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## Notice and Remedies in Copyright Licensing

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## Notice and Remedies in Copyright Licensing

*BJ Ard\**

*Copyright owners claim the power to designate practically any term of a copyright license as a “condition” enforceable in copyright. In doing so, these licensors purport to translate breach of the most trivial or idiosyncratic term into the basis for a copyright infringement suit. This Article argues that these licenses are most problematic when licensors provide inadequate notice of unexpected terms. License conditions are typically buried in boilerplate that no reasonable consumer reads, and licensors have few incentives to make them more salient. These circumstances not only threaten unwitting users with copyright liability, but also impede copyright’s own goals by casting doubt on the legitimacy of the copyright regime and discouraging the public’s engagement with creative works. Copyright law nonetheless offers courts no effective tools to inquire into the adequacy of notice.*

*Because these agreements arise at a unique intersection of copyright and contract, however, contract law supplies a normative and doctrinal framework that allows courts to demand more effective notice. Contract law is skeptical of supracompensatory remedies – like those that would follow from enforcement of a license condition – and awards them only where understanding and assent are clear. Courts therefore ought to require a heightened standard of notice as a prerequisite to the enforcement of license terms in copyright. This approach would check against licensors’ overreaching. At the same time, it would leave room for parties to experiment with unusual but potentially beneficial licensing arrangements like those championed by the free culture and free software movements. By bringing novel licensing arrangements to light, moreover, this approach subjects licenses to public scrutiny and to discipline through market and political forces.*

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## INTRODUCTION

Copyright owners now claim the power to designate practically any term in a copyright license as a “condition” enforceable on pain of a copyright infringement suit. If they are correct, then they can effectively supplement the six statutory grounds for infringement enumerated at Section 106 of the Copyright Act with protections of their own choosing.<sup>1</sup> This move increases copyright owners’ enforcement power significantly: rather than simply sue those who violated the license for breach of contract, they could sue for infringement and claim copyright’s statutory damages, easier access to injunctive relief, and a host of other litigation advantages.<sup>2</sup> Even the most trivial or idiosyncratic breach under this regime would yield mandatory statutory damages starting at \$750.<sup>3</sup>

The power to define one’s own conditions might sometimes be put to socially beneficial uses. Free culture and free software advocates, for example, rely on the enforceability of conditions to make their attribution and share-alike terms effective.<sup>4</sup> It is nonetheless easy to imagine how copyright owners might abuse this power by extending copyright enforcement to arbitrary and unexpected terms. These concerns came to a head in *MDY Industries, L.L.C. v. Blizzard Entertainment, Inc.*, where a videogame developer sued in copyright to enforce license terms that prohibited cheating.<sup>5</sup> To avert an outcome that would pave the way to enforcement of practically any license term in contract, the Ninth Circuit rejected the claim and held that, to be valid, a condition must bear some “nexus” to the “exclusive rights of copyright.”<sup>6</sup> Commentators have roundly criticized this opinion for its questionable adherence to the Ninth Circuit’s own copyright doctrine and for the complications it raises for novel but socially beneficial licenses like those cham-

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1. See 17 U.S.C. § 106 (2012).

2. See *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 941 n.3 (9th Cir. 2010).

3. Copyright carries statutory damages from a mandatory minimum of \$750 up to \$30,000, irrespective of actual damages. 17 U.S.C. § 504(c)(1) (2012); see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) (“Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”). A finding of willful infringement increases the cap to \$150,000. § 504(c)(2). While a finding of innocent infringement would authorize damages as low as \$200, *id.*, this defense would likely be unavailable in cases of license breach. See *infra* notes 106-11 and accompanying text.

4. Indeed, when the Federal Circuit recognized an attribution term as a copyright-enforceable condition in *Jacobsen v. Katzer*, it opined that “these types of license restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief.” 535 F.3d 1373, 1382 (2008). Novel licensing arrangements like these have the potential to benefit authors and the public alike by creating new avenues for engagement with copyrighted works. See *id.* at 1378.

5. 629 F.3d 928.

6. *Id.* at 941.

pioned by the free culture and free software movements.<sup>7</sup> Yet rejection of the *MDY* approach leaves us to ask how courts might guard against licensors' overreaching without falling into the same traps.

This Article argues that the problems of overreach are greatest where licensors seek copyright enforcement of unexpected terms. To counter these problems, courts ought to award copyright remedies only where the licensor has made its terms clear and salient to the licensee. License conditions are typically buried in dense boilerplate that reasonable consumers refuse to read<sup>8</sup>: the opportunity costs of reading are substantial and can hardly be justified relative to the low value of most consumer transactions.<sup>9</sup> This arrangement sets consumers down the path to unwitting infringement and to hundreds, if not thousands, of dollars in copyright damages no matter how trivial or unexpected the breached term.<sup>10</sup> The award of copyright remedies in these circumstances is not only excessive from the perspective of consumer law, but also problematic for copyright itself due to its corrosive effect on the legitimacy of the regime and the chill it casts over users' engagement with creative works.<sup>11</sup>

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7. See, e.g., Robert W. Gomulkiewicz, *Enforcement of Open Source Software Licenses: The MDY Trio's Inconvenient Complications*, 14 YALE J.L. & TECH. 106, 110 (2011); Michael E. Kenneally, *Commandeering Copyright*, 87 NOTRE DAME L. REV. 1179, 1224-25 (2012); see also, e.g., Molly Shaffer Van Houweling, *Touching and Concerning Copyright: Real Property Reasoning in MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 51 SANTA CLARA L. REV. 1063, 1083 (2011) (attempting to rehabilitate *MDY*'s approach with an alternative that would permit copyright enforcement only where doing so "would promote the purposes of the copyright holder's exclusive rights" (emphasis added)).

8. See Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (finding that "only one or two in 1,000 shoppers access a product's [license] for at least 1 second").

9. See Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1486 (2004) ("[T]he rational buyer will invest in information about a good (including information about the rights associated with it) only up to the point where marginal gains equal marginal cost. For low-valued goods this investment would be very low."); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 989 (2001) (explaining the non-drafter's understanding of terms as "primarily a function of two observable facts: (1) the complexity and obscurity of the term in question and (2) the size of the underlying transaction").

10. See *supra* note 3.

11. It may be that courts will refuse to enforce penalties like these that offend their commitments to substantive fairness. See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (describing judicial reluctance to enforce overly-harsh laws). It is nonetheless important that courts justify their decisions in ways that advance the development of copyright law and policy rather than confuse it. *MDY*, for example, may have protected consumers against a substantively overreaching license condition. But as Section III.A argues below, the resulting nexus test has generated doctrinal confusion and threatens to impede innovations in licensing.

One immediate concern with directing courts to scrutinize the adequacy of notice is that copyright law, as it stands, lacks the doctrinal tools to account for notice defects.<sup>12</sup> But this concern dissipates if we take seriously the contractual aspects of the license. The question of whether a license term can be construed as a condition begins as an interpretive question for contract.<sup>13</sup> Contract law, moreover, is normatively and doctrinally responsive to the licensee's expectations in ways copyright law is not.<sup>14</sup> Contract law is loath to impose damages beyond those a party could expect as a result of breach, and it is all the more reluctant to enforce a term that would award supracompensatory damages in the absence of unequivocal assent.<sup>15</sup> The disproportionately large statutory damages that would result from licensors' enforcement of conditions therefore ought to trigger significant concerns regarding the adequacy of notice. Courts could accordingly require these licensors, who seek to invoke remedies greater than what contract typically offers, to provide notice greater than what contract law ordinarily requires.

This Article proceeds in five parts. Part I begins by outlining the features of copyright law that allow copyright owners to designate practically any license term as a condition. It then explains how the high information costs posed by boilerplate license conditions create problems for both consumer law and copyright policy. Part II shows why copyright law lacks the tools to guard against these risks: copyright's mandatory damages foreclose judges from tailoring damage awards to the breaching party's actual culpability following the breach of a trivial and poorly disclosed term, and conventional copyright defenses like fair use, preemption, and misuse do not speak to failures of notice. This Part also considers the mitigating effect of reputational constraints and finds them to be only a partial solution.

Part III situates my approach against other proposals for the regulation of conditions. It begins with a discussion of the *MDY* opinion, explaining why the Ninth Circuit's nexus provides unclear guidance while also impeding innovations in licensing. This Part then considers other substantive reforms, particularly the possibility of developing standardized terms.<sup>16</sup> Standardiza-

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12. See *infra* Part II.

13. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.15[A][1] (2013); see, e.g., *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 939 (9th Cir. 2010) (“We distinguish between conditions and covenants according to state contract law, to the extent consistent with federal copyright law and policy.”).

14. See *infra* Part IV.

15. See, e.g., Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1081-83 (2009) (explaining contract's presumption against the recognition of supracompensatory conditions as a manifestation of contract's antiforfeiture norm).

16. Molly Shaffer Van Houweling and Christina Mulligan spearhead this approach. Van Houweling argues that copyright enforcement ought to be denied to terms that impose information costs higher than those established under copyright's statutory baselines, see Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO.

tion would have the benefit of protecting against runaway information costs by restricting the universe of possible terms. And it is likely that smart new substantive limits could advance the goals of copyright by prohibiting those terms that would be problematic even when properly disclosed. But insofar as the discussion pertains to how courts should approach conditions, it is doubtful that courts are in the best institutional position to identify the terms in need of substantive regulation or to update their holdings to keep pace with innovative developments in the practice of licensing.<sup>17</sup> The Part concludes by considering proposals that would allow licensors to designate the terms of their choice as conditions. While these approaches leave more room for innovations in licensing, they require some mechanism for addressing the high information costs posed by idiosyncratic license terms. These scholars have attempted to locate such protections within copyright law, though they face difficulties due to copyright's limited concern with notice.<sup>18</sup> My own proposal avoids these problems by identifying contract law itself as the doctrinal foundation for the notice inquiry.

Part IV shows how contract law would allow courts to inquire into the adequacy of notice in licensing cases even without changes to copyright law. In particular, contract law's existing presumption against conditions provides a roadmap for courts to follow in requiring heightened notice as a prerequisite to awarding the sorts of supracompensatory remedies that would follow from

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L.J. 885, 897-98 (2008), and Mulligan advances a similar account for the restriction of idiosyncratic terms, see Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235, 275-84 (2012) [hereinafter Mulligan, *Numerus Clausus*]; see also Christina Mulligan, *Personal Property Servitudes on the Internet of Things*, (SSRN Elec. Library, Working Paper No. 2,465,651, Mar. 31, 2015) [hereinafter Mulligan, *Personal Property Servitudes*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2465651](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465651) (extending the argument to IP-embedded goods like seeds, digital cameras, and Google Glass). This Article differs in its approach to information costs by focusing not on the terms per se but their presentation.

17. See Kenneally, *supra* note 7, at 1204 (“Courts would be not only reluctant but also ill-equipped to devise a menu of standardized copyright interests.”); see also *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) (arguing that courts are “ill-equipped” to define the proper scope of a new intellectual property right in news); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 176, 214 (2013) (arguing that courts are “needed to deter opportunistic efforts by contracting parties to exploit their counterparties,” but that substantively “generalist courts are peculiarly ill-equipped to discover and understand the context that innovative parties have developed”).

18. Michael Kenneally, for example, would have courts pioneer new principles in copyright law to account for adequacy of notice. See Kenneally, *supra* note 7, at 1231-32, 1243. In similar fashion, Robert Gomulkiewicz urges courts to be skeptical of adhesive licenses as part of a multifactor remedial inquiry. See Gomulkiewicz, *supra* note 7, at 134-35. Under existing law, this test might justify denial of an injunction, but it could not shield a licensee from copyright's mandatory statutory damages. See *infra* notes 236-37 and accompanying text.

recognizing license terms as conditions. Part V applies this approach to contemporary copyright licenses. Many of today's boilerplate license conditions would likely not withstand heightened scrutiny. But recent work on enhanced disclosure – particularly Ian Ayres and Alan Schwartz's "warning box" for unexpected, unfavorable terms – provides guidance for licensors trying to meet the burden of communicating their terms.<sup>19</sup>

Beyond addressing the high information costs posed by idiosyncratic license terms, this approach also creates space for greater public examination of the terms that copyright owners are propounding. Requiring heightened disclosure as a prerequisite to enforcing license terms in copyright forces them into the open. This openness increases opportunities for consumers to discipline substantive overreach in the market, through public advocacy campaigns, or by recourse to the political process. Heightened transparency would also give lawmakers better purchase on the terms in need of regulation.<sup>20</sup>

## I. CONDITIONS IN COPYRIGHT

Copyright owners have historically granted conditional licenses to their business partners, retaining the right to sue for infringement following specified forms of breach. But the extension of conditional licenses to consumer

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19. See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 553 (2014). The problem and its solution can also be described as one of excessive error and information costs. A user who mistakenly breaches a standard contractual promise is subject to error costs equal to any harm caused by the breach. By contrast, a user who mistakenly violates a copyright-enforceable term faces much higher costs due to the magnitude of copyright's statutory damages. While one who faces high error costs might ordinarily find it worthwhile to investigate her contractual obligations to avoid mistakes, the information costs associated with learning license conditions are themselves prohibitively high: licenses are lengthy, dense, and subject to constant revision, and a user may have to comply with a different license for each piece of software, e-book, and MP3 he encounters in a given day. Cf. Mulligan, *Personal Property Servitudes*, *supra* note 16, at 15-25 (describing the absolute, relative, and aggregate information costs associated with restrictions on personal property). A licensor who raises error costs by drafting copyright-enforceable terms ought to bear the burden of managing information costs by disclosing the operative terms in ways that users can actually understand.

20. While this Article advances a notice-based approach, the approach is compatible with proposals that are more sanguine about the need for courts to impose substantive protections. Indeed, greater attention to notice would likely improve the quality of substantive analysis. If courts first screened license terms to make sure they met the notice requirements proposed in this Article, they would strike many of the most egregious terms. This form of scrutiny, moreover, would discipline conscientious firms into offering more reasonable terms prospectively. Any terms that survived to the point of substantive adjudication would therefore already be scrubbed of notice defects that might skew the court's analysis. In other words, the approach would reduce the likelihood of "bad facts" making "bad law."



copies of digital works is a more recent phenomenon. Some of these new licensing forms might enhance public access to creative works by facilitating creative distribution models;<sup>21</sup> others might burden the public's engagement with creative works while providing few countervailing benefits.<sup>22</sup> Regardless of their intended purpose, however, these license terms pose risks to consumers who are unaware of them. The following discussion explains how these terms are structured, how they give rise to the risk of unwitting infringement, and why this risk is problematic for both consumer law and copyright.

### A. Conditions Defined

The word "condition" . . . is sometimes used in a very loose sense as synonymous with "term," "provision," or "clause." In such a sense it performs no useful service; instead, it affords one more opportunity for slovenly thinking.

– Arthur L. Corbin<sup>23</sup>

Courts and scholars use the term "condition" to refer to any license term where breach could result in copyright liability.<sup>24</sup> This convention is useful shorthand, but it obscures the differences between two classes of terms that can lead to copyright liability: "scope limitations," where infringement results from exercise of a right that was never granted; and "termination conditions," where breach results in wholesale termination of the license. The following discussion unpacks these categories and explains how restrictions like these can be imposed on consumers' use of retail copies.

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21. See, e.g., Kenneally, *supra* note 7, at 1206-11 (describing the potential benefits of price discrimination in software); David McGowan, *The Tory Anarchism of F/OSS Licensing*, 78 U. CHI. L. REV. 207, 223-24 (2011) (defending experimentation with license terms as beneficial to free expression). Subsection III.A.2 articulates the argument in favor of license innovation.

22. See, e.g., Van Houweling, *supra* note 16, at 948 (describing license restrictions that would impair the goals of copyright law). Section III.B articulates the arguments for imposing substantive limits on the terms that may be enforced in copyright.

23. Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 743 (1918).

24. See, e.g., MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 939 (9th Cir. 2010); Jacobsen v. Katzer, 535 F.3d 1373, 1380 (Fed. Cir. 2008); see also Christopher M. Newman, *A License Is Not a "Contract Not To Sue": Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1152 (2013) ("Accepted doctrine currently sorts license terms into two categories: conditions and covenants.").

## 1. Limitations, Conditions, and Covenants

Copyright law grants the copyright holder a bundle of exclusive rights. When Anne writes a book, she gains the exclusive rights to copy the book, create derivative works, distribute copies, or recite passages from it in public.<sup>25</sup> Anne can convey any permutation of these rights to another party via license.

Anne can also convey more limited rights: she might license a publisher to make 10,000 copies or to vend the book in the United States. The license would provide no defense against an infringement claim after the publisher made the 10,001st copy or began distributing the book in Canada.<sup>26</sup> The publisher would be infringing Anne's copyright not by violating the terms of the agreement *per se*, but by exercising rights that Anne never conveyed to it.<sup>27</sup> Terms like these are "scope limitations."

Anne can also draft license terms that allow for termination of the agreement in the event of breach.<sup>28</sup> She might require the publisher to remit a certain percentage of net sales for her book each month or else lose its rights. Or she might grant film adaptation rights to a movie studio, with the proviso that the rights will automatically terminate if the studio does not complete the film within five years. These terms function analogously to standard contract conditions – terms that govern the vesting or expiration of rights and duties<sup>29</sup> – but to clearly delineate these terms I refer to them as "termination conditions."

Termination conditions give rise to infringement not in their breach, but in the licensee's continued exercise of the licensed rights past the license's termination.<sup>30</sup> Consider what would happen if Anne's publisher failed to make its required monthly payment. Anne's right to terminate the agreement would trigger, and she could likely sue in contract for the money owed. The publisher would not be liable for copyright infringement, however, if it immediately stopped printing and distributing the work. Copyright liability would accrue only if the publisher exercised one of the author's exclusive rights – i.e., copying or distribution – after losing authorization to do so.

25. See 17 U.S.C. § 106 (2012).

26. See 3 NIMMER & NIMMER, *supra* note 13, at § 10.15[A][2] ("[I]f a motion picture license is subject to the condition that its exhibition must occur at specified times and places, the licensee's exhibitions at other times and places is without authority from the licensor and therefore constitutes copyright infringement.").

27. See Newman, *supra* note 24, at 1153 (explaining that these unauthorized actions would violate Section 106 even in the absence of a license).

28. See 3 NIMMER & NIMMER, *supra* note 13, at § 10.15[A][3].

29. See *infra* Section IV.C (describing conditions in contract and property law).

30. See 3 NIMMER & NIMMER, *supra* note 13, at § 10.15[A][2]. Licensees sometimes benefit from a grace period during which to wind down their use of the work following termination. See *Geoscan, Inc. of Tex. v. Geotrace Techs., Inc.*, 226 F.3d 387, 390, 393 (5th Cir. 2000); see also *Quinn v. City of Detroit*, 23 F. Supp. 2d 741 (E.D. Mich. 1998).

The line between scope limitations and termination conditions is porous insofar as any scope limitation can also be designated as a termination condition. The attribution requirement under a Creative Commons license, for example, is a scope limitation: the licensee's authorization to create derivative works extends only to those that give proper credit to the original author.<sup>31</sup> But the Creative Commons' attribution term also operates as a termination condition: failure to comply with the license is designated as grounds for automatic termination.<sup>32</sup>

The remaining terms of a license – those that are not scope limitations or termination conditions – are generally enforceable only in contract.<sup>33</sup> Contractual promises like these are usually referred to in the licensing context as “covenants.”<sup>34</sup> Matters are complicated, however, in the event of material breach. A court may permit the licensor to rescind the agreement upon material breach of a covenant, effectively treating the covenant as a termination condition.<sup>35</sup>

## 2. Use Restrictions

“Use” is not an exclusive right under the Copyright Act.<sup>36</sup> Music distributors who encumbered vinyl records with a license specifying that the tracks must be played in order could not, accordingly, sue customers for playing the album in reverse. Nor could a publisher use copyright to enforce a restriction against skipping ahead in a hardcopy book.

Comparable activities nonetheless create the possibility of infringement where digital works are involved. Whenever a user runs software, reads an e-book, or listens to an MP3, her computer copies some part of the work into its working memory (typically its Random-Access Memory or “RAM”).<sup>37</sup> The

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31. See *Attribution 4.0 International*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by/4.0/legalcode> (last visited Apr. 7, 2014) (describing “License Conditions” in § 3).

32. *Id.* at § 6 (describing termination of the license).

33. See *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 939 (9th Cir. 2010).

34. See sources cited *supra* note 24.

35. 3 NIMMER & NIMMER, *supra* note 13, at § 10.15[A][3]. *But see* Newman, *supra* note 24, at 1156 (arguing the termination remedy ought to be available only for breach of express termination conditions).

36. Van Houweling, *supra* note 16, at 938; see Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1079 (2010) (“To the extent copyright law has regulated use historically, it has done so through its display and performance rights.”).

