

**Licensing of User-Generated Content:  
How Online Platforms Exploit Users' Copyrighted Works**

By

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# Chapter I “Mostly harmless”: an introduction

## 1. Background

In late 2012, a news story swept the world: Instagram was updating its Terms of Service agreement.

Normally, this would not make headlines. If anything, software contracts are known for being detailed, verbose, onerous, and difficult to understand; reading these agreements has been widely mocked as a waste of time. As far back as 1990, in *Good Omens*, a book by Terry Pratchett and Neil Gaiman, a computer is purchased:

“...along with the standard computer warranty agreement which said that if the machine 1) didn't work, 2) didn't do what the expensive advertisements said, 3) electrocuted the immediate neighborhood, 4) and in fact failed entirely to be inside the expensive box when you opened it, this was expressly, absolutely, implicitly and in no event the fault or responsibility of the manufacturer, that the purchaser should consider himself lucky to be allowed to give his money to the manufacturer, and that any attempt to treat what had just been paid for as the purchaser's own property would result in the attentions of serious men with menacing briefcases and very thin watches.”<sup>1</sup>

This popular image lives on. For instance, Apple's iTunes EULA has been famously ridiculed for stating that users “also agree that [they] will not use these products for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture or production of nuclear, missiles, or chemical or biological weapon”.<sup>2</sup> Some famously claimed that even the lawyers who write these agreements *never read them*; not too long ago, Chief Justice Roberts of the Supreme Court of the United States stated that he doesn't “read the computer jargon that is a condition of accessing websites”.<sup>3</sup>

So why was the world suddenly paying attention to the digital legalese? Because Instagram, having recently been acquired by Facebook for one billion US dollars, now claimed the right to serve user-posted content in advertisements. The updated terms stated:

“To help us deliver interesting paid or sponsored content or promotions, you agree that a business or other entity may pay us to display your username, likeness, photos (along with any associated

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<sup>1</sup> Neil Gaiman and Terry Pratchett, *Good Omens: The Nice and Accurate Prophecies of Agnes Nutter, Witch* (Reprint edition edn, HarperTorch 2006)

<sup>2</sup> 'Licensed Application End User License Agreement' (*Apple Legal*), <<http://www.apple.com/legal/internet-services/itunes/appstore/dev/stdeula/>> accessed 12 September 2017 See also Chris Hoffman, '10 Ridiculous EULA Clauses That You May Have Already Agreed To' (*MUD MakeUseOf*, 2012) <<http://www.makeuseof.com/tag/10-ridiculous-eula-clauses-agreed/>> accessed 19 September 2017

<sup>3</sup> Debra Cassens Weiss, 'Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print' *ABA Journal* <[http://www.abajournal.com/news/article/chief\\_justice\\_roberts\\_admits\\_he\\_doesnt\\_read\\_the\\_computer\\_fine\\_print/](http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/)> accessed 19 September 2017

metadata), and/or actions you take, in connection with paid or sponsored content or promotions, without any compensation to you.”<sup>4</sup>

Taken at its face value, this would give Instagram the right to use each photo ever uploaded for promoting the brands that users never endorsed. A picture of your family dining out could become an ad for a restaurant; a video of your dog could be used to promote a veterinarian across the globe; your beach photo could be used in a “before and after” weight-loss ad. Or worse.

Users revolted, and Instagram seemingly took a hint. Kevin Systrom, Instagram’s co-founder, wrote an apologetic blog post, explaining how “legal documents are easy to misinterpret”, and promising that Instagram would work hard to re-assess its contractual language. He wrote, reassuringly:

“Instagram users own their content and Instagram does not claim any ownership rights over your photos. Nothing about this has changed. We respect that there are creative artists and hobbyists alike that pour their heart into creating beautiful photos, and we respect that your photos are your photos. Period.”<sup>5</sup>

In the same post, Systrom addressed the use of user content in advertisement in quite some depth. Here, the language became a little bit more vague:

“From the start, Instagram was created to become a business. Advertising is one of many ways that Instagram can become a self-sustaining business, but not the only one. Our intention in updating the terms was to communicate that we’d like to experiment with innovative advertising that feels appropriate on Instagram. [...]

The language we proposed also raised question about whether your photos can be part of an advertisement. We do not have plans for anything like this and because of that we’re going to remove the language that raised the question. Our main goal is to avoid things like advertising banners you see in other apps that would hurt the Instagram user experience. Instead, we want to create meaningful ways to help you discover new and interesting accounts and content while building a self-sustaining business at the same time.”<sup>6</sup>

The controversy quickly died down, despite the fact that once published, Instagram’s revised terms were suspiciously close to the initial draft. Clearly written to achieve the same effect as the original, they stated:

“Some of the Service is supported by advertising revenue and may display advertisements and promotions, and you hereby agree that Instagram may place such advertising and promotions on the

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<sup>4</sup> Matthew Lynley, 'Why the Web Is Freaking Out Over Instagram’s New Terms of Service' The Wall Street Journal <<https://blogs.wsj.com/digits/2012/12/18/why-the-web-is-freaking-out-over-instagrams-new-terms-of-service/>> accessed 20 September 2017

<sup>5</sup> Kevin Systrom, 'Thank you, and we’re listening' (*Instagram Blog*, 2012) <<http://blog.instagram.com/post/38252135408/thank-you-and-were-listening>> accessed 19 September 2017

<sup>6</sup> Ibid

Service or on, about, or in conjunction with your Content. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you.”<sup>7</sup>

This left me with burning questions: if Instagram had no *plans* to use user content in advertisements, as claimed in their blog post, why secure the *rights*? And what if their plans were to *change* one day? Perhaps more importantly: was Instagram *alone* in asking users to give them such broad rights over their content – or was this an *established industry practice*? What did this actually *mean* – for users and online platforms alike?

Even brief initial research revealed that similar licensing clauses could be found all over the web – and that Instagram’s was by no means the most sweeping one. Social media giants, like Facebook and LinkedIn, have historically had terms which required users to give them *perpetual and irrevocable* licenses – in other words, licenses that users would not be able to terminate and that would last forever.<sup>8</sup> Virtually all major websites retained the right to use user content commercially, or to prepare any derivative works they saw fit.<sup>9</sup> Simply stated, YouTube could, if the wording of its agreement was to be taken at its face value, legally write and publish series of books based on users’ videos. Websites such as Craigslist – a hugely popular yellow ads page – asked users to give them *exclusive* licenses over their posts, making it technically illegal for users to upload the ad on another webpage – or, for that matter, to e-mail it to a friend.

It became apparent that these clauses could have profound effects, and that they needed to be studied more closely – which is precisely the goal that this dissertation undertakes. Its overarching question can be stated as: *how are user-generated content licenses affected by various devices of national laws, and which implications does this raise for key stakeholders?*

## 2. Research questions and methodology

To be able to answer this question in a systematic manner, it became necessary to organize this dissertation’s structure around the series of narrower research questions.

The first cluster of questions focuses on establishing the factual background of the prevalent licensing practices; after all, if one is to study certain provisions in depth, the logical starting point is to establish the *content* and *prevalence* of such provisions.

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<sup>7</sup> ‘Terms of Use | Instagram Help Center’ <<https://help.instagram.com/478745558852511>> accessed 15 July 2017.

<sup>8</sup> , ‘Facebook Membership May Be Forever’ (*Fox News*, 2009) <<http://www.foxnews.com/story/2009/02/17/facebook-membership-may-be-forever.html>> accessed 19 September 2017

<sup>9</sup> See Chapter 2

*Question cluster 1: What kind of licensing provisions are typically found in user agreements? In which form are they presented to users? To which extent are they standardized?*

Chapter 2 strives to answer these questions by closely examining user agreements offered by major online platform providers, and by engaging in qualitative analysis of their licensing clauses. In an effort to establish relationships and patterns of prevalence, licensing clauses have been inserted into qualitative analysis software and manually coded, allowing advanced querying and visual modelling.

The second cluster of research questions focuses on users' and platform providers' *expectations* and *interests* when entering into a licensing relationship – in an attempt to lay down a framework for assessing the *effects* of licenses of varying scope. In other words – and somewhat simplistically stated – it poses the quintessential “*so what?*” question, exploring why users, platform providers, and ultimately, the society should care about whether licensing clauses are broad or narrow in scope:

*Question cluster 2: Which licensing-relevant interests are typically held by users and platform providers? To which extent are these interests internally codependent? To which extent are they externally converging or diverging? Is there a societal interest in protecting these interests, and is legal intervention an optimal method of ensuring such protection?*

Chapter 3 undertakes to answer these questions by developing a non-exhaustive, non-hierarchical interest map, focusing on the relationships between different interest clusters – and the implications of the said relationships. By employing a stakeholder-based approach, the Chapter provides us with a methodological framework for assessing how varying license scope may affect users, platform providers, and the society at large.

After we have established the content of the licensing clauses, as well as stakeholders' licensing-relevant interests, it is time to turn to the *legal effects* of the individual licensing clauses. But under *which law(s)* should this analysis be carried out – and what does this mean for stakeholders whose interests we've just mapped?

As Chapter 4 will show, user agreements virtually always contain a choice-of-law clause, designating the US law as applicable, and a choice-of-forum clause, stipulating that any potential disputes are to be resolved before the American courts. Does this mean that this dissertation should focus *solely* on American law?

*Question cluster 3: Are American courts solely competent to rule on licensing disputes between Internet users and platform providers due to a presence of a choice-of-forum clause in their favor? Is application of any other law preempted by incorporation of a choice-of-law clause in user agreement?*

To answer these questions, Chapter 4 will look into an area of law known as private international law – which, somewhat simply put, tells us which court(s) have the jurisdiction to hear the case and under which law(s). The Chapter will also qualitatively examine choice-of-law and choice-of-forum clauses and identify prevailing drafting strategies – and their legal consequences. This analysis will primarily be carried out under the harmonized European instruments of private international law, given their significance and prominence; where necessary, parallels with other systems of private international law will be drawn as well. American case law on forum selection clauses will be explored in considerable depth, in an attempt to pinpoint its underlying rationale and assess the degree to which it can be reconciled with the approaches followed in the EU. In addition, given that substantive Norwegian law will be used for analysis in Chapter 5, for the reasons outlined below, we will also present a short analysis of the key instruments of Norwegian private international law, and explore the effect they might have on online content licensing.

Without the goal of developing a detailed analysis of all the possible private international law aspects of user-content licensing, Chapter 4 will trace the outer boundaries of party autonomy in choice of law and forum – as applied to user content licensing relationships. In so doing, it will demonstrate that European users generally (and Norwegian specifically) *can* bring cases before the courts of their home countries, and that American law does not – and cannot – govern the *entirety* of their relationship with platform providers.

But what kind of impact does this have? Even if different laws could govern various aspects of content licensing – do they do so *differently*, and if so, how does this affect individual licenses? These questions form the core of cluster 4:

*Question cluster 4: Are user-content licensing provisions likely to be held to constitute properly formed contracts under US and Norwegian law? How are they likely to be interpreted by these courts? Could they be invalidated as unfair or unreasonable? Are they affected by the mandatory norms of copyright law? If users can prove infringement, what kind of remedies are at their disposal?*

Chapter 5 therefore forms a central part of this dissertation. It closely examines the lifespan of a licensing relationship under American and Norwegian law, the two legal systems which have few things in common. This contrast serves an important purpose: it helps us critically examine the

respective advantages and shortcomings of each approach, in light of the need for balancing users' and platform providers' interests established in Chapter 3.

Why American and Norwegian law?

American law seems like a logical starting point. Agreements we will explore have been drafted with the goal of complying with its mandatory norms; in addition to this, its interpretative tradition has very likely affected the wording and structure of the agreements. On top of this, American law could, in some parts, still be applicable to the relationship between online users and platforms – depending, as we will see, on the norms of private international law. Finally, this legal system contains a vast collection of sources on electronic contracting and copyright licensing, unmatched by most other legal systems around the globe.

For the purposes of addressing the questions raised in this research cluster, it might initially seem tempting to compare American law with the relevant EU/EEA sources. However, as the core questions raised in this chapter pertain to *contract* law, which is not harmonized at EU level, it becomes apparent that it's necessary to perform an analysis at the level of national law. In this thesis, Norwegian law is selected for this role – because of the assumption that it may be applicable to the relationship between users and platform providers when Norwegian courts assume jurisdiction, as well as because its rich contractual mechanisms which often stand in stark contrast with their American counterparts. The choice of Norwegian law is further justified by the fact that Norway is generally recognized as a country offering a high degree of consumer protection, and that some governmental efforts have been specifically targeted at fighting unreasonable contractual terms in digital user agreements.<sup>10</sup> The sheer contrast between American and Norwegian system can prove useful in determining how – or rather, *if* – national laws can affect user content licensing practices. Finally, Norwegian law is both directly and indirectly influenced by European sources, giving us a chance to examine the way that these norms affect users' and platform providers' rights.

Chapter 5 therefore starts the comparison between two system by focusing on contract *formation* questions: it examines whether licensing clauses can be deemed to constitute properly formed contracts under American and Norwegian law. In so doing, it relies on classical doctrines of contract formation found in both systems, and supplements them with any formation-relevant rules on standard contracts and electronic contracting.

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<sup>10</sup> In the context of user content licensing, see, e.g., Norwegian Consumer council's AppFail campaign: <<https://www.forbrukerradet.no/appfail-en/>>, accessed 19 September 2017

At a first glance, this line of discussion may seem almost passé: after all, the problem of reconciling electronic boilerplate contracting with the basic formation doctrines has been explored in vast depth in the scholarly literature; and the courts – both American and Norwegian – have shown their (general) willingness to uphold standardized electronic contracts just like their individually negotiated, analog counterparts. Why focus on contract formation questions, then?

To answer this, one will need to rely on findings of Chapter 2. As that Chapter will establish, typical licenses are infused with several layers of *ambiguity*; simply stated, relying solely on the contractual text, users cannot determine for certain *to whom* they have given a license, of which *scope*, or for *how long* it will last. The question then becomes – is this level of ambiguity high enough for the agreement to be invalidated as improperly formed? The potential repercussions of such finding would be vast, meriting a closer analysis.

In addition to this line of inquiry, Chapter 2's findings on *presentation* of the terms raise several pressing formation questions. As Chapter 5 will show, certain devices of Norwegian law allow judges to deem that individual terms found in the agreement are not binding on users – not because of a successfully invoked enforcement defense, but because of the way that the term was presented at the formation stage and due to its “surprising character”. This makes it possible for the courts to eliminate individual licensing provisions *entirely* from the agreement, ruling that they fail on *formation* grounds. In a similar vein, presentation of the terms plays a large role in American jurisprudence on validity of clickwrap and browsewrap agreements, meriting an inquiry into the adequacy of licensing terms' content and presentation under that law as well.

Chapter 5 then proceeds to examine how licensing clauses are likely to be *interpreted* under American and Norwegian law. In determining the scope of a licensing clause, one cannot simply rely on its wording; legal effect of a contract is always a result of its interaction with the governing laws.<sup>11</sup> The Chapter distinguishes between statutory and non-statutory terms used in licensing clauses, and portrays a contrast between American system's preference for interpreting the terms as closely to their contractual wording as possible, and traditionally broad Norwegian interpretation, relying on the principles of good faith and reasonable expectations. On top of these divergences in general contract law, both legal systems have *copyright-specific* interpretation doctrines, which could lead to vast differences in how the courts would construe the license. In other words, the Chapter shows how statements like “*you give us a right to use and distribute your content as we see fit,*

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<sup>11</sup> See Giuditta Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press 2014)

*subject to your privacy settings*” may be held to mean one thing in the U.S. – and an entirely different thing in Norway.

Another topic explored in Chapter 5 are *enforcement defenses* – various devices of national contract laws which may be used to invalidate contracts with unreasonable or unfair terms. Could users invoke such claims to set aside unfair licensing clauses – and how likely are they to succeed?

Under American law, the Chapter looks into defenses of unconscionability, unreasonableness, and voidness as a matter of public policy; under Norwegian law, it explores the general defense of unreasonableness, as well as the special standards applicable to consumer contracts (supplemented with the relevant EU sources, where applicable). Under both systems, special care is taken to present enforcement defenses in the light of user’s consumer status, as well as in the light of any subject matter-specific (i.e. copyright-specific) considerations. As the Chapter will show, both of these elements may affect how willing the courts would be to invalidate certain licensing terms.

The Chapter then turns to *effects of mandatory copyright norms*, exploring how certain devices of national copyright laws may affect the licensing relationship between users and online platform providers. Under American law, the Chapter examines copyright exceptions and limitations – notably, the fair use defense – as well as different rules on implied licenses, showing that platform providers might, in theory, be completely insulated from any copyright liability, even if they made no attempts to include any licensing clauses in their user agreements. Under Norwegian law, the discussion turns to norms protecting authors’ moral rights, and those prohibiting license further license transfers. All of these devices could, in theory, affect users’ and platform providers’ interests laid down in Chapter 3, and therefore need to be examined.

Chapter 5 wraps up its analysis of legal effects of licensing clauses by turning to *remedies* which users may claim against platform providers. In other words, the Chapter examines what kind of compensation users could expect to receive, should they succeed in proving that platform providers have exceeded the scope of the license given to them. This line of inquiry has rather broad practical importance: after all, the more that users stand to gain from suing platform providers for copyright infringement, the higher the likelihood of such claims being brought is. Conversely, lack of meaningful remedies may negatively affect users’ interests laid down in Chapter 2, even if *proving infringement*, in itself, might not be a difficult task.

It seems crucial, at this point, to stress that the research question cluster tackled in Chapter 5 is *purposefully* designed broadly, and that this inevitably affects the depth of analysis employed in this

Chapter. Namely, each individual research question presented here could be developed into a fully-fledged doctoral thesis of its own, which means that hard choices had to be made regarding the relative depth of inquiry into various devices of national contract and copyright laws. Staying at mid-level of abstraction was therefore a conscious choice, given that Chapter 5's goal is to give us a *systemic overview* of how national laws treat licensing clauses, rather than to present a completely comprehensive assessment of any particular device.

The rationale behind such structural decision becomes more apparent when we reach our next cluster of research questions, which are aimed at assessing how individual devices of American and Norwegian contract law, laid down in Chapter 5, affect users' and platform providers' interests described in Chapter 3.

*Question cluster 5: How are users' and platform providers' interests affected on a large scale by the devices of American and Norwegian copyright and contract law? Which of these devices are best-suited to promote certain interests, and which, if any, can ensure that the proper balance between users' and platform providers' interests is maintained?*

Chapter 6 strives to show how different treatment of *individual* licenses under various national laws, shown in Chapter 5, has profound *systemic* effects on users and platform providers alike; in so doing, it demonstrates that some of the devices of American and Norwegian law might fail to achieve their purported goals, and that some of them might have completely unforeseen consequences. For instance, the Chapter will show that Norwegian practice of restrictive contract interpretation does little to truly empower users to exercise control over their content, and that it does little to restrict platform provider's flexibility interest in practice.

Lastly, this dissertation turns to potential legal reforms; it seeks to identify devices which can be deployed to ensure that users' and platform providers' interests are preserved.

*Question cluster 6: Which legal reforms, if any, are needed in order to secure that both users' and platform providers' interests are protected and preserved? How should these solutions be implemented?*

These questions are addressed in Chapter 7, which proposes a departure from traditional rights-level licensing model, and suggests an introduction of a *sui generis* licensing regime for licensing of user-generated content. Under the proposed system, platform providers would have to secure licensing rights for individual uses (or categories of analogous uses); the system being closely modelled on consent requirements found in European data protection legislation.

### 3. Scope limitations

The scope of this dissertation is limited in several important ways.

First of all, *users* are defined as *individual persons* who use online platforms for *non-commercial* purposes; the dissertation does not explore whether, for instance, music bands that upload their videos to Facebook also give this platform the right to create derivative works. Granted, the very *definition* of a non-commercial purpose is an open one, and the area of uncertainty generated by some borderline scenarios could have significant legal effects in some areas, especially in the field of private international law. Where needed, this dissertation *points* to such uncertainty and its relevance; but for the most part, it assumes that this question is not disputed.

Secondly, users' posting of content is presupposed to be *lawful*, and users are assumed to be *capable of giving a valid license*. In other words, scenarios involving infringing content or lack of power to give a license are not considered in any meaningful depth. Situations in which, for example, users illegally upload copies of Game of Thrones episodes on YouTube bear little relevance for this thesis: one cannot give more rights than one has, limiting the relevance of the infringing content for our analysis.

Thirdly, this is *not* a thesis about *privacy*, *publicity* or *defamation* law. All of these areas of law are certainly relevant for users' online rights, and they are inevitably tightly knit with the core questions presented in this thesis. If online platforms have a copyright license to print out someone's family photos and sell them on the streets – doesn't that raise serious privacy and publicity concerns? If someone's photo is shown promoting an adult website, doesn't that give them a right to bring a defamation claim?

However, this thesis primarily focuses on *copyright licenses*, and while other areas of law are introduced when they directly *affect the scope* of the said license, their broader relationship with copyright law is left unexamined.

This choice is made defensible by the fact that potential tort claims stemming from platform provider's use of user's copyrighted content may or may not be present at all – depending on the facts of a particular case; as well as the fact that these claims vary widely between different jurisdictions.

Consider a hypothetical scenario in which user uploads a photo of his/her dog to a social networking website, which then proceeds to use it in an advertisement, shown only to this person's

'friends'. This scenario is not necessarily problematic from a privacy/data protection standpoint: the image might not contain any personal data, and, given that it has only been shown to the people it's already been 'shared' with, claiming privacy harm might be difficult. In a similar fashion, bringing a right of publicity claim could be difficult – given that the image does not use user's name or likeness; which also reduces a chance of bringing a meaningful defamation claim. Now, if one imagines a scenario with a different fact pattern – where the image in question prominently featured user's face, where it was accompanied by text stating "Single? Lonely? See what your friend thinks of online dating!", and made accessible to anyone on the Internet – the situation might be entirely different. What both of these scenarios have in common, though, is that platform provider's use of content in this fashion could be problematic from a *copyright* perspective – both on an individual level, as it could constitute infringement; and on a systemic level, because it could affect users' rights at large and the functioning of the modern Web; which is the perspective that this dissertation aims to explore.

