

A PENNY FOR THEIR CREATIONS—APPRIISING USERS' VALUE OF COPYRIGHTS IN THEIR SOCIAL MEDIA CONTENT

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ABSTRACT

Every day, 3.5 billion social media users—among them musicians, visual artists, writers, designers, and other creators—routinely upload their creative work to social media, thereby subjecting their copyrights in those works to a laundry list of draconian demands. Although users usually retain ownership rights in their uploaded content according to most platforms' terms of service agreements, they often grant platforms unbridled license to their work that goes way beyond what is reasonably needed to operate the platform. Most licenses, for example, allow platforms to modify and commercialize their users' content and create derivative works from that content. Some licenses require users to waive claims for attribution to their works or compensation for ideas they submitted to the platforms. Finally, nearly all licenses are defined to be irrevocable (users cannot terminate them), perpetual (they last indefinitely even if the user deletes their account), and sublicensable (platforms have full discretion to extend them to third parties). Do users appreciate the breadth of the licensing agreements they grant social media platforms for original content? Would they understand them if they were to read them? Most importantly, do users care? Would they change their social media “sharing” habits or stop using a social media platform if they had more information? This final question, which focuses on the salience of user-generated content licensing terms to users—defined by the degree to which terms are sufficiently prominent in users' awareness to impact decision making—has become one of the primary benchmarks for evaluating the need for regulatory intervention in mass-market contracting. These inquiries are fundamental to the information age, when user-generated content—much of which is copyright protected—shapes culture, discourse, and communities. Nevertheless, these questions have remained surprisingly unanswered. This Article fills these gaps. It presents the results of the first comprehensive large-sample empirical study on user-generated content licensing and user attitude towards those policies. Specifically, the study investigates user

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awareness, understanding, and expectations of licensing terms and the salience of those terms to users' decisions to upload their copyrighted work. Our findings reveal significant conformity in social media platforms' licensing terms and confirm that such terms are indeed unnecessarily overbroad. Our findings also indicate that most users are unlikely to read, fully comprehend, or have realistic expectations concerning their content licensing arrangements. At the same time, our findings indicate that most users care about copyright policies and claim that they would change their social media behavior if they had more information. We then build on the study's results with law and policy insights that encompass proposals for legal policy work on consumer form contracts and intellectual property.

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I. INTRODUCTION

Imagine you are an artist considering presenting your latest work in a local art gallery. You reach out to the gallery owner, who is excited by your query. The gallery, just like any gallery, offers you, the artist, a platform to display your artwork at no cost to you. However, here, the gallerist also sets forth several conditions for presenting your artwork in their venue. They require that you allow the gallery, as well as its affiliated business (such as the gallery's food and beverage provider), to alter or modify your exhibited art. They also insist that you make your artwork available to advertise the gallery or any affiliate—with no additional payment to you. The gallerist further demands that the gallery and its affiliated business can do these things unilaterally and irrespective of your consent, views, or professional reputation. They will not even guarantee that the gallery will credit you as the artist. Finally, the gallerist demands to reserve their opportunity to harshen these conditions or add additional terms later, as they deem fit. Should you find these conditions objectionable in the future, you could decide not to exhibit any new art at the gallery, but any previously exhibited work would nevertheless be subject to the newly added or altered demands.

Would you choose to exhibit your artwork in such a gallery? One's intuition about the nature of intellectual property rights, moral instincts, and basic artistic integrity might suggest that many creators are unlikely to surrender such overwhelming control over their creative output. Some may even speculate that guided by the gallerist's offensive approach, the business is likely to fall into insolvency. Nevertheless, such outrageous licensing arrangements are standard for the millions of creative works uploaded daily.¹ Moreover, the digital "galleries" that employ such terms are anything but

1. See *infra* Section III.B; G. Ross Allen & Francine D. Ward, *Things Aren't Always as They Appear: Who Really Owns Your User-Generated Content?*, 3 LANDSLIDE 49, 50 (2010) ("Membership in these sites is not free, albeit no fee or tax penalty is required. In return for membership, most social media sites require that the user grant the site and its third-party affiliates, now known or later established, a nonexclusive license to any UGC posted by the user.").

insolvent businesses; instead, they are among the most thriving, wealthiest, and fastest-growing corporations in modern history.²

Today, there are about 3 billion social media users—among them musicians, visual artists, writers, designers, and other creators—who routinely upload their copyrighted output to social media platforms, thereby subjecting their rights in such works to a laundry list of draconian demands.³ While users usually retain ownership rights in their uploaded content according to most platforms' terms of service (ToS), these unbridled licenses go beyond what is reasonably needed to operate the platform.⁴

Platforms often claim a perpetual license (that would extend after users delete their account) over the right to use the work in virtually any way, including to modify, create derivative works, and utilize the work for commercial purposes.⁵ In some cases, the terms extend to a waiver of moral

2. See Macrotrends, *Facebook Market Cap 2009–2020*, <https://www.macrotrends.net/stocks/charts/FB/facebook/market-cap> (last visited Feb. 22, 2020) (providing that Facebook's market cap as of February 21, 2020 was \$611.65B); Justin Kerby, *Here's How Much Facebook, Snapchat, and Other Major Social Networks Are Worth*, SOCIALMEDIATODAY (May 16, 2017), <https://www.socialmediatoday.com/social-networks/heres-how-much-facebook-snapchat-and-other-major-social-networks-are-worth> (showing the multi-billion dollar market caps of Facebook, Snapchat, Pinterest, Twitter, LinkedIn, and YouTube); Alexis C. Madrigal, *Mark Zuckerberg's Power Is Unprecedented*, THE ATLANTIC (May 9, 2019), <https://www.theatlantic.com/technology/archive/2019/05/how-powerful-mark-zuckerberg/589129/> (“Facebook's profits land it in the top 15 companies, and its market value is in the top 10 on its perceived potential for growth.”)

3. Statista, *Number of Global Social Media Users 2010–2021*, (Aug. 14, 2019), <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/>. According to some sources, there are about 3.5 billion internet users world-wide. E.g., Esteban Ortiz-Ospina, *The rise of social media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media>.

4. See *infra* Section III.B. For example, for a very long time Reddit retained a right for to use their users' content for any commercial purpose. See Reddit, *Reddit User Agreement* § 18, (effective May 27, 2016), <https://web.archive.org/web/20180405080131/https://www.reddit.com/help/useragreement/?v=ab935bec-5815-11e6-b911-0ed52af64d23> (mandating that users grant an irrevocable perpetual license to Reddit and “others” of its choice to display and reproduce their creations “in any medium and for any purpose, including commercial purpose”). This agreement was effective at least until March 2018, when Reddit changed its ToS. LinkedIn had a similar provision until October 23, 2014, noting that “[LinkedIn retains the] right to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered . . . without any further consent, notice and/or compensation.” LinkedIn, *LinkedIn Terms of Service*, (June 16, 2011), <https://web.archive.org/web/20130429153448/https://www.linkedin.com/legal/user-agreement> [hereinafter *LinkedIn Old Agreement*]. On June 7, 2017, LinkedIn made its ToS much more user friendly. See *infra* note 236–238 and accompanying text.

5. See *infra* Section III.B.2.

rights⁶ and allow the use of certain “ideas” submitted to the platform without compensation.⁷ These broad licenses permit platforms to share their users’ content in any manner, including sublicensing to third parties for commercial use.⁸ As one scholar noted, Facebook could “surreptitiously sublicense user content to porno.com,” and “this would fall squarely within the license Facebook purports to be granted by users.”⁹

Creators rarely appreciate the breadth of the license they grant a platform unless they are faced with grave implications or receive specific notice about changes in the platform’s ToS. Angel Fraley, for example, first appreciated the breadth of the license she gave Facebook in March 2011 when she saw that her profile picture appeared without her consent in a paid advertisement for a brand that Fraley “liked” on the platform.¹⁰ Similarly, Lucy Rodriguez first

6. In the United States only limited protection is granted to moral rights in creative works. The United States’ only source of moral rights, The Visual Artists Rights Act of 1990 (VARA), only grants moral rights protection to “work of visual art” under certain limitations. 17 U.S.C. § 106A(a)(3). Such rights may be waived but not transferred. *Id.* § 106A(b), (c). VARA rights do not extend to UGC that is uploaded to social media. Beatrice Kelly, *The (Social) Media is the Message: Theories of Liability for New Media Artists*, 40 COLUM. J.L. & ARTS 503, 511 (2017) (“[C]urrent moral rights legislation seems unlikely to help a digital artist. First, the [VARA] only applies to works produced in a limited edition. This requirement seems nearly impossible to overcome in the digital context, where nearly perfect copies may be endlessly replicated. Second, although there is a serious risk of technological obsolescence in Internet art, natural deterioration is not actionable under VARA.”); *see also* U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES (2019), <https://www.copyright.gov/policy/moralrights/full-report.pdf>. In contrast, under European and international law, moral rights provide broader protection. *See generally* Berne Convention for the Protection of Literary and Artistic Works, art. 6(1), September 9, 1886, 1161 U.N.T.S. 3; ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009); *see also* PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES, & SHYAMKRISHNA BALGANESH, 2 INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, ch. IV, at 732 (2020).

7. *See, e.g.*, Reddit, *Reddit User Agreement*, § 4 (effective Sept. 24, 2018), <https://www.redditinc.com/policies/user-agreement-september-24-2018> (these terms were later revised as explained in Appendix A) (“Any ideas, suggestions, and feedback about Reddit or our Services that you provide to us are entirely voluntary, and you agree that Reddit may use such ideas, suggestions, and feedback without compensation or obligation to you.”). While ideas per se are not protected under the copyright laws, users might still intuitively expect some form or compensation (or at least a credit) in cases where social platforms adopt their ideas. These provisions immunize platforms from such user claims.

8. *See infra* Section III.B.2.

9. Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUT. & HIGH TECH. L.J. 829, 848–49 (2008).

10. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011) (explaining that once Fraley “liked” Rosetta Stone’s Facebook profile page, the platform posted her Facebook user name and profile picture on her Friends’ Facebook pages in a “Sponsored Story” advertisement consisting of the Rosetta Stone logo and the sentence, ‘Angel Frolicker likes

appreciated the breadth of Instagram's license in February 2014 when the platform sent her a specific notice detailing its intent to introduce new and harsher demands to its ToS. For example, the new terms authorized Instagram to sublicense users' content, removed limitations from users' licenses, and forced users to waive liability claims.¹¹

Irrespective of the platforms' broad prerogative to exploit users' creative works, the integrity of such works may also be compromised by the acts of third-party users whose access to that content is hardly restricted.¹² For example, on January 2010, a Cypriot refugee and photographer named David Kittos discovered Donald Trump Jr. used in a tweet critical of refugees a photograph that Kittos took and made available on Flickr.¹³ Similarly, in May

Rosetta Stone.'"). This class action later settled. For further discussion, see Jesse Koehler, *Fraleigh v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963 (2013).

11. See *Rodriguez v. Instagram L.L.C.*, No. 3:12-cv-06482-WHA, at 6 (N.D. Cal. Mar. 6, 2013).

12. As one commenter mentioned, users are "led to believe that delete equals delete, yet the very nature of social networking is the 'sharing' concept. So if a user shares her content with 500 of her 'friends,' and then decides to delete the content, those 500 friends still have access to the content; therefore, it is not deleted." Allen & Ward, *supra* note 1, at 50; see Joe Brown, *Instagram's New Terms of Use, Translated into Plain English*, GIZMODO (Jan. 18, 2013), <https://gizmodo.com/instagrans-new-terms-of-use-translated-into-plain-engl-5977053> ("[E]ven if you delete, deactivate, or terminate your account, your stuff might still live on Instagram like a zombie."). Most platforms are compelled by the copyright statute to maintain a notice and takedown mechanism to help users to combat potential copyright violations on their sites. 17 U.S.C. § 512 (c)(1)(A)(1998). Of course, if users download creative works and violate copyright elsewhere, the responsibility to enforce these rights are left to the user. See Jessica Contrera, *A reminder that your Instagram photos aren't really yours: Someone else can sell them for \$90,000*, WASH. POST (May 25, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/> ("On the platform, if someone feels that their copyright has been violated, they can report it to us and we will take appropriate action. Off the platform, content owners can enforce their legal rights.").

13. According to the media reporting, Trump Jr. tweeted the image of multicolored candy inside a white bowl 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." Chiara Palazzo, *Donald Trump Jr Compares Syrian Refugees to a Bowl of Skittles*, THE TELEGRAPH (Sept. 20, 2016), <http://www.telegraph.co.uk/news/2016/09/20/donald-trump-jr-compares-syrian-refugees-to-a-bowl-of-skittles/>. Kittos filed a takedown notice under the DMCA, the tweet was removed, and a copyright infringement suit was initiated in Illinois Northern District Court but then dropped. See *Kittos v. Donald J. Trump For President, Inc.*, No. 1:2016cv09818 (N.D. Ill. Oct. 18, 2016).

Flickr users generally retain rights to their uploaded copyrighted works by default under the Flickr license. Flickr also allows users to waive their rights to their works but only if they elect to do so affirmatively. See *Change Your Photo's License in Flickr*, FLICKR HELP,

2015, several Instagram users were astonished to discover printed screenshots of their Instagram photographs hanging at the Frieze Art Fair in New York City as part of an exhibition by the famous appropriation artist Richard Prince,¹⁴ priced at \$90,000 apiece.¹⁵

Do creators know what rights they have in their uploaded content? Do they know how much of these rights they are giving away? Do they care? These questions are fundamental to the information age, where culture, discourse, and communities are shaped by user-generated content (UGC),¹⁶ and much of this content is copyright protected.¹⁷ Nevertheless, such inquiries remain surprisingly unanswered thus far. Indeed, in the wake of the Cambridge Analytica and foreign-influence scandals surrounding the 2016 presidential election, a surge of legal scholarship began scrutinizing social media giants with an eye toward users' privacy,¹⁸ autonomy,¹⁹ and free speech.²⁰ Policymakers,

https://help.flickr.com/en_us/change-your-photo's-license-in-flickr-B1SxTmjKX (last visited Feb. 25, 2020).

14. Lisa Respers France, *Photographer sells others' Instagram photos as art*, CNN (May 29, 2015), <https://www.cnn.com/2015/05/27/living/richard-prince-instagram-feat/index.html>; Contrera, *supra* note 12.

15. France, *supra* note 14.

16. Indeed, in defining UGC, commenters have consistently recognized the elements of creativity and self-expression. See, e.g., Jordan Sundell, *Tempting the Sword of Damocles: Reimagining the Copyright/DMCA Framework in a UGC World*, 12 MINN. J.L. SCI. & TECH. 335, 337 (2011) (“UGC is creative content produced and published, usually by individuals who possess limited technical expertise, out of a desire to share, connect with others, or simply to express oneself.”); Mihajlo Babovic, *The Emperor's New Digital Clothes: The Illusion of Copyright Rights in Social Media*, 6 CYBARIS AN INTELL. PROP. L. REV. 138, 143 (2015) (“User-generated content, then, means that the individual or organization has created, produced, or developed the content—the phrase in itself would seem to contain an implicit level of creativity.”). According to the Organization for Economic Cooperation and Development, UGC should reflect (among other requirements) “a certain amount of creative effort.” Sacha Wunsch-Vincent & Graham Vickery, PARTICIPATIVE WEB: USER-CREATED CONTENT 8 (2007), <https://www.oecd.org/digital/ieconomy/38393115.pdf>. For a general discussion on how UGC transformed culture and society, see Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. U. L. Rev. 1053 (2016) (emphasizing how digitalization empowered cultural theory beyond traditional democracy-based theories); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (describing how user-generated creativity and collaboration transform economics and culture).

17. See *infra* Section II.B.

18. See *infra* notes 93–94 and accompanying text.

19. See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (setting forth the theory that the rise of the surveillance economy comes at the expense of human autonomy).

20. See, e.g., CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA, IX* (2017) (arguing that platforms' tendency to personalize user experience creates “filter bubbles” which goes against the values embedded in the Fourth Amendment, namely the significance of a diverse and vibrant “public sphere” which is free from speech

legislators, and social activists offered to boycott social media platforms,²¹ regulate them,²² or harness the competition authorities to break them down.²³ In the midst of this passionate policy debate, concerns about users' copyrights in their UGC were all but overlooked.²⁴ This Article is meant to fill this gap by presenting the results of the first comprehensive study to investigate social media platforms' UGC licensing policies.

The study has two parts. It begins by mapping and comparatively analyzing the UGC licensing provisions of eleven of the most popular social media platforms for terms' similarity, readability, and breadth. It then presents the results of a survey (N=1,033) designed to investigate social media users'

restrictions, and stating “the system of free expression must do far more than avoid censorship; it must ensure that people are exposed to competing perspectives. The idea of free speech has an affirmative side. It imposes constraints on what government may do, but it requires a certain kind of culture as well—one of curiosity, openness, and humility.”); Daphne Keller, *Facebook Restricts Speech by Popular Demand*, THE ATLANTIC (Sept. 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/> (exploring Facebook speech regulation practices and claiming that “[t]he prevailing framework for free expression is getting a do-over.”).

21. See, e.g., Jon Swartz, *Wikipedia co-founder plans two-day social-media boycott*, MARKETWATCH (July 3, 2019), <https://www.marketwatch.com/story/wikipedia-co-founder-plans-two-day-social-media-boycott-2019-07-03>.

22. See, e.g., Cecilia Kang & Kevin Roose, *Zuckerberg Faces Hostile Congress as Calls for Regulation Mount*, N.Y. TIMES, (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/business/zuckerberg-facebook-congress.html> (examining the growing calls to regulate Facebook); see also Nina Jankowicz, *Opinion: It's time to start regulating Facebook*, WASH. POST, <https://www.washingtonpost.com/news/democracy-post/wp/2018/11/15/its-time-to-start-regulating-facebook/> (last visited Nov 25, 2020); Mike Allen & Ina Fried, *Apple CEO Tim Cook Calls New Regulations “Inevitable”*, AXIOS (Nov. 18, 2018), <https://www.axios.com/axios-on-hbo-tim-cook-interview-apple-regulation-6a35ff64-75a3-4e91-986c-f281c0615ac2.html>; Natasha Tusikov & Blyne Haggart, *It's Time For A New Way To Regulate Social Media Platforms*, THE CONVERSATION (Jan. 16, 2019) <http://theconversation.com/its-time-for-a-new-way-to-regulate-social-media-platforms-109413>.

23. See, e.g., Siva Vaidhyanathan, *Opinion | Don't Delete Facebook. Do Something About It*, N.Y. TIMES (June 8, 2018), <https://www.nytimes.com/2018/03/24/opinion/sunday/delete-facebook-does-not-fix-problem.html> (“The Department of Justice should consider severing WhatsApp, Instagram and Messenger from Facebook, much as it broke up AT&T in 1982. That breakup unleashed creativity, improved phone service and lowered prices. It also limited the political power of AT&T.”); Nilay Patel, *It's Time to Break Up Facebook*, THE VERGE (Sept. 4, 2018), <https://www.theverge.com/2018/9/4/17816572/tim-wu-facebook-regulation-interview-curse-of-bigness-antitrust>; Damian Tambini, *What Should Be Done With Facebook—Break It Up, Or Regulate It?*, THE GUARDIAN (Apr. 27, 2018), <http://www.theguardian.com/commentisfree/2018/apr/27/facebook-regulate-tech-platforms> (“[Regulators] can use the tax system: the problem is that we do not have a sense of whether Facebook is more like the alcohol and gambling industries—which are considered a social bad and taxed accordingly—or a social good and subject to tax breaks.”).

24. See *infra* Section III.A.

awareness, understanding (whether they comprehend), and expectations (what they want) of the copyright-licensing terms that govern their uploaded UGC. Finally, and most significantly, this study questions the *salience* of UGC licensing terms to users—the degree to which users’ awareness, understanding, and expectations are manifested into actions that impact users’ contractual decisions and content-uploading habits.²⁵

Our findings paint a troubling picture. The textual analysis portion of our study concludes that the UGC licensing policies of many leading platforms appear in a boilerplate form and are grossly overbroad in a way that might undermine the goals of copyright law.²⁶ Our survey portion’s findings are similarly concerning. First, our data suggest that a sizable percentage of social media creators do not understand which rights they have in their UGC to begin with. For example, 31% of the survey participants did not understand the meaning of “derivative work” (a statutory right licensed under the ToS of most platforms in our dataset).²⁷ These findings suggest that social media users routinely trade with property rights that they do not even know exist.²⁸

25. The principle of “salience” is the predominant emerging paradigm to evaluate the legitimacy of standard-form contractual terms. *See* RESTATEMENT OF THE L. CONSUMER CONTS., § 5 notes at 94–95 (AM. L. INST., Tentative Draft 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf; Amit Elazari Bar On, *Unconscionability 2.0 and the IP Boilerplate: A Revised Doctrine of Unconscionability for the Information Age*, 34 BERKELEY TECH. L.J. 567, 624–29 (2019). The U.C.C. adopts the salience test articulated by the above Restatement. *See* U.C.C. § 2-316(2) & cmt. 1 (AM. L. INST. & UNIF. LAW COMM’N 2020). (excluding an implied warranty requires “conspicuous” writing free of “unexpected and unbargained language of disclaimer”). Still, it should be noted that the Restatement adopted the notion of salience in the Reporters’ notes and not the “black letter” or commentary parts. RESTATEMENT OF THE L. CONSUMER CONTS., § 5 notes at 97–98. The notion of salience was first broadly introduced in Russell Korobkin’s *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003). According to Korobkin, consumers’ ability to price contractual terms in their entirety is limited because they are “boundedly rational decisionmakers.” *Id.* at 1203. Consumers are “bounded” because they simply do not have the economic incentive to invest the time required to understand and evaluate all terms. *Id.* Because the market does not police the quality of potentially “socially inefficient” terms, these “nonsalient” terms, which are not evaluated by a significant number of buyers, must be regulated. *Id.* 1203–06; *see also* Part IV. Indeed, according to the Restatement, “standard terms are prima facie nonsalient” and thus “courts adjudicating an unconscionability claim can focus their attention on the substantive inquiry.” RESTATEMENT OF THE L. CONSUMER CONTS., § 5 notes at 97. As we explain, such inquiry can focus on, inter alia, how a term might undermine the purpose of intellectual property laws or rights impacted by the proposed contractual term. *See* Section IV(B); Elazari Bar On, *supra* note, at 657.

26. *See infra* notes 244–247 and accompanying text.

27. *See infra* Section III.C.2.c).

28. *See infra* notes 244–247 and accompanying text. One might even argue that because social media platforms thrive on UGC they have a moral duty, if nothing else, to make sure

Second, and in line with recent empirical investigation of digital contracts generally, our data indicate that a sizable percentage of social media users are unaware of and falsely optimistic about the scope of the licenses they grant social media platforms.²⁹ For example, only 20% of all respondents indicated that they thought social media platforms can grant third parties a license to use their work; yet all the ToS in our dataset at the time of the survey enabled platforms to do just that.³⁰ Similarly, merely 25% of respondents thought that social media platforms are allowed to modify their work, something most platforms can do according to their ToS.³¹

Third, our data also indicate that users' expectations—what should be, in their opinion, the ideal scope of UGC license—diverge substantially from reality. For example, 49.7% of the survey recipients indicated that their work should be available *only* for as long as they “agree,” while only 3.4% indicated that they wish their work to be available indefinitely.³² The terms of nearly all the platforms in our dataset, however, specifically provide perpetual UGC licenses that would technically allow platforms to display and distribute users' content indefinitely.³³

Fourth, and most importantly, in contrast to privacy critics' conventional wisdom that users simply do not care about their rights or would willingly trade these rights for free services,³⁴ our data clearly suggest that most users care

that users are fully aware of their rights and are willfully participating in the service. *Cf.* Elizabeth Townsend Gard & Bri Whetstone, *Copyright and Social Media: A Preliminary Case Study of Pinterest*, 31 MISS. C. L. REV. 249, 275 (2012) (“Since users are the bread and butter of social media sites . . . these sites should at least take the responsibility of writing Terms of Service in easy to understand concepts. Copyright never has to be scary if sites are transparent about what rights they claim and users' responsibilities in terms of content.”).

29. *Cf.* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 551 (2014) (“[T]erm optimism? . . . exists when consumers expect a contract to contain more favorable terms than it actually provides.”).

30. *See infra* Section III.C.2.c).

31. *Id.*

32. *See infra* Section III.C.2.d).

33. *See infra* Section III.C.2.d).

34. *See* James C. Cooper & Joshua D. Wright, *The Missing Role of Economics in FTC Privacy Policy*, in CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY 22 (Jules Polonetsky, Evan Selinger & Omer Tene eds., 2017) (“[M]ost consumers are comfortable with the typical bargain of sharing information with faceless servers in return for free content and services, such as email and social networking platforms.”); *but see* Daniel J. Solove, *The Myth of the Privacy Paradox* (Feb. 1, 2020), <https://ssrn.com/abstract=3536265> (discussing, and refuting, the “privacy paradox” phenomenon—while some claim they value privacy highly, their actual behavior suggests otherwise: they relinquish their data or do not proactively safeguard their privacy). Solove claims that “the privacy paradox is a myth created by faulty logic” since privacy paradox empirical studies involve very specific contexts whereas users' privacy attitudes are actually

deeply about the legal rights in their creative content and would potentially rethink their sharing behavior if they possessed more information. For example, the vast majority of respondents (78.7%) indicated that they are unlikely (34.56%) or extremely unlikely (44.14%) to use a platform whose terms authorizes third parties to distribute or modify user work—something that all the platforms in our dataset currently require.³⁵ Faced with similar findings in the privacy arena, commenters coined the term “privacy paradox” to describe users’ tendency to behave in direct conflict to their expressed preferences.³⁶ Our data reveal a comparable “UGC licensing paradox.”

Finally, our findings provide surprising insight into which rights users consider the most valuable to them. For example, most respondents have indicated that having their work associated with their name—commonly known as the right of attribution, which is not respected for uploaded content under U.S. law³⁷—is even more valuable to them than having their work protected from modification or commercialization by the platform.³⁸ These findings can assist policymakers (and social media platforms) in reconsidering user rights in the digital age.

This Article includes three main parts. Part II presents the applicable legal framework: Section A explores the rise of social media and its dependence on

more general in nature. *Id.* at 2. Thus, Solove observes that data in specific contexts should not be used to reach broader conclusions. *Id.*; see also *infra* notes 93–95 and accompanying text (discussion concerning the “Privacy Paradox”).

35. See *infra* Section III.C.2.e).

36. See, e.g., Alessandro Acquisti, Laura Brandimarte & George Loewenstein, *Privacy and Human Behavior in the Age of Information*, 347 SCIENCE 509, 510 (2015) (“This discrepancy between attitudes and behaviors has become known as the ‘privacy paradox.’”); Meredydd Williams, Jason R. C. Nurse & Sadie Creese, *The Perfect Storm: The Privacy Paradox and the Internet-of-Things*, 2016 11th INT’L CONF. ON AVAILABILITY, RELIABILITY & SEC. 644, 644 (2016) (“While many individuals claim to care about privacy, they are often perceived to express behaviour to the contrary. This phenomenon is known as the Privacy Paradox.”); Susan Athey, Christian Catalini & Catherine Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, MIT SLOAN RESEARCH PAPER NO. W23488 (2017), https://www.ftc.gov/system/files/documents/public_comments/2017/09/00010-141392.pdf (finding that users who mentioned they feel strongly about not sharing their contacts’ information were happily willing to do just that moments later when offered a free pizza slice in exchange for their friends’ email addresses); Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFF. 100, 110–13 (2007) (finding that users shared nearly twice as more personal information than what they stated they were willing to share); Kenneth A. Bamberger, Serge Egelman, Catherine Han, Amit Elazari Bar On & Irwin Reyes, *Can You Pay for Privacy? Consumer Expectations and the Behavior of Free and Paid Apps*, 35 BERKLEY TECH. L.J. 327, 331 (“The misdirection of privacy policies and the framing effects of the ‘myth’ of free, moreover, exacerbate the “privacy paradox[.]”).

37. See *supra* note 6.

38. See *infra* Section III.C.2.e).

UGC; Section B explains that a substantial portion of the uploaded UGC is copyright protected; and Section C discusses the copyright licensing practice. Part III presents our study: Section A sets out the study's objectives and summarizes related work; Section B maps and analyzes the ToC copyright term landscape; and Section C describes our ToS awareness, understanding, expectations, and overall salience survey. Finally, Part IV discusses the policy implication of our findings: Section A discusses the role of market pressure and self-regulation, and Section B investigates avenues for substantive regulation of UGC licensing terms.

II. LEGAL FRAMEWORK

A. SOCIAL MEDIA AND THE PREVALENCE OF USER-GENERATED CONTENT

When it first emerged in the mid-1900s, the internet (then known as the ARPANET) was a research network run by the Department of Defense and connecting only a few universities.³⁹ During these early days, most users were visiting the Web and not contributing to it; the conceptualization of the internet as a place of social connectivity, cultural dialogue, and collaborative “platform-based” creativity seemed fictional.⁴⁰ But by the beginning of the 21st century, standards, protocols, and institutions managing the internet improved, and more websites offered usability and interoperability for end users. These changes transformed the Web from “read-only” (Web 1.0) to “read and write” (Web 2.0).⁴¹ In this environment, users’ contribution and

39. See, e.g., MATTHEW CRICK, POWER, SURVEILLANCE, AND CULTURE IN YOUTUBE'S DIGITAL SPHERE 4 (IGI Global, 2016) (discussing the Web's history).

40. See B. K. Hiremath & Anand Y. Kenchakkanavar, *An Alteration of the Web 1.0, Web 2.0 and Web 3.0: A Comparative Study*, 2(4) IMPERIAL JOURNAL OF INTERDISCIPLINARY RESEARCH, 705 (2016) file:///C:/Users/uriha/Desktop/138.pdf (last visited Nov 25, 2020) (reviewing the early evolution of the web and arguing that the emergence of Web 2.0 is “absolutely the subsequently big thing in the World Wide Web.”); Mike Wolcott, *What Is Web 2.0?*, CBS NEWS, http://www.cbsnews.com/8301-505125_162-51066094/what-is-web-20/ (last visited Nov 25, 2020) (arguing that the Web 2.0 revolution “represents an important shift in the way digital information is created, shared, stored, distributed, and manipulated,” and that this revolution “will have a significant impact in the way businesses use both the Internet and enterprise-level IT applications.”).

41. See Tim O'Reilly, *What is Web 2.0: Design patterns and business models for the next generation of software*. O'REILLY RADAR. Retrieved from: <https://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html>, 2005; see also Pamela Samuelson, *Freedom to Tinker*, 17 THEORETICAL INQUIRIES LAW 563, 564 (2016) (“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

collaboration took center stage.⁴² To celebrate this transformation, *Advertising Age* magazine named “the consumer” as its 2006 “agency of the year,”⁴³ *Time* magazine selected the consumer as “person of the year,”⁴⁴ and various commenters applauded the empowerment of end-users and amateur creators.⁴⁵

Social media platforms were leading players in this revolution. They allowed users to construct public or semipublic profiles that were visible to other users and allowed peers to communicate, create, and share content with one another.⁴⁶ Driven by market competition and their unique “attention-based” business models, platforms strived to reward users for deepening their

others.”). 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, 312–13 (2014) (“Digital 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 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 propertizes the ingredients of iterative creativity, but they are also among the beneficiaries of copyright law’s largess . . .”).

42. *Supra* note 42.

43. Matthew Creamer, *John Doe Edges out Jeff Goodby*, ADVERTISING AGE (Jan. 8, 2007), at S-4.

44. Lev Grossman, *Person of the Year: You*, TIME (Dec. 25, 2006), <http://content.time.com/time/magazine/article/0,9171,1570810,00.html> (explaining that “you” are the founders of Web 2.0 and the new era of “digital democracy”); *see also* Jeff Howe, *Your Web, Your Way*, TIME (Dec. 25, 2006), at 60 (briefly overviewing peer-generated content, using the term “crowdsourcing”).

45. *See, e.g.*, Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683 (2007) (explaining how the enhanced role of peer commentary has revolutionized advertising law); Zahr Said, *Embedded Advertising and the Venture Consumer*, 89(1) N.C. L. REV. 99 (2010) (arguing that consumers in the digital age are empowered and exploring the impact of this empowerment on advertising regulation policy); BENKLER, *supra* note 16 at 129 (describing the impact of peer networks on political and individual freedoms); CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 148–49 (2006) (emphasizing the ability of any user to create and edit content online); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 979–89 (2004) (describing instances of “unauthorized amateur authorship” and “new forms of collaborative creativity”); Creamer, *supra* note 43, at S-4.

46. Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010) (defining social media as “a group of Internet-based applications . . . that allow the creation and exchange of User Generated Content”); Crick, *supra* note 39, at 28; Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 (1) J. COMPUT.-MEDIATED COMM'N, 210, 211 (2007), (defining social network sites as web-based services that allow individuals to (1) construct profiles; (2) connect with other users; and (3) view and traverse their and others’ list of connections within the system).

engagement with the platforms' services.⁴⁷ The ability to personalize a webpage with unique backgrounds and images and to "copy and paste" code, for example, were two early technologies developed by MySpace, which led to the site's rise in popularity and the end of social media platform Friendster.⁴⁸ Over time, UGC substituted customized design as a means to attract users and personalize their social media experience. Soon, platforms that emphasized creating and sharing UGC, such as Facebook, Instagram, and Twitter, became industry leaders.⁴⁹

To improve services and grow their user base, social media platforms also encouraged users to generate and share content indirectly simply by revolutionizing the world of digital advertising. By fostering cheap and real-time connectivity among consumers, platforms advanced the wide-ranging methodological shift from a "one-way street" advertising philosophy, which befitted print and broadcast media, to a newer "two-way street" philosophy emphasizing consumer collaboration, contribution, and co-creation.⁵⁰ The new advertising approach specifically required users to create and share creative

47. Because platforms provide "free" services while making profits from targeted advertising, platforms strive to maximize connectivity (which leads to more advertising exposure) and user engagement (which leads to better targeting capabilities). For a detailed exploration of this unique business model. See Zuboff, *supra* note 19.

48. See Crick, *supra* note 39, at 28.

49. See Cameron Chapman, *The History and Evolution of Social Media*, WEBDESIGNER DEPOT (Oct. 7, 2009), <https://www.webdesignerdepot.com/2009/10/the-history-and-evolution-of-social-media/> (last visited Jan. 14, 2020) ("In 2008 Facebook became the most popular social networking site, surpassing MySpace, and continues to grow. Facebook doesn't allow the same kind of customization that MySpace does. Facebook does, however, allow users to post photos, videos and otherwise customize their profile content, if not the design."); Jessica Gutierrez Alm, "Sharing" Copyrights: *The Copyright Implications of User Content in Social Media*, 35 HAMLINE J. PUB. L. & POL'Y 104, 106 (2014) ("Early social media leaders like Facebook, YouTube, and Twitter originally focused on user-generated content by offering platforms where users could post images, videos, and writings they create."). Instagram, for example, according to its CEO and co-founder, Kevin Systrom, was focused since the beginning on "inspiring creativity" and "becom[ing] the home for visual storytelling for everyone." See Instagram, *About Us*, <https://www.instagram.com/about/us/> (last visited Feb. 25, 2020).

50. "Co-creation" is defined as a collaboration between the consumer and the marketer to shape brand meaning. See, e.g., CLAUDIU V. DIMOFTE, CURTIS P. HAUGHTVEDT, & RICHARD F. YALCH, CONSUMER PSYCHOLOGY IN A SOCIAL MEDIA WORLD 135 (2015) (discussing co-creation and noting that 85% of marketers consider brand co-creation investments to take advantage of social media opportunities); V. Kumar & Shaphali Gupta, *Conceptualizing the Evolution and Future of Advertising*, 45(3) J. ADVERTISING, 302, 303 (2016) ("Marketers moved from a product focus to a sales focus, to eventually a relationship focus. The focus shifted to developing and disseminating communication that inspired consumers to not merely buy but form a lasting relationship with the brand.").

content on social media.⁵¹ Users were incentivized by contests, prizes, and peer recognition.⁵² We are all familiar with these campaigns. In 2015, for example, the retail company Nasty Gal asked users to take selfies with strangers and post them on Instagram for the chance to win a Nasty Gal gift card.⁵³ Other types of promotional endeavors inspire users to create and share content more subtly by inviting them to react and interact with “viral” advertisements.⁵⁴ Successful campaigns such as Dairy Milk’s drumming gorilla⁵⁵ or Old Spice’s “The Man Your Man Could Smell Like,”⁵⁶ for example, have triggered a

51. See, e.g., Deepa Seetharaman, *Facebook Prods Users to Share a Bit More*, WALL STREET JOURNAL, November 13, 2015, <https://www.wsj.com/articles/facebook-prods-users-to-share-a-bit-more-1446520723> (last visited Nov 4, 2020) (explaining how Facebook nudges users to post content).

52. See, e.g., Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFFALO L. REV. 722, 738 (“Volunteer salespeople have also emerged by design, with traditional marketers soliciting user-generated ads for their products and showcasing the most persuasive ones in various ways.”); Goodman, *supra* note 45, at 684–85 (footnotes omitted) (“The power of the peer-to-peer model of production is changing the way advertisers think about communications and how much control they are willing to yield over brand management. As consumers express their devotions to brands in blogs, wikis, video-sharing sites like YouTube, and social networking sites like MySpace and Facebook, brand owners monitor, exploit, and sometimes imitate the genre.”).

53. See Jim Belosic, *How to Run an Instagram Contest: Four Easy Steps*, SOCIAL MEDIA EXAMINER (Feb. 17, 2015), <https://www.socialmediaexaminer.com/run-an-instagram-contest-four-easy-steps/> (last visited Dec. 27, 2020). Other co-creation campaigns are more complex. LEGO®, for example, invited users to create novel LEGO constructions and to promote their designs on social media. LEGO then promised to convert one of the most liked designs into a real-world salable playset and to give the winning designer a percentage of the product’s sales. See Albizu Garcia, *How Co-Creation is Fueling The Future of Marketing*, SOCIAL MEDIA TODAY, <https://www.socialmediatoday.com/marketing/how-co-creation-fueling-future-marketing> (last visited Nov. 5, 2018). See generally, Hacohen & Menell, *supra* note 47.

54. Electronic referral marketing (ERM) or “viral marketing” is another form of marketing technique that emphasizes user engagement. See Arnaud De Bruyn & Gary L. Lilien, *A Multi-Stage Model of Word-of-Mouth Influence Through Viral Marketing*, 25 INT’L J. RES. MARKETING, 151, 151–52 (2008) (defining electronic referral marketing (ERM) as the use of electronic “consumer-to-consumer . . . communications—as opposed to company-to-consumer communications—to disseminate information about a product or service, thereby leading to more rapid and cost effective adoption by the market”); Robert Allen King, Pradeep Racherla & Victoria D. Bush, *What We Know and Don’t Know About Online Word-of-Mouth: A Systematic Review and Synthesis of the Literature*, 28 JOURNAL OF INTERACTIVE MARKETING 167, 170 (2014) (defining enhanced volume as one of the main dynamics that drive electronic word-of-mouth communications); Maria Petrescu, Kathleen O’Leary, Deborah Goldring & Selima Ben Mrad, *Incentivized reviews: Promising the moon for a few stars*, 41 J. RETAILING & CONSUMER SERVICES 288, 288–95 (2018) (“Word-of-mouth marketing is a brand-initiated strategy of intentionally persuading consumer-to-consumer conversations.”).

55. Roberto Becerra, *Phil Collins Gorilla Drummer Cadbury Ad Dairy Milk*, YOUTUBE (April 29, 2013), <https://www.youtube.com/watch?v=kAOZ14Tjg7A> (last visited Feb. 25, 2020).

56. Old Spice, *The Man Your Man Could Smell Like*, YOUTUBE (Feb. 4, 2010) <https://www.youtube.com/watch?v=owGykVbfgUE> (last visited Nov. 9, 2018).

massive volume of UGC in the form of parodies, spoofs, and textual commentary.⁵⁷

Unsurprisingly, the amount of shared UGC on social media is massive. According to the consumer marketing platform Annex Cloud, for example, in 2016, users uploaded between 2 to 4 billion images to social media per day, and the number of user uploaders had increased by 176 million compared to the previous year.⁵⁸ This uploaded content is subject both to federal copyright law and contract law governing the user-platform agreements. The next two Sections discuss these legal regiments, respectively.

B. THE COPYRIGHTABILITY OF USER-GENERATED CONTENT

To be protected, creative work must satisfy the copyright's statutory requirements of originality and fixation.⁵⁹ It is reasonable to assume that a substantial portion of the UGC that is shared on social media will satisfy these two conditions.⁶⁰ The fixation prong will be satisfied for any UGC that is

57. See Karen Attwood, *Drumming gorilla aids revenues at Cadbury*, THE INDEPENDENT (Dec. 12, 2007), <http://www.independent.co.uk/news/business/news/drumming-gorilla-aids-revenues-at-cadbury-764705.html> (last visited Jan. 13, 2020) (“There have been more than 600 postings of the ad and spoofs on YouTube and the videos have been viewed more than 10 million times online.”); Megan O’Neill, *Top 10 Old Spice Parodies On YouTube*, ADWEEK (July 19, 2010) <https://www.adweek.com/digital/top-10-old-spice-parodies-on-youtube/> (last visited Jan. 13, 2020) (“Every [sic] since Old Spice’s ‘The Man Your Man Could Smell Like’ commercials hit YouTube, they’ve inspired a whole slew of spoofs, parodies and remixes.”). These creations were then shared on platforms such as YouTube to generated even more user reaction and commentary. See Brenna Ehrlich, *Lessons Learned From The Old Spice Campaign & Its Imitators*, MASHABLE (Mar. 16, 2011) <https://mashable.com/2011/03/16/old-spice-imitators/> (last visited Oct. 16, 2019) (“One of the reasons why the Old Spice campaign went so viral was that it targeted folks who were influential in the online sphere . . . Those people then acted as brand advocates [j]spreading the gospel of Old Spice to their followers.”); see also Brenna Ehrlich, *The Old Spice Guy Now Making Custom Videos for Fans via Social Media*, MASHABLE (July 13, 2010), <https://mashable.com/2010/07/13/old-spice-gu/> (last visited Oct. 16, 2019).

58. Sean Ogino, *The Ultimate List of User Generated Content Statistics*, ANNEX CLOUD (Sep. 1, 2016) <https://www.annexcloud.com/blog/the-ultimate-list-of-user-generated-content-statistics/> (last visited Jan. 14, 2020); see also Jim Edwards, *Planet Selfie: We’re Now Posting a Staggering 1.8 Billion Photos Every Day*, BUS. INSIDER (May 28, 2014), <http://www.businessinsider.com/were-now-posting-a-staggering-18-billion-photos-to-social-media-every-day2014-5> (Facebook, Instagram, Flickr, Snapchat, and WhatsApp users alone “upload[ed] 1.8 billion images . . . every day”).

59. 17 U.S.C. § 102(a) (2013) (limiting copyright-eligible works to “original works of authorship fixed in any tangible medium of expression”).

60. See Gutierrez Alm, *supra* note 49, at 107 (“Much of this user-generated content may be copyrightable.”); Babovic, *supra* note 16, at 144 (“[A]s a baseline, user-generated content can be copyrightable”). Many copyright infringement cases involve UGC. See, e.g., Perfect 10,

uploaded because, as soon as such content becomes available to other users, it is “perceived, reproduced, or otherwise communicated,” even if for a temporary period of time.⁶¹ The originality prong, on the other hand, would not always be met.⁶² Nevertheless, the standard for copyright originality is so famously low⁶³ that even works of negligible creative expression, such as many status updates on Facebook or 140-character tweets, might satisfy it.⁶⁴

Indeed, most UGC would have at least the modicum of minimal creativity judicially required to satisfy the originality prong.⁶⁵ Selfies, defined by *Time Magazine* as a modern self-portrait, taken at odd angles via smartphone and often shared through social media, are perhaps the most intuitive example.⁶⁶ In recent years, selfies became a cultural phenomenon of international

Inc. v. Giganews, Inc., 993 F. Supp. 2d 1192 (C.D. Cal. 2014) (questioning whether a bulletin board website that hosted infringing photographs could receive immunity under the Digital Millennium Copyright Act’s (DMCA) § 512 safe harbor provision); Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724 (S.D.N.Y. 2012) (concerning the application of the § 512 safe harbor provision to the website Photobucket); Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (concerning a YouTube user video defended as fair use against a claim of copyright infringement).

61. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518–19 (9th Cir. 1993) (quoting 17 U.S.C. § 101 (2012)); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008) (holding that a sound recording downloaded through a peer-to-peer file sharing service was deemed fixed); Babovic, *supra* note 16, at 144 (arguing that UGC satisfies that fixation requirement).

62. See, e.g., Babovic, *supra* note 16, at 145–48 (discussing problems of merger and length).

63. Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc. 499 U.S. 340, 345 (1991) (citing 1 M. NIMMER, NIMMER ON COPYRIGHT § 108[c][1] (1988)) (“[Requiring only] some creative spark, ‘no matter how crude, humble, or obvious’ it might be.”).

64. See Babovic, *supra* note 16, at 148 (“[A] user who recounts a story via a Facebook status update could claim copyright ownership to that writing . . . even a joke being told via Twitter can certainly possess the originality required to receive copyright protection in the work.”); Stephanie Teebagy North, *Twitteright: Finding Protection in 140 Characters or Less*, 11 J. HIGH TECH. L. 333, 335 (2011) (arguing that while the majority of tweets are likely non-copyrightable, some are likely to be protected); Consuelo Reinberg, *Are Tweets Copyright-Protected?*, WIPOMAGAZINE (July 2009), http://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html (same); see also Gutierrez Alm, *supra* note 49, at 110 (“There are great works, of which copyright protection is unquestioned, that would fit comfortably within Twitter’s 140-character limit”).

65. See Feist 499 U.S. at 341.

66. See Katy Steinmetz, *The Top Ten Buzzwords of 2012*, TIME (Dec. 4, 2012), <http://newsfeed.time.com/2012/12/04/top-10-newslists/slide/selfie/>, archived at <http://perma.cc/67BG-55L8>. Although, to date, the term “selfie” has largely escaped judicial attention, the first legal opinion to define the term used the definition provided by the Time article; see also United States v. Doe, No. 1:12-cr-00128-MR-DLH, 2013 WL 4212400, at 8, n.6 (W.D.N.C. Aug. 14, 2013) (quoting Time Magazine’s description of “selfies.”)

magnitude.⁶⁷ A 2013 survey from the United Kingdom revealed that over 50% of adults take selfies (rising to 75% in the 18–24 age bracket) and that nearly half of this group upload these photographs to social media.⁶⁸ In the United States, a survey from August 2018 revealed that 62% of American adults take selfies.⁶⁹ Although few would consider selfies artwork, as photographs most selfies easily satisfy the statutory standard of creativity and would be protected by copyright.⁷⁰ Other social media users, such as hobbyists or professional artists, writers, photographers, musicians, and designers, use social media platforms to share their artwork.⁷¹ For these users, copyrights are especially important as a means to protect the integrity of their work.⁷²

When an original work of authorship meets the requirements of originality and fixation, the author of that work is granted six exclusive rights of ownership.⁷³ These rights include the right to reproduce the work, the right to prepare derivative works, the right to distribute copies of the work, the right to perform audiovisual works publicly, the right to perform sound recordings publicly, and the right to display the work publicly.⁷⁴ These rights are vested

67. See Alison C. Storella, *NOTE: It's Selfie-Evident: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U.L. REV. 2045, 2050 (2014) (providing statistics of selfie usage in the United Kingdom in recent years as an example of “[s]elfies have become a worldwide phenomenon”).

68. *Id.*

69. J. Clement, *Share of adults in the United States Who Have Ever Taken a Selfie as of August 2018*, STATISTA (Nov. 5, 2018), <https://www.statista.com/statistics/683933/us-adults-shared-selfie/> (last visited Feb. 25, 2020).

70. 17 U.S.C. § 102(a) (2012) (extending copyright protections to works of authorship “include[ing] . . . “pictorial, graphic, and sculptural works”); see also, Storella, *supra* note 67, at 2050 (analyzing the selfie phenomenon as a copyrightable subject matter).

71. See Liz Douthwaite, Robert J. Houghton & Richard Mortier, *How Relevant is Copyright to Online Artists? A Qualitative Study of Understandings, Coping Strategies, and Possible Solutions*, 21 FIRST MONDAY 5 (2016), <https://doi.org/10.5210/fm.v21i5.6107> (“Most webcomic creators rely on posting to social media to find and maintain a thriving audience”). In our study about 35% of respondents stated that they are gaining some value other than merely social value (i.e., financial or reputational) from uploading UGC. See *infra* Section III.C.2.b).

72. See Craighton Berman, *An Artist's Guide to Copyrights*, THE CREATIVE INDEPENDENT, <https://thecreativeindependent.com/guides/an-artists-guide-to-copyrights/> (last visited Oct 11, 2020) (“As an artist, it is essential for you to understand your rights in your creations, and what to do if you believe those rights have been violated.”); RightsLedger, *Copyright Basics for Content Creators*, MEDIUM (Apr. 15, 2019), <https://medium.com/rightsledger/copyright-basics-for-content-creators-968ade8a4cb> (last visited Oct 11, 2020) (“[C]opyright is important to every creator, and understanding the basics can help every artist protect their work and their income.”).

73. 17 U.S.C. § 201(a) (2012) (“[C]opyright in a work protected under this title vests initially in the author or authors of the work.”); see also, Babovic, *supra* note 16, at 151 (arguing that in many cases the user is indeed the copyright owner and mention possible exceptions).

74. 17 U.S.C. § 106 (2012).

automatically with the creator without a need for notice or registration.⁷⁵ Once the copyrighted work is uploaded to social media, however, these rights are immediately subjected to a broad copyright license as mandated by each platform's ToS.

C. STANDARD FORM CONTRACTS AND THE COPYRIGHT BOILERPLATE

Half a century ago, W. David Slawson estimated that 99% of all contractual obligations are imposed unilaterally by one contracting party on the other rather than deriving from balanced negotiation and mutually informed consent.⁷⁶ Since Slawson's estimation, the prevalence of non-negotiated and unilaterally imposed contracts has only increased.⁷⁷ Unilateral, non-negotiated contracts (also known as "form" contracts, "boilerplate" contracts, "fine-print," or "contracts of adhesion") are offered to consumers on a take-it-or-leave-it basis with no opportunity for conciliation.⁷⁸

While enforceable by default, form contracts are suspicious in the eyes of many jurists because they so bluntly diverge from the Platonic ideals of meaningful consent and freedom of (and from) contracts.⁷⁹ Indeed, numerous studies have confirmed that consumers rarely read, poorly understand, and are often overly optimistic about the content of form contracts.⁸⁰ As explored later in Part IV, even economists who usually put their faith in the ability of free markets to generate efficient contractual obligations agree that form contracts may sometimes be inefficient and include terms that are detrimental to consumers' welfare.⁸¹

By making form contracts more prevalent and far easier for consumers to ignore, the digital revolution substantially magnified the social concerns associated with lack of meaningful consent and salience of terms, as boilerplate

75. The Berne Convention Implementation Act of 1988 did away with the formalities that authors had to comply with under earlier acts in order to receive copyright protection. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

76. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

77. Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002) ("People encounter standard forms in most of their contractual endeavors . . . standard forms govern [many types of] contractual relationships."); *see also* Korobkin, *supra* note 25, at 1203 ("[N]early all commercial and consumer sales contracts are form driven.").

78. *See, e.g.*, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1983); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 9 (2012).

79. *See generally* RADIN, *supra* note 78; Slawson, *supra* note 76; Korobkin, *supra* note 25.

80. *See infra* Section III.A.

81. *See infra* notes 205-206 and accompanying text (discussing Korobkin's market failure theory).

contracts (and licenses and consumer agreements associated with digital life, generally) became more prevalent.⁸² Indeed, “digital form contracts” (also known as “clickwrap” or “shrinkwrap” agreements) have become an inseparable part of the modern economy—we sign them to access websites, use mobile applications, activate licensed software, and unlock various digital services.⁸³ Multiple studies investigating these contracts have found them to be overbroad and potentially unfair from a user’s perspective.⁸⁴

In the case of social media, users encounter digital form contracts when they first log into the service and check the “I Accept” box at the end of the platform’s lengthy ToS agreement. Under the ToS of most social media platforms, users are required to subject the copyrights in their uploaded creative content to a detailed licensing agreement.⁸⁵ While users usually retain ownership of their work under the terms of most social media platforms, these license agreements also give platforms very broad discretion to use their users’ content as they see fit.⁸⁶ Moreover, unless it is stated otherwise in the platforms’ ToS, these copyright licenses apply automatically whenever users

82. See Elazari Bar On, *supra* note 25, at 589 (discussing the heightened social concern with digital form contracts in the digital age). The digital revolution made form contracts more concerning from a social perspective by making them more prevalent and easier to ignore. At least in the privacy arena, as professor Zuboff explained, even if users were to read and fully understand the terms of many digital services, they cannot fully comprehend the consequences of their agreement. This is because users’ personal data, once aggregated and analyzed by the service provider, may unlock meaningful insights that users cannot anticipate in advance. See SHOSHANA ZUBOFF, WRITTEN TESTIMONY SUBMITTED TO THE INTERNATIONAL GRAND COMMITTEE ON BIG DATA, PRIVACY, AND DEMOCRACY, BIG DATA 6 (2019). <https://www.ourcommons.ca/Content/Committee/421/ETHI/Brief/BR10573725/br-external/ZuboffShoshana-e.pdf>. (arguing that while users prescribe to the legal text visible to them, they also unconsciously prescribe to another “shadow text” that is “the result of [the service provider’s] proprietary analyses of the first text.”).

83. Kevin W. Grierson, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5th 309, 317 n.1 (2003) (A click-wrap agreement is defined as “[an] agreement [that] appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement, and purports to condition further access to the software or transaction on the user’s consent to certain conditions there specified; the user ‘consents’ to these conditions by ‘clicking’ on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction.”).

84. See *infra* Section III.A.

85. See *infra* Section III.B.2.

86. See *infra* Section III.B.2; see also Babovic, *supra* note 16, at 160 (“Terms of service agreements, in general, license a significant chunk of exclusive rights associated with copyright, and have vague limitations on such a license.”); Gutierrez Alm, *supra* note 49, at 115 (“According to the [ToS], there is nothing stopping social media companies from selling copies of a user-photographer’s photos, for example, or placing them in advertisements.”); Allen & Ward, *supra* note 1, at 50–53 (reviewing ToS of Facebook, LinkedIn, Second Life, and Twitter).

upload a photo, share a video, or tweet a poem. The next Part introduces our study, which we designed to uncover the true breadth of these contractual licensing agreements, shed light on users' awareness, understanding, and expectations of these agreements, and to assess the salience of terms to the users.

III. THE STUDY

A. OBJECTIVES AND RELATED WORK

Studies have established that digital form contract terms are notoriously lengthy,⁸⁷ complex,⁸⁸ rarely read,⁸⁹ hardly understood,⁹⁰ and often perceived by consumers to be more favorable than they actually are.⁹¹ As the notion of *term*

87. See Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 PEN L. REV. 315, 320 (2017) (citing Tom Gardner, *To Read, or Not to Read . . . the Terms and Conditions*, DAILY MAIL (Mar. 22, 2012), <http://www.dailymail.co.uk/news/article-2118688/PayPal-agreement-longer-HamletiTunes-beats-Macbeth.html>) (noting that iTunes's ToS are longer than Shakespeare's Macbeth).

88. See DOUGLAS E. PHILLIPS, *THE SOFTWARE LICENSE UNVEILED: HOW LEGISLATION BY LICENSE CONTROLS SOFTWARE ACCESS* 79 (2009) (using the Flesch-Kincaid readability formula to analyze an Adobe licensing agreement and finding that a reader would likely need at least 19.3 years of formal education in order to decipher it); see also Carlos Jensen & Colin Potts, *Privacy Policies as Decision-Making Tools: An Evaluation of Online Privacy Notices*, 2004 PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 471, 473–75.

89. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 1(2014) (finding that users access software retailers' End-User Licensing Agreements (EULA) only 0.05% of the time); see also Nathaniel Good, Jens Grossklags, Deirdre K. Mulligan & Joseph A. Konstan, *Noticing Notice: A Large-Scale Experiment on the Timing of Software License Agreements*, 2007 PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 607, 611 (finding that less than 2% of users reported reading EULAs thoroughly with about two thirds saying that they did not read them at all); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"*, 78 U. CHI. L. REV. 165, 179–81 (2011) (reporting empirical data supporting the conclusion that license terms "are almost always ignored"); Rainer Böhme & Stefan Köpsell, *Trained to Accept? A Field Experiment on Consent Dialogs*, 2010 PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2406 (showing that most users take less than 8 seconds to click through a consent dialog).

90. See Joel R. Reidenberg, Travis Breaux, Lorrie F. Cranor, & Brian M. French, *Disagreeable Privacy Policies: Mismatches between Meaning and Users' Understanding*, 30 BERKELEY TECH. L.J. 39 (2015) (asking comprehension questions about privacy policies to non-expert users, knowledgeable users, and privacy experts, finding discrepancies between non-expert users and experts (and even among experts), and concluding that websites do not convey information in a way that is accessible to reasonable users).

91. Ayres & Schwartz, *supra* note 29, at 551 (arguing that consumers often "expect a contract to contain more favorable terms than it actually provides"). Professors Aaron

salience emerged as a primary scrutinizing factor in the context of form contracts more generally, privacy scholars have also looked at the question of privacy's salience, defined by the degree to which privacy's prominence in people's awareness actually impacts their real-world privacy decisions.⁹²

In this vein, multiple scholars have pointed out a "privacy paradox" in which users who claim to care about privacy policies often behave inconsistently with their stated pro-privacy preferences. One study, for example, found that users who mentioned that they feel strongly about not sharing their contacts' information were happily willing to do just that moments later when offered a free pizza slice in exchange for their friends' email addresses.⁹³ Another study confirmed that users shared nearly twice as much personal information compared to what they initially stated they were willing to share.⁹⁴

Unlike in the privacy arena, almost no studies have looked at users' awareness, perceptions, expectations or overall term salience regarding platforms' UGC licensing policies. Several legal scholars, apparently motivated by empirical evidence in the privacy sphere, have speculated that users are unlikely to read or understand UGC licensing provisions⁹⁵ or comprehend the

Perzanowski & Chris Jay Hoofnagle have recently documented such false "term optimism" in the context of e-commerce by showing that consumers tend to overestimate the rights that they acquire when they press the "Buy Now" buttons that appear in such websites. Perzanowski & Hoofnagle, *supra* note 87; see also Nathaniel Good & Joseph A. Konstan, *Stopping Spyware at the Gate: A User Study of Privacy, Notice and Spyware*, 2005 PROCEEDINGS OF SYMPOSIUM ON USABLE PRIVACY AND SECURITY (SOUPS) 43, 43 (finding that there is a "strong disconnect" between their actual content and users' expectations); see also Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1257 (2015) (noting the potential for consumer misunderstanding as a result of the *Buy Now* button).

92. See Meredydd Williams, Jason R. C. Nurse & Sadie Creese, *Privacy Salience: Taxonomies and Research Opportunities*, IFIP INTL. SUMMER SCH. ON PRIVACY & IDENTITY MGMT., 263, 263–78 (summarizing research and defining privacy salience "as whether an individual is currently considering the topic of informational privacy").

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

94. Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors*, 41 J. CONSUMER AFF. 100, 118 (2007).

95. See Gutierrez Alm, *supra* note 49, at 114 ("The majority of users would likely be surprised to learn that they have licensed such broad latitude with their user-generated content."); Kelly, *supra* note 7, at 515 ("[U]sers are bound by terms they do not understand, with little recourse and seemingly endless policing of the contractual boundaries by Internet conglomerates."); see also, Alina Tugend, *Those Wordy Contracts We All So Quickly Accept*, N.Y. TIMES (July 12, 2013), <https://www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html>. <https://perma.cc/K2AJ-GDEY>.)

legal rights they have in the digital sphere.⁹⁶ Several studies have confirmed these views by showing, for example, that the ToS of some social media platforms are difficult to read⁹⁷ and that users often misunderstand how copyright law operates in the online environment, particularly since subjective concepts such as fair use are relevant in this context.⁹⁸

Only a handful of studies, however, have poked into users' expectations of UGC licensing policies and evaluated the subjective salience of various terms. And those that did drew incoherent results. For example, professors Casey Fiesler, Cliff Lampe, and Amy Bruckman investigated users' perceptions of UGC licensing policies across various websites (including some social media

96. See Storella, *supra* note 67, at 2045 (“[T]he majority of social media users are likely unaware that copyright protection extends to their posted materials at all.”); Kelly, *supra* note 7, at 514 (“Many users may not realize that the content they post on social media platforms is copyrighted, and so will not fully understand the license they are granting.”). This view was bolstered by the notion that many social platforms, while vigorously discussing copyright in their ToS, do very little to educate users about what copyright *is*. For instance, by giving examples of copyrighted material. See, e.g., Gard & Whetstone, *supra* note 28, at 269 (“Pinterest and others engaged in a copyrighted world protect themselves from legal harm, while not educating or advising their users of how copyright works within their system.”).

97. On the issue of readability, see Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, 2016 PROCEEDINGS OF THE 19TH ACM CONFERENCE ON COMPUT. SUPPORTED COOPERATIVE WORK & SOC. COMPUT. (showing that the average Flesch-Kincaid Grade Level Score of many copyright terms was a college sophomore reading level of 14.8 (in a range of 8.4 to 19.8); see also, Amy B. Wang, *A Lawyer Rewrote Instagram's Terms of Use 'In Plain English' So Kids Would Know Their Privacy Rights*, WASH. POST (Jan. 8, 2017), <https://www.washingtonpost.com/news/parenting/wp/2017/01/08/a-lawyer-rewrote-instagram-terms-of-use-in-plain-english-so-kids-would-know-their-privacy-rights/> (showing that at the time of the study, Instagram's ToS required a postgraduate level of reading comprehension); Kelly, *supra* note 7, at 515 (“[M]ost adults do not have the requisite postgraduate degree apparently required to understand the terms and conditions that they are contractually binding themselves to obey.”); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 2018 INFO., COMM’N & SOC. 1, 16 (finding that the 543 participants who joined the study's fictitious social network had spent 51 seconds on average reading the website's ToS, with a 93% acceptance rate).

98. Fair use, perhaps the most complex copyright doctrine to analyze, is an affirmative defense against the claim of copyright infringement. Evaluating whether a work is fair use (and therefore not infringing) requires a delicate balancing of four statutory factors: the purpose of the intended use, the nature of the copyrighted work, the amount and substantiality of the portion used of the copyrighted work, and the effect of the use on the copyrighted work's market. 17 U.S.C. § 107 (1992); see also Casey Fiesler & Amy S. Bruckman, *Remixers' Understandings of Fair Use Online*, 2014 PROCEEDINGS OF THE ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1023; Casey Fiesler, Jessica Feuston & Amy S. Bruckman, *Understanding Copyright Law in Online Creative Communities*, 2015 PROCEEDINGS OF THE ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 116; Catherine C. Marshall & Frank M. Shipman, *The Ownership and Rense of Visual Media*, 2011 PROCEEDINGS OF THE 11TH ACM/IEEE-CS JOINT CONFERENCE ON DIGITAL LIBRARIES 157.

platforms), finding that “users care about how their content can be used yet lack critical information.”⁹⁹ The researchers did not inquire about the salience of copyright terms to users—namely whether users would change their online uploading behavior if they were given more information (although they speculated that this might be the case).¹⁰⁰

Conversely, in another study, professors Liz Dowthwaite, Robert Houghton, and Richard Mortier asked for the perceptions of professional webcomic artists and concluded that such users are somewhat agnostic about copyright policies (including UGC licensing terms) and often rely on one another to red flag substantial concerns.¹⁰¹ These findings suggest that better information about UGC licensing policies is unlikely to change users’ social media behavior.¹⁰²

Finally, commenters also seem to disagree as to whether and to what extent copyright ToS provisions vary across social media platforms. While some commenters argue that copyright provisions are all boilerplate terms,¹⁰³ others suggest that there is a great deal of term variability between different websites.¹⁰⁴ Our study fills these gaps—it is the first study to check the conformity of UGC policies among the most popular social media platforms and to appraise the saliency of these policies to users.¹⁰⁵ The study includes two parts. The first part—a comparative textual analysis of platforms’ ToS—is discussed next. The second part—a survey of users’ awareness, understanding, and expectations and of terms’ salience—is discussed in Section III.C.

99. See Fiesler et al., *supra* note 97, at 1453.

100. See *id.* at 1458 (“[W]e did not ask our participants directly about how licensing terms would affect their site use.”).

101. See Dowthwaite et al., *supra* note 71 (“Creators also tended to rely on each other to point out any issues: ‘I think my feeling is always like well everyone else seems to be using it so I’m sure it’s fine.’”).

102. See, e.g., Babovic, *supra* note 16, at 191 (“It might be said that many users would be willing to surrender their control over UGC that they submit; that it is understood as a price to be paid in order to participate in social media and social networking generally.”).

103. See, e.g., Storella *supra* note 67 at 2064 (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”).

104. See Fiesler et al., *supra* note 97, at 1458 (“[C]opyright licenses are far from one size fits all . . . This goes against conventional wisdom that the legalese in TOS is all boilerplate terms.”).

105. Cf. Fiesler et al., *supra* note 97 (investigating only eight social media platforms within a broader dataset of thirty websites and not investigating salience); Dowthwaite et al., *supra* note 71 (investigating users’ perceptions of copyright policies but focusing on the small subset of users who are professional creators).

B. MAPPING THE COPYRIGHT BOILERPLATE LANDSCAPE

1. *Methods*

To evaluate whether and to what extent the terms that govern UGC vary across different platforms, we have conducted a textual analysis of the ToS of eleven leading social media and content-sharing platforms: Facebook, YouTube, Instagram, Twitter, Pinterest, Snapchat, LinkedIn, Reddit, Vimeo, Vine, and Tumblr. The first eight platforms in our dataset were considered by most measures to be among the ten most popular social media platforms in Western societies (excluding chat-only platforms such as WhatsApp and Skype), amounting to around 80% of active social media users.¹⁰⁶ We also included Vimeo, Vine, and Tumblr due to the substantial amount of copyrighted UGC shared on these platforms and their popularity among advertisers.¹⁰⁷ Our sample is thus representative of the most commonly used social media platforms for UGC sharing and a number of additional platforms for content sharing.¹⁰⁸

We analyzed the ToS provisions of these platforms as of March 1, 2018. We have further confirmed that the relevant terms remain materially (for the purpose of the survey) the same as of February 2020, following the collection of survey answers.¹⁰⁹ Based on our analysis, we identified and characterized seven key elements that reflect ToS terms concerning copyrightability and other related aspects of UGC. We offer the following taxonomy:

106. Irfan Ahmad, *The Most Popular Social Media Platforms of 2019*, DIGITAL INFORMATION WORLD (Jan. 1, 2019) <https://www.digitalinformationworld.com/2019/01/most-popular-global-social-networks-apps-infographic.html> (last visited Feb. 25, 2020); Andrew Perrin & Monica Anderson, *Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018*, PEW RESEARCH CENTER, <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> (last visited Feb. 25, 2020); see also Alexa top 500, “online communities,” https://www.alexa.com/topsites/category/Top/Computers/Internet/On_the_Web/Online_Communities/Social_Networking (listing between 1 to 4, Facebook, Twitter, LinkedIn and Pinterest); eBizMBA, *Top 15 Best Web 2.0 Websites | February 2020*, <http://www.ebizmba.com/articles/web-2.0-websites> (last visited Feb. 25, 2020) (ranking among the top 15 Web 2.0 websites (at the time): YouTube, Twitter, Pinterest, and Tumblr and Instagram).

107. See, e.g., Mediakix, *Have We Seen The End Of Vine?*, <https://mediakix.com/blog/vine-app-losing-popularity/> (last visited Feb. 25, 2020). Notably, the popularity of Vine for advertising purposes is reportedly decreasing. See Lauren Johnson, *Why Brands Are Ditching Twitter’s 6-Second Vine App*, ADWEEK (Dec. 6, 2015), <https://www.adweek.com/digital/why-brands-are-ditching-twitter-s-6-second-vine-app-168433/> (last visited Feb. 25, 2020).

108. Although the boilerplate landscape mapping included Tumblr in the survey, we omitted survey questions related to this platform since there was no adequate sample of Tumblr users.

109. Some updates in the platforms’ ToS following our survey from this analysis are summarized in the footnotes of Appendix A.

1. **Perpetuity:** Language regarding the persistence of copyright licenses to the UGC even after the user-platform agreement has terminated.
2. **Third parties:** Language referring to the platform's ability to sublicense or otherwise permit third parties (such as affiliated businesses) to use the copyrighted work in different ways (e.g., to publish or display the work).
3. **Modification:** Language about the platform's ability to change or modify the copyrighted work.
4. **Derivative works:** Language regarding the platform's ability to create derivative works defined under 17 U.S.C. § 101.¹¹⁰
5. **Immediate Removal:** Language providing the platform the ultimate discretion to unilaterally remove UGC from its service.
6. **Commercial:** Language addressing the platform's ability to utilize UGC for commercial purposes (such as advertising).¹¹¹
7. **Other:** Language addressing the following issues:
 - a) **Moral Rights:** Language specifically requiring users to disclaim moral rights (a term commonly known to include the right for attribution and integrity as defined by 17 U.S.C. § 101).¹¹²

110. "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

111. Some platforms use broader language to enable unlimited commercial uses, other platforms limit their ability to commercialize UGC to promoting their services. For a detailed comparative analysis of the platforms' terms, see Appendix A.

112. Attribution includes the right "to claim authorship of [the] work." 17 U.S.C. § 106A(a)(1)(A). Integrity includes the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [the creator's] honor. . . ." 17 U.S.C. § 106A(a)(3)(A). As explained, U.S. law does not recognize moral rights for UGC. *See supra* note 7. Accordingly, specific waiver of moral rights in the platforms' ToS has no practical meaning. Nevertheless, we still considered the issue of moral rights because we suspected that users care very deeply about those rights, especially the right for attribution. (Our survey later substantiated this suspicion). *See infra* Section III.C.2.c).

- b) **Publicity Rights:** Language regarding instances where platforms specifically claim the right to use users' identity (i.e., name, likeness, and voice).¹¹³
- c) **Ideas:** Language specifically requiring users to waive any claim to compensation or liability with respect to ideas they provide the platform.

We intentionally disregarded elements that are essential for the platforms' operation or functionality, such as having the right to display or distribute UGC.¹¹⁴ Instead, we focused our attention on elements that either provide platforms with substantial control over users' content (such as the right to modify) or that can significantly undermine artistic values and interests (such as denying attribution or subjecting the work to advertising).¹¹⁵ We manually compared the ToS of each platform in our dataset to evaluate how the stated elements conformed or differed across platforms. We considered that a platform has a stated element only if its ToS stated the element explicitly and unmistakably based on the taxonomy we have proposed above. For example, Reddit's ToS addresses four of the seven key elements in a single, concise provision (the number in brackets corresponds with the element's number as it appears in the list above):

“By submitting user content to Reddit, [users] grant [Reddit] a royalty-free, perpetual [1], irrevocable [1], non-exclusive, unrestricted, worldwide license to reproduce, prepare derivative works [4], distribute copies, perform, or publicly display your user content in any medium and for any purpose, including commercial purposes [6], and to authorize others to do so [2].”¹¹⁶

A summary of our textual analysis appears in Figure 1 (the complete table of the investigated terms broken down by key elements appears in Appendix

113. Publicity rights protect against the misrepresentation of one's name, voice, or likeness. *See, e.g.*, Cal. Civ. Code § 3344 (2000) (“Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner. . . without such person's prior consent. . . shall be liable for any damages sustained by the person. . .”). For a discussion of the right of publicity and the challenges imposed on it by social platforms see Jesse Koehler, *Fralely v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY. TECH. L. J. 963 (2013).

114. *See* Fiesler et al., *supra* note 97, at 1454 (“When a user submits content to one of these websites, they are typically licensing that work for use by the site—at the very least, the site must be permitted to display the work, or others would not be able to see it.”). However, we did address the right to display and distribute as means to investigate other related issues—for instance, the platforms' ability to sublicense these rights or to exercise them outside the platforms' services. *See infra* Section III.C.1.c).

115. In this respect our approach is normative rather than pragmatic (as explained, U.S. law does not recognize moral rights for UGC.). *See supra* note 7.

116. *See* Reddit, *supra* note 4.

A). In addition to our comparative similarity analysis, we also gathered statistical text information and evaluated the terms' readability. A discussion of our findings follows.

2. Findings

a) Terms' Readability

We tested the terms that govern UGC for readability using the Flesch-Kincaid Grading System, which was commonly used in similar studies dealing with privacy policies.¹¹⁷ The average Flesch-Kincaid Grade Level Score (representing a U.S. educational grade level) for the UGC terms in our dataset was in a postgraduate reading comprehension level of 17.4. The scores ranged from 13.4 to 27.4 (see Figure 1). These results are significantly higher than the findings of most comparable studies in the privacy realm (which are usually in the range of 14 to 15).¹¹⁸ As the results indicate, many users would find it extremely challenging to understand the legal terms contained in social media platforms' ToS.¹¹⁹

It is difficult to justify these terms' linguistic complexity. Unlike other elements in the ToS agreement that are arguably inherently complex—such as the Digital Millennium Copyright Act (DMCA) takedown procedure¹²⁰—the UGC licenses platforms require to operate their services are relatively

117. See Fiesler et al., *supra* note 97, at 1453; see also, Mary J. Culnan & Thomas J. Carlin, *Online Privacy Practices in Higher Education: Making the Grade?*, 52 COMMUNICATIONS OF THE ACM 2, 126–130 (March 2009); Mark A. Graber, Donna M. D'Alessandro & Jill Johnson-West, *Reading Level of Privacy Policies on Internet Health Web Sites*, 51 THE JOURNAL OF FAMILY PRACTICE 7, 642–45 (2002); Jensen & Potts, *supra* note 88 at 473–75.

118. See, e.g., Jensen & Potts, *supra* note 88 at 473–75; Mark A. Graber, Donna M. D'Alessandro & Jill Johnson-West, *Reading Level of Privacy Policies on Internet Health Web Sites*, 51 J. OF FAM. PRAC. 7, at 642–45 (2002); see also Fiesler et al., *supra* note 97, at 1453 (finding an average of 14.8 for UGC policies across the web).

119. See U.S. Social Reach by Education 2019, STATISTA, <https://www.statista.com/statistics/471386/us-adults-who-use-social-networks-education/> (last visited Oct 10, 2020) (noting, for example, that 64% of adults whose educational background was high school grad or less were using social networks). This concern is especially noteworthy with respect to platforms that are popular among teens and children such as Instagram. See, e.g., Wang, *supra* note 97 (noting that simplifying ToS is important for all platforms but it is more critical for Instagram “for its ubiquity and popularity among teenagers”).

120. The DMCA's notice and take down regime requires content-sharing platforms to remove copyright infringing content upon the copyright owner's notice. 17 U.S.C. § 512 (c)(1)(A)(1998). This procedure is often described as complex and confusing. See, e.g., Micah Singleton & Ben Popper, *The Music Industry Cranks Up the Volume In Its Fight Against YouTube*, THE VERGE (2016), <https://www.theverge.com/2016/6/3/11852146/music-industry-fighting-youtube-dmca> (last visited Oct 11, 2020) (“The industry's biggest complaint about the DMCA is that the take-down process for unlicensed content is too complicated . . .”).

straightforward. Little prevents platforms from simplifying the obscure legalese in these terms and clearly communicating how they will use UGC.

Interestingly, while providing users with such additional clarity should not be overly challenging or costly to platforms, only three platforms in our dataset—Pinterest, Tumblr, and LinkedIn—have included a shortened and simplified version of their main terms in plain English.¹²¹ As seen in Figure 1 below, the average Flesch-Kincaid Grade Level Score of these simplified terms was 8.77, which is on par with children’s novels.¹²² Another useful way platforms can simplify their ToS is to use instructional videos just as LinkedIn did back in 2014.¹²³ We further discuss the benefits of simplified disclosures in Section IV.A.¹²⁴

b) Similarity and Breadth of User-Generated Content Licensing Terms

As depicted in Figure 1, our findings point to a substantial similarity in the platforms’ approaches in our dataset with respect to the seven key elements. All the platforms, for example, required the right to assign and sublicense UGC rights to third parties such as affiliated businesses. Most platforms also required users to provide them with the right to modify content, to create derivative works, or both. Moreover, as seen in the complete textual analysis in Appendix A, many phrases used by social media platforms in their UGC provisions have minimal variability.¹²⁵ This finding confirms the view that legalese in ToS appears in a boilerplate form.¹²⁶

121. See Pinterest, *Terms of Service*, <https://policy.pinterest.com/en/terms-of-service> (last visited Sept. 24, 2021); Tumblr, *Terms of Service*, (July 21, 2021), <https://www.tumblr.com/policy/en/terms-of-service>; LinkedIn, *User Agreement*, (Aug. 11, 2020), <https://www.linkedin.com/legal/user-agreement>.

122. See *The Flesch Reading Ease and Flesch-Kincaid Grade Level*, READABLE, <https://readable.com/blog/the-flesch-reading-ease-and-flesch-kincaid-grade-level/> (last visited Feb. 11, 2020).

123. *LinkedIn User Agreement | Who owns your content? You do*, https://www.youtube.com/watch?v=ha7ASaPnjbA&feature=emb_title (last visited Feb. 11, 2020).

124. See *infra* notes 235–237 and accompanying text.

125. See *infra* Appendix A. For example, compare the following excerpts from our study’s platforms: “[Y]ou grant us [Twitter] a worldwide, non-exclusive, royalty-free license”; “You grant Pinterest and our users a non-exclusive, royalty-free, transferable, sublicenseable, worldwide license”; “[Y]ou hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license”; “[Y]ou grant us [Facebook] a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license”; “[Y]ou grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license”; “[Y]ou grant Vimeo and its affiliates a limited, worldwide, non-exclusive, royalty-free license.”

126. But see Fiesler et al., *supra* note 97, at 1458 (“Based on our analysis of what terms exist on different websites, we see a great deal of variability This goes against conventional wisdom that the legalese in TOS is all boilerplate terms.”)

More substantially, our findings affirm the concerns that were often raised in the privacy arena—that boilerplate terms in digital form contracts are grossly and perhaps unjustifiably overbroad.¹²⁷ Many of the UGC licenses in our dataset used the following legal terminology (in brackets is the number of times these words appear in our ToS dataset)¹²⁸: “perpetual” [1], “irrevocable” [2], “sublicensable” [5], “nonexclusive” [12], “royalty-free” [11], “transferable” [7], “unrestricted” [3], and “worldwide” [4]. These ToS also had language that enabled platforms, among other things, to modify [14], adapt [10], edit [4], and improve [3] UGC; to create derivative works [10]; and to commercially exploit their users’ content.¹²⁹

127. *See infra* Section III.A (giving the example that platforms obtain a broad copyright license for “any commercial license”).

128. *See infra* Appendix A.

129. Of all the platforms in our dataset, Reddit’s ToS contained the broadest language concerning discretion to commercial UGC. *See* Reddit, *supra* note 4. Since conducting our study, Reddit has narrowed its provision and this language was removed. Reddit, *supra* note 7.

Figure 1: Textual Analysis of Platforms' UGC Terms

		F-K	Perpetuity	Third parties	Modification	Derivative works	Immediate removal	Commercial	Other		
									Moral rights	Publication rights	Ideas
1	Facebook	13.8	<input type="checkbox"/>								
2	YouTube	18.7	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
3	Instagram	17.8		<input type="checkbox"/>							
4	Twitter	15.7	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>
5	Pinterest	16.5 / 7.1	<input type="checkbox"/>				<input type="checkbox"/>				
6	Snapchat	13.4	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>					
7	LinkedIn	12.3 / 8.9		<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>
8	Reddit	27.4	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
9	Vimeo	14.0	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
10	Vine	18.7	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>			
11	Tumblr¹³⁰	23.7 / 10.3	<input type="checkbox"/>								

Arguably, policymakers should not be bothered by the fact that the UGC licensing policies are overbroad because platforms are unlikely to fully exhaust

130. Although at the time of the study Tumblr has claimed a relatively broad UGC license, they also subsequently added limiting language that substantially narrowed their discretion to misuse users' content. *See infra* note 237.

their legal privileges in fear of awakening the wrath of the public.¹³¹ Although this argument is not without merit, overbroad UGC licensing policies are concerning for at least two reasons. First, while it is indeed unlikely that platforms “sublicense user content to porno.com,”¹³² it is conceivable that platforms could come up with creative new ways to monetize their users’ content without creating an immediate backlash.¹³³ This possibility is especially valid at the present moment as growing political and public pressure is causing platforms to lose revenue from monetizing users’ data (the platforms’ primary source of income), incentivizing platforms to rethink their monetization

131. Indeed, platforms zealously defend their public image, especially when facing a potential public relationship crisis. *See infra* notes 229–230 and accompanying text; *see also* Craig Silverman, Ryan Mac & Pranav Dixit, “I Have Blood On My Hands”: A Whistleblower Says Facebook Ignored Global Political Manipulation, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/craigsilverman/facebook-ignore-political-manipulation-whistleblower-memo> (last visited Oct 11, 2020) (discussing how a former Facebook employee is accusing the platform of prioritizing potential public-relation concerns in Western democracies but not expressing the same concern for malign activities in other regions where the possibility of journalistic coverage leading to public outcry is less likely).

132. Hetcher, *supra* note 9, at 848 (noting that Facebook could “surreptitiously sublicense user content to porno.com . . . [which] would fall squarely within the license Facebook purports to be granted by users”).

133. *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 235, 235 (Oxford, 2019) (arguing that “[t]he increasingly indispensable nature of the services that platforms provide makes exits particularly infeasible for many users”); *see also* Mireille Hildebrandt, *Primitives of Legal Protection in The Era of Data-Driven Platforms*, 2 GEO. L. TECH. REV. 252, 254 (2018) (“Even if a platform does not intend to use its quasi-sovereign powers to actually institute a quasi-totalitarian rule across the many contexts we navigate, we should be concerned about its potential to do so.”); Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, GEO. L. TECH. REV. 275, 295 (2018) (“A second way data-opolies can extract wealth is by getting creative content from users for free.”). As a cautionary tale, consider the recent case in which the Federal Trade Commission “investigated allegations that Google unfairly ‘scraped,’ or misappropriated [others’] content (including of artists), . . . passed this content off as its own, and then threatened to delist these rivals entirely from Google’s search results when they protested the misappropriation of their content.” Statement of the U.S. Federal Trade Commission Regarding Google’s Search Practices, *In the Matter of Google, Inc.*, FTC File No. 111-0163, at 3, n.2 (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. As one complainant noted, “Artists need to earn a living in order to sustain creativity and licensing is paramount to this; however, this cannot happen if Google is siphoning traffic and creating an environment where it can claim the profits from individuals’ creations as its own.” Samuel Gibbs, *Getty Images Files Antitrust Complaint Against Google*, GUARDIAN (Apr. 27, 2016), <https://www.theguardian.com/technology/2016/apr/27/getty-imagesfiles-antitrust-google> [<https://perma.cc/5WZK-EF98>]. This case settled in 2018. Chris O’Brien, *Getty Images and Google Declare a Truce with New Image Licensing Partnership*, VENTURE BEAT (Feb. 9, 2018), <https://venturebeat.com/2018/02/09/getty-images-and-google-declare-a-truce-with-newimage-licensing-partnership/> [<https://perma.cc/A4LD-FGH3>].

practices.¹³⁴ Indeed, as Angel Fraley’s (sponsored) story from the introduction indicates, social media platforms will not shy away from promising new avenues for generating income.¹³⁵

The second and main reason to be concerned about platforms’ overbroad discretion to exploit UGC is that—as indicated by our survey findings below—users do not actually know and do not expect that platforms have such discretion.¹³⁶ Moreover, most users even claim that they would change their uploading behavior to social media if they knew how much discretion social media platforms have in manipulating their UGC.¹³⁷ Thus, overbroad UGC licenses raise social concerns from both copyright and contract law perspectives.¹³⁸

C. USERS’ AWARENESS, UNDERSTANDING, AND EXPECTATIONS AND TERMS’ SALIENCE SURVEY

1. *Methods*

Our initial survey pool consisted of 1,100 respondents (N=1,100) from Mechanical Turk.¹³⁹ The respondents were generally representative of the U.S. social media adult population.¹⁴⁰ Our survey opened with a screening question designed to filter only those social media users who reported uploading creative content to at least one of the survey’s participating platforms.¹⁴¹ Users who did not upload content did not complete the survey. We then asked respondents a series of demographic questions, including gender, age,

134. See generally Zuboff, *supra* note 19 (noting that the business model of most social media platforms is based on targeted advertising, which is fueled by and thrives on users’ data). Mark Zuckerberg famously said to Senator Orrin Hatch, “Senator, we run ads,” a statement that became a well-known meme. See Emily Stewart, *Lawmakers Seem Confused About What Facebook Does—and How to Fix It*, VOX (Apr. 10, 2018), <https://www.vox.com/policy-and-politics/2018/4/10/17222062/mark-zuckerberg-testimony-graham-facebook-regulations>.

135. A class action, brought against Facebook for its attempt to commercialize users’ stories, settled for 20 million dollars in 2013. See *supra* note 10. According to the filings in the case, Facebook allegedly charged advertisers 234 million dollars for “Sponsored Stories” between January 2011 and August 2012. Dan Levine, *U.S. judge approves Facebook privacy settlement over ads*, REUTERS (Aug. 26, 2013), <https://www.reuters.com/article/net-us-facebook-privacy-settlement/u-s-judge-approves-facebook-privacy-settlement-over-ads-idUSBRE97P0VG20130826>.

136. See *infra* Section III.C.2.c), III.C.2.d).

137. See *infra* Section III.C.2.e); see also Fiesler et al., *supra* note 97 (“Many users are granting these rights without realizing, and they might be unhappy if they knew.”).

138. See *infra* notes 240–245 and accompanying text.

139. Amazon Mechanical Turk is a popular crowdsourcing marketplace tool used, among other things, to source experimental data and conduct surveys and empirical research. See Amazon, *Amazon Mechanical Turk*, <https://www.mturk.com/>.

140. See *infra* Section III.C.2.a (Figure 6).

141. See *infra* Appendix B (Survey Section 2).

education, and income.¹⁴² Figure 6, below, shows a sample of the respondents' demographic information.

The final preliminary step required respondents to review a brief definition page that introduced, in layperson's terms, four legal concepts contained in the survey: (1) "Work or Content," (2) "Platform or Social Media Platform," (3) "Use," and (4) "Term."¹⁴³ We defined the term "Work or Content" to mean those copyright-protected materials created and uploaded by the user, including art, poetry, prose, photographs, sound and musical compositions, illustrations, video, or audiovisual works.¹⁴⁴ "Platform or Social Media Platform" denoted the ten platforms that we chose to survey: Facebook, Instagram, YouTube, Twitter, Snapchat, LinkedIn, Vimeo, Reddit, Pinterest, and Vine.¹⁴⁵ "Use" meant to publicly display, copy, reproduce, distribute, perform, or transmit the work.¹⁴⁶ Finally, "Terms" denoted the platforms' terms of use or the contract that required the users to click "I Accept" when they joined the platform.¹⁴⁷

The substantive portion of the survey was organized around four sets of questions: (1) *Social Media Usage* (asking how frequently respondents uploaded content to social media and what value they derived from doing so),¹⁴⁸ (2) *Awareness and Understanding* (asking respondents to identify, to the best of their knowledge, the legal terms included in the platforms' ToS and their meanings¹⁴⁹); (3) *Expectations* (asking what respondents thought the UGC licensing terms in the platforms' ToS should be),¹⁵⁰ and, finally, (4) *Salience* (asking respondents how likely they would be to change their social media uploading patterns once they understood the legal terms in the platforms' ToS).¹⁵¹

a) Social Media Usage

We asked respondents to indicate how frequently they upload content to social media, as well as what kind of value (if any) they derive from doing so. Concerning value obtained, we asked respondents (1) whether they receive direct income from uploading content; (2) whether they do it for other

142. See *infra* Appendix B (Survey Section 3).

143. See *infra* Appendix B (Survey Section 4).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See *infra* Appendix B (Survey Section 5).

149. See *infra* Appendix B (Survey Section 8).

150. See *infra* Appendix B (Survey Section 7).

151. See *infra* Appendix B (Survey Section 9).

promotional reasons (self or business); (3) whether they do it to increase awareness of their work (“getting the work out there”); or (4) whether their only gain is social interaction.¹⁵² As to frequency, we inquired whether users upload their UGC to social media platforms once (or more) a day, once a week, once a month, or once every couple of months.¹⁵³ Finally, we asked respondents to indicate to which of the platforms in our dataset they upload their content.¹⁵⁴ Figures 7 through 8 in Section III.C.2.b summarize these social media usage patterns.

We categorized our respondents’ answers to these questions to determine whether and to what extent our findings would vary across the different categories. Common sense would suggest, for example, that users who use social media platforms more frequently or who are financially and reputationally dependent on these platforms would also be more term conscious.¹⁵⁵ Previous studies have ignored this distinction or looked only at a single group of social media users (either amateurs or professionals), which prevented researchers from taking a comparative approach like ours.¹⁵⁶

b) Awareness and Understanding

This portion of the survey extended privacy scholars’ work on user awareness and understanding of UGC licensing policies.¹⁵⁷ To achieve this goal, we first classified respondents based on uploading habits—that is, we only asked users who reported that they upload content to a platform about the applicable terms of *that* platform. We presented respondents with a series of affirmative statements and asked whether those statements were correct according to the platform’s ToS. Respondents could mark each statement as correct or incorrect, or respondents could indicate they did not know the

152. See *infra* Appendix B (Survey Section 5, questions 1–2).

153. See *infra* Appendix B (Survey Section 5, question 3).

154. See *infra* Appendix B (Survey Section 6, question 1).

155. Compare with Dowthwaite et al., *supra* note 71, who observed that user-creators tend to rely on their community for flagging any copyright concerns with respect to their UGC. One user-creator, for example, was quoted saying that “watchdogs keep me informed. Artist communities are good at trading this kind of information and flagging up any incidents that other artists need to watch out for.” *Id.* Somewhat surprisingly, our findings did not support a conclusion of substantial distinction in users’ awareness between “professional user-creators” (who get paid for uploading content) and “amateur user-creators” (who upload content merely for social interaction purposes) in most cases. Our findings do support some distinction, however. See *infra* Section III.C.2.c).

156. Cf. Dowthwaite et al., *supra* note 71. (focusing only on “professional” user-creators not on regular users); Fiesler et al., *supra* note 97 (ignoring this distinction altogether).

157. We are aware of another study that similarly investigated ToS of general UGC websites (e.g., IMDA, Craigslist, Y-Gallery); this study, however, had a only few social media platforms in their dataset and a significantly smaller sample overall (410 users). See Fiesler et al., *supra* note 97.

answer.¹⁵⁸ Using Reddit as an example, Figure 2's right two columns present the awareness inquiry as it appeared to the respondents.

The statements presented to the respondents correspond to six of the seven key elements that we identified in Section III.B: perpetuity, third parties (transferability), modification, derivative works, immediate removal, and commercial usage.¹⁵⁹ We did not ask about "other" elements (moral rights, publication rights, and ideas) because, as of the survey date, the majority of our dataset's platforms did not address these elements.¹⁶⁰ Figure 2's left column, which was not part of the survey, classifies the survey's inquiry statements concerning our Section III.B elements.

158. *See infra* Appendix B (Survey Section 6, question 2).

159. *See supra* Section III.B.1.

160. *See supra* Section III.B.2 (Figure 1). We did address the issue of attribution, which is considered a moral right, under the expectation segment of our survey. *See supra* Section III.C.1.c).

Figure 2: Sample Platform Awareness Inquiry (for Reddit)

<i>Elements</i>	<i>For Reddit, mark one option for each statement— According to its terms:</i>	<i>Yes</i>	<i>No</i>	<i>I don't know</i>
<i>Third parties</i>	Reddit may grant others (third parties) license to use my work	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<i>Modification</i>	Reddit may modify my work	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<i>Derivative works</i>	Reddit may create new works based on my work	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<i>Immediate removal</i>	Reddit may remove content upon their sole discretion	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<i>Commercial</i>	Reddit may use my work for any commercial purpose	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Reddit may place advertisements on my work	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Reddit may use my work to promote the platform services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<i>Perpetuity</i>	Reddit may display my work indefinitely, even if I delete my account	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Reddit may display my work until I delete my account	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Other than establishing the lack of terms' readability, previous studies (mostly in the privacy sphere) also suggested that, even if users read boilerplate terms, many would find them too difficult to comprehend.¹⁶¹ Our analysis of UGC licensing terms similarly indicate that users require a postgraduate level of reading comprehension to understand those terms.¹⁶² To further examine whether and to what extent users struggle to understand legal terminology, we asked respondents two general questions about the meaning of specific contractual terms (these questions were identical for all survey respondents irrespective of the platforms they indicated using).

In one question, we asked respondents what platforms mean when they ask users in their ToS to “waive [their] so-called moral rights?”¹⁶³ This phrase, taken from Vimeo's ToS, served as a colorful illustration for an instance in which platforms incorporated complex legal terminology with no proper

161. See *supra* note 118.

162. See *Supra* notes 117–119 and accompanying text.

163. See *infra* Appendix B (Survey Section 8, question 1).

clarification.¹⁶⁴ Respondents were then presented with five alternative answers and asked to mark “all that apply.” Two answers were incorrect: “I will not be paid any royalties,” and “I waive all the copyrights in my work.” Two other answers were correct: “It can present my work without my name” (referring to the right of attribution), and “it can change the meaning of my work and distort it in a manner which is disrespectful” (referring to the right of integrity).¹⁶⁵ The final answer—“I don’t know what ‘moral rights’ are”—was neutral.

In a different question, we asked respondents what it meant to grant platforms “a license to prepare derivative work[s]?”¹⁶⁶ We asked about the term “derivative works” because this term is somewhat legally complex (although less so compared to the term “moral rights”) but was nevertheless present in the ToS of most platforms in our dataset.¹⁶⁷ For this question, respondents could again choose among five alternative answers, but we asked them to mark only one answer as correct: (1) “I grant a perpetual (permanent) license to all the rights I have in my work”; (2) “I allow the platform to copy and share my work”; (3) “I allow the platform to place advertisements on my work without my consent”; (4) “I allow the platform to create new versions of my work”; and (5) “None of the above.”

c) Expectations

The purpose of the expectations portion of our survey was to map the respondents’ general intuition and beliefs regarding the scope of an ideal UGC licensing policy. Accordingly, unlike the awareness segment, which only asked respondents about their content-uploading habits for specific platforms, here we asked respondents about their expectations more broadly and not in a way tailored to any specific platform. We asked the respondents five questions about their expectations. Figure 3’s right two columns show these questions

164. Cf. Elizabeth Townsend Gard & Bri Whetstone, *Copyright and Social Media: A Preliminary Case Study of Pinterest*, 31 MISS. C. L. REV. 249, 275 (2012) (suggesting that platforms have a moral responsibility to educate users about their rights). Although U.S. social media users do not enjoy moral rights protection in their UGC, see *supra* note 7, studies have hinted that user-creators deeply care about these rights (especially attribution). See Dowthwaite et al., *supra* note 71 (noting that artists get particularly upset about removal of attribution); cf. Creative Commons Licenses, CREATIVE COMMONS, <https://creativecommons.org/use-remix/cc-licenses/> (last visited Feb. 26, 2020) (fixing attribution as a fundamental right that exist in all types of Creative Commons copyright licenses). Our study also provides overwhelming support for the proposition that user-creators care about attribution. See *supra* Section III.C.2.e).

165. See *supra* note 112.

166. See *infra* Appendix B (Survey Section 8, question 2).

167. See *supra* Section III.B.2 (Figure 1).

and possible answers. Four of the five questions correspond to four of the seven key elements that we identified in Section III.B. One question, however, was about the breadth of platforms' permissible use of UGC and did not fit squarely with any of our stated elements. The element classification appearing on Figure 3's left column was not part of the survey.

Figure 3: Expectations Inquiry

<u>Elements</u>	<u>Questions</u>	<u>Possible Answers</u>
<i>Perpetuity</i>	In your opinion, display and distribution of your work should be available [mark one option]:	<ul style="list-style-type: none"> <input type="radio"/> Only for as long as I maintain an account on the platform. <input type="radio"/> Only for as long as I agree. <input type="radio"/> Only until I chose to remove my work. <input type="radio"/> Indefinitely.
<i>Immediate removal</i>	In your opinion, sharing platforms should be allowed to [mark the most appropriate option]:	<ul style="list-style-type: none"> <input type="radio"/> Remove content they determine, upon their sole discretion, that violates their terms. <input type="radio"/> Remove content for any reason. <input type="radio"/> Remove content only they are required to do so under law. <input type="radio"/> None of the above.
<i>Commercial</i>	In your opinion, social media platforms should be able to [mark all that apply]:	<ul style="list-style-type: none"> <input type="radio"/> Use, display, or distribute my work only for the purpose of the platform's function (social communication). <input type="radio"/> Use, display, or distribute my work for the purpose to promote the platform or the platform's service. <input type="radio"/> Use, display, or distribute my work for any purpose, including for commercial use. <input type="radio"/> Use, display, or distribute my work for the purpose of training artificial intelligence algorithms (machine learning). <input type="radio"/> None of the above.
<i>Third parties</i>	In your opinion, who should be allowed to display and distribute your work? [mark all relevant options]:	<ul style="list-style-type: none"> <input type="radio"/> The platform. <input type="radio"/> Its users. <input type="radio"/> Other parties, at the discretion of the platform. <input type="radio"/> No-one.
<i>* Breadth of permissible use</i>	In your opinion, a platform should be able to [mark one option]:	<ul style="list-style-type: none"> <input type="radio"/> Display and distribute my work only on the platform. <input type="radio"/> Display and distribute my work on any means of communication. <input type="radio"/> None of the above.

d) Saliency

In our survey's final segment, we attempted to evaluate UGC licensing policies' saliency to social media users. As explained, the legal concept of *term saliency*—the degree to which terms are sufficiently prominent to users to impact their decision to use and upload content to social media platforms—is emerging as the primary indicator for evaluating, among other things, the need for regulatory oversight of standard-form contracting markets.¹⁶⁸ Term saliency in the context of UGC policies is also important because previous studies did not consider the issue.¹⁶⁹

To evaluate the saliency of UGC licensing policies to social media users, we presented survey respondents with two tasks. First, we asked them to indicate on a Likert scale (ranging from extremely likely to extremely unlikely) how likely they are to use a platform that practices (or is allowed to practice based on its ToS) each of the seven key elements identified in Section III.B. Figure 4's right column presents the survey's questions (as they appeared to respondents). The left column shows our element classifications (which were not visible to respondents).

168. See *supra* text accompanying note 25 and *infra* note 211.

169. See *supra* note 105.

Figure 4: Terms' Salience Inquiry

<i>Elements</i>	<i>Consider the following scale <Extremely likely, likely, neither likely nor unlikely, unlikely, extremely unlikely> and indicate how likely you are to use such a platform:</i>
<i>Perpetuity</i>	<ul style="list-style-type: none"> • Its terms say you cannot change your mind and cancel the license (permission) you grant the platform to use/display your work.
<i>Third parties</i>	<ul style="list-style-type: none"> • Its terms authorize others (nonusers) to distribute and modify your work.
<i>Modification</i>	<ul style="list-style-type: none"> • Its terms, allows to modify your work (for any purpose, not just when technically required).
<i>Derivative Works</i>	<ul style="list-style-type: none"> • Its terms allow the creation of new works that are based on your work.
<i>Immediate Removal</i>	<ul style="list-style-type: none"> • Your content can be removed for any reason.
<i>Commercial</i>	<ul style="list-style-type: none"> • Its terms allow the use of your work for any purpose, including commercial use. • Its terms allow to display ads on your work. • Your work is only used for the purpose of operating its platform and nothing else.
<i>Other</i>	<ul style="list-style-type: none"> • Associate your name with your work. • Its terms allow your work to be presented without naming you as the creator. • Your work is used for training AI algorithms (machine learning).

For the second task, we presented respondents with seven statements corresponding to five of the seven key elements identified in Section III.B and asked them to rank the relative importance of those statements on a 1–7 scale (1 being most important and 7 being the least important). Figure 5's right column presents the survey's questions as they appeared to respondents. The left column shows our element classifications (which were not visible to respondents).

Figure 5: Term Ranking

<i>Elements</i>	<i>The following statements represent varies [sic] Intellectual Property rights. Please rank them according to their importance to you (1 being the most important and 7 the least important).</i>
<i>Perpetuity</i>	<ul style="list-style-type: none"> I am able to change or cancel the license (permission) I give platforms to use my work if I change my mind.
<i>Third parties</i>	<ul style="list-style-type: none"> The platform won't be able to authorize other parties (nonusers) to use (display and distribute) my work without my consent.
<i>Modification</i>	<ul style="list-style-type: none"> My work won't be significantly modified (unless technically required) without my consent.
<i>Commercial</i>	<ul style="list-style-type: none"> My work won't be associated with ads. My work won't be used for commercial purposes without my consent.
<i>Other</i>	<ul style="list-style-type: none"> The meaning of my work won't be altered in a manner that is disrespectful without my consent. My work must be displayed/associated with my name.

Answers to the first question indicated how the respondents thought term awareness would impact their social media uploading behavior.¹⁷⁰ Answers to the second question revealed the relative importance of UGC interests to users, information which helps indicate terms that might become salient to better-informed users.¹⁷¹ After presenting our general salience data, we examine whether a significant difference in findings exists between respondents of different usage values.¹⁷²

2. Findings

a) Demographics

Our survey consisted of 1,100 respondents (N=1,100): 51.55% male, 47.91% female, and 0.55% identified as other (rounded). Figure 6 shows the age distribution, with the majority of respondents aged 25 to 34 (43.64%). Figure 6 also shows respondents' income distribution with 30.91% of respondents reporting an income of 25,000 to 50,000 USD and 24.36% reporting an income of 50,000 to 75,000 USD.

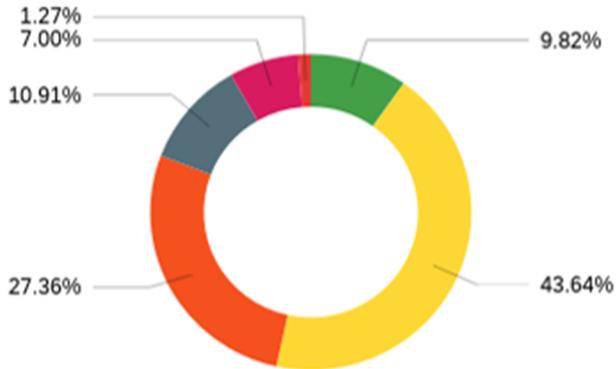
170. Of course, this is merely a partial indication. To fully apprise salience additional work is needed. *See infra* note 203 and accompanying text.

171. Under the notion of salience, the more important an interest or right to a set of user-creators, the more likely it is that a substantial number of them would actually change their social media "sharing" behavior upon receiving more information about how a term affects their interest or right, but *only if* this information is readily understandable. *See* Perzanowski & Hoofnagle, *supra* note 87, at 321–22.

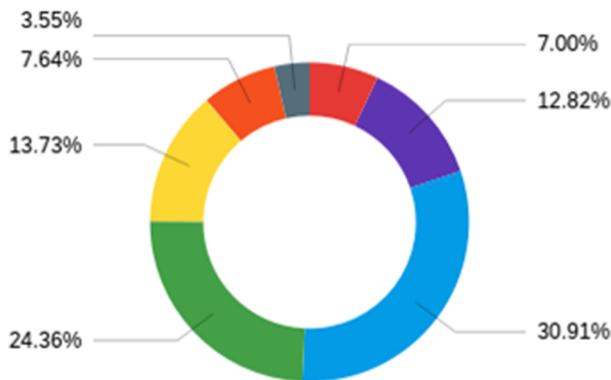
172. *See infra* Section III.C.2.e) (Figure 16).

Finally, Figure 6 shows the respondents' educational background distribution. As indicated, most respondents hold a bachelor's degree. We screened 67 (6.09%) of our respondents after reporting that they did not upload any content to the applicable platforms. That left us with 1,033 respondents.

Figure 6: Demographics Sample



Age Distribution



Income Distribution

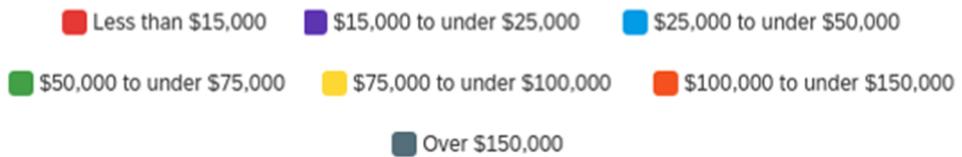
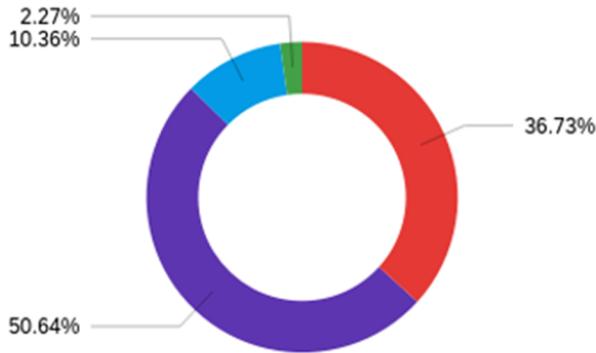


Figure 6: Demographics Sample (continued)



Educational background

■ High school graduate - high school diploma or the equivalent (for example: GED)

■ Bachelor's degree (for example: BA, AB, BS) ■ Master's degree

■ Professional degree or doctorate degree (for example: MD, DDS, DVM, LLB, JD, PhD, EdD)

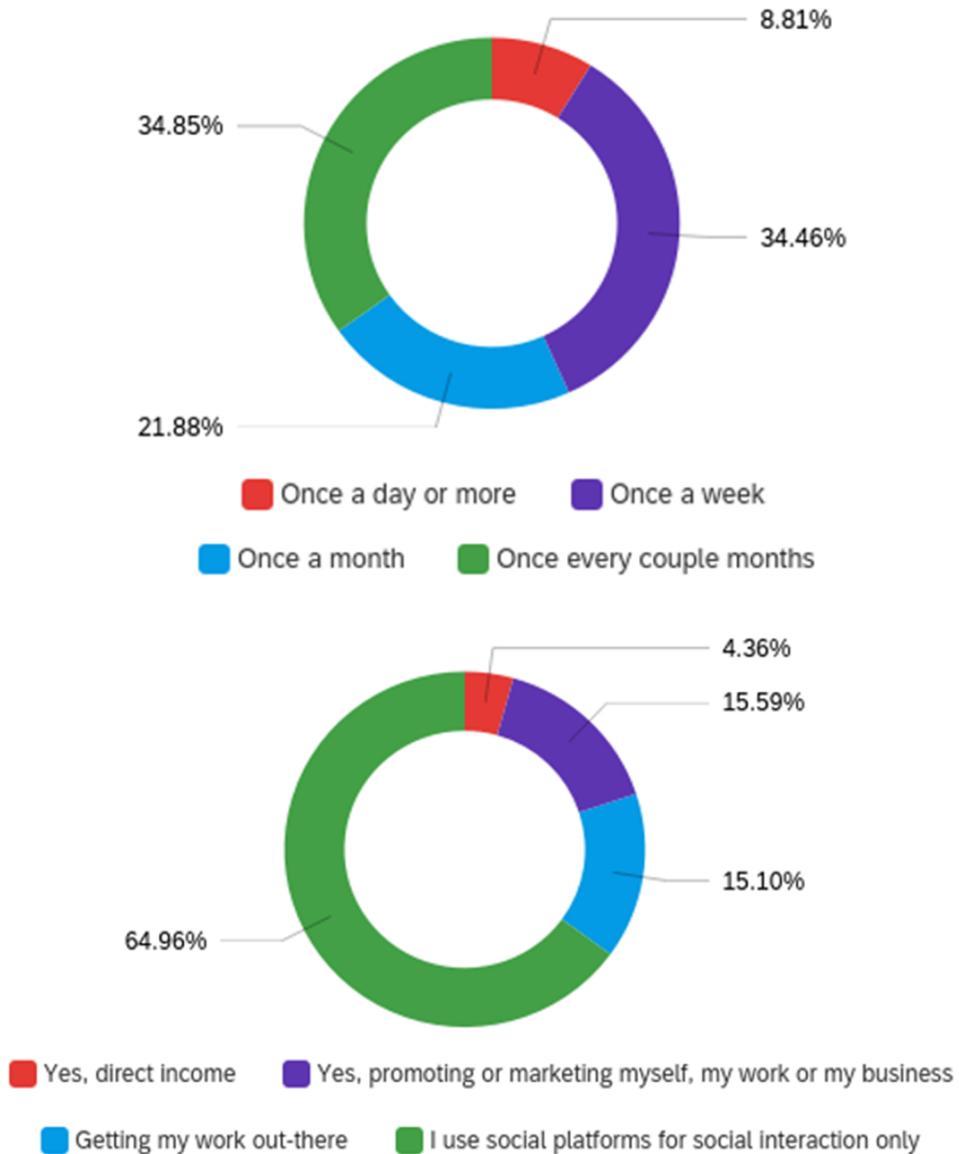
b) Social Media Usage

Survey respondents were asked about how frequently they upload content to social media platforms and about the value they obtain from doing so. From the screened respondents' pool (N=1,033), the majority (64.96%) reported using social media platforms for "social interaction only." 15.10% reported uploading content to platforms for "getting their work out there," 15.59% reported uploading content to promote themselves or their business, and merely 4.36% reported receiving direct income from uploading content (we refer to this small group as "professional user-creators" to distinguish them from "amateur user-creators").¹⁷³

Next, we asked how often users upload their content to social media platforms. Figure 7 shows our findings that 34.8% of respondents upload content once every couple of months, 34.4% upload content once a week, 21.88% once a month, and only 8.81% upload daily or more.

173. See *infra* note 194.

Figure 7: Social Media Usage (Frequency and Value)

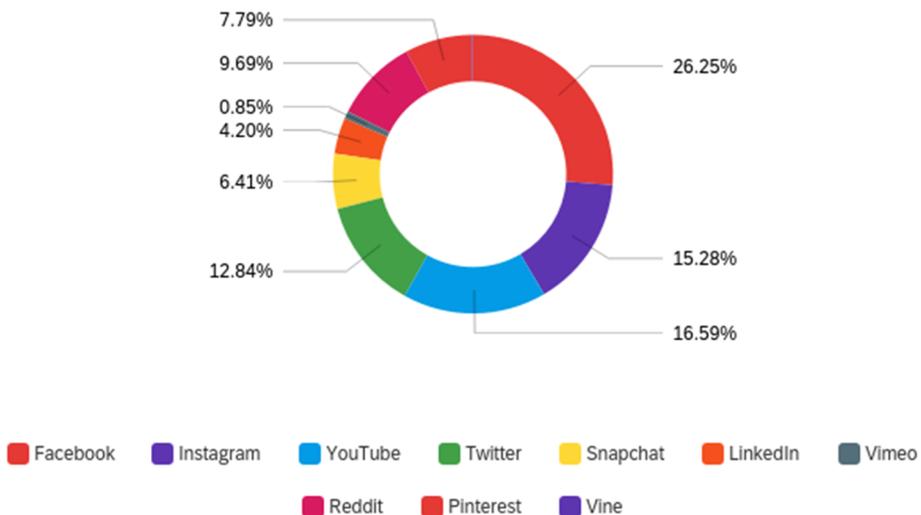


Finally, we asked respondents to which platforms in our dataset they upload their UGC (and respondents could pick multiple platforms, if applicable).¹⁷⁴ Of the content-uploading respondents seen in Figure 8 (N=1,033), 26.25% (rounded) reported uploading to Facebook, 16.59% reported uploading to YouTube, 15.28% reported uploading to Instagram,

174. See *infra* Appendix B (Survey Section 6, question 1).

12.84% reported uploading to Twitter, 9.69% reported uploading to Reddit, 7.79% reported uploading to Pinterest, 6.41% reported uploading to Snapchat, 4.20% reported uploading to LinkedIn, 15.28% reported uploading to Vine, and only 0.85% (26 respondents) reported uploading to Vimeo. This information helped tailor the questions regarding term awareness to the respondents' usage habits.

Figure 8: Social Media Usage (Platform Distribution) (N=1,033)



c) Awareness and Understanding

Respondents were asked to demonstrate term awareness only for the specific platforms to which they indicated uploading content. Figure 9, for example, shows how the survey posed statements about Reddit's terms to users. The table's middle column presents the statements as seen by the Reddit respondents. The left column presents statements' classification based on the key elements identified in Section III.B (this portion was not visible to users). And the right column presents the distribution of the respondents' answers (a complete distribution of term awareness findings per platform appears in Appendix C).

Figure 9: Platform Awareness Inquiry (for Reddit)

<i>Elements</i>	<i>For Reddit, mark one option for each statement—According to its terms:</i>	<i>Yes</i>	<i>No</i>	<i>I don't know</i>
<i>Third parties</i>	Reddit may grant others (third parties) license to use my work.	18.0%	46.8%	35.3%
<i>Modification</i>	Reddit may modify my work.	24.8%	46.8%	27.8%
<i>Derivative works</i>	Reddit may create new works based on my work.	24.1%	39.7%	36.3%
<i>Immediate removal</i>	Reddit may remove content upon their sole discretion.	81.7%	7.5%	10.9%
<i>Commercial</i>	Reddit may use my work for any commercial purpose.	27.8%	37.3%	34.9%
	Reddit may place advertisements on my work.	48.5%	25.8%	25.8%
	Reddit may use my work to promote the platform's services.	39.0%	25.8%	35.3%
<i>Perpetuity</i>	Reddit may display my work indefinitely, even if I delete my account.	46.8%	28.8%	24.4%
	Reddit may display my work until I delete my account.	53.9%	20.0%	26.1%

Our findings shown in Figure 9 suggest that most social media users are grossly unaware of the legal terms governing their UGC. For example, only 18% of respondents knew that Reddit could grant third parties a license to use their work, only 24.8% were aware that Reddit could modify their work or create new works based on their work, and only 27.8% knew that Reddit could commercialize their work for any purpose.¹⁷⁵

Figure 10 provides a wider overview by presenting the average term awareness of all respondents across our entire dataset. The picture portrayed by this figure is similar to the one presented by the Reddit sample in Figure 9. For example, only 20% of all respondents indicated they think social media

175. According to its ToS, Reddit can do all these things. However, Reddit has omitted the provision providing it an all-inclusive commercial-use license. Reddit, *User Agreement*, *supra* note 4.

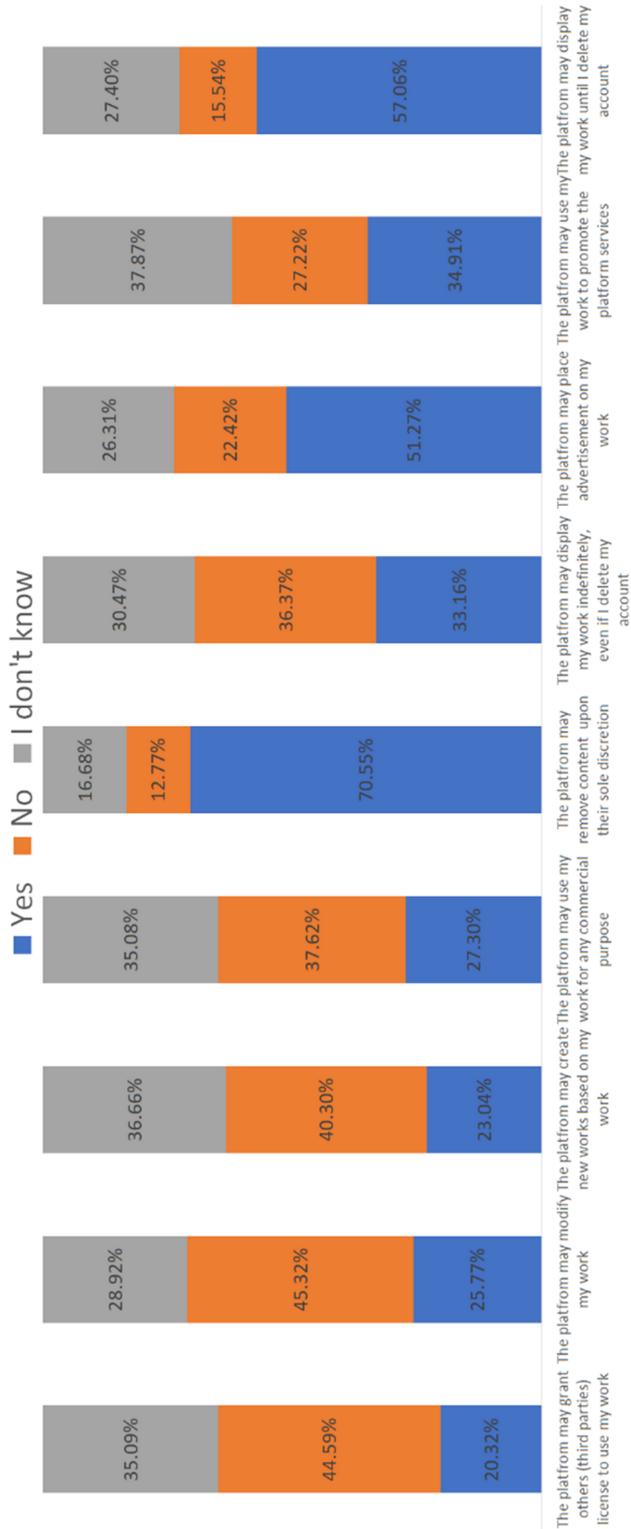
platforms can grant third parties a license to use their work, but the ToS of all platforms in our dataset at the time of the survey enabled platforms to do that.¹⁷⁶ Similarly, 26% and 23% of respondents believed that social media platforms could not modify their work or create derivative works, respectively, but the ToS of most surveyed platforms allowed them to do both.¹⁷⁷ Overall, our findings indicate that users are unlikely to read the ToS that govern their content. This aligns with the conventional wisdom that users rarely read ToS or digital contracts in general.¹⁷⁸

176. *See supra* Section III.B.2 (Figure 1).

177. Of all the surveyed platforms, four platforms (YouTube, Instagram, Reddit, and Vimeo) did not state they can modify their users' work, and four (Instagram, Twitter, LinkedIn, and Vine) did not state they can create derivative works. *See id.*

178. *See supra* notes 87–91 and accompanying text.

Figure 10: Summary of Term Awareness Across Platforms (on Average)



The hypothesis that most users do not read the ToS is supported by data indicating which terms most users either did or did not know existed. These terms unsurprisingly correlated with the platform behavior most users experience in their daily engagement with the platform's service. Of the respondents, for example, 57% knew that social media platforms could display their content at least as long as they retain an active account (something evident merely from seeing photos on Instagram).¹⁷⁹ Similarly, 71% of respondents knew that platforms could unilaterally remove their content (something that many users experience, such as when YouTube videos are taken down for an alleged copyright violation).¹⁸⁰

Moving from awareness to understanding, Figure 11 shows a significant percentage of the survey respondents struggled to comprehend the meaning of “moral rights,” and some respondents even found the term “derivative works” challenging. For moral rights, most respondents' answers (56%) were either wrong or indicated that the respondents “don't know what ‘moral rights’ are.”¹⁸¹ Similarly, many respondents (32%) opted for incorrect answers when asked about derivative works, despite the question being multiple choice and worded so that even uninformed respondents could gather its meaning via context.¹⁸² These findings confirmed our initial concern that social media users

179. As expected, fewer respondents (33%) knew that their content could be presentable even after they deleted their social media account. Still, this number is surprisingly high, which suggests that users are growing to realize that once content is “shared” on social media, it is very difficult to “unshare.” See *supra* note 12.

180. Under the DMCA notice and take down regime, content sharing platforms are required to remove copyright-infringing content upon the copyright owner's notice. 17 U.S.C. § 512 (c)(1)(A)(1998). At the same time, however, technical solutions deployed by platforms—such as YouTube's Content ID system, which allow certain copyright owners to identify potential violations of copyright-protected content uploaded to YouTube—support automatic removal of content. Such automatic removal mechanisms may raise policy concerns—for example, how to treat content that is fair use. This issue was discussed at length in *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008). In one of the later proceedings, the Ninth Circuit adopted a broad conception of fair use, explaining that “[f]air use is not just excused by the law, it is wholly authorized by the law.” *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2015). For a general discussion of the DMCA and the takedown regime, see 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, highlight the importance of substantive copyright in the context of online expression); see also Katrina Geddes, *Meet Your New overlords: How Digital Platforms Develop and Sustain Technofeudalism*, 43 COLUM. J. L. & ARTS 455, 462 (2020); Elazari Bar On, *supra* note 25, at 613.

181. See *infra* Appendix B (Survey Section 8, question 1).

182. See *infra* Appendix B (Survey Section 8, question 2).

face legalese that many of them cannot and should not reasonably be expected to understand.

To sum up, in line with related studies on privacy, our findings confirm that social media users are unlikely to read and are struggling to understand the UGC licensing terms of the platforms' service agreements. As such, these policies are *nonsalient*; because users do not have awareness of the terms, they cannot affect users' market decision-making.¹⁸³ We explore the implication of a lack of UGC term salience in Part IV.

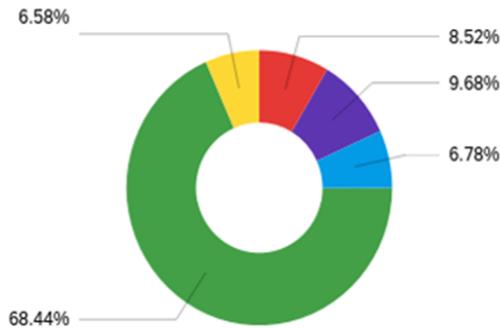
183. Note, however, that users might be aware of a term, but it still would not affect their market decision-making (it would be nonsalient) due to other reasons—for instance, if no alternative terms are being offered in the market (“monopolistic” terms’ market). For further discussion *see supra* note 25.

Figure 11: Term Understanding (“Moral Rights” and “Derivative works”)



When a platform mentions in its terms that “you waive your so-called moral rights” it means:

- I am not paid any royalties
- It can present my work without name
- I waive all the copyrights in my work
- It can change the meaning of my work and distort it in a manner which is disrespectful
- I don't know what "moral rights" are



When a platform mentions in its terms that “you grant the platform a license to prepare derivative work” it means that:

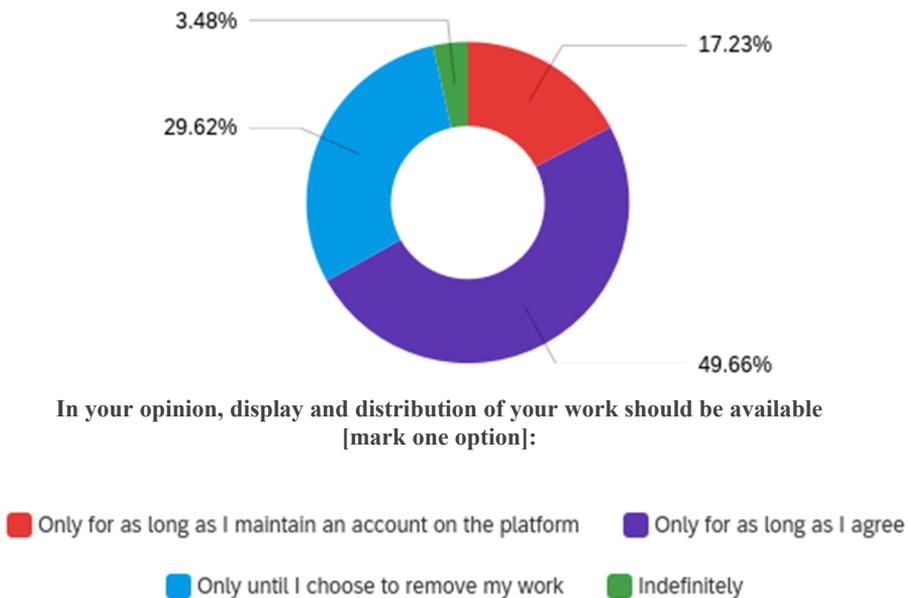
- I grant a perpetual (permanent) license to all the rights I have in my work.
- I allow the platform to copy and share my work.
- I allow the platform to place advertisement on my work without my consent.
- I allow the platform to create new versions of my work.
- None of the above

d) Expectations

Irrespective of the platforms' ToS or users' rights under current copyright law, our survey's expectations segment allowed respondents to indicate their preferences about the ideal scope of a UGC license. These questions revealed what social media users view as the most important elements from *their* perspective. Interestingly, our findings indicate little correlation between respondents' expectations and legal reality.

For example, Figure 12 shows that 50% of recipients indicated that, in their opinion, their work should be available only for as long as they "agree" and merely 3% specified that their work should be available indefinitely. The terms of nearly all the platforms in our dataset, however, specifically provide perpetual UGC licenses that would technically allow platforms to display and distribute users' content indefinitely.¹⁸⁴

Figure 12: Users' Perceptions (Perpetuity)

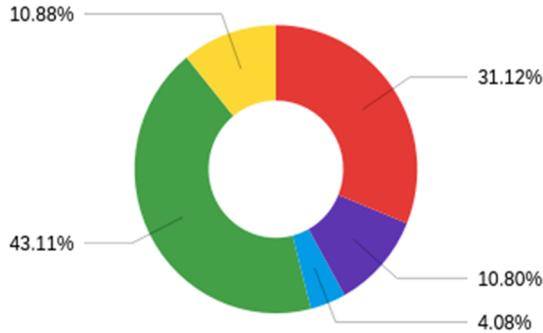


As similarly indicated in Figure 13, among the survey recipients who accepted that social media platforms should be allowed to display and distribute user content at all, the greatest pool of respondents (31%) sought to limit usage to only the platform's functional purpose (social communication).

184. Of all the surveyed platforms, two platforms (Instagram and LinkedIn) did not state they can license their users' work perpetually. *See supra* Section III.B.2 (Figure 1).

Conversely, only 4% of respondents wished to grant platforms the discretion to display and distribute their content for commercial purposes, something that nearly all the platforms in our dataset specifically require.¹⁸⁵

Figure 13: Users' Perceptions (Commercial)



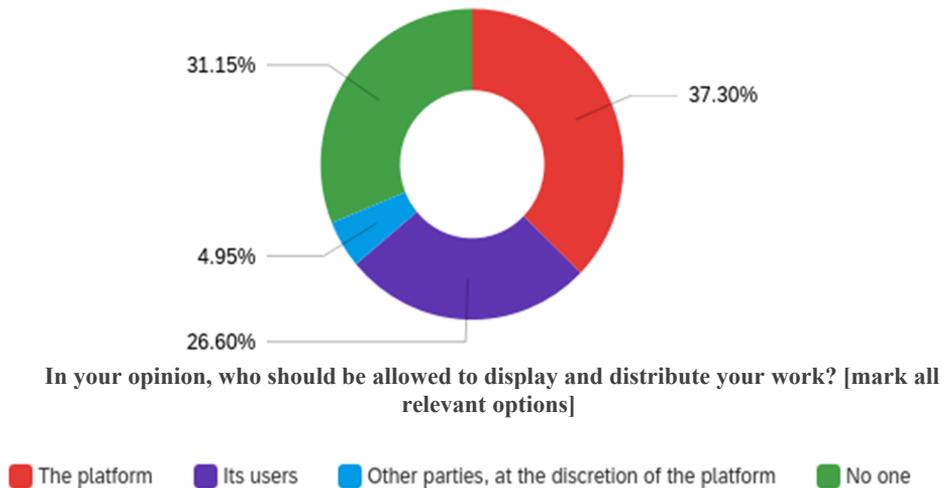
- Use, display or distribute my work only for the purpose of the platform's function (social communication)
- Use, display or distribute my work for the purpose to promote the platform's or the platform service
- Use, display or distribute my work for any purpose, including commercial use
- None of the above
- Use, display or distribute my work for the purpose of training artificial intelligence algorithms (machine learning)

Finally, as seen in Figure 14, only 5% of the survey's recipients indicated that third parties (chosen by the platforms) should be allowed to display or distribute their work, something that *all* the platforms in our dataset require.¹⁸⁶

185. *See supra* Section III.B.2 (Figure 1).

186. *See supra* Section III.B.2 (Figure 1).

Figure 14: Users' Perceptions (Third Parties)



Overall, our findings in this Section paint a striking difference between respondents' expectations and reality. Platforms could not fully adhere to respondents' expectations without completely altering their business models.¹⁸⁷ Still, platforms could very easily make some minor adjustments to UGC licensing policies to better meet respondents' expectations without undermining their services. For example, platforms could disclaim the right to affirmatively display or distribute users' content once users terminate their account.¹⁸⁸ Platforms could also tailor the permissible commercial-use activity to only include promoting their service (as opposed to any imaginable

187. Most social media platforms are advertising companies; they must be able to show ads on their service to maintain this business model. *See supra* note 134.

188. LinkedIn, for example, did just that. Under its current terms, LinkedIn promises that the UGC will not appear on the platform after users have terminated their account unless: (1) for a short period that is technically necessary, or (2) other users have saved and reshared the content. *See infra* Appendix A. Most other platforms, however, do not specifically make such a disclaimer. Instagram ToS, for example, provide that even after users terminate their account, their "[m]aterials and data may persist and appear within the Service." Instagram mentions the scenario in which "[c]ontent has been reshared by others," as an example for why UGC might persist on their service perpetually, but they do not specifically disclaim other scenarios. *See infra* Appendix A.

commercial use).¹⁸⁹ As discussed in Part IV, some of these minor adjustments are already underway.¹⁹⁰

e) Salience

As explained, salience is the degree to which term awareness manifests in real market behaviors.¹⁹¹ In our context, UGC policies would be salient to users if, when presented the terms and understanding the terms' meanings, users would tailor their social media uploading behavior accordingly. To shed light on the question of salience, we charged respondents with two tasks. First, we asked respondents (most of whom were unaware of the platforms' terms¹⁹²) whether and to what extent they would be willing to upload their content to platforms that include various content licensing conditions under their ToS.

Our findings (summarized in Figure 15) indicate that most social media users claim they would significantly change their upload behavior if they knew more about platforms' UGC licensing policies.¹⁹³ For example, the vast majority of respondents (79%) indicated they are unlikely (35%) or extremely unlikely (44%) to use a platform with terms that authorize third parties to distribute or modify their work—something that all the platforms in our dataset currently require. Similarly, most survey respondents (79%) indicated they are unlikely (36%) or extremely unlikely (43%) to use a platform that is allowed to modify their work—something that most platforms in our dataset currently require. Similar inclinations also appeared with respect to platforms' ability to present content without attribution (43% said they are unlikely or extremely unlikely to use), to use and display content after users revoke their authorization (74% said they are unlikely or extremely unlikely to use), and to create derivative works (67% said they are unlikely or extremely unlikely to use).

189. Most platforms do include some limitation on their right to commercialize UGC. Reddit, at the time of the study, had the broadest licenses to commercialize UGC, but it too has since eliminated this broad language. *See* Reddit, *supra* note 4; *infra* note 283.

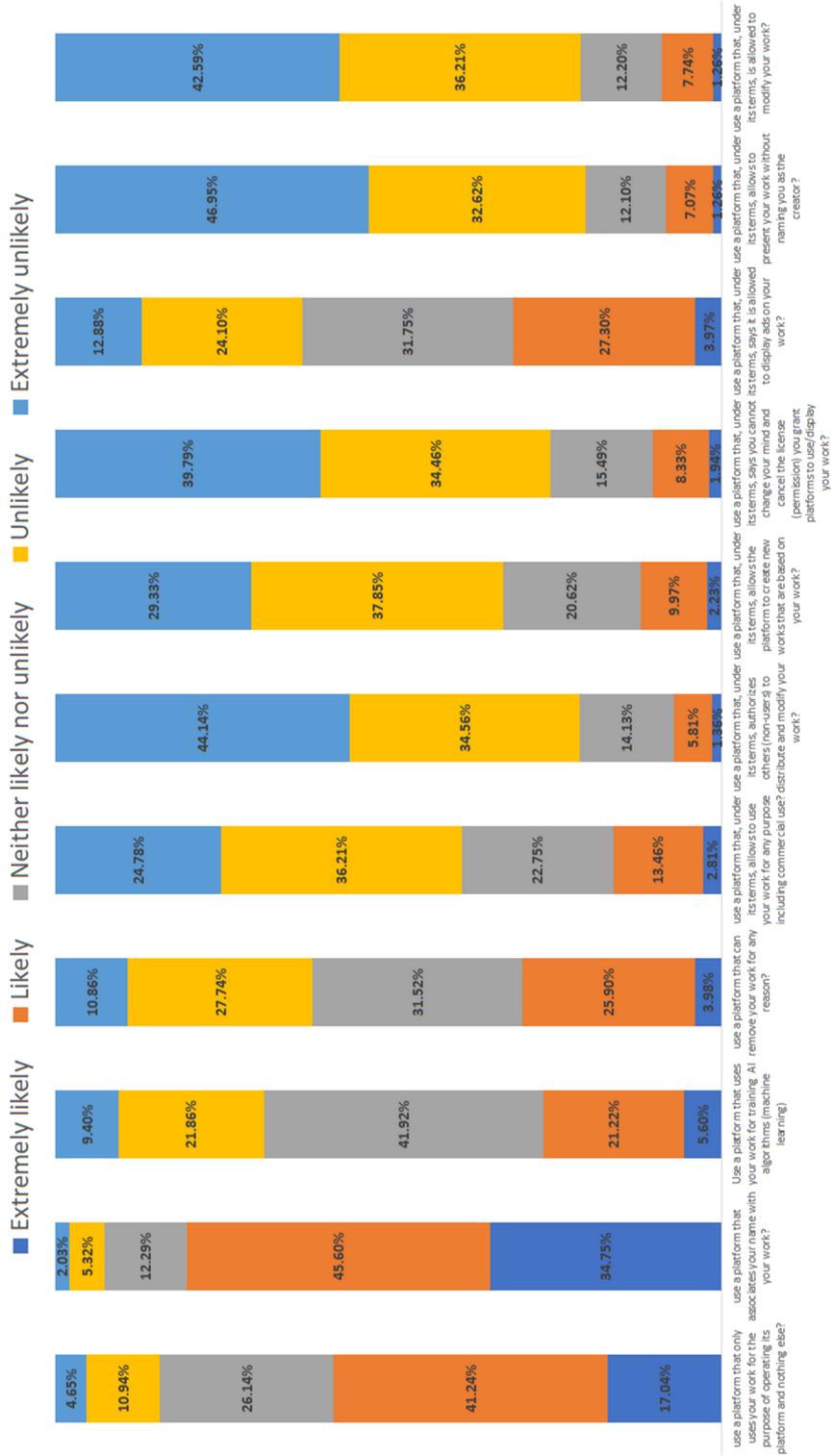
190. *Id.*; *see also* notes 234–238 and accompanying text.

191. *See supra* note 25.

192. *See supra* Section III.C.2.c).

193. These findings should be taken with a grain of salt, however. To fully apprise salience, future work is needed. *See infra* note 203 and accompanying text.

Figure 15: Terms' Saliency Inquiry



While these overwhelming trends do not change significantly after filtering our findings and classifying them based on users' usage habits, minor changes appear at the margins. For example, "professional user-creators" (those who receive direct financial value from uploading content) were far less zealous than "amateur user-creators" (those who upload content solely for social interaction purposes) with respect to at least some of the investigated elements.¹⁹⁴ Figure 16, for example, indicates that more professional users were "likely" and "extremely likely" to use platforms that commercialize their content (36%) or that do not enforce attribution (18%) compared to amateur users (15% and 7%, respectively). These findings do not necessarily mean professional user-creators care less about commercialization or attribution than amateur user-creators; they merely suggest that the former are willing to trade such rights for financial compensation.

194. *See infra* Section III.C.2.c).

Figure 16: Term Salienc Inquiry (Professional vs. Amateurs)

How likely you are to use a platform that under its terms allow [sic] to use your work for any purpose, including commercial? purpose?

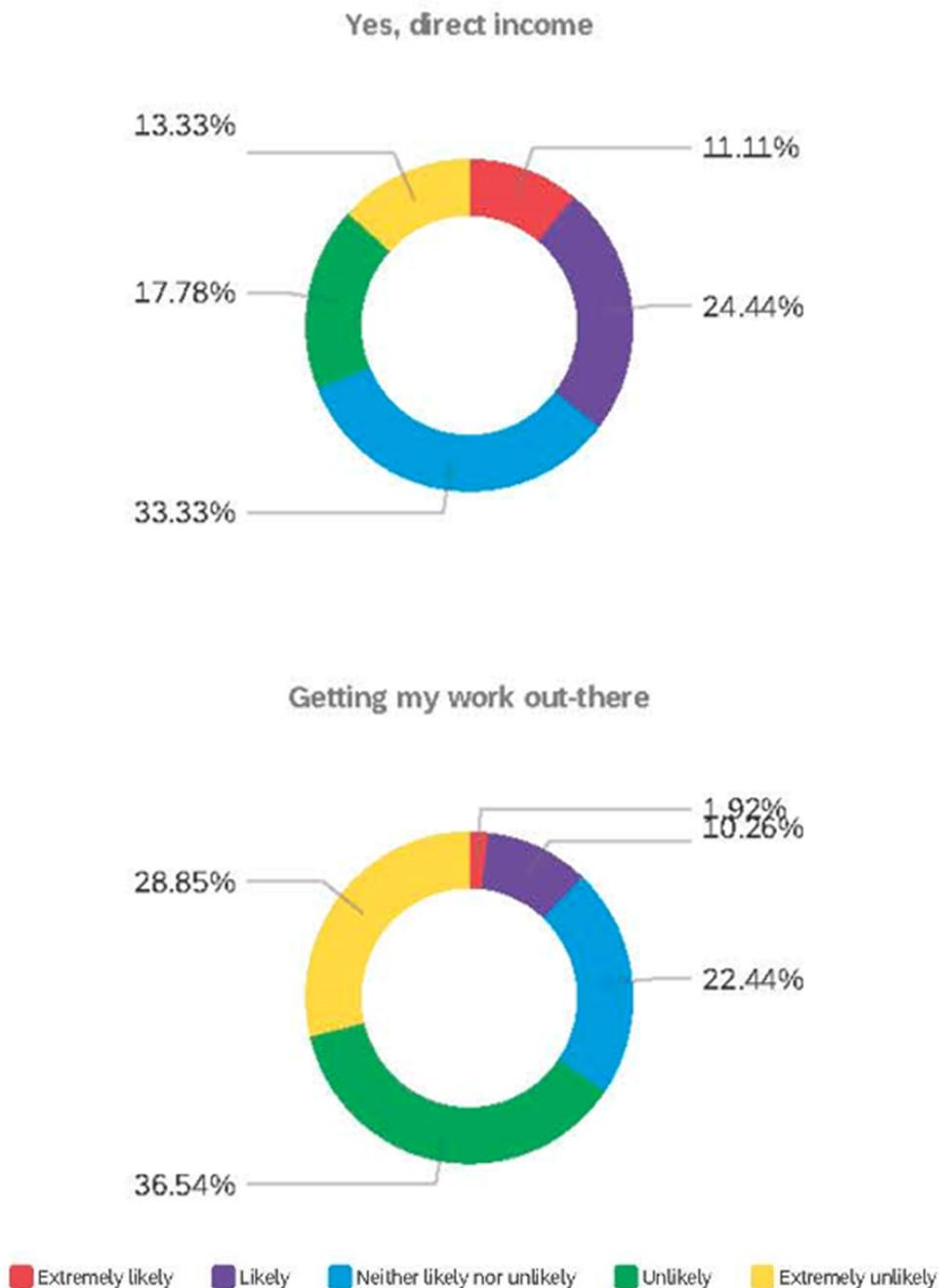
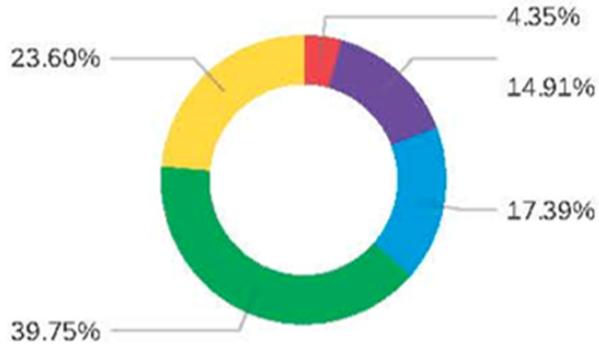


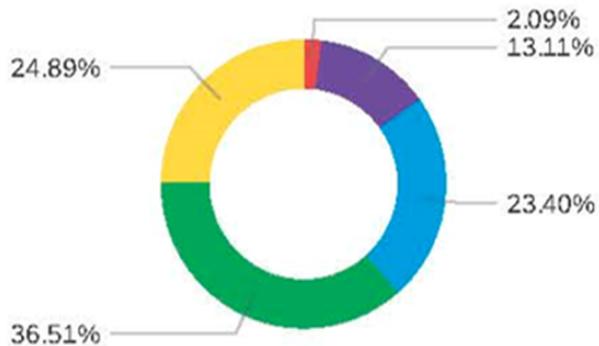
Figure 16: Term Salience Inquiry (Professional vs. Amateurs) (continued)

How likely you are to use a platform that under its terms allow [sic] to use your work for any purpose, including commercial? purpose?

Yes, promoting or marketing myself, my work or my business



I use social platforms for social interaction only



■ Extremely likely
 ■ Likely
 ■ Neither likely nor unlikely
 ■ Unlikely
 ■ Extremely unlikely

Figure 16: Term Salience Inquiry (Professional vs. Amateurs) (continued)

How likely you are to use a platform that under its terms allow [sic] to present your work without naming you as the creator?

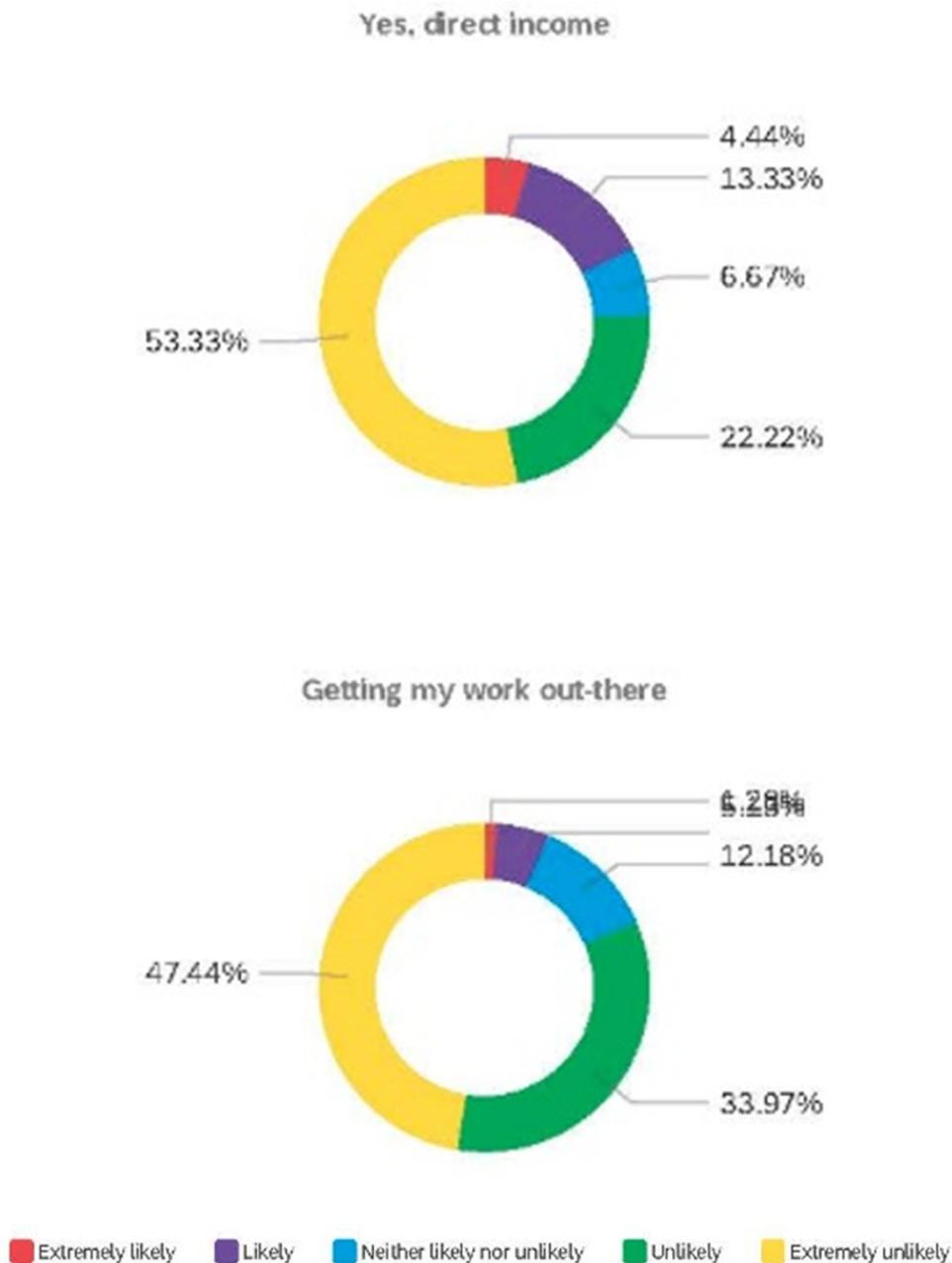
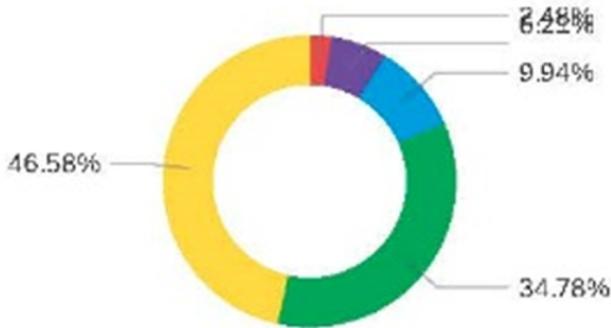


Figure 16: Term Salience Inquiry (Professional vs. Amateurs) (continued)

How likely you are to use a platform that under its terms allow [sic] to present your work without naming you as the creator?

Yes, promoting or marketing myself, my work or my business



I use social platforms for social interaction only



Extremely likely Likely Neither likely nor unlikely Unlikely Extremely unlikely

In the second task designed to shed light on UGC policies' salience to users, respondents ranked seven statements according to importance on a 1–7 scale (1 being most important to them and 7 being least important). This task provides a useful indication of the subjective value users attach to various legal elements relating to their uploaded content. The more value respondents

attach to a specific element, the more likely this element will become salient and drive user uploading behavior.¹⁹⁵

Figure 17 presents each statement's average rank, organized by their relative importance to respondents and classified by element (a full ranking distribution appears in Appendix D).

Figure 17: Term Ranking

<i>Element</i>	<i>Statement</i>	<i>Average Ranking</i>
<i>Other (attribution)</i>	My work must be displayed/associated with my name.	2.82
<i>Perpetuity</i>	I am able to change or cancel the license (permission) I give platforms to use my work if I change my mind.	3.53
<i>Commercial</i>	My work won't be used for commercial purposes without my consent.	3.85
<i>Third parties</i>	The platform won't be able to authorize other parties (nonusers) to use (display and distribute) my work without my consent.	3.87
<i>Other (integrity)</i>	The meaning of my work won't be altered in a manner that is disrespectful without my consent.	4.04
<i>Modification</i>	My work won't be significantly modified (unless technically required) without my consent.	4.07
<i>Commercial</i>	My work won't be associated with ads.	5.81

As seen in Figure 17, most respondents ranked attribution as the single most important feature. Notably, none of the platforms in our dataset respect users' right of attribution, possibly because U.S. copyright law does not provide social media users with such a right to begin with.¹⁹⁶ Nevertheless, attribution's heightened importance to user-creators (a fact that is also supported by other sources¹⁹⁷) suggests that policymakers or the platforms themselves should consider helping users enforce this right. We consider this option further in Part IV.

As offered in the preceding Section, platforms could also address perpetuity and commercialization by introducing reasonable limits to their UGC licensing policies.¹⁹⁸ The same can also be said of an unrestricted sublicensing requirement, something most platforms in our dataset require.¹⁹⁹

195. *See supra* note 171.

196. *See text accompanying supra* note 7.

197. *See supra* note 164.

198. *See supra* note 188.

199. *See supra* Section III.B.2. (Figure 1).

Lastly, Figure 17 shows that most respondents consider platforms' ability to associate their content with ads as the least important term. This finding is good for platforms that rely on advertising to generate revenue. Overall, this exercise indicates that, although users acknowledge platforms must maintain their business, they would prefer platforms to better safeguard their UGC interests.

3. *Methodological Limitations*

We acknowledge the limitations of a self-reported survey methodology. The first key issues with a survey instrument are potential non-response biases and the sample not representing the target population.²⁰⁰ To mitigate those concerns and to validate the study's generalization ability, our survey was conducted among a relatively large sample size (~1000) of Mechanical Turk ("MTurk") users. Our design included a single-screening criterion, which only screened out 67 (6.09%) respondents after reporting they did not upload any content to the applicable platforms. No other respondents or populations were excluded. Given the studied topic's nature, we concluded that a web-based survey is most suitable to capture and represent the target population—a U.S. social media adult population.²⁰¹ Executing our survey via MTurk further assured quality control because studies have found that MTurk produces data "at least as reliable as those obtained via traditional methods," establishing a sample likely to be more diverse than those established by other methods.²⁰²

The second pitfall concerns the reliability of self-reported data and possible response biases. Here, we specifically refer to the "value-action gap"—the gap between people's attitudes or perceptions versus actual behavior.²⁰³ This limitation increases when assessing terms' salience.

200. Particularly, a web-based survey might lead to specific biases resulting from underrepresentation of certain groups online. Some studies find lower presence of certain racial or ethnic groups on online platforms, such as African Americans and Hispanic Americans, as well as age discrepancies because older population tends to use technology less. See, e.g., Gabriele Paolacci, Jesse Chandler & Panagiotis G. Ipeirotis, *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411 (2010). Moreover, there is no current data on what constitutes the global population of UGC-uploading social media users.

201. *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

202. See Michael D. Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 3–5 (2011).

203. For an overview, see Icek Ajzen, Thomas C. Brown, & Franklin Carvajal, *Explaining the Discrepancy Between Intentions and Actions: The case of Hypothetical Bias in Contingent Valuation*, 30(9) PERS. SOC. PSYCHOL. BULL. 1108–21 (2004); see also Icek Ajzen, *Nature and Operation of Attitudes*, 52 ANNU. REV. PSYCHOL. 27–58 (2001). The ultimate way to overcome this difficulty

Acknowledging the advantages of observational studies, the dearth of research in this field, and the cost of collecting behavioral data online, we concluded that a survey is appropriate for collecting data for this study's narrow purposes. Conducting an anonymous survey via a third party (MTurk) allowed us to avoid additional response biases because respondents were given minimal information about the study's aims. We took conventional means to mitigate response biases, such as crafting questions using simple and natural²⁰⁴ language where applicable, randomizing the order of answers, using various answer types, and reversing scales where possible.

IV. POLICY IMPLICATIONS

Commenters disagree about whether and how much courts and legislators should interfere in the free market of contractual obligations and whether to

is by measuring ones' behavior rather than attitude. Thus, as a follow up study, we aim to conduct an experiment geared towards assessing users' behavioral change upon exposure to terms. At the first stage of the experiment, we would solicit participants to upload their original creative content (photographs, videos, poetry, short stories, or articles, and the like) to a designated website as a contest for a prize. Upon uploading their content to the designated competition website, users would have the option to also upload their content to one of several social platforms. Then, users who expressed their desire to share their content on social platforms would see another screen providing them with simplified disclosures of key conditions in the ToS of the specific to platform they chose. This simplified disclosure would be based on the real terms of each platform, relevant at the time of the experiment. For example, these terms might include a commercial-use license to user content, the ability to sub-license the platforms' authority to third parties, etc. Using this interface, we would examine if users *actually* change their behavior after they had been informed of a specific contractual term relating to their copyright in their content at the time they decide to "share" that content. The experiment ends once the user chooses whether or not to upload the content (in any event, content is not shared). We designed the experiment so that content is allegedly uploaded to actual, popular social media platforms. This allows us to avoid the difficulties involved with establishing a new social media network while analyzing real market terms (the actual terms incorporated by the platforms.) This two-phase upload interface is meant to avoid a situation where users are reluctant to share their content for reasons unrelated to the platforms' ToS.

204. Nonetheless, in some instances it would be reasonable to assume that our findings somewhat inflate the level of understanding and knowledge among the sample, compared with actual knowledge among the target population. This is mostly due to the fact that our survey is composed of multiple-choice and scale questions rather than open-ended questions. We believe greater lack of knowledge would have been revealed through open-ended questions. For example, when questioning about the meaning of "derivative work," approximately 70% of respondents knew the correct answer among the five options offered to them. *See supra* Section III.C.2.c). As stated, we believe that had it been an open-ended question, much less than 70% would have provided the correct definition.

outlaw boilerplate terms in form contracts.²⁰⁵ Traditional economic analyses have long established that, in a perfectly functioning market and with complete information, even adhesive contracts between buyers and sellers will always only contain terms that enhance consumers' welfare.²⁰⁶ Professor Russell Korobkin emphasized, however, that buyers are *boundedly rational* rather than fully rational decision-makers (meaning they consider some product attributes and ignore others when making contracting decisions).²⁰⁷ It follows that the laissez-faire approach to boilerplate terms should be bounded as well.²⁰⁸ Specifically, policymakers should trust markets to generate socially desirable terms when buyers consider such terms in their contracting decisions ("salient" terms), but policymakers should be more suspicious of terms that buyers do not consider in their contracting decisions ("nonsalient" terms).²⁰⁹ Regarding the latter, markets will not compel sellers to generate terms that enhance

205. See generally RADIN, *supra* note 78; Slawson, *supra* note 76; Korobkin, *supra* note 25. As a practical matter courts usually view boilerplate terms in digital form contracts as enforceable, at least insofar users have a quality opportunity to read through the agreement. 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."); *Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012) ("In the context of agreements made over the internet, such "click-wrap" contracts are enforced under New York law as long as the consumer is given a sufficient opportunity to read the end-user license agreement, and assents thereto after being provided with an unambiguous method of accepting or declining the offer."); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32–35 (2d Cir. 2002) ("[W]here consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms [R]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.") (footnote omitted). Nevertheless, courts can find specific terms unenforceable, especially if they are uniquely unexpected or "surprising." See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007) (explaining that burying an arbitration provision in a lengthy paragraph under the heading "GENERAL PROVISIONS" caused surprise to the user and that the term thus satisfied the procedural element of unconscionability).

206. See, e.g., R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L. J. 635, 638 (1996); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 284 (1995).

207. See Korobkin, *supra* note 25, at 1204–06.

208. The bounded rationality of buyers is a result of information overload and limitations of attention and cognition. *Id.*

209. Regulation of consumer-salient terms "may be less necessary and may lead to undesirable results, including a reduction in consumer choice." *Id.*

consumers' welfare, and additional regulatory or judiciary oversight might be needed to achieve this goal.²¹⁰

Our findings indicate that users possibly do not read, hardly understand, and have unrealistic expectations regarding UGC licensing policies in platforms' ToS. These findings signal that these policies are nonsalient to users, which may justify some regulatory oversight.²¹¹ We discuss this approach in Section IV.B. On the other hand, our data suggest that social media users care about UGC licensing policies and claim they would change their behavior if

210. In discussing the standards for consumer consent, the Restatement explains that the “concept of salience underlies the metrics regularly used to determine whether a contract term is unconscionable.” THE RESTATEMENT OF THE L. CONSUMER CONT., TENTATIVE DRAFT, at 94–95 (AM. LAW INST. 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf. Thus, consumers' consent is vitiated when they face a “lack of meaningful choice” (if a term was nonsalient because it did not “affect consumers' contracting decisions”). *Id.* Consent may also be vitiated where a term constitutes an “unfair surprise,” is “hidden” or “unduly complex,” or results from “uneven bargaining power.” *Id.* These tests “are either synonymous with, or direct results of, nonsalience.” *Id.*; see also Elazari Bar On, *supra* note 25 (discussing the role of salience in the unconscionability doctrines).

211. As explained in *supra* note 25, nonsalient terms are not automatically inefficient, but they can be. A substantive inquiry should also take place to determine whether nonsalient terms are insufficient. Such an inquiry could suggest that nonsalient UGC terms are procedurally unconscionable because the market does not police those terms since they do not affect users' decision-making. Arguably then, due to the non-substitutable value of social media platforms to consumers and parity between UGC terms across platforms, there is no competitive market for UGC terms. Rather, each platform operates as a monopolistic contractor. Nonsalient UGC terms, therefore, may undermine intellectual property policy (to incentivize market competition) and thus are *substantially unconscionable* as well. See Elazari Bar On, *supra* note 25. The unconscionability doctrine includes two components. 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, establishing whether the term actually affects consumers' contracting decisions, and asking whether the market disciplines the term' quality since drafters are incentivized to provide better terms at the risk of losing consumers to the competition. Therefore, it would be harmful and redundant for courts to intervene via the unconscionability doctrine. This second component, substantive unconscionability, pertains to the question of whether the enforcement of the term would be “shocking to the conscience,” and addresses the one-sidedness of a term that unreasonably undermines “the consumer's benefit from the bargain.” *Id.* at 624–26.

On the relation between the nonsalient nature of terms and justification for judicial intervention, see THE RESTATEMENT OF THE L. CONSUMER CONT., TENTATIVE DRAFT, at 94–95 (AM. LAW INST. 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf; see also Korobkin, *supra* note 25.

they had better information.²¹² Providing users with better information is relatively straightforward in the UGC licensing arena (unlike in the opaquer privacy arena). Thus, remedial approaches that are less radical than substantive regulation, such as improved disclosures or education campaigns, may sufficiently enhance UGC saliency and allow markets to self-regulate. We discuss this approach in the following section.

A. MARKETS AND SELF-REGULATION

Our data indicate that a substantial portion of social media users care about copyright policies and claim they would change their behavior with better knowledge of UGC policies.²¹³ This suggests that mild market interventions—such as disclosures, education, and changing social norms—might suffice to increase term salience to users and pressure social media platforms to improve their UGC licensing practices. In fact, as was long suggested in law and economics literature, even a small minority of term-conscious social media users could suffice to discipline platforms against using unfavorable boilerplate terms.²¹⁴

Several studies on privacy have documented how changing norms and education increase privacy salience.²¹⁵ One study has shown, for example, that

212. It is also possible that, similar to the “Privacy Paradox,” discussed in *supra* note 34–36 and accompanying text, users may act differently than what they report (the “UGC Paradox”). We recognize this limitation in our work and propose that similar experiments to this conducted in the area of privacy can be conducted in this realm as future work. *See supra* note 203 and accompanying text.

213. *See* Section III.C.2.c.

214. The “informed minority” body of literature explores this argument further. Under this view, a consumer minority who read the terms and conditions is sufficient to create a market force that requires suppliers to adjust themselves to the informed minority’s preferences. In this way, the market will create fair contracts without juridical interference. *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, 645 (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* ELENA D’AGOSTINO, CONTRACTS OF ADHESION BETWEEN LAW AND ECONOMICS RETHINKING THE UNCONSCIONABILITY DOCTRINE 62 (2015); Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 502 (1981). *But see* Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (suggesting, on the basis of empirical analysis, that an informed minority cannot affect the willingness of suppliers to change the contract terms in real market conditions).

215. *See generally* Leslie K. John, Alessandro Acquisti & George Loewenstein, *Strangers on a Plane: Context-Dependent Willingness to Divulge Sensitive Information*, 37 J. CONST. RES. 858, 858–59 (2011) (summarizing the factors that contribute to the “privacy paradox,” focusing on social norms); Korobkin, *supra* note 25, at 1266–68 (pointing to the correlation between better education and increased salience).

users with doctoral degrees possessed the greatest level of privacy concern, successively followed by those with vocational degrees, professional degrees, college education, and high school education.²¹⁶ Other studies confirmed that users with the highest levels of education revealed the fewest optional data elements and that users with a cybersecurity educational background are even more reluctant to reveal their information.²¹⁷ Similarly, studies have shown that changes in social norms over time, across cultures, or among age-groups impact privacy preferences.²¹⁸ Unsurprisingly, following the heightened journalistic coverage and public scrutiny of privacy and cybersecurity issues after the foreign influence and Cambridge Analytics scandals, most platforms decided to reconfigure their privacy policies.²¹⁹

In the same way, academics and public advocates could motivate platforms to improve their UGC licensing policies by securitizing these issues. As Professor Margret Jane Radin recently offered, “NGOs can organize publicity

216. See Dara O’Neil, *Analysis of Internet users’ level of online privacy concerns*, 19(1) SOC. SCIENCE COMPUT. REV. 17–31 (2001).

217. See, e.g., Meredydd Williams & Jason R.C. Nurse, *Optional data disclosure and the online privacy paradox: A UK perspective*, in INTERNATIONAL CONFERENCE ON HUMAN ASPECTS OF INFORMATION SECURITY, PRIVACY AND TRUST AT THE 18TH INTERNATIONAL CONFERENCE ON HUMAN-COMPUTER INTERACTION 193 (2016).

218. Andrea Devenow & Ivo Welch, *Rational Herding in Financial Economics*, 40(3) EUROPEAN ECONOMIC REVIEW 603 (1996) (investigating changes in norms over time); Tawfiq Alashour, Mark Keil, Leigh Liu & Jeff Smith, *How values shape concerns about privacy for self and others*, in INTERNATIONAL CONFERENCE ON INFORMATION SYSTEMS (2015) (similar); Elena Daehnhardt, Nick K. Taylor, & Yanguo Jing, *Usage and Consequences of Privacy Settings in Microblogs*, in The 15th INTERNATIONAL CONFERENCE ON COMPUTER AND INFORMATION TECHNOLOGY 667–73 (2015) (reporting on a study of Twitter settings, finding that citizens from Japan were more private than those from Brazil or Spain); Susan B. Barnes, *A privacy Paradox: Social Networking in the United States*, 11(9) FIRST MONDAY (2006) (investigating privacy perceptions across age groups).

219. See, e.g., David Klein & Joshua Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 10(2017) (“In response to sharp public criticism of the fake news phenomenon, many Internet advertising companies have updated their program policies to deny services to fake news publishers . . .”); Anna Gonzalez & David Schulz, *Helping Truth with Its Boots: Accreditation as an Antidote to Fake News*, 127 YALE L.J. FORUM 315, 318 (2017); Amber Jamieson & Olivia Solon, *Facebook to begin flagging fake news in response to mounting criticism*, THE GUARDIAN (Dec. 15, 2016), <https://www.theguardian.com/technology/2016/dec/15/facebook-flag-fakenews-fact-check.>; Facebook, *How is news marked as disputed on Facebook?*, <https://www.facebook.com/help/733019746855448>; Bernhard Clemm, *Analysis | Facebook wants its users to drive out fake news. Here’s the problem with that*, WASH. POST (Feb. 1, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/01/facebook-wants-to-drive-out-fake-news-by-having-users-rate-news-outlets-credibility-heres-the-problem-with-that/> (last visited June 25, 2018) (reporting on Facebook’s attempt to use a crowdsourcing model for verifying fake news); Elisabeth Dwoskin, *Twitter is looking for ways to let users flag fake news, offensive content*, WASH. POST (June 29, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/06/29/twitter-is-looking-for-ways-tolet-users-flag-fake-news/>. See generally Hacoheh & Menell, *supra* note 47.

campaigns to make known to the public what some of the onerous terms in the fine print actually mean. They can take the lead in organizing a rating site that will advise consumers which firms are using reasonable terms and which are not”²²⁰ A task force of lawyers, which the Children’s Commissioner for England convened in 2017, undertook a similarly spirited effort when they tried to simplify Instagram’s ToS to better inform users about their rights.²²¹ This endeavor attracted media coverage, which spurred users’ awareness.²²² Such efforts are becoming increasingly common, especially regarding privacy, cybersecurity,²²³ and false advertising.²²⁴

220. See RADIN, *supra* note 78, at 243.

221. See Wang, *supra* note 97.

222. *Id.* (“[O]nce there is more transparency around how [Instagram’s] site works, we hope that will lead to some consumer pressure from the children and they will start demanding more.”).

223. See The Center for Human Technology, <https://www.humanetech.com/> (last visited Nov. 26, 2020). (a non-profit organization devoted to educating users about the risks of tech manipulation and addiction); see also the NGO “Ranking Digital Rights” (<https://rankingdigitalrights.org/>) (rating leading internet companies’ human rights accountability posture (on a variety of topics from free expression to privacy) based on their ToS and Privacy Policies, *inter alia*). Compare also to the regime in the United Kingdom, where Section 6 of the Unfair Terms in Consumer Contracts Regulations and the Consumer Rights Act 2015 enables certain “regulators” to initiate enforcement action (a complaint) with respect to unconscionable terms. See COMPETITION & MARKETS AUTHORITY, UNFAIR CONTRACT TERMS GUIDANCE 5.7 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf. The United Kingdom’s various regulatory bodies (listed in Schedule 3 to the Act), *id.* at 14, as well as the U.K. Competition & Markets Authority, publish “Guidance” with lists of potentially unfair terms, *e.g.*, *id.*; 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> (“[T]erms which assume consumers have consented to the use of any personal information (including their name) for promotional purposes for the benefit of the operator.”). These regulatory guidelines supplement the “grey list” of presumptively unconscionable terms contained in Schedule 2 of the Consumer Rights Act 2015. 2015 c. 15 (UK).

224. For instance, in the advertising field, see OVERVIEW | MIDDLE SCHOOL CURRICULUM, <https://www.foolproofmiddleschool.com> (last visited Mar. 20, 2018) (“FoolProof” has developed curricula that are used in tens of thousands of schools with the design of teaching children the methods of deception and strategic persuasion. There is some evidence now that, to combat misinformation, teaching the persuasive techniques is more effective than the substance.”); TRUTH IN ADVERTISING, <https://www.truthinadvertising.org> (last visited June 28, 2018) (educating consumers about deceptive advertising practices such as stealth endorsements). In 2018, the digital marketing agency Mediakix created a false social media influencer persona to educate the public on the practices of unjust endorsements on Instagram. Katie Notopoulos, *It’s Easy To Scam Your Way Into Free Hotel Stays By Pretending To Be An Instagram Star*, BUZZFEED (June 25, 2018), <https://>

Furthermore, consumer pressure is likely even more effective in the UGC licensing policies context than in the privacy context. Unlike in the privacy arena, where the opaque nature of privacy harm pushes platforms to stretch their data-monetizing privileges to the fullest, the harms associated with monetizing UGC are far easier for consumers to grasp, which presumably may deter platforms from fully exploiting their overly broad licensing privileges.²²⁵ Thus, unlike in the privacy sphere, platforms have little to lose (and could potentially even benefit) from increased salience, which would invite them to compete for copyright savvy users.²²⁶

In theory, public pressure from educated users might even motivate platforms to provide users with terms that are better than those the law currently provides. This is what happened in the digital advertising sphere following the foreign influence crisis of 2016.²²⁷ Once threats of digital propaganda, fake news, and other forms of voter manipulation intensified, the public's favorable opinion of social media platforms radically shifted.²²⁸ Facing

www.buzzfeed.com/katienotopoulos/its-easy-to-scam-your-way-into-free-hotel-stays-by (last visited June 26, 2018).

225. Users ability to understand the potential risks associated with the terms was referred to in the privacy literature as “risk salience.” See, e.g., Williams, Nurse, & Creese, *supra* note 36 at 3; Bamberger et al., *supra* note 36, at 336.

226. See Korobkin *supra* note 25, at 1204–06 (explaining that if terms are salient to buyers, then sellers—even monopolists—would have a financial incentive to provide them). Platforms may still be discouraged from voluntarily educating users about copyright licensing policies because of the problem of free riding. See *id.* at 1241 (“[A] threshold problem with this premise is that in many situations no seller will have a sufficient incentive to invest in such an advertising campaign, even if the market currently supplies an inefficient term. In a perfectly competitive market, all sellers stand to benefit to the same degree from an attribute becoming salient to buyers, thus causing sellers to replace an inefficient combination of attribute and price with an efficient combination. In this circumstance, advertising is a public good, and no seller will wish to pay the cost of providing it.”).

227. For an overview see Hacothen & Menell, *supra* note 47.

228. See, e.g., HARRISX, Inaugural Tech Media Telecom Pulse Survey 2018, http://harrisx.com/wp-content/uploads/2018/04/Inaugural-TMT-Pulse-Survey_-20-Apr-Final.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top-stories (finding that 84% of the public favor holding social media platform legally responsible for the content posted); see also THE ECONOMIST, *Facebook Faces a Reputational Meltdown* (Mar. 22, 2018), https://www.economist.com/news/leaders/21739151-how-it-and-wider-industry-should-respond-facebook-faces-reputational-meltdown?cid1=cust/ednew/n/bl/n/20180322n/owned/n/n/nwl/n/n/NA/107979/n&utm_source=newsletter&utm_medium=email&utm_campaign=Editors_Picks&utm_term=20180322 (last visited Mar. 22, 2018); Mark Zuckerberg *In His Own Words: The CNN interview* (Mar. 21, 2018), <http://money.cnn.com/2018/03/21/technology/mark-zuckerberg-cnn-interview-transcript/index.html> (last visited Mar 22, 2018); Jackie Wattles, *Mark Zuckerberg and Facebook under fire from politicians over data controversy*, CNN BUSINESS (Mar. 18, 2018), <http://money.cnn.com/2018/03/18/technology/business/mark-zuckerberg-facebook-politicians->

a reputational meltdown, platforms began adopting self-regulatory measures that far exceeded what the law mandated at that time.²²⁹ For example, leading platforms began censoring political content and imposing mandatory disclosure requirements on advertisers even without being compelled to by law.²³⁰

In a similar vein, public pressure coming from UGC-educated users might push social media platforms to provide stronger copyright protection for user content. For example, our survey's findings indicate that social media users care most about having a right of attribution in their UGC.²³¹ The attribution right is recognized in many foreign jurisdictions but not in the United States for UGC.²³² Nevertheless, with sufficient public pressure, social media platforms might be motivated to develop new technological measures that will safeguard user attribution in attempt to remain attractive.²³³

Some platforms already show efforts to scale down their grossly overbroad licensing policies. Consider LinkedIn as a test case. Until June 2017, LinkedIn's UGC licensing terms were among the worst in the industry. LinkedIn's previous terms mandated that "[LinkedIn retains the right] to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered . . . without any further consent, notice and/or compensation."²³⁴ Cynically enough, LinkedIn's old terms plainly stated to their users that "[a]ny information you submit to us is at your own risk of loss."²³⁵

data/index.html (last visited Mar. 20, 2018) ("The growing scrutiny comes after news broke that Cambridge Analytica, a data firm with ties to President Donald Trump's campaign, reportedly gained access to information about 50 million Facebook (FB) users.").

229. See *supra* note 219.

230. See Nellie Bowles & Sheera Frenkel, *Facebook and Twitter Plan New Ways to Regulate Political Ads*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/technology/twitter-political-ad-restrictions.html> (last visited June 9, 2018); Jack Nicas, *Facebook to Require Verified Identities for Future Political Ads*, N.Y. TIMES (April 6, 2018), <https://www.nytimes.com/2018/04/06/business/facebook-verification-ads.html> (last visited Jun 9, 2018); Julia Angwin & Jeff Larson, *Help Us Monitor Political Ads Online*, PROPUBLICA (Sep. 7, 2017), <https://www.propublica.org/article/help-us-monitor-political-ads-online> (last visited June 9, 2018).

231. See *supra* note 164.

232. See *supra* note 7.

233. One such solution can rely on existing technical systems geared to automatically identify the owner of the copyright in content sharing platforms such as Content ID. See *supra* note 180; see also Elazari Bar On, *supra* note 25, at 612–14; Bamberger, Egelman, Han, Elazari Bar On & Reyes, *supra* note 36, at 140 (proposing a technical solution to empower users' rights with respect to boilerplate terms).

234. *LinkedIn Old Agreement*, *supra* note 4. LinkedIn changed these ToS in June 7, 2017.

235. *LinkedIn Old Agreement*, *supra* note 4.

In June 2017, however, LinkedIn voluntarily backed away from these overbroad contractual provisions to become the poster child for excellence in drafting a balanced ToS agreement that respects users' rights.²³⁶ LinkedIn's updated ToS has several compelling features in them. First, LinkedIn adopted language that substantially narrows its UGC licensing policy. In its revised terms, for example, LinkedIn provides:

[LinkedIn] will not include your content in advertisements for the products and services of third parties to others without your separate consent (including sponsored content) . . . and [w]hile [LinkedIn] may edit and make formatting changes to your content (such as translating it, modifying the size, layout or file type or removing metadata), [they] will not modify the meaning of your expression.²³⁷

Second, similarly to Tumblr and Pinterest, LinkedIn provided its users with a short and simplified version of its terms. Third, and most appealingly, LinkedIn created an animated instructional video that clearly and briefly communicates to users the gist of the platform's UGC licensing policy.²³⁸ LinkedIn's ToS transformation may indicate that social media platforms are already facing public pressure to improve ToS agreements.

B. SUBSTANTIVE REGULATION

Some put faith in enhanced disclosure and education, while others are less optimistic. For instance, a substantial body of literature cautions that social media platforms are becoming so prominent in the digital economy that consumer pressure alone cannot police platforms' behavior.²³⁹ Even if users

236. LinkedIn, *User Agreement*, (effective on Jan. 6, 2020), <https://www.linkedin.com/legal/user-agreement> (hereinafter *LinkedIn Jan. 2020 Agreement*); see also LinkedIn, *User Agreement, Who owns your content? You do*, <https://www.youtube.com/watch?v=ha7ASaPnjbA> (last visited Feb. 26, 2020).

237. *LinkedIn Jan. 2020 Agreement*, *supra* note 234. LinkedIn is not alone in this. Tumblr's ToS, for example, provide that, "[t]he rights you grant in this license are for the limited purposes of allowing Tumblr to operate the Services in accordance with their functionality, improve the Services, and develop new Services. The reference in this license to 'creat[ing] derivative works' is not intended to give Tumblr a right to make substantive editorial changes or derivations." Tumblr, *Tumblr Terms of Service* <https://www.tumblr.com/policy/en/terms-of-service> (last visited Feb. 26, 2020).

238. LinkedIn, *User Agreement, Who owns your content? You do*, *supra* note 236.

239. See, e.g., TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); Stucke, *supra* note 133, at 289 ("[N]otice-and-consent regime is meaningless when bargaining power is so unequal that users do not have a viable alternative option."); Sabeel K. Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 *GEO. L. TECH. REV.* 234, 240 (2018) (emphasis added) (noting that in the modern-day internet economy, "technology companies often rely on murky and opaque terms of service that include various unreasonable provisions, particularly those that allow for arbitrary cutoffs or

care about UGC policies, such terms may not become salient because users are a captive audience—they cannot decide to not participate in the platforms’ services.²⁴⁰ Drawing on this concern, commenters in the privacy arena have urged substantial regulatory oversight to improve terms’ quality.²⁴¹ Our findings suggest that comparable regulatory oversight may also be needed for UGC terms—specifically, a regulatory regime focusing on making copyright terms more salient to users. This would protect users and promote the policies underlying the intellectual property laws governing those terms.²⁴²

Indeed, abusive contractual provisions are uniquely concerning in the UGC arena given the constitutional gravity and broad social implications of copyright policies.²⁴³ Copyright, under the predominant utilitarian approach in the United States, is vested in creators to incentivize creativity and to benefit

invasions of user privacy; and crucially, that all this takes place in a context *where one’s access to and ability to function on these platforms are increasingly necessary for modern economic and social activity*”); Hildebrandt, *supra* note 133, at 253 (“The concern regarding platforms centers around their potential for monopolistic or totalitarian behavior. The lack of viable competitors not only disturbs the supposedly beneficial operations of a free market, it also exposes the users of such platforms to potentially monopolistic governance, leading them to accept terms of service across a number of services which leave these users vulnerable to unwarranted exposure and manipulation.”). For views on how to regulate social media, see *supra* note 23.

240. *Cf.* Korobkin, *supra* note 25, at 1212 (emphasizing that “[e]ven when the seller is a monopolist, buyers have the option of not purchasing the goods or services in question.”); *see also supra* note 211 (explaining the relationship between terms’ salience and unconscionability). For example, in March 2016, the German competition authority scrutinized Facebook for possible abuse of its market powers by inappropriate data collection from its users. *Bundeskartellamt Initiates Proceeding Against Facebook on Suspicion of Having Abused Its Market Power by Infringing Data Protection Rules*, (Mar. 2, 2016), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2016/02_03_2016_Facebook.html. The logic underling that prosecution was that given that Facebook control the market for social media, users have no valid contractual alternatives. *See* Eliana Garcés & Daniel Fanaras, *Antitrust, Privacy, and Digital Platform’s use of Big Data: A Brief Overview*, 28 (1) THE JOURNAL OF THE ANTITRUST, UNFAIR COMPETITION, AND PRIVACY LAW SECTION OF THE CALIFORNIA LAWYERS ASSOCIATION, 23, 32 (2018) (“The implicit assumption is that users’ lack of alternatives to Facebook leads them to accept unfavorable terms they would otherwise not accept.”)

241. *See generally* Bamberger, Egelman, Han, Elazari Bar On & Reyes, *supra* note 36.

242. Such endeavor will complement the rich corpus of legal literature exploring the interaction between private ordering mechanisms such as boilerplate language, technological enforcement and copyright. *See, e.g.*, Elazari Bar On, *supra* note 25; Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93 (1997); RADIN, *supra* note 78; and Niva Elkin-Koren, *A Public Regarding Approach to Contracting Copyrights*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 191 (Rochelle Dreyfuss et al. eds., 2001).

243. U.S. CONST. art. I, § 8, cl. 8; *see also* Elazari Bar On, *supra* note 25, at 586–614, 668–71.

all of society.²⁴⁴ Overbroad assignment of copyrights in boilerplate UGC licenses without meaningful user consent and on a massive scale might undermine users' protected property rights and impair the incentives for users (and other parties) to engage in future creation, thereby frustrating the utilitarian goals of copyright law.²⁴⁵ In this case, since the adherent, agreeing to the licensing terms, is the creator of the work and the original copyright owner (an adherent-creator), the terms' nonsalient nature exacerbates the problem from an intellectual property perspective.²⁴⁶

244. See, e.g., Robert D Cooter & Uri Y Hacoen, *Progress in the Useful Arts: Foundations of Patent Law in Growth Economics*, 22 YALE J.L. & TECH. 191, 194 n.10 (2020), <https://yjolt.org/progress-useful-arts-foundations-patent-law-growth-economics> (last visited Oct 12, 2020) (citing sources supporting the notion that intellectual property rights are founded on a utilitarian philosophy); see also Christopher Buccafusco & Jonathan Masur, *Intellectual Property Law and the Promotion of Welfare*, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECONOMICS, No. 790 (2017). This is, of course, not the only philosophical approach to copyright. For a comprehensive discussion on the manner in which boilerplate terms might undermine copyright policies under various conceptions of copyright (such as Lockean, personhood, dialogical, and utilitarian), see Elazari Bar On, *supra* note 25, at 670–73; see also Elkin-Koren, *supra* note 242.

245. Courts have long addressed in their analysis of boilerplate terms the potential implications for public policy interests, not just under the predominate “public policy exception” doctrine and unconscionability standard-form contract law analysis, see Elazari Bar On, *supra* note 25, but in other contexts too, such as legal preemption analysis. *Id.* at 619. As one court stated with respect to the enforceability of statutory waivers, “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.” *Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 412 (citations and internal quotations omitted); see also *DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th 659, 668–69 (June 3, 1999) (citations and internal quotations omitted) (“[A] party may waive a statutory provision if a statute does not prohibit doing so, 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.”).

246. See Elazari Bar On, *supra* note 25, at 591 (explaining the distinction between adherent-creators and adherent-users in the context of judicial intervention in IP-related boilerplate terms, and the distinction’s normative relevance in the context of IP rights assignment in boilerplate). As Elazari explains, 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. The drafter owns nothing, yet seeks to assign or regulate the rights of the adherent in his creations. *Id.* Elazari further explains that adherent-creator contracts have received less attention in IP scholarship than EULAs, in which the drafter owns the IP. *Id.* at 584. 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. *Id.* at 591. As Elazari explains, the rise of UGC and resulting expansion of “adherent-generated content” mandates theoretical adaptations from both an IP and standard form contract perspective. *Id.* at 585. These adaptations are needed to address the adherent-creator versus adherent-user distinction and the rise of adherent-creator contracts. *Id.* at 586. She proposes that since these types of contracts create different externalities from an IP public

Regulators can achieve substantive oversight either *ex ante*, through legislation, or *ex post*, through litigation.²⁴⁷ In the privacy sphere, new ambitious legislative initiatives—notably the GDPR—attempt to address nonsaliency concerns by requiring companies to provide sufficient information about privacy policies to ensure that users’ consent to data sharing is meaningful.²⁴⁸ Similar legislation could address concerns of nonsaliency in the UGC licensing sphere.

A lesson may be taken from the recently enacted Consumer Review Fairness Act of 2016 (CRF).²⁴⁹ This CRF Act was enacted to deter sellers from engaging in the nefarious yet increasingly popular trend of including boilerplate provisions in contracts accompanying the sale of products and services. These provisions require consumers to surrender their copyrights in future reviews of products or services.²⁵⁰ With their consumer-assigned copyrights, sellers could threaten legal actions to prevent consumers from publishing negative reviews criticizing their products or services.²⁵¹ The CRF Act specifically outlaws such practices by voiding “anti-review” and “non-disparagement”

policy perspective, the nature of the contract can be considered as a part of the substantive unconscionability analysis that needs to account for displacement of IP policies under each of these scenarios. *Id.* at 591–92, 670, 674.

247. *Cf.* Korobkin, *supra* note 25, at 1203–06 (2003).

248. *See* Articles 4(11), 7(2) and Recitals 32 and 42 to the GDPR. *See very generally*, European Data Protection Board, *Guidelines 05/2020 on consent under Regulation 2016/679*, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf; Proposed Regulations under the CCPA, § 999.305(a)(3), available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf>. (“If the business intends to use a consumer’s personal information for a purpose that was not previously disclosed to the consumer in the notice at collection, the business shall directly notify the consumer of this new use and obtain explicit consent from the consumer to use it for this new purpose.”).

249. Consumer Review Fairness Act of 2016, H.R. 5111, 114th Congress (2015–2016) codified at 15 U.S.C. § 45b(a).

250. *See id.* at § (2)(b)(1)(c) (rendering contracts with such provisions invalid). Even before the enactment of the law, some courts voided these terms as unconscionable. *See, e.g., Lee v. Makhnevich*, 2013 U.S. Dist. LEXIS 43760 at 4 (S.D.N.Y. Mar. 27, 2013).

251. In the notorious *Medical Justice* case, around 2,000 healthcare providers used boilerplate “anti-review” clauses to either completely ban consumer reviews or assign the copyrights in future consumer reviews written by patients so the healthcare providers would be able to initiate a DMCA takedown notice if and when such reviews were published. *See generally* Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMM. & TECH. L. REV. 1, 2–3 (2017); *see also Lee v. Makhnevich*, No. 11 Civ. 8665 PAC, 2013 WL 1234829 (S.D.N.Y. Mar. 27, 2013).

terms.²⁵² Similar legislation could target overbroad copyright assignments in UGC.²⁵³

Legislation could at least compel platforms to provide more meaningful notice to users about UGC policies.²⁵⁴ Several studies in the privacy arena, for example, documented that contextualized disclosure policies improve term salience.²⁵⁵ In a recent study, for example, one author (Elazari) and Professors

252. See 15 U.S.C. § 45b(b); Goldman, *supra* note 251, at 4–6; see also Clay Calvert, *Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship*, 24 WIDENER L. REV. 203, 222–25 (2018); Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer “Gag” Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59, 132–34 (2016).

253. Cf. 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 (1999) (offering to codify a public policy exception in the proposed reform to the Uniform Commercial Code, Article 2B that did not materialize and warning that without such exception the drafters of non-negotiable terms could undermine the goals of intellectual property policies).

254. Cf. Hacothen & Menell, *supra* note 47 (discussing the need to disclosure legislation to improve transparency in the realm of influencer marketing).

255. Many studies, for example, have shown that the disclosure’s type, context, and timing all change consumers’ perception of privacy. See, e.g., John, Acquisti, & Loewenstein, *supra* note 215, at 858–59 (2011) (presenting four studies supporting the proposition that privacy preference changes in different disclosure contexts—for example if the website looked professional versus unprofessional, thereby elevating disclosure risk); Hazim Almuhammedi et al., *Your Location Has Been Shared 5,398 Times! A Field Study on Mobile App Privacy Nudging*, 6 PROCS. 33RD ANN. ACM. CONF. ON HUM. FACTORS IN COMPUTING SYSS. 787 (2015) (providing real-time information about how lax app data sharing practices prompted over half of studied users to change permissions); see also Rebecca Balebako, et al., *The Impact of Timing on the Salience of Smartphone App Privacy Notices*, PROCS 5TH. ANN. ACM. CCS WORKSHOP ON SECURITY & PRIVACY IN SMARTPHONES & MOBILE DEVICES 63 (2015) (showing that in-app dialogs increase salience more than those shown before an app’s installation); Idris Adjerid, et al., *Sleights of Privacy: Framing, Disclosures, and the Limits of Transparency*, PROCS. NINTH SYMP. ON USABLE PRIVACY & SECURITY 2 (2013) (showing that even a 15-second delay between data use disclosures and the relevant decision can generate measurable differences in privacy-protective behavior). For more discussion about term complexity and the value of simplified disclosures in the privacy arena see Janice Y Tsai, Lorrie Cranor, Serge Egelman & Alessandro Acquisti, *The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study*, 22(2) INFO. SYSTEMS RESEARCH 254 (2011) (showing that understanding privacy information changes users’ decisions about website use); Ewa Luger, Stuart Moran, & Tom Rodden, *Consent for All: Revealing the Hidden Complexity of Terms and Conditions*, 2013 PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2687 (advocating for term simplicity); Jialiu Lin, Shahriyar Amini, Jason I. Hong, Norman Sadeh, Janne Lindqvist & Joy Zhang, *Expectation and Purpose: Understanding Users’ Mental Models of Mobile App Privacy through Crowdsourcing*, 2012 PROCEEDINGS OF THE ACM INTERNATIONAL CONFERENCE ON PERVASIVE & UBIQUITOUS COMPUTING 501 (highlight the value of educating users about the purpose of privacy terms); Matthew Kay & Michael Terry, *Textured Agreements: Re-envisioning Electronic Consent*, 2010 PROCEEDINGS OF THE SIXTH SYMPOSIUM ON

Kenneth Bamberger, Serge Egelman, Catherine Han, and Irwin Reyes showed that, before being primed to consider privacy, only 1% of their study's respondents mentioned privacy as something they would expect to differ in paid and free versions of an app.²⁵⁶ When asked directly about the issue, however, over half of the respondents believed there would be a difference.²⁵⁷ In light of these and comparable findings, legislators should compel social media platforms to improve their default disclosure designs. For example, platforms could be compelled to provide users with simplified disclosures of UGC licensing policies right before users upload content.²⁵⁸

Even without designated legislative solutions, established contract and unfair competition law could be configured to address users' unmeaningful consent. For example, the Federal Trade Commission (FTC), in pursuit of its broad statutory authority under Section 5 of the FTC Act, could scrutinize and outlaw overbroad copyright boilerplate assignments by deeming them "unfair or deceptive."²⁵⁹ In the privacy context, Professors Daniel Solove and Woodrow Hartzog have suggested that the FTC should expand its enforcement agenda from targeting only explicit contractual violations to targeting a broader range of behaviors that have a deceptive impact, accounting

USABLE PRIVACY AND SECURITY (SOUPS) 1 (showing benefit of improved terms' visual design); Patrick Gage Kelley, Lucian Cesca, Joanna Bresee & Lorrie Faith Cranor, *Standardizing Privacy Notices: An Online Study of the Nutrition Label Approach*, 2010 PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1573 (suggest improving privacy notice through labeling).

256. Bamberger et al., *supra* note 36, at 361.

257. *Id.*

258. To the extent that users are truly a "captive audience," such relaxed measures will certainly be insufficient. Nevertheless, such measures may serve to reduce the frequency or thoughtlessness of users' sharing habits. Indeed, several policymakers have argued that platforms should intentionally introduce so-called "friction" into their services, namely to allow users time to better ponder and evaluate their sharing habits instead of operating as automatons. *See, e.g.*, House of Commons Digital, Culture, Media and Sport Committee, Disinformation and 'Fake News': Final Report Eighth Report of Session 2017–19, at 86 ("Friction can be incorporated into the system, to give people time to think about what they are writing and what they are sharing and to give them the ability to limit the time they spend online; there should be obstacles put in their place to make the process of posting or sharing more thoughtful or slower."). In a similar vein, The Center for Humane Technology suggested simple methods for individuals to adopt in order to introduce friction into their mobile device usage habits. These methods include turning off all notifications, apart from people; changing the color of the screen to 'grayscale,' thereby reducing the intensity and lure of bright colors; keeping home screen to tools only; launching apps by typing; charging devices outside people's bedrooms; removing social media from mobile devices; and telephoning instead of texting. Take Control, <https://www.humanetech.com/take-control> (last visited Oct 18, 2020).

259. 15 U.S.C. § 45(a)(1) (declaring unlawful "unfair or deceptive acts or practices in or affecting commerce").

for users' real-world conceptions and expectations.²⁶⁰ Our findings suggest that existing UGC licensing policies have such a deceptive impact because most users are broadly ignorant and falsely optimistic with respect to them. This alone may justify oversight by the FTC.

Alternatively, state law doctrines—notably the contractual doctrine of unconscionability—could be adjusted to curtail abusive copyright licensing practices.²⁶¹ The doctrine of unconscionability empowers courts to void abusive terms in form contracts that are “shock[ing] to the conscience”²⁶² or unreasonably undermine “the consumer’s benefit from the bargain.”²⁶³ Despite its potential to deter platforms from including overbroad copyright assignments in their ToS, however, the unconscionability doctrine has yet to be interpreted by the courts to sufficiently assume such a deterring function.²⁶⁴

260. See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 667 (2016); see also CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 123–25 (2016) (discussing the way in which the FTC employed consumer surveys to appraise consumers’ understandings of promotional representations); KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE 183–96 (2015) (explaining ways in which the FTC tinkers with legal standards to reflect consumer expectations).

261. See Elazari Bar On, *supra* note 25 (urging the application of unconscionability doctrine to boilerplate terms in technology transactions in light of RESTATEMENT OF THE L. CONSUMER CONTS., § 5 notes at 94–95 (AM. L. INST., Tentative Draft 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf, which addresses the one-sidedness of a term that unreasonably undermines “the consumer’s benefit from the bargain”). There are also federal-law policies such as preemption or copyright misuse that can be invoked to strike down a contractual term, but these are less relevant to our context. For an overview see Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 157–58 (1999).

262. *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605–06 (E.D. Pa. 2007) (“A contract or clause is procedurally unconscionable if it is a contract of adhesion. A contract of adhesion, in turn, is a ‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’”) (citing *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002)). However, as noted, courts have invoked a higher standard for procedural unconscionability, requiring “oppression” or an “unfair surprise.” Elazari Bar On, *supra* note 25, at 624–25; THE RESTATEMENT OF THE L. CONSUMER CONT., TENTATIVE DRAFT, at 94–95 (AM. LAW INST. 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf

263. *Id.* at 77.

264. See Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 16 B.Y.U. L. REV. 427 444–49 (2016) (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,

When faced with the issue in *Song Fi v. Google*, the District Court of the District of Columbia refused to invoke unconscionability for social media platforms' ToS.²⁶⁵ To bolster its decision to dismiss plaintiffs' claim that YouTube's ToS are unconscionable, the court emphasized that by "[h]aving taken advantage of YouTube's free services, [the] Plaintiffs cannot complain that the terms allowing them to do so are unenforceable."²⁶⁶ This statement is perplexing at best. If anything, because platforms provide free services, their incentive to monetize users' content (or data) by making their terms nonsalient, only increases.²⁶⁷

As one of the authors suggested elsewhere, courts should consider empowering the unconscionability doctrine to meet the challenges of intellectual property boilerplates in the digital age (even beyond the realm of platforms' ToS). Courts could do this under the substantive unconscionability prong while considering term salience under the procedural unconscionability prong.²⁶⁸ For example, courts could find boilerplate provisions that undermine statutory copyrights (such as the right to create derivative works) to become prima facie unconscionable—thereby shifting the burden to prove otherwise

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 actually be worse-off if contractual terms would be voided since drafters will only draft stricter 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, *supra* note 25; Lemley, *Beyond Preemption*, *supra* note 261, at 163 (noting that "even though Article 2B [of the U.C.C.] provides that substantively unconscionable contract terms will not be enforced, our experience with Article 2 cases makes it clear that courts rarely invoke the unconscionability doctrine to strike terms. The same will undoubtedly continue to be true in Article 2B cases.").

265. *Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 59 (D.D.C. Oct. 29, 2014).

266. *Id.* at 64 (emphasis added). The court reached similar results in *Darnaa, LLC v. Google, Inc.*, 2015 U.S. Dist. LEXIS 161791 (N.D. Cal. Dec. 2, 2015). In *Darnaa*, the plaintiff argued that several provisions of YouTube's ToS, including, *inter alia*, the terms that allow YouTube broad discretion over content removal, were unconscionable. The court found that YouTube's ToS "involve[d] only a marginal degree of procedural unconscionability," and are not so "one-sided as to be substantively unconscionable." *Id.* at 8. Moreover, the court emphasized, in the framework of its 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.*

267. Indeed, as the rich literature in the privacy arena has long-established, the nonsaliency of privacy related terms has provided fertile ground for platforms to draft overbroad terms that enable them to extract users' data far beyond what is needed to maintain their services. See Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606 (2014); see also the review in Bamberger, Egelman, Han, Elazari Bar On, & Reyes *supra* note 36, at 356–57.

268. See Elazari Bar On, *supra* note 25.

to the drafter.²⁶⁹ Alternatively, courts could invigorate the unconscionability doctrine by expanding the doctrine's remedies (for example, by introducing restitution), providing for fee-shifting, or reframing the doctrine from a defense to a cause of action.²⁷⁰ Proposals like these are not foreign to intellectual property policy. Courts, for example, have used fee-shifting to combat copyright and patent misuses for decades.²⁷¹

Finally, databases and technological enforcement can be used to monitor and police the quality of UGC terms in platforms' ToS. Platforms already use technological tools to *enforce* adhesive terms in form contracts (e.g., YouTube Content ID automatically enforces the platform's authority to remove allegedly violating content), so little prevents regulators from employing similar tools. For example, a government agency (such as the FTC) could create a publicly available database of boilerplate terms classified by how much such terms undermine copyright policy.²⁷² At least, such a database would draw attention from consumer advocacy groups and users, which would increase

269. *Id.*

270. See Hazel Glenn Beh, *Contract Law Present and Future: A Symposium to Honor Professor Charles L. Knapp on Fifty Years of Teaching Law: Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1022–45 (2014). Professor Margaret Radin also considered a potential tort-based solution to which she called “tort of intentional deprivation of basic legal rights.” See Radin, *supra* note 78, at 140.

271. Regarding copyright, see, e.g., *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 695–96; see also 17 U.S.C. § 505 (interpreted at *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 525–26 (1994)) (allowing the court discretion in awarding attorney fees to the prevailing party under certain standards). Regarding patents, see *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014); Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C. L. REV. 1443 (2014); see also in the context of “patent trolls,” *Small v. Implant Direct Mfg. LLC*, 2014 U.S. Dist. LEXIS 154468, *9–10 (S.D.N.Y. Oct. 22, 2014) (citing *Lumen View Tech*, 2014 U.S. Dist. LEXIS 74209, 2014 WL 2440867, at *7 (S.D.N.Y. May 30, 2014) (“[T]he need for the deterrent impact of a fee award is greater where there is evidence that the plaintiff is a ‘patent troll’ or has engaged in extortive litigation.”); *Yufa v. TSI Inc.*, 09-CV-01315-KAW, 2014 U.S. Dist. LEXIS 113148, 2014 WL 4071902, at *4 (N.D. Cal. Aug. 14, 2014) (“Today pursuant to 35 U.S.C. § 285, [t]he court in exceptional cases may award reasonable attorney fees to the prevailing party”) (citing *Octane Fitness*, 134 S. Ct. at 1756)). See generally Hannah Jiam, *Fee-shifting and Octane Fitness: An Empirical Approach Toward Understanding “Exceptional”*, 30 BERKELEY TECH. L.J. 611 (2015). One of the authors has similarly suggested using the equitable remedy of restitution to combat patent overreach in the context of pharmaceutical patent overreach. See Uri Y. Hacothen, *Evergreening At Risk*, 33 HARV. J. L. & TECH. 480 (2020).

272. See Elazari Bar On, *supra* note 25, at 686–67; see also RADIN, *supra* note 78. In contrast, the FTC has provided rough guidelines concerning what constitutes adequate disclosure in the case of social media endorsers. The FTC's Endorsement Guides: What People Are Asking, FEDERAL TRADE COMMISSION (2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last visited Feb. 26, 2020).

term salience.²⁷³ Such a database could also be used to train machine-learning algorithms to highlight and flag suspected terms for review by consumers, regulators, and lawyers.²⁷⁴

V. CONCLUSION

In the digital age, social media platforms have become the primary venues for communicating, creating, interacting, sharing content, and engaging in cultural dialogue. When users join social media platforms and agree to the platforms' ToS, they also agree to license their copyrights to their uploaded creative content. In this study, we documented that the most popular social media platforms employ boilerplate copyright-licensing provisions that are grossly overbroad, unnecessary for the platforms' service operation, and detrimental to users' rights and copyright policy. We put forward the largest and most comprehensive empirical study to date, surveying 1,033 social media users geared to evaluate users' awareness, perceptions, and expectations and—most importantly—term salience (the effect on market decision-making) of these boilerplate copyright-licensing terms. Our findings indicate that a

273. Cf. 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, 91–93 (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, although the law has robust provisions, it does not guarantee consumers will actually make use of such provisions). Michael argues that Israel should adopt the publication of “Guidance” on potentially unconscionable terms that have been subject to previous litigations, similar to the approach taken in the U.K., see *supra* note 223, and a simplified disclosure model where drafters who adopt a term which is “grey listed” will need to separately disclose it in the boilerplate in a meaningful, salient way.

274. Machine learning is being used to spot other abusive bot-initiated behavior such as the spread of fake news or fake endorsements. For example, 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.” Berkeley Engineering, *Fighting Fake News* (Nov. 14, 2018), <https://engineering.berkeley.edu/magazine/fall-2018/fighting-fake-news>; see also Josh Constine, *Instagram kills off fake followers, threatens accounts that keep using apps to get them*, TECHCRUNCH (Nov. 19, 2018), <https://techcrunch.com/2018/11/19/instagram-fake-followers/> (noting Instagram states they “built machine learning tools to help identify accounts that use [third-party apps for boosting followers] and removing the inauthentic activity”). For an overview of a tool supporting machine learning analysis of privacy policies see Andy Greenberg, *An AI That Reads Privacy Policies So That You Don't Have To*, WIRED (Feb. 9, 2018), <https://www.wired.com/story/polisis-ai-reads-privacy-policies-so-you-dont-have-to/> (Polisis, <https://pribot.org/>). For a tool allowing users to search a name of a mobile app and learn about its actual information collection practice see APPCENSUS, <https://appcensus.mobi/> (reviewed in Irwin Reyes, Primal Wijesekera, Joel Reardon, Amit Elazari Bar On, Abbas Razaghpahanah, Narseo Vallina-Rodriguez & Serge Egelman, *Won't Somebody Think of the Children?* “Examining COPPA Compliance at Scale”, 2018 PROCEEDINGS ON PRIVACY ENHANCING TECHS. 63 (developed by one of the author's co-authors on this cited research).

substantial portion of users who share their copyrighted content on social media do not understand and have unrealistic expectations about their rights to their content and the rights they give away. Simultaneously, a substantial portion of users appears to care about their copyrights and assert that they would have changed their social media behavior if they had understood the boilerplate terms. After analyzing our study's findings, we proposed various insights for law and policy—ranging from soft remedial solutions to substantial regulatory oversight.

APPENDIX

A. COMPLETE TEXTUAL ANALYSIS OF PLATFORMS' UGC TERMS

<i>Platform</i>	<i>Terms</i>	
Twitter ²⁷⁵	Perpetuity/ Termination	In all such cases, the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: II, III [License], V, and VI.
	3rd parties	you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such . . . uses . . . may be made with no compensation paid to you
	Modification	use, copy, reproduce, process, adapt, <u>modify</u> , publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed) You understand that we may modify or adapt your Content as it is distributed, syndicated, published, or broadcast by us and our partners and/or make changes to your Content in order to adapt the Content to different media.
	Derivative works	-
	Immediate removal	We reserve the right to remove Content alleged to be infringing without prior notice, at our sole discretion, and without liability to you.

275. Twitter, *Terms of Service*, (May 25, 2018), https://twitter.com/en/tos/previous/version_13.

<i>Platform</i>	<i>Terms</i>	
	Commercial	this license includes the right for Twitter to provide, <u>promote</u> , and improve the Services and [same for 3rd parties]
	Ideas	Any feedback, comments, or suggestions you may provide regarding Twitter, or the Services is entirely voluntary and we will be free to use [it] as we see fit and without any obligation to you.
	Moral rights	-
	Publicity rights	-
Pinterest 276	Perpetuity/ Termination	<p>Upon termination, you continue to be bound by Sections 2 [license] and 6–12 of these Terms.</p> <p>Nothing in these Terms shall restrict other legal rights Pinterest may have to User Content, for example under other licenses.</p> <p>Following termination or deactivation of your account, or if you remove any User Content from Pinterest, we may retain your User Content for a commercially reasonable period of time for backup, archival, or audit purposes. Furthermore, Pinterest and its users may retain and continue to use, store, display, reproduce, repin, modify, create derivative works, perform, and distribute any of your User Content that other users have stored or shared through Pinterest.</p>
	3rd parties	You grant Pinterest and our users a non-exclusive, royalty-free, transferable, sublicensable, worldwide license
	Modification	<p>to use, store, display, reproduce, save, modify . . . perform, and distribute . . . solely for the purposes of operating, developing, providing, and using the Pinterest Products.</p> <p>We reserve the right to remove or modify User Content for any reason, including User Content that we believe violates these Terms or our policies.</p>

276. Pinterest, *Terms of Service* (effective Nov. 1, 2016), <https://policy.pinterest.com/en/terms-of-service-2016>.

<i>Platform</i>	<i>Terms</i>	
	Derivative works	create derivative works . . . solely for the purposes of operating, developing, providing, and using the Pinterest Products. Following termination or deactivation of your account, [Pinterest may] continue to . . . create derivative works . . . of your User Content that other users have stored or shared through Pinterest.
	Immediate removal	Pinterest may terminate or suspend this license at any time, with or without cause or notice to you.
	Commercial	-
	Ideas	If you choose to submit comments, ideas or feedback, you agree that we are free to use them without any restriction or compensation to you.
	Moral rights	-
	Publicity rights	-
Vine ²⁷⁷	Perpetuity/ Termination	the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: 4, 5, 7, 8, 10, 11, and 12.
	3rd parties	with the right to sublicense You agree that this license includes the right for Vine . . . to make Content . . . available to other companies, organizations or individuals who partner with Vine for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses . . . may be made with no compensation paid to you
	Modification	use, copy, reproduce, process, adapt, <u>modify</u> , publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).
	Derivative works	-
	Immediate removal	We also retain the right to create limits on use and storage at our sole discretion at any time without prior notice to you.

277. Vine.co, *Terms Of Service*, (Jan. 21, 2013), <https://www.docracy.com/0am76hh9685/vine-co-terms-of-service-tos>.

<i>Platform</i>	<i>Terms</i>	
	Commercial	you agree that Vine and its parent, third party providers and partners may place such advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others. You agree that this license includes the right for Vine to provide, promote, and improve the Services.
	Ideas	-
	Moral rights	-
	Publicity rights	-
Snapchat 278	Perpetuity/ Termination	Regardless of who terminates these Terms, both you and Snap Inc. continue to be bound by Sections 3 [Rights You Grant Us], 6, 9, 10, and 13–22 of the Terms. <i>[for Live, Local, and any other crowd-sourced Services]</i> you also grant us a perpetual license
	3rd parties	<i>[For Services other than Live, Local, or crowd-sourced]</i> you grant. . . a worldwide, royalty-free, sublicensable, and transferable <i>[for Live, Local, and any other crowd-sourced Services]</i> you also grant Snap Inc., our affiliates, and our business partners the unrestricted, worldwide, perpetual right and license to [publicity rights]

278. Snap Inc., *Snap Inc. Terms of Service*, (effective Jan. 10, 2017), <https://web.archive.org/web/20210101071802/>, <https://snap.com/en-US/terms>). If you live in the United States, Snap’s terms of service effective October 30, 2019 state the following: With respect to your use of Bitmoji, you grant Snap Inc., our affiliates, and our business partners a worldwide, perpetual, royalty-free, sublicensable, and transferable license to host, store, use, display, reproduce, modify, adapt, edit, publish, distribute, promote, exhibit, broadcast, syndicate, publicly perform, and distribute (a) any actual or simulated likeness, image, voice, name, poses, or other personal characteristics (collectively, your “Likeness”) embodied in a Bitmoji Avatar or the Bitmoji Services, and (b) any materials you create using the Bitmoji Services, as well as the right to create and use derivative works from those materials, in any and all media or distribution methods (now known or later developed). This license is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones. This means, among other things, that you will not be entitled to any compensation from Snap Inc., our affiliates, or our business partners if your name, likeness, or voice is conveyed through or in connection with Bitmoji, either on the Bitmoji application or on one of our business partner’s platforms. Snap Inc., *Terms of Service*, (effective Oct. 30, 2019), <https://www.snap.com/en-US/terms>.

<i>Platform</i>	<i>Terms</i>	
	Modification	[<i>For Services other than Live, Local, or crowd-sourced</i>] license to host, store, use, display, reproduce, <u>modify</u> , <u>adapt</u> , <u>edit</u> , publish, and distribute that content.
	Derivative works	[<i>for Live, Local, and any other crowd-sourced Services</i>] license to create derivative works
	Immediate removal	[W]e may access, review, screen, and delete your content at any time and for any reason, including . . . if we think your content violates these Terms.
	Commercial	advertising may sometimes appear near your content [<i>For Services other than Live, Local, or crowd-sourced</i>] This license is for the limited purpose of operating, developing, providing, <u>promoting</u> , and improving the Services and researching and developing new ones. [<i>for Live, Local, and any other crowd-sourced Services</i>] <u>promote</u> , exhibit, broadcast, syndicate, sublicense, publicly perform, and publicly display [content] in any form and in any and all media or distribution methods (now known or later developed).
	Ideas	If you volunteer feedback or suggestions, just know that we can use your ideas without compensating you.
	Moral rights	-
	Publicity rights	[<i>for Live, Local, and any other crowd-sourced Services</i>] right and license to use your name, likeness, and voice. This means, among other things, that you will not be entitled to any compensation [from Snapchat or third parties].
LinkedIn 279	Perpetuity/ Termination	You can end this license for specific content by deleting such content from the Services, or generally by closing your account, except (a) to the extent you shared it with others as part of the Service and they copied, re-shared it or stored it and (b) for the reasonable time it takes to remove from backup and other systems.

<i>Platform</i>	<i>Terms</i>	
	3rd parties	A worldwide, transferable and <u>sublicensable</u> right to use. We will get your consent if we want to give others the right to publish your content beyond the Services. However, if you choose to share your post as "public", we will enable a feature that allows other Members to embed that public post onto third-party services, and we enable search engines to make that public content findable through their services
	Modification	copy, <u>modify</u> , While we may edit and make format changes to your content (such as translating or transcribing it, modifying the size, layout or file type or removing metadata), we will not modify the meaning of your expression
	Derivative works	-
	Immediate removal	We may change, suspend or discontinue any of our Services. . . . We don't promise to store or keep showing any information and content that you've posted.
	Commercial	We will not include your content in advertisements for the products and services of third parties to others without your separate consent (including sponsored content). However, we have the right, without payment to you or others, to serve ads near your content and information, and your social actions may be visible and included with ads, as noted in the Privacy Policy
	Ideas	By submitting suggestions or other feedback regarding our Services to LinkedIn, you agree that LinkedIn can use and share (but does not have to) such feedback for any purpose without compensation to you
	Moral rights	-
	Publicity rights	-

<i>Platform</i>	<i>Terms</i>	
Instagram 280	Perpetuity/ Termination	You can end this license anytime by deleting your content or account. However, content will continue to appear if you shared it with others and they have not deleted it.
	3rd parties	you hereby grant to us a non-exclusive, royalty-free, <u>transferable</u> , <u>sub-licensable</u> , worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content
	Modification	you hereby grant to us a . . . worldwide license to . . . modify . . . and create derivative works of your content (consistent with your privacy and application settings)
	Derivative works	you hereby grant to us a . . . worldwide license to . . . modify . . . and create derivative works of your content (consistent with your privacy and application settings)
	Immediate removal	We can remove any content or information you share on the Service if we believe that it violates these Terms of Use, our policies (including our Instagram Community Guidelines), or we are permitted or required to do so by law. We can refuse to provide or stop providing all or part of the Service to you (including terminating or disabling your account) immediately to protect our community or services, or if you create risk or legal exposure for us, violate these Terms of Use or our policies (including our Instagram Community Guidelines), if you repeatedly infringe other people's intellectual property rights, or where we are permitted or required to do so by law. If you believe your account has been terminated in error, or you want to disable or permanently delete your account, consult our Help Center.

280. Instagram, *Terms of Use*, (revised April 19, 2018), <https://www.facebook.com/help/instagram/termsfuse> (“We do not claim ownership of your content, but you grant us a license to use it. Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service. Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). You can end this license anytime by deleting your content or account. However, content will continue to appear if you shared it with others and they have not deleted it. To learn more about how we use information, and how to control or delete your content, review the Data Policy and visit the Instagram Help Center.”).

<i>Platform</i>	<i>Terms</i>	
	Commercial	<p>Permission to use your username, profile picture, and information about your relationships and actions with accounts, ads, and sponsored content.</p> <p>You give us permission to show your username, profile picture, and information about your actions (such as likes) or relationships (such as follows) next to or in connection with accounts, ads, offers, and other sponsored content that you follow or engage with that are displayed on Facebook Products, without any compensation to you. For example, we may show that you liked a sponsored post created by a brand that has paid us to display its ads on Instagram. As with actions on other content and follows of other accounts, actions on sponsored content and follows of sponsored accounts can be seen only by people who have permission to see that content or follow. We will also respect your ad settings. You can learn more here about your ad settings.</p>
	Ideas	We always appreciate feedback or other suggestions, but may use them without any restrictions or obligation to compensate you for them, and are under no obligation to keep them confidential..
	Moral rights	-
	Publicity rights	-
Facebook 281	Perpetuity/ Termination	In all such cases [of termination] this Statement shall terminate, but the following provisions will still apply: 2.2, 2.4 [license], 3–5, 9.3, and 14–18.
	3rd parties	you grant us a non-exclusive, transferable, <u>sub-licensable</u> , <u>royalty-free</u> , worldwide license to use any IP content
	Modification	By "use" we mean use, run, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.
	Derivative works	By "use" we mean . . . create derivative works of.
	Immediate removal	We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies.

281. Facebook, *Terms of Service*, (revised Jan. 30, 2015), <https://www.facebook.com/legal/terms/previous>.

<i>Platform</i>	<i>Terms</i>	
	Commercial	you give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.
	Ideas	-
	Moral rights	-
	Publicity rights	-
YouTube 282	Perpetuity/ Termination	The above licenses granted by you in video Content you submit to the Service terminate within a commercially reasonable time after you remove or delete your videos from the Service. You understand and agree, however, that YouTube may retain, but not display, distribute, or perform, server copies of your videos that have been removed or deleted. The above licenses granted by you in user comments you submit are perpetual and irrevocable.
	3rd parties	grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license in connection with the Service and YouTube's (and its successors' and affiliates') business
	Modification	-
	Derivative works	grant YouTube a worldwide, non-exclusive, royalty-free . . . license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube's (and its successors' and affiliates') business
	Immediate removal	YouTube does not permit copyright infringing activities and infringement of intellectual property rights on the Service, and YouTube will remove all Content if properly notified that such Content infringes on another's intellectual property rights. YouTube reserves the right to remove Content without prior notice.

282. YouTube, *Terms of Service*, (May 25, 2018), <https://www.youtube.com/t/terms?archive=20180525>.

<i>Platform</i>	<i>Terms</i>	
	Commercial	including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels.
	Ideas	-
	Moral rights	-
	Publicity rights	-
Reddit ²⁸³	Perpetuity/ Termination	you grant us a royalty-free, <u>perpetual</u> , <u>irrevocable</u> , non-exclusive, <u>unrestricted</u> , worldwide license The following sections will survive any termination of these Terms or of your Accounts: 4 (Your Content)
	3rd parties	and to authorize others to do so.
	Modification	-
	Derivative works	reproduce, prepare <u>derivative works</u> , distribute copies, perform, or publicly display your user content in any medium and
	Immediate removal	Without advance notice and at any time, we may, for violations of this agreement or for any other reason we choose: (1) suspend your access to reddit, (2) suspend or terminate Your Account or reddit gold membership, and/or (3) remove any of your User Content from reddit
	Commercial	for any purpose, including commercial purposes
	Ideas	[<i>under new terms</i>]
	Moral rights	[<i>under new terms</i>]

283. Reddit, *supra* note 4; Reddit, *supra* note 7. Reddit revised its ToS on September 15, 2020: Reddit no longer requires a license for *any* commercial use. Here are further additions: (1) Reddit broadened the license to include: “Your Content and any name, username, voice, or likeness provided in connection with Your Content.” (2) This license includes the right for us to make Your Content available for syndication, broadcast, distribution, or publication by other companies, organizations, or individuals who partner with Reddit. You also agree that we may remove metadata associated with Your Content. (3) you irrevocably waive any claims and assertions of moral rights or attribution with respect to Your Content. (4) Any ideas, suggestions, and feedback about Reddit or our Services that you provide to us are entirely voluntary, and you agree that Reddit may use such ideas, suggestions, and feedback without compensation or obligation to you. Reddit, *Reddit User Agreement*, (effective Oct. 15, 2020), <https://www.redditinc.com/policies/user-agreement-october-15-2020>.

<i>Platform</i>	<i>Terms</i>	
	Publicity rights	[<i>under new terms</i>]
Vimeo ²⁸⁴	Perpetuity/ Termination	Upon termination, all licenses granted by Vimeo will terminate. Sections 6 and 11 though [sic] 16 shall survive termination.
	3rd parties	you grant Vimeo and its affiliates a limited, worldwide, non-exclusive, royalty-free license and right to
	Modification	-
	Derivative works	copy, transmit, distribute, publicly perform and display (through all media now known or hereafter created), and <u>make derivative works from your video</u> for the purpose of (i) displaying the video within the Vimeo Service; (ii) displaying the video on third party websites and applications through a video embed or Vimeo's API subject to your video privacy choices; (iii) allowing other users to play, download, and embed on third party websites the video, subject to your video privacy choices; (iv) promoting the Vimeo Service, provided that you have made the video publicly available; and (v) archiving or preserving the video for disputes, legal proceedings, or investigations.
	Immediate removal	Vimeo may suspend, disable, or delete your account (or any part thereof) or block or remove any content you submitted if Vimeo determines that you have violated any provision of this Agreement or that your conduct or content would tend to damage Vimeo's reputation and goodwill.
	Commercial	(iv) promoting the Vimeo Service, provided that you have made the video publicly available
	Ideas	Vimeo shall have the right to use your suggestions without any compensation to you.
	Moral rights	you waive any so-called "moral rights" in your non-video content.

284. You grant Vimeo permission to use your name, likeness, biography, trademarks, logos, or other identifiers used by you in your account profile for the purpose of displaying such properties to the public or the audiences you have specified. You may revoke the foregoing permission by deleting your account. Vimeo shall have the right to identify public profiles in its marketing and investor materials. Vimeo, *Terms of Service Agreement* (effective Oct. 6, 2017), <https://web.archive.org/web/20190201171914/>, <https://vimeo.com/terms>. These terms changed on June 26, 2019.

<i>Platform</i>	<i>Terms</i>	
	Publicity rights	-
Tumblr ²⁸⁵	Perpetuity/ Termination	this license to your Subscriber Content continues even if you stop using the Services, primarily because of the social nature of Content shared through Tumblr's Services you acknowledge and agree that: (a) deleted Subscriber Content may persist in caches or backups for a reasonable period of time and (b) copies of or references to the Subscriber Content may not be entirely removed (due to the nature of reblogging, for example).
	3rd parties	you grant Tumblr a non-exclusive, worldwide, royalty-free, sublicensable, transferable right and license
	Modification	modify, adapt (including, without limitation, in order to conform it to the requirements of any networks, devices, services, or media through which the Services are available)
	Derivative works	and create derivative works of, such Subscriber Content. The rights you grant in this license are for the limited purposes of allowing Tumblr to operate the Services in accordance with their functionality, improve and promote the Services, and develop new Services. The reference in this license to "creat[ing] derivative works" is not intended to give Tumblr a right to make substantive editorial changes or derivations, but does, for example, enable reblogging, which allows Tumblr Subscribers to redistribute Subscriber Content from one Tumblr blog to another in a manner that allows them to add their own text or other Content before or after your Subscriber Content.
	Immediate removal	Tumblr may change, suspend, or discontinue any or all of the Services at any time, including the availability of any product, feature, database, or Content (as defined below).
	Commercial	The rights you grant in this license are for the limited purposes of . . . promot[ing] the Services

285. Github, *tumblr/policy*, (May 9, 2018), <https://github.com/tumblr/policy/commit/7ad5058c9ff20d57d7f4ce7d5f0fdf2f32a05cab#> (providing Tumblr's ToS).

<i>Platform</i>	<i>Terms</i>	
	Ideas	-
	Moral rights	-
	Publicity rights	-

B. SURVEY

1. **Consent**

2. **Screening**

- 1) Have you once uploaded your work to at least one of the following platforms: Facebook, Instagram, YouTube, Twitter, Snapchat, LinkedIn, Vimeo, Reddit, Pinterest, Tumblr, Vine?
- Yes
 - No

3. **Demographic quotas**

- 1) Have you once uploaded your work to at least one of the following platforms: Facebook, Instagram, YouTube, Twitter, Snapchat, LinkedIn, Vimeo, Reddit, Pinterest, Tumblr, Vine?
- Yes
 - No
- 2) Have you once uploaded your work to at least one of the following platforms: Facebook, Instagram, YouTube, Twitter, Snapchat, LinkedIn, Vimeo, Reddit, Pinterest, Tumblr, Vine?
- Yes
 - No
- 3) What is your gender?
- Male
 - Female
 - Other
- 4) What is your age? (you must be above 18 year old to take this survey)
- Under 18
 - 18 to 24
 - 25 to 34
 - 35 to 44

- 45 to 54
 - 55 to 64
 - 65 or older
- 5) What is the highest degree or level of school you have completed?
- High school graduate—high school diploma or the equivalent (for example: GED)
 - Bachelor's degree (for example: BA, AB, BS)
 - Master's degree
 - Professional degree or doctorate degree (for example: MD, DDS, DVM, LLB, JD, PhD, EdD)
- 6) What was your annual household income in 2017?
- Less than \$15,000
 - \$15,000 to under \$25,000
 - \$25,000 to under \$50,000
 - \$50,000 to under \$75,000
 - \$75,000 to under \$100,000
 - \$100,000 to under \$150,000
 - Over \$150,000

4. Definitions

- 1) **“Work” or “Content”** means copyright-protected content **created by you**. Content such as art, poetry, prose, photographs, sound and musical compositions, illustrations, video, or audiovisual works.
- 2) If we generally say **“Platform” or “social media platform,”** we mean: Facebook, Instagram, YouTube, Twitter, Snapchat, LinkedIn, Vimeo, Reddit, Pinterest, Vine.
- 3) **“Use”** means: Publicly display, copy, reproduce, distribute, perform, or transmit the work.²⁸⁶
- 4) **“Terms”** means: The platforms terms-of-use, or the contract that requires you to click “I Accept” when you join the platform.

5. Social media index

286. This definition was based on the findings of the copyright boilerplate landscape analysis, described in Section III(B)(1).

- 1) Do you receive any direct income from sharing or uploading content (created by you) to social media platforms?
 - Yes
 - No

- 2) Do you receive any value from sharing or uploading content (created by you) to social media platforms?
 - Yes, direct income
 - Yes, promoting or marketing myself, my work or my business
 - Getting my work out there
 - I use social media platforms for social interaction only

- 3) Considering these options, how often do you upload content (created by you) onto social media platforms?
 - Once a day or more
 - Once a week
 - Once a month
 - Once every couple months

6. Awareness

- 1) Mark all the platforms you are using (uploading content to) [you can choose multiple options]
 - Facebook
 - Instagram
 - YouTube
 - Twitter
 - Snapchat
 - LinkedIn
 - Vimeo
 - Reddit
 - Pinterest
 - Vine

- 2) For <Platform chosen by the participant>, mark one option for each statement—According to its terms:
 - <Platform may> Grant others (third parties) license to use my work.
 - <Platform may> Modify my work.
 - <Platform may> Create new works based on my work.
 - <Platform may> Use my work for any commercial purpose.
 - <Platform may> Remove content upon their sole discretion.

- *<Platform may>* Display my work indefinitely, even if I delete my account.
- *<Platform may>* Place advertisement on my work.
- *<Platform may>* Use my work to promote the platform services.
- *<Platform may>* Display my work until I delete my account.

7. Expectations

- 1) ***<Immediate removal>*** In your opinion sharing platforms should be allowed to [mark to most appropriate option]:
 - Remove content they determine, upon their sole discretion, that violates their terms
 - Remove content for any reason
 - Remove content only they are required to do so under law
 - None of the above.
- 2) ***<Commercial (and other) uses>*** In your opinion, social media platforms should be able to [mark all that apply]:
 - Use, display or distribute my work only for the purpose of the platform's function (social communication).
 - Use, display or distribute my work for the purpose to promote the platform or the platform service.
 - Use, display or distribute my work for any purpose, including commercial use.
 - Use, display or distribute my work for the purpose of training artificial intelligence algorithms (machine learning).
 - None of the above.
- 3) ***<display and distribution>*** In your opinion, a platform should be able to [mark one option]:
 - Display and distribute my work only on the platform.
 - Display and distribute my work on any means of communication.
 - None of the above.
- 4) ***<display and distribution—third parties>*** In your opinion, who should be allowed to display and distribute your work? [mark all relevant options]:
 - The platform.
 - Its users.

- Other parties, at the discretion of the platform.
 - No-one.
- 5) <**Termination**> In your opinion, display and distribution of your work should be available [mark one option]:
- Only for as long as I maintain an account on the platform.
 - Only for as long as I agree.
 - Only until I chose to remove my work.
 - Indefinitely.

8. Understanding:

- 1) When a platform mentions in its terms that “you waive your so-called moral rights” it means [mark all that apply]:
- I will not be paid any royalties [incorrect]
 - It can present my work without name
 - I wave all the copyrights in my work.
 - It can change the meaning of my work and distort it in a manner which is disrespectful.
 - I don’t know what “moral rights” are.
- 2) When a platform mentions in its terms that “you grant the platform a license to prepare derivative work” it means that [choose one option]:
- I grant a perpetual (permanent) license to all the rights I have in my work.
 - I allow the platform to copy and share my work.
 - I allow the platform to place advertisements on my work without my consent.
 - I allow the platform to create new versions of my work.
 - None of the above

9. Salience

- 1) Consider the following scale <*Extremely likely, likely, neither likely nor unlikely, unlikely, extremely unlikely*> and indicate how likely you are to use such platform:
- Only uses your work for the purpose of operating its platform and nothing else.
 - Associate your name with your work.
 - Uses your work for training AI algorithms (machine learning)
 - Can remove your content for any reason

- Under its terms, allows to use your work for any purpose including commercial use.
 - Under its terms, authorizes others (non-users) to distribute and modify your work.
 - Under its terms, can create new works that are based on your work.
 - Under its terms, say you cannot change your mind and cancel the license (permission) you grant the platform to use/display your work.
 - Under its terms, allows to display ads on your work.
 - Under its terms, allows to present your work without naming you as the creator.
 - Under its terms, allows to modify your work (for any purpose, not just when technically required).
- 2) The following statement represent varies [sic] Intellectual Property rights. Please rank them according to their importance to you (with 1 being the most important and 7 the least important).
- The meaning or from of my work won't be altered in a manner that is disrespectful without my consent.
 - My work must be displayed/associated with my name.
 - My work won't be significantly modified (unless technically required) without my consent.
 - My work won't be associated with ads.
 - My work won't be used for commercial purposes, without my consent.
 - The platform won't be able to authorize other parties (non-users) to use (display and distribute) my work without my consent.
 - I am able to change or cancel the license (permission) I give platforms to use my work if I change my mind.

C. TERM AWARENESS ACROSS PLATFORMS

The platform may:	Facebook			Instagram			YouTube			Twitter		
	Yes	No	D/K	Yes	No	D/K	Yes	No	D/K	Yes	No	D/K
Grant others (third parties) license to use my work	19.9%	46.2%	33.9%	22.2%	47.1%	30.8%	24.2%	47.5%	28.3%	20.2%	48.1%	31.7%
Modify my work	18.2%	51.3%	30.5%	23.2%	47.7%	29.0%	26.5%	50.1%	23.4%	20.0%	53.7%	26.3%
Create new works based on my work	24.9%	40.7%	34.4%	26.7%	41.3%	32.0%	28.9%	39.0%	32.1%	24.6%	42.7%	32.7%
Use my work for any commercial purpose	28.2%	40.3%	31.5%	30.8%	38.1%	31.2%	35.8%	37.0%	27.1%	27.9%	41.4%	30.7%
Remove content upon their sole discretion	84.6%	6.5%	8.9%	77.2%	11.2%	11.6%	87.3%	6.3%	6.3%	79.5%	8.7%	11.8%
Display my work indefinitely, even if I delete my account	32.7%	33.7%	33.7%	32.7%	36.8%	30.5%	32.5%	37.8%	29.7%	28.4%	39.1%	32.5%
Place advertisement on my work	43.1%	27.7%	29.3%	37.6%	30.3%	32.0%	75.6%	11.7%	12.7%	46.3%	27.1%	26.6%
Use my work to promote the platform services	36.3%	31.3%	32.4%	40.0%	29.5%	30.5%	51.7%	23.0%	25.4%	41.9%	27.4%	30.7%
Display my work until I delete my account	58.8%	14.5%	26.7%	62.2%	14.6%	23.2%	65.9%	14.9%	19.2%	61.9%	16.9%	21.2%

The platform may:	Snapchat			LinkedIn			Vimeo		
	Yes	No	D/K	Yes	No	D/K	Yes	No	D/K
Grant others (third parties) license to use my work	27.2%	38.0%	34.9%	17.2%	52.3%	30.5%	30.8%	46.2%	23.1%
Modify my work	19.5%	48.7%	31.8%	15.6%	54.7%	29.7%	23.1%	53.9%	23.1%
Create new works based on my work	22.6%	39.5%	38.0%	18.0%	45.3%	36.7%	34.6%	42.3%	23.1%
Use my work for any commercial purpose	25.1%	37.4%	37.4%	22.7%	43.0%	34.4%	42.3%	34.6%	23.1%
Remove content upon their sole discretion	69.7%	14.4%	15.9%	68.8%	16.4%	14.8%	76.9%	15.4%	7.7%
Display my work indefinitely, even if I delete my account	24.6%	43.1%	32.3%	24.2%	46.1%	29.7%	38.5%	38.5%	23.1%
Place advertisement on my work	36.9%	31.8%	31.3%	36.7%	30.5%	32.8%	80.8%	11.5%	7.7%
Use my work to promote the platform services	31.8%	31.8%	36.4%	32.0%	31.3%	36.7%	34.6%	46.2%	19.2%
Display my work until I delete my account	42.6%	33.3%	24.1%	62.5%	14.8%	22.7%	65.4%	15.4%	19.2%

The platform may:	Reddit			Pinterest			Vine		
	Yes	No	D/K	Yes	No	D/K	Yes	No	D/K
Grant others (third parties) license to use my work	18.0%	46.8%	35.3%	23.6%	40.5%	35.9%	0.0%	33.3%	66.7%
Modify my work	24.8%	47.5%	27.8%	20.3%	45.6%	34.2%	66.7%	0.0%	33.3%
Create new works based on my work	24.1%	39.7%	36.3%	26.2%	39.2%	34.6%	0.0%	33.3%	66.7%
Use my work for any commercial purpose	27.8%	37.3%	34.9%	32.5%	33.8%	33.8%	0.0%	33.3%	66.7%
Remove content upon their sole discretion	81.7%	7.5%	10.9%	79.8%	8.0%	12.2%	0.0%	33.3%	66.7%
Display my work indefinitely, even if I delete my account	46.8%	28.8%	24.4%	38.0%	26.6%	35.4%	33.3%	33.3%	33.3%
Place advertisement on my work	48.5%	25.8%	25.8%	40.5%	27.9%	31.7%	66.7%	0.0%	33.3%
Use my work to promote the platform services	39.0%	25.8%	35.3%	41.8%	26.2%	32.1%	0.0%	0.0%	100.0%
Display my work until I delete my account	53.9%	20.0%	26.1%	64.1%	11.0%	24.9%	33.3%	0.0%	66.7%

D. TERMS' SALIENCE (RANKING)

The following statements represent various Intellectual Property rights. Please rank them according to their importance to you (with 1 being the most important and 7 the least important):