37. Perzanowski, *supra* note 36, at 1068 (“Launching a software application, browsing the Internet, or sending an email results in the creation of at least one, and often several, potential copies in the random access memory (RAM) of computing devices.”). Courts consistently hold that RAM copying implicates the Section 106(a) reproduction right. *Id.* Some RAM copies may be too evanescent to trigger liability. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-30 (2d Cir. 2008) (finding no reproduction where buffered video existed for only 1.2 seconds).

licensor who purports to impose a use restriction is conditioning the user's right to make RAM copies on her adherence to the terms. These restrictions sometimes take the form of scope limitations, permitting the user to make RAM copies only for certain uses. Many licenses, for example, specify that software can only be used for "noncommercial" or "educational" purposes.<sup>38</sup> Some of these scope limitations restrict who may use the software: the Home and Student edition of Microsoft Office purports to allow shared use within a given household "by people for whom that is their primary residence."<sup>39</sup> Microsoft's copyright would ostensibly be infringed if a houseguest used that copy of Word to compose a letter.<sup>40</sup>

License terms also take the form of termination conditions, specifying that the failure to comply will terminate the user's permission to make any further RAM copies. Conventional subscription arrangements – e.g., terms conditioning use on monthly payments of \$15 – would fall into this camp. The licensor could also deploy termination conditions to secure non-monetary forms of compensation. Consider a hypothetical user named Seth. He might download a digital copy of *The Interview*<sup>41</sup> subject to a license that purported to terminate whenever someone skipped the movie previews at the beginning of the film.<sup>42</sup> Anyone who fast-forwarded the advertisements would risk

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before being automatically overwritten). Technical accidents like these, however, do not provide reliable limitations for the doctrine. Per *Cartoon Network*, video playback might be non-actionable because each frame is copied into memory only for a fraction of a second. *Id.* On the same logic, however, reading an e-book might create liability merely because the text lingers in the device's memory until the user moves to the next page.

38. See, e.g., *Autodesk Software for Students and Educators*, AUTODESK, <http://www.autodesk.com/education/free-software/all> (last visited Apr. 7, 2015) (offering free licenses to students and educators for non-commercial use).

39. MICROSOFT CORP., SOFTWARE LICENSE TERMS FOR MICROSOFT OFFICE 2010 § 1(12), available at <http://products.office.com/en-us/microsoft-software-license-terms-for-microsoft-office-2010> (last visited Apr. 7, 2015).

40. Mulligan, *Numerus Clausus*, *supra* note 16, at 265. The apocryphal requirement that consumers use the work only while wearing a red hat would also constitute a scope limitation. Cf. Newman, *supra* note 24, at 1154 ("[S]uppose I put up a sign at the boundary of Blackacre saying, 'All persons wearing red hats may enter this property.' If you enter without the prescribed headgear, you are a trespasser.").

41. *The Interview* – a satirical film released in 2014 about the assassination of North Korean leader Kim Jong-un – bears mentioning because many theaters refused to show the film following threats from the North Korean government. See Ryan Faughnder, *'Interview' Could Make Online Film Releases Common*, L.A. TIMES, Dec. 30, 2014, at 1. The majority of consumers who wished to see the film accordingly streamed or downloaded a digital copy subject to the terms of service for a site like Google Play, YouTube Movies, or Microsoft's Xbox Video. See *id.*

42. While this term is hypothetical, the idea of using copyright to safeguard one's commercials is not so foreign to the entertainment industry as consumers might hope. As a case in point consider Fox television's recent suit against the Dish Network, where it argued that Dish's commercial-skipping devices facilitate copyright

committing copyright infringement by creating an unauthorized RAM copy in the course of screening the film.<sup>43</sup> Many licenses also employ what might be called a “shotgun approach,” purporting to terminate upon breach of any term rather than limiting the termination right to a select number of material terms.<sup>44</sup>

Congress recognized the potential for routine software use to create actionable reproductions when it enacted Section 117 of the Copyright Act.<sup>45</sup> The provision clarifies that it is not an infringement for the “owner of a copy of a computer program” to make copies “as an essential step in the utilization of the computer program.”<sup>46</sup> Given full effect, this provision would insulate anyone who owned a copy of a digital work from liability for RAM copying during routine personal use.<sup>47</sup> Its protections are limited, however, by courts’ willingness to define ownership narrowly: one who “licenses” a copy of a computer program may not “own” that copy for the purpose of immunity under Section 117.<sup>48</sup> And courts that recognize this distinction often defer to the terms of the license itself in deciding whether the copy is owned or licensed, regardless of the economic realities of the transaction.<sup>49</sup> Given con-

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infringement. *See Fox Broad. Co., Inc. v. Dish Network, L.L.C.*, 747 F.3d 1060, 1063-64 (9th Cir. 2013).

43. For purposes of this hypothetical, set aside the technological differences that might immunize video use from RAM copy liability relative to the use of software or e-books. *See supra* note 37.

44. This approach cuts across free culture, free software, and proprietary licenses. Examples include the Creative Commons CC BY 4.0 license, *Attribution 4.0 International*, *supra* note 31, at § 6(a) (“[I]f You fail to comply with this Public License, then Your rights under this Public License terminate automatically.”), the GNU General Public License, FREE SOFTWARE FOUNDATION, INC., GNU GENERAL PUBLIC LICENSE VERSION 3, at § 8 (2008), *available at* <http://www.gnu.org/copyleft/gpl.html> (“You may not propagate or modify a covered work except as expressly provided under this License. Any attempt otherwise to propagate or modify it is void, and will automatically terminate your rights under this License (including any patent licenses granted under the third paragraph of section 11).”), and Amazon’s terms of use for the Kindle, *Kindle Store Terms of Use*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950> (last updated Sept. 6, 2012) (“Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the Kindle Store and the Kindle Content . . .”).

45. 17 U.S.C. § 117 (2012).

46. *Id.*

47. Section 117 on its face applies only to “computer programs” and might not cover digitized novels, songs, or movies. *See* 2 NIMMER & NIMMER, *supra* note 13, at § 8.08[B][1] (“The current exemption applies solely to software.”). The question of whether an MP3 listener is therefore at a disadvantage relative to the software user, however, is beyond the scope of the present discussion.

48. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 n.5 (9th Cir. 1993).

49. *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (“We hold today that a software user is a licensee rather than an owner of a copy where the copy-

sumers' inattention to license terms – and the resulting lack of constraint on licensors' ability to characterize the transaction any way they like – the wisdom of deferring to the license on this point is questionable.<sup>50</sup>

Other courts have been more generous to users so long as they possess a physical copy of the work, such as an installation disc. The Second Circuit in *Krause v. Titleserv* recognized that ownership “of a copy” for purposes of Section 117 speaks to ownership over the physical copies of the work, *i.e.*, the discs.<sup>51</sup> Under *Krause*, the fact that a party has “the right to continue to possess and use the programs forever” or even “to discard or destroy the copies any time it wished” is strong evidence that the party owns the copies.<sup>52</sup> Even the Second Circuit's approach offers only limited protection, however, as networked transactions supplant the sale of discs. We have entered an era where leading computer retailers like Apple no longer include DVD drives in their laptops.<sup>53</sup> *Krause's* focus on physical ownership of the copy offers no assurances regarding the application of Section 117 to copies that reside on a third party's server, like those provided by cloud computing and streaming media services.<sup>54</sup>

In any case, copyright owners' potential to impose idiosyncratic use restrictions goes beyond the sorts of uses implicated by the RAM copy doc-

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right owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.”); *see also* *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1359 (Fed. Cir. 1999); *MAI*, 991 F.2d at 518.

Brian Carver criticizes this approach sharply, arguing that “[t]he invented notion of ‘licensing’ software, where that means transferring perpetual possession of a copy but retaining title to the copy, is both incoherent and not found in the Copyright Act.” Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 *BERKELEY TECH. L.J.* 1887, 1954 (2010). David Nimmer likewise criticizes courts for failing to distinguish between ownership of the copy and ownership of the copyright. 2 *NIMMER & NIMMER*, *supra* note 13, at § 8.08[B][c][i] (“[W]hen a copyright owner of a software product sells diskettes of its copyrightable work to consumers, the customers may be licensees of the copyright, but as owners of the copy containing the computer program, they are duly vested with all rights under the Section 117 exemption.” (internal citations omitted)).

50. *See infra* Section I.B.

51. 402 F.3d 119, 123-24 (2d Cir. 2005); *see also DSC*, 170 F.3d at 1360 (refusing to “adopt the Ninth Circuit's characterization of all licensees as non-owners” but nonetheless concluding that “severe” license restrictions indicated a lack of ownership); *ZilYen, Inc. v. Rubber Mfrs. Ass'n*, 935 F. Supp. 2d 211, 218 (D.D.C. 2013) (following *Krause* and *DSC*).

52. *Krause*, 402 F.3d at 124; *see also* 2 *NIMMER & NIMMER*, *supra* note 13, at § 8.08[B][c][i] (supporting this view); Carver, *supra* note 49, at 1954 (same).

53. *See* Jeff Ward-Bailer, *Is Apple Declaring War on DVDs?*, *CHRISTIAN SCI. MONITOR* (July 28, 2011), <http://www.csmonitor.com/Technology/2011/0728/Is-Apple-declaring-war-on-DVDs> (“[T]he company is eyeing a future in which media doesn't come on a DVD – or a CD-ROM or Blu-Ray disc, for that matter.”).

54. *See* 2 *NIMMER & NIMMER*, *supra* note 13, at § 8.12[B][1][d][iii].

trine. Consider the following examples. First, the United Airlines website once claimed this limitation: “You may download one copy of these materials on any single computer and print a copy of the materials for your use in learning about, evaluating, or acquiring United’s service and products.”<sup>55</sup> As Viva Moffat explains, a plausible reading of this agreement would prohibit the user from downloading or printing more than one copy of her itinerary.<sup>56</sup> Even though this use deals with the creation and sharing of permanent, non-RAM copies, it clashes squarely with the customary practice of emailing one’s itinerary to family or to an administrative assistant, let alone printing a spare copy for travel. Second, consider the fact that the terms for *Seventeen* magazine’s website once stated that “you may not access or use the covered sites or accept the agreement if you are not at least 18 years old.”<sup>57</sup> *Seventeen*, of course, is a magazine geared towards teenagers. Finally, consider Apple’s license for the Windows version of Safari. The terms permitted the user to install the software on only “a single Apple-labeled computer” even though the software was marketed for use on PCs running Windows.<sup>58</sup>

To be sure, licensors can legitimately impose a range of restrictions on copying, access, or installation. Indeed, the close “nexus” of these activities to copyright’s traditional protections might give consumers constructive notice that they ought to look out for such restrictions.<sup>59</sup> But the preceding examples are problematic because the licenses prohibit the very uses implicitly authorized in the transactions.<sup>60</sup> The user who pays full retail price for an e-

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55. Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 99 n.243 (2007) (quoting these terms).

56. *Id.* at 99. For United to prevail on such a claim, however, it would have to overcome the user’s arguments that United had no claim to copyright in the factual matter of its itineraries and that printing a copy of one’s own itinerary is fair use.

57. Dave Maass, Kurt Opsahl & Trevor Timm, *Until Today, If You Were 17, It Could Have Been Illegal To Read Seventeen.com Under the CFAA*, ELECTRONIC FRONTIER FOUND. (Apr. 3, 2013), <https://www.eff.org/deeplinks/2013/04/until-today-if-you-were-17-it-could-have-been-illegal-read-seventeencom-under-cfaa>.

58. Cade Metz, *Apple Forbids Windows Users from Installing Safari for Windows*, REGISTER (Mar. 26, 2008, 7:31 PM), [http://www.theregister.co.uk/2008/03/26/apple\\_safari\\_eula\\_paradox/](http://www.theregister.co.uk/2008/03/26/apple_safari_eula_paradox/). While the act of installation does not involve RAM copying per se, it would still fall under the protection of Section 117 because installation is itself an “essential step” in utilizing a computer program. *See* 17 U.S.C. § 117 (2012).

59. *See* Van Houweling, *supra* note 16, at 936-37 (describing the “information-intensive investigation” required prior to reproduction under the Copyright Act even when no license is involved); *see also infra* Part III (discussing different approaches to a “nexus” test for determining whether a term ought to be enforceable in copyright).

60. One might even argue that offering a product so unfit for its intended purpose would make the licensor liable for vending a defective product. *Cf.* James Grimmelmann, *Privacy as Product Safety*, 19 WIDENER L.J. 793, 813-14 (2010) (ar-

book, MP3, or computer program likewise expects to be able to make reasonable personal uses of the work. Problems arise when licensors who tacitly understand these expectations seek to quietly disclaim them in the fine print.<sup>61</sup> As the following Section shows, the sheer informational burden associated with these idiosyncratic terms makes it difficult for consumers to protect themselves against such opportunism.

### B. Copyright's Boilerplate

Practically speaking, no one reads copyright licenses. Yannis Bakos, Florencia Marotta-Wurgler, and David Trossen recently found that “only one or two in 1,000 shoppers access a product’s [license] for at least 1 second.”<sup>62</sup> In other words, only 0.1-0.2% of people take the time to even glance at the agreement. Licensors can accordingly propound whatever terms they want without fear of market discipline.<sup>63</sup> This finding is readily corroborated by anecdotal evidence – perhaps from your own experience – that people do not read before clicking “I Agree.” If you are among the majority of users who neglect to read, you are in the company of our nation’s top jurists: Chief Justice John Roberts has publicly admitted he does not read online agreements.<sup>64</sup>

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guing that firms ought to design their offerings to be safe for the uses that people actually make of their products).

61. *Accord* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (voiding any term where one party has reason to believe that the other was unaware of the term and would not have assented had she known of the term); Michael Seringhaus, *E-Book Transactions: Amazon “Kindles” The Copy Ownership Debate*, 12 YALE J.L. & TECH. 147, 202-03 (2010) (arguing e-book downloads from Amazon should be treated because they are advertised as sales).

62. Bakos, Marotta-Wurgler & Trossen, *supra* note 8, at 3. Those who paused for at least one second, moreover, spent on average only 62.7 seconds viewing the text. *Id.* at 21-22. Given that the average license in the study was 2000 words, there is reason to doubt that even the 0.2% who stopped to view the terms took the time to read the agreements in full, let alone to inform themselves about the contents. *See id.*

63. *See id.* at 3 (explaining that the number of consumers who read their agreements “is orders of magnitude smaller” than it would need to be for an informed minority to effectively regulate the market). Indeed, many scholars identify the complexity and non-salience of disadvantageous mass-market terms as the root problems of boilerplate because they render the market ineffective at disciplining firms. *See, e.g.*, OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 23 (2012) (“Excessively complex contracts prevent effective comparison-shopping and thus inhibit competition.”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1207 (2003) (“When a contract term [in a form contract] is non-salient to most purchasers, the market check on seller overreaching is absent, and courts should be suspicious of the resulting term.”).

64. Andrew Malcolm, *Chief Justice John Roberts on Tiny Type*, L.A. TIMES BLOG (Oct. 20, 2010, 3:24 PM), <http://latimesblogs.latimes.com/m/washington/2010/10/chief-justice-john-roberts-state-of-the-union.html?p=1>. The non-reading phenomenon is not of course limited to the copyright context or even to low-value transac-



## 1. Information Costs

Consumer ignorance of license terms should not come as a surprise given how burdensome they are to read. The costs of reading are most visible in the aggregate. Consider Adobe Flash Player, a free browser plug-in that allows users to view various forms of online content subject to a 3500-word license.<sup>65</sup> Assuming that users read at a pace of 250 words-per-minute, it would take fourteen minutes for each user to read the license.<sup>66</sup> Adobe has claimed its software is installed as often as eight million times per day.<sup>67</sup> If we expected all eight million daily users to read this agreement, then the opportunity cost of this obligation would be a cumulative 1.87 million hours *per day*. That is 213 years. And these are the costs imposed by just one day's worth of installations for one piece of software that most Internet users take for granted.<sup>68</sup> If the entire U.S. Internet-using population of 277 million read the agreement, the economy would lose over 55 million person-hours with hardly anything to show for it.<sup>69</sup>

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tions. Judge Richard Posner notably declined to read the hundreds of pages of disclosures that accompanied his own home-equity loan. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 69-70 (2014).

65. Bob Dormon, *Adobe Demands 7,000 Years a Day from Humankind: It's All in the EULA Fine Print*, REGISTER (Dec. 4, 2012, 8:00 AM), [http://www.theregister.co.uk/2012/12/04/feature\\_tech\\_licences\\_are\\_daft/](http://www.theregister.co.uk/2012/12/04/feature_tech_licences_are_daft/).

66. The 250-word-per-minute rate is identified as the "typical reading rate for people with a high school education" in Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 543, 560 (2008). Given the dense nature of the text, however, there is reason to doubt that the average consumer would retain much information reading at this speed. See James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 197-98 (2013); see also BEN-SHAHAR & SCHNEIDER, *supra* note 64, at 80-84, 86-91 (explaining that disclosures tend to be written above the average user's reading level and that even a highly skilled reader often lacks the sectoral literacy to understand technical terms).

67. See Dormon, *supra* note 65; Emmy Huang, *Two! Four! Six! Eight! Numbers We Appreciate!*, ADOBE BLOGS (Aug. 28, 2008), [http://blogs.adobe.com/emmy/2008/08/two\\_four\\_six\\_ei.html](http://blogs.adobe.com/emmy/2008/08/two_four_six_ei.html).

68. Aleecia McDonald and Lorrie Cranor pose a similar example by reference to the costs of reading privacy policies. By their estimation, it would have taken the average Internet user 244 hours to read all the privacy policies she encountered in the year 2008. McDonald & Cranor, *supra* note 66, at 563. Taking into account the time value of money, the authors estimated that reading these agreements would have cost \$3534 per American Internet user or a collective \$781 billion. *Id.* at 564. This represents "an opportunity cost greater than the GDP of Florida." BEN-SHAHAR & SCHNEIDER, *supra* note 64, at 27.

69. This estimate for Internet usage comes from multiplying the U.S. Census 2014 population estimate of 318,857,056, U.S. CENSUS BUREAU, TABLE 1. ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2014 (2014), available at <http://www.census.gov/popest/data/national/totals/2014/index.html>, by the U.S. Census Internet

Reading costs can also be prohibitively high even with respect to any one transaction. The sorts of works at issue here include \$15 movies, \$0.99 MP3s, and a range of other downloads that cost less than a pizza. Many are even free, like Adobe's plug-in. They often relate, moreover, to the user's leisure activities. Under these circumstances, the marginal costs of acquiring more information about a work – or any restrictions placed on it – quickly outstrip both the transaction's benefits and the user's expertise.<sup>70</sup>

To make the point more concrete, let us return to Seth's predicament in downloading a copy of *The Interview* for personal viewing.<sup>71</sup> If his expected utility from viewing the film were \$15, then he would break even if he paid \$15 for a copy that was unencumbered by a license. The opportunity costs entailed in reading the license make the transaction much less attractive.<sup>72</sup> If Seth downloaded the film from iTunes, it would come encumbered by nearly 15,000 words of boilerplate.<sup>73</sup> Reading the license would take sixty minutes.<sup>74</sup> Reading would not guarantee comprehension, however, given the complexity of the text.<sup>75</sup> For Seth to truly understand his rights and obligations he might have to consult an attorney. With the costs of reading and consultation factored in, the price of understanding the license would quickly exceed Seth's expected benefits from viewing the film.<sup>76</sup>

To be sure, Seth might amortize the search costs across several digital downloads.<sup>77</sup> But even this strategy could be thwarted by Apple's unilateral option to update its terms and conditions for future purchases.<sup>78</sup> It would also be complicated by a lack of standardization among different video services. Seth might seek his next film through Amazon, Hulu, Netflix, or YouTube, each of which carries its own terms. The terms might purport to hold him

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usage estimate of 74.4%, U.S. CENSUS BUREAU, COMPUTER AND INTERNET ACCESS IN THE UNITED STATES (2013), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>. Using the World Bank's estimate of 84.2% U.S. Internet usage would yield even greater losses to productivity. See *Internet Users (Per 100 People)*, WORLD BANK, <http://data.worldbank.org/indicator/IT.NET.USER.P2> (last visited Apr. 7, 2015).

70. See Robinson, *supra* note 9, at 1486; see also Ayres & Schwartz, *supra* note 19, at 574-75 (describing consumers' reading strategies).

71. See *supra* notes 41-42 and accompanying text.

72. On a parallel track, the license restrictions might result in a lower-quality viewing experience and thereby reduce the utility of the work itself to less than \$15. I focus here only on the search costs of learning the restrictions, though the total gains to Seth would also be impacted by any reduction in quality imposed by the terms.

73. See *Terms and Conditions*, APPLE iTUNES STORE, <http://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Apr. 7, 2015).

74. This figure assumes the 250-word-per minute rate identified by McDonald and Cranor. See McDonald & Cranor, *supra* note 66 and accompanying text.

75. See sources cited *supra* note 66.

76. Cf. Mulligan, *Personal Property Servitudes*, *supra* note 16, at 20 ("It's simply not worth spending \$200 to discover how one can use the \$100 glassware.").

77. See Gibson, *supra* note 66, at 201 n.101.

78. *Id.*

liable as a copyright infringer for normal uses of the work, such as fast-forwarding through any advertisements, or they might be perfectly consistent with his expectations. But Seth could not know until he invested time into reading the fine print.<sup>79</sup>

## 2. Behavioral Constraints

Reading costs are high. So too are the penalties for breach, where licenses are enforceable on pain of infringement liability: even the unwitting infringer who caused no actual damages in breach would likely owe a minimum of \$750 in statutory damages.<sup>80</sup> The rational, risk-averse consumer might anticipate the potential for liability and take pains to avoid overreaching licenses. But behavioral accounts of consumer decision-making suggest that most users are likely to simply accept the terms, albeit with flawed understandings of their agreements.

License conditions lack salience insofar as these terms are not the ones that users pay attention to when deciding whether or not to acquire a copyrighted work. This is partly because the terms are not prominent. Blizzard does not advertise to prospective customers that its license strictly prohibits cheating at its game, let alone that it intends to treat breach as an act of copyright infringement.<sup>81</sup> Nor does Apple trumpet the fact that its operating system license purports to terminate all rights automatically upon any breach of its terms.<sup>82</sup> For their part, consumers have little reason to anticipate such severe conditions: consumer licenses are relatively new and (for now) enforced rarely against the end user.

These terms also lack salience because they deal with the sort of contingent events that consumers tend to systematically discount or ignore. Even assuming that users read licenses more carefully, consumers' optimism bias may lead them to discount the likelihood that they will be sued in the event of breach.<sup>83</sup> The risk of incurring copyright's high statutory damages may be

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79. Cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 27 (2000) (“[B]y allowing even one person to create an idiosyncratic property right, the information processing costs of all persons who have existing or potential interests in this type of property go up.”).

80. See *infra* Section II.A.

81. See generally *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928 (9th Cir. 2010).

82. See APPLE INC., SOFTWARE LICENSE AGREEMENT FOR OS X MAVERICKS § 6 (2013), available at <http://images.apple.com/legal/sla/docs/OSX109.pdf> (“Your rights under this License will terminate automatically or otherwise cease to be effective without notice from Apple if you fail to comply with any term(s) of this License.”).

83. See, e.g., BAR-GILL, *supra* note 63, at 22-23 (“Optimistic consumers tend to underestimate the probability of triggering contingent, future costs.”). The same optimism might also cause users to discount the likelihood of breach occurring; the user who is optimistic about the quality of the work might not be troubled by a “no

downplayed, moreover, due to consumers' myopic tendency to discount future costs.<sup>84</sup> And the complexity of these agreements – lengthy and dense as they are – raises the prospect that even a user who read the license would simply be ignorant that breach could give rise to copyright damages.<sup>85</sup> Indeed, an opportunistic firm can use complexity as a weapon to bury disadvantageous terms like these, hiding them from all but the most determined and sophisticated users.<sup>86</sup>

### 3. Consequences for Consumers and Copyright

Copyright licenses exacerbate the usual problems associated with adhesive licenses. As with other boilerplate, consumers are in a poor position to monitor these deals because the licenses are too dense relative to the value of the transaction to merit careful study.<sup>87</sup> But breach of these terms is potentially much worse for the consumer than breach of the typical contractual term. Rather than expose users to actual damages, or perhaps to forfeiture of the work they paid for, copyright-enforceable terms carry damages that are orders of magnitude greater than the value of a retail copy: copyright's statutory damages start with a mandatory minimum of \$200 and can run as high as \$150,000.<sup>88</sup> Given the likely unavailability of the innocent infringement defense in cases of license breach, moreover, the floor for damages would likely start at \$750.<sup>89</sup> Even assuming that the licensor has a valid interest in enforce-

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criticism” condition just as the user who overestimates her videogame skills might think nothing of a restriction on cheating.

84. See, e.g., *id.* at 21-22.

85. See *supra* note 66.

86. See BAR-GILL, *supra* note 63, at 18 (“Complexity hides the true cost of the product from the imperfectly rational consumer.”); BEN-SHAHAR & SCHNEIDER, *supra* note 64, at 164 (“[D]isclosers can disclose too much, exploiting the overload problem.”); Ayres & Schwartz, *supra* note 19, at 574 (explaining firms’ incentives to “bury” undesirable terms); see also Malcolm, *supra* note 64 (relating Chief Justice Roberts’ conclusion that “providing too much information defeats the purpose of providing any, since no one ends up reading it”).

87. See sources cited *supra* note 9.

88. See *infra* Sections II.A, V.A (explaining copyright’s mandatory damages scheme). Terms like these are the other side of the coin to the hidden exculpatory terms that Margaret Radin singles out for criticism in *Boilerplate*. A firm that successfully insulates itself for liability for its own negligence in a low-value transaction might deprive a surprised accident victim of hundreds of thousands of dollars in damages, if not millions. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* xv-xvi, 182-86 (2013). A firm that successfully enforced a license term in copyright could impose massive liability on the user directly.

89. See *infra* notes 106-11 and accompanying text.

ing the underlying restrictions, it is doubtful that this system of hidden liability is efficient in ensuring compliance.<sup>90</sup>

The problems of unwitting infringement go beyond consumer law to hinder the goals of copyright itself. Copyright's statutory damages are high because they are meant to deter infringement.<sup>91</sup> But even the most draconian license term could not deter users who did not understand the license's obligations or the costs of breach. Indeed, the imposition of unexpectedly high damages might prove counterproductive for compliance with copyright. To the extent that these remedies are seen as arbitrary and unfairly distributed, they risk diminishing copyright's legitimacy in the eyes of the public.<sup>92</sup> This perception could undermine the deterrence goal by reducing voluntary compliance, particularly in circumstances where there was little likelihood that infringement or breach would be detected.<sup>93</sup>

Consider next how the risk of unwitting infringement could contribute to underutilization of copyrighted works. While many users would stumble unwittingly into infringement, the conscientious user might understand the risks posed by unknown terms. To avoid these risks, this user might go so far as to avoid using any work prior to studying the license in detail. This strategy would be quite costly, and there is little to commend this use of people's time. Indeed, conscientious readers would need to read the license even for works that carried no conditions, because they could not know which licensed works were so encumbered without first reading them.<sup>94</sup> Consumers would live in a world of widespread uncertainty as to their rights, where the safe response, given limited time for reading, would often be to simply forego

90. Cf. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 104 (1989) (arguing that consumers can only undertake efficient precaution against breach when they understand the scope of their liability).

91. See Samuelson & Wheatland, *supra* note 3, at 499 ("Deterrence is . . . a legitimate goal of statutory damage awards, and Congress unquestionably intended for them to have this purpose.").

92. See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 15-18 (2010) (explaining how overreaching by copyright owners has already contributed to the erosion of copyright law's legitimacy).

93. *Accord id.* at 18 ("A public that complies with copyright only because it's afraid of the copyright police will soon find ways to evade or restrain the copyright police."); Rachel Storch, *Copyright Vigilantism*, 16 STAN. TECH. L. REV. 453, 476 (2013) (arguing that failures of legitimacy undermine deterrence in the copyright context); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL'Y 219, 229-30 (1997) (contrasting the inefficacy of a simple deterrence regime with the effectiveness of one where the law is seen as legitimate and consonant with popular intuitions regarding fairness); see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (explaining the fundamental importance of legitimacy for voluntary compliance with law).

94. See *supra* note 79.

many lawful uses rather than undertake the effort required to investigate which uses were permissible.<sup>95</sup>

Underutilization is a common byproduct of use restrictions, but it is particularly troubling for copyright. Copyright's foremost goal – and constitutional mandate – is to advance the progress of knowledge and culture.<sup>96</sup> Individual users play a key role in this project. As Julie Cohen explains, consumers are not mere vessels for the appreciation of others' work; rather, everyday users contribute to the development of knowledge and culture by using copyrighted works to communicate with others, to grow personally, and to engage in processes of “play” that yield new and unexpected meanings and insights.<sup>97</sup> Jack Balkin, in his work on cultural participation, and Lawrence Lessig, in his work on remix culture, develop similar accounts of the importance of users' engagement.<sup>98</sup>

Some of this engagement is protected by the fair use doctrine, particularly where it favors works that are transformative, parodies and criticisms that cast a work in a new light, or forms of reverse engineering that allow the user to understand others' software and design interoperable works.<sup>99</sup> Accordingly, one way in which license restrictions are problematic is that they can create uncertainty as to whether the exercise of otherwise fair uses might trigger a penalty under the license.<sup>100</sup>

95. See Mulligan, *Numerus Clausus*, *supra* note 16, at 264-65 (describing how uncertainty as to licensed rights leads to underuse).

96. See U.S. CONST. art. I, § 8, cl. 8; Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2580-81 (2009).

97. Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 372 (2005); see also JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 94-95 (2012) (arguing that these serendipitous encounters “are sources of dissonance, provocation, meaning, and unexpected beauty” and that “[s]ustaining the conditions for these encounters should be a central goal of any system of copyright law”).

98. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Expression for the Information Society*, 79 *N.Y.U. L. REV.* 1, 5 (2004) (“In a democratic culture people are free to appropriate elements of culture that lay to hand, criticize them, build upon them, and create something new that is added to the mix of culture and its resources.”). See generally LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008) (articulating the cultural and economic progress advanced by people using new digital tools to create and remix elements of shared culture).

99. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (finding that reverse engineering of videogame software led to “growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works”).

100. See *infra* notes 120-22 and accompanying text (explaining how prohibitions on fair use rights could lay the groundwork for an infringement action by triggering termination of the license). This concern is not merely theoretical: licenses already

But these processes of cultural production also depend on the exercise of much more basic rights to access, share, and experiment with works. These are uses that – in the absence of contemporary licensing practices – ordinarily would not implicate the Copyright Act. Recall the Microsoft Office license that threatens to treat your houseguests as infringers merely for using your copy of Word.<sup>101</sup> Imagine how engagement with creative works would be chilled if similar restrictions loomed over everyday practices of social engagement with works, like the home screening of a digitally downloaded film for friends. Or recall Blizzard’s attempt to treat cheating at its videogame as copyright infringement.<sup>102</sup> There is no end to the sorts of idiosyncratic (but stifling) terms that could follow the same mold: no skipping ahead in this e-book, no playing tracks out of order from this MP3 album, no playing video game avatars of a different gender than one’s own. Allowing for unchecked copyright liability could impair progress by casting legal uncertainty over all but the most straightforward and banal uses of digital works.

Finally, consider how the enforcement of these terms facilitates substantive overreaching by copyright owners. Users would be rightfully offended at licensors’ arrogance in treating many routine personal uses as the basis for an infringement suit. In theory, their individual and collective decisions to reject these licenses would act as a check against the most egregious of these terms. But users can only exercise this sort of power where they are aware of the terms. Practically all of us have agreed to license terms that feature idiosyncratic grounds for copyright liability, perhaps even terms that treat each and every possible breach as infringing.<sup>103</sup> Copyright owners’ ability to enact these terms without facing market discipline opens the door for the worst sorts of “private legislation”: rewriting the Copyright Act to suit owners’ ends at the expense of the public.<sup>104</sup> This Part has argued that consumers are poorly equipped to discipline these terms in the market; the next Part shows that copyright’s defenses likewise do little to protect the public against the harsh effects of boilerplate license terms.

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restrict fair use, though they are conventionally understood to do so on pain of contractual liability rather than infringement liability. *See, e.g., Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (enforcing a contractual ban on reverse engineering).

101. *See supra* notes 39-40 and accompanying text.

102. *See MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928 (9th Cir. 2010).

103. *See supra* note 44 and accompanying text.

104. *See* Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93, 112 (2006) (“To enforce such private legislation could have the effect of granting copyright owners a monopoly in the expression of their ideas, removing material from the public domain and harming the public.”).

## II. COPYRIGHT AND UNWITTING INFRINGEMENT

Copyright law protects against some forms of substantive overreaching by copyright owners. The conventional copyright defenses are poorly suited, however, to account for notice defects in the presentation of a license. As the following discussion explains, these difficulties arise because copyright law offers few opportunities for courts to consider equitable factors – such as deficiencies in notice – in determining liability or in fashioning remedies once liability is found.<sup>105</sup>

### A. Statutory Damages and the Innocent Infringement Defense

Taking it at name value, one would suppose that the innocent infringement defense was ideally suited to address the risk of unwitting infringement. Indeed, a court might conclude that the massive information costs posed by a license would establish that a user's ignorance was reasonable, a factor required to substantiate the defense.<sup>106</sup> But Subsection 401(d) of the Copyright Act preempts this argument. When a work bears a valid copyright notice, the Subsection states that “no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.”<sup>107</sup> This provision – which goes to whether the user ought to know the work is copyrighted (as practically every work on the market is) – is entirely tangential to whether the user ought to know whether a given use is prohibited by license. But taken at face value, Subsection 401(d) would be fatal to the licensee's invocation of the defense so long as the licensed work bore a copyright notice.<sup>108</sup>

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105. This account follows on prior work showing copyright's disregard for information costs and uncertainty borne by consumers, including work that critiques the uncertainty inherent to copyright's lax notice and renewal requirements, *see* R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133 (2007) (arguing that copyright's protections against accidental infringement – like copyright's notice and renewal provisions – have reached a low point), and work problematizing the lack of *ex ante* guidance available under the fair use doctrine, *see, e.g.*, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263 (2003); *see also* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 890-91, 898-900 (2007) (explaining how the apparent indeterminacy of fair use and other copyright doctrines allows copyright owners to claim rights that are more expansive than those provided by statute).

106. *See* 5 NIMMER & NIMMER, *supra* note 13, at § 14.04[B][2][a] & n.77.

107. 17 U.S.C. §§ 401(d), 402(d) (2012).

108. *See* 5 NIMMER & NIMMER, *supra* note 13, at § 14.04[B][2][a] (“[E]ven an innocent defendant generally cannot remit statutory damages below the mandatory minimum, unless the subject work was unpublished, bore an invalid notice, or was inaccessible to that defendant.” (internal citations omitted)).



The innocent infringement defense would offer only limited relief even if courts were to set aside Subsection 401(d). Whereas copyright ordinarily imposes mandatory statutory damages of at least \$750 per work infringed, the innocent infringement defense reduces this floor to \$200.<sup>109</sup> Even against the innocent defendant, the court may still award damages up to the ordinary maximum of \$30,000.<sup>110</sup> In an exhaustive study of copyright's statutory damages, moreover, Pam Samuelson and Tara Wheatland found "only . . . two cases in which a court ever awarded statutory damages in an amount lower than the ordinary infringement minimum" (i.e., within the reduced range permitted upon a finding of innocent infringement).<sup>111</sup>

Many users would suffer disproportionately high damages if they were subject only to the minimum award of \$200. Assume that when Seth skips the advertisements in *The Interview*, he causes the licensor actual damages of \$1 under an arrangement whereby it is paid per-view by the advertisers.<sup>112</sup> An award of \$200 under these circumstances seems so excessive as to offend the Supreme Court's substantive due process jurisprudence, which prohibits statutory penalties "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable."<sup>113</sup> And viewed as punitive damages, the 200:1 ratio is far in excess of the "single-digit ratio between punitive and compensatory damages" condoned by the Court.<sup>114</sup> Seth therefore might have a non-frivolous due process defense – indeed, some courts have expressly recognized its potential viability<sup>115</sup> – but I have found no reported case where a defendant prevailed in challenging copyright's statutory damages on due process grounds.

109. 17 U.S.C. § 504(c)(2) (2012).

110. 5 NIMMER & NIMMER, *supra* note 13, at § 14.04[B][2][a]. A finding of innocent infringement is mutually exclusive, at least, with a finding of willful infringement. *See id.* at § 14.04[B][1][a] (delineating the three levels of culpability). The innocent infringer would therefore be spared the risk of facing willful infringement's enhanced damages of up to \$150,000. *See* 17 U.S.C. § 504(c)(2).

111. *See* Samuelson & Wheatland, *supra* note 3, at 474-75 (emphasis added).

112. *See supra* notes 41-42 and accompanying text (introducing a hypothetical prohibition on fast-forwarding through commercials).

113. *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *see Sony BMG Music Ent. v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013) (applying this test to evaluate copyright's statutory damages).

114. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see also* Samuelson & Wheatland, *supra* note 3, at 472-73 (applying the Court's jurisprudence). The question of whether the Court's *punitive damages* jurisprudence is relevant to the evaluation of *statutory damages*, however, is contested. *See, e.g., Tenenbaum*, 719 F.3d at 70-71 (rejecting this test); Samuelson & Wheatland, *supra* note 3, at 491-97 (weighing the arguments on either side).

115. *See* Samuelson & Wheatland, *supra* note 3, at 471 n.163 (collecting cases where courts recognized the potential viability of the defense). *But see Tenenbaum*, 719 F.3d 67 (rejecting the application of the Supreme Court's punitive damages jurisprudence and upholding statutory damages of \$22,500 per MP3 in a file-sharing case).

To be sure, statutory damages of \$200 sound like they belong in small claims court.<sup>116</sup> Yet on a per-work basis even a small award can accumulate towards ruinous results. Say that Melody lawfully downloads a library of 100 MP3s from a service that allows her to copy her collection to up to five devices she personally owns. She might inadvertently transgress this limitation by copying the files to a sixth device (perhaps she attempted to delete the songs from a prior MP3 player but failed), or by copying her entire hard drive to a cloud-based system recovery service (the third-party backup server would not be a device that she owned). If she were found liable as an innocent infringer, the court would be obligated to award statutory damages of at least \$20,000.

### B. Fair Use

Fair use is one of few copyright exceptions where Congress authorizes the courts to exercise discretion.<sup>117</sup> When the defense is successful, moreover, the defendant is wholly insulated from copyright liability.<sup>118</sup> The doctrine nonetheless offers limited assistance to licensees. To be sure, fair use limits the terms that may be enforced as scope limitations. Fair use establishes that the public may make certain uses of a work – including activities like parody, critical commentary, and reverse engineering – without the author’s permission.<sup>119</sup> The defense must be established on the facts of each case, but for purposes of illustration assume that reverse engineering a word processor is fair use. A software developer would enjoy the right to reverse engineer a word processor as a matter of fair use even if the license were silent on the matter. By the same token, the software developer would be immune from infringement liability even if the license prohibited reverse engineering. The developer’s right to reverse engineer simply would not be the licensor’s to give or take.

But fair use does little to prevent the same prohibitions from serving as termination conditions. As a matter of contract, the law enforces licenses that prohibit activities like reverse engineering or even public criticism of copyrighted works.<sup>120</sup> Accepting that contractual limits on fair use are legally

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116. Indeed, the U.S. Copyright Office has requested authority to create a special administrative tribunal for infringement cases valued at no more than \$30,000 in damages. *See generally* U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013), available at <http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

117. *See* 17 U.S.C. § 107 (2012); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The fair use doctrine thus permits [and requires] the courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” (internal quotation marks omitted)).

118. 17 U.S.C. § 107.

119. *See generally* 4 NIMMER & NIMMER, *supra* note 13, at § 13.05.

120. *See* *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325-28 (Fed. Cir. 2003) (enforcing a contractual restriction on reverse engineering); *Video Pipeline*,

permissible, no established doctrine in copyright law stops licensors from designating these restrictions as conditions of termination for the agreement rather than ordinary covenants. Consider what would happen if the license for a word processing program purported to terminate whenever a licensee attempted to reverse engineer it. The act of reverse engineering would still not itself constitute infringement, but it would end the license. If the licensee continued to make normal use of the software after reverse engineering, that licensee would risk creating infringing RAM copies.<sup>121</sup> This would put the licensee in the unenviable position of having to choose between exercising his fair use rights or continuing to use the software for its intended purpose.<sup>122</sup> Something beyond fair use itself would be required to prevent licensors from conditioning access to their works on the waiver of fair use rights.

### C. Preemption and Misuse

Preemption doctrine prohibits copyright holders from leveraging the tools of state law – like contract – in ways that create rights equivalent to

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Inc. v. Buena Vista Home Ent., Inc., 342 F.3d 191, 206 (3d Cir. 2003) (endorsing a license term that prohibited criticism of a film company or its films); Moffat, *supra* note 55, at 49 (positing that “online contracts almost universally purport to limit the otherwise fair use of copyrighted works”). Courts’ enforcement of these agreements has drawn severe criticism. See, e.g., Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 530-31 (2004); David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 67 (1999) (“Given that the statute itself carves fair use out of the scope of monopoly granted the copyright owner, the copyright owner cannot require a user to contract out of fair use.” (internal citations omitted)).