#### 4. Statement of relevance

Lastly: why are content licenses something that should be written about – and how does this dissertation fit into the current state of legal research?

I believe that the relevance of this research is relatively easy to establish. After all, the numbers speak for themselves: as of writing of this thesis, over 3.7 billion people worldwide had access to the Internet – and over 2 billion of them used Facebook every month.<sup>12</sup> The sheer amount of uploaded content is increasing exponentially as well: in 2013, it was estimated that every single *minute* users uploaded seventy-two hours of new video to YouTube;<sup>13</sup> in November 2014, that estimate came closer to mind-boggling *three hundred hours of video uploaded every minute*.<sup>14</sup> If billions of people around the world are subject to a contractual clauses of uncertain effects – these effects need to be explored.

The pressing need for such research is made even more apparent when one considers the sheer economic significance of user-generated content. As Chapter 3 will show, online platforms are constantly looking for ways to use the content they have in new, profitable ways – be it for data-

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<sup>12</sup> , 'Number of Facebook users worldwide 2008-2017' (*Statista*, <<https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>> accessed 19 September 2017)

<sup>13</sup> Susan Gunelius, 'The Data Explosion in 2014 Minute by Minute - Infographic' ACI <<http://aci.info/2014/07/12/the-data-explosion-in-2014-minute-by-minute-infographic/>>

<sup>14</sup> Mark R. Robertson, '300+ Hours of Video are Uploaded to YouTube Every Minute' Tublar Insights <<http://tubularinsights.com/youtube-300-hours/>> accessed 19 September 2017

mining, machine learning, creation of new digital and analogue products, or incorporation in advertisements. Facebook's own COO explained how advertisements that contain a friend's endorsement are 300% more likely to result in a purchase, adding: "*This is the elusive goal we've been searching for, for a long time; making your customers your marketers.*"<sup>15</sup> In other words – and as explored in-depth in Chapter 3 – evidence points to the fact that we are on the very verge of an impending technological and advertising revolution, and that we have only seen the tip of an iceberg when it comes to the ways that online platforms use user content. We need a solid legal framework for the upcoming mass-scale use of user content – in order to maximize benefits for users and platform providers alike.

We also need to understand the systemic effects of licensing clauses in relation to users, platform providers, and the society. If Instagram retains the right to use your photos and videos in any advertisements they see fit – so what? If the courts are to rule that Google cannot keep copies of your e-mails for data-mining, make derivative works of your YouTube videos, or sell hard-copies of the photos you back-up through Google Photos – whose interests will be harmed?

Relevance of this dissertation is further boosted by the lack of legal sources that have explored this phenomenon in significant depth. It seems like user content licenses have largely escaped the attention of the courts, legislators and legal scholars so far. As we will see, the courts have not actively engaged in an analysis of these clauses to this date, sometimes going so far as to simply brush off their existence as hardly relevant.<sup>16</sup> Scholars writing about user-generated content largely focused on its potential for infringement; some of them even expressly claiming that other problems are unlikely to emerge. In Mariam Awan's words:

"User-authored content is not problematic at all from a copyright perspective. If you take vacation pictures and upload them onto Flickr, or if you broadcast your innermost thoughts through Twitter, you are not infringing any copyright laws."<sup>17</sup>

The papers that *have* acknowledged some of the issues are few and far between; as a rule, they are limited in scope, and lack a broader, systemic discussion which would acknowledge the need to maintain a balance between user's and platform provider's interests.

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<sup>15</sup> *Fraleley v Facebook, Inc.* [2013] 966 FSupp2d 939 (United States District Court, N.D. California, San Francisco Division), Second Amended Class Action Complaint for Damages, document 2011 WL 7663447, paragraph 43, with reference to Sheryl Sandberg, Facebook COO, in "It's All About People", 28 September 2010. Document available at Westlaw Next.

<sup>16</sup> *Cohen v Facebook, Inc.* [2011] 798 FSupp2d 1090 (United States District Court, N.D. California, San Francisco Division), *see* note 54

<sup>17</sup> Mariam Awan, 'The User-Generated Content Exception: Moving Away from a Non-Commercial Requirement' IP OSGOODE <<http://www.iposgoode.ca/2015/11/the-user-generated-content-exception-moving-away-from-a-non-commercial-requirement/>> accessed 13 September 2017

This lack of interest in the topic may, to an extent, be explained by the aforementioned overlaps with other fields of law: quite often, privacy and publicity rights-based discussions will take the spotlight, making the copyright license seem less relevant in comparison. Aside from copyright law, this topic is also tightly linked with numerous other legal areas – contract law, private international law, consumer protection law, administrative law, arbitration law – making it rather difficult to explore in a systematic fashion, and discouraging smaller-scale research inquiries.

An additional explanation for lack of research on the topic may stem from the fact that it seems infinitely more intuitive to imagine scenarios in which *users* are infringers, than those in which *platform providers* infringe user's copyrights. Furthermore, there is an implied notion that online platforms would not do anything that might compromise their reputation – and that this will act as a natural safeguard against any abuses of the rights they might obtain through a broad license; this perception only being boosted through their relentless insistence that “users still own their content”.

It seems as if, at one point, the legal world concluded that copyright licenses that users give to online platforms are nothing more than harmless boilerplate.

I wholeheartedly believe that this assumption must be vigorously challenged.

## Chapter II License to Exploit: Contractual Provisions on User Content Licensing

### 1. Introduction

When users sign up to use online platforms like Instagram, Google, Facebook, LinkedIn, they are usually presented with long agreements defining their rights and obligations. We now know, for a fact, that very few people *actually read* these terms: research has shown that an average user usually takes less than eight seconds to “read” consent dialog boxes.<sup>18</sup> The fact that nothing in the agreement can be changed, even if the user disagrees with a particular term, certainly plays a part in this. So does the fact that the language is often utterly incomprehensible.

These agreements often contain copyright licensing clauses, which give online platform providers certain rights – and this Chapter strives to examine them. Here, we will focus on what the online companies ask of users, rather than on how the legal system responds to that – as that discussion is to follow in the Chapter 5.

The Chapter has three principal lines of inquiry. First, it will map out the licensing terms offered by major online companies. Thirteen user agreements have been selected for this analysis, having either been offered by the most-visited English-speaking websites, or by the most-downloaded English-speaking mobile applications, while offering users an option to actively upload or share their content. The full text of these agreements is available in Annex 1. Secondly, the Chapter examines the extent to which these provisions are standardized, seeking to clarify whether broad licensing terms can be seen as an industry trend. Lastly, the Chapter explores the form in which these agreements are presented to end-users, and explains its potential impact on users’ perception of the terms.

### 2. Comparison of the licensing terms

Goodreads, a popular social network for avid book readers, states in its user agreement:

“By posting any User Content on the Service, you expressly grant, and you represent and warrant that you have a right to grant, to Goodreads a royalty-free, sublicensable, transferable, perpetual, irrevocable, non-exclusive, worldwide license to use, reproduce, modify, publish, list information regarding, edit, translate, distribute, publicly perform, publicly display, and make derivative works of all such User Content and your name, voice, and/or likeness as contained in your User Content, in whole or in part, and in any form, media or technology, whether now known or hereafter developed,

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<sup>18</sup> Rainer Böhme and Stefan Köpsell, *Trained to Accept? A Field Experiment on Consent Dialogs* (ACM 2010)

and to grant and authorize sublicenses of the foregoing for any purpose at the sole discretion of Goodreads.”<sup>19</sup>

Anyone who makes it to the end of that paragraph is amongst a very small and select group. Flesch-Kincaid grade level test, used to measure readability of the text, gives it a score of 47.7 – which means that a person would, on average, need nearly fifty years of formal education in order to be able to understand this paragraph. Gunning Fog index comes up with a similar estimate: it would take 52.09 years of formal education in order to easily understand the text on the first reading. Flesch-Kincaid reading ease test yields similarly discouraging results. The scores on this test usually range between 0 and 100, with higher values indicating higher readability (text which scores 60 to 80 is considered easy to read). Harvard Business Review has a score of 32. Goodreads’ user content license has a score of -52.8.

The fact that user agreements use complicated language is not new. Still, it has a large bearing on the structure of this chapter. If we are to analyze user terms in a meaningful way, we need to break down the text of the license into smaller parts, easier to examine and compare.

To make the reading slightly more convenient, I will refrain from calling the terms offered by the online companies ‘purported contracts’, ‘so-called licenses’, ‘alleged license grants’, and so forth. However, please do not assume that everything that is referred to as a ‘license’, ‘grant’ or ‘contract’ in this chapter actually constitutes one.

## 2.1. How and when is the license granted?

*How*, or better yet, *when* do users grant online companies a copyright license? Does this happen once they click that faithful ‘Sign Up’ button?

Text of the surveyed user agreements reveals that this *might not be the case*. Instead, most of the agreements associate the grant of the license with the act of *uploading* content, rather than with the assent to the user agreement. Google’s licensing clause is illustrative of this:

“When you upload, submit, store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use...”<sup>20</sup>

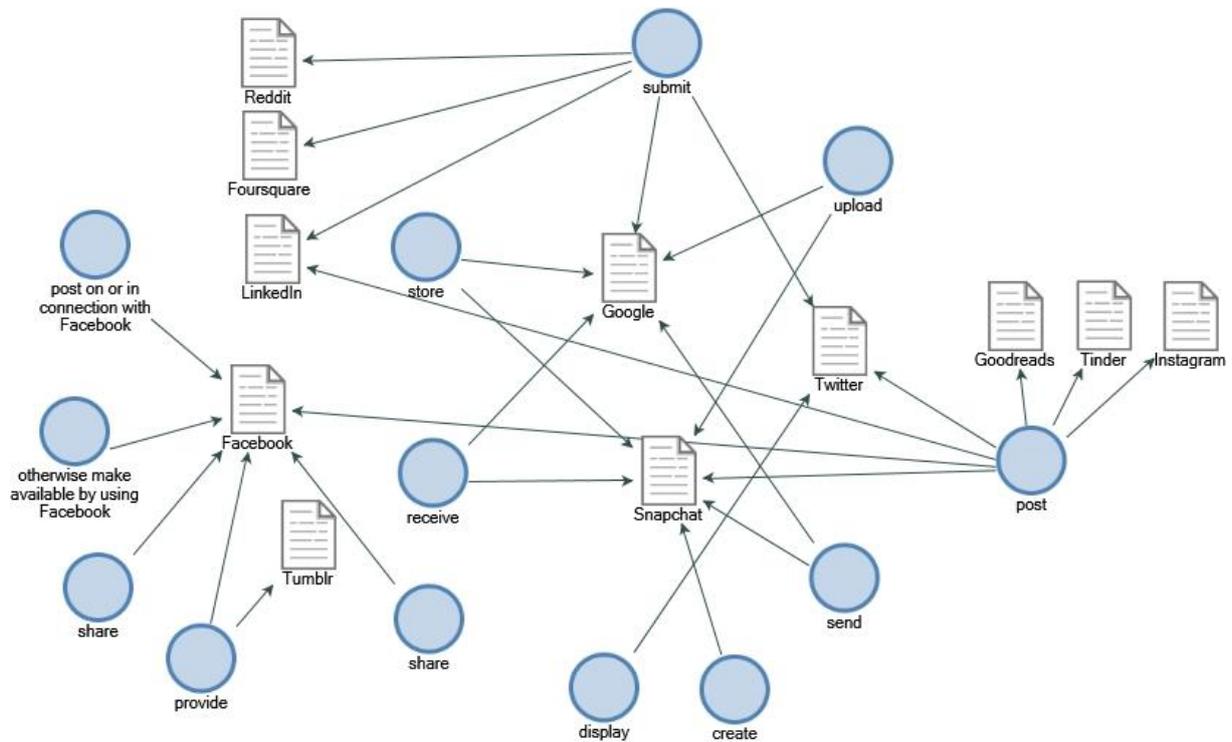
What we can infer is that user agreements simply set the terms of the license, but for actual grant to take place, further action on user’s part is needed.

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<sup>19</sup> ‘Terms of Use’ <<https://www.goodreads.com/about/terms>> accessed 05 May 2016., Goodreads, available at: <<https://www.goodreads.com/about/terms>>

<sup>20</sup> ‘Google Terms of Service – Privacy & Terms – Google’ <<http://www.google.com/intl/en/policies/terms/>> accessed 7 April 2014.

Such terms seems to be prevalent all across the industry. The following graph connects the names of platform providers by the user action which, according to the user agreement, purports to grant them the license over user content:



As we can see, the drafting strategies differ. Some companies, like Google and Snapchat, prefer listing numerous user actions as the ones triggering a license grant. By contrast, other companies tend to rely exclusively on singular, broad terms such as ‘post’ and ‘submit’. Moreover, several agreements contain rather surprising grant mechanisms.

First among these is Facebook. Its user agreement states: “[...] you grant us a [...] license to use any IP content that you post on or in connection with Facebook”.<sup>21</sup> Yet, 94 paragraphs down, in a section titled ‘definitions’, there is a clause which states: “By ‘post’ we mean post on Facebook or otherwise make available by using Facebook.”<sup>22</sup> This section also details that ‘content’ is defined as “anything you or other users post, provide or share using Facebook Services.”<sup>23</sup>

<sup>21</sup> ‘Facebook Statement of Rights and Responsibilities’ <<https://www.facebook.com/legal/terms>> accessed 04 May 2016.

<sup>22</sup> *ibid.*

<sup>23</sup> *Id.*

It remains unclear what ‘posting in connection with Facebook’ mean? Does this include posting things on websites which merely have a button which allows users to share content on Facebook? And how does one make content ‘otherwise available’, unless s/he posts it?

We need to remember that Facebook recently experimented with analyzing user content which was uploaded, but ultimately not shared, in an attempt to get users to post more.<sup>24</sup> (*See* Chapter 3) Is such content subject to this clause? If so, that means that everything that users write – and decide to delete – might in the future be stored somewhere, ready to be data-mined. Already, security researchers are warning that Facebook is gathering far more data on us than what we’re aware of. In the words of Jonathan Zdziarski: “[Facebook] Messenger appears to have more spyware type code in it than I’ve seen in products intended specifically for enterprise surveillance.”<sup>25</sup>

Twitter has similarly perplexing terms: users have given them a license by ‘displaying’ content ‘on or through the Services’. Suppose that I type a tweet, show it to my friend sitting next to me, and decide against sharing it. Have I granted Twitter a license to this content? I have ‘displayed’ content ‘on’ their app, even though I have neither ‘posted’ nor ‘submitted’ it.

Yet the license-granting mechanism which might be the most perplexing is the one found in Snapchat’s user agreement, which states:

“Many of our Services let you create, upload, post, send, receive, and store content. When you do that, you retain whatever ownership rights in that content you had to begin with. But you grant us a license to use that content. [...]”<sup>26</sup>

*Creating* content gives Snapchat a license to use it? The real-world equivalent would be the purchase of a pen which in small print says “BY WRITING WITH THIS PEN YOU GRANT US THE RIGHT TO USE ANY AND ALL CONTENT YOU MAKE”. Hopefully, such term might be ascribed to a drafting oversight, rather than the actual desire to be enforced against end-users.

The fact that the license is granted when the content is uploaded, rather than when user ‘assents’ to an agreement, can also have some bearing on the scope of the license. Namely, it is quite common that the licenses have gone through several revisions. To find out which license applies to which piece of content, users would have to find the version of the user agreement which was in force at the exact time when they uploaded the said content. Only a handful of online providers maintain databases with their earlier user agreements, which obviously leads into considerable legal uncertainty as to the exact scope – or the very existence – of a license.

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<sup>24</sup> Sauvik Das and Adam Kramer, *Self-Censorship on Facebook* (AAAI Press 2013)

<sup>25</sup> Dianne Depra, ‘Report claims Facebook Messenger app packed with spyware’ Tech Times <<http://www.techtimes.com/articles/15981/20140921/report-claims-facebook-messenger-app-packed-with-spyware.htm>> accessed 19 September 2017

<sup>26</sup> ‘Terms of Service • Snapchat’ <<https://www.snapchat.com/terms>> accessed 16 May 2016.

Consider, for example, that Facebook’s user agreement from 2008 did not contain the expansive language such as ‘in connection with Facebook’ or ‘otherwise make available’. This means that the same action on users’ part might not have resulted in a license grant in 2008, but might constitute one in 2017.

## 2.2. To whom is the license granted?

If we assume that the act of uploading content constitutes grant of a copyright license, the next question to ask is – to whom is that license given? The answer might be surprising: platform providers are not the only ones who obtain a license over user-generated content.

This is not immediately obvious from the text of the licenses: in fact, most of them begin in a rather benign way, stating that license is given to the company itself (“Tumblr”), or resort to using the pronoun ‘us’:

“[...] you grant *us* a royalty-free, perpetual, irrevocable, non-exclusive, unrestricted [...]”<sup>27</sup>

Two notable exceptions are Foursquare and Google.

Foursquare asks users to agree that they “also hereby do and shall grant each user of the Site and/or the Service, including Third Party Media, a non-exclusive license [...]”.<sup>28</sup> It would seem that their legal team wants to ensure that each user receives a copyright license over other users’ content. The reasons for this are not immediately obvious to this author.

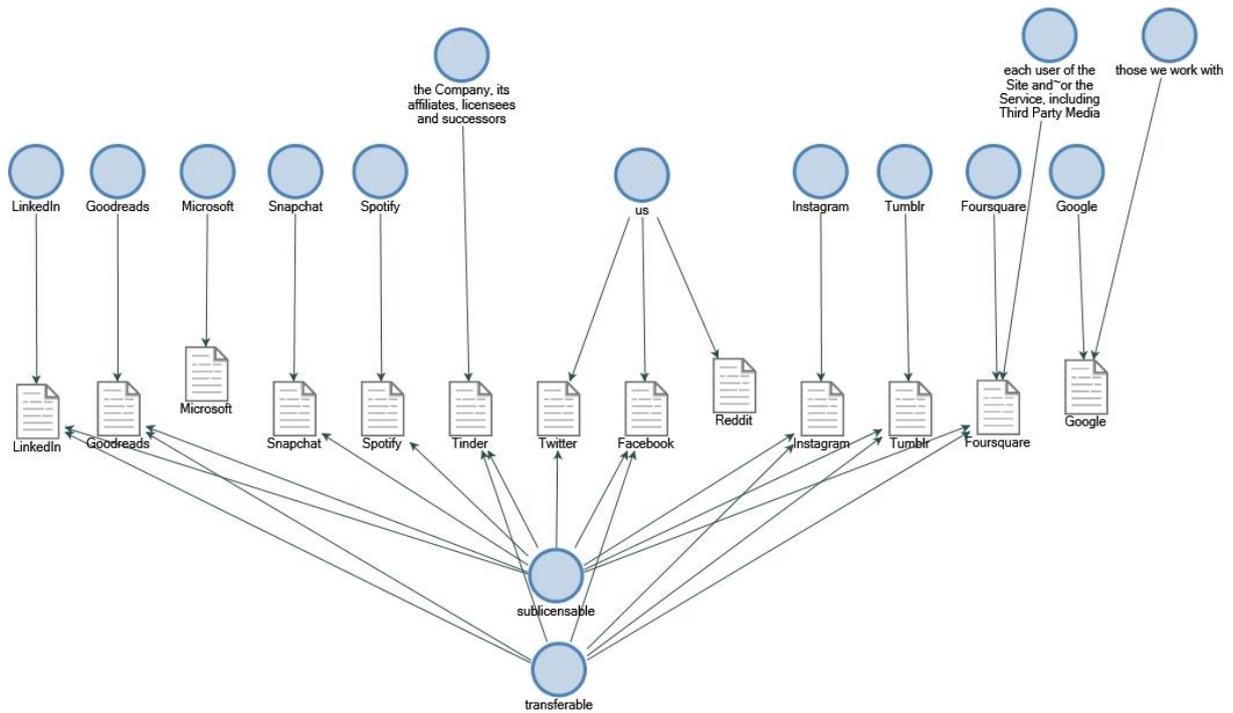
Google says that users give license to Google *and those they work with*. User agreement offers no further guidance on the term, rendering it broad and ambiguous. The term can be construed very expansively, as to include everyone from advertising partners to foreign governments – and users have zero control over this. Google does not maintain a public index of the entities it cooperates with, so that users can make an informed choice. And while users might be comfortable giving *Google* a broad license over their content – they might feel differently about, say, Google extending that license to Donald Trump’s re-election campaign.

But *is* this kind of a term unique to Google? The answer seems to be negative. The wording is different, but most of the major platform providers achieve the exact same thing through their user agreements:

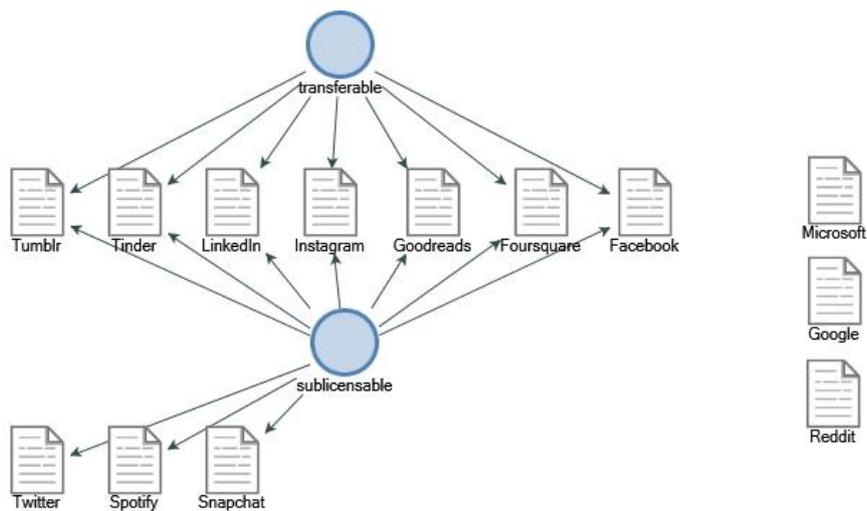
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<sup>27</sup> ‘Reddit.Com: User Agreement’ <<https://www.reddit.com/help/useragreement/>> accessed 4 May 2016. Emphasis added.

