courts can invoke IP purposes, as discussed: for example, in work-made-for-hire case law to decide the justified scope of such assignments 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 use, 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 not 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 it is 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).⁵⁸⁷ 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.⁵⁸⁸ The

586. See, e.g., *Intellectual Property Policy*, WENTWORTH INST. OF TECH. <https://wit.edu/policies/intellectual-property> [<https://perma.cc/LY9G-P4TW>] (defining “Institute-Owned Intellectual Property” to include “significant use of WIT facilities, resources or equipment,” from which “use of an office, library, or desktop computer” is excluded in a policy that applies to students); see also *Intellectual Property Policy*, *supra* note 585 (providing the definition of “University Work”).

587. 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 (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.” Meanwhile, post-circumvention activities, like publication of research results in academic papers or otherwise, would not exceed “the bounds of the exemption.” THE COPYRIGHT OFFICE, *supra* note 20, at 304–05.

588. In fact, in whistleblower cases courts have been invoking contractual language in employment and consultancy confidentiality agreements as void against public policy in a manner that could prevent potential 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*,

following Section will discuss the application of Unconscionability 2.0 in common settings in which other regimes (and policies) are invoked.

4. *Unconscionability 2.0 in Other Technological Realms*

Unconscionability 2.0 is not limited to IP. Boilerplate is 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 lives, sometimes perpetuating inequality and social injustices.⁵⁸⁹ 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,⁵⁹⁰ unconscionability could serve as a 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

Inc., No. 15-cv-02287-BAS-NLS, 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, No. 11-cv-01987-JST, 2013 U.S. Dist. LEXIS 149145 at *32–35 (N.D. Cal. Oct. 16, 2013) (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") (citing *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (stating that "exceeds authorized access . . . does not extend to violations of use restrictions")); *see also* Amit Elazari Bar On & Peter S. Menell, *Promoting Responsible Whistleblowing: Reconciling and Reforming CFAA Liability in the Information Age* (forthcoming) (on file with the author) (providing further discussion).

589. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016); *see* AI Now, *Litigating Algorithms*, AI NOW INST. (Sept. 24, 2018), <https://ainowinstitute.org/announcements/litigating-algorithms.html> [<https://perma.cc/NHH9-D83B>].

590. *See* Bryan Casey et al., *Rethinking Explainable Machines: The GDPR's 'Right to Explanation' Debate and the Rise of Algorithmic Audits in Enterprise*, 34 BERKELEY TECH. L.J. 143, 152 (2019) (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); Bryce Goodman & Seth Flaxman, *EU Regulations on Algorithmic Decision Making and "a Right to an Explanation"*, 38 AI MAG. 50 (2017); *see generally* Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 FORDHAM L. REV. 1085 (2018).

auditing.⁵⁹¹

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 these types of barriers to vital research could be detrimental to public policy and raise First Amendment concerns.⁵⁹² These considerations led at least two courts to decide that such limitations are unenforceable under the CFAA if they seek to limit (according to one court, even through technology) access to public websites.

Still, the contractual enforceability question remains, and it warrants a more nuanced and purposeful judicial review that can be done through unconscionability. The reason 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. While these provisions may limit the ability of competitors (that sometimes emerge as potential whistleblowers and perform effective auditing),⁵⁹³ to contribute to the auditing efforts, or even to 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

591. 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 algorithms of the information age. See Christian Sandvig et al., *Auditing algorithms: Research methods for detecting discrimination on internet platforms*, 2014 DATA AND DISCRIMINATION: CONVERTING CRITICAL CONCERNS INTO PRODUCTIVE INQUIRY 1; 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 [<https://perma.cc/5DKQ-725T>]; see also Motahhare Eslami et al., *User Attitudes towards Algorithmic Opacity and Transparency in Online Reviewing Platforms*, in CHI '19 PROC. 2019 CHI CONF. ON HUM. FACTORS IN COMPUTING SYS. (2019).

592. See Sandvig v. Sessions, No. 16-1368 (JDB), 2018 U.S. Dist. LEXIS 54339 (D.D.C. Mar. 30, 2018); hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099 (N.D. Cal. 2017), *aff'd*, No. 17-16783, 2019 WL 4251889 (9th Cir. Sept. 9, 2019) (“[G]iving companies like LinkedIn free rein to decide, on any basis, who can collect and use data—data that the companies do not own, that they otherwise make publicly available to viewers, and that the companies themselves collect and use—risks the possible creation of information monopolies that would disserve the public interest.”); Komal S. Patel, *Testing the Limits of the First Amendment: How Online Civil Rights Testing is Protected Speech Activity*, 118 COLUM. L. REV. 1473 (2017) (providing a discussion in the interaction of algorithmic auditing with first amendment concerns and the CFAA).

593. See Annie Lee, *Algorithmic Auditing and Competition Under the CFAA: The Revocation Paradigm of Interpreting Access and Authorization*, 33 BERKELEY TECH. L.J. 1307 (2018).

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.⁵⁹⁴

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 on boilerplate such as the new anti-disparagement Consumer Review Fairness Act. It can also be used to evaluate technology, as discussed in previous Sections.

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 is needed to operate the service or other practices that were found to be “unreasonable” under the FTC Act.⁵⁹⁵ 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 that 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.”

Courts should also be mindful of the fact that one provision, (for example, “no bots or automatic tools allowed”),⁵⁹⁶ or technology (blockers that enforce this example of anti-bot ToS provision),⁵⁹⁷ 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 anti-bots boilerplate in a public website can limit privacy, security, and algorithmic auditing, but it can also limit transformative fair use.⁵⁹⁸

594. Such as the Defend Trade Secret Act Whistleblower immunity. *See supra* note 551. Yet this provision does not provide immunity from the CFAA. *See* 18 U.S.C. § 1833(b)(5) (2018); *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); Elazari Bar On & Menell, *supra* note 588. 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).

595. *See, e.g.*, *In re Goldshores Techs. LLC & Erik M. Geidl*, FTC File No. C-4446 (F.T.C. 2014); CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016), at ch. 6, 8; *see also* RADIN, *supra* note 1, at 176–79.

596. *See Sandvig*, 2018 U.S. Dist. LEXIS 54339, at *27, *48.

597. *hiQ Labs*, 273 F. Supp. 3d at 1103.

598. *See Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

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.

5. *Unconscionability 2.0: A “Wild Card” or a Winning Hand—Some Objections and Responses*

At various junctions throughout this Article, I raised some potential arguments that could be claimed against the proposed application of Unconscionability 2.0. 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 the proposed application of unconscionability raises, especially in cases that leave unfettered discretion for courts to consider public policy considerations within their boundaries, is its uncertainty and vagueness. Indeed, opponents of unconscionability have been voicing such concerns for decades.⁵⁹⁹ But as I mentioned—and other scholars (and courts) have argued at length⁶⁰⁰—it 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 societal perceptions.⁶⁰¹ The common law relies on their application as such.⁶⁰² Specifically, unconscionability’s potency lies 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.⁶⁰³ In fact, given their prominence, it is unreasonable even to assume any regulator can read or collect these

599. 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).

600. 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), the content of which is always changing with time and according to circumstances and ever-evolving worldviews. See *supra* notes 472–474 and accompanying text.

601. Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1568 (2010).

602. *Id.*

603. See RADIN, *supra* note 1, at ch. 12.

contracts, let alone scrutinize them in a comprehensive manner. Ellinghuas foresaw 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,” a necessary category of “shifting content and expansible nature,” that “[w]e cannot do without.”⁶⁰⁴

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.⁶⁰⁵ 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.⁶⁰⁶ In fact, Unconscionability 2.0 reaches beyond traditional economic analysis, and accounts for what Radin calls the “normative degradation” effect of boilerplate.⁶⁰⁷ 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 over the correct framework (or better yet frameworks) to apply, irrespective of questions of contract enforcement.

While a full discussion in these two philosophical debates, the one between so-called “Chicagoans” and “autonomists” in boilerplate theory,⁶⁰⁸ and the one

604. Ellinghaus, *supra* note 600, at 814–15.

605. See *supra* note 252; Radin, *What Boilerplate Said*, *supra* note 55, at 8 (“[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.”).

606. *Id.* at 10–11.

607. See *supra* note 579 and accompanying text.

608. Omri Ben-Shahar, *Regulation Through Boilerplate*, *supra* note 3, at 884–85; Radin, *What Boilerplate Said*, *supra* note 55.

between so-called “utilitarian” and “exutilitarian” in IP policy,⁶⁰⁹ is beyond the scope of this Article, Unconscionability 2.0 seems to be able to accommodate both frameworks. Even those taking a narrower view on boilerplate enforceability would agree that at 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,⁶¹⁰ and that IP regimes, jurisprudence, and tradition are better 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.