121. This circumstance parallels the situation where an author terminates a book publishing deal on account of the publisher’s failure to remit royalties. The publisher would not be committing copyright infringement by failure to pay, but it would be if it continued to reproduce and distribute the book without the author’s permission. See *supra* notes 28-30 and accompanying text.

122. Sometimes the licensee’s choice seems easy. Imagine that a publisher releases an ill-advised e-book novelization of *Springtime for Hitler* (you may recall this title from Mel Brooks’ *The Producers*, where it was a play that was supposed to flop). The license might specify that the reader’s rights terminate if she exercises her fair use right to publicly criticize the work. Presumably the reader who hates the book will suffer little personal harm if she forfeits continued access to the book after panning it. The restriction nonetheless remains problematic insofar as a diminution in access hinders the reader’s attempts to communicate just how bad the book is to the larger public, to say nothing of the problems that would be occasioned if the license were drafted not to provide for termination but instead for contractual liability following criticism. Daniel R. Cahoy, *Oasis or Mirage?: Efficient Breach as a Relief to the Burden of Contractual Recapture of Patent and Copyright Limitations*, 17 HARV. J.L. & TECH. 135 (2003) (arguing that few users would risk contractual liability to exercise a fair use right); Van Houweling, *supra* note 7, at 1082 (describing the negative externalities that arise from restrictions on fair use).

those protected in copyright, or rights that otherwise frustrate the objectives of the Copyright Act.<sup>123</sup> Misuse doctrine prevents copyright holders from using their exclusive rights to regulate unrelated conduct, particularly where their exercise of power would have anticompetitive effects.<sup>124</sup> The courts have seldom applied these principles to strike contracts that restrict fair use or otherwise rejigger the rights provided by the Copyright Act.<sup>125</sup> But even a robust application of these doctrines would provide an incomplete answer to the information costs and ignorance surrounding consumer copyright licenses.

### 1. Preemption

The preemption defense as applied by the courts would provide little protection to licensees. Most courts begin and end their analysis with Section 301 of the Copyright Act, which preempts state rights “equivalent to any of the exclusive rights within the general scope of copyright.”<sup>126</sup> The typical inquiry is not particularly deep. Consider the Seventh Circuit’s opinion in *ProCD, Inc. v. Zeidenberg*, where the plaintiff won enforcement of a contractual prohibition on the reproduction and distribution of phone records that were ineligible for copyright protection.<sup>127</sup> The court held, notwithstanding the apparent equivalence between these prohibitions and copyright’s protection of reproduction and distribution, that contractual protections are not

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123. See 1 NIMMER & NIMMER, *supra* note 13, at § 1.01[B].

124. See *id.* at § 13.09[A].

125. See, e.g., *Bowers*, 320 F.3d at 1325-28 (enforcing a restriction on reverse engineering notwithstanding a preemption argument); *Video Pipeline*, 342 F.3d at 203-06 (enforcing a restriction on criticism over a misuse argument). A deep current in copyright scholarship argues that courts *ought* to wield the preemption and misuse doctrines more assertively to police against license terms that are substantively overreaching, particularly those that interfere with fair use. See, e.g., Loren, *supra* note 120, at 535 (arguing for a presumption of misuse when licensors contract for rights greater than those provided in the Copyright Act); Moffat, *supra* note 55, at 108-09 (arguing for preemption of terms that prohibit fair use); Nimmer et al., *supra* note 120, at 23 (“[A]ttempts at altering the delicate balance struck by copyright law should fail under the doctrine of preemption . . .”). While the courts have not taken up this call, these doctrines could provide the hook for the various substantive limits discussed below in Section III.B. Such limits would provide an incomplete answer to the problem of information costs, however, for the reasons described there. For the sake of parsimony, the present Section discusses whether these doctrines might play a role in regulating licenses apart from their role in supporting new substantive tests.

126. 17 U.S.C. § 301(a) (2012); Nimmer et al., *supra* note 120, at 52 (criticizing a court for its failure to look past Section 301 to other constitutional preemption principles).

127. 86 F.3d 1447 (7th Cir. 1996); see *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding just five years prior that telephone records were unprotected by copyright).

equivalent to the exclusive rights of copyright because they bind only the parties to the contract and not the public at large.<sup>128</sup>

*ProCD* has sustained considerable criticism for this poorly theorized distinction.<sup>129</sup> The Seventh Circuit's reasoning has nonetheless been extended to justify prohibitions on traditional fair uses like reverse engineering.<sup>130</sup> The same rationale could be extended to justify other conditions that interfered with fair use.

Consumers would surely face less risk of unwitting infringement if the courts adopted a different tack and wielded the preemption doctrine to strike substantively dubious license restrictions. Courts could reduce consumers' information costs by categorically prohibiting licensors from designating restrictions on fair use as termination conditions. They might go even further in preempting terms that seemed to alter the express entitlements provided by the Copyright Act. Under this approach, users could take comfort in knowing, for example, that they could screen a film at a private gathering – so long as they did not cross the line into public performance – without worrying that the license might prohibit screening the film for houseguests.

This more vigorous preemption doctrine would nonetheless provide an incomplete answer so long as licensors could impose unexpected and idiosyncratic restrictions that were tangential to the preemption doctrine's substantive concerns. The doctrine would have little to say to a prohibition on cheating while playing a videogame or a requirement that users wear a literal red hat while reading the e-book edition of *Red Hat for Dummies*;<sup>131</sup> terms

128. *ProCD*, 86 F.3d at 1454 (“[C]ontracts do not create ‘exclusive rights.’”).

129. See, e.g., Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 140 n.29 (1999) (finding it “troubling that the rationale of *ProCD* means that contract terms should *never* be preempted”); Nimmer et al., *supra* note 120, at 50 (arguing that the contract in *ProCD* should have failed because it “complain[ed] directly about the reproduction right”); see also Michael E. Kenneally, *Misappropriation and the Morality of Free Riding* at 34-39 (SSRN Elec. Library, Working Paper No. 2,310,966, Feb. 22, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2310966](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310966) (forthcoming 18 STAN. TECH. L. REV. (2015)) (offering a more thoughtful account of the difference between the *in rem* duties of copyright and the *in personam* duties of contract). The practical difference between a right against the user and a right against the world, meanwhile, grows ever smaller as more works are made available only subject to a license, casting doubt on the court's conclusion that contractual rights do not impose on the public at large. See, e.g., Moffat, *supra* note 55, at 69-70 (“Private contract rights that seek to restrict fair uses become exclusive rights when the contract terms apply to anyone who wishes to have access to the copyrighted work.”); Van Houweling, *supra* note 16 (comparing license agreements that bind all comers to servitudes).

130. See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325-26 (Fed. Cir. 2003) (upholding a contractual restriction on reverse engineering); see also Cahoy, *supra* note 122, at 155 (collecting cases that have followed *ProCD*'s lead).

131. Such a term would of course be ironic given that Red Hat, Inc. is a major developer of open source software that is usually licensed subject to terms that are friendly to the public.

like these are neither equivalent to the rights provided under the Copyright Act nor directly contrary to them. At best, preemption would eliminate a subset of substantively problematic conditions that happened to impose high information costs. It would not confront the problem of information costs directly.

## 2. Misuse

Copyright misuse vindicates concerns similar to those of preemption: it reaches conduct where copyright holders attempt to extend their monopolies in ways that offend copyright policy.<sup>132</sup> Like preemption, it could be extended to strike restrictions on fair use.<sup>133</sup> And it provides strong relief. Whereas the preemption defense merely strikes down the offending term, misuse bars the copyright holder from enforcing its copyright at all until such time as the misuse is purged.<sup>134</sup> Beyond protecting fair use, the misuse doctrine might restrict licensors' ability to impose conditions that were far afield from their legitimate interests in controlling the licensed work. This extension would stem from the doctrine's historical aversion to tying arrangements like those that would condition access to a copyrighted work on the consumer's purchase of an unrelated good or service.<sup>135</sup>

This application of the misuse doctrine would reduce information costs, but like preemption it offers only a partial solution. It might stop a copyright owner from demanding that you buy a specific brand of cereal or avoid competitors' products as a condition of using a particular work; these activities offend the antitrust principles that the misuse defense is meant to vindicate. More controversially, it might be used to invalidate licenses conditioned on the user's agreement to abstain from cheating at a videogame or to don crimson headgear: a court could hold that the licensor simply has no legitimate interests in these rather trivial aspects of its customers' behavior. But unless the doctrine were reoriented to consider notice rather than focus on substance, users would remain burdened with the risk of unwitting infringement for any poorly disclosed term that passed substantive muster.<sup>136</sup>

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132. See *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990); 4 NIMMER & NIMMER, *supra* note 13, at § 13.09[A].

133. See *Loren*, *supra* note 120, at 530-31 (arguing terms that restrict fair use should give rise to a presumption of misuse).

134. See *id.* at 500-01.

135. See 4 NIMMER & NIMMER, *supra* note 13, at § 13.09[A][b]. But see *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150 (9th Cir. 2011) (rejecting the argument of copyright misuse where Apple restricted use of its operating system to computers it manufactured).

136. *Tempo Music, Inc. v. Myers* plants the seed for such a reorientation. 407 F.2d 503 (4th Cir. 1969). In that case, the court interposed an unclean hands defense against infringement where a music-licensing agency failed to respond to the defendant's inquiry regarding which songs were covered under the agency's public-performance license. *Id.* at 507 & n.7. One could imagine an extension of this prin-

*D. Reputational Constraints*

Finally, some might argue that the concern with copyright-enforceable terms is overblown. The argument would be that, despite copyright's lack of formal protections, market pressures curb licensors' overreaching. Granted, too few people read these agreements for consumers to discipline copyright owners through their purchasing decisions.<sup>137</sup> Yet consumers might still be protected by the exercise of discretion on the part of copyright holders. We should not expect full-blown copyright lawsuits for breach of trivial terms, the argument goes, because these suits would damage the copyright holder's reputation.

Lucian Bebchuk and Richard Posner advance an argument like this regarding one-sided contracts.<sup>138</sup> They argue that firms reserve strong rights in their boilerplate agreements, but that for reputational reasons they typically excuse minor transgressions.<sup>139</sup> The harsh terms are weapons that these firms reserve against opportunistic customers who might attempt to take advantage of the firm.<sup>140</sup> Indeed, these terms might benefit customers as a whole insofar as they allowed the firm to deflect any costs that would otherwise be imposed by opportunistic customers rather than spreading those costs across the entire pool.

Bebchuk and Posner are careful to note, however, that their argument depends on a market where firms are repeat players who compete on the basis of reputation.<sup>141</sup> So perhaps consumers can trust major firms like Amazon and Adobe not to initiate federal litigation over minor violations. But the

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ciple where licensors' poor presentation of terms would support the same defense. *Cf. id.* at 507 n.7 (likening the agency's duty to the general requirement that authors print copyright notices on their works); *see also* *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408 ("The defense of unclean hands by virtue of copyright misuse prevents the copyright owner from asserting infringement and asking for damages when the infringement occurred by his dereliction of duty."). The principle has seen limited applicability, however, because the agency's duty of disclosure sprang not from the general obligations of copyright but from a consent decree previously entered against the agency. *Tempo Music*, 407 F.2d at 506-07; 4 NIMMER & NIMMER, *supra* note 13, at § 13.09[B] n.147. Contract law might nonetheless provide the grounds for imposing heightened disclosure requirements on any licensor who sought to enforce idiosyncratic terms in copyright. *See infra* Parts IV-V.

137. *See supra* note 63 and accompanying text; *see also* BEN-SHAHAR & SCHNEIDER, *supra* note 64, at 178-80 (explaining that sometimes firms offer special benefits only to those who read, ensuring that non-readers receive no benefits from the activities of the informed minority).

138. *See* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

139. *Id.* at 830.

140. *Id.* at 834.

141. *Id.* at 835 ("With infrequent sales or poor information about sellers, sellers will not be constrained by reputational concerns.").

market for copyrighted works includes many who lack the same reputational interests.

“Copyright trolls” represent one category of entities indifferent to their reputations. While scholars offer competing definitions for trolling, these definitions cluster around the idea of enforcing a copyright not to deter infringement or to secure the commercial value of the work, but instead to profit from litigation revenues.<sup>142</sup> These entities are often not themselves authors but rather litigation operations with strong short-term interests in the profits of infringement actions and with little to no interest in their reputations as creators.<sup>143</sup> While many trolls thus far have directed their attention towards consumers who have allegedly engaged in illegal downloading, an enterprising outfit might collect breach of license claims to use as a cheap hook for infringement suits.<sup>144</sup>

Copyright owners also pursue infringement litigation with relative reputational impunity by suing third-party services for their vicarious role in facilitating infringement rather than suing their customers directly. This is why Nintendo sued Galoob for the alleged infringement facilitated by the “Game Genie” – a device that allowed home users to cheat at Nintendo’s copyrighted videogames – rather than its own customers.<sup>145</sup> The same strategy percolated through the file-sharing litigation of the early 2000s, when the recording industry sued website owners rather than individual downloaders.<sup>146</sup> *MDY v. Blizzard* – one of few cases to directly confront the availability of copyright

142. See Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 767 (2013) (“Having no interest in the use or exploitation of the work and dependent entirely on settlements and damages for its revenue, a copyright troll is almost never satisfied with an order merely enjoining the defendant’s infringing activities.”); Brad. A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 59-60 (2014) (identifying trolls as parties who acquire a copyright “with an eye to the litigation value of the work, not the commercial value”); Matthew Sag, *Copyright Trolling, an Empirical Study* at 1 (SSRN Elec. Library, Working Paper No. 2,404,950, July 3, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404950](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950) (forthcoming IOWA L. REV. (2015)) (defining trolls as parties who file infringement suits “to turn litigation into an independent revenue stream”).

143. See Balganesh, *supra* note 142, at 767 (arguing the problem with copyright trolls is that they disrupt the balance between “actionable and enforced” claims and “actionable but tolerated” claims); Greenberg, *supra* note 142, at 59-60.

144. Cf. Greenberg, *supra* note 142, at 62 (“[C]ommercially valueless copyrights are ubiquitous; they are much more cheaply available than bad patents . . .” (internal citations omitted)).

145. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

146. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2000). These cases are distinct from the recording industry’s subsequent suits against individuals.



damages for breach of license terms – is itself a manifestation of this strategy.<sup>147</sup>

As noted in the introduction, *MDY* is about control over gameplay in Blizzard's wildly popular online game, World of Warcraft ("WoW").<sup>148</sup> Blizzard complained that a third party created "bots" – software that automates gameplay in ways that give bot-users an advantage over other players.<sup>149</sup> This concern was not arbitrary: the evidence suggests that many players disapproved of bots and that Blizzard risked losing customers if it could not contain what its players perceived as cheating.<sup>150</sup> To curb the behavior, Blizzard licensed the game on terms that prohibited "cheats, bots, 'mods,' and/or hacks, or any other third-party software designed to modify the World of Warcraft experience."<sup>151</sup>

Notwithstanding the prohibition, 120,000 of Blizzard's customers purchased *MDY*'s "Glider" bot to automate their own gameplay.<sup>152</sup> Blizzard argued that its restriction on third-party software was a condition of its license, and that any customer who breached this term was therefore a copyright infringer.<sup>153</sup> If Blizzard prevailed in this argument, then it could have sued each and every one of the 120,000 customers who used Glider, claiming copyright infringement.<sup>154</sup> Rather than alienate its paying customers, however, Blizzard sued *MDY* on the theory that it was vicariously liable for these tens of thousands of infringing acts.<sup>155</sup> (The Ninth Circuit ultimately held that Blizzard could not enforce these terms as conditions, but its reasoning leaves much to be desired.)<sup>156</sup>

Given the range of enforcement strategies that different copyright holders have adopted, it is no answer to say that reputational constraints will control abuse of license conditions. Rather, a satisfactory answer must account for opportunistic licensors and for secondary liability suits like Blizzard's action against *MDY*.<sup>157</sup>

147. See *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928 (9th Cir. 2010).

148. *Id.* at 934-35.

149. *Id.* at 935-36.

150. See *id.* at 36 ("Blizzard claims that . . . it received 465,000 complaints about WoW bots, several thousand of which named Glider.").

151. *Id.* at 938.

152. *Id.* at 936.

153. See *id.* at 937-38.

154. Multiplying the statutory minimum of \$200 across this number of infringers would result in \$24 million in liability. And that figure assumes innocent infringement. Substituting in the more likely non-innocent minimum damages of \$750 would yield damages of at least \$90 million. See 17 U.S.C. § 504(c)(1)-(2) (2012); see also *supra* notes 106-11 and accompanying text.

155. See *MDY*, 629 F.3d at 937-38.

156. See *infra* Section III.A.

157. The question of when a party ought to be liable for contributory or vicarious liability is complicated by the fact that a third party like *MDY* might be better situated

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Copyright's traditional protections provide limited relief against substantively problematic conditions. They provide even less aid when the licensing defect is a failure of notice. To be sure, there are several ways that the Copyright Act could be bolstered to overcome these limitations. Congress might reform statutory damages to impose a different liability scale in consumer cases, expand judicial discretion to waive damages in cases of unwitting license breach, or do away with statutory damages altogether. Congress – or the Supreme Court – might redirect the preemption and misuse defenses to confront defective notice in licensing. Or Section 117 might simply be expanded to protect routine private uses of a digital work whether it was licensed or owned. In the absence of top-down reform, however, courts and commentators have sought to cabin abusive license practices by developing new substantive limits for adoption in the courts. The next Part considers these proposals.

### III. SUBSTANTIVE REFORM PROPOSALS

Contemporary debate regarding license conditions focuses on whether there ought to be substantive limits on the terms enforceable in copyright. As it stands, those who advocate substantive limits are at an impasse with those who would discard substantive limits in favor of notice and disclosure strategies.

Those who advance substantive limits argue that novel or idiosyncratic conditions are problematic where they impose externalities that undermine copyright's goals.<sup>158</sup> To the extent these terms would continue to pose externalities even if licensees understood their agreements, they present a classic market failure that invites substantive intervention. But to extend these substantive limits beyond this limited set of market failures risks unnecessarily frustrating socially beneficial license arrangements.<sup>159</sup> Drawn carelessly – as in *MDY* – these limits could jeopardize the enforcement of the licenses deployed by the free culture and free software movements, along with the educational-use licenses released by many proprietary software developers.<sup>160</sup> Even a more careful substantive intervention – one that preserved today's innovative licenses – might ossify current licensing practices without leaving

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to understand the terms of the license than the licensees themselves. The discussion of this issue continues below at Section V.D.

158. See Van Houweling, *supra* note 7, at 1082. Section III.B, *infra*, provides a more detailed exposition of the substantive approach.

159. See, e.g., Kenneally, *supra* note 7, at 1232 (arguing “it is hard to identify any concerns” where licensees understand the terms).

160. See, e.g., Gomulkiewicz, *supra* note 7, at 128 (“Many purported license conditions in [Free and Open Source Software] licenses would not be classified as such under the *MDY* approach, even though . . . they are fundamental to open source licensing.”).

room for further development. This approach is also underinclusive: it does nothing to guard against overreaching terms that are substantively non-objectionable yet poorly disclosed.

Those who would reject substantive limits present the opposite concerns: their approach leaves more room for license innovation but downplays the risk that some externalities might not be susceptible to correction through market mechanisms.<sup>161</sup> There are also open questions as to whether the heightened disclosures that some of these scholars propose would actually discipline the use of boilerplate. To the extent this approach relies on copyright law as the basis for inquiring into the sufficiency of notice, moreover, the doctrinal basis for the intervention is unclear.<sup>162</sup> Against this background there is the risk that leaving regulation to contract law would simply give licensors a free hand. The following discussion outlines these positions, beginning with the substantive approach outlined in *MDY*.

#### A. *The Ninth Circuit's Nexus*

The Ninth Circuit inaugurated the discussion of substantive limits with its “nexus” test in *MDY v. Blizzard*.<sup>163</sup> As noted above, the court squarely confronted the question of whether Blizzard could use copyright to enforce a prohibition on third-party cheat bots.<sup>164</sup> The court agreed with Blizzard’s position in theory: it found that users merely licensed their copies and that playing the game therefore created the sort of RAM copies that would be infringing without a license.<sup>165</sup> It was nonetheless troubled. The court reasoned that, if it were to allow conditions like these, then:

Blizzard – or any software copyright holder – could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player’s abstention from the disfavored conduct. . . . This would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners.<sup>166</sup>

To avoid this result, the court held that, for a condition to be actionable in copyright, “there must be a nexus between the condition and the licensor’s exclusive rights of copyright.”<sup>167</sup> (It would go on to recognize copyright liability for non-performance of conditions requiring payment of money, creat-

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161. Section III.C, *infra*, unpacks their arguments and the questions they have left open.

162. *See generally supra* Part II.

163. *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928 (9th Cir. 2010).

164. *Id.* at 939-40.

165. *Id.* at 939.

166. *Id.* at 941.

167. *Id.*

ing a *sui generis* exception.)<sup>168</sup> It then held that the prohibition on bots failed this test, notwithstanding a plausible nexus between this prohibition and players' making of RAM copies during gameplay.<sup>169</sup> The nexus requirement has rhetorical flair, but it has drawn heavy criticism for providing little coherent guidance and for jeopardizing the enforcement of innovative license terms.

### 1. Unclear Guidance

*MDY* offers no clear explanation for why restricting the RAM copying that occurs while running software does not satisfy its nexus test. The opinion recognizes that the user does in fact "copy WoW software" whenever she runs the game.<sup>170</sup> Pursuant to the RAM copy doctrine, moreover, the court recognized that users may infringe if they create copies that do not fall within the scope of the license.<sup>171</sup> This understanding of RAM copies indicates a plausible nexus between any condition restricting gameplay and Blizzard's exclusive right to authorize copying of its software.<sup>172</sup>

The court seems to be tacitly rejecting the RAM copy doctrine in this context and requiring that the restricted conduct infringe the copyright owner's exclusive rights on its own. In rejecting copyright liability, it curtly explained that "Glider does not infringe any of Blizzard's exclusive rights," as "the use does not alter or copy WoW software."<sup>173</sup> If this is the test, however, then the license condition does no work at all. Consider the single term that the opinion identified as a valid condition – one that "forbids creation of derivative works based on WoW without Blizzard's consent."<sup>174</sup> There is no denying that this term has a direct nexus to the copyright owner's exclusive right to create derivative works: it completely duplicates it.<sup>175</sup> By default, no one – licensee or not – has the right to make derivative works without Blizzard's permission (barring an exception like fair use). So far as copyright liability is concerned, a license that was simply silent about any such permission would therefore be equivalent to one expressly forbidding derivative works. At best, the term might give the licensee the option to sue in contract

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168. *Id.* at 941 n.4.

169. *Id.* at 941 (explaining the broad reach of the RAM copy doctrine).

170. *Id.* at 939 (acknowledging that users may infringe when their computers "copy WoW software into RAM").

171. *Id.*

172. Other scholars also find the test just as puzzling. Molly Shaffer Van Houweling, for example, notes: "[I]t is unclear why there was not a nexus in *MDY*, where the forbidden conduct itself – playing World of Warcraft with Glider – involved making a copy of Blizzard's copyrighted game on the user's computer." Van Houweling, *supra* note 7, at 1083. Michael Kenneally likewise asserts: "It is not clear how the license violation, in such circumstances, would lack a nexus with the owner's exclusive right of reproduction." Kenneally, *supra* note 7, at 1224.

173. *MDY*, 629 F.3d at 941.

174. *Id.* at 940.

175. See 17 U.S.C. § 106(2) (2012).

as an alternative to suing for copyright infringement.<sup>176</sup> A term so completely coextensive with the protections of copyright, however, ought to fail under the Ninth Circuit's own preemption jurisprudence.<sup>177</sup>

If the nexus test upheld only those conditions that overlapped with existing copyright protections, moreover, then it would impose a de facto ban on termination conditions.<sup>178</sup> Michael Kenneally offers a keen articulation of this problem:

Perhaps what the Ninth Circuit meant was that using a bot to play a computer game does not in and of itself infringe copyright in the way that making unauthorized derivative works does. It would, however, be quite radical to suggest that license restrictions prohibiting actions that are not in and of themselves infringing could never act as conditions. Not only would such a rule make attribution conditions powerless . . . but it would also foreclose the common practice of conditioning copyright licenses on payment.<sup>179</sup>

The court seemed to recognize this problem in its concession that payment terms might survive as a *sui generis* category of conditions.<sup>180</sup> Under this rule, Blizzard would be empowered to revoke its license for failure to pay a subscription fee – thereby subjecting non-payers who continued to use the software to infringement liability.<sup>181</sup> It would be unable, however, to revoke its license for failure to comply with a prohibition on the use of third-party software like Glider. The court's opinion is unsatisfying in its failure to explain why (or even whether) payment is the single form of collateral consideration that licensors are authorized to demand.<sup>182</sup>

176. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996) (enforcing contractual terms that secured rights similar to those protected by copyright).

177. G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 904 (9th Cir. 1992) (“17 U.S.C. § 301(a) prohibits state-law protection for any right equivalent to those in the Copyright Act.”); 1 NIMMER & NIMMER, *supra* note 13, at § 1.01[B][1][a][iii].

178. Recall that scope limitations define the ways in which the licensee can use the software without infringing; termination conditions describe obligations the licensee must fulfill to retain the license and often speak to matters like payment that are collateral to the actual use of the work. *See supra* Section I.A.

179. Kenneally, *supra* note 7, at 1224-25.

180. MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 941 n.4 (9th Cir. 2010).

181. *See supra* Section I.A (describing how termination conditions lay the foundation for an infringement action for continued use past the point of termination).

182. *See* Gomulkiewicz, *supra* note 7, at 130 (“Neither contract nor copyright policy justifies favoring monetary consideration over non-monetary consideration.”); Kenneally, *supra* note 7, at 1225 (“[I]t would seem important to identify a principled basis for distinguishing cash payments from these other forms of consideration. Yet the court offered none.” (internal citations omitted)).

## 2. Problems for License Innovation

The problem with *MDY*'s nexus test runs deeper than doctrinal confusion. It also makes it difficult for licensors to enforce novel terms regardless of their potential benefits for consumers and copyright policy. In framing this test, the *MDY* court ignored the key role that these terms – which often serve as alternatives to payment – play in advancing the creation and distribution of new works. It also overlooked the importance of copyright liability in making these terms viable.

Consider the attribution requirement of the Creative Commons license and many other free licenses. Authors use these licenses to release works to the public free of charge, asking only that users credit the original author whenever they redistribute or modify the work. These exchanges advance copyright's goals by providing both the incentives and the means to create: the reputational rewards motivate many creators, and open license terms allow subsequent creators to generate countless thousands of derivative works.<sup>183</sup> Terms like these also facilitate the distribution of works by allowing nonmonetary pricing. Even if a user was unwilling or unable to pay money to use a work, he might offer compensation in the form of attribution.

The prohibitions on commercial use that are common for educational or demonstration versions of software serve a similar role.<sup>184</sup> Proprietary soft-

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183. The Federal Circuit in *Jacobsen v. Katzer* waxed poetic on the impact of Creative Commons and similar public licenses:

Open source licensing has become a widely used method of creative collaboration that serves to advance the arts and sciences in a manner and at a pace that few could have imagined just a few decades ago. For example, the Massachusetts Institute of Technology (“MIT”) uses a Creative Commons public license for an OpenCourseWare project that licenses all 1800 MIT courses. Other public licenses support the GNU/Linux operating system, the Perl programming language, the Apache web server programs, the Firefox web browser, and a collaborative web-based encyclopedia called Wikipedia. Creative Commons notes that, by some estimates, there are close to 100,000,000 works licensed under various Creative Commons licenses.

535 F.3d 1373, 1378 (Fed. Cir. 2008); see also Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 424-25 (2002) (arguing that “indirect appropriation” of benefits such as reputation is a powerful motivator for peer production).

184. See Kenneally, *supra* note 7, at 1206-11 (describing the potential benefits of price discrimination in software). For a conventional example of discount software, see *Autodesk Software for Students and Educators*, *supra* note 38. For a more unusual example, consider WordWeb's dictionary-thesaurus software. Rather than offering a student discount, it provides a 30-day free trial to all comers and requires anyone who takes more than “two commercial flights . . . in any 12 month period” to pay for continued use after the 30 days. *WordWeb Free Version Licensing*, WORDWEB, <http://wordweb.info/free/licence5.html> (last visited Apr. 7, 2015). WordWeb's rationale lies partly in market segmentation, providing free access for “relatively non-wealthy people,” and partly from a desire to encourage people to reduce carbon emissions. *Id.* A prior version also discriminated against non-disabled people who “own

ware creators share free versions of their work under these licenses in hopes that they will build awareness for their brand and attract purchases from those who are impressed with the demonstration version. Users pay for these copies not with money, but with a promise not to use this copy except for educational or otherwise non-commercial purposes. Flexibility in licensing allows copyright owners to experiment with product offerings and prices in ways that can increase the public's access to and engagement with copyrighted works.<sup>185</sup>

Neither set of terms would fare well, however, under the Ninth Circuit's nexus test. Attribution is not an exclusive right of copyright.<sup>186</sup> To be sure, the creation and distribution of derivative works – with or without attribution – implicate the author's exclusive rights.<sup>187</sup> The author could therefore argue that the nexus is satisfied because attribution is something the licensee must do while exercising these rights.<sup>188</sup> But there is little to distinguish this position from Blizzard's, whose prohibition on cheating was something the licensee had to observe while exercising Blizzard's exclusive right to make RAM copies.

If the attribution term were relegated to enforcement in contract, however, it would be toothless.<sup>189</sup> What are the expectation damages for misuse of a work given away for free?<sup>190</sup> There might be reputational damages for the

or regularly drive an SUV.” *WordWeb 5.0 Free Version License*, WORDWEB, <http://wordweb.info/free/licence.html> (last visited Apr. 7, 2015).

185. See, e.g., McGowan, *supra* note 21, at 223-24 (“Empowering authors to experiment with a variety of arrangements is, in my view, much more likely to enrich our expressive culture than to impoverish it.”). Terms like these can also be understood as promoting access by facilitating market segmentation among customers willing to pay for the full version and those willing to settle for a restricted version. See William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1239 (1998) (“[P]rice discrimination leads to substantial improvements in distributive justice – better approximation of the ideal of affording all persons access to works of the intellect.”); Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 772-73 (2015) (arguing that market segmentation provides a cheap tool to incentivize creation while also promoting access by allowing authors to expand their markets). But see Mulligan, *Numerus Clausus*, *supra* note 16, at 286-89 (2013) (questioning the net social utility of restrictions like these).

186. See Gomulkiewicz, *supra* note 7, at 129 n.117.

187. 17 U.S.C. § 106(2)-(3) (2012).

188. These terms are often described, moreover, not so much as use restrictions, but as the consideration paid for the license. See, e.g., *Jacobsen*, 535 F.3d at 1379 (describing the “choice to exact consideration in the form of compliance with the open source requirements”); Kenneally, *supra* note 7, at 1225. Viewed as consideration, however, these terms would almost certainly fail under *MDY* because they are not payment terms. See Gomulkiewicz, *supra* note 7, at 131.

189. See *Jacobsen*, 535 F.3d at 1382 (“[T]hese types of license restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief.”).

190. The fact that the breaching party profited would be irrelevant. Contract typically worries itself only with the licensor's loss and not with the licensee's unjust

lost chance to gain recognition, but these would be difficult to quantify and seldom worth suing for.<sup>191</sup> What the author really wants in a case like this is not money – particularly where she gives the work away for free – but an injunction requiring the offender to either provide proper attribution or cease the infringing use.<sup>192</sup> This too is easier to win in copyright than specific performance would be in contract.<sup>193</sup> Without copyright’s fee-shifting opportunities,<sup>194</sup> moreover, it would be hard to justify the expense of a suit with so little in the way of damages.

Non-commerciality provisions would also fare poorly under *MDY*’s test. Consider what little difference there is between a software restriction that prohibits cheating and one prohibiting commercial uses, both of which target a specific form of RAM copying. One might try to save the non-commercial use terms by reference to the Ninth Circuit’s *sui generis* exception for payment terms. Because the licensor often offers an unrestricted version in exchange for monetary payment, it might argue that the restriction is essentially a payment term that ought to be enforceable in copyright. This answer is not satisfying, however, because by the same logic Blizzard could enforce an anti-cheating provision – or really any provision – so long as it charged a higher price for an alternative license without that provision. Under this reasoning, non-commerciality terms might be enforceable for commercial software developers (given that they typically sell higher-priced versions without the restriction), but ironically not for Creative Commons licensors (who often release their works subject to a non-commerciality restriction without selling an unrestricted version). It is counterintuitive that a term would be more enforceable merely because the licensor was willing to put a price on its waiver.<sup>195</sup>

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gains, making copyright the stronger deterrent. See Omri Ben-Shahar, *Damages for Unlicensed Use*, 78 U. CHI. L. REV. 7, 9-10 (2011).

191. See McGowan, *supra* note 21, at 213 (“Violations of those terms can cause harm that is either hard to count in dollar terms or for which authors would not count money as adequate payment.”).

192. See, e.g., Gomulkiewicz, *supra* note 7, at 116 (“Injunctive relief is a particularly critical remedy because the standard remedy for breach of contract, monetary damages, normally is beside the point in FOSS licensing.” (internal citations omitted)).

193. See, e.g., *MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 941 n.3 (9th Cir. 2010); Robert W. Gomulkiewicz, *Conditions and Covenants in License Contracts: Tales from a Test of the Artistic License*, 17 TEX. INTELL. PROP. L.J. 335, 341 (2009) (“[I]njunctive relief is common for copyright infringement but granted rarely for breach of contract.”).

194. See 17 U.S.C. § 505 (2012).

195. See Ben-Shahar, *supra* note 190, at 28 (endorsing firms’ choice not to assign liquidated damages clauses to particularly undesirable forms of breach because they want to eliminate the behavior rather than price it). But see Yafit Lev-Aretz, *Reconciling Original With Secondary Creation: The Subtle Incentive Theory of Copyright Licensing* (Feb. 2014) (unpublished working paper), available at <http://works.bepress.com/yafitlev/>.



Enforcing non-commerciality provisions like these would be a losing proposition in contract. Even setting aside statutory damages, copyright offers an elegant remedy in disgorgement of profits.<sup>196</sup> Disgorgement operationalizes the non-commercial term by depriving the licensee of any profits from unauthorized use. Contract, however, is limited in focus to the licensor's loss.<sup>197</sup> At best, the licensor could argue that it was cheated out of the purchase price for the full version of its software, and it might recover the difference. Even software that retailed for \$1,000 could hardly justify the expense of the lawsuit. The licensee, moreover, would have little incentive to pay the full purchase price at the outset. Limiting enforcement to contract remedies would give the opportunistic licensee the option to simply pay later and even then only if she were caught. As to these opportunists, punitive damages could play a salutary role.

### B. *Alternative Substantive Reforms*

Few would defend *MDY*'s nexus. But some scholars seek to articulate an alternative substantive nexus that would be better tailored to copyright's goals and the high information costs of licenses. Identifying the right standards, however, is difficult. Even rules that accommodated today's free culture and free software licenses might prove stifling to future license innovation. And even the most judicious substantive intervention might not speak to failures of notice.

#### 1. The Purposive Nexus

Molly Shaffer Van Houweling offers a purposive nexus: "a copyright license condition that purports to impose a running restriction on use of a copy of a copyrighted work [would be] enforceable only where its enforcement would promote the *purposes* of the copyright holder's exclusive rights."<sup>198</sup> This approach – almost by definition – would yield the right level of enforcement. It is nonetheless indeterminate in practice given that it requires a court not only to discern copyright's goals, but also to conduct case-by-case analysis to determine whether particular terms are consistent with those goals.<sup>199</sup> The difficulty in applying this approach is apparent in evaluating the anti-bot provision in *MDY*: Van Houweling finds the nexus question "a closer one" because "use of Glider *may* degrade the game experience for oth-

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com/yafit\_lev-aretz/2/ (arguing that a firm's refusal to license a given use strengthens an infringer's claim to fair use).

196. 17 U.S.C. § 504(b) (2012).

197. See Ben-Shahar, *supra* note 190, at 9-10.

198. Van Houweling, *supra* note 7, at 1083 (emphasis added).

199. See *id.* at 1085 (recognizing that the goal of promoting progress has no "clearly agreed upon meaning").

er users in a way that has a nexus with the progress-promoting purposes of the exclusive right to prepare derivative works.”<sup>200</sup>

One advantage of this approach is that it could police against the kinds of market failures that occur when a licensor tries to draw termination conditions that interfere with fair use.<sup>201</sup> Van Houweling explains this risk in the context of a license condition prohibiting criticism of the work.<sup>202</sup> Negative reviews are a classic fair use in part because of the tremendous social benefits they generate: they advance public discussion of the work while simultaneously revealing the quality of the work to other would-be purchasers.<sup>203</sup>

Market failure might occur, however, because the benefit to any individual consumer in retaining the right to criticize a work is low. Most people do not fancy themselves reviewers. Indeed, a user will not know that a product deserves a bad review until after purchasing it and discovering its defects.<sup>204</sup> Consumers – even perfectly informed consumers – might accordingly trade these rights away without regard for the *de minimis* individual benefit.<sup>205</sup> Cumulatively, however, these decisions would create undesirable externalities because “society bears the ill-effects of staying uninformed about the bugs and shortcomings of muzzled products.”<sup>206</sup> Van Houweling notes “that progress would be undermined, not promoted, by deploying copyright to protect copyright owners from critique.”<sup>207</sup> It therefore stands to reason that copyright should substantively bar terms like these.

The set of terms where one might conclude *ex ante* that the harms to copyright policy outweigh the benefits is nonetheless small. Indeed, setting aside restrictions on fair use, it would seem that most license terms have the potential to advance the objectives of copyright by facilitating the creation and distribution of new works.<sup>208</sup> Copyright owners presumably demand particular terms because they find them valuable. Compliance with these

200. *Id.* at 1084 (emphasis added).

201. The classic justification for fair use, after all, is that the doctrine is meant to guard against market failure in the market for use of creative works. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982).

202. Van Houweling, *supra* note 16, at 948. In a later piece, Van Houweling develops a similar argument regarding the defects in the converse term requiring that the user write favorable reviews. Van Houweling, *supra* note 7, at 1084.

203. Van Houweling, *supra* note 16, at 948.

204. See Kenneally, *supra* note 7, at 1206 (“[T]he creative insight to lampoon some piece of software may arrive only after first-hand experience of how dreadful it is.”).

205. Van Houweling, *supra* note 16, at 948.

206. *Id.* A term like this might result in market failure not only because of the externalities posed when well-informed actors rationally undervalue their individual rights to criticize the work, but also because of boundedly rational actors’ systematic discounting of the costs imposed by these terms. See *supra* Subsection I.B.2.

207. Van Houweling, *supra* note 7, at 1082.

208. See *supra* notes 183-85 and accompanying text.

terms may provide the non-monetary compensation that spurs the owner to create and release the work, thereby advancing copyright's interests in creation and distribution.<sup>209</sup> Non-monetary prices likewise have the potential to promote access by allowing users to "pay" for a work even where their discretionary income is limited. The real danger for many idiosyncratic terms lies not in their substantive effect on copyright policy, but in their potential to catch users unaware or chill lawful engagement with creative works.<sup>210</sup>

## 2. Standardization

Some scholars view substantive standardization as the answer to the high information costs posed by licensing. These scholars follow the view that Thomas Merrill and Henry Smith developed in property law, in which standardization is meant to prohibit idiosyncratic property arrangements that impose information externalities on the public.<sup>211</sup> Notwithstanding the concern that property rhetoric is sometimes used to justify the expansion of intellectual property in rent-seeking ways, these scholars show how common law property principles can be mobilized to serve public ends.<sup>212</sup>

Van Houweling argues that greater standardization would combat terms that impose high information externalities.<sup>213</sup> Her approach gives leeway to

209. Cf. Rub, *supra* note 185, at 27-28 (explaining how copyright holders' flexibility to tailor their prices to what people are willing to pay can improve their incentives).

210. See *supra* Subsection I.B.3.

211. See Merrill & Smith, *supra* note 79, at 26-27 ("The need for standardization in property law stems from an externality involving measurement costs: Parties who create new property rights will not take into account the full magnitude of the measurement costs they impose on strangers to the title."). To be sure, licenses are conventionally understood as contracts rather than as a category of property. Scholars like Van Houweling nonetheless reason from property principles because licenses often embody the core characteristic of servitudes as understood in property law: "they run with the assets to which they attach and bind remote owners of those assets." Van Houweling, *supra* note 16, at 890. Other scholars draw the connection more directly. Mulligan, for example, brings attention to IP-embedded goods that are themselves chattels, keying into property law's undisputed application to physical objects. See generally Mulligan, *Personal Property Servitudes*, *supra* note 16. And Christopher Newman – though he is not predisposed towards substantive limits for license terms – argues that the "concept of license . . . belongs fundamentally to property, not contract," thereby inviting the application of common law property principles. Newman, *supra* note 24, at 1109.

212. David Fagundes' recent work explores the complicated role that property rhetoric plays in intellectual property law, contrasting a maximalist approach to intellectual property rooted in the discourse of property ownership with an alternative conception of property as a system of social relations meant to advance the common good. See generally David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652 (2010).

213. See Van Houweling, *supra* note 16, at 897-98.

terms that merely supplant the already high information costs provided by background copyright law.<sup>214</sup> As she notes, the Copyright Act already imposes high information costs on uses of copyrighted works that implicate the exclusive rights set forth at Section 106.<sup>215</sup> The person who has physical possession of a photograph, for example, knows (or ought to know) in light of the Copyright Act that she cannot reproduce the work, publicly distribute it, or create her own adaptations; terms that regulate these uses therefore add few new costs.<sup>216</sup> To undertake these uses would require intensive investigation to identify the copyright owner followed by the transaction costs of negotiating for the necessary permissions.<sup>217</sup> If the same photo were released under a Creative Commons license that allowed for reproduction, distribution, or adaptation subject to an attribution requirement, the licensor would not “complicate an otherwise simple situation.”<sup>218</sup> Indeed, the permissions granted by the publicly available license would probably reduce the licensee’s transaction costs relative to a world where the user had to locate and negotiate with the copyright owner.

Van Houweling contrasts the Creative Commons’ terms with a condition restricting mere use of software.<sup>219</sup> A term like this, in her view, “exceed[s] the baseline restrictiveness of copyright” because “use per se is not an exclusive right of the copyright holder.”<sup>220</sup> The baseline restrictiveness of copyright for the use of digital works is complicated, however, by whatever information costs and restrictions the RAM copy doctrine imposes.<sup>221</sup> We might nonetheless accept the point in modified form by focusing not on the formal obligations of copyright, but rather the “ingrained expectations” of consumers.<sup>222</sup> Consumers may understand that the works they acquire – regardless of how much or how little they cost – typically carry well-known copyright restrictions that disallow copying for friends, remixing, or redistributing the work via a file-sharing site. But they would likely be surprised to find restrictions that applied to their routine personal use of the work. Van Houweling’s analysis therefore suggests a ban on terms that encumber these uses.

Christina Mulligan argues even more emphatically for standardization. She explores in detail the information costs posed by idiosyncratic terms as well as the real economic costs “from [licensees’] underuse of property and

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214. *See id.* at 936 n.282.

215. *Id.* at 935.

216. *Id.* at 936.

217. *See id.* at 937.

218. *Id.*

219. *Id.* at 938.

220. *Id.* (internal quotation marks omitted).

221. *Cf.* Kenneally, *supra* note 7, at 1202-03 (taking the position that any argument against use restrictions “has to be independent of copyright law’s baseline on pain of circularity: it is precisely that baseline that is in dispute in such cases”).

222. *See* Van Houweling, *supra* note 16, at 935.

[licensors'] overinvestment in fences, respectively."<sup>223</sup> She also explains that this confusion is only likely to become worse as more chattels become digitized, exposing consumers to the risk that the mundane items they encounter will be burdened with idiosyncratic license restrictions owing to embedded software or firmware.<sup>224</sup> To counter this uncertainty, Mulligan would effectively do away with consumer use restrictions. Specifically, she suggests re-characterizing most consumer licensures as sales – restoring users' freedom to make incidental RAM copies in the course of use – to “align rights in digital goods with existing consumer expectations in the physical objects all around them.”<sup>225</sup>

Standardization is attractive insofar as it could eliminate much of the uncertainty associated with use restrictions. Short of eliminating use restrictions entirely – establishing sale as the standard form for disposition of consumer copies – standard-setters could create a set menu of copyright-enforceable terms.<sup>226</sup> Perhaps attribution terms and commerciality prohibitions would be approved, but restraints on cheating at a videogame would not. Standardization nonetheless raises at least three difficulties.

The first difficulty with standardization is that it imposes costs by preventing socially beneficial transactions. These costs encompass the frustration of parties' interests when they are unable to structure an individual transaction in the way they would prefer.<sup>227</sup> Frustration costs can also accrue to the detriment of copyright policy. To the extent that novel licensing forms would encourage more creation and sharing of works, prohibiting these licenses impedes progress.

The second difficulty lies in establishing an effective process for separating good terms from bad. Perhaps the legislature or an administrative agency would be equipped to devise a menu of terms that actually advance the policy goals of copyright, or to balance increased information costs against the social benefits of a given term.<sup>228</sup> But this is not the sort of task courts are suited for. The necessary economic analysis exceeds the courts' expertise and puts them in the uncomfortable position of making policy judgments on complex, unsettled issues.<sup>229</sup> Without greater consensus on the policy objectives of copyright or better data on the actual impact of novel

223. Mulligan, *Numerus Clausus*, *supra* note 16, at 265.

224. *See* Mulligan, *Personal Property Servitudes*, *supra* note 16, at 32-34.

225. Mulligan, *Numerus Clausus*, *supra* note 16, at 276.

226. *Cf.* Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 983 (2005) (proposing that an agency generate a white list of pre-approved terms for consumer contracts).

227. Merrill & Smith, *supra* note 79, at 30; Mulligan, *Numerus Clausus*, *supra* note 16, at 286 (“[I]mposition of a numerus clausus principle onto intellectual property law would create frustration costs. The important question is whether those costs are outweighed by the benefits.”).

228. *See* Kenneally, *supra* note 7, at 1204. *But see id.* at 1204-05 (expressing doubt that there is political will for Congress to intervene).

229. *See id.* at 1204.

licensing forms, moreover, the courts could inadvertently thwart socially beneficial innovations in licensing. The *MDY* opinion is the case in point for how judicial standardization could misfire.

Finally, substantive interventions may simply fail to reach the problem of consumer ignorance. Take a common term like an educational-use only clause. A policymaker might decide that this term is substantively appropriate as a matter of copyright policy because it promotes widespread access to works. Policymakers might likewise approve of attribution requirements, limits on transfer, or monthly subscription fees. Consumers would nonetheless face unreasonable information costs – and the risk of unwitting infringement – if licensors were permitted to impose and enforce these restrictions merely by inserting them in the fine print of lengthy user agreements. Procedural protections are necessary – at least as complements – to any project of substantive standardization.

Henry Hansmann and Reinier Kraakman articulate an alternative approach to information costs in property law.<sup>230</sup> They argue that “[t]he law’s limitations on property rights take the form not of standardization into a discreet [sic] number of well-defined forms, but rather of regulation of the types and degree of notice required to establish different types of property rights.”<sup>231</sup> On this view, the law would allow idiosyncratic terms so long as parties successfully internalized their information costs. The next Section explores the scholarship that has taken this more notice-oriented approach to the problem; the following Part will develop the argument further by grounding this procedural approach in the normative and doctrinal commitments of contract.

### C. *The Laissez Faire Approach*

The Ninth Circuit’s flawed nexus test has fueled a wave of scholarship rejecting hard substantive limits on the designation of license conditions.<sup>232</sup> Under these approaches, satisfaction of a “nexus” test might be just one of several routes for validating a condition. This Article builds on this more

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230. See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

231. *Id.* at 374.

232. See, e.g., Gomulkiewicz, *supra* note 193, at 358-59 (arguing that “allowing the parties to freely choose [conditions] seems best” for innovation, and that traditional contract, copyright, and antitrust principles would check against overreaching); Kenneally, *supra* note 7, at 1232 (arguing that, where licensees have “very clear and salient notice of the conditions . . . it is hard to identify any concerns over the new property rules – either from society’s perspective or from that of the licensee who knowingly consented to them”); Newman, *supra* note 24, at 1154 (“There is . . . little need to place substantive restrictions on the sorts of terms that can validly serve as conditions.”).

open-ended approach by identifying the new questions it raises and seeking to answer them.

Robert Gomulkiewicz argues that innovation in licensing is best advanced by allowing parties to freely designate conditions subject to the traditional limits of contract, copyright, and antitrust.<sup>233</sup> He also pushes back against the “either/or” nature of the condition versus covenant question, finding the implications too stark.<sup>234</sup> He would set that question to the side and conduct a multifactor analysis at the remedial stage to determine whether to award injunctive relief for copyright infringement: adhesive consumer license terms that lacked a clear copyright nexus, involved only RAM copying, and had a tenuous connection to copyright policy would fare poorly under his test.<sup>235</sup> So far as Gomulkiewicz is concerned with injunctive relief, his approach works because courts retain discretion to decide whether to issue an injunction even after finding infringement.<sup>236</sup> But the award of statutory damages upon a finding of infringement is mandatory.<sup>237</sup> The either/or question of condition versus covenant, infringement versus breach of contract, therefore requires an answer.

Christopher Newman emphasizes the importance of allowing parties to structure their agreements as they see fit, and accordingly would respect the parties’ choice to designate any terms they liked as enforceable in copyright.<sup>238</sup> He would not rule out a substantive nexus per se, but he would insist on keeping any such substantive restrictions separate from the interpretive rules that delineate conditions and covenants so as to avoid making license interpretation unpredictable.<sup>239</sup> The autonomy and efficiency he seeks to promote by respecting the parties’ agreements, however, assumes a system where the agreement as enforced actually matches the parties’ understandings.<sup>240</sup> In low-value transactions where information costs are high, it may be that we need interpretive rules that go beyond the agreement as written, notwithstanding the added uncertainty, to ensure that unsophisticated parties receive the reasonably anticipated benefits of their licenses.

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233. See Gomulkiewicz, *supra* note 193, at 358-59.

234. Gomulkiewicz, *supra* note 7, at 132.

235. See *id.* at 134-35.

236. See 17 U.S.C. § 502 (2012); eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392-93 (2006) (“[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that copyright has been infringed.”).

237. To be sure, courts could consider Gomulkiewicz’s factors in deciding whether to award only the mandatory minimum damages of \$750 rather than the statutory maximum. See 17 U.S.C. § 504(c)(1) (2012). But these factors could not support a reduction of damages to zero. See *supra* Section II.A.

238. Newman, *supra* note 24, at 1154 n.231.

239. See *id.*

240. See *id.* at 1111 (describing goals for private ordering including the protection of autonomy, avoidance of conflict, and maximization of value through exchange).

Michael Kenneally takes up the boilerplate problem more directly in arguing that courts should attend to whether the user had fair notice that a restriction would be enforceable on pain of copyright's heightened remedies.<sup>241</sup> As he notes, this move could correct against licensors' opportunism, vindicate users' reasonable expectations, and leave room for socially beneficial licenses to invoke copyright remedies.<sup>242</sup> The legal basis for adopting this test, however, requires fuller articulation. As noted above, copyright itself affords little discretion to avoid infringement on the basis of notice defects.<sup>243</sup> Kenneally invites the courts to introduce new principles into copyright law that would afford them greater remedial discretion.<sup>244</sup> Such a development might be salutary against the backdrop of a copyright regime that – on the books and in practice – is often indifferent to the equities. But it is unclear that the courts would be willing to adopt copyright doctrines that conflicted with the mandatory statutory damages expressly provided by the Copyright Act.

I argue that contract law provides the foundation for enhanced scrutiny of license conditions. The next Part shows that contract law provides the normative and doctrinal tools to protect the public from opportunism while leaving room for license innovation. Critics might worry that the increasing contractualization of copyright law is problematic because it gives licensors seemingly unchecked power to claim new rights. Indeed, this concern may explain scholars' motivation to apply property principles rather than contract law to the regulation of licenses, a move that allows them to invoke the public-regarding limitations associated with property law.<sup>245</sup> Missing from this discussion is a comparable account of the public-regarding limitations of contract. Whatever its problems, the contractualization of copyright should not be dismissed as offering unfettered power to licensors.

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241. Kenneally, *supra* note 7, at 1230.

242. *See id.* at 1230-32.

243. *See supra* Part II; *see also supra* notes 236-37 and accompanying text (explaining that courts have discretion to refuse injunctive relief but not damages after infringement). Kenneally looks for authority in support of remedial discretion in *Bowers v. Baystate Technologies, Inc.*, a case in which the Federal Circuit upheld a trial court's "discretion to limit duplicative damages where infringement coincides with contract breach." Kenneally, *supra* note 7, at 1230 (citing 320 F.3d 1317, 1327-28 (Fed. Cir. 2003)). *Bowers*, however, is a case where the jury had awarded \$2 million in copyright and \$4 million in contract for lost profits on copyrighted software. *See Bowers v. Baystate Techs., Inc.*, 112 F. Supp. 2d 185, 186-87 (D. Mass. 2000), *aff'd*, 320 F.3d 1317 (Fed. Cir. 2003). The trial court awarded only the higher figure, reasoning that to award both would allow the plaintiff to recover twice for each lost sale. *Id.* at 187. *Bowers'* reasoning would be of little use to the defendant facing statutory damages, even if actual damages were trivial.

244. Kenneally, *supra* note 7, at 1243.

245. *See supra* notes 211-12 and accompanying text; *see also* Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA L. & TECH. J. 173, 185 (2004) ("When contract becomes property, then the public limitations on property should become relevant.").



## IV. PROPORTIONALITY AND NOTICE IN CONTRACT

The typical contract is enforced on pain of compensatory damages: the breaching party must pay for actual damages caused by breach. Pursuant to doctrines like foreseeability, even actual damages are recoverable only up to the amount that the breaching party could reasonably anticipate. And contract law has historically frowned on parties' attempts to specify alternate remedies. This skepticism extends even to parties' express designation of conditions as grounds for terminating the agreement, though courts enforce these restrictions where they are satisfied that the breaching party understood its obligation.

Some might object that judicial refusal to enforce contracts as written interferes with parties' freedom of contract. But oftentimes these interventions enhance the parties' autonomy and the efficiency of the transaction – core concerns of contract – better than enforcing the letter of the agreement. This is particularly true where the transaction involves unsophisticated parties or is otherwise characterized by asymmetric information. The following discussion explores these features of contract law in detail, with a particular focus on the normative concerns that animate contract law's treatment of conditions. Because copyright enforcement of consumer licenses would impose highly supracompensatory damages in low-value transactions, contract law ought only to recognize copyright-enforceable terms where the licensor provides unequivocal notice of this risk.<sup>246</sup>

A. *Proportionality in Damages*

Contract law's compensatory damages are designed to put a party who suffers breach “in as good a position as he would have been had the contract been performed.”<sup>247</sup> This remedial scheme seeks proportionality between the remedy and actual damages.<sup>248</sup> Parties might prefer to attach supracompensatory liability to particular terms – for example, through a clause providing

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246. One contract doctrine absent from the following discussion is unconscionability. To be sure, the notice concerns that animate this Article and the procedural dimension of unconscionability are analogous. Unlike standard unconscionability doctrine, however, this Article is not concerned with whether a term is enforceable in contract, but rather with whether copyright liability should be available in the event of breach. Cf. M.N. Kniffin, *A Newly Identified Contract Unconscionability: Unconscionability of Remedy*, 63 NOTRE DAME L. REV. 247 (1988).

247. RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981).

248. See E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* 38 (2009) (arguing that “proportionality analysis” suffuses contract law’s “concern for fairness, expressed as freedom to contract and honoring a person’s reasonable expectations”).

high liquidated damages – to increase the likelihood of compliance.<sup>249</sup> But courts refuse to award liquidated damages that exceed a reasonable estimate of the loss, regardless of the parties' wishes.<sup>250</sup> Indeed, it is the parties' intent "to coerce or secure performance" rather than to secure compensation that is damning.<sup>251</sup>

This limitation on remedies can be defended as beneficial for both efficiency and autonomy. It allows "efficient breach," so that a party may elect to breach when contractual performance would be more costly than simply paying compensatory damages for nonperformance.<sup>252</sup> It also enhances contractual autonomy insofar as it increases the likelihood that parties grasp their obligations: parties ought to understand intuitively that they are liable for the actual harms caused by their breach even if they do not or cannot understand the fine print.<sup>253</sup> The limitation also advances a sort of fairness that might be called freedom *from* contract: a party is free to walk away from an obligation so long as she compensates the other party for its loss,<sup>254</sup> and in any case a

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249. *But see* Alan Schwartz, *The Myth That Promises Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990) (questioning this assumption).

250. RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981); *see id.* § 356 cmt. a ("The central objective behind the system of contract remedies is compensatory, not punitive.").

251. 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 65:1 (4th ed. 2012) (collecting cases).

252. *See* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.").

253. Contemporary work exploring consumers' deficient understanding of mass-market licenses also underscores how this limit on damages might enhance transactional autonomy. *See generally supra* Section I.B.

Many scholars question the wisdom of these limits on contractual freedom for agreements between sophisticated parties, who might contract for liquidated damages for perfectly legitimate reasons and with little room for misunderstanding. *See, e.g.,* Charles Goetz & Robert Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: A Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 592 (1977) ("Liquidated damage provisions should be enforced in all cases unless evidence of information barriers or reduced competitive opportunities rebuts the presumption of fair exchange."); Schwartz, *supra* note 249, at 406-07 ("[P]arties will choose appropriate remedies when left to their own devices."). It does not follow, however, that liquidated damages ought to be allowed in transactions involving unsophisticated parties.

254. *Cf.* Schwartz, *supra* note 249, at 369 (explaining that the remedial scheme allows a promisor to "purchase her freedom").

compensatory system protects consumers from oppressive penalties in the event of default.<sup>255</sup>

### B. *Expectations and Disclosure*

In addition to limiting recovery to actual damages, contract law limits recovery to those damages that would ordinarily be expected to flow from breach.<sup>256</sup> To be sure, a party can contract to recover damages that are out of the ordinary. But to do so the party must put the other party on notice that breach would be more costly than expected.<sup>257</sup>

This emphasis on the parties' expectations is evident in the foreseeability rule articulated over 160 years ago in *Hadley v. Baxendale*.<sup>258</sup> As most law students could tell you, Hadley's mill became inoperable because its crankshaft broke. He needed to deliver the broken part to a manufacturer so it could serve as the template for a replacement, so he contracted with Baxendale's company for shipment. The part was supposed to arrive the next day, but it was delayed for a week "by some neglect" on Baxendale's part.<sup>259</sup> Baxendale's mistake rendered Hadley's mill inoperable for an extra week, costing Hadley substantial profits. These losses were actual damages resulting from breach. The court nonetheless refused to award these lost profits, finding they were unforeseeable because Hadley had failed to explain at the time of shipment that delay would result in closure of his business.

The leading justification for the rule is that it imposes efficient disclosure obligations.<sup>260</sup> Ian Ayres and Robert Gertner explain that the rule forces promisees who face higher than usual damages to identify themselves, allowing promisors to take special precautions where the added liability justifies it.<sup>261</sup> Because the promisee is typically in the best position to know its own risks, moreover, this rule is more efficient than one that would burden the promisor with investigating the cost of breach to each potential counterparty.<sup>262</sup> The result is that parties have better information by which to prioritize their obligations or even to engage in efficient breach.

255. See Goetz & Scott, *supra* note 253, at 593-94 (explaining how this rule protected unsophisticated parties prior to the advent of contractual defenses like unconscionability).

256. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

257. See *id.* § 351 cmt. b.

258. (1854) 156 Eng. Rep. 145 (L.R. Exch.).

259. *Id.*

260. See generally Ayres & Gertner, *supra* note 90; Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 J. L. ECON. & ORGS. 284 (1991).

261. Ayres & Gertner, *supra* note 90, at 104 ("*Hadley* penalizes high-damage millers for withholding information that would allow carriers to take efficient precautions.").

262. Cf. *id.* at 103 (describing the large transaction costs involved in trying to discover each promisee's expected damages); Bebchuk & Shavell, *supra* note 260, at

The foreseeability limit on liability likewise advances autonomy and fairness.<sup>263</sup> A party's lack of awareness as to a particular risk provides grounds to question whether that party actually intended to assume the risk as part of the bargain.<sup>264</sup> If the party had understood the full scope of liability, she may have charged a higher price to cover her expense in taking additional precautions to avoid default, or she may have refused to enter the contract at all.<sup>265</sup>

The reasonable expectations doctrine provides courts with another avenue to prioritize parties' expectations. This doctrine, at least in its strongest form, entitles a party to the contractual rights she reasonably expected from the transaction "even though painstaking study of the . . . provisions would have negated those expectations."<sup>266</sup> It originated in the adjudication of insurance policies, an area dominated (much like copyright licenses) by dense terms that all consumers must face even though their prospects for reading the fine print – let alone understanding the nuances – are slim.<sup>267</sup> The Second Restatement of Contracts seeks to extend the reasonable expectations test to contracts generally by way of Subsection 211(3), which voids any term where one party has reason to believe that the other is unaware of a term and would not have knowingly assented to it.<sup>268</sup>

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310-11 (explaining the savings in transaction costs that results when only high-valuation buyers are required to communicate their expected damages). *But see id.* at 286 (recognizing that "communication costs" may sometimes be "higher than the benefits from differential precautions"); Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563, 592-96 (1992) (arguing the rule is inefficient when the costs of processing and communicating information are high). Likewise, the rule may fail where the relevant risk relates not to the potential magnitude of liability but its relative likelihood. *See* Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999).

263. *See* Eisenberg, *supra* note 262, at 612 (arguing that *Hadley's* foreseeability rule has survived "due in part to its ability to serve as a rough surrogate for the principle of fair disclosure").

264. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1596 (2009).

265. *See* Eisenberg, *supra* note 262, at 587 ("[I]f a seller knows that a buyer will probably incur consequential damages, the seller might raise its price, take greater-than-normal precaution . . . or both.").

266. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970) (articulating this principle in the insurance context).

267. *See generally id.* For a particularly thorough exegesis of the doctrine's role in regulating adhesive contracts, see *Estrin Constr. Co., Inc. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 420-27 (Mo. Ct. App. 1981).

268. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981). Among the factors relevant to this determination are the bizarreness or oppression of the term, its potential to "eliminate[] the dominant purpose of the transaction," and defects in its presentation. *Id.* at § 211 cmt. f.

Arizona state courts have taken the lead in applying the reasonable expectations test outside the insurance context, particularly to strike consumer arbitration clauses.<sup>269</sup> Courts applying the test in this way often place great weight on consumers' difficulty in understanding the practical effect of arbitration and the magnitude of the due process rights waived.<sup>270</sup> The test has been subject to considerable criticism – not least on the grounds that in practice courts often neglect the inquiry into consumers' expectations to pursue their own notions of substantive fairness.<sup>271</sup> But when properly directed to matters of notice it sits comfortably with the common law's commitments to autonomy and efficiency. Like the more venerable foreseeability doctrine, it is designed to improve assent by forcing the better-informed party to disclose unexpected consequences (or limitations) of the deal. This arrangement not only lowers transaction costs – saving consumers the burden of trawling each contract for opportunistic clauses – but also makes it easier for parties to appreciate the costs and benefits of the agreement and adjust their performance accordingly.

### C. *Presumption Against Conditions*

Parties who agree to a condition are specifying that the happening of some event will either create or extinguish a legal obligation.<sup>272</sup> Much like a liquidated damages term, a condition gives rise to the risk that a party will pay a penalty that is disproportionately large relative to the breaching conduct. The party who loses his entire insurance claim on account of filing it one day past the contractual deadline might complain that the twenty-four-hour delay caused no actual harm.<sup>273</sup> The party who had to surrender her home for violating a sale condition that prohibited smoking on the premises might likewise complain that her conduct simply caused no cognizable harm

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269. *Broemmer v. Abortion Services of Phoenix*, the inaugural case, struck the mandatory arbitration term in a patient's agreement with a medical clinic as unexpected. 840 P.2d 1013 (Ariz. 1992); see James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U.L.Q. 315, 335 (1997).

270. See, e.g., *Broemmer*, 840 P.2d at 152 (“Plaintiff was under a great deal of emotional stress, had only a high school education, was not experienced in commercial matters, and is still not sure ‘what arbitration is.’”); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002) (faulting defendant for failure to explain the arbitration clause, “a provision by which [the plaintiff] waived at least two constitutional rights, i.e., a right of access to the courts . . . and her right to a jury trial”).

271. See Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 249 (2007) (“Subsection 211(3) has not been expansively adopted by courts across the country.”). As critics note, the doctrine would impose a de facto bar on non-standard terms if it were inattentive to firms' efforts to put consumers on notice. See White, *supra* note 269, at 355.

272. 13 LORD, *supra* note 251, at § 38:1.

273. See RESTATEMENT (SECOND) OF CONTRACTS § 229 illus. 2 (1981).

to the former owner.<sup>274</sup> Given this risk of forfeiture, the law is reluctant to recognize terms as conditions.<sup>275</sup> In the absence of a clear mutual understanding that a term is a condition, a court will construe it as a standard contractual covenant enforceable by standard compensatory damages.<sup>276</sup>

Conditions often exist at the intersection of contract and property law.<sup>277</sup> Consider again a hypothetical no-smoking term attached to the sale of a house. If the court upholds the term as a condition, then the seller regains title and thereby wins a property remedy. If the court enforces the term as a covenant, then the seller wins contractual damages but has no right to retake the property. Contemporary licenses present a similar dichotomy: a term construed as a condition may give rise to copyright remedies, but the same term construed as a covenant gives rise only to contract remedies.

### 1. Term Standardization

Despite their concerns regarding forfeiture, courts typically uphold conditions where the parties express their intent clearly.<sup>278</sup> One focus for judicial inquiry is the text of the agreement, where the anti-forfeiture norm manifests itself as a clear statement rule: courts are more likely to find a condition where parties use standardized language, e.g., stating that a set of rights is conveyed only “on the condition that” the other party refrains from some course of conduct.<sup>279</sup>

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274. See Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769, 770-71 (1993) (considering such a condition).

275. Kraus & Scott, *supra* note 15, at 1083.

276. See, e.g., 13 LORD, *supra* note 251, at § 38:13 (“Contract conditions are generally disfavored . . . and conditions therefore will not be found unless there is unambiguous language indicating that the parties intended to create a conditional obligation.”).

277. The anti-forfeiture norm and the presumption in favor of treating a term as a covenant rather than a condition runs through both bodies of law. See, e.g., *Bornholdt v. S. Pac. Co.*, 327 F.2d 18, 20 (9th Cir. 1964) (“[T]he rule of law is well settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible.”); 13 LORD, *supra* note 251, at § 38:4. Given the potential for conditions to interfere with free alienation and other desiderata of property law, the presumption in favor of contractual enforcement may be even stronger where property is implicated. See generally Van Houweling, *supra* note 16 (explaining the many reasons for skepticism regarding servitudes in real property).

278. See generally 13 LORD, *supra* note 251, at § 38:13.

279. *Id.* at § 38:16 (suggesting the provisos “provided” or “on the condition that”); see also *id.* (“While there is no requirement that these or similar phrases be used, their absence suggests that the parties intended a promise, rather than a condition, and the terms will typically be construed in a manner consistent with that intent.”); Gomulkiewicz, *supra* note 7, at 126 (identifying these key words in open licenses). Other textualist canons also guide this inquiry. Courts frown, for example,

Requirements like these tend to reduce the information costs associated with identifying conditions.<sup>280</sup> Consistent with the demands of foreseeability, these requirements induce the drafting party to be forthcoming with the term or else see it go unenforced. Because these requirements are primarily aimed at the terms' presentation in the written agreement, however, their efficacy is limited to high-value transactions where parties find it worthwhile to read the agreement in detail.<sup>281</sup>

The benefits of standardization, moreover, accrue primarily to those who know the standards. Routinized language makes it easy for a court or an attorney to identify conditions with a high degree of accuracy.<sup>282</sup> As noted above, however, Arthur Corbin remarked nearly a century ago that the word "condition" is "sometimes used in a very loose sense."<sup>283</sup> The layperson – even one who invested time to read a consumer contract – might therefore fail to appreciate the distinction between terms designated as conditions versus those called promises.<sup>284</sup> Textual formalities like these might be necessary to create a condition, but it would be hasty to call them sufficient.

## 2. Materiality

Contract law sometimes refuses to uphold conditions even where the clarity requirement is met. In particular, courts may disregard a condition so as to avoid "disproportionate forfeiture" so long as the condition at issue is

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on intermingling purported conditions with other terms that are not conditions, *see* *Fantastic Fakes, Inc. v. Pickwick Int'l*, 661 F.2d 479, 484 (5th Cir. 1981) (finding no condition when the relevant terms mixed obligations on the part of the licensor with those of the licensee), and courts place great weight on the parties' express acknowledgement of the prior owner's "right to reenter" in deciding whether to enforce a condition in real property, *see* RESTATEMENT (FIRST) OF PROPERTY § 45 cmt. j (1936).

280. Phrased differently, these requirements reduce the risk that the parties will fail to identify the conditions of an agreement. Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2061 (2012) (dubbing this possibility the risk of "party error").

281. *See supra* Subsection I.B.1 (describing the opportunity costs of reading).

282. In communicating the import of the terms to third parties, these rules reduce the risk of "judicial error." Ayres, *supra* note 279, at 2061.

283. Corbin, *supra* note 23, at 743.

284. *Accord* Kenneally, *supra* note 7, at 1226 ("[L]icensees do not always understand the legal ramifications of the conditions/covenants distinction and the tiny variations in language that make the difference."). Even the parties drafting the license might not understand these distinctions. As open source license drafter Lawrence Rosen notes, "Many of us license authors didn't know the legal difference between a 'covenant' and a 'condition' when our licenses were written (and many attorneys still don't)." Lawrence Rosen, *Bad Facts Make Good Law: The Jacobsen Case and Open Source*, 1 INT'L FREE & OPEN SOURCE SOFTWARE L. REV. 27, 30 (2009).

not “a material part of the agreed exchange.”<sup>285</sup> Materiality is of course slippery. Investigating materiality requires asking whether a particular term “was a *sine qua non* of the contract’s fulfillment.”<sup>286</sup> This question makes sense enough for a contract where no conditions are expressly stated: the court can examine the totality of circumstances with special attention to such factors as whether the injured party is deprived of benefits it reasonably expected, or whether the injured party can be made whole through an award of damages.<sup>287</sup> Where express conditions are involved, however, this question requires second-guessing the parties: express conditions represent the parties’ own attempt to define which sorts of breach are material.<sup>288</sup>

Courts often defend this brand of paternalism on substantive grounds. Where a party is late in making a payment or tendering notice, for example, courts often refuse to find material breach because they see no cognizable harm to the other party.<sup>289</sup> Critics object that courts’ insertion of their own notions of substantive fairness introduces uncertainty into litigation by making performance more difficult to verify and damages more difficult to quantify.<sup>290</sup>

The materiality inquiry could find stronger justification on grounds of procedural fairness. Though judicial opinions seldom articulate the issue this way, a court might worry that parties do not read purported conditions that

285. RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981). Courts likewise retain discretion to excuse a condition that is contrary to public policy so long as it is not “essential” to “the agreed exchange.” *Id.* at § 185.

286. *Sahadi v. Cont’l Ill. Nat’l Bank & Trust Co. of Chi.*, 706 F.2d 193, 198 (7th Cir. 1983).

287. *Accord id.* at 196-97; *see* RESTATEMENT (SECOND) OF CONTRACTS § 241.

288. *Cf. Sahadi*, 706 F.2d at 198 (explaining that “asking whether a provision is a ‘condition’ is similar to stating the ‘materiality’ question”).

289. *See, e.g., id.* at 193 (excusing an interest payment that was one day late where upholding the condition would have allowed the bank to call a \$7 million loan); *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 198 (Pa. 1977) (“Allowing an insurance company, which has collected full premiums for coverage, to refuse compensation to an accident victim or insured on the ground of late notice, where it is not shown timely notice would have put the company in a more favorable position, is unduly severe and inequitable.”).

The least controversial application of this principle is to late payment. Where a party pays late – excepting situations where delinquency might cause a liquidity crisis – the other party’s damages can be perfectly measured by late payment with interest. To treat late payment as grounds for terminating the contract therefore invites forfeiture. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES \*159 (articulating this insight by way of mortgagors’ equity of redemption, i.e., their right to make late payment to cure a default). The *MDY* court’s willingness to treat payment terms as conditions, *see MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 941 n.4 (9th Cir. 2010), therefore seems suspect on this dimension of materiality.

290. *See, e.g., Kraus & Scott, supra* note 15, at 1096; *cf. Schwartz, supra* note 249, at 406 (defending liquidated damages as a mechanism to reduce litigation costs).



are buried in the fine print.<sup>291</sup> They might also question whether a party who actually read could appreciate the difference between a term designated as a “condition” and the typical contractual promise.<sup>292</sup> A strong default rule that treats contract terms as covenants – much like the default rule in favor of limiting compensatory damages to those that are reasonably foreseeable – lends accuracy to parties’ predictions regarding the scope of their obligations and the consequences of breach. Parties ought to be able to contract around this default, but only by providing proper notice.

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Copyright-enforceable license terms implicate the core remedial concerns of contract. When any term in the license for a digital work can be made enforceable in copyright, licensors can impose de facto liquidated damages of \$750 or more on even the most trivial breach.<sup>293</sup> For their part, licensees are in no position to anticipate the risk.<sup>294</sup> Contract law allows courts to account for these concerns by tending to consumers’ reasonable expectations in the licensing context. Consider again the law’s reluctance to recognize conditions in real property: when a deed restriction serves as a condition, it creates a substantial risk of forfeiture because it could cost someone her home.<sup>295</sup> Enforcement of copyright’s statutory damages imposes a risk of the same magnitude: copyright’s damages cap of \$150,000 exceeds the median value of a home in many parts of the country.<sup>296</sup> Yet real property has inherent value that justifies resource-intensive inquiry into potential ownership restrictions at the time of sale.<sup>297</sup> Consumer copyright licenses accompany low-value transactions that cannot justify the same expenditures.<sup>298</sup> These licenses should accordingly be governed by a regime that requires licensors to provide unequivocal notice of any nonstandard terms they intend to enforce

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291. Cf. Kraus & Scott, *supra* note 15, at 1096 (criticizing the Restatement (Second) of Contracts for articulating the problem primarily in substantive terms rather than focusing on the procedural problem).

292. See *supra* note 284 and accompanying text.

293. See *supra* notes 106-11 and accompanying text.

294. See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 637-40 (2002) (tracing the need to disclose “radically unexpected terms” in adhesive licenses to the foreseeability principle of *Hadley*); see also *supra* Section I.B.

295. See *supra* note 277; cf. Kraus & Scott, *supra* note 15, at 1084 (“[T]he law of conditions explicitly stacks the deck heavily against the finding and enforcement of conditions on the ground that the law abhors a forfeiture.”).

296. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 613 (2012), available at <https://www.census.gov/compendia/statab/2012/tables/12s0978.pdf>. Indeed, when Congress increased the damages cap to \$150,000 in 1999, Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, 1774, the median value of a home throughout the United States was only \$141,200. See U.S. CENSUS BUREAU, *supra*.

297. See Mulligan, *Personal Property Servitudes*, *supra* note 16, at 20.

298. See *id.*

in copyright. The next Part explores how this regime might look and how it could advance not only the goals of contract, but also those of copyright.

## V. HEIGHTENED SCRUTINY FOR COPYRIGHT CONDITIONS

Consider how the court in *MDY v. Blizzard* could have guarded the public interest – without having to contort copyright law – by focusing on the adequacy of notice. Under the notice-based approach, the court would ask whether users had reason to expect copyright liability for cheating by having a bot play on their behalf. It could be reasonably assured they did not. Blizzard would accordingly be foreclosed from suing for copyright’s statutory damages: its failure to carry the informational burdens that arose from its idiosyncratic terms would preclude the establishment of a valid condition.<sup>299</sup> The following discussion explains this intervention in greater detail and argues that, beyond policing against overreaching terms, this approach leaves room for the development of beneficial licensing arrangements and has the potential to enhance public deliberation on copyright policy.

### A. Terms at Issue

The terms where heightened notice is required are those that are simultaneously supracompensatory and unexpected. Many high-stakes transactions between commercial players would not implicate either concern. The publishing house that owed Anne \$200,000 in unpaid royalties, for example, would face actual damages greater than copyright’s maximum statutory damages of \$150,000; suing for copyright’s statutory damages would be beside the point. High-stakes licenses likewise run less risk of tacitly contradicting the parties’ expectations. For bespoke agreements, the costs of identifying the operative terms are subsumed in the parties’ negotiations. Even as to form agreements, a commercially significant transaction might justify careful study or even legal counsel.

Consumer licenses tend to be more problematic, at least where idiosyncratic terms are involved. Practically any copyright enforceable term in this context poses a risk of substantive overreach: even copyright’s \$200 minimum statutory damages for innocent infringement will typically dwarf any actual damages that arise from personal use of a work.<sup>300</sup> The more dynamic question is whether the user could reasonably anticipate that a particular sort of breach would lead to infringement liability.

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299. The case is complicated by the fact that Blizzard was actually suing a sophisticated party – a third-party software developer who might have understood the copyright implications of the license – for its role in inducing infringement. I examine this wrinkle below in Section V.D.

300. See *supra* notes 113-15 and accompanying text (exploring how copyright’s statutory damages can lead to a troubling ratio between compensatory and punitive damages).

Users' expectations largely ride on the licensor's characterization of the transaction. Even without reading the fine print, users who pay for a retail copy ought to expect copyright liability for reproducing the work, distributing bootleg copies, or performing the work in public. They might even know a set of common or standardized license terms. At the very least, hobbyist programmers might be imputed to know the obligations of the GPL and we might expect remix artists to be familiar with Creative Commons licenses.

Even the user who was intimately familiar with the RAM copy doctrine, however, might be excused for assuming that a retail transaction authorized the full suite of conventional private uses. The Safari for Windows license was an extreme example where the fine print interfered with these expectations – inadvertently threatening users with liability for the intended use of running the software on a Windows PC.<sup>301</sup> So called “sales” of e-books and MP3s raise similar concerns. Where the transaction is dubbed a sale, or where it bears the normal trappings of a sale, users may reasonably expect they can make the same sort of unfettered private uses of the work as they could with a hardcopy book or any piece of software “owned” for purposes of Section 117.<sup>302</sup> These expectations are frustrated when licensors deny licensees the authority to transfer their copies, or where they begin to limit the circumstances under which the user can enjoy the work.<sup>303</sup> This is not to say there is anything inherently problematic about idiosyncratic restrictions. But licensors cannot legitimately profit from customers' reasonable misunderstandings while disclaiming these expectations in the fine print.<sup>304</sup>

### B. Enhanced Notice

Enforcement of license terms in copyright is problematic when the user lacks adequate notice of the risk. Consumer licenses are not valuable enough to justify reading a lengthy agreement, let alone invoking the sort of expertise

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301. See *supra* note 58 and accompanying text.

302. See, e.g., Seringhaus, *supra* note 61, at 202-03 (arguing we should treat e-book downloads from Amazon as sales because Amazon advertises them as sales); see also *supra* notes 49-52 and accompanying text (cataloging judicial and scholarly support for the position that perpetual possession implies ownership for purposes of copyright regardless of the fine print).

303. So far as users' expectations go, rentals would not fare so differently. Consumers understand they do not hold title to a rented copy, that their possession is temporary, and that they have limited authority to transfer the item. These understandings do not translate, however, into notice of potential liability for terms that, say, forbid fast-forwarding a digital film.

304. See RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) (making a contract voidable where one party was mistaken about the material requirements of the agreement and “the other party had reason to know of the mistake or his fault caused the mistake”); see also Rub, *supra* note 185, at 52-54 (arguing that copyright owners should not be able to contract around the first sale doctrine and other exhaustion principles simply by including “magic words” in their licenses).

necessary to parse the technicalities that distinguish conditions from mere contractual promises. Indeed, assigning the full burden of comprehension to the user heightens licensors' incentives to draft licenses that are long, complex, and self-serving.<sup>305</sup> Rather than expect licensees to study their licenses for hidden traps, the better approach would require licensors to internalize the information costs of their idiosyncratic terms by providing clear and salient notice of any terms they intended to enforce in copyright.

### 1. Clarity

At the very least, a licensor ought to be required to draft license conditions so that the user who actually read the term could understand the consequences of breach. Many licenses would fail this simple test because they are written not for users, but for lawyers. Designating the term as a "condition" or using other conventional magic words is helpful shorthand for those who know the jargon. Standardization of this sort may work especially well for transactions that merit legal representation, like the sale of real property. It is doubtful it works so well in the decidedly *pro se* context of reading consumer licenses.<sup>306</sup> Consider an actual license term. The license for Apple's OS X operating system states that "Your rights under this License will terminate automatically . . . without notice from Apple if you fail to comply with any term(s) of this License."<sup>307</sup> Assuming that users read this term, how many would understand that it purported to authorize Apple to sue in copyright for continued use of the computer following even the most trivial breach?

Clarity could be achieved through more careful drafting. As to scope limitations, the licensor would need to explain that any uses of the work that failed to comply with the limitation would be considered infringement. Notwithstanding the sweeping language in Apple's OS X license, Apple moves in the direction of clarity with an iTunes license that expressly states that license violation "may constitute copyright infringement."<sup>308</sup> As to termination conditions, the licensor would need to explain that failure to comply would result in termination of the license, and that continued use past the point of termination would be considered copyright infringement. Licenses must be accessible to the lay reader if they are to have any claim to providing genuine notice.

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305. See *supra* notes 66, 85-86 and accompanying text.

306. Recall that, historically, even the original drafters for some open source licenses have lacked a clear handle on the distinction between calling something a "condition" versus a "covenant." See *supra* note 284.

307. APPLE INC., *supra* note 82, at § 6.

308. *Terms and Conditions*, *supra* note 73, at § B.

## 2. Salience

Salience is the matter of whether a term enters the user's understanding. No matter how clearly the term is drafted, it can only impact the user's initial agreement or subsequent compliance if she is aware of it. Simply mandating the disclosure of all terms is insufficient to ensure salience: licensors can discharge this duty by listing terms in the fine print without consumers noticing.<sup>309</sup> An effective regime must find some way to ensure that users actually understand the disclosures. Many proposals have been floated for the procedural reform of consumer contracting – from requiring licensees to slowly scroll through each term,<sup>310</sup> to requiring licensees to separately initial each material term,<sup>311</sup> to testing licensees to ensure comprehension.<sup>312</sup> But a recent proposal by Ian Ayres and Alan Schwartz is particularly promising due to its careful attention to users' attention constraints and firms' marketing incentives.<sup>313</sup>

Key to the Ayres and Schwartz approach is its method for identifying which terms require enhanced disclosure. Adopting an approach that forced users to specifically read or assent to each and every term would impose enormous opportunity costs.<sup>314</sup> It is also inefficient because it disregards consumers' other sources of knowledge. Consumers learn many product features from extracontractual sources such as advertisements and prior dealings.<sup>315</sup> For their part, sellers are motivated to emphasize the good features of their deals and dispel any erroneous perceptions of the costs and defects.<sup>316</sup> Combining these insights, Ayres and Schwartz would implement a "warning box" requiring special disclosure of (only) those terms that are unknown to the consumer and more unfavorable than expected.<sup>317</sup> Idiosyncratic terms enforceable on pain of copyright's statutory damages fit that description.

It bears noting that Ayres and Schwartz contemplate an FTC mandate requiring all mass-market sellers to conduct studies to identify unexpected, unfavorable terms and then provide appropriate warning boxes.<sup>318</sup> Such an

309. See *supra* note 88 (arguing that disclosing too much can be counterproductive). See generally BEN-SHAHAR & SCHNEIDER, *supra* note 64 (exploring the shortcomings of mandated disclosure).

310. See Gibson, *supra* note 66, at 226-28 (advocating "forced salience").

311. See Ayres, *supra* note 280, at 2069 (questioning the effectiveness of these "mental speed bumps").

312. See *id.* at 2076-80 (describing the "train-and-test" approach).

313. Ayres & Schwartz, *supra* note 19, at 552.

314. Recall the millions of hours that would be lost if every Internet user actually read the license for Adobe Flash Player. See *supra* notes 65-69 and accompanying text.

315. Ayres & Schwartz, *supra* note 19, at 555.

316. *Id.* at 554 (arguing "[f]irms have an incentive to cure pessimism because it costs them sales").

317. *Id.* at 553.

318. *Id.* at 580-81.

intervention might be salutary, but nothing so drastic is needed to reform copyright licensing. The key intervention would come from courts holding licensors accountable for making unexpected terms salient as a matter of contract law. Licensors could attempt to meet this burden however they wanted, but it would be their job to convince the court that they succeeded. The Ayres and Schwartz warning box might appeal to copyright owners due to its track record: preliminary research suggest it is effective in communicating a reasonable number of terms.<sup>319</sup>

User-friendly license summaries like these also find precedent in the Creative Commons licenses.<sup>320</sup> All the licenses feature a summary page that describes each operative condition in about a sentence, conveying these terms to the lay user without requiring her to read the full license.<sup>321</sup> These licenses also keep the terms to a manageable number. Each license is a permutation of just four possible terms – the licenses allow free copying and redistribution subject to (1) an attribution requirement (“BY”); (2) a prohibition on commercial use (“NC” for “non-commercial”); (3) a prohibition on the creation of derivative works (“ND” for “no-derivatives”); or (4) a requirement that any derivative works be released under the same license terms (“SA” for “share-alike”).<sup>322</sup> And because the no-derivatives and share-alike provisions are mutually exclusive, no license features more than three of the terms at once.

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319. See generally Joshua Mitts, *How Much Mandatory Disclosure Is Effective?* 47, (SSRN Elec. Library, Working Paper No. 2,404,526, Oct. 4, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404526) (testing the Ayres and Schwartz warning box).

320. Several other distinguishing features might set the Creative Commons licenses apart from the typical consumer license. For starters, they deal with uses like reproduction, distribution, and the creation of derivative works that the public understands to be regulated by copyright; they do not target personal RAM copying. Somewhat counterintuitively, their novelty also reduces their informational burden. Because public licenses like these function differently than a traditional sale or rental, there is less chance that a user will mistakenly call up the wrong schema for understanding the transaction. The standardization, relative simplicity, and widespread use of these licenses also lend themselves to the possibility that users have actually learned their terms. Each of these features offers guidance to licensors who seek to make themselves better understood, but the discussion here focuses specifically on Creative Commons’ presentation of terms.

321. See, e.g., *Attribution 4.0 International (CC BY 4.0)*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by/4.0/> (last visited Apr. 7, 2015); see also *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Apr. 7, 2015) (stating the material terms of each license in four sentences or fewer).

322. See *About the Licenses*, *supra* note 321. This standardization has also facilitated automated indexing and searching of licensed works so that potential licensees can shop for the terms that fit their intended use. See, e.g., *CC Search*, CREATIVE COMMONS, <http://search.creativecommons.org> (last visited Apr. 7, 2015) (showing that search engines and databases including Google Images and the Wikipedia Commons allow users to filter search results on the basis of Creative Commons license permissions).

Other licensors could emulate Creative Commons' user-friendly disclosures. Alternatively, industry associations and regulators could follow the Creative Commons model in generating a menu of model terms or disclosure formats, vetting terms for problems and also capitalizing on the advantages of voluntary standardization.<sup>323</sup> Model forms like these could provide a baseline against which courts could measure consumers' reasonable expectations.<sup>324</sup>

### C. Termination and Prospective Relief

Say that a licensor does not meet the heightened notice burden outlined above. Is that licensor forever consigned to combat breach through contractual actions, no matter how ineffective? Not necessarily. In many cases the licensor will have laid the proper groundwork to terminate the license and obtain prospective relief.

Copyright's statutory damages have driven the foregoing analysis. This Article submits that suits for copyright damages premised on license breach should often fail as a matter of contract law, not only because these damages are so far divorced from actual compensatory damages but also because users are unlikely to have knowingly accepted this risk. Termination remedies, however, would often fare differently because they are both more predictable and less extreme.

Some license types lend themselves especially well to termination. Where cloud software, streaming media, or similar subscription services are involved, the user ought to understand – even without reading the license in any detail – that the licensor has authority to police use of the work and therefore ought to expect that her account can be closed for breach of various terms in the account agreement.<sup>325</sup> The licensor could accordingly invoke its contractual authority to terminate the licensee's access without offending contract principles. In other words, the user ought not be surprised – nor should she have a defense in contract – if Netflix disabled her account after she missed a monthly payment. The user likewise ought not be surprised if Blizzard terminates her ability to play WoW for cheating.

To be sure, the act of termination cannot be entirely divorced from an infringement suit: continued use of a work after termination gives rise to po-

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323. Cf. Gillette, *supra* note 226, at 983-84. The difference between this approach and the mandatory standardization contemplated *supra* at Subsection III.B.2 of this Article is that adopting the voluntary standards would be just one way – not the only way – of establishing copyright enforceability.

324. Cf. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 85 (2014) (arguing that the Consumer Financial Protection Bureau's model language for credit card contracts is valuable because it sets similar baselines in consumer finance).

325. Cf. Ayres & Schwartz, *supra* note 19, at 551 (“[N]ew car buyers know that the warranty does not last forever . . . it is less clear that consumers would expect their mortgage to have a prepayment penalty term or a forum selection clause requiring them to sue in a distant jurisdiction.”).

tential copyright liability. But courts can ensure that any such liability is preceded by adequate notice by requiring termination itself to be overt and giving the licensee a reasonable opportunity to discontinue use.<sup>326</sup> Consider how these limits would protect against overreaching in a counterfactual world where Netflix was highly litigious and indifferent to its reputation. This Netflix might allow delinquent subscribers to continue streaming films after they had missed a payment and then attempt to sue them for watching videos in violation of their licenses. Besides being a disastrous business model, this approach is beyond the pale of what any subscriber expects. Requiring Netflix to provide notice prior to the accrual of copyright liability would protect users from this sort of opportunism.

Termination is also more palatable because, at least in consumer cases, it will often be less disproportionate to the breach than copyright's statutory damages. True, even the standard contractual condition raises concerns of forfeiture so far as the common law is concerned.<sup>327</sup> Insofar as termination sounds in injunctive relief, there are also reasons grounded in copyright that courts ought to be conservative in enforcing these terms.<sup>328</sup> But few would argue that losing access to a \$0.99 MP3 track is as severe as paying \$200, \$750, or more in damages. Termination, moreover, does not raise the same sort of perverse incentives as copyright's statutory damages. Copyright's statutory damages are appealing to opportunists not only for their strong coercive force, but also for their lucre. By contrast, termination remedies that require turning customers away following minor breach do not maximize profits. In many cases the terminated licensee could argue for restitution of

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326. This approach finds grounding in judicial opinions allowing licensees a brief grace period to wind down the use of a work following termination of a license. *See* *Geoscan, Inc. of Tex. v. Geotrace Techs., Inc.*, 226 F.3d 387, 390, 393 (5th Cir. 2000); *Quinn v. City of Detroit*, 23 F. Supp. 2d 741, 750 (E.D. Mich. 1998). Providing notice prior to the accrual of liability is of course also familiar to copyright law as the cornerstone of the Digital Millennium Copyright Act's safe harbor, which shields Internet service providers from liability for their users' content prior to the receipt of takedown notices. *See* 17 U.S.C. § 512(c) (2012); *see also* Tonya M. Evans, "Safe Harbor" for the Innocent Infringer in the Digital Age, 50 WILLAMETTE L. REV. 1, 25 (2013) (proposing the extension of similar safe harbors to users).

327. *See supra* notes 272-76 and accompanying text.

328. *See, e.g.*, Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1045-46 (1990) (considering how private injunctive power raises the specter of censorship); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (explaining how copyright injunctions act as prior restraints on speech). To the extent that firms sought to obtain injunctive relief for violation of conditions, however, courts could guard the public interest in exercising their statutory discretion over whether to award injunctive relief. *See supra* notes 235-36 and accompanying text; *see also* Gomulkiewicz, *supra* note 7, at 134-35 (identifying specific factors courts ought to consider in the licensing context).



the original purchase price, further dampening the licensor's enthusiasm.<sup>329</sup> The licensor might offer a new license following termination – this time making the conditions more salient – but the licensee would be under no obligation to accept.

#### D. Secondary Liability

Secondary liability presents a special puzzle. Ordinarily, secondary infringement does not exist in the absence of direct infringement.<sup>330</sup> This means that a party like MDY could not be liable for vicarious infringement unless Glider users themselves infringed Blizzard's copyright. Under the analysis proposed above, this would mean that MDY's liability would hinge on whether the Glider users received sufficient notice. One could imagine an alternative system where courts inquired instead into whether MDY was aware that Glider ran afoul of a purported condition in Blizzard's license. After all, MDY was a sophisticated party with significant economic interests in the relationship between WoW and its subscribers. Such parties have fewer excuses to be ignorant.

This more liberal approach to secondary liability would present difficult policy questions.<sup>331</sup> Insofar as the courts were concerned with protecting consumers against liability for unwitting infringement, this separate treatment of users and third-party developers might be sufficient to guard the public's interest. But this approach would do nothing to motivate firms to actually disclose their purported conditions to the broader public. It would therefore miss the opportunity to make unexpectedly restrictive terms transparent so that the public could guard against overreaching.<sup>332</sup> Checks like these are

329. The typical remedy for material breach of a copyright agreement is rescission, which seeks to “return the parties to their positions prior to contracting.” *See* 3 NIMMER & NIMMER, *supra* note 13, at § 10.15[A][3]. This remedy often requires the rescinding party to provide restitution – that is, to return whatever consideration it has received minus appropriate offsets for its erstwhile use of the work. *See id.* A full account of the availability and desirability of such repayment is beyond the scope of this Article, but it would seem that allowing liberal access to restitution would deter use of the termination remedy for breach of trivial conditions. *Cf.* Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 YALE L.J. 690 (2011) (arguing that the availability of rescission and restitution remedies may encourage efficient investment in the performance of contractual duties).

330. *See* 3 NIMMER & NIMMER, *supra* note 13, at § 12.04[D][1] (“[T]he rule should generally prevail that third-party liability, as its name implies, may exist only when direct liability, i.e., infringement, is present.” (internal citations omitted)); MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 937 (9th Cir. 2010) (“To establish secondary infringement, Blizzard must first demonstrate direct infringement.”).

331. Recall that the court is empowered to take account of policy considerations in determining whether to treat a term as a condition. *See* RESTATEMENT (SECOND) OF CONTRACTS § 185 (1981).

332. This transparency might not be so critical under a regime of substantive regulation where courts, legislators, or other policymakers policed against overreaching

especially important in light of the potentially anti-competitive motives that animate firms like Blizzard to target third developers like MDY who wish to offer add-on products. Retaining the traditional rule – requiring direct liability as a precondition to secondary liability – seems to better promote transparency and public participation.<sup>333</sup>

### *E. Progress Through Process*

Determined licensors could discharge the obligations of heightened notice easily enough. Through smarter disclosure – or sustained public education campaigns – they could put the public on notice of any number of idiosyncratic conditions. As the terms piled up, the public might simply accept heavily restricted use as the new normal.<sup>334</sup> The skeptic might therefore question what good heightened notice requirements would do in the long term.

The significance of these notice requirements is that they force licensors to proceed in the open. This move has immediate practical consequences: it removes the risk of unwitting infringement via license breach. Greater transparency also paves the way for public watchdogs to become more involved. With easier access to information, consumer advocacy groups could advise the public of the risks associated with a given firm's licenses much like Consumer Reports evaluates car safety. They could also become a site for collective action, rallying public opinion to persuade firms to abandon overreaching terms – or Congress to intervene – even in cases where individuals might not find it worthwhile to protest acting alone. Such action is possible even without heightened disclosures.<sup>335</sup> The Electronic Frontier Foundation, for exam-

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without the need for public involvement. But insofar as this Article seeks to carve out space for the public to judge licenses in the market and in the political process, transparency is key. *See infra* Section V.E.

333. This approach would not leave Blizzard without recourse. A no-bots provision that failed as a license condition would likely be enforceable as a contractual promise. *See generally supra* Section IV.C. To the extent MDY intentionally induced players to breach their contracts, Blizzard would have the foundation for its claim of tortious interference in contract. *See MDY*, 629 F.3d at 955-58 (considering this argument and remanding it for trial). Nothing about this approach, moreover, would require Blizzard to directly sue its customers. So long as it provided users with proper notice of the conditions, it could still direct its litigation efforts exclusively towards MDY. And in any case the notice requirements proposed in this Article would not interfere with the enforcement of terms – whether by direct or third-party action – that were neither supracompensatory nor unexpected to users. *See supra* Section V.A.

334. *Cf.* Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843 (2002) (describing the slow erosion of privacy protections under a “reasonable expectations” standard as people adjust their expectations downward in light of new incursions).

335. *See* BEN-SHAHAR & SCHNEIDER, *supra* note 64, at 186 (arguing that informed intermediaries “can . . . succeed without mandated disclosure”).

ple, intermittently reports on overreaching terms of service through its “Terms Of (Ab)Use” project.<sup>336</sup> But trawling through licenses for overreaching terms is costly, and the current system leaves room for firms to equivocate if they are confronted. Heightened disclosure would reduce the information costs associated with successful consumer advocacy.

This move is also significant in creating opportunities for greater public participation in the making of copyright policy. As it stands, one of the most powerful critiques of copyright licenses is that they act as “private legislation” – that they allow firms to unilaterally create and secure new rights over works they own.<sup>337</sup> And actual copyright legislation suffers from similar ills: many would argue that copyright has historically been dominated by competing industry interest groups, insulated from public scrutiny, and slow in responding to change.<sup>338</sup> The subjection of license conditions to public scrutiny may shift the playing field by providing a more active role for the public, its advocates, and new generations of creators to voice their concerns regarding copyright enforcement.<sup>339</sup> Consider the relative stakes and costs of involvement. While the stakes in copyright legislation are diffuse and depersonalized, the stakes for the typical consumer license are significant and personal given the risk of copyright liability. These are the sorts of stakes that could serve as a site of collective action if only consumers could cut through the complexity of these agreements. A notice-based intervention could clear these information costs and help users identify their concrete interests. Rather than leave the matter entirely to legislators, industry insiders, or courts, this strategy would pave the way for the public to take a position – in the market by accepting or rejecting terms, or in politics by organizing – on the acceptability of novel allocations of rights.<sup>340</sup>

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336. See generally *Terms of (Ab)Use*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/terms-of-abuse> (last visited Apr. 7, 2015).

337. See Winston, *supra* note 104.

338. See Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 212-20 (2013) (synthesizing the scholarship that argues copyright’s expansion results from “the disproportionate influence of corporate rights holders over copyright lawmaking in the past forty years”).

339. See Greg R. Vetter, *Exit and Voice in Free and Open Source Software Licensing: Moderating the Rein Over Software Users*, 85 OR. L. REV. 183, 214 (2006) (arguing that under the right conditions “the license is an institutional mechanism enabling exit and voice”).

340. This approach is informed by other work that emphasizes the importance of public participation in the establishment and interpretation of law. See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7 (2010) (arguing that important legal commitments emerge from deliberation among intersecting social movements, the private sector, and policymakers); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1985 (2003) (defending the courts’ consideration of social movements and popular debate even in matters of constitutional interpretation).

Aside from expanding copyright decision-making to a larger polity, the notice-based approach is also valuable because it creates space for experimentation with novel licensing forms.<sup>341</sup> Worldwide intellectual property harmonization deprives us of natural comparisons between alternative copyright regimes.<sup>342</sup> Private actors nonetheless experiment with alternative arrangements by license and other means of private ordering. These arrangements provide data by which we might begin to assess the costs and benefits of different allocations of rights, laying the groundwork for possible substantive interventions in Congress or the courts. And this data would be even more valuable if it reliably indicated users' assent to novel allocations of rights.

### CONCLUSION

This Article deploys contract law to limit private parties' power to rewrite the Copyright Act. The Article nonetheless examines only one piece of a larger puzzle. Even if courts adopted this proposal, firms could enforce idiosyncratic restrictions many other ways, most notably by enforcing license terms in contract<sup>343</sup> or imposing technological protection measures.<sup>344</sup> Conditions nonetheless demand special attention because they are unique in permitting copyright owners to call down the full force of copyright's statutory damages scheme to penalize activities that do not directly implicate the exclusive rights set forth at Section 106.<sup>345</sup>

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341. For a classic statement of courts' role in advancing policy experimentation, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 673-74 (1981) (arguing that the existence of multiple fora advances the articulation of new norms and the instantiation of new policies while limiting fallout from risky experiments).

342. Cf. Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65 (2015) (addressing this problem in the patent law context).

343. See, e.g., Cahoy, *supra* note 122 (arguing that mere contractual enforcement of licensors' self-serving terms is problematic).

344. See, e.g., Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003) (arguing for a misuse doctrine to regulate overreaching technological protection measures); Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have To Give Notice of Their Use of Technical Protection Measures?*, 6 J. ON TELECOMM. & HIGH TECH. L. 41 (2007) (describing the problems that accrue to consumers for lack of disclosure regarding digital rights management technologies); Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13 (2006) (exploring the problems of technological protection measures for the international copyright regime).

345. Recall that for purposes of copyright even an innocent infringer is liable for at least \$200 in damages. See *supra* Section II.A. An action for circumvention of a technological protection measure, by contrast, permits maximum statutory damages of only \$2500 and vests courts with discretion to award no damages in cases of innocent violation. 17 U.S.C. § 1203(c)(2), (c)(5)(A) (2012). Claims for breach of contract are likewise limited to actual damages. See RESTATEMENT (SECOND) OF

As the foregoing discussion has shown, the urgency of the distinction between enforcing a term in copyright or in contract is a function of the judiciary's lack of discretion in assigning copyright remedies. Some commentators seem to think it is a waste of effort to invest so much energy into drawing the line between conditions and mere promises.<sup>346</sup> Perhaps it is. But copyright permits extremely little flexibility at the remedial stage once a condition is found. Under copyright law as it exists today, even the most trivial breach by the most unwitting infringer requires an award of at least \$200 in damages.<sup>347</sup> Any court that wishes to act on the equities of the case therefore must do so during the interpretive step of deciding whether the term constitutes a valid condition.

Careful attention to the problem of distinguishing conditions from covenants also offers new perspectives on the institutional dynamics of copyright policymaking and enforcement. Courts are competent to consider whether licensors have made adequate disclosures to designate an idiosyncratic term as a condition. Courts are not well suited, however, to answer the kinds of policy questions that arise from attempts to impose a "nexus" or similar substantive limits on the enforcement of license terms. By requiring heightened notice as a prerequisite to the enforcement of conditions, however, the judiciary can play a valuable role in copyright policymaking by exposing license terms to greater scrutiny by other institutional actors and the broader public.

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CONTRACTS § 347 (1981) (explaining contract's compensatory damages scheme); *see also supra* Section IV.A.

346. *See, e.g.*, Gomulkiewicz, *supra* note 7, at 132 (questioning the "emphasis on identifying the absolute definitional boundary between contractual covenants and license conditions").

347. *See supra* Section II.A.