<sup>28</sup> ‘Foursquare’ <<https://foursquare.com/legal/terms>> accessed 19 May 2016.



The upper row on this chart illustrates the (pro)nouns which the companies use in the license grant – which, aside from Google’s, tend to sound reasonable enough. But the bottom row shows two legal terms included in the license itself: one of them making the license transferable, and the other one making it sub-licensable. This allows the businesses to either transfer the license entirely onto other entities of their choosing, or to give those entities an additional license in user’s name. More companies tend to use the latter term:



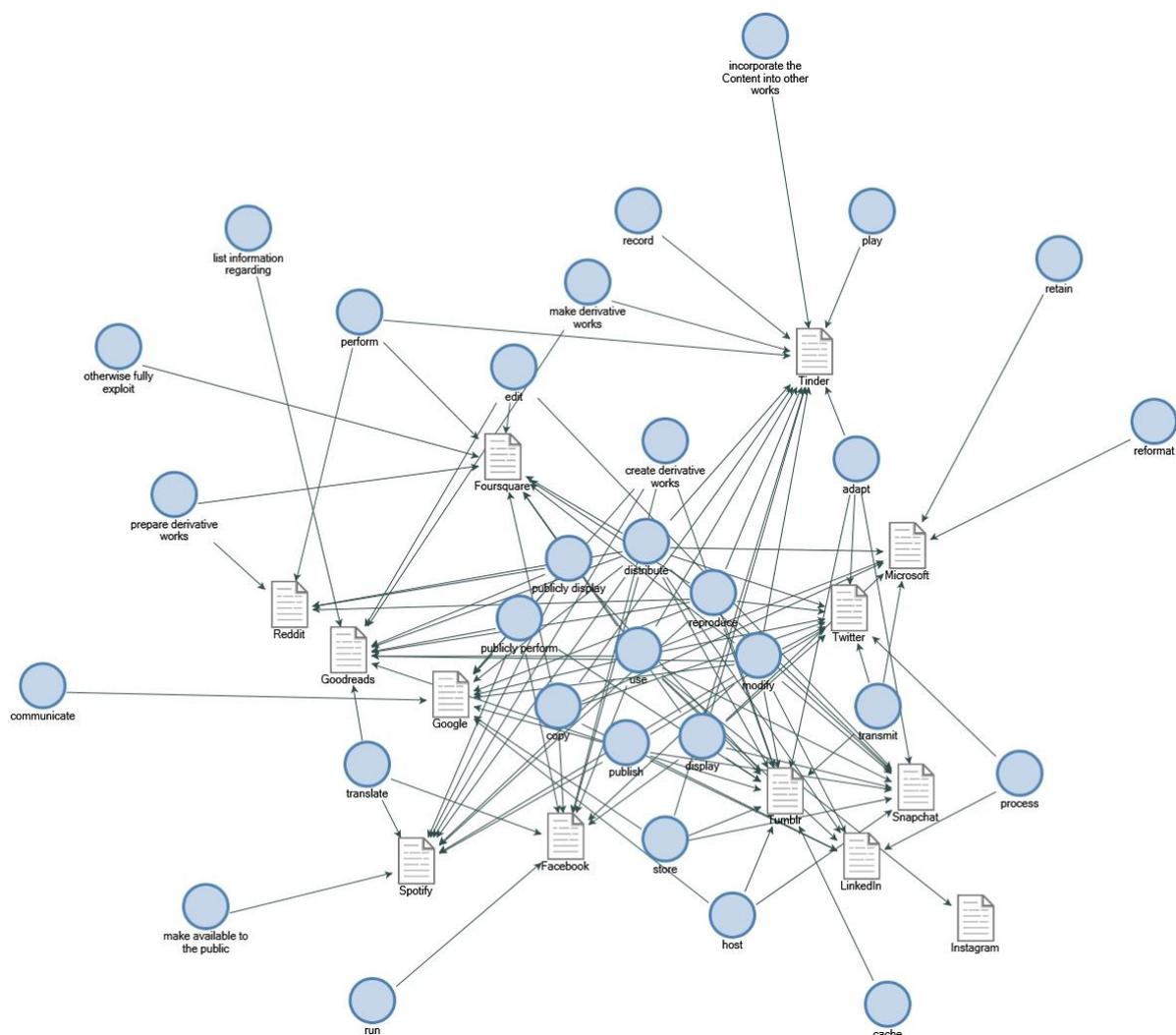
The only two companies which do not include such provisions in user agreements are Microsoft and Reddit. (As mentioned above, Google achieves the same thing through using the ‘and those we work with’ term.)

From user agreements, it does not appear that users have to consent to further transfers/grants of licenses in any way, or for that matter, even be notified of them. This results in a high level of uncertainty for users, rendering them powerless to decide who gets to use their content.

### 2.3. Which rights are given?

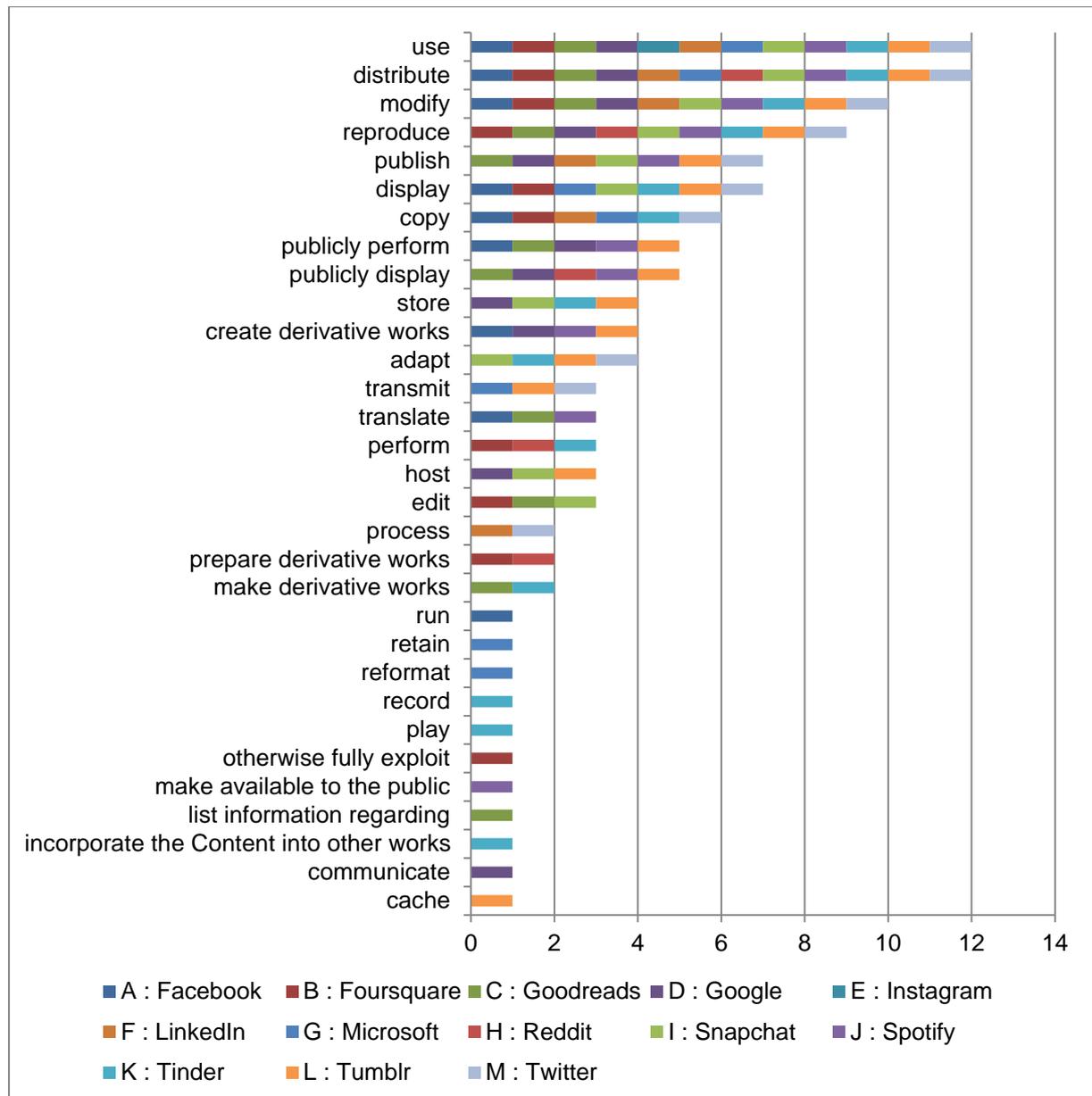
Finally, the central question: *which* rights do the users give to online companies according to the user agreements? The short answer is – *all* of the economic rights associated with copyright.

The initial survey of the terms reveals a broad and seemingly chaotic enumeration of different rights associated with copyright, as well as mentions of different technological processes, which, for some reason, have been included in the text of the license ('reformat', 'play', 'cache', etc.):

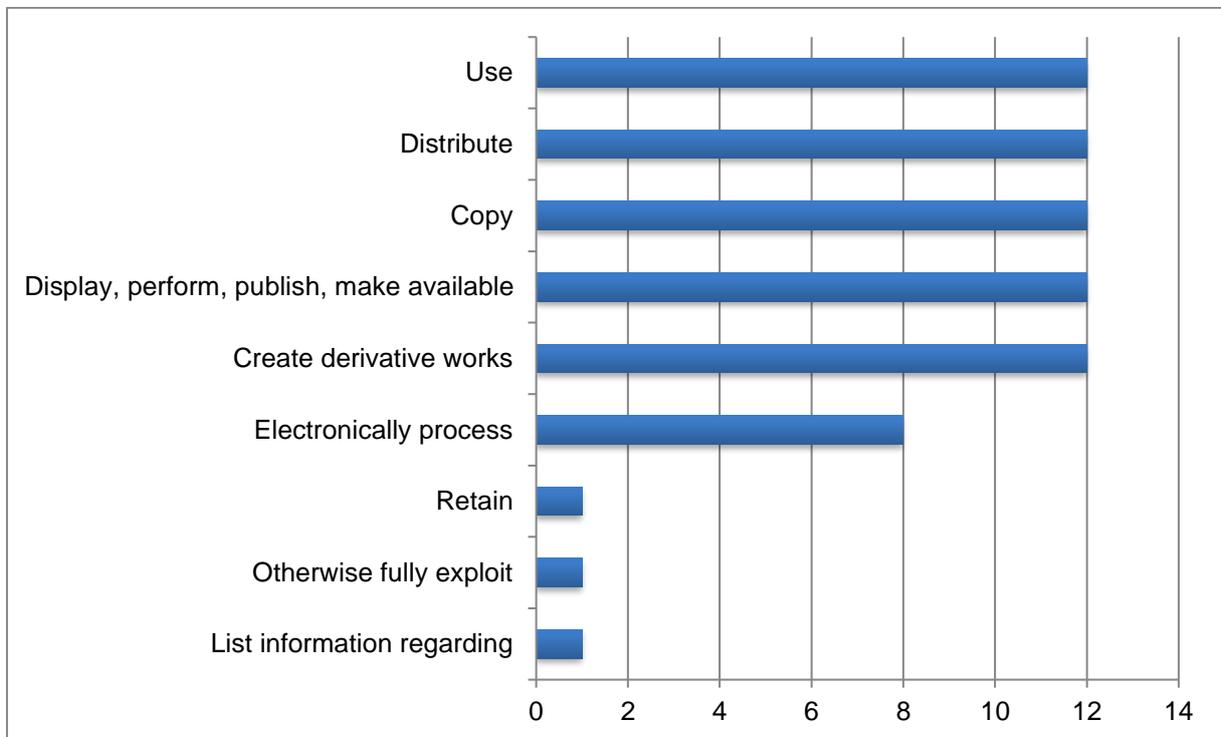
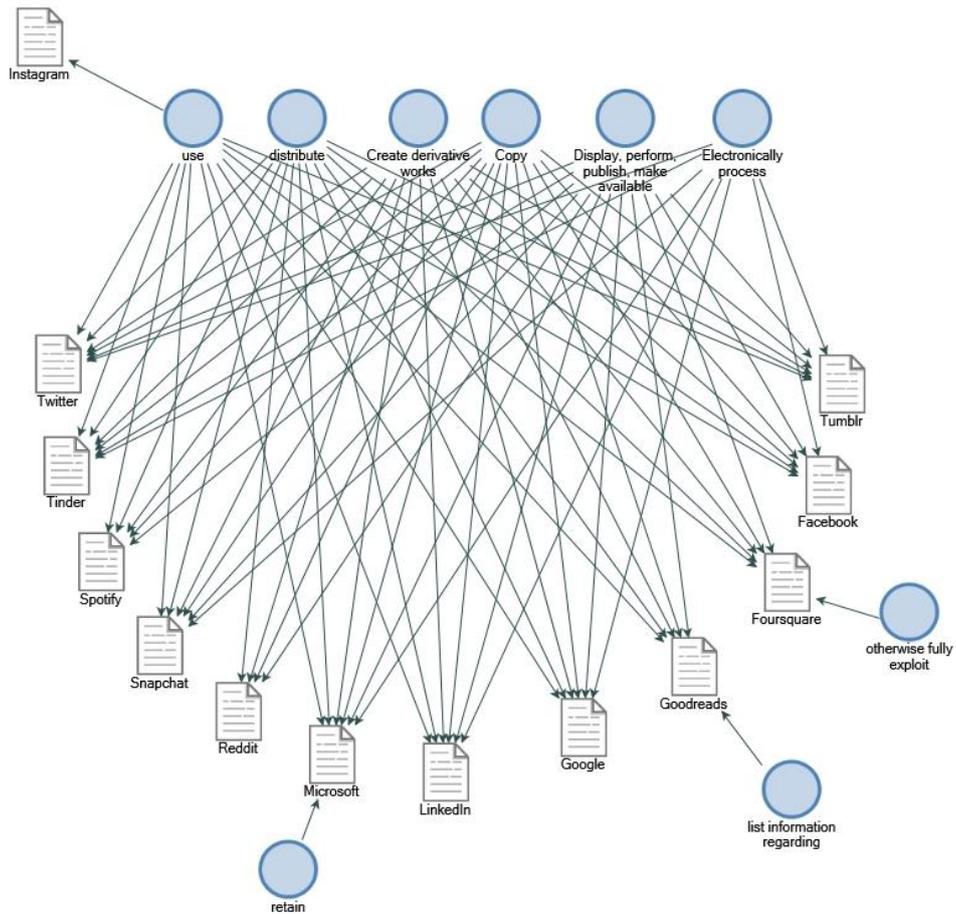


Still, it appears that there is a pattern to be found here. Arranged by their frequency of use, terms of license reveal a rather high degree of standardization when it comes to core terms used in

copyright licensing, but, expectedly, a rather high degree of differentiation in terms which enumerate technological processes which the companies can engage in:



The results remain largely consistent if we group together similar terms – so that those covering the same rights – such as ‘reproduce’ and ‘copy’ – are grouped together into one category. This allows us to more easily identify the terms which are most prevalent, as well as those that stand out from the common licensing practices. Note that technological terms such as ‘transmit’ or ‘cache’ have been grouped as ‘electronically process’:



Consistently, the term which is used most often is – ‘license to use’. In fact, Instagram’s user agreement relies exclusively on this term – and on the surface, so does the Facebook’s. (The

‘definitions’ section of Facebook’s user agreement, way below the license grant, does however specify that “[b]y ‘use’ we mean use, run, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.” There is no similar provision in Instagram’s user agreement.)

‘Right to use’ seems to be intended to be a catch-all term by the drafters; we will discuss the significance of this in the Chapter 5, which will discuss the validity of license grants under the US, Norwegian law. What should be noted at the outset, however, is that this term, in the context of copyright, does not have a clearly defined meaning under any of the mentioned legal systems.

This is followed by the terms which allow companies to make copies of user content, to make derivative works, to distribute it, display, publish, perform and make publicly available. Enumeration of such terms seems to be aimed at covering all the individual economic rights available under different governing laws.

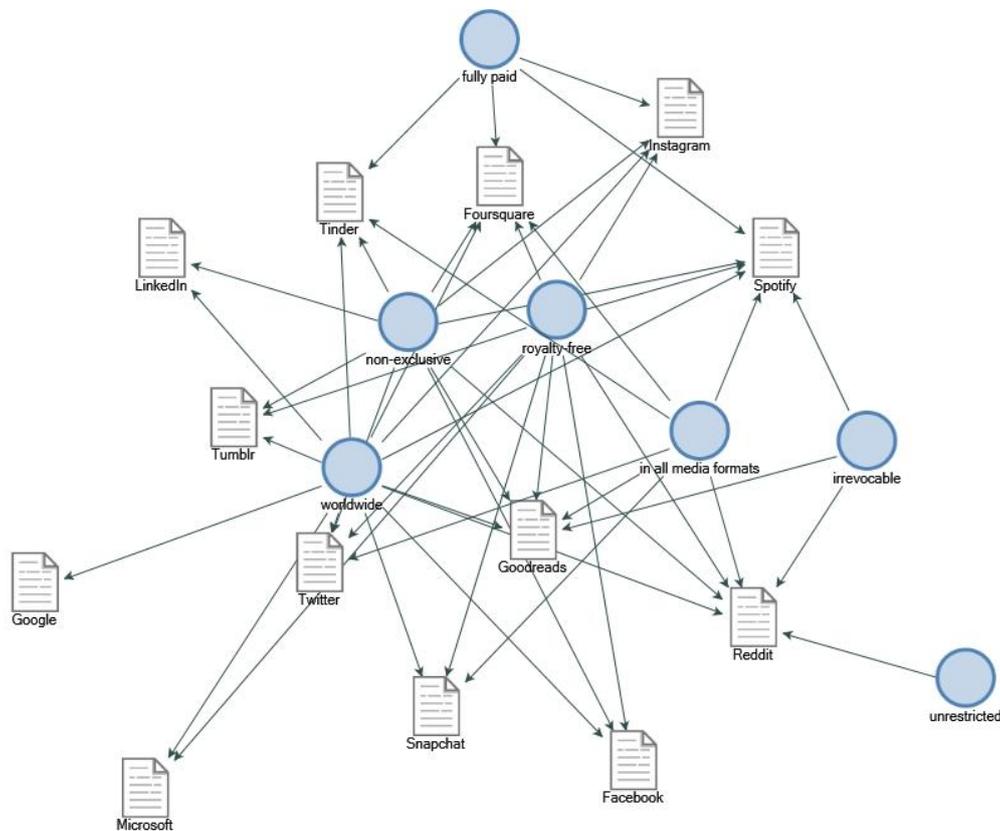
What does this mean for end-users? A broad license may be used to do something as innocent as making a thumbnail out of your profile picture and making it accessible to your friends; or something as unnerving as printing out your chat messages and selling them to the highest bidder. What is important to note is that this decision – what kind of content use the platform providers will engage in – is completely out of user’s hands: by giving an all-encompassing license, they relinquish control over their content. It is now up to the platform providers to decide what they want to do with it – depending on which features they want to introduce. Of course, it is quite likely that they will not *actually* do everything that they *may* do under the license. Yet, this does little to alleviate serious concerns about potential abuses.

Of course, legal systems may impose restrictions on which uses are acceptable, or simply interpret the meaning of the terms differently. As we will see in Chapter 5, however, these restrictions do not tend to be expansive, and are in most cases ill-suited to protect user interests.

We do not find too many terms that stand out – but they tend to be expansive, making it wise to read the user agreements carefully. Microsoft wants a license to retain your content, Goodreads wants to list information regarding it, and Foursquare wants to ‘otherwise fully exploit’ your submissions. Spotify’s user agreement contains a waiver of moral rights, claiming: “Where applicable and permitted under applicable law, you also agree to waive any ‘moral rights’ (or the equivalent under applicable law) such as your right to be identified as the author of any User Content, including Feedback, and your right to object to derogatory treatment of such User Content.” Such terms, while not an industry standard, might significantly impact user rights under the applicable law(s).

#### **2.4. Does license contain any additional terms?**

Licenses often contain terms which stipulate additional conditions of the license grant. In the analyzed agreements, we identify the ones claiming that the license is ‘non-exclusive’, ‘royalty-free’, ‘worldwide’, ‘in any media formats’, ‘fully paid’, ‘irrevocable’ and ‘unrestricted’.



*Royalty-free* and *fully paid* terms would imply that the rights given through the license – which, as the previous section has explored, are very broad – are given for free. In other words, according to the wording of the agreement, users are waiving any remuneration for the use of their works by the platform providers.

As the licenses are *worldwide*, they are not subject to any territorial restrictions: platform providers are allowed to use the content in any country around the world.

By the virtue of the license being *non-exclusive*, users are free to let other entities exploit their content, too. For example, Facebook cannot sue its users because they have uploaded their content on YouTube as well.

*In any media and in all formats, now known or later developed* is a term rather prevalently used in user agreements. It means that the companies are allowed to change the content media without requiring any additional consent from users. Your Tinder photo may be printed out, knitted on a sweater, shown as a hologram.

*Irrevocable* licenses are those that users cannot revoke: if they stop using Spotify, or delete all of their content, for instance, the company would still have the right to store content, make copies of it, display it publically, and so forth. This might be the single most onerous term to be found in licensing agreements. It is currently contained in Spotify's, Reddit's and Goodreads' user agreement.

These additional terms further solidify platform provider's grasp over user content – yet, as we have seen in the previous chapter, they might run counter to many national laws. As such, they should not be taken at their face value, and as with other terms, their validity should be carefully assessed under the applicable law(s).

## **2.5. Is license subject to certain limitations?**

Are there any limits to these licenses? Surely this does not mean that platform providers are claiming they can do *anything they like* with our content? While the wording of the agreements includes some limitations as to the purposes for which the license is granted, such limitations tend to be worded extremely ambiguously, rendering them nearly meaningless in practice.

Consider Google's user agreement, which states: "The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones." Is there a single kind of use which would not fall under the scope of this clause? If Google prints out a billboard poster with your picture and places a Google logo on it, is it not promoting its services? The concept of what constitutes a 'service' may also change over time, and thereby, when online companies introduce new features – and begin 'operating' them – scope of the license expands without control.

The fact that the wording of these restrictions is so broad may have different implications under different legal systems, as we will explore in the next chapter. Namely, in some systems, the courts are trying to enforce contracts primarily based on their text. By contrast, in others, the courts are subjecting contracts to examinations under certain overarching principles, such as reasonableness and good faith. In addition to this, promises to use content only in certain ways are in some systems considered to be contractual covenants, rather than conditions of the license. (See Chapter 5, Part II.)

Yet 'restrictive' provisions which are rendered nearly meaningless due to extremely expansive wording seem to be fairly standard. Snapchat offers a similar one: "This license is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones." However, this limitation pertains only to content submitted to "Services other than Live, Local, and any other crowd-sourced Service" – which require a

“broader license”.<sup>29</sup> Microsoft’s user agreement stipulates that the license is given “to the extent necessary to provide the Services to you and others, to protect you and the Services, and to improve Microsoft products and services.”<sup>30</sup>In a rather similar vein, Tumblr states:

“The rights you grant in this license are for the limited purposes of allowing Tumblr to operate the Services in accordance with their functionality, improve the Services, and develop new Services.”

Potentially the longest explanation of limitations of a licensing clause is found in LinkedIn’s user agreement, which states:

“These rights are limited in the following ways:

- a. You can end this license for specific content by deleting such content from the Services, or generally by closing your account, except (a) to the extent you shared it with others as part of the Service and they copied or stored it and (b) for the reasonable time it takes to remove from backup and other systems.
- b. We will not include your content in advertisements for the products and services of others (including sponsored content) to others without your separate consent. However, we have the right, without compensation to you or others, to serve ads near your content and information, and your comments on sponsored content may be visible as noted in the Privacy Policy.
- c. We will get your consent if we want to give others the right to publish your posts beyond the Service. However, other Members and/or Visitors may access and share your content and information, consistent with your settings and degree of connection with them.
- d. While we may edit and make formatting changes to your content (such as translating it, modifying the size, layout or file type or removing metadata), we will not modify the meaning of your expression.
- e. Because you own your content and information and we only have non-exclusive rights to it, you may choose to make it available to others, including under the terms of a Creative Commons license.”

Yet, even these limitations do not appear very restrictive, upon a closer inspection. Consider the fact that they are prefaced with the following license grant:

“As between you and LinkedIn, you own the content and information that you submit or post to the Services and you are only granting LinkedIn the following non-exclusive license: A worldwide, transferable and sublicensable right to use, copy, modify, distribute, publish, and process, information and content that you provide through our Services, without any further consent, notice and/or compensation to you or others.”

We can strike through several parts that do not appear to be relevant. First, claims of users retaining ownership of content are largely insignificant (see Chapter 5):

“As between you and LinkedIn, ~~you own the content and information that you submit or post to the Services and~~ you are ~~only~~ granting LinkedIn the following non-exclusive license: A worldwide, transferable and sublicensable right to use, copy, modify, distribute, publish, and process, information and content that you provide through our Services, **without any further consent, notice and/or compensation to you or others.**”

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<sup>29</sup> ‘Terms of Service • Snapchat’ (Annex 1).

<sup>30</sup> ‘Microsoft Services Agreement’ <<https://www.microsoft.com/en-us/servicesagreement/>> accessed 19 May 2016.

Secondly, as discussed in section 6 below, the way that license grant may be terminated is rather problematic: why would termination depend on behavior of third parties? (Even if it were perfectly predictable, this clause is not relevant as a limitation. A way to terminate a license is not a restriction of its *scope*.) Thirdly, we can eliminate the language which does not actually present a limitation, but rather *expansion* of a license – “we have the right to serve ads..”. Fourthly, we can eliminate the unnecessary statements that follow from the nature of the license granted – such as the one claiming that users are free to give others a license to use their content. Here is what remains:

“These rights are **limited** in the following ways:

- a. ~~You can end this license for specific content by deleting such content from the Services, or generally by closing your account, except (a) to the extent you shared it with others as part of the Service and they copied or stored it and (b) for the reasonable time it takes to remove from backup and other systems.~~
- b. We will not include your content in advertisements for the products and services of others (including sponsored content) to others without your separate consent. ~~However, we have the right, without compensation to you or others, to serve ads near your content and information, and your comments on sponsored content may be visible as noted in the Privacy Policy.~~
- c. We will get your consent if we want to give others the right to publish your posts beyond the Service. ~~However, other Members and/or Visitors may access and share your content and information, consistent with your settings and degree of connection with them.~~
- d. ~~While we may edit and make formatting changes to your content (such as translating it, modifying the size, layout or file type or removing metadata), we will not modify the meaning of your expression.~~
- e. ~~Because you own your content and information and we only have non-exclusive rights to it, you may choose to make it available to others, including under the terms of a Creative Commons license.”~~

Now, this leaves us with three things: the promise that the meaning of users’ expressions will not be modified, as well as that users’ consent will be obtained if their content is to be used in ads or outside LinkedIn. Yet, we do not know what *constitutes* such “separate” consent: it may be argued that it’s given by accepting LinkedIn’s privacy policy, which states that content will be provided to third parties “as reasonably necessary in order to provide our features and functionality to you”. (In addition, it is not entirely clear what’s the *practical* difference between “including your content in advertisements” and “serving ads *near* your content”. It is also interesting to note that the license text states that LinkedIn has the right to use user content without “*any* further consent”, making it necessary to inquire which of these provisions prevails.)

We also find agreements which expressly disclaim any limitations on the scope of the license. Spotify’s user agreement states that user content may be used “in any manner and by any means”. Foursquare’s user agreement proclaims: “We may use your User Submissions in a number of different ways in connection with the Site, Service and Foursquare’s business as Foursquare may

determine in its sole discretion”. Goodreads wants to use the content “for any purpose at the sole discretion of Goodreads”, as does Reddit – “for any purpose, including commercial purposes”.

## 2.6. Privacy-related limitations

Several major companies point out that the licensing clause is limited by user’s privacy rights and choices – the best example of that being Facebook, which, in the licensing clause, states: “[...] you specifically give us the following permission, subject to your privacy and application settings [...].”

It is worth noting that ‘privacy’ and ‘application settings’ are hyperlinks which take users to the respective control panels – users which are not logged into Facebook cannot access these links – and there is a difference between license being subject to *user settings* and being subject to *Data Policy*. Facebook declined to comment.

Similarly, Instagram provides that content may be used “subject to the Service’s Privacy Policy”, and Twitter explains that “[y]ou agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.” (The text does not link to such additional terms.)

Even if we assume that privacy policies *are* binding, and that they *do* restrict the license grant – which is a rather big assumption to make, as we’ll see in Chapter 5, when discussing conditions and covenants<sup>31</sup> – what do these documents actually say? Their language seems to be rather abstract, making it difficult to see how they would effectively limit the scope of a copyright license.

Consider Facebook’s Data Policy:

“We want our advertising to be as relevant and interesting as the other information you find on our Services. With this in mind, we use all of the information we have about you to show you relevant ads. We do not share information that personally identifies you (personally identifiable information is information like name or email address that can by itself be used to contact you or identifies who you are) with advertising, measurement or analytics partners unless you give us permission. We may provide these partners with information about the reach and effectiveness of their advertising without providing information that personally identifies you, or if we have aggregated the information so that it does not personally identify you.”<sup>32</sup>

On the surface, this seems very reasonable – until we realize that our content may be commercially exploited *even without* any disclosure of personally identifiable information to advertisers.

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<sup>31</sup> See Chapter 5, sections 2.2.2 and 3.2.1.6

<sup>32</sup> ‘Facebook’ <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> accessed 6 May 2016.

Remember the fact that Facebook already uses profile pictures and names in their sponsored materials, and, given that these are not sent to the advertisers, no disclosure of personal facts takes place.

How does that work?

The ad algorithm is purposefully designed as a black box – and has always been one. It is true that Facebook advertisers never receive any personal information about end-users: instead, they select audiences they wish to target with their campaigns. Suppose that you are an advertiser and wish to target people older than 18, of foreign origin, living in Oslo, likely to start using new technologies, and who enjoy fast food. When designing an ad, you would tell Facebook about your targeted demographics – and Facebook would display information only to those users, without telling you who they actually are:

The screenshot displays the Facebook Audience Definition tool. On the left, a map shows a location in Oslo, Norway, with a 30-mile radius. Below the map, targeting filters are set: Age (18 - 65+), Gender (All), and Languages (empty). The 'Detailed Targeting' section is set to 'INCLUDE' and lists several criteria: Behaviors > Digital activities > Console gamers, Technology early adopters; Behaviors > Digital activities > Internet Browser Used > Primary Browser: Chrome; Behaviors > Expats > Expats (All); and More Categories > Facebook Categories > Fast Food. On the right, the 'Audience Definition' summary shows a gauge indicating the audience is defined, and provides the following details: Location: Norway, Oslo (+30 mi) Oslo; Age: 18 - 65+; Placements: News Feed on mobile devices or News Feed on desktop computers; People Who Match: Behaviors: Console gamers, Primary Browser: Chrome, Technology early adopters or Expats (All); Category: Fast Food. The 'Potential Reach' is 660,000 people, and the 'Estimated Daily Reach' is 3,400 - 9,100 people on Facebook out of 480,000.

Note that the same holds true for the use of user content: it does not have to be shared with the advertisers in order to be used in ad campaigns. Imagine purchasing an ad which says “show these people a picture of their friends who like Norwegian drink Solo” – you will not, as an advertiser,

receive such pictures. Instead, *Facebook* will use its algorithms to determine who your close friends are, will see if they have liked Solo's page, will identify pictures in which they are near beverages which resemble Solo, and will show those pictures – to you.

No in-depth explanation of such features is offered to end-users, apart from a short statement on a page buried rather deeply in Facebook's help documentation:

*“Does Facebook use my name or photo in ads?”*

Your profile picture or name may be paired with an ad to show your activity on Facebook (ex: if you follow the Starbucks Page). Keep in mind that your name and profile picture will only appear to the people who have permission to view your Page likes.”<sup>33</sup>

Facebook also includes the following paragraph in its “Statement of Rights and Responsibilities”, under the section “About Advertisements and Other Commercial Content Served or Enhanced by Facebook”:

“Our goal is to deliver advertising and other commercial or sponsored content that is valuable to our users and advertisers. In order to help us do that, you agree to the following:

1. You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.
2. We do not give your content or information to advertisers without your consent.
3. You understand that we may not always identify paid services and communications as such.”

This is essentially a reiteration of Facebook's licensing clause – included after litigation over Facebook's use of profile pictures in its Friend Finder service, as we'll see in the next chapter – which was included to make double-sure that Facebook has the necessary rights to exploit user content in ads. On the surface, it reads very close to the “proper” copyright license – the one included in the same agreement – and suffers from the same (or largely similar) ambiguities. (What is “the right to use”? What is “enhanced” content? What constitutes additional consent?)

There is an additional layer of ambiguity to be found here. “You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us.” Does the last part of the sentence – “in connection with commercial content” – relate to *information* or the *right to use*? In other words, do you give Facebook the right to use 1) name, 2) profile picture, 3) content, 4) information in connection with commercial/sponsored/related content? Or do you, rather, give Facebook the right

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<sup>33</sup> See <https://www.facebook.com/about/ads/>

to use 1) name, 2) profile picture, 3) content, 4) information – and they can use all of these in connection with sponsored content?

In terms of privacy, this section mentions again that Facebook will respect your choices of audience for content – but the same limitations discussed above apply. First, there is content for which users *cannot* select audience: name, gender, username and user ID (account number), profile picture, cover photo and networks are always public on Facebook. Secondly, as noted above, content needs not be shared with new audiences to be commercially exploited.

Similar provision on using user content in ads is found in Google’s Terms of Use, but unlike Facebook, Google seems to limit the scope of the license to profile name, photo and user actions:

“If you have a Google Account, we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1’s, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts. We will respect the choices you make to limit sharing or visibility settings in your Google Account. For example, you can choose your settings so your name and photo do not appear in an ad.”<sup>34</sup>

A rather telling paragraph is to be found in Instagram’s Terms of Use agreement, too. While Instagram stipulates that the user content license is given subject to their Privacy Policy, it also includes the following text, as mentioned in Chapter 1:

“Some of the Service is supported by advertising revenue and may display advertisements and promotions, and you hereby agree that Instagram may place such advertising and promotions on the Service or on, about, or in conjunction with your Content. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you.

You acknowledge that we may not always identify paid services, sponsored content, or commercial communications as such.”

To re-state: advertisements may be posted *on, about or in conjunction with* your content, in a manner, mode and to an extent of their choosing. Also worth remembering: there are no robust privacy settings on Instagram.

Consequently, while privacy policies might seem to be keeping the licensing clauses in check, they have a limited reach. These policies – under the right conditions, and to a certain extent – prevent the companies from *processing user’s personal data in certain ways*. Yet, if the audience remains the same, but the work gets re-purposed (say, your Instagram photo becomes an ad) – proving a violation of privacy rights might become exceedingly difficult.

We must also consider whether the companies might argue that licensing clauses can be considered privacy waivers. Consider Facebook’s Data Policy – “[w]e do not share information that personally

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<sup>34</sup> ‘Google Terms of Service – Privacy & Terms – Google’ (Annex 1).

identifies you [...] unless you give us permission” – versus the licensing clause – “you specifically give us [...] transferable, sub-licensable [...].” Sadly, an in-depth discussion of this topic is outside the scope of this dissertation.

This is not to say that subjecting licensing clauses to privacy policies has no value: in fact, it might be the only thing legally stopping Facebook from printing out users’ posts and selling them on the street. It is also certainly preferable to licenses which state that users’ content may be used for any purpose at all, determined at company’s sole discretion. But dismissing *all* the concerns over user content licensing by stating that users are shielded by the applicable privacy policies is as misguided as it is short-sighted.<sup>35</sup> Privacy policies do very little to stop companies from, say, data-mining users’ texts, placing profile pictures on political ads, or adding donkey ears to a picture of user’s grandmother. Reliance on the privacy policies and legislation as effective guardians of online content therefore comes at user’s own peril.

Some more examples are in order here. Privacy policies do not apply after you die – whereas the content licenses will continue to be valid for as long as the work is copyrighted – in most jurisdictions, 70 years after your death. Privacy policies do not extend to third parties. Your content may be sub-licensed to another entity – and it might have a much more limited privacy policy, or even not have one at all. That farming game that you allowed to access your Facebook profile? It might have received a permission to use all the things you’ve ever posted, subject to its own terms. Furthermore, some courts have held that privacy policies are not legally binding: they have analogized them with employee handbooks of the 1970s, holding them to be unilateral statements, rather than enforceable contracts. For a discussion on these issues, see Chapter 5.

## 2.7. How long does the license last?

Lastly, is there a time limit for the licenses, or can they be terminated by a specific action on user’s part? The drafting practice seems to differ.

First, we identify agreements which state that the license grant is perpetual. Such provisions are found in user agreements offered by Snapchat, Reddit, Spotify and Goodreads. Snapchat’s agreement clarifies that a perpetual license is given only for content submitted to “Live, Local, and any other crowd-sourced Services”.<sup>36</sup> Spotify’s agreement states that in jurisdictions in which perpetual license grants are not allowed under the law, license grant is considered to last for 20 years.<sup>37</sup>

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<sup>35</sup> See also L. Brandimarte, A. Acquisti and G. Loewenstein, 'Misplaced Confidences: Privacy and the Control Paradox' (2013) 4 SAGE Journals 340; Daniel J. Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126 Harv L Rev 1880

<sup>36</sup> 'Terms of Service • Snapchat' (Annex 1).

<sup>37</sup> Spotify ToS, Annex I

We also find agreements which arguably seek a perpetual license, but employ softer wording. Google’s user agreement stipulates:

“This license continues even if you stop using our Services (for example, for a business listing you have added to Google Maps). Some Services may offer you ways to access and remove content that has been provided to that Service.”<sup>38</sup>

Tumblr has a similar provision, alongside an explanation focused on freedom of speech:

“Note also that this license to your Subscriber Content continues even if you stop using the Services, primarily because of the social nature of Content shared through Tumblr’s Services - when you post something publicly, others may choose to comment on it, making your Content part of a social conversation that can’t later be erased without retroactively censoring the speech of others.

(One thing you should consider before posting: When you make something publicly available on the Internet, it becomes practically impossible to take down all copies of it.)”<sup>39</sup>

Facebook’s user agreement states that “this IP License ends when you delete your IP content or your account *unless your content has been shared with others, and they have not deleted it.*”<sup>40</sup> What does this mean? The agreement does not define ‘others’ – which means that the term might include user’s friends, Facebook’s advertising partners, and Facebook itself. (Note the use of the passive voice: there is a difference between “unless your content *has been shared with others*” and “unless *you* have shared your content with others”). Read in conjunction with other terms of the license – giving Facebook the rights over content ‘posted on Facebook’, ‘posted in connection with Facebook’, ‘otherwise made available by using Facebook’, ‘provided’ or ‘shared’ through Facebook Services – there seems to be little that users can do to end the license grant.

This is also partly because Facebook users cannot possibly know whom their content has been shared with. Consider just the fact that the word ‘Facebook’ in user agreement does not necessarily mean – *Facebook*. Agreement makes that clear in the definitions section: “By ‘Facebook’ or ‘Facebook Services’ we mean the features and services we make available, including through (a) our website at [www.facebook.com](http://www.facebook.com) and any other Facebook branded or co-branded websites (including sub-domains, international versions, widgets, and mobile versions); (b) our Platform; (c) social plugins such as the Like button, the Share button and other similar offerings; and (d) other media, brands, products, services, software (such as a toolbar), devices, or networks now existing or later developed.”<sup>41</sup>

In addition, what about the content which has been shared with the public? Facebook, as mentioned above, includes a privacy setting which allows its users to share content with the entire world – not just their friends:

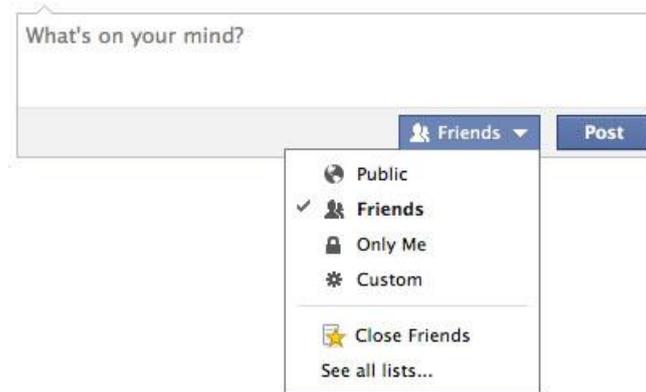
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<sup>38</sup> ‘Google Terms of Service – Privacy & Terms – Google’ (Annex 1).

<sup>39</sup> ‘Tumblr’ <<https://www.tumblr.com/policy/en/terms-of-service>> accessed 21 May 2016.

<sup>40</sup> ‘Facebook Statement of Rights and Responsibilities’ (Annex 1). Emphasis added.

<sup>41</sup> *ibid.*



By default, profile and cover pictures are visible to the public – even those who are not Facebook users – and users cannot change this setting. How would deletion of content – and, consequentially, termination of a license – work in that case?<sup>42</sup>

We find a similar provision in LinkedIn’s user agreement, which provides:

“You can end this license for specific content by deleting such content from the Services, or generally by closing your account, except (a) to the extent you shared it with others as part of the Service and they copied or stored it and (b) for the reasonable time it takes to remove from backup and other systems.”<sup>43</sup>

Why would LinkedIn still have a valid license if *others* have copied and stored user content? And, given that one can never be sure if *someone* out there downloaded his content from the Internet, how does s/he then proceed to terminate *LinkedIn’s* license?

Other surveyed agreements are silent on the topic of license termination. We therefore find no agreement which provides a straightforward, predictable and user-friendly way of terminating license grants.

## 2.8. Are licensing provisions standardized?

If users don’t feel comfortable giving broad licenses over their content to certain companies, can’t they just find the ones which offer better terms? Don’t like Google? Use Bing. Suspicious towards Facebook? Move to Twitter.

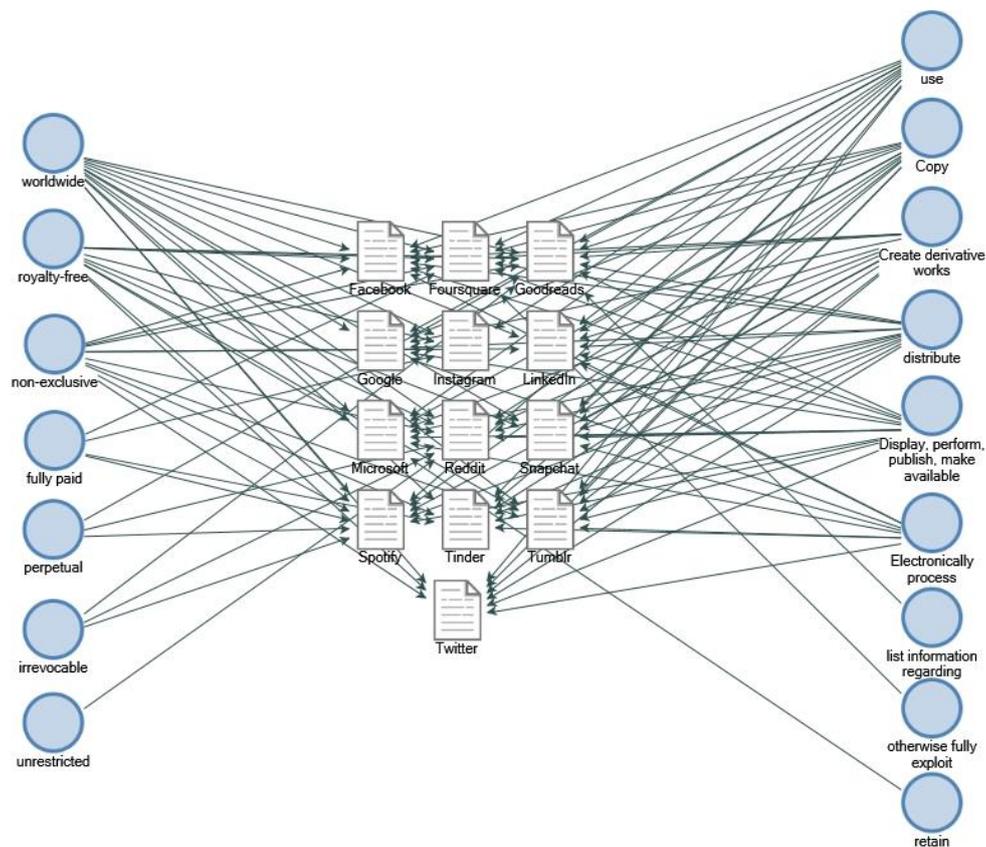
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<sup>42</sup> In Facebook’s words: “Information you share that is always public: Some of the information you give us when you fill out your profile is public, such as your age range, language and country. We also use a part of your profile, called your Public Profile, to help connect you with friends and family. Your Public Profile includes your name, gender, username and user ID (account number), profile picture, cover photo and networks. This info is also public.” <https://www.facebook.com/help/167709519956542>

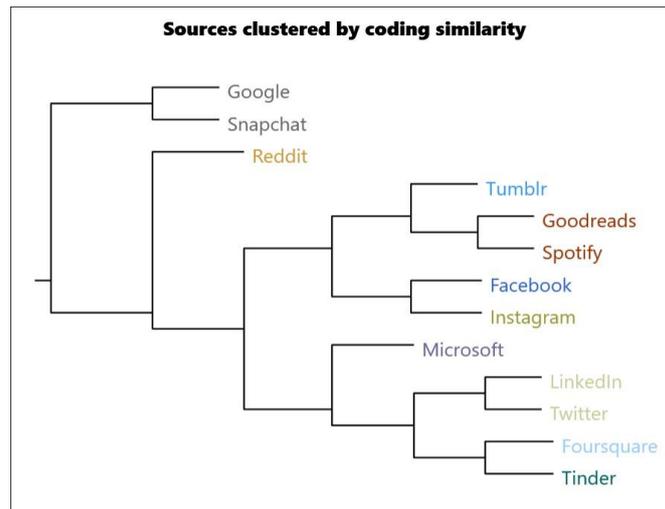
<sup>43</sup> ‘User Agreement | LinkedIn’ <<https://www.linkedin.com/legal/user-agreement>> accessed 13 May 2016.

This is easier said than done. First, because of the way that licensing terms are presented, most users are not even aware of their existence. (See part 3, below.) Secondly, even if they read the text of the license, users might not understand the implications for their content. Thirdly, moving to a new platform requires a tremendous amount of effort on user’s part: they have to download and re-upload all of their content, re-connect with all the friends, spend time customizing the settings... And fourthly: in most cases, they don’t really *have* any alternatives.

Consider the following diagram, illustrating the rights given to platform providers, as well as additional licensing terms included in user agreements:



We see astounding similarities in the core licensing terms – and this is based only on the *explicit* terms of the license. If we factor in additional findings – for example, the fact that Google does not use the term ‘perpetual’ for its license, but says that it continues even after users stop using their services – we are certain to find an even more standardized landscape. *Users are consequently left with no meaningful choice, as inclusion of broad licenses seems to be an established industry standard.*



The relevance of this finding goes beyond implications for individual users. As we will see, in determining whether certain contractual terms are enforceable – especially so in the copyright context – the courts often turn to the prevailing industry practice. An established standard of broad licensing terms might therefore make it very difficult to challenge the validity of licenses in court.

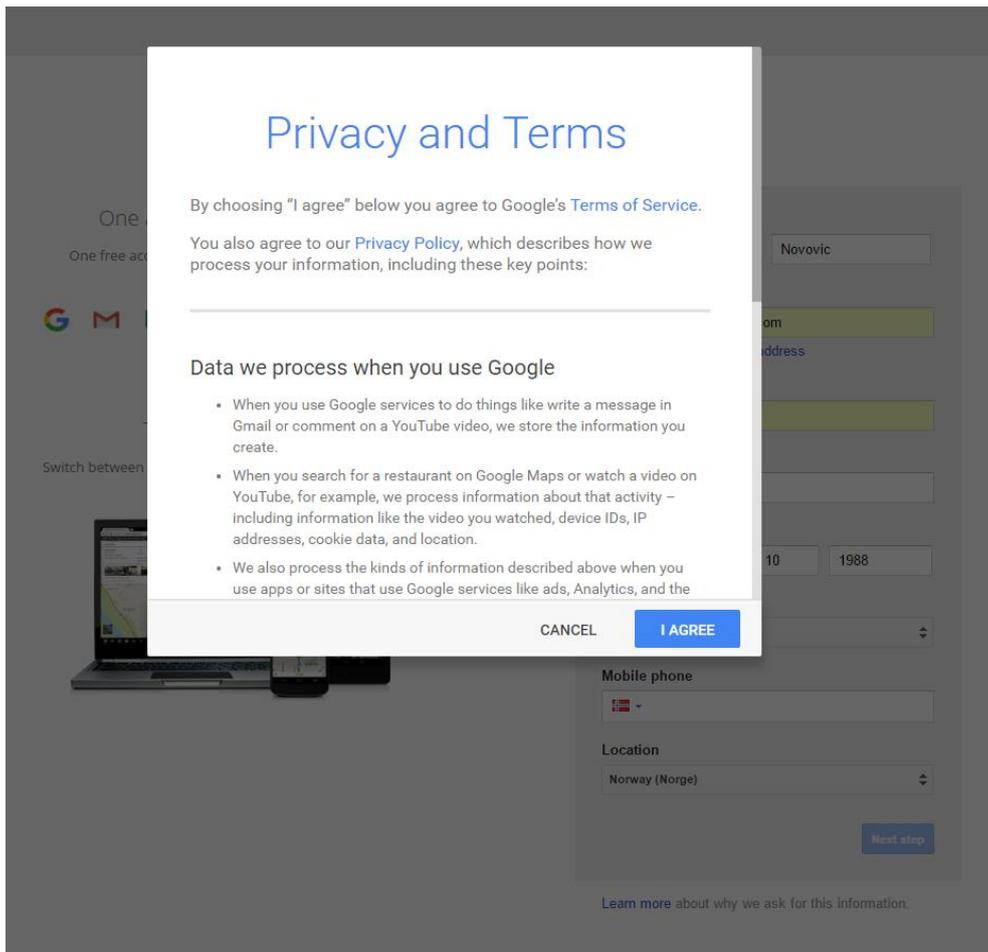
This does not mean that all the licenses are the *same*: as mentioned several times before, differences in certain areas make it necessary to individually read and assess each license. Yes, the licenses are standardized insofar they cast a wide net over user’s economic rights, include expansive modifying terms, contain ambiguous limitations, and offer no clear termination mechanisms. Yet, the extent to which that is true for each element in a *specific* user agreement can vary, warranting a case-by-case examination.

### 3. Comparisons of the form

Contract law has moved away from heavy formalism long time ago. Yet, online, the form of the agreement still matters. As we will explore in the next chapter, courts have reached different conclusions on the validity of the online terms based on how they were presented – making it necessary for us to examine the ways in which users meet with the licensing clauses.

In wrap contract cases, time and again, users have claimed that they have no recollection of assenting to any terms whatsoever. We find that the way in which companies present their terms during the sign-up process might be responsible for this.

Namely, only one of the surveyed companies – Google – uses the standard ‘clickwrap’ dialog to “force” its users to actually view their terms – but even this part contains only an excerpt of the terms. After a prospective user fills out certain information – such as name, desired e-mail address, and birth date – and clicks ‘Next step’ s/he is presented with a pop up window:

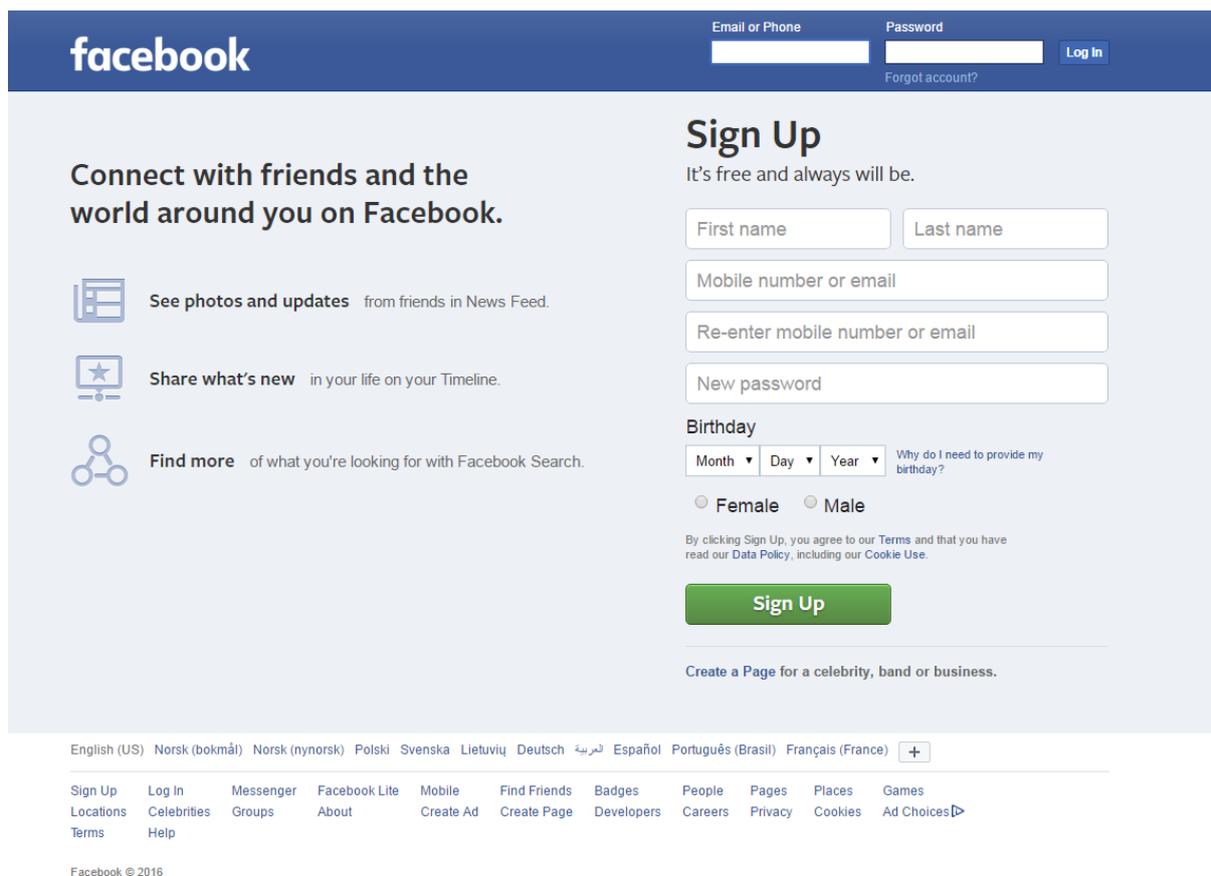


Note that there is no mention of a licensing clause in this excerpt of the terms. To access the license, user would need to click the hyperlink ‘Terms of Service’ and read through 43 paragraphs of legal text until s/he encounters the actual license text.

It is worth mentioning that most users would likely be afraid to actually click the hyperlink, as they might believe that they would have to fill out the registration form again. They have no way of knowing whether the link will redirect them or open in a new window. (It does the latter, but there is no icon which indicates that – such as this one, nowadays commonly used online: [\[icon\]](#).)

Most of the other agreements do not even contain this kind of a notice, making users aware of the terms. Rather, front page of service’s website usually contains a sign-up form, with a big button that allows users to ‘Sign Up’ or ‘Register’, and there is a line of text that states that by clicking that button, users accept the company’s policies.

Consider Facebook’s front page, which doubles as a sign-up screen:



A prospective user is required to fill out a form with his/her personal details and click the ‘Sign up’ button. Beneath this button, there is a text which states: “By clicking Sign Up, you agree to our Terms and that you have read our Data Policy, including our Cookie Use.” ‘Sign up’ caption on the top of the page is written in 27-point font, whereas the text “It’s free and always will be” and the caption on the ‘Sign Up’ button are given in 14.5 point-type. By contrast, the text stating that users are bound by Facebook’s policies is presented in 8.5-point font, and in color which closely resembles the one of website’s background, rendering it barely visible.

This format is prevalent across other platforms as well. It does not resemble a typical ‘clickwrap’ agreement: users are not required to actually see or scroll through the agreement before assenting. But it is not a typical ‘browsewrap’”, either: users are bound by clicking, rather than merely browsing the website.

These agreements – let’s, for the lack of better terminology, call them ‘sign-in-wraps’ – are certainly not designed to foster the actual reading of the terms by the prospective users. Consider a user making his/her online account for the first time – all the excitement, all the impatience! Faced with the prospect of clicking this big green button, which will unlock a whole new world, this user

is unlikely to pay attention to 8.5-points large text, clicking on which might erase all the data s/he has entered, and which s/he likely won't be able to understand, anyway.

Which brings us to the next point: even those who decide to read the agreements might be severely discouraged by their length and complexity. Facebook's Statement of Rights and Responsibilities, combined with their Data use policy, is 6220 words long and has 170 paragraphs. It employs perplexing drafting practices, such as using one term in the body of the text, and then later defining it to include other terms as well ("By 'use' we mean use, run, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.") Converted to a 12-point font, it spans across 13 pages. (By contrast, a standard contract used to sell apartments in Norway, alongside Consumer council's explanatory guide, is 8 pages long.)

Then there is the problem with multi-wrapping.<sup>44</sup>One wrap contract references another, via a hyperlink – and it becomes incorporated by reference. This makes it nearly impossible to “hunt down” all the terms that form a part of the contract. And oftentimes, the way in which these terms are combined may severely impact user's rights.

Form in which we are presented with a contract matters. Imagine if, when signing up for a gym membership or a cell phone plan, you were presented with 13 pages of legal text: it would certainly make you raise an eyebrow. Why does this company need so many waivers? Which rights am I giving away? *Why?* Yet, as authors have noted, wrap contracts eliminate the reading, and in the process, the bad image that comes from including the terms which are too long, broad, or onerous.<sup>45</sup>As Nancy Kim explains:

“When you rent a car, you are typically asked to sign one contract; you are not asked to sign four others that belong to “affiliates,” nor are you asked to fetch the agreements yourself from different filing cabinets. The agreement is typically short, not forty pages long. Even if you are not inclined to read the contract, its length signals the significance of the transaction and the burden which you are accepting as part of that transaction. [...]

In the physical world, customers are typically asked to sign lengthy, multipage contracts only for significant transactions, such as the purchase of a house, or for transactions where the drafting party has a continuing property interest, such as a car rental agreement or a lease agreement. Online, a customer may be deemed to have assented to a thirty-page document simply by visiting a website. An analogy would be stopping to browse at a shop and being asked to sign a lengthy agreement prior to entering. (A more precise analogy to browswraps would be one where you walk into the store and are deemed to have agreed to that agreement simply by setting foot in the door and not immediately exiting.)”<sup>46</sup>

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<sup>44</sup> Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press 2013)

<sup>45</sup> Ibid

<sup>46</sup> Ibid

To make things even more complex, licensing clauses link certain *actions* on user's part to the actual license grant<sup>47</sup> – so that the license is granted when content is uploaded, posted, displayed, created, and so forth. But users are *never* reminded of the legal consequences of these actions. Facebook could, for instance, periodically display a pop-up window when users are about to update their status, asking “Are you sure you want to post this? Remember, we’ll get a worldwide license to use your content after you post it”. Of course, they never do.

This becomes even more significant when we realize that a substantial portion of user content gets uploaded online without users being aware that any uploading is taking place. Consider Google Photos, for instance – Google’s version of a gallery application, primarily used on mobile phones. When users open the app for the first time, it presents them with a series of set-up dialogs. One of these dialogs asks users about the Auto Back Up feature, which, as the name suggests, stores all of the user’s photos in the cloud. The feature is on by default, and most users – likely opening the app for the first time since they bought the phone, excited to see their first photographs – simply click ‘Next’, giving it little second thought.

That’s all it takes. Every photo they take from that moment on gets backed up to Google’s servers – and Google uses it, among other things, to train its computers to recognize objects, things, and in certain countries – people. This information gets correlated with the time and location and which the photo has been taken – and Google gets troves of new data.

Some users might forget that this auto-back up feature is on. Others might be aware of it, and might disagree with the prospects of Google analyzing each and every photo they upload – but the promise of unlimited, free storage might just be too tempting to resist. We have seen the same thing happening when Gmail was introduced for the first time – users were aware that their e-mails were being used to target advertisements, but given the service’s then-revolutionary storage capacity, they flocked to it nevertheless.

Contrast the ease with which we upload content – giving these companies broad copyright licenses – with the difficulty of interpreting the licensing terms or ending the license. This is why the form matters: making clear, unambiguous, prominent statements about the consequences of user’s actions might give those users a chance to think again, to reconsider posting, to stop using a service altogether. On the other hand, using purposefully confusing, virtually unnoticeable text practically guarantees that users will not challenge the terms – or even remember that they exist.

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<sup>47</sup> See part 2.1 above

But it doesn't have to be that way.

Form of the contract often signifies the importance of the underlying transaction: the golden rule is that the more serious the transaction, the higher the form requirements – which is why, for example, a written contract is required in order to sell real estate or to employ someone. In other cases, law requires the consent to be of certain quality: before you can undergo a medical procedure, for instance, you need to give *informed consent*, based on your full understanding of the risks and benefits of the procedure. We have the legal mechanisms to impose heightened requirements on certain contracts; yet, no such requirements apply to (non-exclusive) copyright licensing. You can give someone a full, perpetual, irrevocable right to exploit your e-mails, photos, videos and texts by doing something as mundane as clicking the 'Send' button, taking a video by your phone, or adding a Snapchat filter to your photo.

Because of this – and because form and substance often go hand in hand – we have to rethink the form of the online licensing agreements, as much as we need to rethink their substance.

## Chapter III      **Side effects: diverging interests in user-content licensing**

### **1. Introduction**

We have now established that user content licenses tend to be broadly worded, and that they are often presented to users in a nearly unintelligible manner. The question which we now turn to is – how does this *affect* users and platform providers – and, by extension, the society at large? Which interests are served by the broad licenses; or, on the flip side – where is the harm in such licensing practices?

Such questions cannot be adequately answered in a generalized manner. In order to assess the effects of any legal relationship, I believe, one should first turn to the interests that the parties entering the said relationship have, seen in the light of overarching public policy interests. Such stakeholder interest-based assessment can provide a reliable analytical framework, which can, in turn, be deployed to assess the effects of both drafting practices and corresponding legislative responses.

Suppose, for example, that certain clauses are being routinely inserted into sales agreements. Following stakeholder-based approach, one could define buyer's and seller's inherent interests when entering such agreements – some of which may be converging (e.g. interest in legal certainty), and some of which may be diverging (e.g. economic interests, or interests in party-borne risk minimization). On top of that, one could introduce overriding societal interests, such as promotion of free trade or non-alienability of certain goods. With these interests mapped out, it becomes easier to assess which effects the aforementioned boilerplate clause might have: e.g., does it create a significant imbalance of power on behalf of one party, or does it undermine certain overriding interests? Any proposed changes in the law could then be assessed against the same backdrop, making it easier to ascertain potential positive effects and pitfalls.

### **2. Terminology: stakeholders and interests**

Several terminological clarifications might be required at the outset of this analysis.

The very term '*legal relationship*' is used broadly in the context of this chapter – and it refers to licensing of user-generated content through a standardized agreement that user purportedly consents to when s/he signs up to use an online platform. The goal of this chapter is not to assess legal *status* of such agreements – as this discussion is to follow later; which is why the term 'legal relationship' should not be used as an indication of validity of any licensing terms.

Within the confines of a licensing relationship, this chapter will postulate that there are *stakeholders*, who, in turn, have certain *interests*.

In this thesis, the term ‘*stakeholders*’ is not employed in its narrow legal sense often used in English contract law to describe third persons holding a monetary deposit.<sup>48</sup> Nor is it used within its meaning routinely employed in contemporary company law discussions, where stakeholders are defined as “those groups without whose support, the business would cease to be viable”: such definition would fail to acknowledge that platform providers are stakeholders in licensing deals.<sup>49</sup> Rather, modeled on the approaches followed in organizational theory and project management practices, *stakeholders* are best seen as *individuals and organizations that are actively involved in a legal relationship, those who may exert influence over it, or whose interests may be positively or negatively affected by the said relationship*.<sup>50</sup>

In our case, primary stakeholders would therefore be *users* and *platform providers*. At the same time, we have to acknowledge that there are certain societal interests which may be affected by licensing relationships; this way, *society* can be seen as an active stakeholder as well. If there is a public interest which can be affected by proliferation of broad licensing terms – for example, societal interest in promotion of innovation – then the society logically has a stake to hold.

*Interests* should be construed broadly. Rather than focusing on legal definitions or quantifications of reasonableness, we will resort to a definition of an interest modelled on game theory, broadly defining interests as *desirable outcomes*. In game theory, each player has a goal of maximizing payoffs; here, we will assume that entering a legal relationship, each party (each stakeholder) has a goal of maximizing desirable outcomes (interests). Despite this, we will not assume that parties are always acting rationally towards realizing this goal, that they are aware of all interests they might have, or that they know how to value them appropriately. In other words, when mapping stakeholder interests, we will recognize that certain stakeholders may be suffering from bound rationality, and cannot be treated as fully rational market actors. To that extent, stating that certain stakeholders *have* an interest should not be interpreted as any kind of signal on whether that interest is realistically likely to be recognized or *pursued* by the stakeholder him/her/itself.

### 3. Users

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<sup>48</sup> “Stakeholder, n.: a third person, chosen by two or more persons, to keep in deposit property, the right or possession of which is contested between them and to be delivered to the one who shall establish his right to it. Thus each of them is considered as depositing the whole thing. This distinguishes this contract from that which takes place when two or more tenants in common deposit a thing with a bailee.” from John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law* (Childs & Peterson 1856)

<sup>49</sup> R. Edward Freeman and others, *Stakeholder Theory : The State of the Art* (Cambridge University Press 2010)

<sup>50</sup> The Project Management Institute (ed), *A Guide to the Project Management Body of Knowledge* (2000 edn, Project Management Institute 2000)

The first stakeholder group that we turn to are Internet users entering into licensing agreements. Being mindful that users act both as authors and consumers, we will group their interests into five larger categories: content control interests, foreseeability interests, transparency interest, continued access interest, and economic interests.

### **3.1. Content control interest**

The first cluster of user interests centers around the notion of retaining maximum possible control over one's content. In more specific terms, users have a vested interest in being able to control *the exact modalities* of platform provider's use of their copyrighted content.

The *existence* of this interest is largely uncontroversial. Since Internet users are *authors*, one cannot argue that they have no interest in controlling how their works of authorship are being used. Such an argument would inevitably lead one into questioning the core principles of copyright law – and as such, would remain of dubious practical significance.

Establishing the *source* of this interest cluster is not difficult, either. Looking into copyright theories alone, one could rely on a number of approaches to reach the same conclusion. If one subscribes to property-based theories of intellectual property, then it logically follows that users have an interest in controlling how their property is used, who has access to it, and who receives the “fruits” of its exploitation. If one decides to follow personality-based theories, user's claim for retaining maximum control is put into an even stronger light: the more control that users exercise, the more tightly the “personal bond” between an author and his/her work is retained. In more contemporary theories which build on Kantian philosophy, creation of copyrighted works is described as an ultimate expressive activity; and copyright infringement is perceived as harmful because it amounts to compelled speech. Such theories support retention of maximal control by users as well: one should, in their light, have the ability to control the message contained within his/her expression; and the more control one retains, the greater this ability is. On the flip side, the less control one is able to exercise over own content, the greater the likelihood that the “core message” contained in that content will be “hijacked” for more or less legitimate purposes.

What does user's control interest cluster entail in practice? The answer will inevitably change depending on the type of content, the type of online platform that it is uploaded to, and individual user's preferences. The following list of scenarios in which users have a control interest is therefore not meant to be exhaustive; rather, it is meant to be illustrative of the potential modalities of this interest cluster.

### **3.1.1. Temporal aspects of licensing: when, how, for how long is a license granted**

It is completely logical that a party entering into any contract will have a vested interest in knowing *when and how* the contractual terms are to take effect. This is not any different in user content licensing: users will normally have an interest in knowing from which point onwards their content may be exploited by a platform provider. Is it from the moment that content is created through an app, from the moment it reaches provider's servers, or from a point other users access it?

In a similar vein, one can state that the length of contract's "lifespan" is something that each contractual party has an interest in controlling. In the interest of foreseeability and certainty, one should be able to control *for how long* his/her content may be used by a platform provider. Can user's photographs be used after s/he deletes them from the servers? Can platform providers keep the right to publicly display one's e-mails forever?

From users' perspective, temporal elements of control over content would therefore be best met if users were to be able to set clear and explicit limits on licenses' lifespan, while being fully aware of the precise time points from which the licensing terms are to become binding.

### **3.1.2. Subject-based aspects of licensing: to whom is a license granted**

Users also have an interest in controlling which persons or entities obtain a license to use their content. Giving a license to WhatsApp might not be the same as giving license to Facebook; and giving a license to an online fan fiction site could be radically different than giving it to a data mining company.

The interest in controlling who the licensee is principally stems from two sources: the need to maintain control over the scope of the rights given, as well as control over the content of user's communicative act. First aspect is perhaps better stated in a negative form: if users cannot control who has the right to use their content, it becomes difficult for them to exercise any meaningful control over the scope of such use. The second aspect is rather straightforward: platform provider's business model and overall reputation can influence the core message that an author wishes to convey through his/her work. One and the same image, uploaded on Instagram and on an adult website, conveys a very different message.

From users' perspective, therefore, there is a clear interest in being able to control whom they have given a license to use their content.

### 3.1.3. Rights-based aspect of licensing: scope of a license

Each party entering a contract has an interest in being able to control the scope of rights and obligations that it agrees to transfer or undertake; and in order to maximize payoffs, each party will normally have an interest to transfer as few rights as possible, for as high of a remuneration as possible. The same holds true in licensing of copyrighted content: any licensor will have an interest in being able to control which economic and (where applicable) moral rights it confers onto a licensee; and the fewer rights one transfers, for a higher remuneration, the better-off one is.

Applied to user content licensing, user's interest to control the scope of rights transferred extends both to the questions of *which rights* are transferred and under *which conditions*, limitations or restrictions. Did user give a right to simply make a temporary copy of his/her work, or did s/he give a right to publicly display this work as well? If the right to publicly display the work is granted to a platform provider, is this right conditioned by user's ability to choose the public that the work will be shown to? Does the right to create derivative works involve the right to make substantive editorial changes? Does the user retain the right to be named as an author of the work?

Of course, one cannot ignore the communicative, expressive side of sharing content on online platforms: it inevitably factors into any discussion of the scope of license given. From users' perspective, the interest to control the scope of the license must consequently be balanced with their interest in having continued access to online platform, discussed in section 4 below. From users' standpoint, therefore, the interest for retaining control over the scope of the license will usually be best served if users are capable of giving *as narrow of a license as possible, while still enabling user's communicative activity to proceed unhampered*.

This is potentially best illustrated through an example. When somebody writes a status update on Facebook, s/he has an interest in giving Facebook as few rights as possible – as any licensor does. At the same time, Facebook serves as a communication platform, and users have an interest in being able to communicate their message to their target audience. Consequently, for users, the ideal balance of *controlling* interests is achieved if minimal amount of rights is transferred, and yet, if Facebook can still display their status update in the intended way and to the intended audience.

### 3.1.4. Context-controlling interest

User's controlling interest has one additional dimension: users have an interest in determining the *context* in which their content is shown. For instance, giving social media website right to publicly display someone's profile picture might result in that picture being shared with person's friends,

indexed on that platform's search engine, and so forth. At the same time, the license nominally also gives platform provider the broad right to display the same photo in a completely new context – for example, by offering new services through the same search engine featured on the website (“click here to find convicted felons who live in your vicinity”). User will likely have an interest in photo being shown in the first context – but will also have an interest in ensuring that it does not appear in the latter context.

Theoretical underpinnings of context-controlling interest may be found in labor and personality theories; they are also broadly reflected in author's moral rights, and most explicitly in the right of integrity. As stated in the Berne Convention:

“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”<sup>51</sup>

Context-controlling interests can, following this line of reasoning, be seen as author's line of defense against integrity of his/her work. As explained by Hansman and Santilli:

“[...] Prejudicial display of the work, can harm the artist in a variety of ways. The most direct is simply the subjective personal anguish the artist feels from seeing his work abused, quite apart from—and even in spite of—what anyone else might think about it. Thus, an artist may identify with his works as with his children: prize them for their present character and not want that character changed. Or he may be trying to communicate something to others, whether they want to receive the message or not. Or he may wish to have a personal reputation as the kind of person who creates certain types of works, even if those works are not the most marketable.

For all these reasons, an artist may wish to maintain the integrity of his works after he has sold them, even if that reduces the value of the works to their current owners and to other prospective purchasers. The right of integrity permits an artist to do this”<sup>52</sup>

When it comes to user-generated content, the existence of this interest has implicitly been acknowledged by the courts in some instances. In the case of *Cohen v. Facebook*, discussed in greater depth in Chapter 5, the court reasoned:

“Facebook is correct that the Terms documents make clear that users have no expectation of complete privacy in their names or profile pictures per se, but that is merely consistent with common law and statutory misappropriation law, neither of which protect against disclosure of a person's name or identity, but against particular uses thereof. Presumably Facebook would not argue that its supposed license to use profile pictures ‘in any manner’ would insulate it from defamation claims were it to post the names and pictures of the named plaintiffs on every user's Facebook home page, over a caption reading, ‘The FBI's Most Wanted.’”<sup>53</sup>

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<sup>51</sup> Berne Convention for the Protection of Literary and Artistic Works [1886] Article 6 bis

<sup>52</sup> Henry Hansmann and Marina Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' (1997) 26 J Legal Stud 95

<sup>53</sup> *Cohen v Facebook, Inc.*

What is important to note, however, is that user's context-controlling interest has both wider and more granular scope of application than the right of integrity found in some national copyright laws. Whereas right of integrity protects author's and work's reputation, context-controlling interest also entails the ability to ensure *integrity of one's message*. In other words, users have an interest in controlling how their work is being used and displayed not only as to ensure that no reputational harm to them or their work has ensued; *but also* that their communicative act serves its intended purpose.

One can imagine a wide range of scenarios that illustrate this point. Using one's status update to promote a brand mentioned in it; sending e-mails with user's name and profile picture, encouraging people to join a certain group; featuring someone's video in sponsored content – all of these things are already happening. While they may not be harmful to user's reputation or the integrity of his/her work, they still might *alter the message* that user meant to communicate when the content was originally posted. User's status update or 'like' relating to a certain brand might have been ironic; his/her profile picture might have been made with the goal of promoting interests diametrically opposed to those that promoted content is advancing.

If context-controlling interest, as articulated here, sounds too broad – that is because it is dependent on many external factors. Its modalities of exercise will inevitably vary between different user groups, platform provider types, and content categories – as is the case with any other aspect of content-controlling interest. *Because* the nature of messages conveyed through different channel will differ, interest in protecting the *integrity* of this message through context control will take on different forms. Sometimes this integrity may be jeopardized by little more than unfortunate cropping and placement of content; sometimes the message will be of such a nature – and communicated by such means – that its integrity cannot be easily compromised. User's interests will correspondingly be best-served if they can obtain full insight into the exact modalities of platform providers' use of their content, in as broad of a context as possible.

One can assess that broad conception of context-controlling interest cannot be seen as legitimately based in copyright law: common sense revolts at the idea of giving authors an absolute control over context in which their works are shown. If one recognizes that users of internet platforms have the interest in controlling how their content is, say, placed in relation to other content, what is to stop book authors from claiming that they have an interest in controlling which other books will be placed on a bookshelf next to theirs?

The answer to this dilemma must be sought in the very nature of copyrighted content that is routinely shared on today's Internet platforms. Content which users post is usually filled with author's personal information – and is commonly directed at narrow audiences. This will result in author's increased need to control how content is used – and in public's decreased interest in having access to this content. In other words, *the balance between author's and public interests cannot be the same for non-professional*

*user generated content and for all other categories of works of authorship.* We will come back to this discussion in Chapter 7, after we have assessed how different governing laws affect licensing relationships.

### 3.2. Foreseeability interest

When entering into licensing deals, users have a desire to exercise as much control over their content as possible – but they also have an interest in being able to *foresee* how their content *will or might be used in the future*. This foreseeability interest may be seen as a simple flip side of user’s content-controlling interest: without being able to ascertain which possible uses will emerge in the future, it becomes increasingly difficult to assess the risks involved with giving a license of a certain scope in the present.

User’s foreseeability interest is thus inherently linked with the astonishing, exponential pace at which technological advancements are being made. New ways to exploit user content, to “unlock its value”, are virtually being developed on a daily basis. Platform providers might not know all the ways in which they will be able to exploit user content the moment that it gets uploaded; but by asking users to give them a broad license over this content, they make sure they will have the right to use it in new ways. This way, broad terms allow for “licensing for the future”.

And who knows just what the future might bring?

British television show “Black Mirror” paints a dystopic, yet vivid image of one possibility. Suppose that in some years, advancements in deep learning allow the computers to pass the Turing test – the one determining whether people can detect if they are talking to machines or humans. In other words, suppose that computers get the ability to closely emulate the way that we talk. (They are getting there.) Now, suppose that computers can also learn about own preferences, interests, phrases we use, places we have seen – so that they can emulate specific people. (They are getting there as well.) Finally, imagine that these two things are combined into a service allowing the families of the deceased persons to create an artificial personality simulating their recently passed family member, so that they can ‘talk’ to them, while coping with their loss.

Far-fetched?

Nobody is saying that *this* will happen. But that’s the point: we have no idea what’s on the horizon. From platform provider’s perspective, it makes complete sense to ask for the right to exploit user content in as many ways as possible, for as long as possible. For users, on the other hand, increased foreseeability results in increased control and autonomy. The more specific information users have, the better decisions they can make.

But can this information be realistically provided? Platform providers cannot predict how their technologies can or will develop; any information on future modes of content exploitation given to users would likely be highly speculative. Yet – nothing stops platform providers from re-obtaining consent once new modes of exploitation are devised, thus increasing foreseeability on user’s part.

Differently stated, apart from expecting that platform providers develop uncanny prophetic abilities, user’s foreseeability interests may be well-served if users, instead of granting broad, long-lasting licenses, were asked to grant narrow, use-specific, time-limited licenses. When license is limited in scope and duration in this way, predicting future developments becomes less and less critical.

### 3.3. Transparency interest

Users also have an interest in *transparency* – in being able to determine the *exact ways* in which their content is being used by platform providers. For instance, if a platform provider obtains the right to use user content in commercial ways – did it actually exercise this right? If so, which pieces of user content were used commercially – and how? Has any profit been made?

This interest can be linked to content-controlling interest cluster: after all, one cannot control that which one cannot see. Bentham’s words ring true: “without publicity, all other checks are fruitless; in comparison of publicity, all other checks are of small account”.<sup>54</sup> Full, specific insight into individual uses of their content is a *conditio sine qua non* for user’s control over their content.

Transparency is linked to foreseeability as well. Not only does it allow users to exercise more control over content that they have already uploaded, but it also allows users to make better-informed decisions about the content that they are *yet to upload*. Having full insight into how platform provider treat their already-uploaded content serves an important signaling effect.

Transparency interest may be served in numerous ways. Normally, the more specific information that users are able to obtain on individual uses of their content, the better this interest will be served. In practical terms, this could mean that, from user’s standpoint, there is an interest in having access to records of uses linked with individual pieces of content that they have licensed to platform providers.

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<sup>54</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice*, vol 1 (Hunt and Clarke 1827) page 524

### **3.4. Interest in continued access**

It seems fairly straightforward that users have an interest in being able to maintain continued access to online platforms. This interest explains why users can't simply quit using online platforms – and solve the problem of their overreach that way.

It is vital to remember that these platforms serve an important communicative role: they allow users to reach specific audiences they want to reach, in a (relatively) familiar way. Having to switch a platform is therefore often undesirable: even if platforms offer exactly the same functionalities, differences in user base and feature-learning curve might discourage users from making a switch. This is why a lot of start-up projects within the field of social networking have failed: few people are willing to learn how to operate a new website – especially the one that only few of their friends and acquaintances might be using. Their reasoning is simple: Facebook is familiar – and everyone's on it.

Additionally, maintaining access to online platforms often means maintaining access to one's content – access that might otherwise be jeopardized. Think of years' worth of Facebook status updates or YouTube videos, Snapchat stories and e-mail archives. True, some of that content may be downloaded offline; but lots of content exists in an “online-only” state, where downloading copies is either impractical or outright impossible.

Therefore, from user's standpoint, there is an interest in being able to continue using services offered by online platform providers, both because it facilitates communication, and because it allows them to access their own content.

### **3.5. Economic interests**

Lastly, it can be observed that users have certain economic interests. If users are primarily viewed as authors, it becomes clear that they will have an interest in receiving as high remuneration for use of their content as possible. If they are viewed as consumers, it is equally apparent that they will have an interest in paying as little as possible for use of online communication platforms – or, better stated, that they will have an interest in offering as little in exchange for the continued access as possible. (This holds true whether one provides monetary compensation or personal data in exchange for access.) Observed generally, we can assess that users want to minimize their costs and maximize the income generated by use of their content.

### **3.6. User's interests: a theory of harm**

We have now explored several broad categories of outcomes that users might deem desirable when entering into licensing relationship. We have seen that users might wish to *control* how their content is being used (by whom, for how long, in which ways and in which context), as well as that they might want to know as much as possible about *future uses* of such content. We have assessed that both of these interests require a certain level of *transparency* – easily accessible information pertaining to how content is actually being used by platform providers; and have shown that users have an interest in maintaining *continued access* to online services. We have also remarked that users, as authors and consumers, could have certain *economic* interests, both in terms of minimizing costs and maximizing royalties.

It is crucial to note that these interest clusters are highly interdependent. Without foreseeability and transparency, it is impossible to achieve high levels of control over content. (Once again, one cannot control that which he cannot see or predict.) Without proper economic incentives or control over content, users will lose their interest in maintaining continued access to online platforms. (For instance, if access to an online platform is too expensive, or if user feels like his/her content is being overly exploited.) Without continued access, there is no transparency or control.

Yet, when we started mapping these interests, we claimed that users might not be even able to articulate them, let alone rationally pursue them – so where is the danger in these interests being disregarded? What could go wrong if users were to be deprived of control, foreseeability, and transparency, while being asked to provide increased amounts of personal data and content in exchange for continued access?

In my view, such practices are harmful because they threaten to undermine *the trust* between users and platform providers: the more that users feel that they have relinquished control over their content, the more their trust in platform providers will be undermined.

We have already witnessed increased user concern for how the content they create and upload may be used by the platform providers. Consider the outfall of Instagram’s ToS update discussed in Chapter 1; or a “notice” which several times went “viral” on Facebook, as countless users were sharing a message which typically read:

“[...] I declare that my rights are attached to all my personal data drawings, paintings, photos, video, texts etc. published on my profile and my page. For commercial use of the foregoing my written consent is required at all times.

Those who read this text can do a copy/paste on their Facebook wall. This will allow them to place themselves under the protection of copyright. By this statement, I tell Facebook that it is strictly

forbidden to disclose, copy, distribute, broadcast, or take any other action against me on the basis of this profile and or its content. [...]

The content of my profile contains private information. The violation of my privacy is punishable by law (UCC 1-308 1-308 1-103 and the Rome Statute).”<sup>55</sup>

While the legal analysis offered by this notice leaves a lot to be desired – what does the Rome Statute have to do with user privacy? – we should be focused on the fact that users seem quite afraid that their content will be commercialized without their further consent, and were more than willing to voice their concerns over this.

What would be the consequences of a systemic loss of trust between users and platform providers?

Answering that question is difficult. Once jeopardized, the trust between users and platform providers might be regained over time: the more that people become used to relinquishing control over their content, the easier this loss of control could become to accept. This has already, to a large degree, happened with personal data: people *know* that their most personal information is being used as currency, but they continue using advertising-based online services anyway.

At the same time, loss of trust between users and platform providers could signal the end of participative Web as we know it. Feeling powerless and overly exploited, users may turn to boycotting individual platforms – or they might simply opt to post less content online. In that scenario, lack of control would directly lead into lack of trust, which would lead to less content-sharing, and, possibly, less content creation. *This demonstrates that any system where users’ licensing interests are left disregarded threatens to produce devastating cultural and economic effects: when users post less content, everybody loses.*

## 4. Platform providers

The second stakeholder group that we turn to are platform providers. We will group their interests into four larger categories: legal risk minimization, flexibility, reputation management, and profit-making.

### 4.1. Legal risk minimization

When drafting user-content licensing agreements, platform providers have an interest in minimizing their legal risks. In the context of user-content licensing, this means that they will have

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<sup>55</sup> , 'All Facebook Posts to Be Made Public?' (*Snopes*, 2012) <<http://www.snopes.com/computer/facebook/privacy.asp>> accessed 3 October 2017

an interest in ensuring that they have all the necessary legal rights to operate their services, that they have enough foreseeability – or legal certainty – as to how the content may be used, and that they want to prevent any potential infringement claims brought on by their users.

How is this interest best served?

Among platform providers, there seems to exist a consensus that broadly drafted agreements can be employed in order to secure the necessary rights and prevent infringement claims. In their eyes, the broader and more detailed their user agreements are – the lower the chance to be exposed to any legal risk for misuse of user content.

On its face, this argument does seem tempting. However, as we will explore in the upcoming chapters, such arguments inevitably presuppose that contracts can, on their own, create legal effects which lead to desirable outcomes (in this case, risk minimization). Contracts cannot, however, be read in absolute isolation: one always has to assess their effects under the governing law<sup>56</sup> – and the inclusion of broad licensing terms may, in cases where these terms are so broad as to be rendered unreasonable, actually have a counter effect of *increasing* legal risks. Still, it is important to note that this desire – even if based on false premises – could offer a valuable insight into *why* companies use broad licensing language.

## **4.2. Flexibility interest**

Online platform providers have an interest in being able to use user content in as many ways as possible. The more ways that user content can be used in, the more innovative services and products can be offered to the general public; this also, in turn, increases the scope of the license that platform providers need to obtain from users.

In order to establish the existence of this flexibility interest, we will explore several categories of use of user content which might not be immediately apparent to end-users, but which are becoming increasingly more relevant. We therefore turn, as illustration, to the applications of user-content in deep learning, behavioral research, ad targeting, as well as its direct use in advertisements.

### **4.2.1. Deep learning**

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<sup>56</sup> Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability*

Our world has changed, and most of us have not even noticed. Computers can now tell how you *feel* based on your photo. They can understand the sentences you write – not just pick out keywords, but infer the meaning, at nearly human-level performance. They can *write* descriptions of what they see. They can *learn*.

This is not some distant-future technology we are discussing: this technology is already here, implemented in some of the services we use every day.

Consider Google Vision API – cloud service offered to app developers, sharing parts of the code with Google Photos app described above. Here is how Google describes its capabilities to potential customers (emphasis in the original):

“Google Cloud Vision API enables developers to **understand the content of an image** by encapsulating **powerful machine learning models** in an easy to use REST API. It quickly **classifies images** into thousands of categories (e.g., "sailboat", "lion", "Eiffel Tower"), **detects individual objects and faces within images**, and finds and reads printed words contained within images. You can build metadata on your image catalog, moderate offensive content, or enable new marketing scenarios through image sentiment analysis. **Analyze images uploaded in the request** or integrate with your image storage on Google Cloud Storage.

#### **Insight From Your Images**

Easily **detect broad sets of objects** in your images, from flowers, animals, or transportation to thousands of other object categories commonly found within images. **Vision API improves over time** as new concepts are introduced and accuracy is improved.

#### **Detect Inappropriate Content**

Powered by Google SafeSearch, **easily moderate content** from your crowd sourced images. Vision API enables you to detect different types of inappropriate content from adult to violent content.

#### **Image Sentiment Analysis**

Vision API can **analyze emotional facial attributes** of people in your images, like joy, sorrow, and anger. Combine this with object detection and product logo detection, so you can assess how people feel about your logo.

#### **Extract Text**

Optical Character Recognition (OCR) enables you to **detect text** within your images, along with **automatic language identification**. Vision API supports a broad set of languages.”<sup>57</sup>

And there’s a testimonial, too:

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<sup>57</sup> ‘Vision API - Image Content Analysis’ (*Google Developers*) <<https://cloud.google.com/vision/>> accessed 11 July 2016.

“We have drones that take thousands of photos per flight. We find that Google Cloud Vision API is the best way to turn those huge number of photos, automatically produced, into meaningful insight.’ — **Tomoaki Kobayakawa** General Manager, Aerosense Inc.”<sup>58</sup>

Image labeling? OCR? Sentiment analysis? Surely the cost of such services must be prohibitive? No. Google is offering access to Vision API for free – for up to 1000 analyzed images per month.

Deep learning offers us possibilities which are amazing – to the point of disbelief. It has brought our medical science to a brink of revolution: computers are now getting better at recognizing cancer cells than trained oncologists, and are even giving us new medical insights, completely on their own. They are learning how to drive cars, how to help us communicate with each other in foreign languages, how to understand our tastes in music, fashion, film, literature. Our predictive keyboards can learn how we speak to each of our friends, which phrases we use at which time, which slang or jargon words we rely on – and can start predicting what we are about to say with astonishing accuracy. The possibilities are endless.

But where does the user content licensing come into play? Simply put: without user content to process, there would be no deep learning. This is because of the inner workings of deep-learning technologies: you can’t really tell the computer how to find a cat in an image – it needs to learn a concept of a ‘cat’ on its own. As MIT experts explain:

“Several artificial intelligence projects have sought to hard-code knowledge about the world in formal languages. A computer can reason about statements in these formal languages automatically using logical inference rules. This is known as the knowledge base approach to artificial intelligence. None of these projects has led to a major success.

One of the most famous such projects is Cyc. Cyc is an inference engine and a database of statements in a language called CycL. These statements are entered by a staff of human supervisors. It is an unwieldy process. People struggle to devise formal rules with enough complexity to accurately describe the world. For example, Cyc failed to understand a story about a person named Fred shaving in the morning. Its inference engine detected an inconsistency in the story: it knew that people do not have electrical parts, but because Fred was holding an electric razor, it believed the entity “FredWhileShaving” contained electrical parts. It therefore asked whether Fred was still a person while he was shaving. The difficulties faced by systems relying on hard-coded knowledge suggest that AI systems need the ability to acquire their own knowledge, by extracting patterns from raw data.”<sup>59</sup>

So computers need raw data to learn from. And this raw data is what today’s online platform providers have in abundance – its availability being the very reason why deep learning is possible nowadays, and was a distant dream only a decade ago:

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<sup>58</sup> *ibid.*

<sup>59</sup> ‘Deep Learning’ <<http://www.deeplearningbook.org/>> accessed 11 July 2016.

“One may wonder why deep learning has only recently become recognized as a crucial technology though the first experiments with artificial neural networks were conducted in the 1950s. Deep learning has been successfully used in commercial applications since the 1990s, but was often regarded as being more of an art than a technology and something that only an expert could use, until recently. It is true that some skill is required to get good performance from a deep learning algorithm. Fortunately, the amount of skill required reduces as the amount of training data increases. The learning algorithms reaching human performance on complex tasks today are nearly identical to the learning algorithms that struggled to solve toy problems in the 1980s, though the models we train with these algorithms have undergone changes that simplify the training of very deep architectures. *The most important new development is that today we can provide these algorithms with the resources they need to succeed.*

This trend is driven by the increasing digitization of society. As more and more of our activities take place on computers, more and more of what we do is recorded. As our computers are increasingly networked together, it becomes easier to centralize these records and curate them into a dataset appropriate for machine learning applications. The age of “Big Data” has made machine learning much easier because the key burden of statistical estimation—generalizing well to new data after observing only a small amount of data—has been considerably lightened. As of 2016, a rough rule of thumb is that a supervised deep learning algorithm will generally achieve acceptable performance with around 5,000 labeled examples per category, and will match or exceed human performance when trained with a dataset containing at least 10 million labeled examples.”<sup>60</sup>

We know that as early as in 2012, Google used YouTube videos to train its algorithms to recognize unlabeled objects.<sup>61</sup> The results of such efforts are visible today – Google and other companies with similar offerings, such as Facebook and Microsoft, have a changing, evolving machine learning platform that can recognize patterns and draw conclusions from ever-increasing data sets.

Deep learning is the future of computing – and the fuel behind it is user-generated content. Your selfie might not be too valuable on the marketplace – but it might help teach computers about faces, expressions, emotions, make up, fashion. As such, it is *very* valuable to certain companies; still, to use it as a training tool for their algorithms, they need a license: at the very least, they are making a copy of your work. And so they make sure to include one in their user agreements, as broadly worded as possible.

#### **4.2.2. Behavioral research**

The story broke out in 2014: Facebook was conducting psychological experiments on its users, without any knowledge on their part. This came to public attention after Facebook’s research team published a study that detailed how they manipulated the emotions of more than half a million users, in an effort to determine whether positive and negative posts had an effect on their moods.

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<sup>60</sup> *ibid.*, emphasis added

<sup>61</sup> Quoc V. Le and others, *Building High-level Features Using Large Scale Unsupervised Learning* (ICML 2012)

As the study – focusing on *emotional contagion*, transference of emotional states between people – explains:

“In an experiment with people who use Facebook, we test whether emotional contagion occurs outside of in-person interaction between individuals by reducing the amount of emotional content in the News Feed. When positive expressions were reduced, people produced fewer positive posts and more negative posts; when negative expressions were reduced, the opposite pattern occurred. These results indicate that emotions expressed by others on Facebook influence our own emotions, constituting experimental evidence for massive-scale contagion via social networks.”<sup>62</sup>

The story sparked enormous controversy. Was this research ethical? Aren't those who are being experimented on supposed to give their consent?

Facebook's response was that the work “was consistent with Facebook's Data Use Policy, to which all users agree prior to creating an account on Facebook, constituting informed consent for this research.”<sup>63</sup> One out of 129 sentences in Data Use Policy namely states:

“We conduct surveys and research, test features in development, and analyze the information we have to evaluate and improve products and services, develop new products or features, and conduct audits and troubleshooting activities.”

This study was only one among the many that were conducted – and one of the many that were to come. In its aftermath, Facebook promised to establish internal mechanisms for controlling the ethical aspects of their studies, but they continued carrying out behavioral research at an astonishing pace.

Some of the studies continued probing user's emotional responses – as did a study carried out in June 2015, which sampled about 1.5 million users and 30 million status updates. As the abstract explains:

“Life is more than cat pictures. There are tough days, heartbreak, and hugs. Under what contexts do people share these feelings online, and how do their friends respond? Using millions of de-identified Facebook status updates with poster-annotated feelings (e.g., feeling thankful or feeling worried), we examine the magnitude and circumstances in which people share positive or negative feelings and characterize the nature of the responses they receive. We find that people share greater proportions of both positive and negative emotions when their friend networks are smaller and denser. Consistent with social sharing theory, hearing about a friend's troubles on Facebook causes friends to reply with more emotional and supportive comments. Friends' comments are also more numerous and longer. Posts with positive feelings, on the other hand, receive more likes, and their comments have more positive language. Feelings that relate to the poster's self-worth, such as *feeling defeated*, *feeling unloved*, or *feeling accomplished* amplify these effects.”

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<sup>62</sup> Ibid

<sup>63</sup> Inder M. Verma, 'Editorial Expression of Concern: Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks' (2014) 111 Proc Natl Acad Sci

Another study, mentioned in Chapter 1, looked into the reasons why people decide against posting content at the last minute:

“We report results from an exploratory analysis examining ‘last-minute’ self-censorship, or content that is filtered after being written, on Facebook. We collected data from 3.9 million users over 17 days and associate self-censorship behavior with features describing users, their social graph, and the interactions between them.

Our results indicate that 71% of users exhibited some level of last-minute self-censorship in the time period, and provide specific evidence supporting the theory that a user’s ‘perceived audience’ lies at the heart of the issue: posts are censored more frequently than comments, with status updates and posts directed at groups censored most frequently of all sharing use cases investigated.

Furthermore, we find that: people with more boundaries to regulate censor more; males censor more posts than females and censor even more posts with mostly male friends than do females, but censor no more comments than females; people who exercise more control over their audience censor more content; and, users with more politically and age diverse friends censor less, in general.”<sup>64</sup>

Some of the research focuses on economics (“We document that the recent house price experiences within an individual’s social network affect her perceptions of the attractiveness of property investments, and through this channel have large effects on her housing market activity”).<sup>65</sup> Other studies are more concerned with our relationships – as is the one mapping out how we communicate with our children and parents:

“Using statistical techniques on 400,000 posts and comments, we identify differences in how parents talk to their children (giving advice, affection, and reminders to call) compared to their other friends, and how they address their adult sons and daughters (talking about grandchildren and health concerns, and linguistically treating them like peers) compared to their teenage children.”<sup>66</sup>

Researchers even claim to be able to identify romantic partners, even in cases where users do not enter any information about their relationship status:

“A crucial task in the analysis of on-line social-networking systems is to identify important people -- those linked by strong social ties --- within an individual's network neighborhood. Here we investigate this question for a particular category of strong ties, those involving spouses or romantic partners. We organize our analysis around a basic question: given all the connections among a person's friends, can you recognize his or her romantic partner from the network structure alone?

Using data from a large sample of Facebook users, we find that this task can be accomplished with high accuracy, but doing so requires the development of a new measure of tie strength that we term ‘dispersion’ --- the extent to which two people's mutual friends are not themselves well-connected.”<sup>67</sup>

Consider also the study on gender, topics, and audience response on Facebook:

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<sup>64</sup> Das and Kramer, *Self-Censorship on Facebook*

<sup>65</sup> Michael Bailey and others, *Social Networks and Housing Markets* (NBER Working Paper, 2016)

<sup>66</sup> Moira Burke, Lada A. Adamic and Karyn Marciniak, *Families on Facebook* (AAAI Publications 2013)

<sup>67</sup> Lars Backstrom and Jon Kleinberg, *Romantic Partnerships and the Dispersion of Social Ties: A Network Analysis of Relationship Status on Facebook* (ACM 2014)

“Although users generate a large volume of text on Facebook every day, we know little about the topics they choose to talk about, and how their network responds. Using Latent Dirichlet Allocation (LDA), we identify topics from more than half a million Facebook status updates and determine which topics are more likely to receive audience feedback, such as likes and comments.

Furthermore, as previous research suggests that men and women use language for different purposes, we examine gender differences in topics, finding that women tend to share more personal issues (e.g., family matters) and men discuss more general public events (e.g., politics and sports). Post topic predicts how many people will respond to it, and gender moderates the relationship between topic and audience responsiveness.”<sup>68</sup>

The study concludes with:

“Our findings have several implications. First, our analysis indicates that certain topics evoke more feedback from audiences (e.g. Asking for support), while others may be poorer (e.g. Sleep). Designers of SNS may want to take these into consideration when designing feed ranking algorithms, promote content with topics that viewers are more likely to respond to. Second, that topics matter for responsiveness suggests that assisting individuals with content construction might improve their experiences on SNS.”<sup>69</sup>

In other words: you want people to post more? Make sure that their content feeds will prioritize posts that deal with certain topics, that are highly emotional,<sup>70</sup> and that were shared by the people who have strong ties with the user.

All these research efforts are geared towards generating insights about user interactions, relationships, and actions – and the findings can be used to significantly boost the platform’s attractiveness, grow user base, increase number of posts, and serve the right advertisements at the right time – in other words, to fulfill any business objective of platform provider’s choosing. Yet, carrying out these studies would not be possible without having large samples of user content to work with – to copy, classify, modify, process, co-relate, analyze. Getting a broad license over user content is therefore an essential step in carrying out studies on user behavior: with no license, there is no right to use user content in this manner, and by extension, no research.

### 4.2.3. Ad targeting

We all know that the largest online companies make money through advertising. Their business model is rather straightforward: offer some services for free; gather data on user behavior; use this data to target users with advertisements that they are interested in.

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<sup>68</sup> Yi-Chia Wang, Moira Burke and Robert E. Kraut, *Gender, Topic, and Audience Response: An Analysis of User-generated Content on Facebook* (ACM 2013)

<sup>69</sup> Ibid

<sup>70</sup> “We also observed a withdrawal effect: People who were exposed to fewer emotional posts (of either valence) in their News Feed were less expressive overall on the following days, addressing the question about how emotional expression affects social engagement online.” *Id.*

So what does this have to do with user content licensing? Simple: user content may be data-mined to find out *even more* about user's preferences and target users with even more ads. Here, unlike in section three, we are not talking about your content being used to *teach* the computers how to analyze user preferences; we are talking about those algorithms, once developed, being *used* to analyze individual user behavior.

This technology is not new, either: it has simply gotten better over time.

In 2003, prior to launch of its Gmail service, Google filed two patents for “serving information associated with e-mail”,<sup>71</sup> claiming: “Advertisers are permitted to put targeted ads on e-mails. The present invention may do so by (i) obtaining information of an e-mail that includes available spots for ads, (ii) determining one or more ads relevant to the e-mail information, and/or (iii) providing the one or more ads for rendering in association with the e-mail.” This filing was later subsumed by the application for “serving advertisements based on content”, which resulted in the grant of a US patent 7,136,875.

Investigative journalists have relied on these patent applications to identify the things that Google would use to construct its user profiles:

1. Concepts and topics discussed in email, as well as email attachments
2. The content of websites that users have visited
3. Demographic information — including income, sex, race, marital status
4. Geographic information
5. Psychographic information — personality type, values, attitudes, interests and lifestyle interests
6. Previous searches users have made
7. Information about documents a user viewed and or edited by the users
8. Browsing activity
9. Previous purchases<sup>72</sup>

Yet, while the content-mining technologies might not be new, the advancements in machine learning and data-mining discussed in the previous sections have pushed their boundaries. With unprecedented ease, and with marginal costs, platform providers can now extract troves of

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<sup>71</sup> “Serving advertisements using information associated with e-mail”, US Patent 20040059712 A1

<sup>72</sup> Yasha Levine, 'The Psychological Dark Side of Gmail' AlterNet <<http://www.alternet.org/media/google-using-gmail-build-psychological-profiles-hundreds-millions-people>> accessed 19 September 2017

information from our content. Computers no longer have to serve the ads based on the websites we visited or the pages we liked. Instead, they can rely on the message we wrote to our friends, on the clothes that we wear, on the pets that show up in our images. Consider just the aforementioned promotional statement for Google Vision API:

“Vision API can analyze emotional facial attributes of people in your images, like joy, sorrow, and anger. Combine this with object detection and product logo detection, so you can assess how people feel about your logo.”

Clearly, we are standing before an entirely new frontier – and only one thing is certain: when it comes to the amount of personal data that can be extracted from our content, we have seen only the tip of the iceberg.

But, someone might say, why is this relevant for *copyright licensing*? After all, it is well-known that copyright protects expressions, not facts. If I see a picture in which you seem happy, write that down, and send it as a message to my friend – you don’t have a *copyright* claim against me. In other words, copyrighted works can convey messages and facts – but these are not protected by copyright law. How is copyright implicated?

Copyright licensing is important in the context of data-mining of user content not because the facts that come as the *result* of the mining are copyrighted, but because the *mining process* requires the content to undergo a series of copyright-relevant events. Most pertinently, content needs to be reproduced and modified in the process, which requires copyright owner’s consent – in form of a license. Accordingly, copyright licensing facilitates data mining.

#### **4.2.4. Use of user content in advertisements**

User content may also be used in advertisements.

At first, this sounds far-fetched. Why would these companies need user content in ads? Aren’t billions spent each year to ensure that ad campaigns include perfectly polished content? How does my shaky video even compare with a high-quality, studio-produced one?

Turns out, *who* recommends us a certain product can have a vast bearing on our decision whether or not to purchase. Consider the following statement by Mark Zuckerberg:

“Nothing influences people more than a recommendation from a trusted friend. A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising.”<sup>73</sup>

Sheryl Sandberg, Facebook COO, similarly stated:

“When a customer has a good experience...on Facebook, the average action is shared with the average number of friends, which is 130 people. *This is the elusive goal we've been searching for, for a long time; making your customers your marketers.*

On average, if you compare an ad without a friend's endorsement, and you compare an ad with a friend's [Facebook] “Like”, these are the differences: on average, 68% more people are likely to remember seeing the ad with their friend's name. A hundred percent--so two times more likely to remember the ad's message; and 300% more likely to purchase.”<sup>74</sup>

“Making your customer your marketer” increases the likelihood of purchase *three hundred percent?* For Facebook alone, then, in 2015 figures, there's additional 35.6 billion dollars to be made by using customized advertisements in place of generic ones – *per year.*<sup>75</sup>

Now, there are many ways in which user content may be turned into an ad – and it can be done in a rather subtle manner. Initially, for example, a person may share a picture of his/her family enjoying a dinner in a local restaurant:

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<sup>73</sup> Claire Hoffman, 'The Battle for Facebook' Rolling Stone <<http://www.rollingstone.com/culture/news/the-battle-for-facebook-20100915>> accessed 26 September 2017, cited in *Fraleley v Facebook, Inc.*, Second Amended Class Action Complaint for Damages.

<sup>74</sup> *Fraleley v Facebook, Inc.*, Second Amended Class Action Complaint for Damages, paragraph 43, with reference to Sheryl Sandberg, Facebook COO, in "It's All About People", 28 September 2010.

<sup>75</sup> . “...friend endorsements are two to three times more valuable than generic advertisements sold to Facebook advertisers”; ‘Global Facebook Advertising Revenue 2015 | Statistic’ (*Statista*) <<http://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/>> accessed 14 July 2016.



The fact that the image was taken in a particular restaurant, and that it expressed positive emotions, can prompt the algorithms to turn it into an ad – shown to this person’s friends with matching ad preferences for days, or even years.<sup>76</sup>



So far, such uses of user content in endorsements have been limited to use of user’s profile pictures alongside ads. However, there is no indication that this will continue to be the case – and, as we

<sup>76</sup> Image is a mock-up made to illustrate the principle.

have seen in the previous chapter, some user agreements explicitly mentioned that user content may be served in ads.

There is another behavioral element to be considered when talking about value of user endorsements. Not only are the users more likely to purchase goods and services used by their friends because they *trust* them: they might be inclined to do so because they *envy* them.

Behavioral economists have been aware of this for quite some time. Conspicuous consumption, a term introduced by the Norwegian-American economist and sociologist Thorstein Veblen in his book "The Theory of the Leisure Class",<sup>77</sup> refers to consumers who make purchases to display wealth and social standing, rather than to cover their needs: they are those people proverbially trying to “keep up with the Joneses”. Your neighbor bought an SUV? Of course you need one as well. Your friend is traveling to Spain? You’ll be heading to South America. Everyone is hyped about the new iPhone? You will pre-purchase one and get it first.

In these scenarios, reminding users of other people’s purchases is of critical importance: it gives social context to their purchases. Now, this social context is important in the offline world as well – but online, its importance can be brought up more pervasively, with subtle, yet constant nudging, designed to help customers rationalize the irrational.

Licensing of user content for use in ads, coupled with behavioral studies identifying the best ways to serve such content, can therefore result in a significant increase in profits for online platforms and their advertising partners.

### 4.3. Reputation management

We keep hearing it over and over again: for individuals and companies alike, reputation is everything; it is to be guarded at all costs. Online platform providers are no exception to this, as they clearly have an interest in maintaining positive public perception.

In a 2013 ACE European Group study, four out of five executives expressed their belief that reputation is their company’s most valuable asset. Yet, 92% of interviewed executives “strongly agreed” that the risk of losing reputation, *reputational risk*, is more difficult to manage than any other specific risk category.<sup>78</sup> This comes as no surprise, if reputation is understood as “a collection

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<sup>77</sup> Thorstein Veblen, *The Theory of the Leisure Class* (Series: Dover Thrift Editions, Reprint edn, Dover Publications 1994)

<sup>78</sup> ACE Insured, *Reputation at Risk* (ACE European Risk Briefing, 2013)

of perceptions and beliefs, both past and present, which reside in the consciousness of an organization's stakeholders—its customers, suppliers, business partners, employees, investors, analysts, communities, regulators, governments, pressure groups, non-governmental organizations and the public at large":<sup>79</sup> threats to reputation are inherently ever-present and diverse. Developing comprehensive reputational risk management plans is therefore difficult. Unlike other risk types associated with conducting business, reputational risk does not stand on its own, it is "triggered" by a failure to manage other risks in an adequate manner.<sup>80</sup>

It seems clear that the potential negative fall-out following bad publicity can be vast, including loss of current or future users; loss of employees or managers within the organization; an increase in hiring costs or staff downtime; reduction in current or future business partners; increased costs of financial funding via credit or equity markets; increased insurance costs; increased government supervision, fines and penalties, etc.<sup>81</sup>

In the context of user-content licensing, reputational risk may materialize if the company is perceived as being overly exploitative – which usually happens when companies start claiming the right to use user content in commercial ways. (The aforementioned public outcry over Instagram's updated terms serves as an important example of this.) What is important to note, however, is that this perceived exploitativeness is not always directly linked to the *actual scope* of the licensing terms. Inclusion of "user-friendly" language into user agreements can go long ways towards mitigating reputational risks that flow from broad user licenses, even if these clauses do not do anything to *actually reduce* the scope of license.

This is evident from the practice of including the proverbial "this licensing clause is not problematic because you still own your content" line into digital user agreements; such explanations had been offered by Instagram, Facebook, LinkedIn and several other companies following bad press over their overly broad licensing terms. While they do little to reduce the scope of the license, they go a long way towards ensuring users that "nothing improper" will happen with their content.

#### 4.4. Profit-making

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<sup>79</sup> Jenny Rayner, *Managing Reputational Risk: Curbing Threats, Leveraging Opportunities* (Wiley 2003)

<sup>80</sup> David Benyon, 'Can reputational risk be measured' Risknet <<https://www.risk.net/risk-management/operational-risk/1566895/can-reputational-risk-be-measured>>

<sup>81</sup> Jason Perry and Patric de Fontnouvelle, *Measuring Reputational Risk: The Market Reaction to Operational Loss Announcements* (2005), unpublished; available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=861364](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=861364)>

Lastly, a lot of online platforms will have an interest in generating profit. This interest will, when applied to user content licensing, usually entail two things: generating as much revenue from individual user's content, while paying minimal remuneration possible.

These assumptions hold true for the majority of market actors: even some of the smaller companies might have an interest in obtaining a license to exploit as much content as possible. While not having the capabilities to, say, data-mine the content themselves, they might sell this content to companies that are interested in it, or, even more likely, hope that their entire business will be acquisitioned by one of the big companies.

While such deals invariably happen behind the closed doors, and users are left uncertain under which terms their content has been sublicensed/transferred, we have seen some telling signs on the market. For example, there was seemingly no reason for Facebook to spend 19 billion dollars acquiring WhatsApp – after all, Facebook already had its own messaging technology in place. Instead, experts point out that this was done so that Facebook would acquire the content of user's phone contact lists:

“Let's be perfectly clear – Facebook paid 19 billion dollars to get access to your address book, and to see the connections between you and your contacts, as well as how you use them. It doesn't need to integrate advertising into WhatsApp, it simply needs you to continue to use the application in the ways that you always have. The data that the application will eventually provide to Facebook will allow for better, more targeted advertising via a line of communication that has largely been cut off from Facebook or any of its partners in social media.”<sup>82</sup>

By acquiring troves of user content, combined with a broad license to use it, small companies are without any doubt increasing their market value, which means that there is a direct link to be found between their economic interests and the license they obtain over user content.

#### **4.5. Platform providers' interests: a summary**

If platform provider's interests are to be summarized, it can be stated that online companies generally have an interest in being able to use user content in as many ways as possible, while minimizing legal and reputational risks and maximizing their profits.

What happens if these interests are not met?

The first thing to suffer from too narrow of a scope of license is *innovation*. If platform providers cannot secure the rights to manipulate user content in numerous ways, this might affect their ability

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<sup>82</sup> Brad McCarty, 'With WhatsApp, Facebook Just Bought Its Way Into Your Address Book' (*FullContact*, 2014) <<https://www.fullcontact.com/blog/whatsapp/>> accessed 3 October 2017

to create new, innovative services based on extended uses of such content. A good example of this are deep learning platforms: as outlined above, their efficiency is directly linked to the amount of content that is fed into the algorithm, which makes user content essential to their viability. Over-simplistically stated, videos of YouTube cats, processed correctly, can lead to development of platforms for detecting early-onset cancer in humans. If no permission for such processing is obtained – they will remain videos of cats.

Secondly, lack of flexibility on platform provider's part can have negative *economic effects*. As we explored earlier, researchers claim that the ability to use user content in advertisements can increase the likelihood of final product purchases by 300%. This means that inability to use user content in broad and flexible ways can affect platform provider's profit line – but it also has the potential to affect economy at large. More flexibility in use of user content can lead to more purchases, which, in turn, means that user content can serve as an important catalyst of economic activity.

Thirdly, reduction of platform provider's ability to manipulate user content may result in *reduced feature access* to users. If online platforms make profit by manipulating user content (and extracting personal data from it), reduction of their ability to dispose freely with this content directly affects their profit-making ability. This may result in reduction of (seemingly) free services that online platforms are offering to the general public, as the companies will have to find other profit-making alternatives, such as paid subscription plans. (Once again, somewhat simplistic example: if Facebook and Twitter can't make enough money by selling advertisements and manipulating user content, they might not be able to continue offering their services for "free", opting to introduce paid subscriptions instead.) Given that some users might not be able to afford – or willing to pay for – such features, they would effectively have reduced access to certain features.

## **5. Societal interest in fair licensing practices**

So far, we have established that users and platform providers have certain interests when it comes to content licensing, and that severe disregard of those interests can have long-lasting negative consequences. We have also demonstrated that there is a strong internal inter-dependency between different interest clusters. The question still remains: how do users' and platform providers' interests affect one another? The answer lies in a picture of astounding complexity.

User's *control interest* may negatively be affected by platform provider's interest in legal risk minimization and flexibility, as well as by their economic interests. As discussed above, platform provider's need to minimize legal risks often leads them to include broad licensing terms, in an

attempt to secure as many rights as possible, thereby reducing the scope of user's control. Same holds true for their interest in flexibility: it calls for a broad licensing clause, which, in turn, removes control from users.

User's interest in *foreseeability* may similarly be affected by platform provider's quests for flexibility, legal risk minimization and reputation management. Platform providers have an incentive to retain the rights to use user content in new ways and formats, which makes it difficult for users to foresee how their content may be used. Their reputational and legal risk-management concerns might lead platform providers into including broad, non-specific language into licensing clauses ("you give us the right to *use* your content"). This "user-friendly" language might, as we have explored, alleviate some reputational risk concerns; but it creates a layer of added legal uncertainty, as it is unclear how different courts might interpret it. This serves as a constraint on user's foreseeability interest.

User's interest in *transparency* may be negatively affected by platform provider's reputation management interest. Those providers which intend to use user content in unexpected ways might want to disclose as little information to users as possible, in a quest to safeguard their reputation. This could, of course, backfire: but the tension between interests still remains. (Consider, for example, how Facebook obtains consent to use user's content for psychological research, discussed in section 2.B.)

Interest in *continued access* can, in theory, be positively linked to platform provider's interest in flexibility. The more flexibility in using user content that platform providers have, the more services they can offer, and at lower prices. This, in turn, can benefit user's *economic* interests (in a sense of reduction of access fee that they would have to pay to be able to use online platforms).

On platform provider's side, *legal risk minimization* interest is positively linked with user's control and foreseeability interests. The more control users have, and the more easy it is for them to predict how their content may be used in the future, the lesser the risk that those users will sue platform providers for copyright infringement. *Reputational risk management* interest also benefits from increased control given to users; or, negatively stated, the less control that online platforms give to users, the greater the chance that this risk might materialize.

Platform provider's key interest – the one in *flexibility* – can be at odds with user's interest in control. The more control that users retain, the less flexibility in using user content platform providers have. Given that decreased flexibility could result in decreased *profits*, this means that

user's interest in retaining maximal control can negatively affect platform provider's economic interests.

At the same time, it is vital to note that platform provider's interest in flexibility will hardly be jeopardized unless some of their other interests are threatened. In other words, online platforms will be *very unlikely to purposefully limit the ways in which they use user content, unless this would result in increased legal risk, increased reputational risk, and/or potential economic loss.*

This list of relationships between different interest clusters is not meant to be exhaustive, but rather, it purports to show that there could be a significant area of tension between different interest clusters. Combined with our finding that these interest clusters are internally inter-related, as well as the realization that preserving these interests serves important societal goals (maintaining trust between users and online platform providers, fostering innovation, generating economic activity), we have to conclude that *there is a prevailing societal interest in finding an equilibrium where the largest possible amount of these interests are fulfilled.* Otherwise, the treat of systemic risk looms large on the horizon.

But is this threat something that *legal systems* should be preoccupied with? After all, an argument can be made that user's and platform provider's interests are best balanced by the sheer operation of the market, which would quickly eliminate any inefficiencies.

Such non-interventionist arguments strike me as naïve. A parallel may be drawn with the position of consumers on financial markets, where it has been long-established that systemic risk resulting from loss of confidence, coupled with the need to protect consumers as weaker party, merits regulatory response. As explained by Lumpkin:

“The potential for large economic and social costs from financial instability provides one of the principal motivations for financial regulation – to ensure that financial market disruptions do not have a significant impact on aggregate real economic activity. Such events can disrupt the normal functioning of financial markets and institutions by destroying the mutual trust required for most financial transactions to be concluded.

Maintaining the stability of the financial system depends in some large measure on preserving confidence. Episodes of widespread financial distress have often been sparked by a contagious loss of confidence in the integrity of major institutions or the system as a whole.

A second, but closely related objective is to protect consumers. Absent some form of assurance that their rights will be fully protected, consumers will not have confidence in the financial services system and the products and services it provides.

Prudential regulation, thus, serves the dual objective of maintaining the integrity and stability of the financial system *and* protecting consumers of financial services.”<sup>83</sup>

The same largely holds true when it comes to licensing of user content. The potential for loss of trust between users and platform providers exists, and such loss of trust could, as we have discussed above, lead into decrease in the amount of uploaded – or, in extreme circumstances, created – content. On top of this, one cannot ignore the fact that users, as authors and consumers, are a weaker contractual party. They suffer from bounded rationality, and there are significant information asymmetries in their disfavor. They are also offered access to online platforms on a “take it or leave it” basis, being unable to negotiate terms individually. Worldwide digital consumer movements remain difficult to organize and coordinate. Finally, as we have seen, platform providers have strong financial incentives to remove as much control from users as possible. All of this points to the fact that, left unchecked, the balance is likely to be skewed in favor of platform providers, who have a unique ability to dictate the terms – and it makes the need for legislative balancing of user’s and platform provider’s interests rather apparent.

## **6. Conclusion**

In this chapter, we strived to establish a framework for assessing the effects of user-generated content licenses. In order to tackle this challenge, we laid down a web of interests held by users and platform providers. We have explored how internally co-dependent these interests are, and how user’s and platform provider’s interest may be at odds. We have seen that disregarding user’s interests by using overreaching clauses can lead into loss of trust between users and platform providers, jeopardizing the very existence of participative Web. On the other hand, the participative communities can also be endangered in platform providers are not given enough flexibility in using user content. This chapter therefore postulated that careful balancing of these interests is indeed needed, and that it cannot be achieved through sheer operation of the market. Rather, legislative regulation is necessary – and the question which we now turn to is to which extent contemporary legal systems secure a balance between user’s and platform provider’s interests.

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<sup>83</sup> Stephen Lumpkin, 'Consumer Protection and Financial Innovation: A Few Basic Propositions' (2010) 2010 OECD Journal: Financial Market Trends 117

## Chapter IV      The Game of Courts: Private International Law Aspects of User Content Licensing

### 1. Introduction

There is a story that most Internet users are conditioned to believe in.

When you sign up for an online service, the story goes, you enter into a contract. Whether you have read or understood the terms when you made that faithful “*I agree*” click does not really matter: the terms became binding the moment you were given a notice of their existence, and they govern the entire relationship between you and the company offering you the service. Every comment you type, picture you post, click you make – it all falls under the scope of this agreement. The terms offered are, for all intents and purposes, the sacred law of the virtual land. Reject them or breach them, and you will be banished.

Yet this story paints a very limited picture. Terms of Service agreements are – or purport to be – contracts. Contracts are, in their essence, promises between two parties that the law deems enforceable; which is why the promise to sell you my car might be upheld in the court, whereas the promise to get a cup of coffee tomorrow might not be; based on what the law has to say.<sup>84</sup> An exchange of promises therefore becomes a contract *only* because the law recognizes it as such; the flip side of this being that any legal effect that the contract might have comes not from its wording, but rather from the *interaction* of that wording with the governing law.<sup>85</sup> Simply put: we cannot solely look into the contracts to discern their effects. We need to read the laws as well.

But *which* laws do we need to apply to the licensing clauses, as to answer the main questions – whether they constitute proper contracts, how to interpret them, and what kind of remedies might be available to us? Just as importantly: before *which* courts can we seek redress?

These questions are of vast significance – but the answers can be complex, as we have to keep in mind the global nature of the Internet. Most of the dominant online companies are headquartered

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<sup>84</sup> See e.g. Brian H. Bix, *Contract Law: Rules, Theory, and Context* (Cambridge Introductions to Philosophy and Law, Cambridge University Press 2012); Woodrow Hartzog, 'Website Design as Contract' (2011) 60 Am U L Rev 1635; Lawrence A. Cunningham, *Contracts in the Real World: Stories of Popular Contracts and Why They Matter* (1 edition edn, Cambridge University Press 2012); Shmuel I. Becher and Tal Z. Zarsky, 'E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation' (2008) 14 Mich Telecomm & Tech L Rev 303

<sup>85</sup> See Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability*

in the US. Yet Internet users come from all around the world; in December 2015, Facebook alone had 1.04 billion daily active users, 83.6% of which came from outside the US and Canada – some 861 million people.<sup>86</sup>

Should all of them be subjected to the US law and compelled to litigate any potential claims in the US? Or can they avail themselves of the privileges guaranteed by the national laws, which can vary widely, and litigate before the courts in their home countries? The answer to that question is the first step in understanding what platform providers can – and cannot – do with user’s content; to reach that answer, we need to resort to private international law.

## 2. Jurisdiction

Suppose that you have a favorite brand of clothes – ACME – and that you have liked their page on Facebook. There are also quite a few pictures of you wearing ACME shirts, taken during your last vacation, and shared with your Facebook friends. One morning, you wake up, only to find out that your pictures appear in your friends’ feeds – not as something you have shared, but as ACME commercials, with a caption that states that you like ACME. You get outraged, and decide that you want to file a lawsuit against Facebook. Which court can you go to?

To answer this question, we need to look into the agreement between you and Facebook, and any laws which might be applicable. However, the very laws stipulating which courts have jurisdiction in international cases are, despite being called private international laws, primarily *national* in nature – they differ from country to country, making it necessary to limit the scope of the analysis in some way.<sup>87</sup> To achieve this, we will primarily discuss the venues available to the users coming from the EU/EEA countries (with a specific focus on Norway in section 2.2.2), and will contrast this with the approach followed in the US. We will examine contractual provisions first, and then assess their effects under the law.

### 2.1. Contractual terms on jurisdiction

“*The Bay Area is beautiful this time of year. It doesn't matter what time of year it is, that's what's so great! Anyway, you'll have to sue us here.*” – state Pinterest Terms of Service.<sup>88</sup> In smaller print, they specify: “We each agree to submit to the personal jurisdiction of a state court located in San Francisco County, California or the United States District Court for the Northern District of California, for

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<sup>86</sup> ‘Company Info | Facebook Newsroom’ <<http://newsroom.fb.com/company-info/>> accessed 18 February 2016.

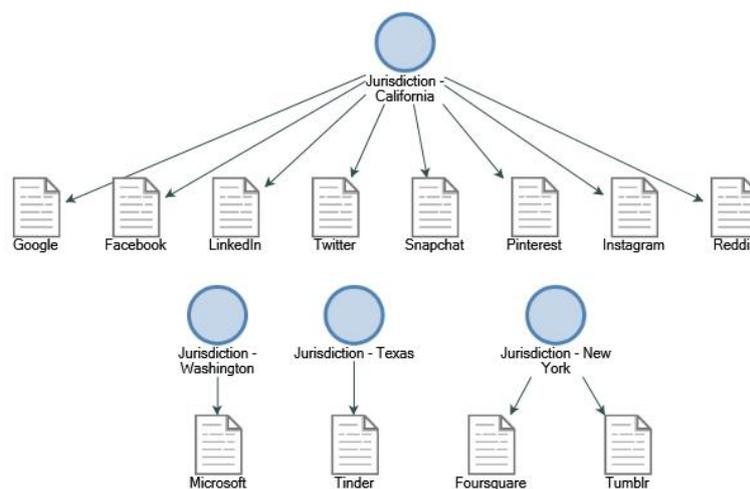
<sup>87</sup> Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability*

<sup>88</sup> ‘Terms of Service | About Pinterest’ <<https://about.pinterest.com/en/terms-service>> accessed 18 February 2016.

any actions not subject to Section 10 (Arbitration). Our Products are controlled and operated from the United States, and we make no representations that they are appropriate or available for use in other locations.”<sup>89</sup>

Pinterest is not alone in this. Virtually all of the agreements offered by the major online companies contain a clause such as this one, stipulating that users agree to submit their disputes to certain courts located in the US. These clauses are known as “forum selection clauses” – they are usually used when companies want to ensure that they get sued on the “home turf”, reducing the cost, and increasing the predictability of the outcome.<sup>90</sup> The clauses have been around for a long time – they certainly pre-date the Internet – but in our case, they deserve special attention: majority of Internet users situated outside the US do not have the means of pursuing a claim in the US courts, and upholding such a clause would effectively mean depriving them of any legal remedies.

In this chapter, user agreements offered by Facebook, Foursquare, Google, Instagram, LinkedIn, Microsoft,<sup>91</sup> Pinterest, Reddit, Snapchat, Tinder, Tumblr, and Twitter have been qualitatively analyzed. These companies have been selected as they offer services which are immensely popular, and which are based on active contribution of user content, for which these companies want to acquire a license through their ToS agreements. Our finding is that all of the surveyed agreements contain a forum selection clause in favor of various American – dominantly Californian – courts:

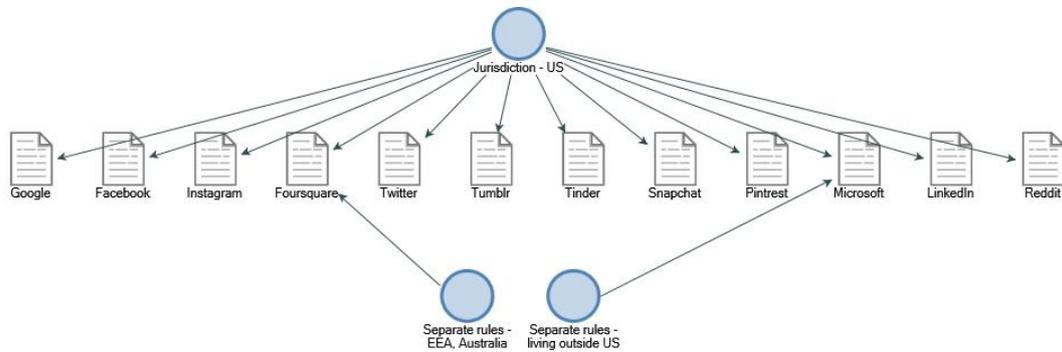


<sup>89</sup> *ibid.*

<sup>90</sup> See e.g. Brenda R. Sharton, 'Forum Selection Clauses: More Than Just Boilerplate' Goodwin Procter LLP <<https://www.goodwinlaw.com/publications/2014/03/business-litigation-reporter/forum-selection-clauses-more-than-just-boilerplate>> accessed 19 September 2017; Andrew S. Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford private international law series, Oxford University Press 2003); Debra Lyn Bassett, 'The forum game' (2006) 84 North Carolina Law Review 333; Friedrich K. Juenger, 'Forum shopping, domestic and international' (1988) 63 Tul L Rev 553

<sup>91</sup> Applies to services such as Skype, Office.com, Xbox Live and others.

Very few of the largest companies offer terms which recognize the fact that some of their users are not US residents, offering provisions on the alternative venues to sue – in our analysis, that turned out only to be Foursquare – and possibly Microsoft.



However, even these two companies do not say that their users are free to bring a lawsuit in their respective home jurisdictions. As the only exception to the jurisdiction of the US courts, Foursquare user agreement states that users from EU/EEA and Australia agree to submit all potential disputes to the exclusive jurisdiction of the English courts.<sup>92</sup> Microsoft’s user agreement is vague: jurisdictional clause begins with *“If you live [...] in the United States, the laws of the state where you live govern all claims [...]. You and we irrevocably consent to the exclusive jurisdiction and venue of the state or federal courts in King County, Washington.”*<sup>93</sup> This forum selection clause can be interpreted either as pertaining only to users referred to in the first sentence – those living in the US – in which case other users around the world would not be bound by any forum selection provision, and would be free to bring a lawsuit before their home country courts; or, alternatively, it can be argued that the first sentence, containing choice-of-law provision is independent from the second one, and that the latter binds all the users.

We also find some agreements that contain special forum selection clauses based on the specific country of user’s residence. Spotify’s user agreement is illustrative, as it contains the following jurisdictional chart:<sup>94</sup>

Country	Jurisdiction
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<sup>92</sup> “Solely in respect of users located in the EEA and/or Australia, the following governing law provisions shall apply: These Terms of Use and any disputes or claims arising out of or in connection with it shall be governed by, and construed in accordance with, the laws of England. All disputes or claims arising out of or relating to these Terms of Use shall be subject to the exclusive jurisdiction of the English Courts to which the Parties irrevocably submit.” ‘Foursquare’ (Annex 1).

<sup>93</sup> Microsoft Services Agreement’ (Annex 1).

<sup>94</sup> ‘Terms and Conditions of Use’ <<https://www.spotify.com/no/legal/end-user-agreement/#s24>> accessed 19 February 2016.

Poland, Italy	Exclusive; Courts of Local Country
Turkey	Non-exclusive; Courts and other tribunals in the Republic of Turkey
Brazil	Exclusive; State and Federal Courts of São Paulo, State of São Paulo, Brazil
Canada	Exclusive; Courts of Ontario, Canada
United States, Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay	Exclusive; State and Federal Courts of San Francisco County, CA or New York, NY
Estonia, Hong Kong, Latvia, Lithuania	Non-exclusive; Courts of Sweden
Spain	Exclusive; Courts of the consumer's current domicile in Spain.
All remaining countries	Exclusive; Courts of Sweden

In practice, however, such agreements are exceedingly rare. Motives behind having such provisions can be questioned – most likely, these clauses are made in an attempt to satisfy bare minimums of compliance requirements under the mandatory norms found in different national laws. Still, compared to the agreements which solely pertain to compel users to litigate in the US, irrespective of where they come from or what their local laws say, such provisions seem to be a step in the right direction.

But how often are forum selection provisions invoked in practice? Wouldn't the companies risk significant reputational damage if they were to attempt to use these clauses against their users, forcing them to litigate any claims in far-off jurisdictions? Isn't the reputational risk alone enough to stop the companies from doing so?

The answer seems to be a resounding 'no'. Online companies fight vigorously to have the forum selection clauses upheld. