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CyberInfants

Cheryl B. Preston*

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I. INTRODUCTION

The past two decades have seen life in America dramatically altered by the digital revolution.¹ Minors, including both small children and mature adolescents,² are increasingly involved in online activities that generate

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1. See, e.g., JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 1–15 (2008); David Buckingham, *Is There a Digital Generation?*, in DIGITAL GENERATIONS: CHILDREN, YOUNG PEOPLE, AND NEW MEDIA 1–12 (David Buckingham & Rebekah Willet eds., 2006).

2. A legal “infant” or “minor” refers to anyone under age eighteen in almost all states. 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:3 (4th ed. 2009) [hereinafter WILLISTON]. The adult in such transactions, whether acting on his own behalf or on behalf of another person or entity, is sometimes referred to as the “major.” The age of majority was generally lowered to eighteen in

profits for online service providers (OSPs). According to recent studies, approximately ninety-five percent of teens ages twelve to seventeen were online in 2011,³ seventy percent go online daily, and nearly fifty percent go online several times a day.⁴ Eighty percent of those online teens used social network sites.⁵ Providers of such “free” web services do so intending to recover their costs and make significant profit from advertisements and other monetized features. Economic incentives drive OSPs to increase their teen user base, as well as their adult user base. In addition, because of youths’ widespread online presence, combined with increasing access to money,⁶ “children comprise a significant segment of online consumers, a segment that is rapidly enlarging.”⁷ According to a 2010 Pew Research Center Internet study, “48% of wired teens have bought things online like books, clothing or music.”⁸ The most popular sites for minors include eBay, Amazon, Barnes & Noble, and MySpace,⁹ and almost three million minors make purchases online every month.¹⁰

OSPs almost universally present their potential online customer or user with an adhesive contract containing extensive administrative terms. These ongoing licensing agreements—intended to govern use of e-mail, online games, and other forms of intellectual property services, as well as commitments made in creating an account for purchasing goods—are typically identified as “Terms of Service,” “Terms of Use,” “Conditions of Use,” “Terms and Conditions,” “End User License Agreements,” and so

the early 1970s. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981) (“49 States have lowered the age of majority, either generally or for contract capacity, to less than twenty-one; usually, the age is eighteen.”).

3. AMANDA LENHART ET AL., PEW INTERNET, TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES: HOW AMERICAN TEENS NAVIGATE THE NEW WORLD OF “DIGITAL CITIZENSHIP” 15 (Nov. 9, 2011), available at <http://pewinternet.org/Reports/2011/Teens-and-social-media.aspx>.

4. *Id.* at 16.

5. *Id.*

6. MEDIAMARK RESEARCH INC., TEEN MARKET PROFILE 7 (2004), available at <http://www.magazine.org/content/files/teenprofile04.pdf> (revealing that in 2003, teens ages twelve to seventeen spent \$112.5 billion).

7. Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors’ Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 255 (2008) (citing RONALD J. MANN & JANE K. WINN, ELECTRONIC COMMERCE 202 (2d ed. 2005)); see also 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, 293 (2006) (“Minors make a great deal of contributions to the marketplace as consumers, employees, and sellers.”).

8. AMANDA LENHART ET AL., PEW INTERNET, SOCIAL MEDIA & MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 4 (Feb. 3, 2010), available at <http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx>.

9. ROBERT BROWN & RUTH WASHTON, PACKAGED FACTS, THE TEENS MARKET IN THE U.S. 54–56 (June 2007) (citing SIMMONS MARKET RESEARCH BUREAU, TEENS NATIONAL CONSUMER SURVEY (2006)).

10. *Id.* at 53 (listing 12.4% of the roughly twenty-five million teen population as having made a purchase in the last thirty days).

forth (hereinafter collectively and singularly “TOS”). These contracts may be characterized as “clickwrap,” “browsewrap,”¹¹ or other “wrap” contracts,¹² referring to the method of formation.¹³ TOS have generally been found to be enforceable as a matter of contract law, although some courts and many commentators have challenged this result by suggesting that TOS are almost never read, comprehended, or negotiated, and frequently invoke very little evidence of assent, even when the included terms are not unconscionable.¹⁴ Even if generally enforced against adults, minors can frequently void TOS under the traditional infancy doctrine.

The infancy doctrine, although subject to some narrow defenses, permits avoidance of any contract entered into by a minor. Avoidance is permitted throughout minority and for a reasonable time after reaching adulthood, so long as the minor has not ratified the contract as an adult.¹⁵ Disaffirmance does require that the minor return any benefit received as consideration on the contract, to the extent it is still in the minor’s possession.¹⁶ In most jurisdictions, the minor is also entitled to restitution of the consideration already conferred on the adult pursuant to the contract.¹⁷ In a dozen states, the adult has a right to offset the depreciation of the consideration from the amount paid back to the minor.¹⁸ But in most states, the minor is entitled to repayment without deduction.

11. See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006) (describing “clickwrap” and “browsewrap” agreements); *Specht v. Netscape Comm’ns Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002) (using “clickwrap”).

12. Maybe we will soon see a court using “cookiewrap.” For an explanation of how cookies can be implicated as contracts, see Max Stul Oppenheimer, *Consent Revisited*, 12 J. INTERNET L. 3, 3 (2010) (explaining how cookies have capabilities to accept terms automatically).

13. For a more complete discussion of wrap contracts and the trends in judicial enforcement, see Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browseraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. (forthcoming 2012).

14. See *infra* Part III.A.

15. WILLISTON, *supra* note 2, § 9:17; BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* 422 (2003). For additional discussion of the infancy doctrine generally and the necessities exception, see Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47 (2012).

16. See RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. c (1981).

17. See, e.g., *Webster St. P’ship, Ltd. v. Sheridan*, 368 N.W.2d 439, 444 (Neb. 1985) (holding that upon disaffirmance of the lease, the adult was required to refund to the minors the entire amount of the lease and the security deposit, even though the adult had no right of offset for the value to the minors of occupying the apartment).

18. WILLISTON, *supra* note 2, § 9:16 (“Although the weight of authority still permits an infant buyer to recover the price paid merely upon offering to return the property, if any, remaining in her hands, without accounting to the seller for its depreciation or its use, there is an increasing number of jurisdictions that allow the seller to deduct for such depreciation and use.”); *id.* at n.13 (listing

Online markets are increasingly dependent on minors.¹⁹ With the threat of the infancy doctrine, one would think merchants would be extremely reluctant to deal with minors for any transaction that is not *de minimus* or for food, clothing, or shelter (and even then, most minors providing these goods for themselves are not providing “necessities”).²⁰ And yet, the lure of profits appears to have overcome the fear of legal disaffirmance, at least so far. But the infancy doctrine cannot be dismissed as an insignificant risk. Once minors, and their parents, catch on to the fact that the legislatures of almost every state and the vast majority of courts still strictly affirm the doctrine, the impact on businesses targeted largely at minors may be severe.²¹

As I discuss elsewhere,²² the emergence of a significant market relying on unemancipated teens to consume purely discretionary goods and services, and various other changes in the way we think about teens, may warrant a serious reassessment of the infancy doctrine and its existing exceptions. The doctrine may be unwarranted when asserted by a minor to evade the payment of a standard, publicized price in a part of the market that is truly competitive and for which information is readily available. But this does not mean the doctrine need be thrown out entirely. Any reassessment must be thoughtful and limited unless and until we have current evidence establishing that minors no longer need some or all of the doctrine’s protections or that the doctrine is being regularly abused. Such a reassessment must be sensitive to context and consider whether changes in the infancy doctrine should be undertaken first with brick-and-mortar transactions or TOS, and whether changes should be experimental and incremental or encompassing. At this point, the infancy doctrine is the law, and it is one mechanism for encouraging online businesses to reign in their greed both in targeting children and in catching all users with hidden, overreaching contract terms.

With the exception of older hornbooks and collations,²³ a few cursory mentions of the doctrine in practitioner guides, and brief summaries of infancy doctrine implications in other fields of law—such as the juvenile

twelve states that allow depreciation deductions). The depreciation offset applicable in some states is discussed *infra* in the text accompanying notes 94–103.

19. The spending power of teens is discussed *infra* Part IV.A.

20. See Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. VA. L. REV. 431, 457 (2010) (“Because most services do not meet the category of necessity or other unavoidable contract, courts have allowed minors to disaffirm their contracts for services.”).

21. The reasons why the infancy doctrine is currently underused, and the potentialities that will bring it to the forefront, are discussed in Preston & Crowther, *supra* note 15.

22. *Id.*

23. See, e.g., 43 C.J.S. *Infants* § 209 (2004); 42 AM. JUR. 2D *Infants* § 74 (2010); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS §§ 8.1–8 (6th ed. 2009); WILLISTON, *supra* note 2, §§ 9:1–:25.

justice system and criminal culpability,²⁴ immigration and asylum for minors,²⁵ and medical consent²⁶—very few sources devote more than a footnote to the infancy doctrine. Of the publications that treat the infancy doctrine with more than a perfunctory summary, most are student or recent graduate work. Very few are scholarly engagements primarily aimed at infancy doctrine theory and application. Even then, the student and faculty treatments in the last decade are of limited usefulness, a matter discussed in detail below.²⁷ This article provides solid foundations for a discussion of where the doctrine fits, in the face of a rising youth market and the digital revolution. This article considers the implications of the extant infancy doctrine in the online context.

Part II.A covers the general parameters of the infancy doctrine. Part II.B dispels the notion that the doctrine will not be applicable to online services once the service has been used or consumed. This subpart critiques the primary analysis of the one case that has addressed the infancy doctrine in the online arena—*A.V. v. iParadigms, LLC*.²⁸ Although this case appears to create or expand an infancy doctrine defense based on the use of benefits, the court misapplies the law. Part II.C addresses a possible secondary explanation of *iParadigms* and the seemingly eternal question of whether the infancy doctrine can be used as a sword, whatever that means in various jurisdictions and contexts. Any suggestion that such a restriction eviscerates the doctrine's application is singularly unfounded. Part II.D explores another infancy doctrine defense that apparently is providing false comfort to some online merchants. This defense is based on a fraudulent misrepresentation of age. The mere recital of adulthood is unlikely to provide any support for the assertion of this defense and OSPs take no further steps to require verification. Part II.E tackles the only other basis commonly raised for suggesting the infancy doctrine does not or should not apply online. It describes why a minor's advanced technical skills are not relevant to the policies of the infancy doctrine and, in fact, might emphasize the minor's lack of caution in making legal commitments online.

24. See Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 58 JUV. & FAM. CT. J., Summer 2007, at 1, 2.

25. See Charles H. Kuck & Grace Kennedy, *Children in Immigration Proceedings*, in LEXISNEXIS EXPERT COMMENTARIES 3–4 (2007).

26. See Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines* (forthcoming).

27. See *infra* notes 41–51 and accompanying text.

28. 544 F. Supp. 2d 473 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

Part III focuses on the peculiarities of online contracting. Part III.A briefly provides context for the current state of contract law doctrine and the increasing laxity in maintaining traditional protections against falling unintentionally into serious contractual burdens. Part III.B reviews the major objections to enforcing many TOS and assesses whether other contract doctrines provide sufficient basis for policing the abuses of TOS. This subpart concludes that, if the infancy doctrine needs to be limited to better accommodate current market needs, the online TOS is not the best place to begin.

Part IV predicts the collision of the infancy doctrine and a market ever more greedy to engage minors. Part IV.A addresses minors' economic power, whether online businesses are less at risk because they do not take cash, and the extent to which a parent or other entity secondarily guarantees the payment of online financial promises or reimbursement for money refunded to a minor under the infancy doctrine. Part IV.B considers the more subtle economic costs associated with minors' ability to avoid contract terms even if the service is free or the right to payment is not challenged. Part IV.C outlines the options available to online businesses and offers recommendations for how OSPs could and should respond to an upswing in infancy doctrine claims.

II. PORTING INFANCY DOCTRINE INTO CYBERSPACE

To date there has been no successful campaign to devise a new body of contract law for cyberspace.²⁹ Generally, courts attempt to apply the same principles and doctrines when considering online contracts that apply elsewhere, although the context of the Internet and electronic goods and

29. The highlights of the somewhat tortured interchange on the issue of whether the Internet should be governed by a "new" body of cyberlaw, rather than by existing real-world law applied by analogy, are laid out by Ann Bartow in a recent book review. Ann Bartow, *A Portrait of the Internet as a Young Man*, 108 MICH. L. REV. 1079, 1098–100 (2010) (reviewing JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* (2008)). In short, after an extensive debate on the question between David Johnson and David Post, Judge Easterbrook made a parody of the concept of a cyber-specific "law," which spurred a cottage industry of disputing and defending the point (and insulting each other) involving Larry Lessig, Declan McCullagh, David Post, Jack Goldsmith, Marc Rotenberg, and Steve Bryant. *Id.* (citing David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); David G. Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L.J. 1365 (2002); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 231 (1999); David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439 (2000); Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy: (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, 1 n.*, http://stlr.stanford.edu/STLR/Articles/01_STLR_1; Steve Bryant, *What Larry Doesn't Get*, README (May 4, 2003), <http://journalism.nyu.edu/pubzone/ReadMe/article.php%3Fid=141.html>; and others).

services does suggest some additional concerns. This part begins with a brief overview of the infancy doctrine. I then address the four issues most pertinent to the intersection of the infancy doctrine and online contracts. First, I dissect the ruling in *A.V. v. iParadigms, LLC*,³⁰ a case involving an online TOS that is regularly cited as providing a path around the doctrine. Second, I dispel the notion that the maxim—the infancy doctrine cannot be used as a sword—gives a judge the right to override any of the established elements of the doctrine. Third, I explain why OSPs may not avert application of the infancy doctrine by a recital of age buried in a TOS. And, finally, I consider how a minor’s technological skills figure into the calculation required by the infancy doctrine.

A. *Infancy in a Byte*

The infancy doctrine,³¹ the notion that a person who enters into a contract while under legal age may later void the contract, can be traced to the fifteenth century,³² if not earlier. The continued application of the doctrine is based on the presumption that minors are generally more vulnerable to exploitation than adults and less capable of comprehending the nature of the legal obligations associated with a contract.³³ For ease of administration and clarity in application, the rule was settled with a

30. *iParadigms*, 544 F. Supp. 2d 473.

31. See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 4.4 (4th ed. 2004); PERILLO, *supra* note 23, §§ 8.2–8; JOHN EDWARD MURRAY JR., *MURRAY ON CONTRACTS* § 24 (4th ed. 2001). See also Melvin John Dugas, Comment, *The Contractual Capacity of Minors: A Survey of the Prior Law and the New Articles*, 62 TUL. L. REV. 745, 746–54 (1988) (providing a detailed discussion of early developments of infancy protections in French and Roman law and how these principles became incorporated into Louisiana law).

32. WILLISTON, *supra* note 2, § 9:2.

33. *City of New York v. Stringfellow’s of N.Y., Ltd.*, 684 N.Y.S.2d 544 (App. Div. 1999).

Infancy, since common-law times and most likely long before, is a legal disability and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal condition is that of incompetency. In addition, an infant is deemed to lack the adult’s knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them.

Id. at 550–51. In this case, an adult establishment attempted to skirt the city’s zoning ordinances by allowing children to enter if they signed a waiver releasing the establishment from any liability for any damage caused to them by viewing uncovered female breasts. *Id.* at 550.

categorical age line without regard to whether any particular individual is mature or infantile.³⁴

Generally, the operation of the doctrine is straightforward, although subject to a few defenses. I more thoroughly explain the doctrine's nuances elsewhere.³⁵ Here, I briefly overview the defenses that could be applicable to the enforcement of TOS and, in the next two subparts, I illustrate two issues of the doctrine's application in the context of a significant recent case.

The most widely applicable defense to the infancy doctrine is that the contract provided necessities for the minor. Social networking, music downloads, and e-mail accounts are not necessities (. . . at least not yet). Additionally, even items that would normally be considered necessities may not qualify because most teens with computer access can rely on parental financial support. Under the doctrine, if minors could have food, clothing, medical care, and other necessities provided by a parent, it is not essential for them to contract to survive, and thus, there is no need to immunize adults who contract with them.³⁶ Even if the adult party to the contract successfully asserts the defense of necessities, the historical rule provides that the minor must then pay the quantum meruit value of the consideration the minor received under the contract; it does not reinstate the contract for all purposes.³⁷

The emancipation defense only applies if the minor is married, in the military, or kicked out of both parents' homes.³⁸ Although rarely applicable, this defense could serve to bind some minors to a contract made online if the OSP could establish these facts. However, this defense does not provide much advance protection for OSPs. Determining emancipation prior to online contracting is difficult unless the OSP is willing to ask for marriage data or enlistment status before contracting, which would likely be deemed invasive. As a result, OSPs should not assume this defense will protect them.

The "retains benefit" defense is an attempt to mitigate the economic loss of the contracting adult. In most jurisdictions this defense means that to be entitled to void the contract a minor must return any consideration still in the minor's possession.³⁹ But courts have found that returning damaged or used

34. MURRAY, *supra* note 31; BLUM & BUSHAW, *supra* note 15; Preston & Crowther, *supra* note 26.

35. Preston & Crowther, *supra* note 15.

36. WILLISTON, *supra* note 2, § 9:21.

37. *Id.*

38. *Id.* § 9:4.

39. *Id.* § 9:14.

consideration, such as a wrecked car or half-used goods, is sufficient.⁴⁰ Thus, while a minor seeking to void an online TOS will no longer be allowed to use the service, the fact that the minor has benefited from the service in the past is not grounds to prevent voiding the contract.

An adult who relies in good faith on a reasonable investigation of the other party's age may, in some states, assert fraudulent misrepresentation of age as a defense,⁴¹ and, in other states, bring an action in tort for fraud.⁴² But even in jurisdictions that allow the defense, generally by statute, it has been limited to instances of bad faith or active misrepresentation on the part of the minor.⁴³ Additionally, to qualify for this defense, adults have a duty to investigate sufficiently so they can then rely in good faith and reasonably.⁴⁴ This is because the policies of the infancy doctrine presuppose that adults know that minors have incentives to lie about their age, especially online where they perceive themselves as anonymous. Many TOS include, somewhere in the middle of their dense legalese, a statement that the user is age eighteen or older, or of legal age. The use and actual effectiveness of such a representation in creating good faith and reasonable reliance are discussed in greater detail in Part II.D below.

In rare and exceptional cases, courts have found that the conduct of a minor sinks to the level of bad faith that precludes use of the infancy doctrine. For instance, a minor's disaffirmance of a contract for the benefit of a third party is not in good faith and bars application of the doctrine.⁴⁵ Malicious destruction of the consideration or an unnecessary act done out of spite or to punish the adult would also qualify as bad faith. In this sense, the doctrine requires clean hands in the process of entering and voiding the contract. An example is *Rivera v. Reading Housing Authority*,⁴⁶ where the court held that this principle forbids minors from using infancy "to practice

40. See, e.g., *Halbman v. Lemke*, 298 N.W.2d 562, 563–64, 567 (Wis. 1980) (finding that a minor who disaffirmed a contract and returned a damaged car to the seller was not liable for the damage to the car or any depreciation in value).

41. See, e.g., *Nichols v. English*, 154 S.E.2d 239 (Ga. 1967); 42 AM. JUR. 2D *Infants* § 101 (2010).

42. WILLISTON, *supra* note 2, § 9:22; see also *Royal Fin. Co. v. Schaefer*, 330 S.W.2d 129, 130 (Mo. Ct. App. 1959) ("[A]n infant who induces another to contract with him by misrepresenting that he is of age to the adult's resulting injury, is liable in tort.").

43. 43 C.J.S. *Infants* § 151 (2004).

44. See, e.g., KAN. STAT. ANN. § 38-103 (West 2010) ("No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority . . . the other party had *good reasons* to believe the minor capable of contracting." (emphasis added)).

45. 43 C.J.S. *Infants* § 225 (2004) ("The right to disaffirm will not be extended beyond the required limits, and it is not given to be exercised for the advantage of others than the infant.").

46. 819 F. Supp. 1323 (E.D. Pa. 1993).

unconscionable business methods,” such as voiding an employment contract in order to compete with an employer.⁴⁷ This exception is discussed in Part II.E below. But very few cases raise a bad faith defense.

This article does not purport to address every nuance of the infancy doctrine and every emerging trend,⁴⁸ but rather only those pertinent to the typical online contract. Some other context-specific defenses to the infancy doctrine seem to be emerging in some states. These include defenses to a minor’s attempt to avoid a waiver given as a condition for participation in children’s recreational sports sponsored by volunteers,⁴⁹ and perhaps an attempt to avoid an arbitration provision in a contract for necessary medical treatment.⁵⁰ Some states are also beginning to make an exception to the infancy doctrine in the context of a contract for the minor’s employment.⁵¹ While an employment contract is unlikely to arise from a TOS, this exception is discussed below in another context.⁵²

Certainly, the infancy doctrine can often produce dramatic results. The original infancy doctrine has over time become subject to the foregoing exceptions and defenses to mitigate the perceived harshness of its result in some situations, the lack of sympathy engendered by some minors’ conduct, and the doctrine’s obviously arbitrary age cutoff.⁵³ The next section considers whether, without substantial legislative and judicial changes, any basis exists to suspect that the doctrine is not as potent online as it is in face-to-face transactions.

B. iParadigms and the “I Keep Benefits” Defense

Some are citing a recent case, *A.V. v. iParadigms, LLC*,⁵⁴ as having cast doubts on the continued applicability of the infancy doctrine—at least with

47. *Id.* at 1331–32 (quoting *Pankas v. Bell*, 198 A.2d 312, 315 (Pa. 1964)).

48. For a more thorough discussion of infancy doctrine nuances, see *Preston & Crowther*, *supra* note 15.

49. *See, e.g.*, *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998).

50. *See, e.g.*, *Doyle v. Giulucci*, 401 P.2d 1, 3 (Cal. 1965); *Leong ex rel. Leong v. Kaiser Found. Hosps.*, 788 P.2d 164, 169 (Haw. 1990).

51. *See, e.g.*, *Sheller ex rel. Sheller v. Frank’s Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997); *Douglass v. Pfleuger Haw., Inc.*, 135 P.3d 129 (Haw. 2006).

52. *See infra* Part II.C.

53. “There is . . . a modern trend among the states, either by judicial action or by statute, in the approach to the problem of balancing the rights of minors against those of innocent merchants.” *Dodson ex rel. Dodson v. Shrader*, 824 S.W.2d 545, 547 (Tenn. 1992). The court goes on to say that evidence of this trend is found in the development of two defenses: (1) “[U]pon rescission, recovery of the full purchase price is subject to a deduction for the minor’s use of the merchandise,” and (2) “[T]he minor’s recovery of the full purchase price is subject to a deduction for the minor’s ‘use’ of the consideration he or she received under the contract, or for the ‘depreciation’ or ‘deterioration’ of the consideration in his or her possession.” *Id.* at 547–48.

54. 544 F. Supp. 2d 473 (E.D. Va. 2008), *aff’d in part, rev’d in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

respect to contracts for online services.⁵⁵ The Virginia district court's language in the case suggests that a minor who uses the benefit of services prior to attempting to avoid the contract cannot then assert the infancy doctrine.⁵⁶ The idea is that even kids cannot have their cake and eat it too. On appeal, the Fourth Circuit evaded its responsibility to fully articulate the district court's misapplication of the infancy doctrine's exception for failure to return benefits by finding that the district court's holding made full analysis of the infancy doctrine issue unnecessary.⁵⁷ However, the circuit court's footnote evidences that the cursory declaration of the district court was not supported by the authority it cited.⁵⁸

In *iParadigms*, four high school students sued iParadigms for copyright infringement of their work submitted through iParadigms' anti-plagiarism software, Turnitin.⁵⁹ Each of the students attended (or claimed to attend) schools that required students to submit their papers through Turnitin, which then produced plagiarism reports for the teachers.⁶⁰ In addition, the schools had authorized Turnitin to archive the student submissions to be part of an ever-growing database against which to check future papers for plagiarism.⁶¹ Each of the students created a profile, finishing with a click on "'I Agree' to the terms of the 'user agreement' (also referred to as the 'Clickwrap Agreement')." ⁶² This TOS included an astonishingly sweeping waiver:

55. Michael G. Bennett, *The Edge of Ethics in iParadigms*, 2009 B.C. INTEL. PROP. & TECH. F. 6, at 3, <http://bciprf.org/wp-content/uploads/2011/07/12-iptf-Bennett.pdf> (explaining that the judge in this case relied on an exception to the infancy doctrine that bars a minor from taking "the contract's benefits while leaving behind its burdens"); Cromer Young, *supra* note 20, at 434 ("In [*A.V. v. iParadigms*] 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."); see also Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2007–2008*, 64 BUS. LAW. 199, 211–12 (2008) (In *A.V. v. iParadigms, LLC*, "[t]he court had no trouble rejecting the [infancy doctrine]. [T]he minor cannot accept the benefits of the contract without also bearing its burdens Because plaintiffs had benefitted from their use of defendant's product (they had, after all, satisfied their school paper requirements), they must accept any burdens imposed by the Click-wrap Agreement."); Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 620 (2011) (discussing *iParadigms* as an example that "courts are increasingly reluctant to disaffirm contracts" on the basis of infancy).

56. *iParadigms*, 544 F. Supp. 2d at 481–82.

57. *iParadigms*, 562 F.3d at 636 n.5.

58. See *infra* text accompanying note 71.

59. *iParadigms*, 544 F. Supp. 2d at 477.

60. *Id.* at 478.

61. *Id.*

62. *Id.* Oddly enough, in addition to this TOS, iParadigms' website had another "Usage Policy," even though the original TOS discussed in the text purported by its terms to be the "*the entire agreement* between the user and iParadigms' with respect to usage of this web site." *Id.* at 479, 484–

In no event shall iParadigms, LLC and/or its suppliers be liable for any direct, indirect, punitive, incidental, special, or consequential damages *arising out of or in any way connected with the use of this web site* or with the delay or inability to use this web site, or for any information, software, products, and services obtained through this web site, or *otherwise arising out of the use of this web site*, whether based in contract, tort, strict liability or otherwise, even if iParadigms, inc. or any of its suppliers has been advised of the possibility of damages.⁶³

The minors added written disclaimers on the copy of their submitted works, indicating they did not consent to the archiving of the works by Turnitin.⁶⁴ Turnitin continued to archive the students' works and the students brought an action through adult representatives.⁶⁵

Among other arguments, the students sought to void the terms of the TOS by asserting the infancy doctrine.⁶⁶ The district court rejected this argument, declaring:

In Virginia, a contract with an infant is voidable by the infant upon attaining the age of majority. *See Zelnick v. Adams*, 263 Va. 601, 608, 561 S.E.2d 711 (2002) However, the infancy defense cannot function as “a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.” *MacGreal v. Taylor*, 167 U.S. 688, 701, 17 S. Ct. 961, 42 L. Ed. 326 (1897). In other words, “[i]f an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the

85. The court found the second Usage Policy unenforceable because it was not visible to users during account creation and it did not require a click or other indication of assent. *Id.* at 485. The court refused to accept the argument that this agreement became binding as a “browsewrap” when the minors used the Turnitin program. *Id.* at 484–85.

63. *Id.* at 478. The waiver in the iParadigms' TOS might have been challenged on unconscionability grounds. It purports to waive liability for every action or inaction and does not exclude from its range intentional or recklessly negligent torts of its own employees. Not all courts look kindly on a blanket waiver of any responsibility to the other party to the contract. *See, e.g., Anderson & Nafziger v. G. T. Newcomb, Inc.*, 595 P.2d 709, 712 (Idaho 1979) (“[It is] well established that courts look with disfavor on such attempts to avoid liability [blanket waiver of liability provisions] and construe such provisions strictly against the person relying on them, especially when that person is the preparer of the document.” (citing *Am. Auto. Ins. Co. v. Seaboard Sur. Co.*, 318 P.2d 84 (Cal. Dist. Ct. App. 1958); *Talley v. Skelly Oil Co.*, 433 P.2d 425 (Kan. 1967); *Walker Bank & Trust Co. v. First Sec. Corp.*, 341 P.2d 944 (Utah 1959))).

64. *iParadigms*, 544 F. Supp. 2d at 478.

65. *Id.*

66. *Id.* at 480–81.

conditions or stipulations.” 5 Williston on Contracts § 9:14 (4th ed. 2007).⁶⁷

The court then held that the students could not void the contract and retain the two “benefits” of using Turnitin: a “grade from their teachers” and the “standing to bring the present suit” granted by the TOS.⁶⁸

On appeal,⁶⁹ the Fourth Circuit avoided directly touching upon the infancy doctrine issue, stating: “In light of our ‘fair use’ analysis, we decline to address the question of whether the terms of the Clickwrap Agreement created an enforceable contract between plaintiffs and iParadigms.”⁷⁰ This sentence is supported by footnote five, which says,

[T]he district court refused to void the contract based on the doctrine of infancy, *see Zelnick v. Adams*, 263 Va. 601, 561 S.E.2d 711, 715 (2002) (“[A] contract with an infant is not void, only voidable by the infant upon attaining the age of majority.”), concluding that plaintiffs cannot use this doctrine as a “sword” to void a contract while retaining the benefits of the contract—high school credit and standing to bring this action, *cf.* 5 Richard A. Lord, *Williston on Contracts* § 9.14 (4th ed.) (“When the infant has received consideration which he still possesses, . . . he cannot, upon reaching majority, keep it and refuse to pay.”)⁷¹

Like the district court, the Fourth Circuit cited *Zelnick* for the application of the infancy doctrine in Virginia. However, the Fourth Circuit omitted any reference to the 1897 case cited by the district court that uses the “sword” language, which is discussed further in the next subpart. The court then relied on the same *Williston* section cited by the district court. Note, however, that the signal used by the Fourth Circuit before the *Williston* cite is *cf.* In addition, the Fourth Circuit includes as a parenthetical an excerpt from *Williston* that is more complete than the language cited by the district court. According to *The Bluebook*, a *cf.* signal means that the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.”⁷² The Fourth Circuit’s use of a

67. *Id.* at 481.

68. *Id.*

69. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

70. *Id.* at 645 n.8.

71. *Id.* at 636 n.5.

72. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

cf. signal here suggests that the *Williston* source differs from the conclusion of the district court. In fact, the *Williston* section does differ.⁷³ The section later clarifies that, if the minor no longer possesses any tangible returnable consideration, the “taking the benefit” defense fails.⁷⁴ The cited *Williston* section contains no hint of an expanded meaning such as the “sword” language quoted from the 1897 case by the district court.⁷⁵

The infancy doctrine, in virtually every jurisdiction,⁷⁶ only requires the minor to return any “consideration that he or she still possesses.”⁷⁷ Additionally, the benefits iterated by the district court do not even qualify as consideration given by iParadigms.⁷⁸ The first benefit the students received, the benefit of getting a grade from their teachers and schools, was not given by iParadigms, and thus the benefit was not consideration given by iParadigms in the transaction sought to be voided.⁷⁹ The second benefit noted by the district court, standing to sue, has never been conceptualized as consideration for a contract.⁸⁰ Moreover, in this case, “if there was no user agreement, [the] students would still have standing to sue for copyright infringement.”⁸¹

If we apply the “taking the benefit” defense to TOS for e-mail accounts, the benefit—using the service to communicate—would no doubt be terminated with respect to future use if the minor disaffirmed the TOS, but then there would seem to be nothing tangible to “return” from past service. Some jurisdictions go further and allow the infancy doctrine to be used in certain situations to punish the adult for entering the contract.⁸² In these cases, the minor is allowed to disaffirm the contract without even returning any consideration he or she still possesses.⁸³

73. See WILLISTON, *supra* note 2, § 9:14.

74. *Id.*

75. *Id.*

76. A few jurisdictions have statutorily required that an infant is liable for the depreciation of the goods to be returned under a disaffirmed contract. 42 AM. JUR. 2D *Infants* § 91 (2010). See, e.g., *Sec. Bank v. McEntire*, 300 S.W.2d 588 (Ark. 1957); *Toon v. Mack Int’l Motor Truck Corp.*, 262 P. 51 (Cal. Ct. App. 1927); *Barber v. Gross*, 51 N.W.2d 696 (S.D. 1952). The offset for depreciation is further discussed *infra* Part II.C.

77. WILLISTON, *supra* note 2, § 9:14.

78. Cromer Young, *supra* note 20, at 455–57 (arguing that the benefit of receiving a grade from the school would not qualify under the infancy doctrine); Stephen Sharon, Comment, *Do Students Turn Over Their Rights When They Turn in Their Papers? A Case Study of Turnitin.com*, 26 *TOURO L. REV.* 207, 215–16 (2010).

79. Cromer Young, *supra* note 20, at 457.

80. *Id.* at 456. Cromer Young further argues that “standing to sue” cannot be the consideration for a contract because it is “implicit in the formation of a contract.” *Id.*

81. Sharon, *supra* note 78, at 215–16.

82. Daniel, *supra* note 7, at 256 (citing *Halbman v. Lemke*, 298 N.W.2d 562, 567 (Wis. 1980); *Weisbrook v. Clyde C. Netzley, Inc.*, 374 N.E.2d 1102, 1107 (Ill. App. Ct. 1978)).

83. *Id.*

After making quick work of dismissing the infancy doctrine, the district court directs most of its efforts to an alternative theory for its holding—that the retention of the shadow file of the students’ papers was fair use under the copyright laws.⁸⁴ This is also where the Fourth Circuit directs its attention, also at some length.⁸⁵ Instead of directly addressing whether the contract was voidable under the infancy doctrine, which, if true, would have been a simple, straightforward way to resolve the case, both courts spent considerable effort to reach the alternate and more credible holding on fair use.⁸⁶

Other aspects of the district court’s *iParadigms* opinion, and the facts of the case, suggest that the court’s reasoning would not necessarily translate to other cases, in any event. The district court stresses the inherent ability of a school district to detect and respond to plagiarism, noting that a school can restrict the First Amendment rights of a student in a way that would be unconstitutional with respect to an adult.⁸⁷

The district court’s comments on the infancy doctrine, in this context, may be interpreted as dicta. But even if taken literally, the district court’s conclusion misapprehends the retained benefit exception to the infancy doctrine. Reliance on this case as a basis to deny minors a right to avoid a TOS is unfounded.

C. *iParadigms*, *eSwords*,⁸⁸ and the Black Hat Defense

The district court in *iParadigms* further justified its dismissal of the infancy doctrine by saying that the infancy doctrine may not be used as a sword.⁸⁹ The court did not elaborate on what uses are swordlike, but the tenor of the language suggests that the court may have thought that the infancy doctrine cannot be used to take rights away from adults. But, absent

84. *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 484 (E.D. Va. 2008), *aff’d in part, rev’d in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

85. *iParadigms*, 562 F.3d at 638–45.

86. *Id.*; *iParadigms*, 544 F. Supp. 2d at 484.

87. *iParadigms*, 544 F. Supp. 2d at 481 (citing *Morse v. Frederick*, 551 U.S. 393 (2007)). The district court relies on *Morse*, the “BONG HiTS 4 JESUS” case, where the Supreme Court went as far as it ever has in respecting some speech rights for minors. Thus, even *Morse* acknowledges the presumption that free speech concerns are circumscribed when dealing with minors. *Morse*, 551 U.S. at 403. Moreover, the circuits have, since *Morse*, been reluctant to apply the liberalization portended in *Morse* outside of its narrow facts. *See, e.g., B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009).

88. I credit this term to an online ministry: Rick Meyers, *eSword: The Sword of the Lord with an Electronic Edge*, ESWORD, <http://www.e-sword.net/index.html> (last visited Oct. 21, 2011).

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

a defense or exception, the adult's right to enforce a contract always falls to the infancy doctrine.

All the minors sought to do with the infancy doctrine in *iParadigms* was avoid the TOS contract containing the overreaching waiver.⁹⁰ A review of other cases using sword language in the context of the infancy doctrine sheds light on the *iParadigms* court's treatment of the infancy doctrine.

Discussions about the infancy doctrine frequently employ metaphors of shields and swords.⁹¹ The concept is typically cited to a few very early cases that first associated the doctrine with a sword.⁹² The principle from these cases still applies as far as it is interpreted correctly.⁹³ However, courts and commentators have inconsistent and unsupportable visions about what using the doctrine "as a sword" means in legal terms. The language in *iParadigms* provides an excellent illustration of this opaque treatment.

One of these principal cases using sword language is a 1920 case, *Pettit v. Liston*.⁹⁴ It identifies the minor's status as a plaintiff as one factor in limiting the right of the minor to recoup all the consideration previously paid to the adult.⁹⁵ In *Pettit*, the minor was allowed to void the contract and the minor returned the consideration he still possessed, a used motorcycle, to the adult.⁹⁶ The court, however, limited the minor's recovery of money he had already paid to the adult by an amount equal to the depreciation in the value of the motorcycle to prevent the minor from using his infancy as a sword.⁹⁷

90. *Id.* at 478.

91. *See, e.g., id.* at 481; Sheller *ex rel.* Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997); Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1330 n.209 (1989); Cunningham, *supra* note 7, at 294; Daniel, *supra* note 7, at 256; Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 485 (1994); John R. San Fellipo, Jr., *Oregon's Telephone Information Delivery Service Law: A Consumer Protection Step Too Far*, 28 WILLAMETTE L. REV. 455, 473-74 (1992); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1302 (2000); D. Ross Martin, Note, *Conspiratorial Children? The Intersection of the Federal Juvenile Delinquency Act and Federal Conspiracy Law*, 74 B.U. L. REV. 859, 892 n.202 (1994).

92. *See, e.g., iParadigms*, 544 F. Supp. 2d at 481 (citing *MacGreal v. Taylor*, 167 U.S. 688 (1897)); Cozzillio, *supra* note 91, at 1330 n.209 (citing *Rice v. Butler*, 55 N.E. 275, 276 (N.Y. 1899); *Pettit v. Liston*, 191 P. 660, 661 (Or. 1920)); Daniel, *supra* note 7, at 256 n.135 (citing *Rice*, 55 N.E. at 276); DiMatteo, *supra* note 91, at 485 n.20 (citing *Zouch v. Parsons*, (1765) 3 Burr. 1794 (K.B.)).

93. *See* 43 C.J.S. *Infants* § 225 (2004) ("An infant's right to avoid or disaffirm a contract made during infancy is absolute and unconditional; however, infancy acts as a shield and not a sword.").

94. *Pettit*, 191 P. at 661.

95. *Id.* at 662 ("We must not be understood as deciding at this time what would be the rule where the vendor is seeking to enforce an executory contract against the minor, which is a different question not necessarily involved in this case.").

96. *Id.* at 660.

97. *Id.* at 662. Professor Cozzillio uses sword language in precisely the same way. Cozzillio, *supra* note 91, at 1330 n.209. He ties the use of sword language to the minor's position as a plaintiff, but being a plaintiff does not deprive the minor of the ability to use the doctrine to

Similarly, an 1899 case, *Rice v. Butler*,⁹⁸ uses sword language to explain a holding that reaches the same result as *Pettit*, but omits any link with the minor's status as plaintiff.⁹⁹ The *Rice* court required the minor "to offset the depreciation in value of the bicycle from the payments he had made."¹⁰⁰ The existence of an offset rule, and the holdings in both these cases, actually affirm that the minor can use the infancy doctrine to escape enforcement of the contract. Thus, use as a sword describes a minor's attempt to demand return of the full price paid upon return of the consideration, although the consideration has been damaged or suffered a loss in value.

A dozen jurisdictions now apply this rule and allow an offset of the depreciation against the cash the adult must return to the minor upon disaffirmance.¹⁰¹ In *Williston*, the offset rule is acknowledged as a minority exception to the full restitution generally permitted, but it is not associated with sword language. *Williston* says:

Although the weight of authority still permits an infant buyer to recover the price paid merely upon offering to return the property, if any, remaining in her hands, without accounting to the seller for its depreciation or its use, there [are] an increasing number of jurisdictions that allow the seller to deduct for such depreciation and use.¹⁰²

disaffirm. *Pettit*, 191 P. at 662. Rather, when the minor is a plaintiff the court may require more than simply returning whatever consideration is in the minor's possession in whatever condition. *Id.*

98. 55 N.E. 275 (N.Y. 1899).

99. *Id.* at 275–76.

100. Brian A. Darst, Speech at the Federal Publications Seminar: Basics of Commercial Contracting 6 (2007), available at BCC GLASS-CLE 1 (Westlaw) (summarizing the facts in *Rice*); see also Scott Eden Mgmt. v. Kavovit, 563 N.Y.S.2d 1001, 1003 (Sup. Ct. 1990). Requiring full restitution from the adult without any offset for benefits already used and unreturnable would put the infant "in a position superior to that which he would have occupied had he never entered into the contract with plaintiff." *Id.* Retaining an advantage from the repudiated transaction is "using the privilege of infancy as a sword rather than a shield." *Id.* Justice and fairness require a minor "to account for . . . reasonable use or deterioration in value" of an item upon disaffirmance. W.E. Shipley, Annotation, *Infant's Liability for Use or Depreciation of Subject Matter, in Action to Recover Purchase Price upon His Disaffirmance of Contract to Purchase Goods*, 12 A.L.R.3d 1174 (1967) (citing *Rice*, 55 N.E. at 276).

101. WILLISTON, *supra* note 2, § 9:16.

102. *Id.* (listing cases from twelve jurisdictions, with the most recent case decided in 1992); see also Olson v. Veum, 222 N.W. 233, 233–34 (Wis. 1928) ("To sustain the judgment below is to overlook the substantial distinction between a mere denial by an infant of contract liability where the other party is seeking to enforce it and those cases where he, who was the minor, not only disaffirms such contract, but seeks the aid of the court to restore to him that with which he has parted at the

However, the offset rule does not apply widely, and it never applies beyond the amount of cash the adult would otherwise have to return. If the depreciation is greater than what the minor has paid, the adult may keep the amount paid, but cannot seek further reimbursement.¹⁰³ The minors in *iParadigms* did not ask for the return of any cash or other consideration, and so could not be subject to an offset.¹⁰⁴ Thus, this interpretation of using infancy as a sword could have no meaning in this case.

Sword language has also become associated with whether the minor is the plaintiff in the case.¹⁰⁵ This interpretation developed because the court in *Pettit* mentions the minor's status as plaintiff, and because the minor in *Rice* was also the plaintiff, although the *Rice* court does not tie that to its holding.¹⁰⁶ Some current literature continues to link sword language to the notion that a minor may not use the doctrine as a plaintiff, but then acknowledges that such a rule no longer exists. For instance, Professor Daniel states:

Although the minority incapacity doctrine was initially intended to be used only as a shield and not as a sword, in many cases this is a distinction without a difference. Generally, it is acknowledged that a minor may institute an action to disaffirm a contract and is not relegated to using his minority status as a defense.¹⁰⁷

Daniel cites *Rice*, but recall the consequence for using the doctrine as a sword in *Rice* was only the application of the offset rule. Plaintiff or not, the minors in *Pettit* and *Rice* were allowed to disaffirm.¹⁰⁸ Another example of this interpretation appears in Professor Hartman's statement that "the power of disaffirmance constitutes both a sword and shield, as it may be used either

making of the contract. In the one case he is using his infancy merely as a shield, in the other also as a sword.").

103. *Pettit v. Liston*, 191 P. 660, 661–62 (Or. 1920).

104. *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

105. See, e.g., Benjamin J. Cooper, Note, *Naked Before the Law: Reality Porn and the Capacity to Contract*, 11 CARDOZO WOMEN'S L.J. 353, 377 (2005) ("[C]ourts have had trouble with cases where a minor sues to dissolve a contract instead of using it as a defense."). To support this idea, the student author cites *Zouch v. Parsons*, (1765) 3 Burr. 1794 (K.B.), which provides that "[a] third rule deducible from the nature of the [infancy] privilege, which is given as a shield, and not as a sword, is that it never shall be turned into an offensive weapon of fraud and injustice," which does not lend much support to a plaintiff/defendant distinction. *Id.* at 1802 (internal quotation marks omitted).

106. See *Rice v. Butler*, 55 N.E. 275 (N.Y. 1899); *Pettit*, 191 P. 660.

107. Daniel, *supra* note 7, at 256.

108. See *Rice*, 55 N.E. 275; *Pettit*, 191 P. 660.

defensively or offensively.”¹⁰⁹ Hartman cites *Monahan v. Friederick* for this truism, but it is a case which makes no reference to swords or shields.¹¹⁰

Although there is minimal support for the idea that sword language ever equated to a minor’s inability to use infancy as a plaintiff, there is some sense that the plaintiff/defendant distinction might be relevant when considering the minor’s obligations upon disaffirmance. The hornbook *Calamari and Perillo on Contracts* specifically discusses this distinction and states that that a minor who buys an item on credit and is then sued for non-payment can disaffirm the contract and is only liable to return whatever consideration he still possesses.¹¹¹ On the other hand, a minor who pays cash for the item and later seeks to disaffirm the contract and recover the purchase price is entitled to recovery of consideration paid, but is required to return the consideration he still possesses and the amount returned to the minor is offset by any depreciation in the consideration returned.¹¹² *Calamari and Perillo on Contracts* traces this plaintiff/defendant distinction back to *Rice* and *Pettit* and cites a number of other cases that support the offset rule.¹¹³ As discussed above, this depreciation rule does have support in a number of jurisdictions; however, its use is tied to whether the minor is seeking a return of consideration paid rather than whether the minor is a plaintiff in the case. This confusion is understandable because in most instances, a minor seeking a return of consideration paid would be a plaintiff. The minors in *iParadigms* were plaintiffs; however, because the sword language does not make a plaintiff/defendant distinction, and because Virginia has not adopted the offset rule,¹¹⁴ this sword interpretation would likewise be invalid had the district court intended this meaning.

Sword language, without reference to the offset rule or plaintiffs, does show up occasionally in other infancy doctrine cases. In *Sheller v. Frank’s Nursery & Crafts, Inc.*,¹¹⁵ the court refused to allow a minor employee to

109. Hartman, *supra* note 91, at 1302.

110. *Monahan ex rel. Monahan v. Friederick*, 455 N.W.2d 914 (Wis. Ct. App. 1990). While Professors Daniel and Hartman make it clear that minors may use the infancy doctrine as plaintiffs, Daniel appears to suggest this was the original meaning, and Hartman appears to tie the term “sword” to offensive use as a plaintiff.

111. PERILLO, *supra* note 23, § 8.5(a).

112. *Id.* § 8.5(b).

113. *Id.* § 8.5(b) nn.10–11.

114. See WILLISTON, *supra* note 2, § 9:16 (the state jurisdictions that have accepted the offset rule are Arkansas, California, Colorado, Florida, Illinois, Minnesota, New York, Ohio, Oregon, South Dakota, Tennessee, and Texas).

115. 957 F. Supp. 150 (N.D. Ill. 1997).

void the agreement to arbitrate contained in an employment contract.¹¹⁶ The court stated that “the privilege of minority . . . is to be used as a shield and not as a sword,” and consequently that a “minor’s right to disaffirm in any case ‘should be exercised with some regard to the rights of others, certainly with as much regard to those rights as is fairly consistent with adequate protection of the rights of the minor himself.’”¹¹⁷ The court does not articulate what “adequate protection of the rights of the minor” is and, by refusing the right to avoid in that case, the court seems to be giving no protection to the minor. How broadly can the declaration of the *Sheller* case be applied?

Another explanation for the *Sheller* holding is that it is one of several courts who have recently recognized an exception to the infancy doctrine for employment contracts.¹¹⁸ For instance, in *Douglass v. Pflueger Hawaii, Inc.*, the concurring judge stated that avoidance of the arbitration requirement in the minor’s employment contract was not allowed because infancy should not be used as a “sword to injure the defendants.”¹¹⁹ The majority opinion,¹²⁰ which makes no mention of swords, reasons that the legislative grant permitting minors to be employed implies that minors should have capacity to enter enforceable employment agreements.¹²¹ If *Sheller* is not based on an employment exception, it appears to be simply wrong.

Another example of a case using sword language to characterize another element of a well-known exception to the infancy doctrine is *State Farm*

116. *Id.* at 153–54.

117. *Id.* at 153 (quoting *Shepherd v. Shepherd*, 97 N.E.2d 273, 282 (Ill. 1951)).

118. *See, e.g.*, *Robinson v. Food Serv. of Belton, Inc.*, 415 F. Supp. 2d 1227, 1231 n.1 (D. Kan. 2005) (“[This] court does not believe that the Kansas Supreme Court, if faced with the issue, would permit these plaintiffs to disaffirm their employment contracts when those contracts were, on the whole, beneficial to those plaintiffs.”); *Smith ex rel. Smith v. Captain D’s, LLC*, No. CV04-281AA, 2005 WL 6141649 (Miss. Cir. Ct. Dec. 21, 2005) (upholding an arbitration provision in a minor’s employment contract because thousands of Mississippi minors receive benefits of employment and compensation dependent on such contracts). On an interlocutory appeal, the Mississippi Supreme Court remanded the case for a full trial because the dispute in the case was outside the scope of the arbitration agreement; consequently, the court did not address the infancy doctrine claim. *Smith ex rel. Smith v. Captain D’s, LLC*, 963 So. 2d 1116 (Miss. 2007). *See also* *Preston & Crowther*, *supra* note 15 (discussing the employment exception to the infancy doctrine more fully). *But see* *Stroupes v. Finish Line, Inc.*, No. 1:04-cv-133, 2005 WL 5610231, at *2 (E.D. Tenn. Mar. 16, 2005) (rejecting the concept of an employment exception to the infancy doctrine).

119. 135 P.3d 129, 148 (Haw. 2006) (Acoba, J., concurring).

120. *Id.* at 131–45 (majority opinion).

121. *Id.* at 138 (“With respect to contracts of employment, it is apparent that, by relaxing the requirements for sixteen—and seventeen-year-olds to obtain employment, the legislature clearly viewed minors in this particular age group—being only one to two years from adulthood—as capable and competent to contract for gainful employment and, therefore, should be bound by the terms of such contracts.”).

Mutual Automobile Insurance Co. v. Skivington.¹²² The court held that the sword principle does not allow a minor to unilaterally change a contract to impose additional obligations on the other party.¹²³ Rather, a minor must “affirm or disaffirm the contract as a whole.”¹²⁴ The minor purchased car insurance, but rejected uninsured motorist coverage and then, after an accident, wanted to disaffirm only the rejection of the uninsured coverage and be compensated from that accident.¹²⁵ This denial of a partial avoidance and partial affirmation is an obvious result and is acknowledged in the *Williston* section cited by the district court in *iParadigms*.¹²⁶

Neither the *Sheller* nor the *Skivington* case sheds any light on what the district court in *iParadigms* meant in repudiating use of the infancy doctrine as a sword. If anything, these cases suggest that whenever a court is applying an established defense, exception, or limit on the use of the infancy doctrine, it may pull out the maxim about the doctrine not being used as a sword, but such language does not seem to contain any substance beyond the established parameters of the infancy doctrine. And none of these parameters seem to apply in *iParadigms*.

There is one other possibility. Outside of the minority offset rule, the most legitimate use of the sword metaphor seems tied to the situation where the minor has acted in bad faith, as discussed above. In that situation, courts appear unwilling to follow the literal rules of the infancy doctrine, and instead apply equitable powers to circumvent traditional infancy rules while still claiming that the infancy doctrine applies.¹²⁷ In the ordinary case, the right to use the doctrine to void the contract “is absolute and unconditional,”¹²⁸ and, in fact, “[t]he rule relating to the avoidance of infants’ contracts should be liberally applied.”¹²⁹ However, a court may refuse to recognize the infancy doctrine when a minor’s conduct is reprehensible. Is it possible that the district court in *iParadigms* was

122. 28 Pa. D. & C.4th 358 (Ct. Com. Pl. 1996).

123. *Id.* at 365–67.

124. *Id.* at 365.

125. *Id.* at 360.

126. WILLISTON, *supra* note 2, § 9:14.

127. *See, e.g.*, *MacGreal v. Taylor*, 167 U.S. 688, 703 (1897) (minor was required to reimburse adult where she borrowed money to pay off encumbrances on the property, even though the consideration was technically no longer in the minor’s possession); *Fifth Third Bank v. Gilbert*, 478 N.E.2d 1324, 1326 (Ohio Mun. 1984) (refusing to allow a minor to disaffirm unauthorized charges she made with her father’s credit card because that would allow her to use infancy as a sword).

128. 43 C.J.S. *Infants* § 225 (2004).

129. *Id.*

suggesting, with the sword language, that the minors in that case had gone so far as to exhibit bad faith?

Professor Cromer Young suggests that the district court in *iParadigms* may have been reacting to the perceived “bad actor status” of the plaintiffs.¹³⁰ Professor Cromer Young writes,

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.¹³¹

But there is no evidence in the opinion that any of the minor plaintiffs in this case plagiarized or were trying to escape the consequences of plagiarism. In fact, one of the students submitted his work through Turnitin to a school he did not attend,¹³² and thus the school could not have issued academic sanctions against him in any event.

The plaintiffs’ attorney, Robert Arthur Vanderhye, who also served as A.V.’s adult representative in the case, has brought at least one other case against *iParadigms*.¹³³ Comparing this other case to *iParadigms* suggests that the motive in challenging the TOS in both cases was to obtain compensation for *iParadigms*’ use of others’ works to build the database on which the profitable business depends. The defendant’s brief asserts that one of the parents and the attorney contrived the false submission to Turnitin for the purpose of the suit and thus, in a premeditated manner, clicked to accept the Usage Policy with no intention of abiding by it.¹³⁴ Although this fact may be true, and courts may associate bad faith with entering an

130. Cromer Young, *supra* note 20, at 458.

131. *Id.*

132. See *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 479 (E.D. Va. 2008) (“[A.V.] used Turnitin to submit his written work to the University of California, San Diego (‘UCSD’), an educational institution in which A.V. was not enrolled.”), *aff’d in part, rev’d in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

133. In *Christen v. iParadigms, LLC*, No. 1:10cv620, 2010 WL 3063137 (E.D. Va. Aug. 4, 2010), attorney Vanderhye attempted to use state law replevin, conversion, and unjust enrichment to obtain compensation for students on whose work the profitable Turnitin depends. *Id.* at *3. The plaintiff in *Christen* was an adult when the work was submitted and the case raises no infancy doctrine issues. *Id.* at *1. The district court granted *iParadigms*’s motion to dismiss in *Christen* and held that all the claims are preempted by the Copyright Act and the fair use holding from the earlier Fourth Circuit case. *Id.* at *7–9.

134. *iParadigms, LLC*’s Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Summary Judgment, *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473 (E.D. Va. 2008) (No. 1:07 cv 293), 2007 WL 4298735.

agreement with intent to sue,¹³⁵ the district court's opinion does not suggest this is the reason for the holding, and such a reason would make the *iParadigms* holding on the infancy doctrine limited to such facts.

Alternatively, although it would not explain the holding with respect to the other minors, the *iParadigms* court may have envisioned one of the minors, A.V., as a bad actor. He misrepresented his school affiliation and identity and used another person's identification and password that attorney Vanderhye discovered online.¹³⁶ *iParadigms* counterclaimed against this student, alleging his "misuse" of the Turnitin system was a trespass to chattels, a violation of the Computer Fraud and Abuse Act, and a violation of the Virginia Computer Crimes Act.¹³⁷ But it is highly unlikely that the district court meant to suggest the infancy doctrine was misused based on these alleged violations since the court found them to be harmless. The district court easily dismissed all three of these counterclaims because *iParadigms* "fail[ed] to establish any actual damage or impairment to the Turnitin system as a result of A.V.'s allegedly unauthorized submissions."¹³⁸ On appeal, the Fourth Circuit reversed this holding with respect to the Computer Fraud and Abuse Act and the Virginia Computer Crimes Act, determining that *iParadigms* had showed evidence of qualifying damages.¹³⁹ However, this later contrary conclusion cannot be attributed to the district court or provide a reason for the district court to determine that the minors in the case acted in bad faith.

Thus, the district court's use of the maxim—the infancy doctrine cannot be used as a sword—does not appear to be relevant to any aspect of infancy law doctrine in this case and thus is not a basis for justifying the court's refusal to apply the doctrine. It is understandable that the district court in *iParadigms* would resonate with the maxim because it was not inclined to allow these students out of the TOS, but the maxim cannot be used as an excuse to disregard the clear application of the infancy doctrine. The infancy doctrine allows minors to disaffirm contracts unless one of the well

135. See, e.g., *Habetz v. Condon*, 618 A.2d 501 (Conn. 1992) (finding that the homeowner's attempt to void his contract with his home builder after his house was built because the contract was missing a mandatory provision was in bad faith, and that the whole transaction evidenced bad faith on the homeowner's part, and therefore he was precluded from voiding his contract).

136. The Fourth Circuit tells us, "The password was provided to A.V. by plaintiffs' counsel who obtained it by conducting an internet search." *iParadigms*, 562 F.3d at 635.

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

138. *Id.* at 486.

139. *iParadigms*, 562 F.3d at 646 ("This broadly worded provision plainly contemplates consequential damages of the type sought by *iParadigms*—costs incurred as part of the response to a CFAA violation, including the investigation of an offense.").

articulated defenses applies. A court wishing to plow new ground and overturn an ancient doctrine established in every jurisdiction should offer some explanation.

So far in this Part II, I have explained why reliance on *iParadigms* is misplaced, and that the retained benefits defense and the bad faith defense are unlikely to offer much comfort to OSPs. I turn now to another defense frequently asserted with respect to a minor's efforts to disaffirm an online TOS. A glance through the terms in a wide variety of TOS for businesses likely to attract minors suggests that, if *iParadigms* does not save them, OSPs plan to rely on the fraudulent misrepresentation of age defense. But such reliance will not be successful.

D. Trojan Horses and the (Mis)representation of Age Defense

OSPs tuck representations of age into TOS, never in the first few paragraphs and sometimes several pages down. OSPs do not provide any warning that they plan to rely on such representations or warn that to accept services if the representation is not true will result in consequences of any kind going forward. In this way, OSPs seem to induce users to click (or browse) unaware of the significance of such a representation, which can be, and frequently is, in direct conflict with the actual personal information the user has entered during a prior step. Like the Trojan horse, users accept such TOS without a second thought. But "hidden" should not be as good a strategy in contract law as it is in war. Clever or not, OSPs may fail to realize that the representation of age inside a TOS is not nearly as deadly as the contents of the ancient horse. In this Part II.D, I first discuss the standards for establishing a defense based on misrepresentation of age.¹⁴⁰ Second, I address briefly the issues surrounding investigating age online. Finally, I describe what OSPs are doing to discover and respond to age and compare these efforts to the standards for the defense.

As explained above in Part II.A, this defense is only available when the adult has undertaken reasonable investigation and relies in good faith on the results of the investigation.¹⁴¹ It requires more than a mere statement of inaccurate age.¹⁴² The adult has a duty to reasonably investigate age, notwithstanding the representation. The reliance must be "justified" and in

140. Fraudulent misrepresentation of age is, in some jurisdictions, a defense to the infancy doctrine, and in others, a tort claim that can be raised against a minor who seeks to disaffirm a contract. See *supra* notes 41–42 and accompanying text. In this article, I discuss both as a "defense."

141. WILLISTON, *supra* note 2, § 9:22 (stating that this rule is statutory in some jurisdictions).

142. See, e.g., *Gillis v. Whitley's Disc. Auto Sales, Inc.*, 319 S.E.2d 661, 666 (N.C. Ct. App. 1984) (holding that a minor's misrepresentation of age does not bar him from disaffirming a contract).

“good faith.”¹⁴³ For instance, in *Topheavy Studios, Inc. v. Doe*,¹⁴⁴ a minor affirmatively presented a fake identification.¹⁴⁵ The court held that the fake ID was a mere attempt to defraud, and insufficient as a defense to the infancy doctrine, which requires satisfaction of a three-part test: (1) the minor misrepresented her age, (2) the minor intended for the other party to rely on the misrepresentation, and (3) the party was injured as a result of its actual and justifiable reliance.¹⁴⁶

Of course, the issue of investigating age is more complex online. The law relating to the fraudulent misrepresentation defense and duty to investigate age was developed when most contracts were formed in person. Literature refers to the notion that red flags about age would arise visually.¹⁴⁷ What might be the equivalent online? Certainly online age verification technology has been the subject of extended debate,¹⁴⁸ even beyond the Child Online Protection Act (COPA) cases.¹⁴⁹ Online age verification methods exist,¹⁵⁰ and some are currently being implemented by certain online service providers.¹⁵¹ Proponents argue that these methods are as good as visual checks in at least raising the suspicion that age needs to be investigated. “While these methods may not be one hundred percent effective in excluding minors, neither are the current methods [used] by

143. A. D. Kaufman, Annotation, *Infant's Misrepresentation as to His Age as Estopping Him from Disaffirming His Voidable Transaction*, 29 A.L.R.3d 1270 (1970); see also DiMatteo, *supra* note 91, at 497 (stating that the requirement is “reasonable reliance”).

144. No. 03-05-00022-CV, 2005 WL 1940159 (Tex. Ct. App. Aug. 11, 2005) (citing and mirroring the elements of fraud discussed in *Ernst & Young, LLP v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573 (Tex. 2001)).

145. *Id.* at *1.

146. *Id.* at *4.

147. Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 214–15 (1967) (quoting *Sternlieb v. Normandie Nat'l Sec. Corp.*, 188 N.E. 726, 728 (N.Y. 1934)).

148. See, e.g., RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET 39 (May 2006), available at <http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf>.

149. For an overview of the various cases and courts that addressed COPA and its age verification affirmative defense, see *American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 185–86 (3d Cir. 2008). The Third Circuit concluded that the “implementation of COPA’s affirmative defenses by a Web publisher . . . would involve high costs and also would deter [adult] users from visiting implicated Web sites.” *Id.* at 197.

150. See LAWRENCE LESSIG, CODE: VERSION 2.0, at 68 (2006) (proposing a scheme of “digital IDs” that could identify users online).

151. For instance, “Lasseters Online requires a copy (which may be a faxed or a scanned copy) of a valid passport, drivers license, birth certificate or ‘Age identification card’ in order to prove that the player is not a minor.” Jonathan Gottfried, Comment, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH., Feb. 2004, at 1, 12, 37 n.158 (citing Lasseters’ Terms of Use).

brick and mortar [businesses], which are often based on physical appearance.”¹⁵²

Further, necessity is the mother of invention and, if OSPs had sufficient incentive, development of age verification practices would become as robust as they are for online security services.¹⁵³ In the 2008 joint statement with state attorneys general, MySpace agreed to develop age verification technology and to begin by organizing a task force focused on “finding and developing online identity authentication tools.”¹⁵⁴ The task force’s final report does not conclude that age verification is not possible now, or in the future.¹⁵⁵ Rather, the still contentious debate in the report is whether such technologies should be used.¹⁵⁶ For purposes of this paper, I establish only that what most OSPs are currently doing is flagrantly insufficient to evoke the defense. I defer to another day the issues of what technology or methods are available for age verification, their effectiveness against tech-savvy or dishonest youth, and the tradeoffs in terms of privacy for minors and burdens on adults using websites.

A study of the current practices with respect to age makes it difficult to take seriously any claimed commitment of OSPs to avoid teenage customers. The practice of eBay and a few other sites with respect to pre-teens demonstrates that the OSPs know how to take precautionary measures.¹⁵⁷

152. *Id.* at 10.

153. Some of the many services Norton offers, including Antispyware, are Antirootkit, Smart Firewall, Network Mapping & Monitoring, Anti-Spam, Identity Protection, and Download Protection, among others. *Norton AntiVirus 2011*, NORTON, http://antivirus.norton.com/norton/ps/1up_us_en_gh1.html?om_sem_cid=hho_sem_sy:us:ggl:en:ekw000004480/6514133956 (last visited Oct. 27, 2011).

154. JOINT STATEMENT ON KEY PRINCIPLES OF SOCIAL NETWORKING SITES SAFETY 1 (Jan. 14, 2008), *available at* http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2008/01/14/pdf (MySpace agreed to organize a task force focused on “finding and developing online identity authentication tools.”). The task force was convened and issued its final report on December 31, 2008. ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES 3 (John Palfrey, danah boyd & Dena Sacco eds., 2010) [hereinafter ISTTF REPORT].

155. In fact, the final report describes a variety of existing age verification practices. ISTTF REPORT, *supra* note 154, at 30–31.

156. Professor Palfrey’s introduction to the ISTTF Report explains:

Some argue that the use of . . . age verification in particular, ought to be widespread, if not mandatory Others argue that . . . [t]he extensive use of strong authentication and age verification technologies will not solve the problem, . . . and will bring with them negative externalities, including risks to innovation, free expression and privacy.

Id. at xvi.

157. eBay is such a recognized avenue of business and commerce for teenagers that teenager-focused entrepreneurial advice websites offer articles on how teenagers can set up shop on eBay. *See, e.g.,* R. Sharp, *Run an eBay Business from Your Own Home—A Guide for Teens*, EZINE @RTICLES, <http://ezinearticles.com/?Run-an-eBay-Business-From-Your-Own-Home---A-Guide-for-Teens&id=680961> (last visited Oct. 27, 2011); *Personal Finance: How Teens Can Make Money with*

Juxtaposed against the numerous websites that take serious steps to prohibit pre-teen users from accessing services, websites which undertake no age inquiry or allow self-identified minors to register anyway, cannot argue that the online format has hoodwinked them into dealing with a minor against their will. Adults who voluntarily enter transactions with minors seem willing to assume the risk that minors will void the contracts.

OSPs' treatment of youth under thirteen, as compared to youth under eighteen, illustrates that, first, OSPs are not making even a minimal effort to exclude older teens or to ascertain actual age, and, second, OSPs know how to exclude most users based on age disclosures when they so choose. Although it may be practically difficult to prevent persistent minors from improperly obtaining access to online services, hardly any OSPs do anything even to discourage underage customers or to prevent a minor from proceeding who has truthfully self-identified as under age.

Twitter¹⁵⁸ and Amazon,¹⁵⁹ for instance, do not bother to inquire about age when opening an account. MySpace,¹⁶⁰ Facebook,¹⁶¹ Google,¹⁶² Blogger (a Google service),¹⁶³ YouTube,¹⁶⁴ and Yahoo!¹⁶⁵ require a date of birth. They then block anyone who has entered an age that would make the person younger than thirteen years old from establishing an account or using the service. OSPs are particularly leery of pre-teens because of the Children's Online Privacy Protection Act of 1998 (COPPA).¹⁶⁶ COPPA's provisions set forth restrictions on the gathering and use of pre-teens' personal information.¹⁶⁷ Rather than risk liability for failure to comply with the statute, most sites are programmed to refuse access to a person self-

eBay, ERUPTINGMIND EDUC., <http://www.eruptingmind.com/teens-make-money-ebay/> (last visited Oct. 27, 2011).

158. TWITTER, <https://twitter.com/signup> (last visited Feb. 7, 2012).

159. AMAZON, <https://www.amazon.com/gp/flex/sign-in/select.html> (enter e-mail address; then select "No, I am a new customer") (last visited Feb. 7, 2012).

160. MYSPACE, <http://www.myspace.com> (click "Sign Up") (last visited Feb. 7, 2012).

161. FACEBOOK, <http://www.facebook.com> (last visited Feb. 7, 2012).

162. GOOGLE, <http://www.google.com> (click "Sign in"; then "Create an account now") (last visited Feb. 7, 2012).

163. BLOGGER, <http://www.google.com/accounts/ServiceLogin?service=blogger&passive=1209600&continue=http://blogger.com/home&followup=http://www.blogger.com/home<mpl=start#s01> (click "Get started") (last visited Feb. 7, 2012).

164. YOUTUBE, <http://www.youtube.com> (click "Create Account") (last visited Feb. 7, 2012).

165. YAHOO!, <http://www.yahoo.com> (click "New here? Sign Up") (last visited Feb. 7, 2012).

166. 15 U.S.C. § 6501 (2006); Jill Joline Myers & Gayle Tronvig Carper, *Cyber Bullying: The Legal Challenge for Educators*, 238 EDUC. L. REP. 1, 6-7 (2008) (discussing some OSPs' responses to COPPA's preteen restrictions, primarily allowing access to services only to those over thirteen).

167. 15 U.S.C. § 6501(8) (2006).

identified as under age thirteen. In addition, some sites are programmed to continue to block a user who changes a birth date after being refused access for entering a date making the user under age thirteen.

Efforts to similarly block teens ages thirteen to seventeen are extremely rare. The registration page for eBay, on one hand, has a conspicuous notice that users must be eighteen years or older, and it follows through by blocking registration to users who give a birth date making them under eighteen.¹⁶⁸ Most other OSPs do not take the same precautions. Facebook,¹⁶⁹ Google,¹⁷⁰ Blogger,¹⁷¹ YouTube,¹⁷² and Yahoo!¹⁷³ each have a clause in their TOS agreement in which the user purportedly recites adult age qualification, but none of the sites prevent users who have entered birth dates that conflict with such a representation from establishing accounts and using their services. Whatever is required for a reasonable investigation and good faith reliance on an intentionally fraudulent assertion of age, *this* will not qualify.

In addition to the three defenses discussed above in Part II, another challenge that seems particularly pertinent to the application of the infancy doctrine in the online context is the superior expertise demonstrated by many minors in the use of technology. The last section of this part addresses this argument.

E. Cyberpunk Versus Cybersense

Children through time have learned how to deal with gadgets their parents never fathomed.¹⁷⁴ Without question, in many homes minors are more comfortable with technology, especially the Internet, than adults.¹⁷⁵

168. EBAY, <http://www.ebay.com> (click “Register”) (last visited Oct. 27, 2011).

169. *Statement of Rights and Responsibilities*, FACEBOOK, ¶ 4.5, <http://www.facebook.com/terms.php> (last visited Oct. 29, 2011) [hereinafter Facebook TOS].

170. *Google Terms of Service*, GOOGLE, ¶ 2.3, <http://www.google.com/accounts/TOS> (last visited Oct. 29, 2011) [hereinafter Google TOS].

171. *Blogger Terms of Service*, BLOGGER, ¶ 1, <http://www.blogger.com/terms.g> (last visited Oct. 29, 2011).

172. *Terms of Service*, YOUTUBE, ¶ 12, <http://www.youtube.com/t/terms> (last visited Oct. 29, 2011).

173. *Yahoo! Terms of Service*, YAHOO!, ¶ 3, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited Oct. 29, 2011).

174. See GUSTAVO S. MESCH & ILAN TALMUD, *WIRED YOUTH: THE SOCIAL WORLD OF ADOLESCENCE IN THE INFORMATION AGE 7* (2010) (explaining that today’s children differ in many ways from their parents’ generation, “express[ing] different values, attitudes and behaviours to those of their predecessors” as a result of growing up “[i]mmersed in [modern] technologies”).

175. Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 45 (1995) (“Many parents complain that access by children to computer information . . . is very difficult to control. This difficulty may even be exacerbated by the greater prevalence of computer literacy in minors than in adults.”); Daniel, *supra* note 7, at 241 (“[M]inors tend to be more comfortable and proficient with web-based devices than many adults.”); *see also*

For many American families, the children are the only ones with the required technological and language skills to use the Internet.¹⁷⁶ One critique of the infancy doctrine is that technologically skilled minors could use the infancy doctrine to wreak havoc on innocent, unsuspecting, computer-challenged adults.¹⁷⁷ Thus, the argument goes, minors' technological savvy challenges the presumption of unequal bargaining power, which is one of the underlying assumptions of the infancy doctrine.¹⁷⁸

The technical skill argument is a red herring. The need for the infancy doctrine arises from the flaws in the substantive decision to purchase a product or service and the legal implications of the often invisible and elaborate terms, not the mode by which the contract is executed.¹⁷⁹ The infancy doctrine is designed to protect minors from "crafty adults" and "from their own want of sound judgment," not merely as a safeguard for minors incorrectly using the technology in the process of contracting.¹⁸⁰ The terms of contracts are no less dangerous when they are accepted with a click of a mouse rather than a signature on a hard-copy document. In fact, as discussed in more detail in Part III.B below, TOS tend to be particularly abusive, pushing the boundaries of overreaching terms in longer, denser texts hidden behind a hyperlink in an obscure corner of a webpage.¹⁸¹

To the extent the understanding of the technology matters, familiarity of the mechanisms for contracting online may actually increase the need for the protections of the infancy doctrine. Minors contracting online may feel (falsely) empowered by their greater understanding of the tools they are using. Comfort with the technology may overshadow the discomfort that should exist when faced with significant decisions and a representation that states the user has read and understood the terms (assuming the OSP has

MESCH & TALMUD, *supra* note 174, at 12 ("Families are social systems characterized by a hierarchy of authority. The computer can change this hierarchy, as the adolescent, a frequent user, becomes the family expert upon whom other family members rely for technical advice and guidance.").

176. See Cate, *supra* note 175, at 45.

177. See Daniel, *supra* note 7, at 241; DiMatteo, *supra* note 91, at 485.

178. 43 C.J.S. *Infants* § 210 (2004); see also Algeria Ford, *School Liability: Holding Middle Schools Liable for Cyber-Bullying Despite Their Implementation of Internet Usage Contracts*, 38 J.L. & EDUC. 535, 537 (2009) (citing *Johns Hopkins Hosp. v. Pepper*, 697 A.2d 1358, 1364 (Md. 1997)).

179. 43 C.J.S. *Infants* § 210 (2004).

180. *Id.*

181. See Ryan Patrick Murray, Comment, *MySpace-ing is Not a Crime: Why Breaching Terms of Service Agreements Should Not Implicate the Computer Fraud and Abuse Act*, 29 LOY. L.A. ENT. L. REV. 475, 490 (2009) ("The TOS agreements of most sites are hidden behind a hyperlink at the bottom of a webpage and are long, unorganized, and written in incomprehensible legalese.").

included that much of a warning). Although adults may be confounded by the unintelligible legalese, they have some experience with which to process a TOS. Youth are less likely to have been exposed to words and phrases such as “indemnification,” “hold harmless,” “arbitration,” “waived warranties,” and so forth.¹⁸² Adept hacking skills do not prepare one for the implications of legal liability.

Whatever the merits of redesigning the infancy doctrine, the online context seems to be a particularly inappropriate place to abandon the doctrine, notwithstanding the technological immersion of digital youth. I pursue this theme further in Part III, where I review the kinds of specific consumer protection issues raised with TOS and the status of the larger debate about their enforceability.

III. BOTTLENECKED IN THE TOS BLACK BOX

The focus of this article is the application of the infancy doctrine to contracting online. This part reviews what about online contracts may raise different issues than contracts in the real world and how those differences should influence the application of the infancy doctrine. TOS create greater challenges for traditional contract law in three ways. First, the process of manifesting assent is frequently blurred or nonexistent. Second, notice of the contractual terms is weak and any assent is unknowing. And third, the temptation to include every possible waiver of consumer rights and every possible grant of power in favor of the drafting party overcomes restraint when virtually unlimited text space is crammed behind a tiny hyperlink or diffused over multiple webpages. The contents of such text space cannot be hefted, let alone seen, in their entirety at any one time.

The obligations minors undertake in entering online contracts are typically twofold: they commit to pay a price for goods and services, and they agree to be bound by a variety of legal terms. With respect to the first risk—price—online markets are less prone to take advantage of minors than the bargaining situations confronting minors in the prior centuries when the doctrine was being solidified. The kind of haggling about price and hard bargaining common at car lots and craft fairs is uncommon online. Because there is no visual contact, the OSP may be less aware of the particular vulnerabilities of individual customers than in the real world. On the other hand, some OSPs expressly target minors, and most large scale services collect enough data on their marketing objectives and successes to understand when the demographics point to large numbers of minors. In addition, ongoing services frequently require opening an account and supplying a birth date, so OSPs have clear data on the ages of their users.

182. See 43 C.J.S. *Infants* § 210 (2004).

Through cookies, OSPs could link each customer account with a version of the webpage tailored to play to customer interests and vulnerabilities. Notwithstanding access to this information and technology, pricing online seems to be uniform and, for this article, I will assume that the prices minors pay online present no unique problems.

The more difficult question with online contracting is the legal terms to which users become bound in many TOS. Like many adults, minors may be totally unaware that simply opening and using a free program may form a browsewrap contract. A click on “I accept” means no more to minors than to adults. Minors may be prepared to understand and compare prices, but minors as a class are less likely to understand, let alone fairly evaluate and compare, the legalese included in TOS.

It is not my purpose to review all of the arguments on the merits of TOS, pro or con. Rather, for purposes of this paper, I briefly situate the infancy doctrine in the context of the critiques of online contracting. Part III.A starts with the larger trends in contract law, both on and offline, favoring powerful repeat players by loosening assent requirements and forsaking unconscionability. Part III.B then looks specifically at the contract enforcement issues raised by TOS as to adults and compares the risks when minors are involved. Part III.C briefly surveys the reach of common TOS provisions. This part concludes that terms imposed by TOS tend to be lengthier, less comprehensible, and more overreaching than real-world contracts, even though courts still seem willing to enforce them. While the terms imposed on minors are no more offensive than the terms imposed on adults, this caldron of potential contract abuse seems an unwise place to begin eviscerating deeply entrenched common-law and statutory protections for minors.

A. *Loosewrap Jurisprudence*

In the last decade, “real-world” or “paper” contract law has become noticeably more tolerant of a lack of manifestation of assent,¹⁸³ adhesion

183. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428–30 (2d Cir. 2004) (upholding a browsewrap agreement despite a lack of conscious assent and arguing that, if there is indication that consumers know terms exist and take a benefit, it makes economic sense to bind them even though traditional subjective and objective manifestations of assent are absent); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 980–82 (E.D. Cal. 2000) (enforcing a browsewrap agreement even though the court concluded “that many visitors to the site may not be aware of the license agreement [because] [n]otice of the license agreement is provided by small gray text on a gray background”). The infamous opinion that may be the root of this tolerance is *ProCD, Inc. v. Zeidenberg*, 86 F.3d

contracts,¹⁸⁴ and terms once thought to be overreaching.¹⁸⁵ The Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*¹⁸⁶ and the Seventh Circuit in *ProCD, Inc. v. Zeidenberg*¹⁸⁷ served up influential opinions that enforced fine print, real-world contracts with terms that were received by the other party after contract formation occurred under traditional principles. As discussed in more detail in Part IV.B below,¹⁸⁸ both courts relied on the assumption that such contracting served economic efficiencies and reduced costs to users and consumers, an assumption strongly supported by some commentators.¹⁸⁹ Others are cynical about this economic analysis and the comparative weighing of business and consumer benefits.¹⁹⁰ Particularly in the context of applying contract law to technology transactions, courts have shown deference to the importance of supporting an emerging technology/digital market.¹⁹¹

1447 (7th Cir. 1996), which is discussed at length *infra* in the text accompanying notes 270–75, and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

184. See Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 585–86 (2005) (discussing the level to which contracts of adhesion have become enforceable against both individuals and businesses).

185. See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (upholding a forum selection clause against complaints that the term amounted to substantive unconscionability and recognizing the prolific use and validity of these clauses in today’s contracts); Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 91 (2006) (recognizing “courts’ current constraint” in applying the unconscionability doctrine, thus upholding powerful terms against claims that they are overreaching).

186. 499 U.S. 585 (1991).

187. 86 F.3d 1447 (7th Cir. 1996).

188. See discussion of the economic benefits of form contracts *infra* in the text accompanying notes 267–69.

189. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829 (2006) (arguing that there are advantages—lower transaction and agency costs, which lead to lower-priced goods and services—to having standard nonnegotiable contracts in a competitive marketplace and claiming that the majority of courts agree and therefore are willing to enforce contracts of adhesion).

190. See Roger C. Bern, “*Terms Later*” *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 717–18 (2004) (arguing that Judge Easterbrook erroneously applied economic analysis, believing it would help maintain lower product prices, when in truth his holding may actually “increase transaction costs, enhance hold-up or opportunistic behavior by vendors, and result in inefficiencies as well as distributional unfairness by systematically redistributing wealth from consumers to vendors”); see also Glynn Lunney, *Protecting Digital Works: Copyright or Contract?*, 1 TUL. J. TECH. & INTELL. PROP., Spring 1999, at 1, 23 n.38 (“For ProCD to attempt such a price discrimination scheme, it must have some degree of monopoly in the market for telephone listings. Given such monopoly, there is little reason to expect the market to constrain effectively ProCD’s attempt to impose improper and inefficient terms in the use agreement.”).

191. Historical and current trends in contract law are more fully discussed in Preston & McCann, *supra* note 13.

The consumer protection movement in American jurisprudence began in the 1960s and hit its apex in the 1970s.¹⁹² The unconscionability doctrine emerged as the mechanism for policing contract overreaching early in the movement.¹⁹³ The focus has shifted and consumer interests are now more freely subsumed by renewed support for powerful, repeat players. Currently, the unconscionability doctrine is being applied only rarely by increasingly conservative judges fearful of activism charges. Further, online clientele are not as likely to be the same kind of sympathetic party as the inner-city, undereducated, single, welfare mother without transportation to any other retailer, who successfully avoided contract enforcement in *Williams v. Walker-Thomas Furniture Co.*, sometimes viewed as the foundational unconscionability case.¹⁹⁴ Courts tend to reserve unconscionability relief for parties disadvantaged by age, education,¹⁹⁵ language, and experience.¹⁹⁶

Nonetheless, a few commentators believe the unconscionability doctrine is sufficient even to combat the abuses of TOS.¹⁹⁷ Most commentators who

192. Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-To-Consumer Internet Merchants*, 62 BUS. LAW. 209, 211 (2006) (noting decrease in U.S. consumer protection legal activity since the 1960s and 1970s).

193. Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 348–49 (2010) (explaining that unconscionability was a primary tool courts used to protect consumers from overreaching acts throughout the 1960s and 1970s).

194. 350 F.2d 445 (D.C. Cir. 1965). Professor Stewart Macaulay notes the use of this case as the core teaching vehicle for the unconscionability doctrine. “The *Williams* decision quickly became a favorite of law review and casebook authors. It still is. For example, my survey of fourteen casebooks published since 1980 shows that nearly everyone includes it.” Stewart Macaulay, Address, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 579 (1989) (footnote omitted). However, he continues, “[t]he opinion is largely liberal symbolism, blinding us to the structural changes needed to attack poverty.” *Id.* at 581. Others criticize the use of this case, fearing harms that may follow its reinforcement of race and class stereotypes. Miriam A. Cherry, *Exploring (Social) Class in the Classroom: The Case of Lucy, Lady Duff-Gordon*, 28 PACE L. REV. 235, 243 (2008) (citing AMY HILSMAN KASTELY, DEBORAH WAIRE POST, SHARON KANG HOM & NANCY OTA, *CONTRACTING LAW* (4th ed. 2006)).

195. *Marshall v. Mercury Fin. Co.*, 550 So. 2d 1026, 1028 (Ala. Civ. App. 1989) (describing unconscionability as a remedy for the uneducated and unsophisticated, and refusing relief to a college educated plaintiff).

196. Jennifer M. Ralph, Comment, *Unconscionable Mediation Clauses: Garrett v. Hooters-Toldeo*, 10 HARV. NEGOT. L. REV. 383, 396 (2005) (“[C]ases that have addressed unconscionability in the context of an ADR agreement have also considered factors such as the plaintiff’s ‘age, education, intelligence, and business acumen and experience.’” (citing *Sikes v. Ganley Pontiac Honda, Inc.*, No. 82889, 2004 WL 67224, at *2 (Ohio Ct. App. Jan. 15, 2004))).

197. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 493–95 (2002) (recognizing Internet-specific contract

have noted the increasing trend for courts to enforce contracts with overreaching terms question the ability of existing contract doctrines to limit TOS abuses.¹⁹⁸ In particular, some argue that the unconscionability doctrine is not being effectively applied by courts to police TOS,¹⁹⁹ and others argue that unconscionability is an improper vehicle for policing overreaching contracts.²⁰⁰ Thus, although TOS formation procedures, if any, combined with the bevy of extreme substantive terms should be enough, the likelihood of equitable relief in this climate seems unpromising.

This movement in contract law favoring powerful actors and diluting the protections for vulnerable parties may itself be the best argument for the need to retain the infancy doctrine.²⁰¹ Against this background, the peculiar characteristics of TOS are assessed in the next subpart, both as they apply generally to adults and as they become heightened when minors are involved.

B. Fat TOS and the FUD They Should Invoke

The process of entering into, and the content of, a typical TOS are roundly criticized by Professors Mark Lemley,²⁰² Nancy Kim,²⁰³ and others

concerns, but finding adequate recourse in traditional doctrine, particularly the doctrine of unconscionability).

198. See, e.g., Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472–73 (2008) (arguing that unconscionability is inadequate for the task and suggesting that a better solution would be requiring “knowing assent,” rather than what some courts are currently calling “assent” or “mutual assent,” to enforce standard form contract terms). See also Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006); Schmitz, *supra* note 185.

199. See, e.g., Bern, *supra* note 190, at 795 (arguing that the only mechanism for policing contracts of adhesion is through current unconscionability doctrines which are far too weak to put buyers on equal ground with sellers); William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099, 1117–18 (2004) (arguing that doctrines such as unconscionability are currently insufficient to properly rein in the recent and unrelenting expansion of rolling contract doctrine, particularly in online contracting). The effectiveness of unconscionability doctrine in the TOS context is developed more fully in Preston & McCann, *supra* note 13.

200. Zalesne, *supra* note 184, at 597. She argues that unconscionability has the effect of quashing negative behavior when strictly enforced, but often “harms the very parties such doctrines are intended to protect . . . [w]hen courts fail to enforce contracts based on unconscionability.” *Id.* It follows that current unconscionability doctrine for dealing with problems, such as adhesion, should likely be reevaluated. See *id.*

201. Daniel, *supra* note 7, at 240, 255 (“The long-accepted rationale for the minority incapacity doctrine” provides “a general recognition that minors deserve protection from their online escapades.”).

202. Lemley, *supra* note 11.

203. Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797 (2007).

for their lack of notice and adhesiveness,²⁰⁴ even with respect to enforcement against adults. The basis for these critiques depends on a careful comparison between the process, timing, incentives, mechanisms, and psychology of contracting in cyberspace as opposed to the world in which contract law and the infancy doctrine in particular have been formed.

To begin with, fewer offline transactions involve significant boilerplate terms. When consumers pay cash and go into a movie there may be some sort of contract, but it includes only those words that can fit across the bottom or the back of the ticket. They can buy a handbag and walk out of the store protected by implied Uniform Commercial Code warranties and without committing to resolve any dispute with the vendor in Santa Clara County, California. They can mail a letter and photographs without granting the postmaster a global license to the use of their creative works for any purpose and forever.

Some offline transactions involve a complex set of terms similar to those typically found in TOS. Although the Internet has effectively replaced many forms of interaction, webpages do not offer any substitute for the precautionary function of feeling the size of a tangible multiple-page document, seeing the serious format and the obvious work of well-paid attorneys, and devoting the time for a formal signature, let alone the ritualistic significance of going to the provider's office to "execute" the contract. The contract provider's mere presence in any location creates yet another trigger for the consumer to recognize the significance of her actions.

A person asked to sign a lease or license in the brick-and-mortar world may well balk at signing ten pages of small print and begin asking questions about the implications of the document. Online, such a person cannot readily comprehend the enormity of the terms, and there is no one with whom to discuss them. The ability to tuck in heaps of virtually invisible and under-scrutinized terms is a notable characteristic of cyberspace.

Most real-world consumers will be aware they are contracting if the length of the terms exceeds the back of the receipt. On the other hand, vast legal consequences hidden behind a hyperlink embedded in some brief phrase are activated with a click thought of only as a request to continue to the next page. With such a clickwrap contract, if anyone sees the link and follows it, she may find that the next screen is also highlighted with other

204. Criticism of the "rolling contract" concept traced to *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), may also be applied to all wrap contracts. *See, e.g.*, Bern, *supra* note 190, at 641-710, 766-67, 795 (harshly criticizing Judge Easterbrook's "terms later" analysis and arguing that allowing sellers another avenue for abusing buyers in the contracting process increases the power imbalance).

hyperlinks to other elements of the overall legal commitment. For example, Professor Nancy Kim dissects the TOS for Gap.com to demonstrate that a user must engage in a virtual scavenger hunt just to obtain each piece of the TOS that the consumer is allegedly bound to by using the services.²⁰⁵ Other TOS, such as Google's, simply refer to and incorporate into the "Universal Terms" any number of other collections of terms without the benefit of hyperlinks.²⁰⁶ Of course, the terms comprising a browsewrap contract are not even this obvious. The consumer is not asked to click, and the contract can become binding without moving a cursor anywhere near a link to the terms.

But then, even users expressly directed to TOS will typically not actually read them.²⁰⁷ Flipping through for an overview of the terms is not as practical online. An OSP might easily use available technology to make terms conspicuous without the additional expense associated with printing user-friendly forms; flashing, variegated colors and sound might be interesting. Easy coding can serve to direct readers to the most significant or dangerous terms. Including links to external resources for understanding the significance of certain kinds of terms would be simple. But OSPs have not bothered with these approaches because judicial and economic pressure have never materialized. The best solution for OSPs is to decrease the likelihood that anyone will read them.

Consumers may suffer some increased vulnerability to fraud and unreliable business practices and products online, and such problems may be more difficult for consumers to resolve.²⁰⁸ Established merchants in the brick-and-mortar neighborhood have likely been vetted by people the consumer knows and trusts, and such businesses must have demonstrated some reliability to support their longevity. On the other hand, a webpage

205. Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1358 (2011) (analyzing the Gap browsewrap agreement which notes, "Your submission of personal information through the Sites is governed by our privacy policy, which can be reached by clicking on the 'Privacy Policy' link located in the footer section of the Sites. . . . This Agreement incorporates by reference the terms and conditions of the Privacy Policy."); see also Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1331 (2005) (asking whether "an Internet user [should] be required to click through a series of pages to find the contract terms to which she is agreeing").

206. Google TOS, *supra* note 170, ¶ 1.4.

207. Susan E. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears*, 8 NW. J. TECH. & INTELL. PROP. 1, 7, 24 (2009) (noting the general acceptance that consumers typically do not read online contracts); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 840-41 (2006) (recognizing that Internet users do not usually read terms, let alone understand them or the potential risks attached to them).

208. See Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 743 (2005); Hillman & Rachlinski, *supra* note 197, at 468.

may look like an established business even though it is in its first day of operation.

Customers of physical businesses can identify the people who own the business or those who work there if the principals are not apparent. Local owners and employees may have more incentive to avoid creating unhappy customers who are going to appear in person, raise their voices, and create an uncomfortable scene. Moreover, legal disputes that arise are more cheaply and easily solved by the consumer. The real-world product or service provider is less likely to attach significant fine print to ordinary transactions. Without a forum selection clause, a dispute with such a provider may be resolvable in a local court. Without a sweeping waiver of responsibility or liability, a consumer at least retains a cause of action to pursue.

Of course, many eStores and services have what digital natives may think of as eons of longevity and may be used regularly by all of one's acquaintances. Minors are accustomed to relying on others to check for their safety. In fact, minors may perceive that they are so restricted from what adults think is dangerous—such as buying alcohol, entering a casino, or holding a credit card—that anything they are permitted to do without a fuss must be eminently safe. Minors may also rely heavily on the crowd;²⁰⁹ one may think that, because everyone is doing it, someone must have figured out the fine print and decided it was not a problem—if a minor is aware of fine print at all.

In addition to the lack of signals warning that practically invisible, extraordinarily lengthy and complex terms lurk online, digital transactions feed on impulsiveness and exaggerate weaknesses in judgment and inaccurate assessments of risk.²¹⁰ A product or service may be located with a browser, selected by the buyer/user based on a digital image, and purchased through an electronic shopping cart using a secure socket layer to transmit virtual cash—all within seconds. Professor Susan Gindin's analysis of the *Sears* privacy disclosure case describes studies showing that the nature of the Internet forum and the dramatically increased number of contracts entered per online consumer makes these consumers "unlikely to consider the legal consequences of [their] online behavior."²¹¹

209. For a discussion of this phenomenon, see MURRAY KRANTZ, CHILD DEVELOPMENT: RISK AND OPPORTUNITY 510 (1994).

210. See Preston & McCann, *supra* note 13 (addressing why people are more impulsive online and the cautionary issues involved with online contracting).

211. Gindin, *supra* note 207, at 7.

The psychological dynamics of entering fast and easy contracts online are reviewed with compelling insights by Professor Juliet Moringiello.²¹² Moringiello specifically notes the significance of having a person present in the face-to-face contracting as both a source of information and a prompt for the other party to recognize the legal implications of the decision.²¹³ Additionally, Moringiello argues that taking the time to apply a physical signature to a document rather than quickly clicking through a page has some psychological effect, as “we are conditioned to think that we are doing something important.”²¹⁴ Digital purchasers need not form even the forethought necessary to get dressed, move from a comfortable chair, and drive themselves to a store during business hours. Online, the stores are at one’s fingertips twenty-four hours a day.

Adults regularly succumb. But the power of instant gratification to overcome judgment is magnified by the nature of minors. Recent neuroscience research suggests that minors’ brains are structurally immature and that the pre-frontal cortex, responsible for impulse control, is one of the last areas of the brain to mature,²¹⁵ and so minors’ ability to “exhibit adult levels of judgment and control” are generally limited.²¹⁶ When mixed with one-click satisfaction, minors’ tendency toward impulsiveness and risk taking becomes toxic.

Of course, if the provisions of TOS were balanced and reasonable, the process of, and motivations for, entering into them become relatively insignificant. In the next subpart, I briefly survey the kinds of terms common in TOS.

212. Moringiello, *supra* note 205, at 1347.

213. *Id.* at 1315.

214. *Id.* at 1316.

215. Brief for the Am. Med. Ass’n & the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 13, 23, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2247127 [hereinafter AMA Brief]. *Id.* at 18, 25–26 (“[A]dolescents experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior.” (citing Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision-Making*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 1023 (2006))). For more discussion of the recent medical studies and how they inform minors’ capacity to contract, see Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: Allowing Science to Inform Law’s Conceptions of Childhood* (forthcoming); see also Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1013 (2003) (citing Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417 (2000)).

216. AMA Brief, *supra* note 215, at 4.

C. Standard Protocol TOS

Several writers have expounded on various TOS that could be considered overreaching with respect to adults, standing alone or in conjunction with other factors,²¹⁷ including me.²¹⁸ A thorough cataloguing is unnecessary, but awareness of typical terms that would likely bewilder a minor (if read) or implicate important interests of minors is useful for weighing the infancy doctrine's viability online.

Although minors may have some understanding of the jury system, they seem ill-suited to weighing the disadvantages of abandoning the constitutional right to a jury, with or without arbitration. Rather than an arbitration clause, the MySpace TOS provides: "Each of the parties hereby knowingly, voluntarily and intentionally waives any right it may have to a trial by jury in respect of any litigation (including, but not limited to, any claims, counterclaims, cross-claims, or third party claims) arising out of, under or in connection with this agreement."²¹⁹

Fewer TOS now contain mandatory arbitration clauses following *Specht v. Netscape Communications Corp.*,²²⁰ *McKee v. AT & T Corp.*,²²¹ and *Bragg v. Linden Research, Inc.*,²²² though some still do.²²³ Further, such clauses are likely to have renewed popularity following the Supreme Court's recent decision in *Rent-A-Center, West, Inc. v. Jackson*,²²⁴ broadening the enforcement of arbitration clauses. Notwithstanding many staunch supporters, a commitment to mandatory arbitration ought not be taken

217. See, e.g., Gindin, *supra* note 207, at 35–36 (providing cases that have held clauses in online contracts unconscionable); Murray, *supra* note 181, at 489–90 (2009) (applying tests from *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 771–72 (Ga. 1996), and finding TOS agreements "procedurally and substantively unconscionable").

218. See Preston & McCann, *supra* note 13.

219. *MySpace.com Terms of Use Agreement*, MYSPACE, ¶ 16 (June 25, 2009), <http://www.myspace.com/Help/Terms> [hereinafter MySpace TOS].

220. 306 F.3d 17 (2d Cir. 2002) (identifying the degree to which users should reasonably have been aware of the arbitration clause in a technology contract).

221. 191 P.3d 845 (Wash. 2008) (finding a TOS with an arbitration clause was a contract of adhesion, unconscionable, and overly harsh).

222. 487 F. Supp. 2d 593 (E.D. Pa. 2007) (finding arbitration clause unenforceable under California unconscionability law).

223. Professor Schmitz studied "wireless phone service contracts from the nine major providers with a presence in Colorado. All of the companies required arbitration of consumer claims." Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 147 (2010). She also reports on a study finding that "[75%] of the [end-user license agreements] studied had choice of law clauses, 28% had choice of forum clauses, and only 6% had arbitration clauses." *Id.* at 137–38.

224. 130 S. Ct. 2772 (2010).

lightly. Professor Amy Schmitz has published extensively on arbitration clauses.²²⁵ She documents that “overly burdensome” arbitration clauses are rampant, especially online.²²⁶

TOS typically include a number of other material terms once considered overreaching and unenforceable, such as a mandatory choice of venue. These are now joined by terms that reach even further. Professor David Horton describes various types of unilateral modification clauses common in TOS, and the varying degrees of obligations the OSP retains in informing the consumer of changes.²²⁷ The TOS for MySpace,²²⁸ Twitter,²²⁹ and Amazon²³⁰ give the OSPs the power to unilaterally modify the user agreement. MySpace does not even agree to provide the user with notification of any changes, instead stating that it is the user’s obligation to read the TOS regularly to make sure she still agrees to all the terms.²³¹ Even if real assent were required to enter a TOS, it is difficult to argue that a user knowingly conferred on the other contractual party a carte blanche to make and remake any contract it likes. The use of unilateral modification clauses “widens the informational gulf between drafters and adherents [and] increases the burden on the judicial system.”²³² Yet courts are upholding such clauses.²³³ Expecting a minor to regularly check for significant changes in his or her contractual risks is even less realistic than assuming he or she will feed the dog twice a day without reminders.

Some OSPs in their TOS claim to own the rights to all material posted or submitted to their sites for any purpose, including the right to copy, sublicense, and distribute that material. For instance, “you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use

225. Schmitz, *supra* note 223, at 168–69.

226. *Id.* at 116 (“Companies increasingly include arbitration clauses among the ‘modular’ terms cobbled into boilerplate contracts. . . . Commentators and policymakers worry that pre-dispute arbitration clauses rob consumers of their judicial recourse rights without knowing consent and unfairly advantage corporate ‘repeat players’ who routinely include arbitration clauses in their form consumer contracts.”).

227. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623–53, 661–62 (2010).

228. MySpace TOS, *supra* note 219, at Introductory para. 3.

229. *Terms of Service*, TWITTER, para. 16 (June 11, 2011), <http://twitter.com/tos>.

230. *Terms of Use*, AMAZON WEB SERVICES, para. 13, <http://aws.amazon.com/terms> (last updated Feb. 8, 2011) [hereinafter Amazon TOS].

231. MySpace TOS, *supra* note 219, at Introductory para. 3.

232. Horton, *supra* note 227, at 605.

233. *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002) (upholding a unilateral modification clause because the party with the power to modify was limited in the agreement to only modify “non-material” terms); *Margae, Inc. v. Clear Link Techs., LLC*, No. 2:07-CV-916, 2008 WL 2465450, at *7 (D. Utah June 16, 2008) (upholding a unilateral modification clause because the consumer could have easily viewed the agreement online and noticed updates); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 836 (S.D. Miss. 2001), *aff’d*, 34 F. App’x 964 (5th Cir. 2002) (upholding an arbitration clause that was unilaterally added).

any IP content that you post on or in connection with Facebook.”²³⁴ Professor Cromer Young and others have addressed the harrowing notion that sites could exercise such a clause to limit a minor’s use of her own creative work at a future time.²³⁵ For example, children on Disney’s Club Penguin site are “encouraged to author articles, jokes, poems, and other works,” and then grant Disney an irrevocable license to the intellectual property rights according to the TOS.²³⁶ While not all material posted on Facebook or sent by e-mail is worthy of Shakespeare or Picasso, many minors are exceptionally creative and the Internet has opened possibilities for marketing intellectual property previously unavailable to budding artists and poets in prior generations.

Moreover, minors may be less cautious than adults in posting pictures of themselves and their friends online. The image of a young girl taken by her church counselor and posted on Yahoo!’s Flickr appeared on bus shelters all over major metropolitan centers in Australia, with captions such as “FREE VIRGIN TO VIRGIN TEXTING,” as part of Virgin Australia’s ad campaign for mobile phone services.²³⁷ Even if such use was not offensive to the pictured minor, large-scale commercial use without compensation is surely not contemplated by minors who post photos online. The notion that minors knowingly grant what appears to be an exclusive license for exploitation of their content seems absurd.

Finally, consider the two TOS presented in the *iParadigms* case.²³⁸ Although the minors in the case were found to have accepted the User Agreement by clicking,²³⁹ Turnitin also had another set of terms titled “Usage Policy” that purported to become binding when the site was used, even without the submission of a paper. The first paragraph of this Usage Policy warned: “IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS, PROMPTLY EXIT THIS SITE.”²⁴⁰ Apparently, continuing on the site for the purpose of reading the terms of the Usage Policy makes reading them irrelevant, as acceptance has already occurred.

234. Facebook TOS, *supra* note 169, ¶ 2.1.

235. Cromer Young, *supra* note 20, at 444–47; Heather Hruby, Comment, *That’s Show Business Kid: An Overview of Contract Law in the Entertainment Industry*, 27 J. JUV. L. 47 (2006).

236. Cromer Young, *supra* note 20, at 446 (footnotes omitted).

237. Chang *ex. rel.* Chang v. Virgin Mobile USA, LLC, No. 3:07-CV-1767-D, 2009 WL 111570, at *1 (N.D. Tex. Jan. 16, 2009).

238. A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 478–79 (E.D. Va. 2008), *aff’d in part, rev’d in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

239. *Id.* at 480.

240. *Usage Policy*, TURNITIN, <https://turnitin.com/static/aboutus/usage.php> (last visited Oct. 28, 2011).

Although the district court in *iParadigms* did not apply the browsewrap Usage Policy, it did enforce the User Agreement, which the court characterizes as the Clickwrap Agreement.²⁴¹ The district court drew the line at the browsewrap Usage Policy²⁴² because of two problems: (1) the Clickwrap Agreement stated that it was the sole agreement for users, thereby contradicting the existence of the additional Usage Policy, and (2) the minors never gave knowing and meaningful assent to the Usage Policy because they did not know it existed and were not required to see it or even given a link to it.²⁴³ The existence of multiple sets of terms, as was the case here, itself identifies another kind of risk not common in hard copy contracts, but prevalent online.

But the Clickwrap Agreement in *iParadigms* was bad enough on its own. It contained a sweeping waiver of liability.²⁴⁴ The waiver purports to waive everything, including intentional torts and strict liability statutory claims.²⁴⁵ Moreover, even if the cause of action survives, the waiver cancels every possible kind of damages.²⁴⁶ The court interpreted the waiver to counter the minors' claims, although the examples following the first italicized phrase below are centered around claims caused by the OSP's misfeasance:

In no event shall iParadigms, LLC and/or its suppliers be liable for any direct, indirect, punitive, incidental, special, or consequential damages *arising out of or in any way connected with the use of this web site* or with the delay or inability to use this web site, or for any information, software, products, and services obtained through this web site, or *otherwise arising out of the use of this web site*, whether based in contract, tort, strict liability or otherwise, even if iParadigms, inc. or any of its suppliers has been advised of the possibility of damages.²⁴⁷

241. *iParadigms*, 544 F. Supp. 2d at 485.

242. *Id.* at 479.

243. *Id.* at 484–85.

244. *Id.* at 478.

245. *Id.*

246. *Id.*

247. *Id.* The waiver in the *iParadigms*' TOS might have been challenged on unconscionability grounds. It purports to waive liability for every action or inaction and does not exclude from its range intentional or recklessly negligent torts of its own employees. Not all courts look kindly on a blanket waiver of any responsibility to the other party to the contract. *See, e.g.*, *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 595 P.2d 709, 712 (Idaho 1979) (“[It is] well established that courts look with disfavor on such attempts to avoid liability [blanket waiver of liability provisions] and construe such provisions strictly against the person relying on them, especially when that person is the preparer of the document.” (citing *Am. Auto. Ins. Co. v. Seaboard Sur. Co.*, 318 P.2d 84 (Cal.

The minors' written disclaimers on the copy of their submitted works indicated they did not consent to the archiving of their works by Turnitin.²⁴⁸ In a brick-and-mortar context, this act would create a counteroffer. Understandably, OSPs must rely on computer interface and the program does not screen for deviations in acceptance and counteroffer, although it could theoretically be coded to do that. The fact that demonstrations of intent cognizable in the real world are ignored online may be another reason to subject them to stricter scrutiny.

The infancy doctrine may be archaic. Some courts and commentators seem leery of the doctrine, but abandonment at this point in time, in which the legal environment is unsupportive of consumers generally and without other robust policing mechanisms, may not be optimal. Moreover, cyberspace is not the place to foreground an erosion of the doctrine, if indeed that is the right choice. The juxtaposition of the particular risks involving TOS and the particular tendencies of most youth suggest TOS present an inappropriate context for experimenting with removing traditional protections for minors.

IV. PHISHING FOR MINORS' BUSINESS

Professor Daniel argues that the continued application of the infancy doctrine would be devastating in digital markets, and so concludes the doctrine should be abandoned.²⁴⁹ I propose that the economic implications would be significant, but not disastrous. In Part IV.A, I discuss how minors make purchases online and the extent to which these mechanisms of payment provide any protection to vendors. But, as mentioned above, businesses' right to payment is only one part of the transaction; the right to rely on the TOS provisions is also threatened by the infancy doctrine. In Part IV.B, I discuss how online businesses, even those offering "free" services, may have an economic stake in the enforceability of TOS, whether or not the social value of such economic benefits are, or should be, outweighed by consumer interests. Reliance on TOS to form a substantial part of the economic bargain is particularly unwise when attempting to impose TOS on minors.

In Part IV.C, I discuss how the risks of disaffirmance can be managed if OSPs make reasonable changes to their practices. Of course, these changes

Dist. Ct. App. 1958); *Talley v. Skelly Oil Co.*, 433 P.2d 425 (Kan. 1967); *Walker Bank & Trust Co. v. First Sec. Corp.*, 341 P.2d 944 (Utah 1959)).

248. *iParadigms*, 544 F. Supp. 2d at 478.

249. Daniel, *supra* note 7, at 255.

may not be sufficient if use of the infancy doctrine balloons extraordinarily. In such an event, the infancy doctrine, and the policies supporting it, may need a major reassessment. In the meantime, a refresher on the policies behind the infancy doctrine may lead to substantial improvements in markets aimed at minors.

A. *Caching in on Minors*

Teenagers' buying power in 2006 was \$79.7 billion and is expected to increase to \$91.1 billion in 2011 despite an estimated 3% decline in the teenage population during that time.²⁵⁰ According to a 2010 Pew Research Center Internet study, the 48% of wired teens who now purchase online is a significant increase from the "31% who had done so in 2000."²⁵¹ With this trend towards increased participation in the online marketplace, minors have the potential to cause serious economic consequences to online businesses by disaffirming contracts in droves.

Minors have access to money, and they spend it. Teens have always had a high rate of summer employment, with fifty-one percent employed in June 2000, although teen employment is down during the current recession.²⁵² Family allowance programs, gifts, and "as needed" money from parents and other relatives also contribute to disposable teen income.²⁵³ According to a 2006 study, teens had eighty billion dollars in yearly income from allowances, work around the house, or employment.²⁵⁴ These teenagers were estimated to control \$4,500 in discretionary spending,²⁵⁵ with "boys under 18 hav[ing] an average of \$525 to spend each month, while girls have \$430."²⁵⁶

250. *Teen Market to Surpass \$200 Billion by 2011, Despite Population Decline*, MARKETING CHARTS (June 28, 2007), <http://www.marketingcharts.com/interactive/teen-market-to-surpass-200-billion-by-2011-despite-population-decline-817> [hereinafter *Teen Market*]; see also DEBRA AHO WILLIAMSON, EMARKETER, TWEENS AND TEENS ONLINE: FROM MARIO TO MYSPACE 4 (Oct. 2006), available at http://www.emarketer.com/Reports/All/Em_tweens_oct06.aspx (revealing that in 2005, children ages three to eleven commanded \$18.3 billion in spending power, which was projected to increase to \$21.4 billion in 2010).

251. LENHART ET AL., *supra* note 8, at 4.

252. Stephanie Pappas, *Soaring Teen Unemployment Could Have Lifetime Effects*, LIVE SCIENCE (Aug. 22, 2010), <http://www.livescience.com/health/recession-impacting-teenage-employment-opportunities.html>.

253. *Teen Market*, *supra* note 250; M. J. Alhabeed, *Teenagers' Money, Discretionary Spending and Saving*, 7 FIN. COUNSELING & PLAN. 123, 124 (1996) ("Teens have three major sources of income: family allowances, earnings from part-time employment, and gifts and other funds received from parents and relatives.").

254. BROWN & WASHTON, *supra* note 9, at 3.

255. MEDIAMARK RESEARCH INC., *supra* note 6, at 4.

256. Renee M. Covino, *Cracking the Kid/Candy Code*, ALLBUSINESS.COM (Oct. 1, 2007), <http://www.allbusiness.com/marketing-advertising/market-groups-youth-market-teens/5500615->

Businesses rely on minors. If minors disaffirm, in most states they can demand back any amounts paid to the adult, subject only to the obligation to return whatever physical consideration is still in the minor's possession, if any. Thus, as it currently stands, the infancy doctrine could lead to significant direct economic losses in the inability to collect monies committed by contract or, alternatively, from an obligation to refund consideration paid by a minor.

Vendors online may find a certain solace in believing a parent is secondarily liable for online charges made by minors. However, assuming that every credit card charge means a parent has assumed liability to pay the money (let alone be bound to the TOS) is a mistake. It is true that minors frequently do make online charges using a parent's credit card, and most of the time, the parent's credit card company would be liable for the money part of the transaction at least, but not always. Assuming the minor has actual authority to use the card, the adult owner of the card becomes liable to pay, even if the minor does not. If the minor does not have authority, then the card is treated as stolen, and the other party to the disaffirmed contract must return the money paid by the minor and cannot look to the card owner or to the card company that will likely charge back any credit given on that sale.²⁵⁷ In any event, if the minor disaffirms, the vendor could demand payment from the adult or the adult's credit card company.²⁵⁸ But the agreement with the card issuer does not bind the parent owner of the credit card to comply with the OSPs' TOS.

Minors have ways to pay without using a parent's credit card. A minor may, in limited cases, own a regular credit card issued before the Credit Card Accountability, Responsibility and Disclosure Act of 2009 became effective.²⁵⁹ The Act now prohibits issuing credit cards to anyone under age

1.html. Of these teenagers, about twenty-six percent had placed an Internet order in the year before the survey. BROWN & WASHTON, *supra* note 9, at 211.

257. See *Fifth Third Bank v. Gilbert*, 478 N.E.2d 1324 (Ohio Mun. Ct. 1984); see also 15 U.S.C. § 1643(d) (2010) (“[Subject to a few exceptions], a cardholder incurs no liability from the unauthorized use of a credit card.”).

258. Mary Elizabeth Matthews, *Credit Cards—Authorized and Unauthorized Use*, 13 ANN. REV. BANKING L. 233, 238 (1994) (detailing the various parties and contracts involved in a credit card transaction and citing JEFFREY B. REITMAN ET AL., 10 BANKING LAW § 259.02[1]–[3] (1989)).

259. Credit Card Accountability, Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.). Certain provisions of the Act became effective on February 22, 2010. Press Release, Board of Governors of the Federal Reserve System (Jan. 12, 2010), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20100112a.htm>.

twenty-one,²⁶⁰ unless signed by an adult willing to be jointly liable for any debts,²⁶¹ or supported by evidence of “independent means of repaying any obligation.”²⁶² Under the Act, an unemancipated minor may be able to establish independent funds and obtain a card. Although allowing such a minor out of a transaction may push the boundaries of the infancy doctrine policies, there is no established exception applicable.

Teens typically deposit the money they control into a bank account and direct debits from such accounts are permitted by many OSPs. If a transaction is later voided and the amount paid by the minor refunded, the adult who takes a debit drawn on such account does not have a claim against the bank.²⁶³ The bank does not secondarily guarantee payment. Minors can also use cash to purchase prepaid credit cards, and may be the recipients of prepaid gift cards.²⁶⁴ But, as discussed above, the loss of expected payment is only one half of the consequences of disaffirmance.

B. A Glitch in Processing TOS

Clearly an online business would be hurt if an obligation to pay were not enforceable, but economic losses may arise in other ways. In addition, many of the most popular online service sites are “free.” Outside of the expectation of payment, OSPs may suffer a cost in being stripped of an enforceable TOS although measurement of that cost is more subtle. Even if an OSP does not require direct payment, economic benefits are what induce an OSP to provide a free service (and keep their shareholders from suing the board of directors for giving away corporate resources). These benefits include advertising revenue, brand recognition, increased likelihood that users of free services will also purchase revenue generating services, and so forth. If the OSPs may be subject to disputes without any protection from a TOS, the cost of providing non-chargeable services may outweigh these benefits.

For instance, the economic viability of Turnitin, the “free” plagiarism detection program in *iParadigms*, is dependent on retaining a database of

260. 15 U.S.C.A. § 1637(c)(8)(A) (West 2010) (“No credit card may be issued to, or open end consumer credit plan established by or on behalf of, a consumer who has not attained the age of 21 . . .”).

261. *Id.* § 1637(c)(8)(B)(i).

262. *Id.* § 1637(c)(8)(B)(ii).

263. The bank acts only as an agent in honoring the drawer’s order to pay. *See* U.C.C. § 3-414 (2002). Only the owner of the account who signs or directs payment is liable on the underlying transaction unless the payment is a certified or cashier’s check signed by the bank. *See* U.C.C. § 3-401(a) (2006).

264. These kinds of cards are defined and regulated in the Electronic Fund Transfer Act, as amended, 15 U.S.C.A. § 16931(-1) (West 2009).

prior submissions against which to check future submissions.²⁶⁵ The TOS includes a waiver that arguably protects it from a lawsuit for copyright infringement liability for this practice.²⁶⁶ Although both the district court and the Fourth Circuit were able to construct a fair use exception protecting iParadigms from copyright infringement claims without ultimately relying on the waiver, in another case, the fair use exception may not be available. An OSP could avoid the normative pitfalls of TOS and provide a clear and obvious provision permitting the exchange of data for the use of the service. The availability of such programs is unquestionably linked to the ability to make some bargains with users. The right of minors to disaffirm puts these benefits at risk.

Putting aside for the moment the disputes about the application of economic theory and the reality of eventual consumer benefits, a matter on which I do not intend to comment, obviously economic consequences attach to TOS terms. Some consequences may benefit only the bottom line of the OSP, but having some bottom line is essential to staying in business.

According to Judge Easterbrook, “Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets.”²⁶⁷ Maureen O’Rourke agrees: “[T]erms of use are no less a part of ‘the product’ than are the size of the database and the speed with which the software [works].”²⁶⁸ Further, “[t]his method of contracting facilitates a mass market that might otherwise not exist by saving the transaction costs of face-to-face bargaining. The particular terms help the OSP recoup its investment while not forcing it to charge an exorbitant price.”²⁶⁹

An example of a TOS that validly decreases the cost of doing business is a reasonable limitation on the license to use software. What if Matthew Zeidenberg had been seventeen at the time he purchased and uploaded software from ProCD? The district court in that case found that the database provided by ProCD was not protected under the Copyright Act or the Computer Crimes Act, and that all the state claims were preempted by

265. *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 477–78 (E.D. Va. 2008), *aff’d in part, rev’d in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

266. *Id.* at 478.

267. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (quoting in part *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995)).

268. Maureen A. O’Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 69 (1997) (quoting *ProCD*, 86 F.3d at 1453).

269. *Id.* at 68.

federal law.²⁷⁰ This conclusion was assumed to be true on appeal to the Seventh Circuit.²⁷¹ Thus, the courts proceeded on the assumption that, in the absence of an enforceable contract, nothing prevented Zeidenberg, or anyone else, from purchasing access to the ProCD database at the private consumer price and then using it for commercial purposes.

The district court refused to enforce the contract, concluding that “because defendants did not have the opportunity to bargain or object to the proposed user agreement or even review it before purchase and they did not assent to the terms explicitly after they learned of them, they are not bound by the user agreement.”²⁷² On appeal, all of Judge Easterbrook’s efforts to find an enforceable contract would have been for naught if Zeidenberg could then simply disaffirm the contract using the infancy doctrine.²⁷³ Applicability of the TOS was economically significant in that case even though Zeidenberg had paid the purchase price and was not asking for a refund.

In addition, according to Judge Easterbrook’s explanation of price discrimination against commercial users and arbitrage, if all restrictions in license agreements were unenforceable, databases such as those compiled by ProCD, which “cost more than \$10 million to compile and [was] expensive to keep current,” would become prohibitively expensive for consumers and most commercial clients.²⁷⁴ As Judge Easterbrook notes, “To the extent

270. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996), *rev’d*, 86 F.3d 1447 (7th Cir. 1996). The court also held that:

(1) users did not infringe copyrighted software by downloading it onto their computer’s hard drive for purposes of making uncopyrightable listings available on Internet; (2) users were not bound by “shrinkwrap license” included with the software; (3) state law breach of contract and misappropriation claims were preempted by Copyright Act; and (4) Computer Crimes Act claim, as to users’ conduct, was preempted.

Id. at 640.

271. *ProCD*, 86 F.3d 1447. However, this assumption is in some respects wrong. See Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103 (explaining that, although it was uncertain that intellectual property law protected software, the underlying code or program is subject to copyright protection and, if a patent has been filed for the code, to patent law protection).

272. *ProCD*, 908 F. Supp. at 655.

273. As to the preemption findings of the district court, Judge Easterbrook concludes by stating that promises to pay for intellectual property can be enforced even though federal law “offers no protection against third-party uses of that property.” *ProCD*, 86 F.3d at 1454. Nothing in the opinion addresses whether any other possible remedy exists without an enforceable contract.

274. *Id.* at 1449.

If ProCD had to recover all of its costs and make a profit by charging a single price . . . it would have to raise the price . . . [and consumers] would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

Id.

licenses facilitate distribution of object code while concealing the source code (the point of a clause forbidding disassembly), they serve the same procompetitive functions as does the law of trade secrets.”²⁷⁵ These procompetitive benefits depend on an enforceable TOS.²⁷⁶

Another example of a provision that makes doing business cheaper, although it may not always be fair when hidden deep in an incomprehensible TOS, is a forum selection clause.²⁷⁷ The Supreme Court in *Carnival Cruise Lines, Inc. v. Shute* noted that a contract with a forum selection clause allows a business with national reach to avoid “litigation in several different fora,” and “dispel[s] any confusion about where suits . . . must be brought . . . sparing litigants . . . time and expense.”²⁷⁸ The Supreme Court then referenced the Seventh Circuit’s language in *Northwestern National Insurance Co. v. Donovan*, which notes the “huge convenience to [a business] to be able to defend these suits in home territory.”²⁷⁹ In addition, in the absence of a statute, attorneys’ fees are not recoverable by a party that prevails in a dispute unless a contract term provides for fees,²⁸⁰ and, of course, lawyers everywhere support such provisions.

Other provisions that may lower the cost of doing business are those that identify as governing law a state with law familiar or favorable to the OSP, proscribe rules for filing complaints, shorten statutes of limitations, and so forth. The normative value to society in permitting mega-conglomerate power-holders to impose such terms on consumers may be questionable. But the economic value to those who have enough power to impose them is clear.

275. *Id.* at 1455.

276. See *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323–26 (Fed. Cir. 2003) (upholding a shrinkwrap agreement that prohibited viewing source code for reverse engineering, even though reverse engineering is a fair use).

277. The MySpace TOS, for example, contains a term acknowledging that the licensee waives all rights to trial by jury for any litigation resulting from the use of its services and further restricts all conflict resolution to the jurisdiction of New York. MySpace TOS, *supra* note 219, ¶ 16. eBay explains that by accepting its TOS, the licensee agrees to resolve any dispute either in “the courts located within Santa Clara County” or through arbitration if the claim is under \$10,000. *Your User Agreement*, EBAY, para. 17 (“Legal Disputes”), <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Oct. 29, 2011). The Amazon TOS contains a term subjecting the licensee to personal jurisdiction in the state of Washington and demanding that all disputes will be settled within Washington courts. Amazon TOS, *supra* note 230, para. 12 (“Disputes”).

278. 499 U.S. 585, 593–94 (1991).

279. 916 F.2d 372, 378 (7th Cir. 1990).

280. 1 ROBERT L. ROSSI, ATTORNEYS’ FEES § 6:1 (3d ed. 2010) (“The ‘American Rule,’ which has been consistently applied throughout the United States, is that a litigant is ordinarily not entitled to collect attorneys’ fees from the opposing party in the absence of a statute or court rule or a contractual provision.”).

In summary, the infancy doctrine allows a minor to walk away from unreasonable contract obligations and from contract obligations that may have been reasonable if imposed on an adult—and to obtain restitution of any consideration she has already paid, subject to an offset in a minority of jurisdictions.²⁸¹ The right to assert this doctrine, in all of its breadth, is bounded by limited established defenses.²⁸² It is no surprise that, with increased use, the infancy doctrine would ultimately discourage online businesses from contracting with minors. But then, this disincentive is, precisely, one of the stated purposes of the doctrine.²⁸³ In the next subpart, I suggest how online businesses should respond to the threat of the infancy doctrine.

C. *Defragmenting a Volatile Situation*

In this article, I acknowledge that the infancy doctrine may be in need of reassessment, but that reassessment must be thoughtful and new standards should be carefully tailored to the merits and abuses of modern markets and the capacities of minors. In addition, I recommend that such reassessment take place in conventional contract forums before being attempted with respect to TOS. However, until that reassessment happens, online businesses can, and must, respond appropriately to the doctrine, as it is now the law. I offer some common sense suggestions for dealing with a teen market.

Of course, we can all imagine how the infancy doctrine may be abused. Most, if not all, of the general categories of abuse are not new, and have been contemplated by courts and legislatures considering the doctrine over the last century.²⁸⁴ In addition, of course, courts may police actions that rise to the level of bad faith.²⁸⁵ One aspect of current technological markets not previously included in the calculation of the infancy doctrine may be the need for limited software licenses. And, perhaps, further limitations should target a minor's premeditated and repeated use of the doctrine. Research on the frequency of youth taking advantage of uninformed casual sellers and small businesses is warranted, even if the conduct is not what would traditionally be identified as bad faith. Elsewhere, I offer suggestions for additional exceptions to, and some amelioration of, the burdens of enforcing the infancy doctrine.²⁸⁶

281. See *supra* text accompanying notes 94–102.

282. See *supra* Part II.B–D.

283. 43 C.J.S. *Infants* § 210 (2004) (“It is the policy of the law to . . . discourage adults from contracting with an infant.”).

284. *Id.* (citing cases as early as 1920).

285. See *supra* Part II.A.

286. See Preston & Crowther, *supra* note 15.

But the values that underlie the infancy doctrine are powerful. The infancy doctrine should at least have the effect of inducing online businesses to treat minors fairly and avoid outrageous TOS provisions. This treatment will minimize the risk of dissatisfaction, which leads to disaffirmation of their contracts. Minors who enter fair transactions for products they want in transactions that go smoothly are unlikely to seek to avoid the contract. The infancy doctrine is admirable, although currently ineffective, as a preventative mechanism encouraging the responsible exercise of the dominant power held by companies that would otherwise insist on imposing adhesive contracts with overreaching clauses on vulnerable populations.

In addition, perhaps a more ethical approach to tapping the teen market would include affirmative efforts to encourage the involvement of a parent. Although the discussion about youth safety on the Internet is highly contentious, most experts agree that players in the Internet industry need to help parents “be more actively engaged in stewarding young people’s adoption of technology and safe practices. They need accurate information about risks, solid implementable ideas for the home, places to go to learn more, and clear information about what to do if a problem arises.”²⁸⁷ The risks to children of a marketplace that comes into their homes at any hour of the day and night and is accessible with a click include the risk of incurring legal and financial obligations without sufficient understanding.²⁸⁸ Of course, some parents may be unenthusiastic about taking time to open accounts with online vendors that allow them to supervise (and assume contractual liability) for the online activity of minors. Some minors will be equally unenthusiastic about cluing in their parents to their online lives. But an ethical business will be willing to facilitate the involvement of parents.

Another solution for online businesses that are unwilling to reduce the risk by writing balanced contracts for quality products and services or by involving parents, is to adjust their practices. The most obvious measure is to conduct some reasonable age investigation. Although such an investigation would not be foolproof, an OSP has a defense if it investigates a representation of age with sufficient caution so that reliance on it is in

287. YOUTH SAFETY ON A LIVING INTERNET: REPORT OF THE ONLINE SAFETY AND TECHNOLOGY WORKING GROUP 33 (June 4, 2010), *available at* http://www.ntia.doc.gov/reports/2010/OSTWG_Final_Report_070610.pdf. The predominately industry writers of this report argue that “research . . . shows that many young people have adopted and continue to adopt effective strategies to deflect dangers from both adult criminals and their misbehaving peers. [But t]his is not to suggest that youth don’t need adult supervision and support . . .” *Id.* at 33–34.

288. *See id.* at 16.

good faith. As explained above in Part II.D,²⁸⁹ the OSPs of many of the most popular online services may include a recital of adulthood somewhere in a TOS, but they take no efforts to draw sufficient attention to the representation to credibly argue it was made knowingly. They, for the most part, ignore the contrary birthdates that users enter to open an account. And they undertake no investigation efforts. The existing exception for fraudulent misrepresentation is therefore entirely unavailing. This total inaction does not mean that notice and reasonable investigation practices are impossible to implement. If digital marketers wanted to take seriously avoiding contracts with minors, options for verifying age must be explored. But it is disingenuous for them to argue difficulties with age verification as an objection to the infancy doctrine. So far, most OSPs are not taking even the simple verification steps they know how to take to avoid dealing with pre-teens. If they wanted to avoid dealing with all minors, they could do at least that much.

The elephant in the room is, of course, that such measures will naturally reduce the number of minors with whom to do business. And online businesses are greedy. If OSPs choose not to take these precautions, they have the choice to simply absorb the business losses associated with occasional disaffirmance. But courts ought not come to their rescue. So we return full circle to the policy of protecting minors. Responsible businesses have options, but not cost-free options.

V. CONCLUSION

Minors have long been viewed as deserving protections from adults and from themselves in making economic and legal decisions. The infancy doctrine is still on the books and, despite some muddled verbiage, no doctrinal development suggests that it is not applicable to online contracts. Using benefits derived under the contract, making unknowing representations of age, and exercising exceptional computer savvy will not deprive a minor of the right to void a TOS. Simply using the doctrine for its express purposes is not bad faith, although, in fact, both conniving and innocent adults who deal with minors will pay the price the doctrine extracts. Steering adults away from hard bargaining with minors, such as evidenced by TOS, is the point. While there are some defenses and exceptions to the infancy doctrine, including one for bad faith, the vast majority of online TOS are squarely subject to avoidance.

The rush of teens into the market may require a meaningful inquiry into the policies of the infancy doctrine, but the arena in which to begin that discussion should not be TOS. Contract abuses are particularly prevalent in

289. See *supra* notes 169–73 and accompanying text.

TOS formation and terms. Further, the processes of online contracting encourage thoughtless and impulsive behavior, a problem particularly troubling for teens already prone to these qualities.

Notwithstanding the infancy doctrine, a look at the market reveals adults are more than willing to contract with minors; they affirmatively woo them. One risk is nonpayment, or a demand for refund, when a contract is voided. Some protections are built into online transactions because of the use of credit cards frequently tied to parents' accounts. But minors are not limited to credit cards and, more importantly, recourse against a parent for the price does not mean that the other TOS terms will be enforceable against anyone. TOS provide certain economic benefits to OSPs, some quite legitimately, although others may be overreaching. Contract avoidance under the infancy doctrine thus presents a significant threat to businesses relying on minors. But until legislatures or courts thoughtfully rewrite the doctrine, it will apply even in cyberspace.

Certainly, the infancy doctrine may become an unmanageable factor in digital market economics. But dramatic changes without serious consideration of historical values and long-term implications ought not occur in an arena where the temptation to commit contract abuses is apparent and in a judicial context where consumer protection is undervalued. At least with respect to TOS, in this imbalance, the infancy doctrine should be enforced—and perhaps publicized to encourage its use.
