


January 2010

From the Mouths of Babes: Protecting Child Authors from Themselves

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Recommended Citation

Julie C. Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. Va. L. Rev. (2010).

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FROM THE MOUTHS OF BABES: PROTECTING CHILD AUTHORS FROM THEMSELVES

*Julie Cromer Young**

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Out of the mouth of babes and sucklings hast thou ordained strength, because of thine enemies, that thou mightest still the enemy and the avenger.

— Psalm 8:2–3¹

Kids say the darndest things.

— Art Linkletter²

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¹ *Psalms* 8:2 (King James).

² From the “House Party” television series, 1952–1968 and 1968–1969.

I. INTRODUCTION

Akiane Kramarik, age fifteen at the time of this writing, is an accomplished artist and poet, earning appearances on programs such as “Oprah Winfrey” because of her prodigious talent. At the age of four, she began to draw, and by the age of six, she was painting.³ She painted some of her earliest commercial works by age seven.⁴ She works four to five hours each day painting, often rising before five in the morning to begin.⁵ Born to a professional-chef father and a stay-at-home mother, Akiane now paints eight to twenty paintings a year, which sell for anywhere from \$50,000.00 to \$1,000,000.00 apiece.⁶ In addition, she has written and published two books of poetry.⁷ Her teenage brothers operate a web site (www.artakiane.com) dedicated to Akiane and her works, and on that site, consumers can purchase her books and artwork. The web site bears the copyright notice, “All Material on this site is © Copyright 2000–2008 Akiane Kramarik.”⁸ She only has one federally registered copyright, co-owned with her mother, Foreli, for the book *Akiane — Her Life, Her Art, Her Poetry*.⁹ Her brothers do not have a copyright registration in the web site.

Like Akiane and her brothers, thousands upon thousands of “underage authors” are exposing their copyrighted works online. But what rights, exactly, are they securing for themselves? In theory, the Copyright Act could protect against the misappropriation of the young author’s rights, but only if that author thinks to register his or her work. The minor author is often all too willing to expose the work to infringement by publishing or even creating the copyrightable work online, inviting right-click instantaneous copying of the work. Distribution of copyrighted works can occur before the author has even realized that a work has been created, thanks to social networking sites that target teens and tweens as young as age six.¹⁰ In addition, each of these sites has complex user

³ See Akiane: Her Life, http://www.artakiane.com/her_life.html (last visited June 4, 2008) (hereinafter “Akiane”). It is the author’s understanding that the information on the web site has not been updated since February 2008, so any factual information provided here is subject to that limitation.

⁴ See Akiane, <http://www.artakiane.com/home.html> (last visited Feb. 24, 2009).

⁵ See *id.*

⁶ See *id.*; see also Akiane: Questions and Answers, http://www.artakiane.com/questions_answers.htm (last visited June 4, 2008). Limited and open edition giclees are available for \$450.00 to \$10,000.00 a piece. *Id.*

⁷ AKIANE KRAMARIK, *AKIANE — HER LIFE, HER ART, HER POETRY* (2006); AKIANE KRAMARIK, *MY DREAM IS BIGGER THAN I — MEMORIES OF TOMORROW* (ARTAKIANE LLC 2006).

⁸ See Akiane, *supra* note 4.

⁹ U.S. Copyright Reg. No. TX0006466698 (registered Nov. 9, 2006), available at http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=TX0006466698&Search_Code=REGS&PID=dhaqyVBADIE9HIGpB4BADvTJax18F&SEQ=20091013114256&CNT=25&HIST=1.

¹⁰ See, e.g., Gina Chen, *Making Sense of Social-Networking Sites for Young Kids*, SYRACUSE POST-STANDARD, Dec. 29, 2008, http://blog.syracuse.com/family/2008/12/making_sense_of_

agreements and terms of use that could confuse someone who is thirty-eight, much less eight. These terms, which many users never acknowledge or see, purport to be contractual agreements that bind the user regardless of that user's age.

Or do they? In theory, the age-old contractual doctrine of infancy¹¹ — the principle that contracts are voidable at the election of a contracting minor¹² — protects the minor from malevolent contractual predators who would take advantage of a naïve child. In this respect, the doctrine may be used as a defensive shield for the child to negate a contract that the minor in an older, wiser stage of life (often by only months) may regret. An infant may raise this defense in litigation when an adult plaintiff seeks to uphold the agreed-upon terms when the minor defendant lacked the capacity to agree.¹³ Used in this manner, the infancy defense is often all but guaranteed. Conversely, as a longstanding rule, the infancy doctrine may not be used as a sword, allowing minors to pick and choose the contracts he would disaffirm.¹⁴ In other words, an infant plaintiff has no recourse from the doctrine when attempting proactively to avoid a contract that might impinge upon that plaintiff's rights. As a result, because of its reliability as a defense but its impracticability as a cause of action, the infancy doctrine is structured in a way that makes it nearly impossible for a plaintiff to succeed in an infancy-related dispute. It is no surprise, then, that the doctrine of infancy has always had its share of critics, and, like their historic counterparts, recent authors have called for its abolition.

Online contracts, however, may present an instance where the doctrine of infancy should not be abolished or even limited, but perhaps should be expanded so that minor authors who post materials on a web site can protect the rights in those works from unwitting dilution. Online click-through agreements often contain licenses to the young authors' copyrighted works, but authors who could be protected by the doctrine of infancy habitually are aware neither of the rights they have obtained in the work nor of the license granted merely by the child's navigation through a colorful site. Assuming the child obtains access without the assistance of a parent, he could be bound to pages of legal jargon,

socialnetworki.html. Ms. Chen reviews six social networking sites aimed at minors, three of which (ClubPenguin.com, Nicktropolis.com, and Webkinz.com) list ages as young as six as acceptable for the site.

¹¹ Formation of contracts requires that the contracting parties have the capacity to do so, and this capacity is presumed "unless he falls within one of the classes of persons who are held by the law to have no capacity, or only a limited capacity to contract." Infants comprise one of these classes. See 5 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 9:1, at 2 (4th ed. 2009).

¹² [Book I] E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 443 (3d ed., Aspen Publishers 2004).

¹³ For purposes of this Article, the terms "infant," "child," "minor," and "underage" signify a person who is under the age of majority, typically age eighteen years, in his or her jurisdiction.

¹⁴ See, e.g., *Lemon v. Beeman*, 45 Ohio St. 505, 509 (Ohio 1888) ("[T]he general doctrine of rescission is departed from no further than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield, and not a sword.").

even though the web site may target children who possess a vocabulary comprising of little more than monosyllabic words.¹⁵

Granted, the hypothetical situation of an exploited six-year-old author held to the terms of an overly legalized adult contract may sound a little extreme. The erosion of the doctrine of infancy and of the rights that infant authors may have in copyrighted works would not begin in such a case, but in a case such as *A.V. v. iParadigms*.¹⁶ In *iParadigms*, the author was an older infant, bound by terms and conditions of a web site to which he was *forced* to publish as part of a high school class in order to receive a passing grade.¹⁷ In this case involving the popular plagiarism-checking software Turnitin, the court created an opinion that not only had immediate analytical impact for the contractual doctrine of infancy, but also had a more subtle, lasting impact on how courts are to interpret the terms and conditions of sites. And, as a result, the problems that are highlighted by the failure to apply the doctrine to online contracts, as well as the failure to protect infant authors, may eventually change how web site terms and conditions, user agreements, and click-wrap licenses will ultimately be viewed and created.

This Article begins by examining the practical ability or inability of the “infant author” to achieve and exploit the full rights of copyright, given that the Copyright Office itself seems to recognize that any rights given to infant authors are tempered by contract laws. Section II reviews the contractual doctrine of infancy and its effect upon a child author’s protection under copyright law. Section III examines the specific problem of minors contracting regarding their copyrights, especially online contracts. Section IV explores the issue as currently framed, reviewing potential solutions already suggested and noting their inherent problems. Section V examines the recent decision, *A.V. v. iParadigms*, concerning child authors and noting potential flaws in the district court’s rationale. Section VI explores some of these problems, including constitutional rights that support the creative process but which may be limited in a child’s setting, and suggests a measure that Congress could take to ensure that these

¹⁵ ReadingKEY, a vocabulary-building program for grades one through five, identifies fewer than three dozen polysyllabic words over a thirty-six week first-grade course (ten words per week), of which only three are more than two syllables: “together,” “tomorrow,” and “beautiful.” See TampaReads, Grade 1 National Reading Vocabulary, <http://www.tampareads.com/worksheet/start.htm> (last visited Jan. 20, 2009). The first sentence of ClubPenguin.com, by comparison, contains as many polysyllabic words as monosyllabic words, including three four-syllable words (“Welcome to Club Penguin (the ‘Site’). Club Penguin is operated and presented to users by Club Penguin Entertainment Inc. of Kelowna, British Columbia, Canada (“Club Penguin”).”), if one overlooks the section title, “Introduction.” See Disney, Inc., Club Penguin Terms of Use, <http://www.clubpenguin.com/terms.htm> (last visited Jan. 20, 2009).

¹⁶ 544 F. Supp. 2d 473 (E.D. Va. 2008), *aff’d on other grounds, rev’d on other grounds sub nom*; *A.V. ex rel. Vanderhye v. iParadigms*, 562 F.3d 630 (4th Cir. 2009). For an in-depth discussion of this case see *infra* notes 135—155 and accompanying text.

¹⁷ *iParadigms*, 544 F.Supp.2d at 478. At the time the complaint was filed, Plaintiffs attended high school in Virginia, and in the context of their high school studies, they were required to submit their papers to the Turnitin.com site or receive a zero for the assignment. *Id.*

rights are born with the child's work and mature as quickly as rights for a work authored by an adult.

II. RIGHTS FOR, AND RESTRAINTS ON, CHILD AUTHORS

Unsurprisingly, laws do apply to children. Children benefit from laws as much as the children's adult counterparts, receiving constitutional protections from birth (and in some instances, from before birth).¹⁸ Additionally, equal protection of the laws has been held to be as applicable to children as it is to adults.¹⁹ A child's status as a child does not negate these protections, even though arguably the child does nothing to earn them. A child pays little to no taxes and does not vote. In fact, as a general rule, American society and its laws protect the child more because of the child's status as a child. Laws provide children with public education, provide police protections and heightened criminal offenses for child victims, and design numerous civil protections and further opportunities for children. As a class, compared with other demographic classes in the United States, children are overprotected, a phenomenon neither unusual nor unexpected.

This overprotection extends even further when the child is considered to be an individual actor in a legal context. When the law appears to involve the inability of the minor to appreciate fully an action that he has taken, laws either prohibit the child from acting or excuse or rescue the child from acting badly or irrationally. The above-mentioned legal prohibition of a child to vote until he has reached the age of eighteen²⁰ protects society from a vote ostensibly not cast

¹⁸ For purposes of this Article, because children lack the access to tangible mediums of expression on which to fix an original work until they are in fact separated from their mothers at birth, I am assuming that children may begin to realize the potential of copyright at childbirth. This Article makes no representation about when rights not related to intellectual property might attach to a child, though it recognizes the possibility that an ultrasound of an unconsenting naked fetus may in fact be interpreted to violate privacy rights. *See Carey v. Population Services, Int'l*, 431 U.S. 678, 693 (1977) (holding that the right to privacy in connection with decisions affecting procreation extends to minors as well as adults); *Aid for Women v. Foulston*, 441 F.3d 1101, 1116–17 (10th Cir. 2006) (concluding the right of informational privacy extends to minors); *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789 (9th Cir. 2002) (recognizing “a young woman’s privacy interest in avoiding disclosure of sensitive personal information.”); *Doe v. Irwin*, 615 F.2d 1162, 1166 (6th Cir. 1980) (“Though the state has somewhat broader authority to regulate the conduct of children than that of adults, minors do possess a constitutionally protected right of privacy.”); *Wynn v. Carey*, 582 F.2d 1375, 1384 (7th Cir. 1978) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“[A] minor possesses the right of privacy, defined as ‘the right of the individual . . . to be free of unwarranted governmental intrusion into . . . the decision whether to bear or beget a child,’ [but] that right is not unqualified.”)). The author declines to enter into that discussion for purposes of this Article but encourages the dialogue to continue.

¹⁹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding that minors, as well as adults, are protected by the Constitution and possess constitutional rights).

²⁰ *See* U.S. CONST. amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

with full understanding of the issues at hand.²¹ Additionally, it protects the child from outside influence and pressure to vote in a way that the child would not otherwise believe if the child possessed the maturity to form a fully-informed opinion.²² The capacity of the child's mind is taken into account when considering a variety of potential offenses and behaviors. Bad actions may be excused when a child lacks the mental capacity to form sufficient intent to commit an intentional crime, such as murder or battery.²³ Laws can also rescue a child's bad or irrational decisions — for example, in the infancy doctrine for contracting, which allows a child to avoid certain contracts made before the child attained the age of majority.²⁴

In cases involving child authorship, two categories of laws must be considered. The first legal consideration involves which rights the child author receives as a benefit for creating a copyrighted work. The second involves the child's ability to contract concerning that work and the ability to invalidate such a contract under the infancy doctrine.²⁵

²¹ For example, the argument against incorporating the eighteen-year-old voting age in the Twenty-sixth Amendment to the Constitution included rationales that “young people between the ages of 18 and 21 lack the maturity and experience that the exercise of the right to vote demands in a free society,” “[p]hysical maturity is quite different from social and political maturity,” and “[t]he right to vote should be restricted to those who are mature enough to assume the full responsibilities of citizenship.” Thomas H. Neale, *The Eighteen-Year-Old Vote: The Twenty-Sixth Amendment and Subsequent Voting Rates of Newly Enfranchised Age Groups*, Congressional Research Service Report No. 83-103 GOV (May 20, 1983) (citing Doris W. Jones, *Lowering the Voting Age to 18 Years: Pro and Con Arguments*, U.S. Library of Congress Legislative Reference Service (1959)).

²² For example, several U.S. schools decided not to air the speech of President Barack Obama to U.S. schoolchildren in an attempt to protect them from perceived political influence. See, e.g., *Obama Urges Students to Work Hard, Stay in School*, CNN, available at <http://www.cnn.com/2009/POLITICS/09/08/obama.school.speech/index.html?ref=newssearch> (last visited Sept. 11, 2009).

²³ See, e.g., *State v. Pittman*, 647 S.E.2d 144, 153–54 (S.C. 2007) (“Where a person is between seven and fourteen years of age, he is presumed not to have the mental capacity of committing a crime, but that is a rebuttable presumption.”); *People v. Stowe*, 790 N.Y.S.2d 521, 522 (N.Y.A.D. 2 Dept. 2005) (“As a juvenile offender [under the age of 16], the defendant cannot be held criminally responsible for felony murder where the underlying felony, attempted robbery, is a crime for which he cannot be held criminally responsible.”); *Bragan ex. rel. Bragan v. Symanzik*, 687 N.W.2d 881, 888 (Mich. App. 2004) (“Children under the age of seven are presumptively incapable of committing negligent or criminal acts or intentional torts.”).

²⁴ See *See LORD, supra* note 11, at § 9:5, p. 35 (“an infant’s contract or transfer is voidable . . .”); RESTATEMENT (SECOND) OF CONTRACTS § 14.

²⁵ Admittedly, a third legal category should be considered in order to examine all rights and liabilities concerning childhood authorship. Infringement of copyright is a tort which requires no specific intent on the part of the infringer. See *Zurich Ins. Co. (U.S. Branch) v. Killer Music*, 998 F.2d 674 (9th Cir. 1993) (finding copyright infringement can be innocent or intentional). But it could require an examination of intent when examining a defense of fair use. See *Int’l Stamp Art v. U.S. Postal Serv.*, 456 F.3d 1270 (11th Cir. 2006) (finding a likelihood of confusion standard, including questions of intent, may be appropriate to analyze fair use). A child author could infringe an existing work by creating an unlicensed derivative work of the existing work. This is an

A. *Rights for Child Authors: Copyright*

Most intellectual property rights that would benefit children due to the child's creation of that intellectual property would be protected under copyright.²⁶ In the United States, copyright is the mechanism that protects most authors and works of authorship. It has its roots in the U.S. Constitution, which extends to Congress the ability to protect authors and their writings.²⁷ Congress's current iteration of this directive is the Copyright Act of 1976, which protects original works of authorship fixed in tangible mediums of expression.²⁸ Provided the work is one that can be protected,²⁹ the author receives the rights afforded to authors in the Copyright Act, dependent upon the type of work. The six rights enumerated in § 106 of the Copyright Act are rights of reproduction, creation of derivative works, distribution, performance, display, and digital performance.³⁰ Depending on the type of work, additional rights and protections may be available.³¹ These protections are not contingent upon registration of the copyrighted work³² and can be transferred or licensed in whole or in part.³³

Section 201 of the Copyright Act governs ownership, declaring that “[c]opyright in a work . . . vests initially in the author or authors of the work.”³⁴ The Copyright Act is silent regarding the definition of the term “author.” Sec-

interesting topic which merits a longer discussion. Other cases not involving initial child authorship have considered child infringers and as a rule have held them liable.

²⁶ This is not to say that children cannot create other forms of intellectual property. The Patent and Trademark Depository Library Association has posted a list of child inventors, including the inventors of items of everything from toy trucks and chalk storage to luminescent writing and a mop head cover. See Patent Search Presentation to Young Inventors, <http://www.ptdla.org/journal/2001giles> (last visited Feb. 26, 2009). Young entrepreneurs also may secure a trademark in their companies; for example, Adam Hildreth founded the British technology venture Crisp Thinking when he was age thirteen. See Crisp, <http://www.crispthinking.com/about.htm> (last visited Feb. 26, 2009).

²⁷ U.S. CONST. art. I, § 8, cl. 8.

²⁸ 1976 Copyright Act, 17 U.S.C. § 102(a) (2006). Unless otherwise expressly specified, all references to the “Copyright Act” herein refer to the 1976 Copyright Act.

²⁹ Works that cannot be protected include works that lack originality, such as those listed under 17 U.S.C. § 102(b).

³⁰ 17 U.S.C. § 106. Not all rights are available to all works; for example, the right to digital performance is limited to sound recordings.

³¹ For example, for works of visual art, the author may claim rights of attribution and integrity. *Id.* § 106A.

³² See U.S. COPYRIGHT OFFICE, CIRCULAR 1 (rev. July 2008) [hereinafter U.S. COPYRIGHT OFFICE, CIRCULAR 1], at 3 (“No publication or registration or other action in the Copyright Office is required to secure copyright.”). However, registration confers certain benefits upon the copyright owner, including the ability to file an action for copyright infringement. *Id.* at 7.

³³ 17 U.S.C. § 201(d)(1) (2006) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . .”).

³⁴ *Id.* § 201(a). In addition to the types of ownership addressed *supra*, § 201 addresses joint authorship, works made for hire, and collective works.

ondary sources define it as “one who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself;”³⁵ or, “a person who makes or originates something; creator; originator.”³⁶ From the Copyright Office’s perspective, “the individual who actually created the work is the author except in the case of a ‘work made for hire.’”³⁷

For authors who are not working anonymously or for hire, the duration of the rights afforded by a copyright is contingent upon age.³⁸ Section 302 of the Copyright Act provides that “Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”³⁹ The very minimum, then, that a copyright may last is seventy years (assuming death immediately upon the work’s creation). For authors of joint works, a copyright may last even longer than seventy years beyond an author’s life; if an author is survived by a joint author, a deceased joint author’s heirs will enjoy a copyright for seventy years from the surviving joint author’s death, even if that event occurs long after the first author’s death.⁴⁰

With the exception of the predeceasing joint author, copyright lasts longest for those who write when they are young and live long lives. The Copyright Act contains no age limit for the author who applies for a copyright. In fact, the sole guidance for an author’s age comes not from the statute, but from the Copyright Office in its Circular 1: “Minors may claim copyright, but state laws may regulate the business dealings of copyrights owned by minors.”⁴¹ In a

³⁵ BLACK’S LAW DICTIONARY 151–52 (9th ed. 2009) [hereinafter BLACK’S].

³⁶ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 92 (3d ed. 1997) (1988).

³⁷ U.S. COPYRIGHT OFFICE, APPLICATION FOR COPYRIGHT REGISTRATION, FORM CO INSTRUCTIONS 2 (2009), available at <http://www.copyright.gov/forms/formco2d-ins.pdf>; 17 U.S.C. § 101 (2006).

A “work made for hire” is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id.

³⁸ 17 U.S.C. § 302(c) (2006) (“In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.”).

³⁹ *Id.* § 302(a).

⁴⁰ *Id.* § 302(b).

⁴¹ U.S. COPYRIGHT OFFICE, CIRCULAR 1 at 2.

rare deference to state laws with respect to copyright, the Copyright Office acknowledges that when children are concerned, the state laws control.⁴²

B. Additional Rights for, but Also Restraints on, Child Authors: Contract

Implicit in the recognition of state laws when concerning copyrights owned by minors is the suggestion that the ownership of copyright may be tempered by areas of law other than copyright. The consideration of business dealings concerning copyright necessitates consultation and interpretation of contract law. Like other legal areas, courts view contracts with minors as instruments to be handled with great care. Accordingly, it has long been a legal tradition for the courts to offer increased protections to minors when they are parties to contracts. For generations, this has been accomplished through the contractual doctrine of infancy. The doctrine of infancy, which allows a minor to avoid or disaffirm contracts, was recognized at common law as early as 1292.⁴³ The principle that contracts were voidable at the election of the infant, regardless of the fairness of the contract,⁴⁴ was well settled by the fifteenth century.⁴⁵

Like many legal concepts rooted in English law, including copyright,⁴⁶ the doctrine of infancy migrated to the United States. Common-law rules regarding an infant's lack of contractual capacity have "endured in the United States . . . with considerable vitality."⁴⁷ Traditionally, the common law has viewed minors as naïve and unsophisticated, especially in the marketplace.⁴⁸ Because of this marketplace vulnerability, the law assumes minors may have been induced into contracts and therefore need additional protections. It follows that courts have held that "[i]n all suits or legal proceedings of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court . . . may be invoked whenever it becomes necessary to fully

⁴² Because the ability to protect authors was afforded to Congress in the Constitution, the Copyright Act provides that it preempts state laws with respect to copyrights. See 17 U.S.C. § 301(a)(1). For further discussion see *infra* notes 119–120 and accompanying text.

⁴³ *Creech v. Melnick*, 556 S.E.2d 587, 590 (N.C.App. 2001) (citing Robert E. Richards, *Children and the Recorded Message Industry: The Need for a New Doctrine*, 72 VA. L. REV. 1325, 1332–33 (1986)). See also LORD, *supra* note 11, at § 9.2, p. 5 (citing [1292] YB 20 and 21 Edw I, p. 318).

⁴⁴ FARNSWORTH, *supra* note 12, at 443.

⁴⁵ *Creech*, 556 S.E.2d at 590 (citing *Gastonia Personnel Corp. v. Rogers*, 172 S.E.2d 19, 20 (1970) (quoting 2 WILLISTON, CONTRACTS § 223 (3d ed. 1959))). However, the infant was held liable for contracts for necessities — food, clothing, shelter.

⁴⁶ One of the earliest copyright laws was the Statute of Anne.

⁴⁷ *Creech*, 556 S.E.2d at 591 (quoting JOHN N. HUTSON, JR. & SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW § 1-26, 30 (2001)).

⁴⁸ *Creech*, 556 S.E.2d at 590 (quoting Robert E. Richards, *Children and the Recorded Message Industry: The Need for a New Doctrine*, 72 VA. L. REV. 1325, 1332–33 (1986)).

protect such rights.”⁴⁹ Under the doctrine of infancy, contracts with minors are voidable at the minor’s election, regardless of the minor’s apparent age or maturity or of the other party’s knowledge of the minor’s actual age.⁵⁰

In the absence of a specific statute, contracts by minors are not invalid, but voidable by the infant,⁵¹ but the infant must disaffirm the contractual obligations within a reasonable time of attaining the age of majority in order to invalidate the contract.⁵² While at common law the standard age of majority was twenty-one,⁵³ in most states presently a person is a minor until the age of eighteen.⁵⁴ When the infant’s age is used as a shield rather than a sword — that is, when the underage status is used to rebuff an attempt to enforce a contract — it will be construed as favorably as possible to the infant without regard to the unfairness to the adult.⁵⁵ In addition, courts have a general tendency to find in favor of the infant and prevent the child from being taken advantage of by those without a disability (adults).⁵⁶

The doctrine of infancy has always had its share of legal critics. Henry A. L. Hall decried “a blind and servile adherence to rules laid down by the judges in England, two or three hundred years ago.”⁵⁷ Professor Larry DiMatteo noted that criticisms of and restrictions on the infancy doctrine dated to 1794, resulting in limitations on the ability to disaffirm contracts for “necessaries” and time limits on when a minor can disaffirm.⁵⁸ Professor DiMatteo calls for the abolition of the infancy doctrine and replacing it with a “factors” test to

⁴⁹ Creech v. Melnick, 556 S.E.2d 587, 590 (N.C.App. 2001) (quoting Latta v. Trustees of Gen. Assembly of Presbyterian Church in U.S., 196 S.E. 862, 866 (N.C. 1938)). For a thorough treatment of the current state of the infancy doctrine and its application, see Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors’ Incapacity to Contract through the Cyberscope*, 43 GONZ. L. REV. 239, 244 (2008).

⁵⁰ FARNSWORTH, *supra* note 12, at 443.

⁵¹ A notable exception is a contract for necessities, which is deemed valid. See note 47.

⁵² FARNSWORTH, *supra* note 12.

⁵³ *Id.* at 443–44.

⁵⁴ The age of majority is eighteen in all the states except for Alabama (nineteen), ALA. CODE § 26-1-1; Nebraska (nineteen), NEB. REV. STAT. § 43-2101; Wyoming (nineteen), WYO. STAT. ANN. § 14-1-101; and Mississippi (twenty-one), MISS. CODE ANN. § 1-3-27. However, in the Mississippi case *Garrett v. Gay*, 394 So.2d 321 (Miss. 1981), the age of majority is lowered to eighteen for the purpose of entering into contractual relationships for personal property. In addition, certain statutes addressing the age of majority allow for another statute to take precedence over the general majority age. (Alaska, Connecticut, Florida, Minnesota, Oklahoma, and Virginia).

⁵⁵ FARNSWORTH, *supra* note 12, at 449.

⁵⁶ *Id.* at 454.

⁵⁷ Henry A. L. Hall, *The Liability of an Infant Who Represents Himself of Age*, 8 YALE L.J. 235 (Feb. 1899) (criticizing the ability of infants to disaffirm contracts under common law when they misrepresented their age to the adult contracting party).

⁵⁸ Larry A. DiMatteo, *Deconstructing the Myth of the Infancy Law Doctrine: From Incapacity to Accountability*, 21 OHIO N. U. L. REV. 481, 488 (1994).

determine the capacity of the minor to contract.⁵⁹ In recent years, the perceived increased sophistication of underage consumers online has increased the criticism. Professor Larry Cunningham, noting the failure of most states to keep up-to-date with studies on child psychology and adolescence, advocates the implementation of a Model Children's Code for revisions extending not only to contracts but also to all areas involving the legal status of children.⁶⁰

The doctrine of infancy has not been abolished, but years of implementation have restricted the instances in which it applies. For example, as noted above, a minor cannot disaffirm contracts for "necessaries," those goods and services "necessary for health and sustenance."⁶¹ Necessaries include food, medicine, clothes, shelter, or "personal services usually considered reasonably essential for preservation and enjoyment of life."⁶² Moreover, some obligations, "because of public policy, statute, or implications drawn from statute, are binding on infants and cannot be disaffirmed."⁶³ However, even given these limitations, it remains "a well-established general rule at common-law that a minor is not liable on any contract he makes and that he may disaffirm the same."⁶⁴

III. YOUNG AUTHORS AND THE CONTRACTS THEY ENTER

As noted above, child authors enjoy the same ability to own a copyright for their works as their adult counterparts. However, this ability is curbed by the authors' youth. In the infancy doctrine, the very thing that is designed to help young authors may in fact hinder their ability to enter into contracts at all. Contracting parties often have special contingencies if the other contracting party is a minor. For example, when actor Heath Ledger won an Academy Award posthumously in February 2009, there was little question that the Oscar statuette would go to his daughter and sole surviving heir, Matilda.⁶⁵ However, the Academy concluded that she was "legally unable to sign the winner's agreement — a contract required of all nominees that says the recipient will not

⁵⁹ *Id.* at 524.

⁶⁰ Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 365 (Summer 2006). In areas of juvenile criminal law, however, proponents of the infancy doctrine remain vocal. See, e.g., Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687 (April 2006); Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, in *Symposium 2007, The Promise of in re Gault: Promoting and Protecting the Right to Counsel in Juvenile Court*, 60 RUTGERS L. REV. 33 (Fall 2007).

⁶¹ *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520 (Haw. 2006).

⁶² *Muller v. CES Credit Union*, 832 N.E.2d 80 (Ohio App. 2005).

⁶³ LORD, *supra* note 11, at § 9:6, p. 47.

⁶⁴ *Williams v. Baptist Health Systems, Inc.*, 2003 WL 1120186 (Ala. Civ. App. 2003).

⁶⁵ Associated Press, *And the Oscar Goes to Matilda if Ledger Wins* (February 18, 2009), available at <http://movies.msn.com/movies/article.aspx?news=352984> (last visited March 2, 2009).

resell his or her Oscar without first offering it back to the academy for \$1.”⁶⁶ Under California Family Code § 6701, a minor may not make a contract relating to any personal property not in the immediate possession or control of the minor;⁶⁷ therefore, while Matilda Ledger is legally entitled to the Oscar, her mother signed the winner’s agreement and retained control of the statuette until Matilda reaches the age of eighteen, when she can legally sign the agreement under California law.⁶⁸

While examples of reservations are evident, these reservations have not prevented minors and minor authors from entering into agreements regarding their copyrights. And, it logically follows that it has not prevented the courts from becoming involved in those agreements.

A. *Offline Copyright Contracts*

Several states anticipate contracts with minors, albeit not in the context of the minor’s creation of a copyrighted work. Few cases have in fact dealt with instances where an infant has created a work subject to copyright, but evidence of young authors is abundant. For example, composer Wolfgang Amadeus Mozart was writing musical works by the age of five⁶⁹ and, by the age of eighteen, had written three operas.⁷⁰ Diarist Anne Frank was only thirteen when she began to write her diary, although she likely did not think that it would become a commercial success at the time she wrote it.⁷¹

In *Valjo Music Publishing Corporation v. Elvis Presley Music*, although the Southern District of New York did not expressly deal with a contract that was entered into by infants, it accepted that minors could be the authors of musical works.⁷² At issue was a dispute over the authorship of the song “Hound Dog,” made popular by vocal artist Elvis Presley.⁷³ In *Valjo*, plaintiff Johnny Otis alleged that he was the co-author of the song along with two defendants, Jerry Leiber and Mike Stoller, who were minors at the time “Hound Dog” was written.⁷⁴ Otis rationalized a prior settlement agreement with the two by saying

⁶⁶ *Id.*

⁶⁷ CAL. FAM. CODE § 6701(3) (West 1994). A minor is also prohibited from giving a delegation of power or from making a contract with respect to real property.

⁶⁸ Associated Press, *supra* note 65.

⁶⁹ OTTO ERICH DEUTSCH, MOZART: A DOCUMENTARY BIOGRAPHY 455 (Stanford University Press 1966).

⁷⁰ RUTH HALLIWELL, THE MOZART FAMILY: FOUR LIVES IN A SOCIAL CONTEXT 172, 183–85 (Oxford: Oxford University Press 1998).

⁷¹ ANNE FRANK, DIARY OF A YOUNG GIRL 2–4 (B.M. Mooyaart-Doubleday trans., Bantam Books 1993) (1967) (“[I]t seems to me that neither I — nor anyone else for that matter — will be interested in the musings of a thirteen-year-old schoolgirl.”).

⁷² 156 F. Supp. 568 (S.D.N.Y. 1957).

⁷³ *Id.* at 569.

⁷⁴ *Id.* at 568, 570.

that he learned that the defendants were infants and would, therefore, disaffirm any contract that they had with him.⁷⁵ The court noted that this made no sense and alluded to the fact that minors could author works of music: “Otis was a man who had many years experience in the music business. He must have realized that even though Leiber and Stoller were infants they could not disaffirm his co-authorship of a song, if in fact he had been a co-author.”⁷⁶ In saying this, the court appeared to accept as a matter of course that in entertainment, minors author music and enter into contracts regarding that music as part of the business culture.

B. *Online Copyright Contracts*

When considering the ability of minors to contract online, often scholars pay heed to those contracts which benefit the young contractors to certain detriment of the adult contracting party. For example, Professor Juanna Lowder Daniel focuses on the purchasing power of minors through electronic commerce, noting that “merchants are . . . forced to reckon with the minority incapacity doctrine, despite the level of sophistication demonstrated by minors in their interactions with cyberspace.”⁷⁷ She also identifies “sophisticated untoward behavior,” “online criminal activity,” and “electronic misdeeds,” all of which question continued protection of minors for online transactions.⁷⁸

Professor Daniel is entirely justified in identifying the bad-actor children as a lens through which to view and critique the infancy doctrine. On the other hand, however, child authors such as Akiane Kramarik are not necessarily acting with a level of malice that Professor Daniel and others anticipate. The opportunities for minors to engage in authorship and publicize young creative writing have multiplied with the expansion of the Internet and social networking sites, even those directed at children under the age of ten. As demonstrated above, when any of these young authors create their works, they are automatically covered by copyright and given the rights to reproduce, create derivative works, distribute, perform, and display as befits the particular situation.⁷⁹ In the case of young authors, however, these rights are almost immediately compromised because the electronic media where most young authors post their works automatically limit their rights through the terms and conditions of their sites.

Some sites actually first encourage authorship and posting, then proceed to limit the rights the author would otherwise enjoy had she written it with pen

⁷⁵ *Id.* at 570.

⁷⁶ *Id.*

⁷⁷ Daniel, *supra* note 49, at 255.

⁷⁸ *Id.*

⁷⁹ 17 U.S.C. § 106.

and paper instead of posting it online. For example, the Contra Costa Times,⁸⁰ serving Contra Costa County, California, has for years incorporated a Teen Board.⁸¹ Recently, the Board “went digital,” inspiring the LIP Teen Blog “I Should Be Doing My Homework.”⁸² The blog allows teens to write about a variety of topics, from school politics to summer jobs, from social activism online to dismay over the delay of the next *Harry Potter* movie installment.⁸³ The members of the Teen Board post often and in detail.

By posting on the blog, authors agree to grant:

. . . a perpetual, irrevocable, royalty-free, non-exclusive, worldwide license, with the right to use, copy, sublicense, modify, adapt, transmit, distribute, publicly perform or display such material. The foregoing grants shall include the right to exploit any proprietary rights in such material, including but not limited to rights under copyright, trademark, service mark or patent laws in any jurisdiction. All rights in this paragraph are granted without compensation of any sort to you.⁸⁴

In another example, Facebook is a “social utility” that “facilitate[s] the sharing of information through the social graph, the digital mapping of people’s real-world social connections.”⁸⁵ J.C.⁸⁶ posts regularly on facebook.com, inviting status updates from his friends and posting his own. While not authorship to the artistic or creative level of Akiane, his writings are in fact protected by copyright, which merely requires originality and fixation in a tangible medium of expression.⁸⁷ Yet postings on facebook.com are subject to the following license:

you automatically grant, . . . to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly per-

⁸⁰ The Contra Costa Times, located online at www.contracostatimes.com, is part of the Bay Area News Group, which serves the San Francisco Bay area. See Bay Area News Group, www.bayareanewsgroup.com (last visited Nov. 1, 2009).

⁸¹ The Life in Perspective Teen Board is made up of teens who write feature stories and columns for the Contra Costa Times. See Life in Perspective Teen Board, <http://www.contracostatimes.com/teens> (last visited Dec. 12, 2009).

⁸² LIP stands for “Life in Perspective.” See LIP Teen Blog, <http://www.ibabuzz.com/lip/> (last visited Sept. 22, 2008).

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ Facebook, Facebook Factsheet, <http://www.facebook.com/press/info.php?factsheet> (last visited Feb. 28, 2009).

⁸⁶ My cousin, who like many teens would be mortified if I actually identified him by name.

⁸⁷ 17 U.S.C. § 102(a).

form, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing. . . . If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.⁸⁸

More accurately, that was the license at the time of his posting. On February 4, 2009, Facebook posted a new license that removed the last language of that license, removing the expiration of the license and including a provision that the license paragraph survived any termination of the license by the owner.⁸⁹ After complaints from tens of thousands of users and a threatened Federal Trade Commission complaint by consumer watchdog Electronic Privacy Information Center, Facebook reversed its policy, returning to its previous Terms of Use just two weeks after changing them.⁹⁰

Another popular social networking site is Club Penguin, created by Disney and popular with pre-teens.⁹¹ According to the Club Penguin parents' page:

Players create a penguin and explore the snow-covered island of Club Penguin, engaging in a variety of fun and imaginative activities. Players can chat, send greeting cards, use emotes (emotion icons), or choose from a set of pre-defined actions such as waving or dancing. Users can also attend parties and special events, take on a role in the latest stage play, adopt and care for

⁸⁸ Facebook Terms & Conditions, <http://www.facebook.com/terms.php?ref=pf> (last visited Feb. 28, 2009).

⁸⁹ See, e.g., Chris Walters, *Facebook's New Terms of Service: "We Can Do Anything We Want With Your Content. Forever."* THE CONSUMERIST (Feb. 15, 2009), <http://consumerist.com/2009/02/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever.html#comments-content> (last visited Dec. 12, 2009).

⁹⁰ See Douglas MacMillan, *The Complaint Almost Filed Against Facebook*, The Tech Beat, BUS. WK. (Feb. 18, 2009), available at http://www.businessweek.com/the_thread/techbeat/archives/2009/02/the_complaint_a.html. The author recognizes that Facebook may not be the most popular mode of online social networking at this time. That honor may have passed to twitter.com, "a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: What are you doing?" Twitter, <http://twitter.com> (last visited April 4, 2009). The Twitter terms of service actively prohibits users under the age of 13. Twitter, Previous Terms of Service, http://twitter.com/tos_archive/version_1 (last visited Nov. 9, 2009). So for the most part, it falls outside the scope of this Article. However, it is interesting to note that although it prohibits the use of the service by most underage posters, it also has the most liberal copyright ownership provisions, even terming the entire "Copyright" section, "(What's Yours is Yours)." *Id.*

⁹¹ Club Penguin lists the target age as 6–14, but notes that it is open to all ages.

a cute and cuddly puffle pet, and play games to earn virtual coins which can be used to design the perfect igloo and create hundreds of outfits for their penguin. New content is added every week.⁹²

Club Penguin acts much like an adult gaming counterpart, Second Life,⁹³ in that it is a virtual world where penguins can waddle around and meet one another. In addition, members can write for the Club Penguin Times, the free Club Penguin newspaper delivered every Thursday.⁹⁴ Members are encouraged to author articles,⁹⁵ jokes,⁹⁶ poems,⁹⁷ and other works that are copyrightable.

Disney's license to use the content, ostensibly aimed at a very young age group, is most comprehensive and includes concessions the others do not. Not only does the license include:

a perpetual, non-exclusive, irrevocable, fully-paid, royalty-free, sub-licensable and transferable (in whole or part) worldwide license under all copyrights, trademarks, patents, trade secrets, privacy and publicity rights and other intellectual property rights you own or control to use, reproduce, transmit, display, exhibit, distribute, index, comment on, modify (including removing lyrics and music from any Submission or substituting the lyrics and music in any Submission with music and lyrics selected by us), create derivative works based upon, perform and otherwise exploit such Submissions, in whole or in part, in

⁹² Club Penguin Parents' Guide, http://www.clubpenguin.com/parents/club_penguin_guide.htm (last visited Nov. 9, 2009) [hereinafter "Penguin"].

⁹³ Second Life is an online three-dimensional virtual world maintained by Linden Lab of San Francisco, California. Users create their own personas in the form of avatars, and explore worlds that are created by users to provide a virtual space to interact with other peoples' avatars. See Second Life, <http://secondlife.com/whatis/?lang=en-US#Welcome> (last visited Nov. 1, 2009); see also Press Release, Linden Lab Announces Name of New Onlien World 'Second Life™' And Availability of Beta Program (Oct. 30, 2002), available at http://lindenlab.com/pressroom/releases/02_10_30.

⁹⁴ See, e.g., Club Penguin Times (Nov. 26, 2009), <http://media1.clubpenguin.com/play/v2/content/local/en/news/20091126.swf>.

⁹⁵ Club Disney also encourages the participation, displaying in capital letters "WE NEED YOU!" next to the title of the newspaper. See *id.*, page D1, labeled "SUBMIT YOUR CONTENT."

⁹⁶ Contributed by 01chance: "There was a polar bear that went to a candy store and said, 'I would like some lemon heads, candy canes, and . . . Umm . . . Ahh . . . Umm . . . Ahh . . . Oh yeah! Jelly Beans!' The shopowner asked, 'Why the large pause?' The polar bear answered, 'I don't know, I've had them my whole life.'"

⁹⁷ Contributed by Rooney 348: "By day, shut in his workshop,/Joe Bright cuts bits of tin,/And smoothes them out and flattens them,/Until they're paper thin./At dusk Joe Bright flies skywards,/With boxes, bags, and jars,/And on the branches of the dark,/He hangs a million stars."

all media formats and channels now known or hereafter devised (including on WDIG Sites, on third party web sites, on our broadcast and cable networks and stations, on our broadband and wireless platforms, products and services, on physical media, and in theatrical release) for any and all purposes including entertainment, news, advertising, promotional, marketing, publicity, trade or commercial purposes, all without further notice to you, with or without attribution, and without the requirement of any permission from or payment to you or to any other person or entity[;]⁹⁸

it also appoints Disney representatives to be agents to execute contracts on behalf of the authors (presumably all children), *and* it includes a waiver of enforcement of moral rights.⁹⁹ Again, as soon as the creative content is submitted to the site, the rights are curtailed, and rights that may not even exist in the United States are stripped from the users.

The Creative Commons license is another way in which minor authors may subsequently realize what that “legal jargon” was about, well after the piece that they had written had been published and even further after the minor had reached the age of majority. Creative Commons licenses “attach to the work and authorize everyone who comes in contact with the work to use it consistent with the license.”¹⁰⁰ It is foreseeable that, for example, a student who uses information published in the Creative Commons in order to finish his or her work may wish to disavow this license restriction once she is of the age of majority, realizing that her work is copyrighted and may have value outside the Creative Commons. The student may have had full notice of the restrictions before contracting, but not the capability of understanding what accepting those restrictions would mean for her work.

IV. COPYRIGHT AND CONTRACT: THE DILEMMA

It is possible that the contracting infant doctrine could save minors from having portions of their copyrights so rudely snatched away by those sites that would encourage the creation of content. However, proposals that have questioned the viability of the contracting infant doctrine have existed for decades. As early as the nineteenth century, a New York court noted:

[A] protracted struggle has been maintained in the courts, on the one hand to protect infants or minors from their own improvidence and folly, and to save them from the depredations and

⁹⁸ Penguin, *supra* note 92.

⁹⁹ *Id.*

¹⁰⁰ Creative Commons Frequently Asked Questions, <http://wiki.creativecommons.org/FAQ> (last visited Nov. 9, 2009).

frauds practiced upon them by the designing and the unprincipled, and on the other to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.¹⁰¹

More recent scholarship has also questioned the viability of the infancy doctrine than has defended it. In addition to the criticisms noted by Professors DiMatteo and Cunningham above, Professor Daniel noted that other areas of the law (torts, crimes, and medical treatment) “operate under rebuttable presumptions of capacity . . . allowing inquiry into whether the minor truly understood the nature and consequences of his actions.”¹⁰² Professor Daniel suggests that the burden of establishing contractual incapacity rests on the minor adolescent, establishing a sense of responsibility for that contracting person.¹⁰³ She notes that traditional contractual avoidances would remove the need for the contracting infant doctrine; if the law were to treat the infants as adults, then those same defenses would be available to them.¹⁰⁴ Specifically, she discusses misrepresentation, undue influence, duress, and unconscionability.¹⁰⁵

Regardless of the type of contract to which these defenses refer, for three out of four, the situations to which they would pertain appear to be limited at best. It is possible that a misrepresentation, an intentional false statement respecting a matter of fact relevant to a contract,¹⁰⁶ may induce a minor to enter into a contract for goods and be misled as to the type or quality of goods he is contracting to procure. The defenses of undue influence and duress,¹⁰⁷ however, seem to have little if any sway for contracts where the minor and the seller have little if any contact. In addition, Professor Daniel’s focus appears to be the contracting by minors for goods that can be purchased and sold online. Additional sites, however, might in fact be detrimental to the minor because the minor is not availing himself of a good or making a purchase *per se*, but instead is merely agreeing to the terms of use to which the site mandates every person agree. In those cases, it is difficult to see how misrepresentation, undue influence, or duress would apply.

On the other hand, the defense of unconscionability may have more teeth with the average click-wrap agreement. Professor Daniel notes that “the widely-accepted definition of unconscionability has been stated as the ‘absence

¹⁰¹ FARNSWORTH, *supra* note 12, at 444 (citing *Henry v. Root*, 33 N.Y. 526, 536 (1865)).

¹⁰² Daniel, *supra* note 49, at 268.

¹⁰³ *Id.* Professor Daniel acknowledges that a presumption of incapacity for pre-adolescent minors is appropriate. *Id.*

¹⁰⁴ *See id.* at 258.

¹⁰⁵ *See id.* at 258–61.

¹⁰⁶ *See* BLACK’S, *supra* note 35, at 1091.

¹⁰⁷ “Undue influence,” in contractual terms, suggests that the contract would not have been entered into but for the “dominion and control” of another. *Id.* at 1666. “Duress” similarly involves threats and the removal of a contracting party’s free will. *Id.* at 578–79.

of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹⁰⁸ She continues: “a minor who finds himself in a one-sided contract procured through unfair bargaining can avail himself of the opportunity to avoid the contract. Thus, this modern doctrine seems to address the very concerns behind the ancient doctrine of minority incapacity to contract.”¹⁰⁹

Some would say that unconscionability should apply beyond the click-wrap agreements. Professor Steven Hetcher has argued that the defense should extend to typical terms and conditions as well, which must be affirmatively sought out by the user in order to learn their content. Professor Hetcher examines the social networking site facebook.com in detail and notes that the terms and conditions to which the user must agree are unfair, especially when considering the interests of minors:

[M]inors, like other users who wish to remain on the site, click a button to signify acceptance of the Terms of Use. Given the nature of this procedure, the question naturally arises as to whether the Terms of Service constitute a contract of adhesion, and if so, an unconscionable one.¹¹⁰

Professor Hetcher’s arguments run counter to those of Professor Daniel. He explains that “while it may be a legal fiction to do so,” because of the relative inexperience of minors, they cannot be held accountable for the terms and conditions as adults — despite the fact that they took the affirmative step to accept the terms by signifying their acceptance of them by checking a box before using the site.¹¹¹

Professor Hetcher thereafter does not seek to eradicate the contracting infant doctrine, but instead wants to fortify it by extending an implied license with the *guardians* of the minors to use content posted on facebook.com. By doing so, Professor Hetcher notes, “it would presumably disallow Facebook or its successors in interest from claiming permanent [user-generated content] interests at some later time, on the basis of capacious, largely incomprehensible lawyerly jargon, located in a form contract the person clicked through years earlier when a minor.”¹¹²

¹⁰⁸ Daniel, *supra* note 49, at 261 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

¹⁰⁹ *Id.* (citing Walter D. Navin, Jr., *The Contracts of Minors Viewed From the Perspective of Fair Exchange*, 50 N.C. L. REV. 517, 520 (1972)).

¹¹⁰ Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two — Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 858 (May 2008).

¹¹¹ *Id.* at 858–59.

¹¹² *Id.* at 866.

The difficulty that the creation of an implied license imposes on minors is the implicit devaluation or joint authorship of the minors' copyrighted works.¹¹³ As noted above, the Copyright Act places no age restriction on authorship.¹¹⁴ At the same time, it reserves the particular economic rights that it affords exclusively to the author of the work.¹¹⁵ Because it is silent as to a minimum age required when authoring a work, likewise it is silent as to parents' ability to enjoy the benefits the Copyright Act might bestow upon infant authors just by virtue of their parenthood.¹¹⁶ While state laws have attempted to provide some protection with respect to child actors,¹¹⁷ laws are silent with respect to any additional child authorship rights.¹¹⁸

Moreover, such an extension of a license to parents of minor authors may be the type of law specifically preempted by the Copyright Act. Because inherently contracts are governed by state laws, the law of implied contracts is also governed by state laws. State laws that conflict with the Copyright Act may in certain instances be preempted by the Copyright Act, to the extent that those state statutes conflict. The Copyright Act provides for the statutory preemption of state laws in those situations where two conditions are satisfied. First, the legal or equitable right afforded by the state law must be equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106.¹¹⁹ Second, the legal or equitable right applies to works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.¹²⁰

If an implied license is extended to the parents of minor authors, application of the Copyright Act appears to preempt the state license. First, the legal

¹¹³ An additional theoretical difficulty may exist in that several minor authors may not want their parents to know that which they have posted on Facebook, much less have the ability to impliedly license it.

¹¹⁴ See *supra* note 41 and accompanying text.

¹¹⁵ 17 U.S.C. § 106. Those economic rights are the right to reproduce the copyrighted work, to make derivative works from the work, to distribute the work, to perform the work, to display the work, and to perform the work digitally. *Id.*

¹¹⁶ Unfortunately, it is not a foregone conclusion that parents have the best interest of their children at heart. The foundation, A Minor Consideration, for example, exists to provide guidance to young performers, noting that "Child Stars must pick their parents with care." A Minor Consideration, <http://www.minorcon.org/index.html> (last visited Nov. 9, 2009).

¹¹⁷ "Coogan laws" are named after child actor Jackie Coogan, who lost all earnings to his unscrupulous parents. These laws exist in California (CAL. LAB. CODE § 1308.5, CAL. CODE REG. 11753), New York (N.Y. EST. POWERS & TRUSTS LAW § 7-7-1), New Jersey (N.J. STAT. ANN. § 34:2-21.57 et seq.), New Mexico (N.M. STAT. ANN. § II-1-4), and Louisiana (LA. REV. STAT. ANN. § 23:151-234) and affirm that earnings of child actors belong to the actors themselves, not to their parents.

¹¹⁸ For a complete list of state employment statutes with respect to child employment, see *generally* Screen Actors Guild, <http://www.sag.org/content/state-statutes> (last visited Sept. 7, 2009).

¹¹⁹ 17 U.S.C. § 301(a).

¹²⁰ *Id.*

or equitable right afforded by the license must be equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106.¹²¹ The implied license made available to parents via Facebook and other social networking sites appears to do just that: extend to parents the ability to consent to reproduction, distribution, and display of the child's work.¹²² Second, the requirement that the works of authorship are fixed in a tangible medium of expression and come within the subject matter of copyright would be met just by virtue of their publication on Facebook, as long as the subject matter of such works falls within what is legally acceptable.¹²³

Furthermore, even if an implied license is not specifically preempted by the Copyright Act, such an omission may be the type that falls under the general preemptive power of the Constitution. This power is contained within the Supremacy Clause of the Constitution, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹²⁴

In other words, no law of any state may conflict with the Constitution or the laws of the United States. Called conflict preemption, under the Supremacy Clause of the Constitution, states cannot enact laws that interfere with the purposes of the federal copyright laws.

Copyright is one of those provinces given exclusively to Congress in the Constitution. Article I, Section 8, Clause 8 states: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹²⁵ For a state to interfere with the powers of copyright would be for that state to act in direct conflict with the Constitution. Examples of such state laws that are preempted

¹²¹ See, e.g., *Wilchcombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 956 (11th Cir. 2009) (citing *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1996) ("A copyright owner waives his right to sue for copyright infringement while the nonexclusive license is in effect.")).

¹²² Perhaps the other rights are implicated as well; however, the rights most pertinent to Facebook would be the aforementioned rights.

¹²³ In order for a work to be copyrightable, the work must be fixed in "any tangible medium of expression" and must be original. 17 U.S.C. §102(a). In order for a work to be original, it must possess a minimum degree of creativity and a modicum of creativity. *Feist Publ'n. Inc. v. Rural Tel. Co.*, 111 S. Ct. 1282, 1287 (1991).

¹²⁴ U.S. CONST. art. VI, cl. 2.

¹²⁵ U.S. CONST. art. I, § 8, cl. 8.

include state unfair competition laws prohibiting unauthorized copying of product designs that are neither copyrighted nor patented.¹²⁶

Not all state laws are preempted in this manner. For example, the state regulation of trade secrets is not preempted.¹²⁷ Where there is a situation where Congress has not established a policy with respect to a particular class of works, states are free to act.¹²⁸ Similarly, contracts which create rights that are similar to those discussed here are generally not held to be preempted by the Copyright Act. *ProCD v. Zeidenberg*¹²⁹ established that, because the rights created by contract are created by individuals and not laws, they are not “equivalent to any of the exclusive rights within the general scope of copyright,” and therefore not preempted by the Copyright Act.¹³⁰ In *ProCD*, the Seventh Circuit found that a shrinkwrap license for a software product bound the user to its terms, including the prohibition from copying data from the software database.¹³¹ As such, contracts could protect the contents of a database, even if the Copyright Act specifically excluded those contents from copyright protection, and were not subject to preemption.¹³²

In some instances, however, contracts have been found to be preempted. For example, the Ninth Circuit, in *Rano v. Sipa Press, Inc.*, held that “a state law allowing contracts of unspecified duration to be terminated at will was preempted by § 203 of the 1976 Act (which allows grantors to terminate copyright grants after 35 years, even if the grant specifies a longer term).”¹³³ Other circuits have squarely rejected *Rano*, finding no conflict preemption, because § 203 does not *require* copyright grants to last for a minimum 35-year term.¹³⁴ The purpose of § 203 is to protect authors from being locked into unfavorable long-term contracts, and state law termination-at-will provisions support rather than conflict with that goal. In contrast, a state law that *prohibited* early terminations of copyright grants would be preempted by § 203 to the extent it pre-

¹²⁶ See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 226–30 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238–39 (1964).

¹²⁷ See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474 (1974). *But see* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (holding a state law prohibiting a method of copying preempted).

¹²⁸ *Goldstein v. California*, 412 U.S. 546 (1973) (finding unconstitutional a California criminal law prohibiting the unauthorized copying of uncopyrighted musical recordings).

¹²⁹ 86 F.3d 1447 (7th Cir. 1996).

¹³⁰ *Id.* at 1454.

¹³¹ *Id.* at 1455.

¹³² Of course, this premise invites debate. See, e.g., Kristen Osenga, *Information May Want to be Free, but Information Products Do Not: Protecting and Facilitating Transactions in Information Products*, 30 CARDOZO L. REV. 2099, 2116 (2009) (discussing the pros and cons of protecting information with contract).

¹³³ *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 585 (9th Cir. 1993).

¹³⁴ See e.g., *Walthal v. Rusk*, 172 F.3d 481 (7th Cir. 1999); *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999).

vented grantors from terminating their contracts at the end of 35 years. The treatment of this decision signals the courts' overwhelming preference not to preempt contract law with copyright.

V. RECENT DECISION: *A.V. v. IPARADIGMS*

The problem of online infant contracting has not gone unnoticed by the courts, but it has not necessarily been taken seriously, either. In March 2008, in *A.V. v. iParadigms*, the Eastern District of Virginia almost summarily dismissed the invocation of the infancy defense.¹³⁵ The facts may have warranted that the young plaintiff authors should lose the case, but the court's opinion, in avoiding established legal doctrines, raises new questions that might have broader implications for online licensing.

In *iParadigms*, the plaintiffs were four high school students in school districts in Virginia and Arizona who were required as part of their course to register and submit works through the popular plagiarism-checking service, Turnitin, available through the web site turnitin.com.¹³⁶ Turnitin is a system that compares a student work to content available on the Internet and also works previously submitted to the Turnitin program.¹³⁷ When submitting a work in fulfillment of their course requirements, students must read a user agreement and click "I Agree" before the work is accepted into the Turnitin database.¹³⁸ The click-through license includes a representation that the student licenses Turnitin to retain a copy of the student work in the database for future plagiarism checks.¹³⁹ If such a future plagiarism check finds that the new turned-in paper is similar to the prior work, the prior work is referenced in an "Originality Report" and made available for the alleged plagiarist's teacher to view.¹⁴⁰

In an attempt to avoid the requirement of an archival copy in the Turnitin database, the plaintiffs included bold disclaimers on the face of their submitted papers, claiming that they did not consent to the archival of their works by Turnitin.¹⁴¹ The service ignored the disclaimers and archived the papers anyway, which prompted the plaintiffs to file a suit for copyright infringement.¹⁴² *iParadigms* responded with a defense of copyright fair use and with counterclaims, including contractual indemnification, trespass to chattels, and violation

¹³⁵ 544 F.Supp.2d 473 (E.D.Va. 2008).

¹³⁶ *Id.* at 478.

¹³⁷ *Id.* at 477–78.

¹³⁸ *Id.* at 478.

¹³⁹ *Id.* The average daily submission of student works to Turnitin numbers around 100,000. *Id.*

¹⁴⁰ *iParadigms*, 544 F.Supp.2d at 479.

¹⁴¹ *Id.* at 478.

¹⁴² *Id.*

of two criminal computer fraud statutes.¹⁴³ The plaintiffs raised the infancy doctrine and duress as potential defenses to the counterclaims.¹⁴⁴

The district court¹⁴⁵ roundly rejected all parties' claims and entered summary judgment against all claims and counterclaims, but also made findings relevant to the minor authors, which in fact raise more questions than answers.

A. *Copyright Infringement*

The court found that it was not possible for iParadigms to infringe the students' copyrighted work through the doctrine of fair use. The fair use defense requires the court to balance factors of the purpose and character of the infringing use, the nature of the copyrighted work, the amount and substantiality of the copyrighted work used in the infringing work, and the effect of the infringing use on the market of the copyrighted work to determine whether the use of the copyrighted work is excused.¹⁴⁶ If a use is fair, it is not an infringement.

The *iParadigms* court found that the purpose and character of the use of the students' works was a transformative use from "education and creative expression" to "an entirely different purpose," although that purpose still used each student's work in its entirety.¹⁴⁷ That factor the court explained away by declaring that it was for comparative use only, providing a "highly beneficial" service to the public.¹⁴⁸ The court explained, citing no authority, the creative nature of the students' copyrighted work weighed neither for nor against a finding of fair use, because the infringing use was comparative only.¹⁴⁹ Finally, the court found that any perceived economic effect was merely speculative at best¹⁵⁰—failing to acknowledge that any argument for an anticipated effect on the marketplace is by its nature speculative at best.¹⁵¹

The court cited little authority for its rewriting of the four factors, and placed much weight on the academic setting for its interpretation of each of the

¹⁴³ The Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(5)(A)(iii), (a)(5)(B)(i); Virginia Computer Crimes Act, VA. CODE ANN. §§ 18.2-152.3, 18.2-152.6 (2005).

¹⁴⁴ *A.V. v. iParadigms*, 544 F.Supp.2d 473, 480–81 (E.D.Va. 2008).

¹⁴⁵ Judge Claude M. Hilton. Interestingly, before being appointed to the bench, Judge Hilton was a member of a board of education. ALMANAC OF THE FEDERAL JUDICIARY, VOL. 1, 4TH CIR., 68–69 (Aspen 2009).

¹⁴⁶ 17 U.S.C. § 107.

¹⁴⁷ *iParadigms*, 544 F.Supp.2d at 482.

¹⁴⁸ *Id.* at 483.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 484.

¹⁵¹ Notes Michael G. Bennett, the plaintiffs had no choice but to take the "comically awkward position of having their strongest claim to negative impact be based on their inability . . . to sell their works to an on-line student paper mill that would go on to re-sell the works to other high school students." Michael G. Bennett, *The Edge of Ethics in iParadigms*, 2009 B.C. INTEL. PROP. & TECH. F. 100601, at *12.

four factors that there was no copyright infringement. However, this interpretation diminishes the value of a copyright that the students have by suggesting that if students create works in an academic setting, because the works were authored by students in their capacity as students, any secondary use is more likely to be fair. Although the Internet has substituted school as the primary genesis of copyrightable works for young authors, it still suggests a condescending disregard for works authored by minor authors.

B. *Infancy Doctrine*

The court also found that although the students had attempted to disaffirm their contracts pursuant to the doctrine of infancy, they had received a benefit from the ability to submit their papers to Turnitin.¹⁵² The court defined the benefit as twofold. The first benefit was the “grade from their teachers, allowing them the opportunity to maintain good standing in the classes in which they were enrolled.”¹⁵³ Second, the benefit was “the benefit of standing” to bring the lawsuit, a benefit which would not be returnable if the infancy defense were in fact to be revoked.¹⁵⁴ Those benefits, reasoned the court, removed from the students the ability to disaffirm the contracts, because “he cannot take the benefit of the contract without the burden of the conditions or stipulations.”¹⁵⁵

Before considering the merit of the identified “benefits” of the contract, it is necessary to realize exactly what the bargain is. Before the student can get into the site to upload his paper, the student has to click through the agreement that agrees that iParadigms can keep an archival copy to be searched through turnitin.com in the future. As a result, the exchange is the ability to upload a paper for a grade, for the benefit of the student, for an ongoing license to the student’s copyright in the work, for the benefit of iParadigms.

The two “benefits” are nothing of the sort, and create serious implications if they could be construed as such. First, it is nonsensical to state that a benefit of a contract can be the standing to bring a lawsuit (and indeed, the court cites no authority for this statement). Had the students attempted to bring a law-

¹⁵² *iParadigms*, 544 F. Supp. 2d at 481 (quoting LORD, *supra* note 11, at § 9.14, p. 126). The court’s use of this language is suspect, however. The quotation begins, “*If an infant enters into any contract subject to conditions or stipulations*, the minor cannot take the benefit of the contract without the burden of the conditions or stipulations.” LORD, *supra* note 11, at § 9.14, p. 126 (emphasis added). A “condition” or a “stipulation” is a qualification, restriction, or limitation modifying the original act with which it is connected; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite.” BLACK’S, *supra* note 35, at 333. The court fails to state what the “condition” or the “stipulation” of the iParadigms contract is, apart from the uploading of the paper — the bargained-for burden.

¹⁵³ *iParadigms*, 544 F. Supp. 2d at 481.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* This conclusion was noted by the Fourth Circuit on appeal, but the Fourth Circuit declined to address it in its opinion, despite being asked to by the appellants. See *iParadigms*, 562 F.3d at 636 n.5.

suit based on breach of the contract and, then, attempted to avoid the contract only as a defense to the counterclaim, logically the students would be estopped from relying on the contract for a right to relief and in the same lawsuit claiming that the contract is void. However, a case grounded in copyright infringement, as this case is, is completely consistent with the notion that the contract between the students and iParadigms was void *ab initio*, because any reproduction of the material supposedly contracted for would constitute an infringement.

The idea that standing to sue may be a “benefit” of the contract raises questions about whether implementing the doctrine of infancy may simply give way to an infant’s quasi-contractual obligations to avoid the unjust enrichment of a party contracting with the infant. This is true of the idea of necessities. As Williston notes:

An infant may make himself liable for goods that are necessary, considering his position and station in life. This liability, though often treated as arising from the promise of the infant, is in reality a quasicontractual obligation If the minor chooses not to disaffirm the contract, or, after reaching majority to ratify it it [sic], she may do so, both when necessities are the subject of the contract and when they are not. What is really meant then by saying that the minor is liable only quasicontractually for necessities is that he may avoid his contracts to pay for necessities just as he may avoid other contracts, but that if he does so, as quasi-contractual liability will be imposed upon him by the law which liability he cannot avoid.¹⁵⁶

“Necessaries” do not include “standing to sue,” and it is implausible that the standing to sue can be part of the consideration resulting from the bargain between parties; implicit in the formation of a contract is the ability of the parties to sue for its breach.¹⁵⁷ The language of “benefit” and “burden” suggests the doctrine of unjust enrichment, which would require a benefit conferred upon the infant by the plaintiff, an appreciation or knowledge by the infant of the benefit, and the acceptance or retention by the infant of the benefit under such circumstances as to make it inequitable for the infant to retain the benefit without the payment of its value.¹⁵⁸ However, it is clear that doctrinally, standing has never been included in what is eligible for quasi-contractual relief from infant contractors. Extension of the quasi-contract beyond necessities all but nullifies the doctrine of infancy.

¹⁵⁶ LORD, *supra* note 11, at § 9:18, pp. 181–83, 188.

¹⁵⁷ “The requirement of ‘standing’ is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation.” BLACK’S, *supra* note 35, at 1536.

¹⁵⁸ *Id.* at 1129–30.

First, to address the point most relevant to infants, the Turnitin contract dealt with a service, and not a good.¹⁵⁹ Because most services do not meet the category of necessity or other unavoidable contract, courts have allowed minors to disaffirm their contracts for services.¹⁶⁰ The extension of this doctrine in this instance requires one of two further clarifications. Either the court intends to extend the infancy doctrine to services in addition to goods, or, the court is treating the Turnitin service as a good. Treating web services as goods could create interesting questions, such as the implication in trade.

Perhaps more notably, however, the court emphasized and identified the benefit that was conferred upon the students — the grade that the students received from the course. This “benefit” was in itself flawed in two distinct ways. First, the benefit was not derived from Turnitin, the party to the contract that the students were attempting to disaffirm. Instead, this “benefit” was conferred by the school the students attended and by the specific instructor who graded the students. Because the power of disaffirmance is personal to the minor or his legal representatives, third party beneficiaries of contracts are not permitted to disaffirm contracts entered into by minors, even though the minors’ infancy could render the contract voidable or invalid.¹⁶¹ It seems incongruous that the supposed benefit of a contract the minor is supposed to receive is in fact permitted to be bestowed by a party who has no power over the contract between the parties to it.

The second question is how precisely to quantify the benefit conferred by a clickwrap agreement that merely permits the user to post to a certain web site. Monetarily, the user may receive no benefit. The user may find ease of communication with Facebook, or substantially cut down on distribution costs by posting to a site. However, the required license or temporary suspension of rights seems like a disproportionate price to pay where the only cost a site has in distributing the material is wholly not dependent upon whether the user has any content posted thereon. Quantification of this benefit and its practical effect could influence other tests involving online distribution such as fair use and even infringement.¹⁶² However, the *iParadigms* court paradoxically refused to

¹⁵⁹ Even the home page of [turnitin.com](http://www.turnitin.com) indicates that Turnitin is in fact a service. See Turnitin, <http://www.turnitin.com/static/index.html> (last visited Nov. 9, 2009).

¹⁶⁰ See, e.g., *Berg v. Traylor*, 148 Cal. App. 4th 809, 818 (2d Dist. 2007) (“As a general proposition, parental consent is required for the provision of services to minors for the simple reason that minors may disaffirm their own contracts to acquire such services.” (quoting *Ballard v. Anderson*, 4 Cal. 3d 873, 878 (1971))).

¹⁶¹ LORD, *supra* note 11, at § 9:10, pp. 88–90. This has been codified in several states. See, e.g., CAL. CIV. CODE §§ 34, 35 (West 1987); GA. CODE ANN. § 13-5-3 (1933); IDAHO CODE ANN. § 32-103 (1972); MONT. CODE ANN. § 41-1-304 (1997); OKLA. STAT. tit. 15, § 19 (1972); S.D. CODIFIED LAWS § 26-2-6 (1972); see also *Harris v. Ward*, 224 So. 2d 517 (La. App. 2d Cir. 1969) (holding a sale may not be held invalid as to the plaintiff who was neither a party to the contract nor an assignee of the rights of the minor).

¹⁶² For example, the first fair use factor is the purpose and character of the allegedly infringing use. 17 U.S.C. § 107. This factor often looks at whether the work is commercial or noncommer-

acknowledge this benefit when considering whether or not there would be an effect on the marketplace for the students' works.

VI. A SOLUTION

In light of the court's decision in *A.V. v. iParadigms*, it is clear that in the wrong context the infancy doctrine could be little more than a speed bump for the party contracting with the minor to overcome. The *iParadigms* court may have reached the right conclusion due to the bad-actor status of the minor authors — in this case involving cheating and plagiarism, it is difficult to see what objection the minors would have to the archiving of their works, unless they believed that future submitted works would be flagged because they raised alarming similarity to their works.¹⁶³ Applied in a different context, however, the minor author could be left without recourse upon discovering the number and nature of the rights that the author has unknowingly licensed away. This opinion is worrisome, as it highlights the error in relying on a doctrine that few are willing to apply.¹⁶⁴

Part of the underlying problem in relying on the doctrine of infancy to save infant authors from the contracts which they enter into restricting or allowing the dissemination of their copyrighted works is the lack of a clearer directive about its application. Although the doctrine in principle may be exactly what is necessary to help these young authors, in practice, it is housed in the codes of fifty separate governing entities, each of which must be construed differently when applied to the rights created by Congress. As a result, the only consideration of this issue will come from courts where underage copyright owners are able to use their infancy as a defense because in itself, infancy has been held not to be a viable cause of action.

The failsafe solution, then, is for Congress to address the question of contracts involving minors, incorporating portions into the Copyright Act. The traditional governance of the laws of contract by the states has not prevented Congress from addressing certain contractual problems within the Copyright Act. In fact, Congress may already have the framework for some relief in the Act in the form of § 203. As noted above, § 203 of the Copyright Act provides for the outright termination of transfers of copyright by the author, effecting the

cial in nature. If distribution online were to be a quantifiable benefit to the alleged infringer, uses that previously have been deemed noncommercial in nature and more likely to be considered a fair use of a copyrighted work could be found to confer a commercial benefit upon the user, making almost all unlicensed online uses of copyrighted works unfair under § 107.

¹⁶³ In other words, it is most likely conceivable that the teen authors wished to sell their works to underclassmen for use in future classes.

¹⁶⁴ The author is aware that as precedent, this District Court opinion is less likely to be afforded precedential value than those of its appellate counterparts. However, because the doctrine of infancy has few modern decisions on which to rely, the persuasive value of every holding increases.

rights' return back to the author.¹⁶⁵ However, the section provides that the transfer must be terminated within a five-year window thirty-five years *after* the execution of the transfer.¹⁶⁶ As a result, transfers and licenses involving an author who would invoke the doctrine of infancy to invalidate them are necessarily excluded; the contracting infant must seek to invalidate the contract during their infancy or soon thereafter,¹⁶⁷ making the realistic time lapse considerably less than twenty years.

One straightforward way to incorporate the doctrine of infancy into the Copyright Act is merely to add the possibility of infant invalidation directly into § 203. In addition to the possibility of termination of transfer or license thirty-five years after the execution of a contract, Congress could provide for the termination of transfer or license within a five-year window after the execution of the transfer, if the author has not yet reached the age of majority, or within five years of the author's attaining the age of majority if the author would not in fact attain that age within the five-year period.¹⁶⁸ To avoid the bad-faith situation presented in *A.V. v. iParadigms*, the author would have to sign a statement to the effect that the termination was not being made for any improper purpose — a statement that, if successfully challenged, would amount to fraud on the Copyright Office with the possibility of penalty.

Of the remaining provisions of § 203, only one would have to be amended because it does not go far enough to protect minors in a similar transfer termination. Under § 203(b)(1), authors of derivative works prepared pursuant to the grant prior to its termination may continue to use those derivative works. In order to reflect the infancy doctrine, an amendment to § 203 could not permit this to continue. The distinction is warranted for two reasons. First, if derivative works are not permitted, then § 203 would act more as an invalidation of the contract — similar to what the infant would be able to achieve under the traditional doctrine of infancy. Second, the difference in the timing of invalidating an infant's transfer (which could occur in as little as one year within the execution of the grant) renders it less likely that derivative works would have been created in that time span.

Such a solution is not contrary to the purpose of § 203. According to the Notes of Committee on Judiciary, the law was intended to safeguard authors "against unremunerative transfers."¹⁶⁹ The Committee noted that the law was necessary "because of the unequal bargaining position of authors, resulting in

¹⁶⁵ 17 U.S.C. § 203(b). The termination of transfers also applies to other rights-holders, though it seems likely that most minors discussed in this Article would not have engineered multiple licenses or transfers at this point in their careers.

¹⁶⁶ *Id.* § 203(a)(3). Or, if the grant covers the publication of the work, any time during a five-year window beginning at the earlier of thirty-five years from the date of publication or forty years from the date of execution of the grant.

¹⁶⁷ See LORD, *supra* note 11, at § 9.14, p. 126.

¹⁶⁸ See Appendix A *infra*.

¹⁶⁹ See 17 U.S.C. § 203 (citing H.R. Report No. 94-1476).

part from the impossibility of determining a work's value until it has been exploited," and found that § 203 "reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved."¹⁷⁰ The extension of § 203 to infant contracts is natural. Largely, contracts that infant authors would enter into have the possibility of being unremunerative or underremunerative, and the authors definitely suffer from an unequal bargaining power when faced with the contracts of large corporations. And, the compromise that can be achieved with the addition of a half a paragraph to § 203(a)(3) has the potential to further the objectives not only of copyright law but also of the doctrine of infancy, without tampering with the defensive mechanism as it exists in most states.

Insofar as state laws are concerned, incorporating the doctrine of infancy into the Copyright Act would solve two problems. First, as discussed above, typically, while the Copyright Act preempts coexisting state law rights, it has been held not to preempt most rights based in contract.¹⁷¹ This is because most rights conferrable by contract are not squarely addressed within the Copyright Act. § 203, however, has been held to preempt a terminable-at-will contract that deals with the mode of contracting regarding a grant of copyright.¹⁷² This precedent would have *stare decisis* value to apply to all questions arising from § 203, such as whether contracts with infants would be preempted as well.

Second, including the termination of infant contracts within § 203 would eliminate the need to harmonize conflicting state applications of the doctrine of infancy, at least as far as copyright is concerned. Relatively few discrepancies exist among state laws with respect to the doctrine of infancy, but some exist. California offers one of the most protective laws with respect to minors in the entertainment industry,¹⁷³ but it does not directly address any copyrights that they might own. Under a new § 203, because it would specifically address the question of copyright ownership, any claims to the contrary would be preempted, and state laws differing with respect to age of majority would be deemed irrelevant for copyright purposes.

Two concerns might arise from the amendment of § 203. First, it is difficult to determine the extent to which terminations under § 203 would be filed, as well as the administrative costs it would impose upon the Copyright Office. As it is currently written, § 203 only covers works created on or after January 1, 1978. Because of the mandatory thirty-five year period, therefore, the earliest that a grant can be terminated under this section is January 1, 2013, so at this

¹⁷⁰ *Id.*

¹⁷¹ *See, e.g.,* ProCd v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996).

¹⁷² *See* Rano v. Sipa Press, Inc., 987 F.2d 580, 585 (9th Cir. 1993) (finding terminable-at-will licensing agreements for copyrights under California law to be in direct conflict with § 203 and therefore preempted).

¹⁷³ *See* discussion *supra*.

point not much discussion has been had about § 203 and its implementation.¹⁷⁴ The first notices of terminations of transfer were thus eligible to be filed on January 1, 2003, but one was not actually filed until August 2004.¹⁷⁵ As of December 10, 2009, only ninety-one notices of terminations of transfer had been filed with the Copyright Office.¹⁷⁶ At an average of about eighteen per year, then, the costs as thus far established are not high, especially considering that the Copyright Office plays solely a recording function. However, the urgency with which minors may wish to retrieve rights could be greater than the urgency of an estate seeking to recoup rights on behalf of a deceased author, placing more pressure upon the Copyright Office for expediency.

Moreover, because they are not yet in effect, no terminations have been tested in the courts, so it is unclear what amount of litigation terminations under this title will inspire. On January 8, 2010, comics giant Marvel Entertainment sued the heirs of cartoonist Jack Kirby for exercising the termination of transfer rights with respect to the copyrights in various franchises such as X-Men, The Fantastic Four, Spider-Man and The Incredible Hulk.¹⁷⁷ The heirs filed notices of terminations of transfer September 16, 2009, for a copyright transfer granted in 1972.¹⁷⁸ The litigation, which appears to center on whether the Kirby works were works-made-for-hire,¹⁷⁹ may provide a barometer to determine the litigation costs that terminations of transfer will ultimately entail.

The second concern one might have about § 203 is that it treats minors even more favorably than their adult counterparts who are subject to the same contracts. In one respect, this is the purpose behind the infancy doctrine; adults who would be subject to the identical contractual terms and conditions would be forced to comply with their requirements, whereas their contracting underage

¹⁷⁴ However, there have been discussion concerning and cases interpreting 17 U.S.C. § 304, which covers transfers of works under the 1909 Copyright Act. This Article does not suggest amending that section of the Act, as all works created by minor authors (even assuming creation at infancy) would not have been created prior to 1991.

¹⁷⁵ See 17 U.S.C. § 203(a)(4)(A) (providing that notice shall not be served upon a transferee, or recorded with the Copyright Office, more than ten years prior to the termination). The first notice of transfer was filed August 23, 2004, by the trustee of Ira Gershwin, terminating the transfer of "'s wonderful & 163 other titles" to Warner/Chappell Music, Inc., effective January 5, 2013. Copyright Office Record V3514D325 (recorded August 23, 2004).

¹⁷⁶ Interestingly and perhaps ironically, one of these terminations is the termination of the transfer of the copyright in E. Allan Farnsworth, *Contracts*, to Aspen Publishers, Inc., filed by his widow and surviving children. Copyright Office Record V3560D577 (recorded Feb. 25, 2008).

¹⁷⁷ See Erik Larson, *Marvel Sues Over Copyright Claims by Artist's Heirs*, BUS. WK. (Jan. 8, 2010), available at <http://www.businessweek.com/news/2010-01-08/marvel-sues-over-copyright-claims-by-artist-s-heirs-update1-.html> (last visited Jan. 12, 2010). The lawsuit is *Marvel Worldwide Inc v. Kirby*, 2010-cv-141, U.S. District Court, Southern District of New York (Manhattan).

¹⁷⁸ Press Release, Nasdaq, *Marvel Sues the Children of Legendary Comic Book Creator Jack Kirby*, available at <http://www.nasdaq.com/asp/stock-market-news-story.aspx?storyid=201001090813dowjonesdjonline000008&title=press-release-marvel-sues-the-children-of-legendary-comic-book-creator-jack-kirby> (last visited Jan. 12, 2010).

¹⁷⁹ *Id.*

counterparts would be able to avoid them. However, amending § 203 would provide an easy exemption for a protected category of authors while permitting online distributors to continue embedding problematic copyright licenses within their terms and conditions for authors who may be older by a matter of weeks. In this respect, the amendment would achieve the primary purpose of § 203 — “to give authors . . . a second chance to market works even after a transfer of rights has been made”¹⁸⁰ — but would not legislate fair and reasonable practices for those providing terms and conditions on web sites.

VII. CONCLUSION

Currently, there are very few opportunities to join the discourse about the infancy doctrine, and even fewer to join in its favor. The trend among scholars for years has been to criticize the doctrine and call for its abolition. Even in the area of minors online, it is easy to believe that the infancy doctrine has absolutely no applicability due to the relationship the contracting minor most often has to the copyrighted work. In other words, better-known issues involve children illegally downloading music or other content, creating unsympathetic bad actors whom we want to hold accountable for their contracting or infringing activities online.¹⁸¹ This is an aspect shared by the iParadigms case. Practically speaking, the only rational motivation for teen authors to care whether Turnitin retains a nonexclusive license for their copyrights is for the hopes to keep it from searching in the future — perhaps after selling a successful paper to a future student of the same instructor, or reusing the paper in a collegiate or university context. To its credit, the limited license that Turnitin retains neither raises a possibility of infringement based on the Turnitin license nor prevents the author, in most cases, from capitalizing on his own copyrighted work. If more online models followed this example, this conversation could be purely academic.

But when we consider the case of Akiane Kramarik and other child artists and authors who merely want to distribute or display online works, it becomes easier to see why we should preserve this doctrine or at least implement some workings of it into the Copyright Act. The flaws apparent in the licenses running to the web sites from the child authors are indicative of flaws apparent in all terms and conditions automatically licensing copyrighted content of work. By highlighting and addressing this problem with respect to children, it is possible that a way to resolve the problems inherent in site terms and conditions can be illuminated.

¹⁸⁰ *Walthal v. Rusk*, 172 F.3d 481, 484 (7th Cir. 1999) (finding that § 203 did not prevent a termination of an agreement pursuant to contract law).

¹⁸¹ See, e.g., Daniel, *supra* note 49; Bowie & Jensen, LLC, *The (Unanticipated) Costs of Child Rearing*, LEGALEASE NEWSLETTER (Vol. 7, Issue 2, Apr. 8, 2009), available at http://www.bowie-jensen.com/News/NewslettersArchive/Vol7Issue2/art04_ParentalLiability.html (last visited Jan. 12, 2010) (discussing costs of parental secondary liability for child infringement cases).

The wolf also shall dwell with the lamb, and the leopard shall lie down with the kid; and the calf and the young lion and the fatling together; and a little child shall lead them.

— The Holy Bible, Isaiah 11:6¹⁸²

¹⁸² *Isaiah* 11:6 (King James).

APPENDIX A

§ 203 Termination of transfers and licenses granted by the author [suggested revision]

(a) Conditions for Termination. — In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected as follows:

(A) At any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier;

(B) If the author has not yet attained eighteen years of age, at any time during a period of five years from the date of the execution of the grant; or, if the author will not attain eighteen years of age within five years from the date of the execution of the grant, within five years of the author's eighteenth birthday.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of Termination. — Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the

author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) If termination is effected pursuant to section (a)(3)(A) above, a derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no

way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