Finally, it is important to recognize that the concerns voiced by those opposing vague application of unconscionability seem to not be supported by empirical evidence.⁶¹¹ In other words, the so-called costs of said uncertainty do not seem to limit the application of boilerplate or hinder its economic benefits. Boilerplate is 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).⁶¹² In other words, drafters are not really policed, even in 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 there is a 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 a lesser problem than the

609. See *supra* note 492 and accompanying text.

610. The Restatement, *supra* note 29, at 94; see also Korobkin, *supra* note 74.

611. If anything, evidence supports 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 55, at n.11; RADIN, *supra* note 1, at 139–40.

612. 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 will actually make use of such provisions.

uncertainty of society at large as to the rule of law and the broader application of IP law, and uncertainty about whether the market polices IP boilerplate adequately or not.⁶¹³ Maybe that is why, even though misuse is also often critiqued for its “uncertainties” and “vagueness,”⁶¹⁴ it is still applied by courts, and recently even more rigorously. 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 have also suggested pathways to mitigate such uncertainness, 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 a declaratory relief that its contract is enforceable.⁶¹⁵ In Israel, such procedure existed for decades, until 2014. The tribunal could have “preapproved” a standard form contract, granting the boilerplate near-immunity from unconscionability claims for a five-year period, and removing any uncertainty as to the enforceability of the term.⁶¹⁶ The “proud” drafter could even label its form contract as “approved” by the tribunal. This procedure was canceled and removed from the law in 2014, after it was found to be ineffective.⁶¹⁷ Empirical research showed that over a period of fifteen years (1996–2011), on average, only two approval requests were filed in Israel per year, a total of thirty requests over a decade and a half.⁶¹⁸ At least in Israel, or so it seems, boilerplate drafters preferred to remain uncertain than to risk that terms would be voided or changed.

613. Cf. RADIN, *supra* note 1, at 164 (“Even if people do mean to assume the risks posed by boilerplate clauses, we should understand that they are likely to be mistaken about the level of risk that they face . . .”).

614. 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); Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2004) (discussing such arguments).

615. 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); RADIN, *supra* note 1, at 227–29 (discussing this proposal).

616. See The Standard Contracts Law, ch. C §§ 12–15 (1982) (Isr.). Under unique justified circumstances and the request of the Israeli Attorney General, the tribunal could still void a term in a preapproved contract. *Id.* at § 14(c); see Deutch, *Controlling Standard Contracts*, *supra* note 423.

617. Proposed Bill to amend the Standard Form Contract Law, Amend. n.5 at p. 296–97 (2014) (in Hebrew); cf. Gillette, *supra* note 615 (noting that “sellers will not necessarily take advantage of the [pre-approval] process”).

618. Michael, *supra* note 612, at 72.

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 Section II(F). In a nutshell, 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 use of unconscionability that combines 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,⁶¹⁹ would be reversed in those circuits.

Finally, another critique is that Unconscionability 2.0 could 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,⁶²⁰ which makes the doctrine potentially too unstable to also deal 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 vicious cycle repeats.⁶²¹ Usually Unconscionability 2.0 claims, similar to misuse claims, would be litigated in federal courts (because another IP claim would be raised) which 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.

619. Rub, *Copyright Survives*, *supra* note 36.

620. See The Restatement, *supra* note 29, at § 5.

621. Balganes, *supra* note 601, at 1615 (“[T]he 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, and of proceeding with caution, one case at a time.”); see 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,⁶²² and all contracts are “smart.”⁶²³ 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 in check and accountable. Is this a dystopian vision or one grounded in reality? This Article suggests 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 limits fair use rights and allows the deployment of algorithms that 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.”⁶²⁴ 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.”⁶²⁵

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?⁶²⁶ And if law is already displaced by contracts that we can

622. Mulligan & Bamberger, *supra* note 174.

623. Adam J. Kolber, *Not-So-Smart Blockchain Contracts and Artificial Responsibility*, 21 STAN. TECH. L. REV. 198, 199 (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 COMPUTING 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).

624. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 267–68 (2002).

625. *Id.*

626. RADIN, *supra* note 1, at 46.

read, how can we prevent a reality in which opaque technology is 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.”⁶²⁷ 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.⁶²⁸ 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.

627. *Id.* at 229.

628. *See* Mulligan & Bamberger, *supra* note 174.

