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COPYRIGHT, FREE EXPRESSION, AND THE ENFORCEABILITY OF “PERSONAL USE-ONLY” AND OTHER USE-RESTRICTIVE ONLINE TERMS OF USE

Bradley E. Abruzzi†

Abstract

Expression is simultaneously creative and referential. It is copyright’s task both to supply ownership incentives sufficient to promote the creation of expressive works, and to carve out creative (and for that matter, expressive) space from those rights for subsequent creators. Fair use and uses of copyrighted content that the Copyright Act has traditionally privileged are therefore themselves critical to expression. Purveyors of expressive content on the World Wide Web would challenge copyright’s careful balance by conditioning access to content on the user’s acceptance of nonnegotiable, contractually binding terms of use (“TOU”). Website TOU commonly impose “personal use-only” restrictions on users that prohibit uses copyright law would permit. If enforced against critical and scholarly uses of web content, these TOU could undermine the great democratizing potential of the come-one/come-all Internet. Trends in the case law suggest that express and conflict preemption and unconscionability defenses will likely be unavailing to authors who engage in prohibited uses of TOU-restricted web content — even if these uses would be “fair” under the Copyright Act. Although individual parties should be free to negotiate away copyright-approved uses in their dealings with content owners, courts should not be constrained in finding TOU unconscionable or preempted by copyright, when circumstances suggest the content purveyor means to augment its rights unilaterally through nonnegotiable bulk “contracting.” Indeed, when a copyright-approved use of content subject to TOU is expressive in nature, courts should consider a possible constitutional defense to enforcement of the TOU.

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INTRODUCTION

Most every professionally-maintained website contains terms of use (“TOU”), in some form or another. Sites condition access to their content on visitors’ acceptance of these TOU, which generally assume an agreement between the website and user that is enforceable by state contract law. TOU may be deployed to all sorts of purposes. They may set the terms and conditions for online purchases;¹ they may limit the site’s liability for damage that its content and services cause to users.² A site may, through its TOU, obtain the rights to use and reproduce content users post to a website, for example, comments to a blog.³ And TOU may condition or restrict the subsequent uses a site visitor may make of content that he or she access on the website.⁴ It is these TOU — use restrictions — that preoccupy this Article, as it is increasingly the case that websites interpose use restrictions on expressive content in excess of the proprietary rights afforded to them under the Copyright Act.

The most common type of use restriction in a website TOU is a “personal use-only” restriction. A website that contracts with visitors only to make personal use of the content it displays deprives visitors of public privileges made available to them by copyright law. It is not copyright infringement, for example, to make fair use of content subject to copyright protection, but personal use-only TOU empower a website to bring a breach of contract action against certain fair users. Indeed, a website’s proprietor may be able to sue to enjoin (or obtain damages for) uses of content for which the site owns no copyright, either because the rights belong to a third party or because the content is by its nature not subject to copyright protection at all. Determinations by Congress and the courts regarding what expression should and should not be copyrightable — as well as what uses of copyrighted expression ought to be available to the public — reflect an abiding concern that property rights in one’s expression by their

1. See, e.g., StubHub, Inc. User Agreement, http://www.stubhub.com/user_agreement (last visited Jan. 23, 2009).

2. See, e.g., eBay, Your User Agreement, http://pages.ebay.com/help/policies/user-agreement.html?_trksid=m40 (last visited Jan. 23, 2009) (“Liability”).

3. See, e.g., Blogger Terms of Service § 6, <http://www.blogger.com/terms.g> (last visited Jan. 23, 2009) (“Intellectual Property Rights”) (“By submitting, posting or displaying Content on or through Google services which are intended to be available to the members of the public, you grant Google a worldwide, non-exclusive, royalty-free license to reproduce, publish and distribute such Content on Google services for the purpose of displaying and distributing Google services.”).

4. See *infra* notes 45–52.

nature impede expression by another.⁵ Whether or not lawmakers have struck a proper balance between creating incentives to creativity and carving out open space in which those same creators may work, content purveyors online are writing binding rules that upset that balance decidedly in favor of proprietarization.

This Article discusses the TOU phenomenon on the Internet and raises a concern that existing case law appears to support a right of web publishers to graft contract-law protections onto their copyright prerogatives at the expense of the privileged uses that copyright law grants to the public. Part I of the Article sets forth a brief overview of copyright law, focusing specifically on the express limitations that Congress and the courts have imposed on the rights of creators. This Part illustrates how copyright law's doctrine of fair use in particular intends to advance the dual ends of free expression and "the Progress of the useful Arts and Sciences."⁶ Part II discusses the emerging convention on commercial websites that favors "personal use-only" and other forms of TOU that significantly encumber fair and other copyright-privileged public uses. Part II goes on to discuss the implications of these use restrictions for online expression, particularly at the grassroots level. Part III explains that the use-restrictive TOU that (purportedly) govern user access to published web content are an outgrowth of "end user license agreements" that computer programmers appended to software deliverables. This Part considers several potential defenses to the enforcement of TOU — questions of contract formation, copyright preemption, unconscionability, and the First Amendment specifically. The decisions of courts that have addressed these defenses to date, largely in the context of software licensing, point to the enforcement of use restrictions against web users who would otherwise have sound legal defenses to a copyright infringement claim.

Part IV argues that, with respect to the preemption, unconscionability, and constitutional defenses, success or failure of the defense should turn — at least initially — on the extent to which the contract was freely bargained and the user obtained fair value in exchange for his or her waiver of lawful uses of the content. Courts have so far declined to consider that in typical browsewrap or clickwrap presentations, that TOU essentially allow private parties to override, unilaterally and in their favor, the careful balance U.S.

5. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 560 (1985).

6. U.S. CONST. art. I, § 8, cl. 8.

copyright law strikes between proprietary rights and public privileges. As Part IV notes, tiered pricing and more complicated content delivery models may make it difficult for courts to identify free and fair, and therefore enforceable, waivers of lawful uses of web content. However, the most common, one-option browse- or clickwrap presentation of personal use-only restrictions is a straightforward case that cries out for invalidation by the courts if the fair use and the “idea/expression dichotomy,” among other well-regarded compromises of copyright, are to subsist on the Internet as they do offline.

I. THE COPYRIGHT ACT’S INCENTIVES TO CREATIVITY AND INDULGENCES TO EXPRESSION

It is worthwhile at the outset to consider briefly the scope and extent of rights a content creator acquires by the Copyright Act,⁷ and specifically, the extent to which Congress and the courts have carved out from creator rights an area of privileged conduct. This includes, but is not limited to, fair use that the broader public may practice conducive towards the end of fostering a deliberative, critical culture consistent with First Amendment values. The Copyright Act confers certain exclusive rights upon the creators of copyrightable works, *i.e.*, works of expressive content “fixed in a tangible medium of expression.”⁸ The “bundle of discrete exclusive rights” reserved to copyright owners includes the rights to reproduce, distribute, perform, and display copyrightable works, as well as to prepare derivative works based on the copyrighted material.⁹ The Copyright Act affords copyright owners a variety of remedies against persons who infringe their exclusive rights. A rightsholder may sue an infringer for actual damages resulting from the infringement.¹⁰ The law also permits a content owner to elect to accept “statutory damages” within a range set by Congress. A court has the discretion to award statutory

7. 17 U.S.C. § 102 (2006).

8. *Id.* § 102(a). (The statute enumerates specific kinds of works that Congress has deemed eligible for copyright protection, including “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works”).

9. *New York Times Co. v. Tasini*, 533 U.S. 483, 495 & n.4 (2001) (quoting 17 U.S.C. § 106) (internal quotation marks omitted).

10. 17 U.S.C. § 504(a)(1) (2006).

damages ranging from \$750 to \$30,000 for each work infringed.¹¹ Equitable remedies are available to rightsholders as well: they may sue to enjoin further infringing conduct,¹² and under certain circumstances a court may issue an order mandating the impound or destruction of infringing material.¹³

Of course, the “ultimate aim” of copyright law is to supply ownership incentives sufficient “to stimulate artistic creativity for the general public good.”¹⁴ This much is apparent from the constitutional provision that empowers Congress to legislate in this area: Article I’s Copyright Clause grants Congress the authority “[t]o promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”¹⁵ The exclusive rights and remedies for infringement set forth in the Copyright Act are significant, but an author’s rights are not absolute. The Constitution mandates, for example, that copyrights not endure for an unlimited or indefinite period but “for limited Times,” and the copyright laws in Title 17 of the U.S. Code provide consistently with that mandate.¹⁶ Not all works have the same copyright period,¹⁷ but in every case the law contemplates a moment at which a copyrighted work lapses into “the public domain” — the body of works that are no longer (or never were) subject to copyright protection and may be freely reproduced, distributed, performed, and displayed.¹⁸

For material still under copyright protection, Congress and the courts have determined that further allowances to the public are

11. 17 U.S.C. § 504(c)(2) (2006) (A court may reduce a statutory damages award to \$200 per work infringed, if it finds that the defendant “was not aware and had no reason to believe” he or she was infringing. If a plaintiff is able to establish that the infringement was willful, the court may award damages of up to \$150,000 per work infringed).

12. 17 U.S.C. § 502 (2006).

13. 17 U.S.C. § 503 (2006).

14. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

15. U.S. CONST. art. I, § 8, cl. 8.

16. *See Eldred v. Ashcroft*, 537 U.S. 186, 199–204 (2003) (holding that repeated extensions to the copyright term are not inconsistent with the Constitution’s “limited Times” mandate, because the extended terms still do expire within a definite period).

17. *See* 17 U.S.C. §§ 302–304 (2006).

18. *See, e.g.,* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 360–64 (1999) (discussing a proper definition for the term “public domain”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (1990) (defining the term as “a true commons comprising elements of intellectual property that are ineligible for private ownership”).

appropriate. A rightsholder cannot absolutely restrict uses of copyrighted content that implicate the exclusive rights of 17 U.S.C. § 106.¹⁹ The Copyright Act enumerates a number of specific uses of copyrighted material for which the user will bear no infringement liability.²⁰ For example, “libraries and archives” enjoy a statutory privilege to make and keep archival copies of copyrighted works in their collections.²¹ The law also exempts from infringement the “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction,”²² as well as any “performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.”²³

Most significantly, U.S. law grants the public a privilege to make “fair use” of copyrighted works.²⁴ By statute, copyright law privileges the limited use — so long as it is fair — of copyrighted material for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”²⁵ The fair use doctrine is, by design, flexible and open-ended.²⁶ The Copyright Act calls upon courts to apply a four-factor test in assessing the merit of fair use defenses: courts are to consider the nature and purpose of the defendant’s use of the work, the nature of the copyrighted work, the amount and substantiality of the work that defendant used, and the effect of the defendant’s use on the copyright owner’s ability to market the work in question.²⁷ Fair use is therefore a very fact-intensive question; the contours of the privilege are drawn and redrawn incrementally, on a case-by-case basis.²⁸

19. See 17 U.S.C. § 106 (2006).

20. See generally 17 U.S.C. §§ 108–112, 119, 121–122 (2006).

21. *Id.* § 108.

22. *Id.* § 110(1); see also *id.* § 110(2) (Somewhat more limited, and conditional, privileges are available to instructors who conduct classroom exercises remotely, as in distance learning environments).

23. *Id.* § 110(3).

24. *Id.* § 107.

25. *Id.*

26. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 20–21 (2001).

27. 17 U.S.C. § 107; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560–61 (1985).

28. See, e.g., *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (observing that “the task [of determining fair use] is not to be simplified with bright-line rules, for the statute, like the

Accordingly, although they are not listed among the “heartland” fair uses in 17 U.S.C. § 107, myriads of other uses of copyrighted material have been recognized by courts as “fair.”²⁹

The fair use doctrine reflects the longstanding conviction of lawmakers that although copyright protection serves as “an engine of free expression,”³⁰ the public must enjoy some limited privilege to borrow and build upon the works of others.³¹ If, as the Supreme Court has written, copyright is to be the engine of creativity and expression, then existing works — in copyright and out — supply that engine’s fuel. Indeed, the Supreme Court recently observed that the doctrine of fair use, along with the law’s distinction between idea and expression, is a “built-in First Amendment accommodation” that obviates the need for further constitutional review of the copyright laws.³² The First Amendment depends on fair use to keep copyright law from restricting free expression unduly; copyright law depends on fair use to enable the continued generation of expressive works for it to protect.³³ Otherwise the copyright scheme suffocates itself.³⁴

doctrine it recognizes, calls for case-by-case analysis,” and noting that the examples of fair use in § 107 are “illustrative and not limitative”) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994)).

29. For example, courts have ruled that incursions on the exclusive rights of copyright owners may be appropriate toward the end of parody. See *Campbell*, 510 U.S. at 593 (for a collage); see *Blanch*, 467 F.3d at 258–259 (for the reverse engineering of software); see, e.g., *Bowers v. Baystate Tech., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003); see *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006) (for indexing web content to make it computer-searchable).

30. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1985).

31. See *Campbell*, 510 U.S. at 575–76 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, J.) (“In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”); see *Carey v. Kearsley*, 170 Eng. Rep. 679, 681 (K.B. 1803) (Ellenborough, J.) (“[W]hile I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.”); see also *Litman*, *supra* note 18, at 966 (“[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.”).

32. *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (“[W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”).

33. See *Netanel*, *supra* note 26, at 285 (1996) (describing the “precarious balance” that copyright law endeavors to strike between the cross-purposes of “encourag[ing] authors to create and disseminate original expression” and “promoting public education and creative exchange.” “If copyright is cast too narrowly,” *Netanel* writes, “authors may have inadequate incentives to produce and disseminate creative works or may be unduly dependent on the support of state or elite patrons. If copyright extends too broadly, copyright owners will be able to exert censorial control over critical uses of existing works or may extract monopoly rents for access, thereby chilling discourse and cultural development.”).

Clearly, copyright law's charge and challenge is to strike an ideal balance that maximizes both property-based incentives to creators and the access and usage rights other speakers require in order to express themselves (a constitutional value) in their own original works (a copyright value). In their rulings on copyrightability and fair use, courts are constantly calibrating and adjusting the scales, and commentators are always ready with criticism on the direction the law is taking.³⁵ This Article leaves for another day the question of what apportionment of property rights and public use privileges would be ideal. Of more immediate concern to this article is the existential threat that website terms of use pose to fair use and other legal limitations on copyright protections.

II. THE TERMS OF USE CRISIS

Websites of all stripes, commercial³⁶ and nonprofit³⁷ alike, commonly post "terms of use" to govern their relationships with web browsers. Sites may title them "terms of service," "user agreements," or simply "terms of use," but what defines TOU is the intention of websites to bind users to them on a contract theory; the site conditions

34. Judge Leval prefers a "strangling" analogy, but his point is the same. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109–10 (1990); *see also, e.g.*, Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 246 (1988) ("In attempting to accommodate these conflicting policies, the fair use doctrine addresses the fundamental paradox of copyright law, and indeed of all intellectual property law: the exclusive rights granted to authors may hinder the creation of new works from old ones, while at the same time providing the financial incentives without which the old works might never have been created.").

35. Two common complaints are that courts are retrenching on fair use privileges in the face of powerful publishing litigants. *See, e.g.*, Netanel, *supra* note 26, at 21–22 (expressing concerns that a "market-centered view of fair use has steadily gained ground" in the courts, as courts "have repeatedly invoked the bare possibility of licensing in potential markets for the copyright holder's work to deny fair use," and that "courts have denied fair use even where the copyright owner's avowed purpose is to suppress publication of material that might show the copyright owner in an unfavorable light," and that fair use is so flexible and open-ended as to offer no useful, predictive guidance to the public); *see, e.g.*, Leval, *supra* note 34, at 1105–07 (1990) ("Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes.").

36. *See, e.g.*, Google Terms of Service, <http://www.google.com/accounts/TOS?loc=US> (last visited Jan. 23, 2009); Bucknuts Terms of Use, <http://bucknuts.com/termsfuse/> (last visited Jan. 23, 2009); CNN Interactive Service Agreement, http://www.cnn.com/interactive_legal.html (last visited Jan. 23, 2009).

37. *See, e.g.*, Amnesty International 2009 Report, Terms and Conditions, <http://thereport.amnesty.org/eng/Terms%20and%20Conditions> (last visited Jan. 23, 2009); Internet Archive Terms of Use, Privacy Policy, and Copyright Policy, <http://www.archive.org/about/terms.php> (last visited Jan. 23, 2009); United States Chamber of Commerce Terms and Conditions, <http://www.uschamber.com/terms> (last visited Jan. 23, 2009).

a user's access on his or her agreement to abide by the terms.³⁸ The specific conditions that a site imposes on users through its TOU are limited only by the imagination of the persons (usually lawyers) who draft them.³⁹ However, certain elements recur, most notably, limitations on liability and restrictions on the use of content posted on the site and made available to the user.⁴⁰ Although Section III.B.1 of this Article will discuss the question of whether a contract is formed in the first instance — such that any of a site's posted TOU might be enforceable against a user who never saw the terms or made any gesture of assent to them — the remainder of the Article will consider the cases for and against the enforcement of content use restrictions.

A. *The TOU Phenomenon*

Not all websites advance TOU, and not all of those that do impose use restrictions on persons who access site pages.⁴¹ For that matter, sites that do carry use-restrictive terms do not make their content available on identical terms, although a certain, very limited scope of licensed uses has come to predominate. The *New York Times* website, for example, propounds "Terms of Service" by which anyone who "choose[s] to use the NYTimes.com service" is deemed to have agreed "to abide by all of the terms and conditions of this Agreement between you and The New York Times on the Web."⁴² The *Times* Terms of Service provides:

38. In this respect terms of use are distinct from copyright notices that, short of attempting to impose restrictions as content terms, simply state what users may or may not do with the site's copyrighted material. *E.g.*, Brewster Kaleidoscope Society, <http://www.brewstersociety.com/> (last visited Jan. 23, 2009) ("All text, images, graphics, animation, videos, music and other materials on this website are subject to the copyright and other intellectual property rights of GM. These materials may not be reproduced, distributed, modified or reposted to other websites without the express written permission of GM.") GM.com, Copyright and Trademark, <http://www.gm.com/copyright/> (last visited Jan. 23, 2009); SGVTribune.com, Copyright Notice, <http://www.sgvtribune.com/Copyright> (last visited Jan. 23, 2009) ("All text, photos, graphics, artwork and other material on the San Gabriel Valley Tribune site are copyrighted and may not be published, broadcast, rewritten or redistributed without permission.").

39. *See, e.g.*, *Internet Archive v. Shell*, 505 F. Supp. 2d 755, 760-61 (D. Colo. 2007) (describing terms of use that, *inter alia*, assessed a \$50,000 fee for a user's reproduction of any single web page and granted the site's proprietor "a perfected security interest of \$250,000 'per each occurrence of unauthorized use' of the website in all of the user's land, assets and personal property").

40. *See, e.g.*, eBay User Agreement, *supra* note 2 (limitations of liability); *infra* notes 45-52, 87-89 (use restrictions).

41. *See infra* text accompanying notes 80-89.

42. NYTimes.com Terms of Service § 1.1, <http://www.nytimes.com/ref/membercenter/help/agree.html> (last visited Jan. 23, 2009).

You may not modify, publish, transmit, participate in the transfer or sale of, reproduce (except as provided in Section 2.3 of these terms of service), create new works from, distribute, perform, display, or in any way exploit, any of the Content or the Service (including software) in whole or in part.⁴³

Section 2.3's indulgences extend to "personal use-only," and the section takes pains to add that "[c]opying or storing of any Content for other than personal use is expressly prohibited," absent permission from the Times.⁴⁴ Hard-copy editions of the New York Times are not sold subject to personal use restrictions. This "personal use-only" license is customary for brand-name content sites. Most major media websites contain TOU with use restrictions similar in scope to the New York Times's.⁴⁵ Local news sources have embraced the personal use-only trend as well.⁴⁶ Online retailers,⁴⁷ search engines,⁴⁸ Internet-only publications,⁴⁹ state government websites,⁵⁰ corporate sites,⁵¹

43. *Id.* § 2.2.

44. *Id.* § 2.3.

45. *See, e.g.,* Walt Disney Internet Group Terms of Use § 2, <http://disney.go.com/corporate/legal/terms.html> (visited Jan. 23, 2009) (governing, *inter alia*, Disney.com, ABC.com, ABCnews.com, ESPN.go.com) ("one copy . . . for your personal, noncommercial home use only"); MSNBC.com Terms & Conditions, <http://www.msnbc.msn.com/id/3303540/> (visited Jan. 23, 2009) ("Restrictions on Use") ("personal, non-commercial use only"); LATimes.com Terms of Service, <http://www.latimes.com/services/site/lat-terms,0,6713384.story> (visited Jan. 23, 2009) ("Copyright") ("a single copy for . . . your personal, non-commercial use"); British Broadcasting Corp. Terms of Use § 4, <http://www.bbc.co.uk/terms/> (visited Jan. 23, 2009) ("personal, non-commercial use"). *See also* Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 48 (2007) ("Super-copyright provisions are nearly universal. If you have surfed the web, bought a computer, done online banking, ordered flowers, purchased a plane ticket, downloaded software, listened to music on iTunes, or watched a video on YouTube, you have entered into a contract and agreed not to make use of the material you encountered.")

46. *See, e.g.,* Terms of Use for and.com, http://www.adn.com/help/user_agreement/ (last visited Jan. 23, 2009) ("Copyrights and Trademarks"); The Vindicator Web Site Terms of Use and Availability § 2, <http://www.vindy.com/legal/tou/index.php> (last visited Jan. 23, 2009).

47. *See, e.g.,* Amazon.com Conditions of Use, <http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=508088> (last visited Jan. 23, 2009) ("License and Site Access"); Sears.com Terms of Use, http://www.sears.com/shc/s/nb_10153_12605_NB_Cstermservice?adCell=AF (last visited Jan. 23, 2009) ("Use of the Site/Services," "Restrictions on Rights to Use").

48. *See, e.g.,* Yahoo! Terms of Service § 18, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited Jan. 23, 2009).

49. *See, e.g.,* WebMediaBrands Inc. Web Site User Agreement § 1, <http://www.webmediabrands.com/corporate/legal.html> (last visited Sep. 23, 2009) (governing mediabistro.com); Slate User Agreement and Privacy Policy § 4(a), <http://www.slate.com/id/2111949/> (last visited Jan. 23, 2009).

50. MyFlorida.com Copyright Statement: Conditions of Use § 1, <http://www.myflorida.com/myflorida/copyright.html> (last visited Jan. 23, 2009); Kansas.gov

and the websites of NGOs⁵² all incorporate “personal use-only” restrictions.

Personal use-only TOU restrictions are so much the norm that the Practicing Law Institute promotes them in a form “Sample Terms of Use Agreement”:

Limited Right to Use. The viewing, printing or downloading of any content, graphic, form or document from the Site grants you only a *limited, nonexclusive license for use solely by you for your own personal use* and not for republication, distribution, assignment, sublicense, sale, preparation of derivative works or other use. *No part of any content, form or document may be reproduced in any form* or incorporated into any information retrieval system, electronic or mechanical, *other than for your personal use* (but not for resale or redistribution).⁵³

Some websites are still more restrictive, imposing terms that permit no unauthorized reproduction or distribution of site material, in whole or in part, and without exception.⁵⁴

Terms of Use Agreement, http://www.kansas.gov/about/terms_of_use.html (last visited Jan. 23, 2009) (“Copyright,” “Limited Right to Use”).

51. See, e.g., McDonalds Internet Site Terms and Conditions, <http://www.mcdonalds.com/terms.html> (last visited Jan. 23, 2009) (“Restrictions on Use”); Microsoft.com, Information on Terms of Use, <http://www.microsoft.com/info/copyright.msp> (last visited Jan. 23, 2009) (“Personal and Non-Commercial Use Limitation”).

52. See, e.g., Amnesty International 2009 Report Terms and Conditions, *supra* note 37.

53. Richard D. Harroch, *Legal Issues Associated with the Creation and Operation of Websites*, in 1 FOURTH ANNUAL INTERNET LAW INSTITUTE 537, § 19, at 596 (Practicing Law Inst. ed., 2000) (emphasis added). Another article encourages websites to make “offensive use” — pun not apparently intended — of TOU to confer quasi-copyright protection on data not subject to copyright protection:

Web sites will frequently disclose valuable content to the public, such as pricing data, which might not otherwise be protected by copyright laws. The inclusion of a clause limiting the commercial use of such data by Web site users can be enforced against competing businesses that collect or use such data in an unauthorized manner.

Adam R. Bialek & Scott M. Smedresman, *Internet Risk Management: A Guide to Limiting Risk Through Web Site Terms and Proactive Enforcement*, 20 No. 11 INTELLECTUAL PROPERTY & TECH. L. J. 1, 5 (2008).

54. See, e.g., CBS Interactive Site Terms of Use, http://www.cbsinteractive.com/terms_of_use.php (visited Jan. 23, 2009) (governing, *inter alia*, ZDNet.com, “Tech News, Blogs, and White Papers for IT Professionals”) (“You may not modify, publish, transmit, participate in the transfer or sale of, reproduce, create derivative works of, distribute, publicly perform, publicly display, or in any way exploit any of the materials or content on our sites in whole or in part.”); Pitchfork Terms of Use, <http://www.pitchfork.com/terms> (visited Jan. 23, 2009) (“Any reproduction, copying or redistribution of the Materials or design elements of the Website for any purpose are strictly prohibited without the express written consent of Pitchfork . . .”).

B. Implications of Restrictive TOU for Online Expression

The TOU described above certainly prohibit users from engaging in conduct that the Copyright Act would tolerate, either as fair use, use subject to statutory exemption, or use of material that would not be protected by copyright. Fair use extends much further than the reproduction of another's material for "personal, noncommercial use." It is not obvious, and far from settled, what "personal" means in these TOU, which tend not to define the term. It seems fair to assume, however, that "personal" means "for personal consumption," and that any further distribution of a site's content by the user to a third party — on, or offline — would not pass as "personal." The Copyright Act privileges the public to use portions of copyrighted material "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research,"⁵⁵ all of which necessarily entail the communication of the copyrighted material to a third party. Consider the case in which a blogger wishes to discuss an article published in the *New York Times*. The blogger can link to the article online, but in order to discuss a particular segment of the article, he or she might choose to copy over that segment of the article in a block quotation. Publication of a blog post with that block quote would violate the "agreed" usage restrictions on NYTimes.com, because the publication would not be a "personal" use of the content made available there.⁵⁶ And if the blogger were established or influential enough to charge users to access the blog's content or earn any revenue whatever from the blog — say, from advertising on the site — the use would offend the TOU as "commercial," too.

Consider another example: a defense contractor or environmental NGO publishes a press release on a website subject to personal use-only TOU. This time the influential blogger uses an excerpt from the press release in a blog entry that criticizes the contractor/NGO. As part of an effort to suppress online criticism of the organization, the contractor/NGO's attorneys bring suit against the blogger. Although fair use would surely protect the blogger against a copyright claim — the blogger deploys the content for a

55. 17 U.S.C. § 107 (2006).

56. See NYTimes.com Terms of Service, *supra* note 42, §§ 2.2–2.3. This result is not only objectionable from the standpoint of free expression and constructive online debate, but it demonstrates the bizarre disjunction between hard-copy media and its online counterpart. The blogger would be free to "use" a portion of the article if he or she obtained it from a purchased newspaper copy — or even on microfilm or microfiche. Content available in those formats is subject to no contractual restrictions in excess of what the Copyright Act forbids. If the blogger clips the very same material from NYTimes.com, the *Times* has a breach of contract claim.

“transformative” use: critical commentary — the blogger has no fair use defense against a contract claim based on the site’s TOU. By selecting when and where to enforce its TOU, a person or organization can use contract law to place severe restrictions on how the public may speak of it.

Other examples of forbidden fair uses abound. Google copies entire websites into its searchable index. When it displays search results, Google post links to “cached” copies of web pages on its own servers. Users can click to the cached copies to find pages that crop up in search results but may no longer subsist on the web; the cached copies also highlight the user’s search terms, so that users may find them more easily. At least one court has upheld these unauthorized reproductions and displays as fair uses,⁵⁷ even though they would offend restrictive TOU. Large commercial websites will not object to Google indexing their sites (indeed, most websites would not), but if they so chose, their TOU would give them a cause of action. Similarly, efforts to crawl and copy evanescent web content into archives for posterity can collide — and already have, in at least one case⁵⁸ — with TOU that permit only personal use of a site’s content. Courts have not yet ruled that copyright law would allow a person to archive another’s web content, but the Google cache page decisions point to a fair use finding.⁵⁹

Personal use-only TOU would also support claims against users who could otherwise point to express exceptions to liability in the copyright laws. The Copyright Act’s face-to-face teaching exemption⁶⁰ allows a university lecturer — indeed any teacher at a non-profit educational institution — to read aloud text from the web

57. *Field v. Google*, 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006). *Cf. Parker v. Google*, 422 F. Supp. 2d 492, 497-98 (E.D. Pa. 2006), *aff’d*, 2007 WL 1989660 (3d Cir. July 10, 2007) (not reaching the fair use question, holding instead that Google’s conduct could not violate the Copyright Act because the alleged unauthorized copying and distribution of cached web pages could not be said to be “volitional acts” on Google’s part). In both *Field* and *Parker* Google asserted the further defense that a “system caching” safe harbor, enacted as part of the DMCA, precluded any copyright infringement liability. *See id.* at 498 (citing *Field*, 412 F. Supp. 2d at 1122-25). The system caching safe harbor, contained in 17 U.S.C. § 512(b) (2006), applies only to claims of copyright infringement, and certainly not to contract claims predicated on TOU.

58. *See Internet Archive v. Shell*, 505 F. Supp. 2d 755, 760-61 (D. Colo. 2007).

59. Indeed, the text on a website’s TOU page is itself subject to the terms: this Article’s limited quotation of the language of website TOUs, as in footnote 46, would violate the TOU. Although we assume above that the hypothetical blogger could post a link to a TOU-ed website, the site owner could even colorably argue — though without guaranteed success — that the use of URLs associated with web pages is subject to restrictive TOU. An aggressive website could leverage personal use-only TOU to control who links to the site.

60. 17 U.S.C. § 110(1) (2006).

in class, or even display it to his or her students on an overhead projector. Such use would hardly qualify as “personal.” Performance or display of web content in a religious service is also a privileged use under the Copyright Act.⁶¹ Restrictive TOU effectively override the limited rights of libraries to archive the works they cover under 17 U.S.C. § 108.

In short, if courts treat them as enforceable, personal use-only or stronger TOU would grant anyone who distributes content on the Internet the ability to write fair use and other statutory privileges out of the law, at their option. To be sure, a website plaintiff would have only a contract claim against a violator, and not a copyright claim — and the remedies available in contract are less extensive than under the Copyright Act. The website owner would not have the hammer of statutory damages to brandish against infringers. It would have to prove actual damages flowing from the violation, which would be a difficult and more costly proposition in litigation, leading often to a less significant damages award. Injunctive relief could still be available, however: a TOU claimant could demand in its complaint that the court issue an order requiring full compliance with the TOU.⁶² Such an order would compel a user of termed-up web content to stop using it.

The consequences of enforcing these TOU would be significant. For centuries the economics of publication in physical media have constricted the flow of expressive works — whether artistic, academic, critical, or political in nature — from their creators to the public. Only so many works can be printed and in only so many copies; only so many works can be shipped, stocked, and shelved.⁶³

61. *Id.* at § 110(3).

62. Software developers commonly litigate for injunctions requiring defendants to adhere to the terms of their end user license agreements. *See, e.g.,* XPEL Techs. Corp. v. Md. Performance Works Ltd., Civ. No. SA-05-0593, 2006 WL 1851703, at *3 (W.D. Tex. May 19, 2006) (“XPEL requests actual damages, exemplary damages, permanent injunctive relief mandating Defendants’ compliance with the terms of the EULA, judgment declaring Defendants’ use of XPEL’s property as unlawful, and attorney’s fees.”); *see e.g.,* Davidson & Assocs., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164, 1167 (E.D. Mo. 2004) (listing “breach of the EULAs and TOU” among the plaintiff’s claims for injunctive relief). Software EULAs operate in a manner very similar to website TOU, and a defendant in a TOU case will be put to the task of distinguishing the groundswell of cases supporting EULA enforcement. *See infra* Part III.

63. Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information and Law*, 76 N.Y.U. LAW. REV. 23, 93 (2001) (“While there is no formal limitation on anyone producing and disseminating information products, the economic realities limit the opportunities for storytelling in the mass-mediated environment and make storytelling opportunities a scarce good.”).

These limitations in turn constrain the diversity of content made available, as content purveyors (or their advertisers) are driven to tailor their works for the broadest possible appeal or approval.⁶⁴ Digital media and the Internet have broken the bottleneck by dramatically reducing the effort and expenditure required to reproduce and distribute expressive works.⁶⁵ Commentators therefore have often noted the great potential of the Internet to promote, as the Copyright Clause would have it, “the progress of Science,” by enabling just about anyone to convey his or her ideas to a worldwide audience, with no regard for the limitations of time and space — and little regard for cost.⁶⁶ A robust fair use privilege is as necessary to enable the production and dissemination of digital works in the 21st century as it has been offline in the past. In fact, the proliferation of contractual restrictions on fair use online threatens to undercut perhaps the most significant benefit of the Internet Age — the ability of any person with a connection to broadcast his or her creative works to anyone else in the world.

Moreover, much has been made of the Internet’s potential to reshape political discourse. The truest deliberative democracy allows all of its constituents to argue and inform on the important matters of the day.⁶⁷ Our First Amendment promotes that ideal, but in practice problems of time and distance complicate matters. The loudest and most omnipresent voices are heard — and in the world of physical media these characteristics tend to coincide with access to capital. A large-scale publisher can disseminate its ideas far and wide and thereby exercise a disproportionate amount of argumentative authority.⁶⁸ For example, an established television network or radio

64. See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS AND ENT’T L.J. 215, 262–64 (1996).

65. E.g., *id.* at 260–61 (“Distribution in a digitized form makes information more accessible by allowing more information to be distributed to more people at less costs.”); see also Note, *Exploitative Publishers, Untrustworthy Media, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2438, 2446–47 (2001).

66. Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1135 (2003); Note, *supra* note 66, at 238, 246–47.

67. See Benkler, *supra* note 64, at 110 (“[A]utonomy, like democracy and robust political discourse, supports a strong normative commitment to attaining an information environment in which stories are told by diverse and antagonistic sources.”).

68. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 163–66 (2004). Trends in copyright law to support the interests of large-scale content purveyors are reinforcing the hegemonies that media companies have acquired through consolidation. See also *id.* at 110 (expressing concern that an “enclosure movement” in copyright law, reflected in extensions to

conglomerate can buy up large swaths of the broadcast band and dominate the airwaves. But the Internet has promised to alter these dynamics. It seeks to ensure that through technology that every voice can be heard (if you can find it), and on largely — if not exactly — equal terms.⁶⁹ Anyone with modest means can start a website or weblog, peddle his or her wares in the marketplace of ideas, and slowly build a business. One accumulates authority “from the bottom up” — on the strength of one’s ideas, and not particularly because of some privileged access to a microphone, printing press, or broadcast transmitter.

The promise of bottom-up democratic participation and deliberation is yet another promise that the Internet will not deliver without unfettered fair use and the other public privileges lawmakers have carved out of copyright. Websites that insist on personal use-only content distribution propose to deliver proprietary content to as many persons who may want it, but to each person individually, at his or her terminal, and the person may make no further use of it. The end user is an endpoint: website TOU consider and reject the notion that the users may themselves wish to be a part of the network — quoting, discussing, building on the content they receive to create works of their own. It is not surprising that the content providers most inclined to adopt overly restrictive terms of use are the content providers that have already grown powerful managing the information-flow scarcities offline.⁷⁰ Entrenched media interests have grown comfortable working in the hierarchical offline paradigm, in which there are media and there are audiences.⁷¹ These organizations do not

the copyright term and the Digital Millennium Copyright Act’s incursions on fair use, is “increasingly subject[ing] the cultural commons from which we draw to form our understandings of the world to the control of a small number of professional commercial producers”).

69. See, e.g., Shyamkrishna Balganesh, *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 BERKELEY TECH. L.J. 1303, 1361 (2007) (“One of the consequences of the internet and the emergence of digital technologies is that it decentralizes and democratizes the process of distribution.”) (citing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)).

70. See Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 25 (1990) (suggesting that “intellectual property, paracopyright, and digital rights management are being invoked . . . to control how ordinary individuals experience the Internet” and describing “a desire for greater control over how individuals will be permitted to use digital networks and digital content”).

71. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 563–65 (2000). Benkler explains that the economics of “mass media markets” have promoted a convention of audiences as passive “consumers,” whereas the Internet, “at least as it was in the 1990s,” holds out the prospect of audiences as “users”:

typically seek to interpose contractual restrictions on fair use of the content they deliver in hard copy. The idea that audiences might *become* media is revolutionary: it was never before so easy for anyone to create and publish a work, and in so doing make use of a preexisting work.⁷² Offline, Publisher B's work makes fair use of Publisher A's work. Online, a million self-publishers can post content that cuts, references, reworks, or even collages Publisher A's work.⁷³ Fair use is a grander proposition and a greater imposition on these publishers in the digital world, but fair use must be allowed and supported there nonetheless.⁷⁴

That there should exist and flourish some publisher-created exception to copyright-privileged uses in digital media is all the more troubling when one considers that content continues to migrate out of physical media into digital space. Reports on the death of physical media — the newspaper, the book — are greatly exaggerated, to be sure. But over time the Internet will surely become the principal forum where content is distributed and where the public meets to inform itself and to deliberate. It will be where one watches Presidential debates and where one argues the merits of the respective candidates, where one buys the new Stereolab album and where one reads and writes critiques of the songwriting. Use-restrictive TOU propose a different, stricter set of rules in the digital environment than

Users sometimes receive information and sometimes rework it and send it to others. They can play the roles of producer and consumer. Their acts of reception are dialogic in the sense that they can easily be mapped as moves in a conversation rather than as endpoints for the delivery of a product.

Id. at 564; *see also* Balkin, *supra* note 70, at 33–34 (2004) (“Internet speech is participatory and interactive. People don’t merely watch (or listen to) the Internet as if it were television or radio. Rather, they surf through it, they program on it, they publish to it, they write comments and continually add things to it. Internet speech is a social activity that involves exchange, give and take. The roles of reader and writer, producer and consumer of information are blurred and often effectively merge.”).

72. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 212 (2006) (observing that the Internet has “fundamentally altered the capacity of individuals, acting alone or with others, to be active participants in the public sphere as opposed to its passive readers, listeners, or viewers.”).

73. Balkin, *supra* note 70, at 33–34.

74. The very structure of the Internet — and the World Wide Web, in particular, with its linking, framing, and embedding protocols — promotes an unprecedentedly referential and cumulative expressive culture. *Id.* at 33. On that basis one could argue that it actually means more to vindicate fair use online than offline: HTML code does not challenge copyright so much as it recognizes the very cumulativity, the interconnectedness of expressive works that underlies the fair use doctrine. The Web enables users to explore these relationships with an ease and convenience they never enjoyed in the hard-copy environment; its protocols assume fair use and draw out its potential.

exist currently in the hard-copy environment. As (or if) digital modes of reproduction and distribution begin to predominate over the less efficient old-school channels, the mainstreaming of these TOU amounts to a frontal assault on fair use itself.

And indeed, when TOU purport to expand the scope of proprietary content beyond what is copyrightable, the promise of street-level publication on matters of public interest grows still dimmer. Mass media organizations exclusively acquire, process, and deliver most of the information that the public receives. In many cases, Big Media and Big Media only have access to an information source: there are only so many chairs in the White House press room, so many opportunities to “embed” reporters with American soldiers in Iraq. Mass media organizations have resources that bloggers do not — full-time investigative reporters on staff, relationships with government sources, or at the least, money to conduct costly fact-gathering. It seems fair and appropriate that media organizations that expend capital to gather information should enjoy the right to profit from their investment; it seems excessive that mass media should dictate terms of use of the information they channel and label that information for personal consumption only — otherwise get permission.⁷⁵ Copyright laws’ distinctions between what is protectable and non-protectable matter — expression of ideas, but not the ideas themselves; original content, but not facts — strike a reasonable, if occasionally imperfect balance between the interests of creators and audiences.⁷⁶ It is not clear that a website with artfully-written TOU could not bring a contract claim for the defendant’s use of facts, ideas, or even public domain content made available there.⁷⁷

Of course, the Internet is a diverse community of information, and not all of its content is locked down on personal use-only terms.

75. The free trade in permissions among large media organizations empowers them together against small-time critics and content generators. For example, one television network might freely grant another permission to use its news programming’s video footage, on the theory that institutions with equivalent, but not identical, access to news coverage have much to gain by pooling footage (so long as each network is able to make first publication of exclusive material). The same mutuality of interest is not apparent when, say, a blogger seeks to use news clips, or facts gathered by news organizations. *See infra* note 77, as reference or jumping-off points for discussion.

76. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985); *see id.* at 588 (Brennan, J., dissenting) (quoting *Sony of Am. Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)); Dratler, *supra* note 34, at 246–47.

77. *See* Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 *FORDHAM L. REV.* 1025, 1063–64 (1998) (observing that “strict limits on commercial re-use . . . are often associated with websites that provide data or information that is primarily factual and thus likely benefits from little or no copyright protection”).

Open-source and open-content advocates have created and promoted standard-form “copyleft” licenses to counter the mainstream trend in restricting web content.⁷⁸ The GNU Project, writer of the open-source Unix operating system software, promulgates a GNU Free Documentation License for anyone to append to their web content.⁷⁹ The Free Documentation License imposes its own range of restrictions — for example, conditions on modification and mass distribution — on content that would likely be delivered unencumbered in hard copy.⁸⁰ Indeed, the license itself states that although “[e]veryone is permitted to copy and distribute verbatim copies of this license document, but changing it is not allowed.”⁸¹ But the Free Documentation License allows largely unrestricted use of the licensed material:

You may copy and distribute the Document in any medium, either commercially or noncommercially, provided that this License, the copyright notices, and the license notice saying this License applies to the Document are reproduced in all copies, and that you add no other conditions whatsoever to those of this License. You may not use technical measures to obstruct or control the reading or further copying of the copies you make or distribute. . . .

You may also lend copies, under the same conditions stated above, and you may publicly display copies.⁸²

Although specifically prepared to license the accompanying documentation for open-source software,⁸³ websites — Wikipedia, most notably — have attached the Free Documentation License to other content as well.⁸⁴

Another open-content initiative, Creative Commons, offers owners of web content a menu of simple licenses to add to their sites. At Creative Commons’s license webpage, a user can check boxes indicating what uses he or she would allow for their content, along

78. Christina J. Hayes, *Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works*, 21 HARV. J. L. & TECH. 567, 585 nn.129, 130 (2008).

79. GNU Free Documentation License v. 1.3, §§ 3, 4 (Nov. 2008), <http://www.gnu.org/licenses/fdl.txt> (visited Jan. 23, 2009).

80. *Id.*

81. *Id.*

82. *Id.* §2

83. *Id.* § 0 (“Preamble”).

84. See Wikipedia, Main Page (“All text is available under the terms of the GNU Free Documentation License.”), http://en.wikipedia.org/wiki/Main_Page (last visited Jan. 23, 2009).

with a jurisdiction for their licenses.⁸⁵ Creative Commons then generates one of a number of licenses to fit the user's specific permutation of preferences; the site presents HTML code that the user can attach to his or her site. The code links to a full explanation of the license provision on the Creative Commons website.⁸⁶ None of the license options available through Creative Commons is as restrictive as the personal use-only terms commonly advanced on the Web.

A license format is attractive to open-content advocates because it enables rightsholders to make their content available on terms more generous than the Copyright Act might, with its static package of statutory exceptions and fair use privileges. Just as closed-content sites use licenses to overlay contract-based restrictions on use that copyright law would not countenance, institutions like the GNU Project and Creative Commons can deploy licenses to shift the allocation of rights and privileges between the creator and users of web content away from copyright's baseline — but in users' favor.

Sites also write TOU that expressly permit fair use. The Commonwealth of Massachusetts website contains TOU that prohibit "any copying or use other than 'fair use' under the Copyright Act."⁸⁷ CNN.com's Interactive Service Agreement strictly prohibits unauthorized reproduction of distribution of site content, but only up to a point: the site allows uses of its content that are "expressly permitted under copyright law."⁸⁸ A number of popular weblogs and online-only publications encourage their readers to make fair or even unfettered use of their content.⁸⁹

Restrictive TOU may thus be the norm in mainstream online media, but practices do vary, and movements like Creative Commons's and the GNU Project have taken steps to promote a culture of open content on the Internet. Activists and web publishers

85. See Creative Commons, License Your Work, <http://creativecommons.org/license/> (last visited Jan. 23, 2009).

86. *Id.* (input data; then follow "Select a License" hyperlink)

87. Mass.Gov Terms of Use, http://www.mass.gov/?pageID=mg2utilities&L=1&sid=massgov2&U=utility_policy_terms (last visited Jan. 23, 2009). By its terms, however, the Massachusetts website would preclude uses subject to statutory exemptions other than fair use. Whether by design or simply by oversight, the Commonwealth's TOU are therefore more restrictive than the Copyright Act.

88. CNN Interactive Service Agreement, *supra* note 37, ¶ 5(B).

89. See, e.g., Daily Kos: State of the Nation, <http://www.dailykos.com/> (last visited Jan. 23, 2009) ("Site content may be used for any purpose without explicit permission unless otherwise specified."), Gawker Media Terms of Use, <http://gawker.com/advertising/legal/> (last visited Jan. 23, 2009) ("Use of Content") (posting a "Some Rights Reserved" Creative Commons license).

are hastening to create a nonproprietary space on the Net — or at least one that lives by the rules and conventions that govern content offline. There still remain, however, great swaths of online content that at least purport to be locked down by contract. This Article’s next Part shows that case law currently on the books would appear to support enforcement of the contracts that websites are foisting on their viewers.

III. TRIED AND POTENTIAL DEFENSES TO ENFORCEMENT OF TOU

Before proceeding to discuss the prospects of legal defenses to enforcement of website TOU, it is worth pausing to consider the preceding generation of software licensing agreements that — not without generating controversy of their own — laid the groundwork for TOU’s frontal assault on copyright-approved expressive uses of content.

A. Software Licensing and TOU

The imposition of terms of use to govern website access has its origin in software sales practices. It has become a routine business practice for software developers not to sell copies of their copyrighted works — as print publishers do with books and magazines — but to sell licenses to use software.⁹⁰ The introduction of end-user license agreements (“EULAs”) predated the extension of copyright protection to computer code; as one court notes, software developers deployed EULAs “to augment trade secret protection in order to protect against unauthorized copying at a time when, first, the existence of a copyright in computer programs was doubtful, and, later, when the extent to which copyright provided protection was uncertain.”⁹¹ Even after computer programs received copyright protection, developers continued to eschew conventional “copy sales” in favor of EULAs, principally toward the end of circumventing the Copyright Act’s “first sale doctrine,”⁹² which allows the purchasers of a copy of a work to

90. *See generally* Adobe Sys., Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1091–92 (N.D. Cal. 2000) (citing abundant expert testimony explaining that the sale of licenses, and not copies, is the predominant business model for software distribution).

91. *SoftMan Prods. Co v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1083 (C.D. Cal. 2001).

92. *See* 17 U.S.C. § 109(a) (2006) (“[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”). Of particular concern to software developers was the possibility that the first sale doctrine might allow buyers to lend or lease software they purchased to third parties. *See*

resell that work free of encumbrance by the copyright holder.⁹³ Courts are not of a single mind on the question whether EULAs can fairly accomplish this result, but the weight of authority supports enforcement of EULA terms that would impair the rights of a copy buyer under the first sale doctrine.⁹⁴

Other licensing restrictions are common. For example, software licensing agreements frequently contain prohibitions on reverse engineering.⁹⁵ The fair use doctrine affords the public a limited privilege to reverse engineer copyrighted software.⁹⁶ However, because the indulgences given to reverse engineering flow from the doctrine of fair use, they only relieve a user of liability for copyright infringement. A software license that expressly or implicitly forbids reverse engineering opens up contractual liability for the reverse engineer, notwithstanding that the practice has been ruled fair use. Software licenses also contain personal use-only provisions — indeed, the similar provisions that appear in website TOU likely find their origin in these license restrictions. As the Ninth Circuit recently

Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 96 n.7 (3d Cir. 1991). By 1990, Congress amended § 109 so that it would prohibit purchasers of a “computer program” from lending, leasing, or renting the program “for direct or indirect commercial purposes,” See 17 U.S.C. § 109(b), but § 109(a) still preserves the right of a software buyer to sell a used computer program outright.

93. *Step-Saver Data Sys.*, 939 F.2d at 96 n.7.

94. *Compare, e.g., SoftMan Prods. Co.*, 171 F. Supp. 2d at 1083–89 (C.D. Cal. 2001), with, e.g., *Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 784–85 (9th Cir. 2006); *Davidson & Assocs., Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164, 1177–78 (E.D. Mo. 2004); *Adobe Sys., Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1060 (N.D. Cal. 2002); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d at 1090–92.

95. *See, e.g., Davidson & Assocs. v. Jung*, 422 F.3d 630, 634 n.4 (8th Cir. 2005) (“Subject to that Grant of Licence hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, *reverse engineer*, derive source code, modify, disassemble, decompile, create derivative works based on the Program, or remove any proprietary notices or labels on the Program without the prior consent, in writing, of Blizzard.” (quoting the EULA in litigation)); *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 203 (3rd Cir. 2002) (“Customer shall not modify, reverse engineer, reverse assemble or reverse compile any Program or part thereof . . .”) (quoting the EULA in litigation); *see also, e.g., United Asset Coverage, Inc. v. Avaya Inc.*, 409 F. Supp. 2d 1008, 1020–21 (N.D. Ill. 2006); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1217 (E.D. Cal. 2005); *Dreamcatcher Software Development, L.L.C v. Pop Warner Little Scholars, Inc.*, 298 F. Supp. 2d 276, 288 (D. Conn. 2004).

96. *See Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003) (citing *Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992)) (“[R]everse engineering object code to discern the unprotectable ideas in a computer program is a fair use.”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520 (9th Cir. 1992) (“Where there is good reason for studying or examining the unprotected aspects of a copyrighted computer program, disassembly for purposes of such study or examination constitutes a fair use.”).

wrote, “By licensing copies of their computer programs, instead of selling them, software developers maximize the value of their software, minimize their liability, control distribution channels, and limit multiple users on a network from using software simultaneously.”⁹⁷ That is, software licenses are written to advance the interests of the developers, whatever they might be, and their terms hardly reflect vigorous arms-length bargaining between the developer and the consumer.

Putting aside the obvious attraction of license-style content distribution — that the licensor is positioned to write its own rules — it was not obvious or intuitive that a license/TOU paradigm should surface to overlay contract terms on users’ access to web content. To be sure, some of the content available online is downloadable software, and it seems logical that software companies would press license terms on software obtained in this manner — just as they do for the software they distribute in physical media. However, the vast majority of the copyrighted content offered on the web is not computer software but written text, graphic illustrations and photographs, digital sound recordings, and audiovisual works rendered in digital format. Such works have less in common with computer software than they do with analogous works distributed in physical media. It is not a business practice of print publishers to sell novels and newspapers with terms of use attached — nor do they purport to sell “licenses” to read copyrighted works instead of actual copies.⁹⁸

But this is not to say that traditional hard-copy media publishers could not, if they so chose, reconfigure their marketing to sell licenses to works rather than complete copies. Record companies already assert this prerogative routinely with respect to “promotional” compact discs issued free of charge to record companies.⁹⁹ If software

97. *Wall Data Inc.*, 447 F.3d at 785 n.9 (citing Christian H. Nandan, *Software Licensing in the 21st Century: Are Software “Licenses” Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555 (2004)).

98. See, e.g., R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 583–84 (2003).

99. *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1058 (C.D. Cal. 2008). UMG distributed advance promotional copies of its recordings to select “insiders”; the CDs contained the following language:

This CD is the property of the record company and is licensed to the intended recipient for personal use only. Acceptance of this CD shall constitute an agreement to comply with the terms of the license. Resale or transfer of possession is not allowed and may be punishable under federal and state laws.

Id. UMG brought copyright claims against Augusto for selling the promotional CDs on eBay in

companies can license computer programs deliverable in CD-ROM formats, there is no obvious reason why publishers might not go a further step to sell licenses to works on CD, rather than CDs themselves.¹⁰⁰ Some 150 years of tradition support a public privilege to make fair use of copyrighted content published in print and other hard-copy formats.¹⁰¹ A restructuring of the hard-copy market — and consumer expectations — to introduce restrictive terms of use alongside these works would be a controversial proposition, at best.¹⁰²

There is not the same long public momentum in favor of fair use of digitized content made available on websites. And there are reasons why web content, although similar in nature to the content in books, newspapers, compact discs and DVDs we buy in hard-copy markets, might cry out for license-style treatment. First, content is made available for display on a website. We conceive of the web as a network of “sites” — “places” that users “visit” to experience content. In this respect a web page is more readily analogized to a theater than to a book — or to a bookstore or newsstand. The local AMC or Loew’s displays movies to the public, provided that the public pays the price of admission. The moviegoer does not receive a copy of the film to take home. Second, web content is quite often made available to the public free of charge: content is often advertisement-supported, or it brings in no revenue at all. A site visitor who accesses content

violation of the license terms.

100. In *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), a century-old copyright case, the Supreme Court looked askance at a publisher’s attempt to impose a condition on book buyers such that resale of a work for under \$1.00 would qualify as copyright infringement. The first-sale doctrine mandated a finding of noninfringement. The *Bobbs-Merrill* Court was ruling on a copyright claim, not a contract claim, and cases supporting the use of EULAs have relied on this fact to reconcile their holdings to the Court’s. *E.g.*, *Adobe Sys., Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1055 (N.D. Cal. 2002) (“In this case, Adobe has elected to distribute its products via license rather than sale. Adobe alleges that their OCRA and EULA are clearly licenses.”); *id.* at 1060 (citing *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1091 (N.D. Cal. 2000)) (holding that the terms of Adobe’s EULA support a license, such that the first-sale doctrine does not apply). Had the publisher in *Bobbs-Merrill* established a binding contract, with the \$1.00 resale minimum as a term, its case would be no different from any of the Adobe cases — except for the nature of the copyrighted work.

101. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM & MARY L. REV. 1525, 1588 (2003) (tracing fair use “[a]s a formal concept” back to two 19th-century decisions by Justice Story, *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), and *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136)).

102. One commentator does note that “[b]ooks and other printed works, the most traditional of copyrighted works, are increasingly accompanied by copyright notices that . . . purport to restrict unauthorized re-use of the copyrighted material.” Madison, *supra* note 77, at 1065 (citing a copyright notice in a case book on intellectual property law). Such notices do not give rise to contract rights — they only strictly forbid noncommercial uses and nowhere suggest that the buyer is bound by contract to comply with the prohibition.

for free may not feel the same entitlement to make use of it as he or she does the book bought at Barnes & Noble.

What makes the Internet unique — and uniquely problematic — is that by their nature, websites simultaneously display content and make it available for reproduction and further distribution.¹⁰³ Web browsing applications commonly enable users to cut and paste text, to download audio and video where websites allow it, to right-click on individual images to save copies, and indeed to save entire web pages to personal hard drives. Thus, as much as a user's direct interface with a website is display-oriented, the user has at his or her fingertips the means to copy some or all of the site's content. These reproductive faculties are secondary to the web experience — one has to go to the site and view the content before taking a copy for keeps, and it is often, if not almost always, sufficient for a user simply to experience the content on the site — and to the site owner, who is principally concerned with driving user traffic to the website, these faculties are cause for concern, for obvious reasons. A website's TOU page is its box office, the "place" where it imposes conditions on access. The movie theater is content simply to collect the price of admission before displaying the film. The website, understanding that one who accesses content has the capacity to make innumerable perfect copies of its content, may find itself compelled to impose conditions on what users can do with the copies.

Some proponents of website TOU have sought to enforce terms against users who have acted outside of the posted guidelines. Cases on the enforceability of TOU have trickled into the law reports, most notably on the question of contract formation: can a user be bound to terms to which he or she has made no affirmative gesture of assent and for that matter, may not even have seen on the site? Courts are moving in the direction of a yes answer. Other defenses that might be available to users — preemption, unconscionability — have been asserted, more or less unsuccessfully in cases involving software end user license agreements.¹⁰⁴ In fact, most of the currently applicable precedent is directed at the enforceability of EULAs.¹⁰⁵ In their

103. Indeed, the display only occurs by way of the user's web browser application copying data from the website's content server and displaying the copy to the user. In fact, browser applications universally contain a feature whereby web content is "cached" locally on a user's hard drive for faster retrieval and display when the user makes subsequent visits to the website.

104. *Bowers v. Baystate Tech., Inc.*, 320 F.3d 1317, 1324 (Fed. Cir. 2003); *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

105. See *infra* Part III.B. See generally *Bowers*, 320 F.3d 1317 (software license agreement); *ProCD*, 86 F.3d 1447 (software license agreement); *Vault Corporation v. Quaid*

efforts to uphold a widely-supported distribution practice in an industry not particularly suited to copyright protection, courts have opened the door to broader use of content licensing that impinges on the privileges reserved to the public by copyright law. The law on the books points, regrettably, to full enforcement of use-restrictive TOU.¹⁰⁶

B. Potential Defenses to TOU

Attempts to enforce website TOU are susceptible to at least four defenses. First, depending on how a TOU is presented to a user, and to what extent a site requires and records any gesture of assent to the terms, a user might argue that he or she never entered into a contract at all with the TOU's proponent. Second, when the user's TOU violating conduct implicates the exclusive rights afforded to content owners by the Copyright Act, the user is positioned to argue that federal law ought to preempt the site's contract claim under state law. Third, a user might, as well, argue that the TOU are unconscionable. Reference to contract formation principles, preemption, and unconscionability defenses are common in the case law.¹⁰⁷ A fourth defense, sounding in the First Amendment, has not been adjudicated or considered by any court, but may serve as a useful surrogate and constitutional backstop in contract cases, for which fair use is no defense. I discuss these four defenses below.

1. Contract Formation.

The manner in which websites foist TOU upon users raises litigable questions of contract formation — and specifically, whether the user had sufficient notice of the proposed terms and agreed to them. Questions like these have found their way to court since software developers first propounded EULAs that purported to bind end users upon opening the software's packaging, loading the program, and using it.¹⁰⁸ These licenses came to be known as

Software Ltd., 847 F.2d 255 (5th Cir. 1988) (software license agreement); and *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (Involving both EULA and TOU).

106. See generally *Bowers*, 320 F.3d 1317 (software license agreement); *ProCD*, 86 F.3d 1447 (software license agreement); *Vault Corporation*, 847 F.2d 255 (5th Cir. 1988) (software license agreement); and *Davidson & Assocs.*, 422 F.3d at 639 (Involving both EULA and TOU).

107. See generally *Bowers*, 320 F.3d 1317 (software license agreement); *ProCD*, 86 F.3d 1447 (software license agreement); *Vault Corporation*, 847 F.2d 255 (software license agreement); and *Davidson & Assocs.*, 422 F.3d at 639 (Involving both EULA and TOU); see also *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000).

108. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241–42 (1995) (“Vendors intend that, by opening the plastic wrap and actually using the

“shrinkwrap” licenses, after the practice of delivering the terms on a sheet of paper sandwiched between the boxed software and its transparent plastic wrapper.¹⁰⁹ Courts without fail pronounced the terms of such licenses unenforceable against users, until a Seventh Circuit case, *ProCD v. Zeidenberg*¹¹⁰ turned the tide.¹¹¹

The defendant Zeidenberg raised the usual, anticipated defense to breach of a shrinkwrap contract term: he argued that he never agreed to the term when he purchased the software in question. In rejecting this argument, Judge Easterbrook looked to the Uniform Commercial Code — he noted that a vendor “may invite acceptance by conduct,” and “a buyer may accept by performing the acts the vendor proposes to treat as acceptance.”¹¹² The buyer had “an opportunity to read the license at his leisure,” and if he found the terms unacceptable, he could return the software — so long as he had not used it first.¹¹³ Commentators immediately found fault with the court’s reasoning in *ProCD*,¹¹⁴ but the decision broke the seal on the enforcement of shrinkwrap license terms, and at least as many courts have upheld shrinkwrap terms since *ProCD* as have rejected them.¹¹⁵

Websites typically present TOU to users in one of two formats: “clickwrap” or “browsewrap.” A clickwrap site presents TOU to the user and requires him or her to “click through,” *i.e.*, check a box indicating that he or she agrees to the contract’s terms.¹¹⁶ In these cases, a website owner retains (or should retain) in its records evidence that the user did see and affirmatively express assent to the

software, customers will bind themselves to the terms of the shrinkwrap license.”); *see also*, *e.g.*, *ProCD*, 86 F.3d 1447 (considering whether a party could be bound by shrinkwrap terms received after purchasing software); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (same).

109. Lemley, *supra* note 108, at 1241.

110. *ProCD*, 86 F.3d 1447.

111. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 468 (2006).

112. *ProCD*, 86 F.3d at 1452.

113. *Id.*

114. *E.g.*, Robert J. Morrill, Comment, *Contract Formation and the Shrink Wrap License: A Case Comment on ProCD, Inc. v. Zeidenberg*, 32 NEW ENG. L. REV. 513, 515 (1998) (concluding that the court’s reasoning was “flawed,” that the court “overlooked some fundamentals of contract formation,” and that it “should not be looked to as precedent” in consumer retail transactions); Christopher L. Pitet, Comment, *The Problem with “Money Now, Terms Later”*: *ProCD, Inc. v. Zeidenberg and the Enforceability of “Shrinkwrap” Software Licenses*, 31 LOYOLA L. REV. 325, 340–47 (1997) (“A Contract Was Formed When Zeidenberg Purchased the Software;” “The UCC Does Not Sanction ‘Money Now, Terms Later’”; “The Holding in *ProCD* Exploits the Consumer”).

115. Lemley, *supra* note 111, at 469 & nn.34, 35 (collecting cases).

116. *See Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 728–29 (N.D. Ohio 2007); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

terms of use. A user's click-through is usually adequate to establish that the user and the website proprietor formed a "contract" that incorporates the terms of use.¹¹⁷ The enforceability of click-through agreements is uncontroversial, but a click-through presentation can be jarring to the user and disrupt a website's presentational flow.

The far more common method of presentation is to post the terms on a separate web page, with a moderately descriptive link ("Legal," "Terms of Use," "Terms of Service," "Copyright Notice"). This "browsewrap" format does not require the user to make any click-through gesture of assent to the terms,¹¹⁸ and websites prefer it in part because it is unobtrusive and less likely to "scare away" users.¹¹⁹ The terms are there for the user to review at his or her discretion, but they purport to bind the user, whether or not he or she actually bothers. Courts were initially reluctant to hold users to TOU presented in this fashion.¹²⁰ The leading case on this side of the issue was a 2002 decision of the Second Circuit Court of Appeals, *Specht v. Netscape Communications Corp.*¹²¹ The *Specht* court wrote: "Reasonably 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."¹²²

More recently cases have turned away from the strict notice-and-assent requirements endorsed by the *Specht* court. In *Register.com, Inc. v. Verio, Inc.*,¹²³ the plaintiff was a domain name registrar, and its website enabled users to conduct "WHOIS" searches to acquire information on web domain ownership. Register.com confronted

117. See, e.g., *Feldman*, 513 F. Supp. 2d at 236 (holding that a customer's click-through was sufficient to establish assent to a forum selection clause in a transaction conducted through the defendant's website); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 781–82 & n.14 (N.D. Tex. 2006) (holding that Texas law supports enforcement of clickwrap contracts); *i.Lan Sys., Inc. v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) ("i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating 'I agree.'"); *Forrest v. Verizon Comm'ns, Inc.*, 805 A.2d 1007, 1010 (D.C. 2002) (enforcing a clickwrap forum selection clause).

118. *Feldman*, 513 F. Supp. 2d at 236 & n.1 (citing James J. Tracy, *Legal Update: Browsewrap Agreements*, *Register.com v. Vario, Inc.*, 11 B.U.J. SCI. & TECH. L. 164 (2005)).

119. Tracy, *supra* note 118, at 165.

120. See, e.g., *Specht v. Netscape Comm'ns Corp.*, 306 F.3d 17, 34–35 (2d Cir. 2002); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (expressing reservations about the enforceability of terms of use in a case where the terms were "not set forth on the homepage" but "on a different web page that is linked to the homepage").

121. *Specht*, 306 F.3d 17 (2d Cir. 2002).

122. *Id.* at 35 (emphasis added).

123. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

users with its TOU after they completed searches. On this basis, the *Register.com* court observed that the case was not strictly a “browsewrap” case. There was no link to the TOU on the website, and users did not seek out the terms at their discretion. As soon as the user conducted a WHOIS search, the site presented the user with the TOU. Thereafter, and for subsequent searches, the users were on notice of the terms. The Second Circuit held *Register.com*’s TOU enforceable against a regular user of the site, as the evidence showed that — at least after its first search — the site had presented the terms to the defendant user.¹²⁴ The *Register.com* court rejected the defendant’s argument that although it may have had notice of the TOU, it never gave affirmative assent to them; notice of the terms and a determination to proceed with the searches was sufficient.¹²⁵

Subsequent cases have gone a step further to hold that a plaintiff need not even prove actual notice of the terms. Simple notice that TOU exist can be sufficient to form a contract between the website and the user — even if the TOU are located on a separate web page and the user does not actually visit that page to review them.¹²⁶ The terms need only be “sufficiently conspicuous” that a user could review them.¹²⁷ In *Druyan v. Jagger*,¹²⁸ the plaintiff sued the Rolling Stones and Ticketmaster, an online ticketing agent, over the cancellation of a concert.¹²⁹ Ticketmaster raised as an affirmative defense certain liability limitations contained in its website’s terms of use,¹³⁰ and the plaintiff countered that she lacked notice of the terms’ content and therefore could not be bound to them. The district court held that although *Druyan* may not have seen the terms, it was enough that they were available on the site for her to review, and she manifested her assent to them by a click-through.¹³¹

124. *Id.* at 401 (“If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register’s conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted.”).

125. *Id.* at 403.

126. *Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1106–07 (C.D. Cal. 2007).

127. *Druyan v. Jagger*, 508 F. Supp. 2d 228, 237 (S.D.N.Y. 2007).

128. *Id.*

129. *Id.* at 232.

130. *Id.* at 237 (“The Terms of Use and the Concert ticket provided the plaintiff with unequivocal notice that any concert or event was subject to the risk of rescheduling. Neither of the contracts required defendants to notify ticketholders of such rescheduling within any specific period of time prior to the concert.”).

131. *Id.* (citing *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003

Another case involving Ticketmaster, *Ticketmaster L.L.C. v. RMG Technologies, Inc.*,¹³² supports a conclusion that a website provides sufficient notice to users of contract terms simply by posting a link to them in an appropriately conspicuous location. Ticketmaster brought a number of claims against RMG Technologies for its development and marketing of web crawling software that third parties used to harvest concert information from Ticketmaster's servers.¹³³ One cause of action was breach of contract, predicated on express prohibitions against automated crawlers in the website's TOU.¹³⁴ The court approved Ticketmaster's breach of contract theory in its grant of a preliminary injunction against the defendant. The *RMG Technologies* court rebuffed the defendant's claim that it had no notice of the terms:

Plaintiff has presented evidence showing that access to the website is governed by specific Terms of Use, and that any person viewing the website is put on notice of the Terms of Use. For example, the ticketmaster.com homepage displays the following warning: "Use of this website is subject to express *Terms of Use* which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms." The underlined phrase "Terms of Use" is a hyperlink to the full Terms of Use; the same phrase appears on almost every page of ticketmaster.com.¹³⁵

As Ticketmaster had further demonstrated that the defendant had accessed the site — if not necessarily the page containing the terms — the court concluded that it had appropriate notice of the terms.¹³⁶

Though it is probably too early to declare a consensus in the courts on the question,¹³⁷ the Ticketmaster cases likely mark the

WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (distinguishing *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002), on the ground that terms of use on the Ticketmaster site were "plainly visible.").

132. *Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

133. *Id.* at 1102–03.

134. *Id.* at 1107.

135. *Id.* (citations omitted); see also *Tickets.com*, 2003 WL 21406289, at *2 ("The contract aspect of the case derives from a notice placed on the home page of the TM web site which states that anyone going beyond that point into the interior web pages of the web site accepts certain conditions, which include, relevant to this case, that all information obtained from the website is for the personal use of the user and may not be used for commercial purposes.").

136. *Id.*

137. In *A.V. v. iParadigms, Ltd. Liab. Co.*, 544 F. Supp. 2d 473 (E.D. Va. 2008), for example, a district court held that the plaintiffs did not agree to an indemnification provision in browserwrap TOU, in part because iParadigms offered no evidence that the plaintiffs ever saw

tipping point in a trend favoring findings of contract formation. The least one can say is that the case for formation now has a foothold in the case reporters. And it is now a regular practice of commercial sites posting browsewrap TOU to place links to the terms at the foot of the website's home page, and quite often on every individual page on the site.¹³⁸ As time passes and more sites adopt this convention, and the links subsist on these sites for a longer time, a user's argument that he or she did not know where to find the term will become less supportable. What a court rules, on balance, to be "sufficiently conspicuous" today may not even require the balancing tomorrow. If the history of shrinkwrap agreements is any guide, browsewrap TOU will overcome the skepticism of courts by sheer persistence: it is far safer, jurisprudentially, to ratify widespread business practices than to invalidate them.¹³⁹

2. Preemption.

Defendants have raised statutory and conflict preemption defenses to contract claims that implicate the Copyright Act.

(a) Statutory Preemption

Section 301 of the Copyright Act contains a preemption provision stating that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title."¹⁴⁰

Theoretically, a state law claim for breach of contract could be

them. *See id.* at 485 (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004), but not accounting for the *Ticketmaster* cases). It surely helped the plaintiff's cause that the browsewrap TOU were proffered independently of a clickwrap agreement that the plaintiffs had seen and accepted, and which the plaintiff could reasonably have believed to include all the terms and conditions iParadigms meant to impose. *Id.* at 484-85.

138. *See, e.g.*, ABC News Home Page, <http://abcnews.go.com> (link to "Terms of Use") (last visited Jan. 23, 2009); eBay Home Page, <http://www.ebay.com> (link to "User Agreement") (last visited Jan. 23, 2009); FindLaw Home Page, <http://www.findlaw.com> (link to "Terms") (last visited Jan. 23, 2009); MSN.com Home Page, <http://www.msn.com> (link to "Legal") (last visited Jan. 23, 2009).

139. Other formation frontiers still remain for websites and their users to explore. For example, it is not yet clear to what extent a defendant can be held to be "on notice" that terms of use exist when its automated software have accessed the site and terms of use are displayed to the crawler, but not to any human being. The Internet Archive has raised this defense in *Internet Archive v. Shell*, 505 F. Supp. 2d 755 (D. Colo. 2007), in which a website owner has brought suit alleging, *inter alia*, that the Internet Archive breached terms of use that required users to pay for copies of web pages. To this point the district court has not ruled on the extent to which the Internet Archive entered into a contract with Ms. Shell simply by sending its crawler there. *Id.* at 765-66.

140. 17 U.S.C. § 301(a) (2006).

subject to copyright preemption. Litigants have explored this proposition, and by now it is generally accepted that the Copyright Act does not preempt contract claims based on uses of content that copyright law would tolerate.¹⁴¹ Judge Easterbrook's disposition of the preemption defense raised in *ProCD v. Zeidenberg* is the seminal case on this question. The contract claims in *ProCD* arose out of an end user license agreement that the plaintiff proffered as a condition on use of copyrighted software by which the defendant would access ProCD's proprietary databases. The defendant invited the court to reject the contract claim as preempted by the Copyright Act. The court accepted *arguendo* that the databases were insufficiently original to be copyrightable.¹⁴² Although the databases in issue did not fall within the scope of copyrightable material, the court nonetheless concluded that for preemption purposes the Copyright Act occupies a zone of subject matter that would include them:

One function of § 301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if "subject matter of copyright" includes all works of a *type* covered by sections 102 and 103, even if federal law does not afford protection to them.¹⁴³

On this basis, the court held that the defendant had cleared the first, "subject matter" impediment to a preemption finding.

The court went on to rule, however, that the preemption defense failed, on the ground that rights created by contract are not the sort of "exclusive rights" that are comparable or competitive with those conferred by copyright. "A copyright is a right against the world," the court wrote. "Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights.'"¹⁴⁴ The court noted that this principle supports any data repository's imposition of restrictions against wholesale

141. *E.g.*, *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005) ("Most courts have held that the Copyright Act does *not* preempt the enforcement of contractual rights." (citing *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324 (Fed. Cir. 2003)) ("[M]ost courts to examine this issue have found that the Copyright Act does not preempt contractual constraints on copyrighted articles."); *and Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 766 (N.D. Tex. 2006) (observing that a "majority of courts" have so ruled).

142. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

143. *Id.* at 1453 (noting that copyright "commentators" had reached consensus on this point (citing 3 PAUL GOLDSTEIN, COPYRIGHT § 15.2.3 (2d ed. 2005); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B] (Matthew Bender, Rev. Ed. 2009); 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1108-09 (1994))).

144. *ProCD*, 86 F.3d at 1454 (quoting 17 U.S.C. § 301(a) (2006)).

reproduction of data by their customers: thus a user could not cannibalize LEXIS's collection of public-domain judicial decisions in order to create his own competitive (or cost-free) database.¹⁴⁵ The *ProCD* court took care not to rule categorically that copyright law cannot preempt a breach of contract claim, but it came close. The Copyright Act does not vacate the premises upon simple incantation of the word “*contract*” — the court wrote that “the variations and possibilities are too numerous to foresee. . . . But general enforcement of shrinkwrap licenses of the kind before us does not create such interference.”¹⁴⁶

The *ProCD* position has some surface appeal, to be sure. The imposition of restrictions on one contracted party hardly speaks to an “exclusive” right. Moreover, the Copyright Act, like property law, merely establishes a default setting of rights for parties to alter and adjust by agreement. Just as an owner of real estate has the prerogative to sell some or all of his or her bundle of property rights, parties assigned a certain measure of copyrights or fair use privileges by federal law ought to be able to bargain away those rights in an enforceable agreement. Adopting *ProCD*'s reasoning, the Federal Circuit has observed that “[c]ourts respect freedom of contract and do not lightly set aside freely-entered agreements.”¹⁴⁷ Thus although the subsequent case law admits of the occasional exception,¹⁴⁸ a substantial majority of courts to consider the question have adopted the *ProCD* position wholesale.¹⁴⁹ Commentators have taken a dim view of *ProCD*'s pronouncements on the Copyright Act's limited ability to preempt contractual arrangements.¹⁵⁰ What is perhaps most discouraging is that the court left for another day any consideration of what contractual circumstances might warrant a finding of preemption. Judge Easterbrook writes only that contracts do not “generally” shrink before § 301, and the facts before it warranted no

145. *Id.*

146. *Id.* at 1455; *see also id.* at 1454 (observing that “Congress possesses power to preempt even the enforcement of contracts about intellectual property”).

147. *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323 (Fed. Cir. 2003).

148. *See Lipscher v. LRP Publ'ns., Inc.*, 266 F.3d 1305 (11th Cir. 2001).

149. *See Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005); *Bowers*, 320 F.3d at 1324.

150. *See, e.g.*, Glynn S. Lunney, Jr., *Copyright's Price Discrimination Panacea*, 21 HARV. J.L. & TECH. 387, 441–42 (2008) (“[B]oth a new interpretation of legal rules governing contract formation and a narrowing of copyright's preemption doctrine proved no impediment to Judge Easterbrook in his zeal to ensure ProCD's ability to price discriminate.”); Moffat, *supra* note 45, at 76 (observing that *ProCD* “reflects no effort by the court to determined or understand congressional intent” *vis-à-vis* the Copyright Act).

exception — hence no precise articulation of when copyright preemption should, if ever, trigger. And still this omission would not in itself be cause for concern, had not subsequent courts charged with considering the cases that *ProCD* could not “foresee” tended simply to apply *ProCD*’s holding without further analysis.¹⁵¹

To its credit, the Sixth Circuit, in *Wrench LLC v. Taco Bell Corp.*,¹⁵² did articulate a standard for finding contract claims preempted by § 301; that standard, however, is unavailing to defeat website TOU that restrict copyright law-approved uses. The *Wrench* court cited Nimmer’s treatise in support of a proposition that the Copyright Act would preempt a contractual claim predicated on a simple promise not to engage in conduct that would describe infringement of a copyrighted work.¹⁵³ By the minority Nimmer/*Wrench* rule, a breach of contract claim must “allege[] more than reproduction, adaptation, etc. *simpliciter* of a copyrighted work.”¹⁵⁴ The *Wrench* court acknowledged that the reach of this rule is extremely limited — it will rarely be the case that a plaintiff cannot point to an additional element in a breach of contract claim. A defendant’s promise to pay to use the plaintiff’s copyrighted work will be enough to defeat preemption.¹⁵⁵ The *Wrench* court ultimately did reject the preemption argument, even after rejecting *ProCD*’s much narrower view of preemption.¹⁵⁶

The difference between *Wrench*’s “additional promise” standard and what guidance one can discern from *ProCD* is that *Wrench* would preempt contract claims based on conduct that would otherwise be actionable as copyright infringement, and *ProCD* would not.¹⁵⁷ Both courts would have upheld the contract in *ProCD* that imposed copy

151. See Moffat, *supra* note 45, at 76–77 (describing *ProCD*’s preemption holding as “extremely influential” and cited by the “vast majority of cases concerning § 301 preemption of contracts”); *id.* at 102 (critiquing courts’ “rote reference to precedent” in this context).

152. *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001).

153. *Id.* at 457–58 (“If the promise amounts only to a promise to refrain from reproducing, performing, distributing or displaying the work, then the contract claim is preempted.”).

154. *Id.* at 457 (quoting NIMMER & NIMMER, *supra* note 144, § 1.01[B][1][a], at 1-15 to -16) (internal quotation marks omitted).

155. *Id.* at 458 (citing *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988) (so holding), and *Brignoli v. Balch Hardy & Scheinman, Inc.*, 645 F. Supp. 1201, 1205 (S.D.N.Y. 1986) (same)).

156. *Id.* at 457–58. The *Wrench* court wrote specifically: “[W]e do not embrace the proposition that all state law contract claims survive preemption simply because they involve the additional element of promise.” *Id.* at 457 & n.6 (citing *ProCD* for this broader proposition while conceding, in a footnote, *ProCD*’s recitation that certain unforeseeable circumstances might call for preemption of contractual terms).

157. See *id.* at 457–58.

restrictions on an uncopyrightable database. The *ProCD/Wrench* distinction is likewise immaterial to the case in which the owner of web content seeks to enforce website TOU against a visitor who makes a fair or otherwise statutorily privileged use of the content. Even under *Wrench's* "additional promise" standard, copyright law will not preempt a contract between content purveyor¹⁵⁸ and content user, in which the user agrees to waive some or all of his or her statutorily privileged uses. The user has made a promise, and the promise is not simply to refrain from infringement but rather the privilege to engage in *legal, noninfringing* uses. That additional concession takes the contract out of the zone of exclusive governance of the Copyright Act.

The Federal Circuit's ruling in *Bowers v. Baystate Technologies, Inc.*¹⁵⁹ is illustrative. The plaintiff in *Bowers* sought enforcement of a EULA that strictly prohibited reverse-engineering of the software at issue. The court recognized that copyright law protects a limited amount of reverse engineering of software as fair use.¹⁶⁰ Applying First Circuit law, and relying heavily on *ProCD*, the *Bowers* court held that "the First Circuit would find that private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act."¹⁶¹

A dissenting judge in *Bowers* elected to confront the elephant in the room. Judge Dyk would have applied a preemption standard borrowed from the patent cases more familiar in the Federal Circuit: the Copyright Act should preempt any enforcement of state law that "substantially impedes the public use of the otherwise unprotected material."¹⁶² The contract before the *Bowers* court was not the result of arms-length bargaining, nor was there evidence to reflect that the defendant obtained value in exchange for waiving the right to make

158. Here and elsewhere I use the term "content purveyor," and not "content owner," because contractual provisions may allow their proponents to impose use restrictions on content in which they own no copyrights at all, as in *ProCD*, where the plaintiffs had no copyrights in the factual contents of its database.

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

160. *Id.* at 1325 (citing *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992)). *Bowers* took care not to disturb that principle with its holding. *Id.* at 1325 ("In making this determination, this court has left untouched the conclusions reached in *Atari Games v. Nintendo* regarding reverse engineering as a statutory fair use exception to copyright infringement.").

161. *Id.* at 1325–26.

162. *Id.* at 1335 (Dyk, J., dissenting) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157, 167 (1989)) (internal quotation marks omitted). Copyright law, like patent law, after all, means to strike a balance between proprietary rights and public use.

noninfringing use of the software. The defendant bought the software, and it arrived on his doorstep with a shrinkwrap license that laid down the condition against reverse engineering, and “Like any other contract of adhesion, the only choice offered to the purchaser is to avoid making the purchase in the first place. State law thus gives the copyright holder the ability to eliminate the fair use defense in each and every instance at its option.”¹⁶³

Judge Dyk went on to note that if one accepts the majority’s holding in *Bowers*, “there is no logical stopping point” for unilateral contractual bans on uses that the Copyright Act otherwise sets aside for the public, including the first sale doctrine.¹⁶⁴

This is the crux of it: the delicate balancing that Congress and the courts have undertaken with respect to copyrights comes to nothing if state contract law empowers content purveyors to impose their own rewrites of the law on consumers. Commentators have rightly applauded Judge Dyk’s insights¹⁶⁵ and regarded the majority opinion in *Bowers* as a reckless extension of the *ProCD* decision.¹⁶⁶ David Nimmer suggests that courts will ultimately reverse the no-preemption momentum and “vindicat[e]” the *Bowers* dissent.¹⁶⁷ Nimmer points to a more recent decision in the Federal Circuit, *Chamberlain Group, Inc. v. Skylnk Technologies, Inc.*,¹⁶⁸ in which the court “reacted violently” at the plaintiff’s proposal, “through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work.”¹⁶⁹ “Such reasoning” Nimmer projects, “moves inexorably”

163. *Id.* at 1337 (citation omitted); *see also id.* at 1336 (“If state law provided that a copyright holder could bar fair use of the copyrighted material by placing a black dot on each copy of the work offered for sale, there would be no question but that the state law would be preempted.”).

164. *Id.* at 1337. Judge Dyk highlights the first sale doctrine, but of course this limitation on copyright was by the time of *Bowers* a longtime casualty of the software licensing distribution model.

165. *E.g.*, Bryan Seigworth, *Injuring Competition and Impeding the Progress of Science: Why Bowers v. Baystate Technologies Was Wrongly Decided*, 23 J.L. & COM. 205, 227 (2004) (referring to Judge Dyk’s dissenting opinion as a “bright spot”); David A. Rice, *Copyright and Contract: Preemption After Bowers v. Baystate*, 9 ROGER WILLIAMS U. L. REV. 595, 602–03 (2004) (describing the dissenting opinion as “vigorously and soundly argued”).

166. *E.g.*, Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703, 772 (2006) (suggesting that the *ProCD* and *Bowers* courts may have “too easily upheld state contract law in the shrinkwrap context”).

167. David Nimmer, *Promises! Promises!*, 119 HARV. L. REV. F. 74, 81 (2006), available at <http://www.harvardlawreview.org/forum/issues/119/jan06/nimmer.pdf>.

168. 381 F.3d 1178 (Fed. Cir. 2004).

169. Nimmer, *supra* note 167, at 81 (quoting *Chamberlain Group*, 381 F.3d at 1202 (internal quotation marks omitted)); *see also Chamberlain Group*, 381 F.3d at 1202 (“Copyright

toward a repudiation of the *Bowers* holding.¹⁷⁰ The sea change Nimmer promises has not yet arrived, however. Meanwhile, the “vast majority” of cases in the reporters reject § 301 preemption of state contract law,¹⁷¹ and use restrictions continue to proliferate and grow more entrenched on the Internet.

(b) *Conflict Preemption*

Where the protections of § 301’s preemption provision fall short, a party confronting a contract claim might still assert the defense of conflict preemption, as the defendant did in *Davidson & Associates v. Jung*.¹⁷² The defense of conflict preemption is available “when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷³ One would expect the latter condition to be established when a content purveyor conditions access to content on the user’s acceptance of restrictions on uses that the Copyright Act would permit. Surely a state statute that restricted fair or otherwise privileged uses of copyrighted content — or that broadened the scope of content subject to copyright protection — could not but be held preempted on the ground that it subverted the carefully considered balancing of proprietary rights and public prerogative that Congress has written in Title 17 of the U.S. Code.¹⁷⁴

In 1988, in *Vault Corporation v. Quaid Software Ltd.*,¹⁷⁵ the Fifth Circuit in fact invalidated a state law, the Louisiana Software

law itself authorizes the public to make certain uses of copyrighted materials. . . . What the law authorizes, Chamberlain cannot revoke.”).

170. Nimmer, *supra* note 167, at 81.

171. *Id.* at 77 (quoting NIMMER & NIMMER, *supra* note 143, § 1.01[B][1][a][iii], at 1-23 to -24).

172. *Davidson & Associates v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005).

173. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (internal quotation marks omitted)).

174. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-11 (1984) (invalidating a state law restricting television advertisements of alcoholic beverages on the ground that the law disturbed a compulsory copyright licensing scheme enacted by Congress to support national cable television broadcasts). At issue in *Capital Cities Cable* was a very narrow indulgence (paid compulsory licenses) that Congress afforded to a very narrow constituency (cable television systems) under the Copyright Act. Broader statutory assaults on public privileges at the core of the copyright scheme ought to trigger much more intense conflict preemption scrutiny from courts.

175. *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988).

License Enforcement Act (“LSLEA”),¹⁷⁶ that treated certain software license terms specified in the law as enforceable on users so long as the licenses met certain procedural requirements.¹⁷⁷ The terms approved by statute included “the prohibition of: (1) any copying of the program for any purpose; and (2) modifying and/or adapting the program in any way, including adaptation by reverse engineering, decompilation or disassembly.”¹⁷⁸ The plaintiff in *Vault* brought copyright infringement and contract claims and invoked the LSLEA in support of the contract claims, arguing that the license restrictions on all copying and reverse engineering, regardless of whether these uses were privileged uses under the Copyright Act, satisfied all the LSLEA conditions and should be enforced. The Court of Appeals held the LSLEA preempted on the ground that restrictions on reverse engineering “conflict[ed] with the rights of computer program owners” under the Copyright Act.¹⁷⁹

The Fifth Circuit glossed over the question whether the state contract law on its own would support enforcing the licensing provisions that conflicted with federal copyright laws. It simply ruled that, without the assistance of the LSLEA, the contract language was unenforceable.¹⁸⁰ The Fifth Circuit noted in passing that trial court had declared the license agreement “a contract of adhesion which could only be enforceable if the [LSLEA] is a valid and enforceable statute.”¹⁸¹ This fact presumably supplied the basis for the Fifth Circuit’s proceeding from its preemption holding to its ruling that the software license was unenforceable.¹⁸²

The defendants in *Davidson & Associates*,¹⁸³ cited *Vault* in support of their conflict preemption appeal. The Eighth Circuit rejected the argument. The state law at issue in *Davidson* was bare contract law: there was no statute analogous to the LSLEA that rendered the TOU binding and enforceable. The Court of Appeals emphasized that the defendants “contractually accepted restrictions on

176. LA. REV. STAT. ANN. § 51:1961-:1966 (2003).

177. *Vault*, 847 F.2d at 269-70.

178. *Id.* at 268-69.

179. *Id.* at 270.

180. *Id.*

181. *Id.* at 269 (quoting *Vault Corp. v. Quaid Software Ltd.*, 655 F. Supp. 750, 761 (internal quotation marks omitted)).

182. *See id.* at 270 (“For this reason, and the reasons set forth by the district court, we hold that at least this provision of Louisiana’s License Act is preempted by federal law, and thus that the restriction in Vault’s license agreement against decompilation or disassembly is unenforceable.” (emphasis added)).

183. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005).

their ability to reverse engineer by their agreement to the TOU and EULA.”¹⁸⁴ Citing *Bowers v. Baystate Technologies, Inc.*, the court ruled that the defendants “expressly relinquished their rights to reverse engineer.”¹⁸⁵ The court nowhere considered whether the terms were imposed unilaterally and without negotiation.¹⁸⁶ Although the plaintiff presented its restrictive TOU in an adhesive clickwrap format — so that the access that it necessarily a precondition to reverse engineer was conditioned on accepting a restriction on that use — both the trial court¹⁸⁷ and appeals court in *Davidson & Associates* embraced the fiction that users traded away or waived their reverse-engineering rights for value.

The *Davidson & Associates* courts fairly read *Vault*’s invocation of conflict preemption to apply only to the LSLEA’s enforceability charm and not to the enforceability of use-restrictive EULAs themselves. That is, the *Vault* court never considered that the specific contractual provisions before it could be preempted by copyright law. It never rejected this proposition, either. The *Vault* court simply invalidated the statute that would have affirmed such provisions over defenses of unenforceability; from there it ruled the license terms before the court unenforceable because they were contracts of adhesion.¹⁸⁸ The court arguably never reached the question of conflict preemption of the contractual terms, because they were unconscionable in any event. The Fifth Circuit in *Davidson & Associates* was asked to consider that particular question, and it punted — even though the effect of the decision was to enforce state contract law in a manner that would entitle any content purveyor to impose use-restrictive TOU that disturb delicate balance copyright law has struck between proprietary and public use interests.

3. Unconscionability.

A third defense against restrictive terms of use is unconscionability — that is, that the contract terms are so unfairly imposed that to enforce them would offend public policy. Conclusions regarding unconscionability may vary from one state to

184. *Id.* at 639.

185. *Id.* (citing 320 F.3d 1317, 1325–26 (Fed. Cir. 2003)).

186. As I will discuss below, the district court had already held that the TOU were not unconscionable, under California law. *Davidson & Assocs., Inc. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1180 (E.D. Mo. 2004).

187. The district court, too, cited *Bowers* with approval and rejected *Vault* as inapposite. *Id.* at 1181.

188. *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269–70 (5th Cir. 1988).

the next,¹⁸⁹ but the mode of analysis is consistent nationwide: courts review contract terms for “procedural” and “substantive” unconscionability.¹⁹⁰ Procedural unconscionability turns on the extent to which the contract’s terms are offered as standard and non-negotiable, on a take-it-or-leave-it basis, by a party with “superior bargaining strength.”¹⁹¹ The substantive element concerns the fairness of the terms.¹⁹² Courts may enforce such contracts of adhesion only if their terms are not overly burdensome on the offeree. Conversely, a freely-negotiated contract term that is gravely one-sided may be held unenforceable as well. Courts apply a “sliding scale” unconscionability standard, by which courts “disregard[] the regularity of the procedural process of the contract formation . . . in proportion to the greater harshness or unreasonableness of the substantive terms themselves.”¹⁹³ As Williston writes, “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”¹⁹⁴

Defendants have raised unconscionability defenses to contract claims predicated on website TOU, with mixed results. Class action waivers and arbitration clauses in online clickwrap purchase agreements have been ruled unconscionable under California law.¹⁹⁵ Applying Texas law, an Illinois state court ruled that an online

189. *Compare, e.g., Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (finding class action waivers presented in contracts of adhesion to be inconsistent with California public policy and therefore substantively unconscionable in that state), *with, e.g., AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 199–200 (Tex. App. 2003) (holding class action waivers in arbitration clauses not substantively unconscionable).

190. *See, e.g., Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) (applying California law); *Gilman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988); *Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 119–20 (Pa. 2007) (“[A] contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it.”).

191. *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172–73 (N.D. Cal. 2002); *see also Bess v. DirecTV, Inc.*, 885 N.E.2d 488, 495–96 (Ill. App. Ct. 2008).

192. *Comb*, 218 F. Supp. 2d at 1172–73.

193. 15 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1763A (3d ed. 1972); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000); *see also Delta Funding Corp. v. Harris*, 912 A.2d 104, 111 (N.J. 2006).

194. *Armendariz*, 24 Cal. 4th at 114 (Cal. 2000).

195. *See Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 WL 618988, at *7 (N.D. Cal. Mar. 4, 2008); *Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2007 WL 2255296, at *6 (N.D. Cal. Aug. 3, 2007); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 612 (E.D. Pa. 2007) (applying California law).

“Terms and Conditions of Sale” agreement containing an arbitration provision and class action waiver was not unconscionable — notwithstanding that the Terms were not “conspicuous” to the user.¹⁹⁶ A federal district court in Ohio ruled last year that a website’s disclaimers of warranties and liability limitations, presented in a clickwrap format, were neither procedurally nor substantively unconscionable.¹⁹⁷ A clickwrap agreement’s forum selection clause was held not unconscionable.¹⁹⁸

Only one case to date has considered the question whether a website TOU’s restrictions on the use of copyrighted content are unconscionable. Applying California law, the trial court in *Davidson & Associates, Inc. v. Internet Gateway, Inc.* rejected the unconscionability defense.¹⁹⁹ As I have noted above, the TOU at issue in the *Davidson* case barred the user from reverse-engineering Internet Gateway’s video game software — a use that the court recognized as fair under copyright law.²⁰⁰ The district court ruled first that the contract was not procedurally unconscionable, because (1) other, competing video games were available to the defendants to use; (2) the defendants were “not unwitting members of the general public,” but “computer programmers and administrators familiar with the language used in the contract; (3) the contract terms were “no surprise” to the defendants, who had notice of them before accessing the video game; and (4) the website afforded the defendants thirty days to review the terms and reject them.²⁰¹

The court’s recitation of these mitigating facts might have offered a blueprint for future litigants to distinguish the *Davidson & Associates* TOU from the now-standard browsewrap formats that immediately and irrevocably bind users to refrain from making otherwise lawful use of their content. Website TOU more often than not bind “the general public” (as did the TOU in *Davidson & Associates*, for that matter) and in many instances are never presented to users. These facts might have provided a basis for distinguishing the *Davidson & Associates* holding, except that the court ruled that the terms were not substantively unconscionable, either, as they were not so “harsh or oppressive,” “so one-sided as to ‘shock the

196. See *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 123-26 (Ill. App. Ct. 2005).

197. See *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719, 734-36 (N.D. Ohio 2007).

198. See *Feldman v. Google*, 513 F. Supp. 2d 229, 239-43 (E.D. Pa. 2007).

199. *Davidson & Assocs., Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164, 1178-80 (E.D. Mo. 2004).

200. *Id.* at 1180 (“Reverse engineering as a fair use is firmly established.”).

201. *Id.* at 1179-80.

conscience.”²⁰² The defendants appealed to the Eighth Circuit Court of Appeals, where it raised the defense of conflict preemption.²⁰³ The appellants did not seek review of the district court’s rulings on unconscionability.

The case law on shrinkwrap and other software end user license agreements is surprisingly devoid of unconscionability analysis. Early on, when courts were inclined to hold shrinkwrap licenses and EULAs unenforceable, they tended to do so on the ground that the user had bought a copy of the software outright — so that there was no license agreement to review for unconscionability.²⁰⁴ The *ProCD* decision marked a turning point in the courts’ treatment of these agreements. As courts came to accept the license model of software distribution, they were finally positioned to consider a defense that a license agreement’s terms might be unconscionable. By this time, shrinkwrap and clickwrap practices have grown so entrenched in the industry that courts have proved reluctant to pull the trigger on unconscionability rulings.²⁰⁵ Thus, although one would expect cries of unconscionability to have been a familiar refrain of defendants in cases to enforce EULAs, courts have written very little in this area. *Davidson* is the only case that opines on the question whether TOU that restrict fair and other uses privileged by the Copyright Act are unconscionable. That single district court decision does not foreclose more encouraging developments in other courts — particularly as it only applied Missouri law — but to this point, unconscionability is a losing argument.

4. The First Amendment.

In *Eldred v. Ashcroft*²⁰⁶ the Supreme Court ruled that there is no separate, collateral First Amendment defense against a copyright claim.²⁰⁷ The Court held that the “idea/expression dichotomy” and fair use doctrine grant expressive indulgences to would-be speakers sufficient to satisfy the command of the First Amendment. The protections of copyright law — and conversely, its restrictions on

202. *Id.* at 1180.

203. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 637 (8th Cir. 2005).

204. *See Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 97 n.11 (3d Cir. 1991).

205. *E.g.*, *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (rejecting an unconscionability defense to a EULA); *Davidson & Assocs.*, 334 F. Supp. 2d at 1179–80; *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 315 (Wash. 2000).

206. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

207. *Id.* at 218–21.

expression — only extend to the rightsholder’s original creations.²⁰⁸ “[E]very idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication” of a copyrighted work.²⁰⁹ And through fair use, the public can even make limited use of the protected creative content.²¹⁰ By implication, then, the Court views these doctrinal carve-outs from copyright to be at least as protective as the First Amendment would require without them — and possible more so.²¹¹

A defendant cannot, of course, plead fair use (or the idea/expression dichotomy or any other statutory privilege set forth in the Copyright Act) as a defense to a breach of contract claim. Where a content purveyor seeks to enforce a *contractual* term that limits a user’s ability to utter the owned content, the same First Amendment values are implicated as in a copyright infringement claim, but the fair use vehicle is not available to carry them forward. It seems appropriate, then, that a user could assert a First Amendment defense to any content purveyor’s gesture at obtaining judicial enforcement of a contractual term to enjoin or seek damages for the user’s expression. What the nature of that constitutional defense may be, and how courts would apply it, is unclear. The *Eldred* Court did make clear that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.”²¹²

The Court’s “bears less heavily” *dictum* might suggest a less rigorous standard of review than the “strict scrutiny” that is routine in First Amendment cases — perhaps the intermediate scrutiny that courts apply to regulatory schemes targeted at commercial speech.²¹³ It is not obvious that a strict or intermediate scrutiny model is appropriate for this context, where the court does not confront a speech-burdening act of the elected branches, but it is instead reviewing a civil claim, the adjudication of which implicates the First

208. *Id.* at 219 (citing 17 U.S.C. § 102(b) (2000) and *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

209. *Id.* at 219 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991)).

210. *Id.* at 219 (“[T]he ‘fair use’ defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”).

211. The *Eldred* Court did leave itself some wiggle-room here, as it noted that “copyright’s built-in free speech safeguards are *generally* adequate to address” First Amendment concerns. *Id.* at 221 (emphasis added).

212. *Id.* at 221.

213. See, e.g., *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 773 (N.D. Ill. 2008) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980)).

Amendment through the *court's* action.²¹⁴ It seems analytically awkward to consider to what extent a plaintiff's TOU advance any government interest, whether substantial or compelling. Whether enforcement of the TOU advances a government interest — and whether such enforcement might be narrowly tailored or reasonably calculated to accomplish that interest — seems a more appropriate question, but in most cases²¹⁵ there would be no government party to weigh in on the point. The court's task would be to balance society's interest in enforcing contracts against the free expression values that the contract puts at risk. Is the enforcement interest "substantial" enough? Is the TOU's impact on expression sufficiently contained to survive strict or intermediate scrutiny? For that matter, does the challenged use look enough like "making other people's speeches" to call for something less than strict First Amendment scrutiny?

These questions might lure a court into conducting something like an unconscionability analysis, with its attendance to public policy (supporting enforcement of contracts and disfavoring speech restrictions) and the onerousness of the contract terms at issue. Or a court might hit upon the screamingly obvious answer: to conduct a fair use inquiry. As the *Eldred* Court observed, after all, fair use is the time-honored methodology for adjudicating the competing interests of owned content and free expression.²¹⁶ The four factors can get at the question whether the user was "making other people's speeches" or simply fashioning that other speech into his or her own. They can surely inform a court's balancing of the parties' respective interests, and they incorporate considerations that key specifically on the

214. *Cf., e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 254, 268–71 (1964) (fashioning a heightened intent requirement for common law defamation claims, in order to reconcile them to the First Amendment). As Eugene Volokh observes:

The Court's First Amendment cases don't just set forth substantive rules, such as the exceptions to First Amendment protection. They also set forth procedural rules that help ensure that speech restrictions don't inadvertently suppress protected speech as well as the unprotected. Libel and obscenity, for instance, fall within exceptions to First Amendment protection; but libel and obscenity law must still comply with these "[F]irst [A]mendment due process" rules. Likewise, speech that infringes a copyright falls within the copyright exception — but copyright law must comply with these procedural rules, too.

Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUSTON L. REV.* 697, 718 (2003).

215. Conceivably, a government could sue to enforce its website TOU in a way that burdens free expression. *See supra* note 51 (describing the use-restrictive TOU on state government websites). Indeed, one could imagine federal entities taking back by contract the proprietary rights that the Copyright Act denies them as creators. *See* 17 U.S.C. § 105 (2006).

216. *See Eldred*, 537 U.S. at 219–220.

property and expressive interests that are in opposition. That the rights of the content “owner” are established by contract, and not the Copyright Act, should not materially affect the constitutional analysis.

It may be the case that fair use is constitutionally *overprotective* — that the doctrine surely satisfies the First Amendment, but still reaches further to accomplish a specific statutory objective: *i.e.*, beyond protecting free expression from infringement actions, fair use affirmatively promotes the creative of creative work. Perhaps something less than the full range of fair uses would pass constitutional muster. But fair use is what we have, and it would not be unprecedented for courts to “overprotect” a constitutional value in their holdings. Courts enforce the *Miranda* doctrine as a constitutional matter, absent any underlying Fifth Amendment ‘violation.’²¹⁷ And in the First Amendment context, specifically, the doctrines of vagueness and overbreadth authorize a court to invalidate a speech regulation on its face, even when the regulation would be constitutional as applied to its challenger.²¹⁸ Indeed, the facial invalidation cases reflect the Court’s determination that the First Amendment cries out for more “breathing space”²¹⁹ than other constitutional values.²²⁰ A constitutional defense that is congruent with fair use may be “strong medicine”²²¹ in the contract context — stronger even than the First Amendment requires — but

217. *Dickerson v. United States*, 530 U.S. 428, 431-32, 444 (2000) (upholding the *Miranda* rule as constitutionally required to protect against involuntary confessions, notwithstanding the “disadvantage” that “statements which may be by no means involuntary . . . may nonetheless be excluded and a guilty defendant go free as a result”).

218. *E.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-74 (1997) (vagueness); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-17 (1973) (overbreadth).

219. *Broadrick*, 413 U.S. at 611-12.

220. *See, e.g.*, *Reno*, 521 U.S. at 870-71 (finding a statute’s vagueness problematic under the First Amendment, but not necessarily the Fifth). Of course, the animating principle to facial challenges under the First Amendment is that vague and overbroad regulations “chill” lawful, protected speech. *E.g.*, *Broadrick*, 413 U.S. at 612. It bears noting that the *Eldred* holding, that fair use vindicates First Amendment values against copyright, is unsatisfying precisely because fair use is such a case-specific, unpredictable proposition. One can generally never be sure his or her use of copyrighted content is fair, until a judge has passed on the question. The Supreme Court, for its part, holds its First Amendment doctrines to a less exacting standard of clarity and predictability than it commands of the political branches — perhaps because they do not describe the boundary between legal and illegal expression *per se*, so much as they distinguish between protected speech and speech left to the government to regulate. *Compare* *Miller v. California*, 413 U.S. 15, 23-26 (1973) (setting forth the legal standard for obscenity), *with* *Reno*, 521 U.S. at 870-73 (facially invalidating a provision of the Communications Decency Act on vagueness grounds notwithstanding the government’s argument that Congress modeled it on the *Miller* test).

221. *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999).

this is no basis for ruling it out in favor of a less suitable legal standard that provides little guidance to courts.

But courts may not even get to this point. As we have seen in the preemption cases, parties can freely bargain away uses of content that are lawful under copyright law.²²² The fact that some of those uses might have constitutional protection makes them no less waivable. Courts generally accept that a party can contract away constitutional rights. Criminal courts accept plea bargains, by which criminal defendants agree to waive their rights to confront and cross-examine accusers and to a jury trial.²²³ The right of free expression does not get special treatment, either: there are myriad contexts in which courts enforce freely-negotiated contractual restrictions on expression. One classic example is the nondisclosure or confidentiality agreement, which by its very definition imposes restrictions on a party's free expression.²²⁴ Agreements to settle litigation routinely contain this sort of restriction, along with potentially other restrictions on communication.²²⁵ Indeed, the fundamental obligation of an agreement to settle a copyright claim may be a promise not to distribute or display expressive matter — in many instances, the settling defendant agrees to refrain from conduct that was never ruled to be infringing or unlawful. No court would adopt a First Amendment defense that would undermine these arrangements.

Courts ought to take a different view when a contractual restriction on expression is imposed without negotiation. The customary uniformly-presented click-through and browsewrap TOU that condition access to content on the user's acquiescence to severe restrictions on use are hard to characterize as instances of a voluntary waiver or exchange of an expressive right for value. It is true that the user's statutory privileges under the Copyright Act do not guarantee

222. See *supra* Section III.A.2.

223. See FED. R. CRIM. P. 11 (authorizing defendants to enter into plea agreements and requiring judges to enumerate in open courts the constitutional rights the defendant waives in taking a plea).

224. See, e.g., *Harsco Corp. v. Piontek*, Civil No. 3:07-0633, 2008 WL 686217, at *12 (M.D. Tenn. Mar. 5, 2008) ("It is certainly in the public interest to enforce confidentiality agreements [pertaining to trade secrets] and to punish those who violate them and those who secure the violation of those agreements.").

225. See, e.g., Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 385-89 (1999); see also, e.g., William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology*, 17 LAB. LAW. 25, 70 (2001) ("Employers frequently require [high tech] employees to execute nondisclosure agreements, which impose continuing confidentiality obligations Nondisclosure agreements are usually enforceable without much fanfare.").

unfettered access to a work (for starters, he or she may be required to pay for it), but access to content is necessarily a precondition to use.²²⁶ If we accept, as courts have written in copyright cases, that some limited use of others' original content is necessary to fuel a new generation of expression, the exchange of that limited use for first-instance access to the content is an empty sale.²²⁷ Attempts to enforce nonnegotiable click-through or browsewrap terms that restrict expressive use²²⁸ of content on a website, agreement to which is imposed (or assumed) as a precondition to accessing the content on, ought to be subjected to constitutional review in some form, whether or not it be a reimportation of copyright's fair use doctrine. Enforcement of these terms is less an endorsement of freedom of contract principles than a judicial ratification of rights asserted by fiat.

IV. A "FREELY NEGOTIATED" TEST

So we find courts trending in favor of enforcement of online use restrictions, notwithstanding that the Copyright Act might accept some of the restricted uses as crucial to the promotion of future creative works, and that the uses themselves very often entail expression that might otherwise be protected by the First Amendment. The *Bowers* court enforced an end user license agreement against a user's fair use of the plaintiff's software. The *Davidson* court brought that logic online and enforced a similar provision in website TOU, against the same fair use. When the time comes that other website owners invite a court to enforce personal use-only restrictions of web content — perhaps against defendants' reverse engineering of the site's software, as in *Davidson* and *Bowers*, or perhaps against defendants' critical or scholarly reference to the content in question — courts will confront a body of law that affirms the principle that lawful uses of content can be freely bargained away. Copyright law should not preempt such an arrangement, the unconscionability

226. *Lipscher v. LRP Publ'ns., Inc.*, 266 F.3d 1305, 1312 (11th Cir. 2001) (“[O]btaining access to a work is a necessary condition to copying it.”). The *Lipscher* court held a contract claim to be preempted by the Copyright Act when it was based on an exchange of access to copyrighted material for a promise not to make use of it.

227. There may be instances in which the same content is made otherwise accessible at a reasonable market price, but the content owner offers a discounted price in exchange for a purchaser's waiver of lawful uses of it. In such cases it may be fair to treat the user as having bargained away expressive rights. See *infra* Part IV. The common one-size-fits-all terms of website contracts of adhesion do not fit this description.

228. A First Amendment defense to contract liability might not be available when the defendant's copyright-approved use is not, strictly speaking, expressive — as when the challenged use is reverse-engineering, or copying for search-engine indexing.

doctrine should not be lightly invoked to supersede it, and the First Amendment should not insist on protecting speech that the speaker has sworn off by contractual agreement. These sound like the right results.

But surely an exception is warranted when the bargaining is not really “free,” and when the practical effect of a uniformly, unilaterally imposed, nonnegotiable use restriction is to augment its proponent’s copyrights by abrogating the fair use and other statutory privileges of *everyone who accesses the content*. It is this paradigm that has emerged to govern content purveyor/content user relationships on the Internet — and unsurprisingly so.²²⁹ Consider the most straightforward case: online-only content protected by a browsewrap “personal use-only” restriction. These TOU declare the sort of “rights against the world” that should trigger a preemption defense to their enforcement — if not statutory preemption, then the frustration-of-legislative-intent strain of conflict preemption.²³⁰ To be sure, the website’s rights are established by a contract to which only the content purveyor and the individual user are parties. But the same contract is replicated across the range of users, and when aggregated together, the gathered corpus of uniform contracts of adhesion amounts to a declaration of rights by fiat — and these rights are at odds with the reckoning of Congress and the courts on how best to promote the production of creative works.²³¹ Under these

229. See Madison, *supra* note 77, at 1113 (suggesting, in 1998, that “recent scholarship fairly persuades” that *ProCD*’s vision of market-based model, in which users barter statutory privileges for value, will fail for lack of competition to supply licensed uses. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)). Judge Easterbrook envisioned that *ProCD*’s “rivals” in the market “may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements.” *Id.* (quoting *ProCD*, 86 F.3d at 1453 (internal quotation marks omitted)). Because the content at issue in *ProCD* was part of the public domain, competing vendors were at least in a position to offer the same content on different terms. Where the content is original and subject to copyright, and the additional contractual rights would limit fair uses of that content, the market does not hold out the prospect of aiding the fair user. If Blogger X wants to excerpt a recent post of Blogger Y’s in order to critique Y’s argument, it does not help that Blogger Z has more permissive TOU governing *his* content.

230. Moffat, *supra* note 45, at 102 (“The ubiquity of super-copyright provisions transforms them from instances of private ordering into exclusive rights against the world.”); Madison, *supra* note 77, at 1127–30 (describing this phenomenon as “private legislation”).

231. Theoretically, of course, there is another universe of persons who do not access the content and are therefore not bound to these restrictions on use — but because access is a precondition to use, use by these persons, though not barred by contract, is not possible. Circumstances might permit a user to access a website’s content via a third party, i.e., without ever visiting the website and succumbing to its TOU. These circumstances would only occur if the website owner let its enforcement program lapse, as the third party that visits the website and redistributes its content would be acting in violation of the personal use-only mandate. The

circumstances an unconscionability defense should, too, get traction with a court, as the terms are unilaterally imposed²³² in a manner that runs counter to public policy — again, as reflected in federal law’s apportionment of proprietary rights and public privileges through the Copyright Act. And finally, the enforcement of use-restrictive TOU, for which the defendant never bargained, may amount to a judicial injunction against protected expression.²³³

There is a point of convergence here, where a court could conceivably apply any or all of the three defenses enumerated above, once the “freely-negotiated” impediment is cleared. It is worth pausing to consider the relative merits of the three defenses and what might be gained or lost by choosing one over another. Because unconscionability is a matter of state law, courts might reach different conclusions from one jurisdiction to another. Mitigating this concern somewhat is the fact that it is a national “public policy” — *i.e.*, Congress’s and the federal courts’ determinations on what uses of another’s content ought to be privileged — that would be undermined by the terms argued as unconscionable. Courts in the fifty states ought to arrive at the same answer, but website TOU proponents would (in theory, anyway) have fifty opportunities to litigate the question. The free expression defense is more limited in its applicability, as it only adheres when the restricted but privileged use subject to suit is expressive in nature. One could argue, for example, that restrictions on reverse-engineering software, such as those at issue in *Bowers* and *Davidson*, do not implicate the First Amendment any more than a government regulation would that prohibited the same practice.²³⁴

browsewrap TOU restrictions otherwise impose an airtight lockdown on otherwise legal uses.

232. Indeed, browsewrap agreements are more than contracts of adhesion, which the offeree is at least empowered to accept or reject, if not negotiate. Browsewrap pronouncements are instantly binding on anyone who accesses content on the website. The user does not need to have reviewed the terms. The most substantial rejection the user can accomplish is to leave the site promptly and never return. As to the content he or she accessed there, the user is still bound by contract not to make unapproved use of it.

233. The constitutional defense assumes that the restricted uses do not fall outside the zone of First Amendment protection for other reasons, *e.g.*, because they are obscene.

234. For the same reason — that the use restrictions did not implicate expressive conduct — the courts in *Bowers* and *Davidson* may have had fewer qualms about enforcing the contracts over the preemption and unconscionability defenses that the defendants did raise. One can argue that the case law is now so hospitable to the enforcement of EULA provisions and TOU because the terms courts have seen, (*e.g.*, restrictions on reverse-engineering) and the conduct plaintiffs have sued over, (*e.g.*, competitor websites’ wholesale copying of the plaintiff’s secured database) have set the equities in plaintiffs’ favor. This fact might supply a basis for distinguishing the reverse-engineering cases, when the defendant invokes unconscionability or preemption to vindicate an expressive use of content.

Thus the First Amendment defense, whether or not it takes the form of a reimported fair use inquiry, would not protect certain nonexpressive uses deemed fair or statutorily privileged under the Copyright Act.²³⁵ For its part, conflict preemption offers the prospect of a federal ruling that would reach any restrictions of uses privileged under copyright law.

Treatment of the two extreme cases discussed above ought to be uncontroversial. If, on one hand, a party negotiates an individualized transaction by which he or she waives certain privileged uses of the other party's expressive content for value — say, access to the content in question at a discounted price — the resulting contract ought to be enforceable. On the other hand, the content purveyor should not be entitled to impose uniform, restrictive conditions on access to his or her work in a manner that overrides the Copyright Act. The trouble is figuring out what to do with the range of cases that could possibly fall between the two extremes. *ProCD* was just such a case: ProCD offered two pricing tiers with different license terms, and Zeidenberg could have paid more for a license that would have authorized the use subject to litigation. Judge Easterbrook seized on this fact in his decision.²³⁶ Far from an individually negotiated solution, however, this was a case in which the plaintiff happened to present an array of options that included the use that the defendant did not pay for. Moreover, the use at issue was at least arguably reasonably priced.

An analogous case in the context of website TOU might be one in which a website — say, an online magazine — posts content subject to a \$1.00 per-page access charge. Users enter a credit card number, start an account, and pay to view the pages, with no restrictions on use. The site can enforce the Copyright Act against content pirates, but a user who pays his or her dollar, accesses a page, and makes fair use of the content there has no liability. Now imagine that the site decides to offer the same content at a discount rate — for free, even — but subject to severe use restrictions that prohibit any unauthorized reproduction, display or distribution of any part of the content. Simple “consumption” of the site may be accomplished *gratis*, but a critic must pay a toll for the right to reproduce even a snippet of text from the magazine on his or her weblog. Under *Bowers* and *ProCD*, the Copyright Act would not preempt this model:

235. See, e.g., *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (reverse-engineering as fair use); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006) (caching of indexed web pages for web search as fair use).

236. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

a user can decide whether or not to forfeit fair use privileges at a dollar per page.

There is some surface appeal to the idea of differentiated licensing terms, by which a content purveyor allows free or cheaper access subject to restrictions on lawful uses and restriction-free access at a price. But there are complications. The first is that such a scheme is susceptible of two interpretations. In defense of the scheme, a licensor could argue that the price of restriction-free access is the price of access, and the cheaper, consumption-only access is available at a discounted price, conditional on a waiver of lawful uses. A licensee could colorably counter that the baseline pricing is the consumption-only pricing, and that the licensor's two-tier scheme in fact means to compel users to pay for a license to engage in otherwise lawful uses.²³⁷ The law should provide that a user may sell fair uses (and other statutory privileges), but a content purveyor may not require users to buy them. However, absent recourse to a counterfactual — what unfettered access consistent with Copyright Act defaults would cost — one cannot know which party has sold a privileged use.

And even assuming one could clear this conceptual impediment to adjudicating whether a party has sold statutorily privileged uses, rather than buying them, there remains the fact that the content purveyor devises its pricing scheme unilaterally. Suppose that the *New York Times* makes content personally consumable to the public online free of charge, but to use today's online content in a manner fully commensurate with what the Copyright Act allows, one would be required to pay \$1.25. We might well regard this scheme as reasonable, as we know that hard copies of the *Times* are available at newsstands for precisely \$1.25. Readers who buy the hard copies are subject to no license-style impositions on their usage rights, and the online user who pays the \$1.25 finds himself in substantially the same position. That \$1.25 price tag would not necessarily represent the market value of fair and other privileged uses, but enough people might swallow it to make it defensible. This case is one in which a court would have the benefit of something close to a valuation of unfettered access to the content — because corresponding hard copies

237. The distinction here would matter to the dissenting judge in *Bowers*, who wrote, in the course of distinguishing (rather than rejecting) *ProCD*, that “[t]he Copyright Act does not confer a right to pay the same amount for commercial and personal use. It does, however, confer a right to fair use, which we have held encompasses reverse engineering.” *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1338 (Dyk, J., dissenting) (citation omitted).

are sold.²³⁸ But what if the *Times* decided instead to charge \$12.50, or \$125, or \$125,000? One could argue that anyone who rejected these pricing terms in favor of restricted “free” access freely bargained away their usage rights. Indeed one could argue — albeit implausibly — that the user sold his or her rights for a whopping \$125,000 value. Such a result could well be agreeable to Judge Easterbrook, as anyone *could* contract to make lawful use of the *Times* website’s content. It is just not clear that they *would*.

It cannot be enough, then, that a content purveyor can abrogate the Copyright Act on a “freedom of contract” theory simply by presenting users with an option — any option — to engage in copyright-approved uses at an increased “cost of access.” Courts ought to review such pricing schemes for fairness. And more specifically, they should assess whether the practical effect of the scheme is to write out by contract uses and privileges that the public should enjoy under the federal copyright laws. A reasonable standard might be the one that dissenting Judge Dyk proposed to borrow from patent law in *Bowers*: do the TOU “substantially impede” a lawful public use?²³⁹ If the content purveyor does not offer a level of access consistent with copyright law’s defaults, a court should rule it unenforceable, on any of the three theories we have discussed. If that level of access is available, but only subject to unreasonable conditions — price-related or otherwise — a court should refuse to enforce the resulting use-restrictive contracts. This sort of review, which reduces to the essential question whether a waiver of privileges was freely and fairly bargained, calls for case-by-case review of access pricing schemes, which surely could vary significantly in material ways from one website to another. Such case-specific review is problematic because, like the fair use doctrine, outcomes are difficult to predict and can in fact be inconsistent across jurisdictions. Indeed, where a website user to make fair use of web content subject to TOU, the uncertainty is compounded: the prospective defendant must wonder first, whether a court will regard the TOU as fairly

238. It complicates matters a bit that the *New York Times*’ print and online editions are not identical in size and scope (the online edition, for example, contains blogs), and that the *Times*’ primarily ad-driven online business model differs significantly from the way it does business in the hard copy market. How much of the \$1.25 print-edition charge covers the much greater costs of pressing hard copies on newsprint and distributing them in trucks to retail locations? How much more valuable to advertisers are the more targeted and topical ads that the *Times* web servers deliver in conjunction with specific articles than the general-audience ads in the print editions? It is not easy to control for these and other factors that make the user experience and the content purveyor’s business different when they go on- or offline.

239. *Bowers*, 320 F.3d at 1335.

bargained, and second, whether the multi-factor fair use inquiry supports his or her proposed use.

But courts need not travel too far down this road to invalidate the lion's share of website TOU that entrench on copyright-approved uses of the site's content. The tiered pricing that Judge Easterbook endorsed in *ProCD*, with all the complications it would raise for courts seeking to apply a principled "fair and freely bargained" doctrine, is not at all a common paradigm for the delivery of web content. Rather, the most common presentation by far is the browsewrap, personal use-only "agreement" that sticks instantly to the user the moment he or she visits the site.²⁴⁰ These contracts of super-adhesion, and their terms that unilaterally and uniformly abrogate provisions of federal copyright law, ought to present a simple black-and-white case to courts. If statutory preemption is too toothless to reach them, then conflict preemption, unconscionability, and in many cases the First Amendment as well ought to be available to support a holding that the use restrictions are unenforceable — provided that courts prove willing and able to reverse the considerable precedential momentum in favor of rubber-stamping these TOU. One hopes that courts asked to consider personal use-only website TOU will recognize the far-ranging implications enforcement of these TOU would hold for free online expression, as courts applying preemption and unconscionability doctrines in the software context have not.

V. CONCLUSION

It may be an overstatement to describe the current state of play on the Internet as a terms of use "crisis." An enforceable contract is not always enforced, after all; the terms of automated clickwrap and browsewrap contracts that are (arguably) formed every second between website proprietors and millions of site visitors might be ignored by the parties as blithely as they were adopted. Unlike digital rights management and copy-protection technologies, which automatically lock down content to prevent privileged and lawful reproduction and further dissemination of content, TOU require attentive policing, and they admit the possibility that a site owner will exercise its judgment and conclude that a certain use is or ought to be tolerated. And indeed, to this point the law reporters have recorded very few instances in which content purveyors have litigated to hold users to the terms of website TOU — and only one case in which the

240. Bialek & Smedresman, *supra* note 53, at 6 (observing that "the vast majority of Web site terms of use agreements" appear in a browsewrap format).

content purveyor sued over a term that restricted fair use of a content.²⁴¹ The much more common case is a commercial dispute over a sale of goods or services on the Internet, and the browsewrap or clickwrap term the plaintiff seeks to enforce is a mandatory arbitration provision and class action waiver,²⁴² limitation on liability,²⁴³ or forum selection clause.²⁴⁴ The state and federal courts have not witnessed any concerted effort by Big Media entities to quash street-level discussion or criticism of their content. Websites that have sought to enforce use-restrictive terms have tended to wield them against aggressive competitors rather than the end-consumers of the content in question.²⁴⁵

Moreover, websites may have innocent — or at least justifiable — reasons to adopt privileged use-restrictive website TOU. Except where governments restrict access to them, websites are open to users around the world to view. Not every jurisdiction would tolerate the range of fair uses available under U.S. copyright law.²⁴⁶ A website that incorporates copyrighted material of third parties — licensed or unlicensed — might reasonably conclude that use-restrictive TOU reduce the likelihood that it might have to answer to those third party content owners for downstream infringement by the site's visitors.²⁴⁷ Where the site could be held liable in any nation under that nation's laws, it might decide that the most prudent course is to hold visitors to an agreement to engage only in the least offensive uses of the content they find there. Or a site with an international consciousness might write TOU tailored to the more restrictive nations' laws — as opposed to allowing fair or other uses consonant with the values of U.S. copyright law — because it sees no reason to give away uses that would be infringing in these more

241. See *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1167 (E.D. Mo. 2004).

242. See *Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 WL 618988, at *4, *7 (N.D. Cal. Mar. 4, 2008).

243. See *Druyan v. Jagger*, 508 F. Supp. 2d 228, 234 (S.D.N.Y. 2007); *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719, 734-36 (N.D. Ohio 2007).

244. See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

245. E.g., *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1102 (C.D. Cal. 2007); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 976 (E.D. Cal. 2000).

246. See, e.g., Brian F. Fitzgerald, *Digital Property: The Ultimate Boundary?*, 7 ROGER WILLIAMS U. L. REV. 47, 94 (2001) (explaining that Canada, Australia, and the United Kingdom have a "much more limited and specific fair dealing doctrine" than fair use offers in the United States).

247. Website TOU commonly express concerns about third-party liability. See, e.g., *Gawker Media Terms of Use*, *supra* note 89; *Mass.Gov Terms of Use*, *supra* note 87.

stringent jurisdictions, where the content is just as available as it is to U.S. users. Let the courts applying “softer” copyright laws make the appropriate exceptions. Finally, these considerations may not have occurred to websites at all. Now that personal use-only TOU have become the emerging commercial standard online, many sites will adopt them as a “best practice” with no particularly invidious intentions in mind.

All these facts, however, make the use-restrictive website TOU phenomenon more insidious. It makes for a precarious state of things to allow online content purveyors to rewrite the rules of engagement between sites and users — to the exclusive benefit of the sites — and then rely on their goodwill not to hold users to them. As use-restrictive TOU continue to proliferate, with little thought given to what they actually mean in the aggregate, we risk allowing them to grow so entrenched that courts will not want to disturb them. This dynamic enabled software distributors to exempt themselves from copyright’s first sale doctrine simply by their own say-so. The EULA/first sale cases, and others in which the equities might have favored contract plaintiffs — suits against competitors, or suits over uses that are not expressive or core privileged uses under the Copyright Act — have laid the groundwork for courts to enforce personal use-only TOU. Case law on the books today. This would support a wholesale conversion of digital environments into privileged use-free zones at the election of content providers — for no other reason than that they own and operate web servers and can condition access to the content there on the user’s “agreement” to draconian TOU. It would have been a much less significant, and therefore much easier, gesture to reject these TOU before their promulgation became standard operating procedure on the Internet. By the time a website plaintiff gets round to asking a court to enforce TOU against a fair user of its content, or a user who reproduced unoriginal facts taken from the site, courts may not feel that they are in a position to say no.

In the meantime use-restrictive TOU chill site visitors from engaging in First Amendment protected expressive uses of the content they find on the Internet.²⁴⁸ Scrupulous surfers of the web — the sort to follow rules when and where they find them — will want to comply with the terms that govern access to the sites they visit. Others may simply be cowed into a personal consumption-only submission, either because they are unfamiliar with the indulgences

248. Moffat, *supra* note 45, at 66–67.

the Copyright Act affords them or because they are familiar with the case law trends discussed here (which is worse). And if the TOU themselves do not sufficiently discourage the public from engaging in copyright-privileged uses, a demand letter from an attorney, citing potential conflict claims, could nudge the user into compliance. The chilling effects of these TOU may therefore not be apparent from the state of the case reporters.

One hopes that a court, if asked to enforce TOU to enjoin or award damages for otherwise lawful expressive use of web content, will find a basis to distinguish or repudiate the holdings of *ProCD*, *Bowers*, and *Davidson & Associates*. The court should accept a defendant's invitation to examine whether the contract at issue was freely negotiated, and whether its practical effect is to adjust copyright's balance of proprietary rights and public privileges unfairly in the website's favor. Perhaps because they have separately considered the questions of formation and preemption and unconscionability, courts to date have unnecessarily cabined their consideration of the circumstances of formation. Those circumstances should bear on defenses like preemption and unconscionability. It is not enough simply to conclude that the defendant agreed to terms, and because he or she agreed, the other defenses fail. The preemption and unconscionability defenses require a holistic review of how the agreement was reached, and what specifically was agreed. Where the terms are non-negotiable (indeed inescapable, in a browsewrap format), and they restrict copyright-privileged uses of content, they ought to be held preempted, unconscionable, and — if the use at issue is expressive — unconstitutional to enforce. Nothing about the Internet calls for its content peddlers to be exempt from the policies established by Congress and the courts to harmonize copyright law with free expression.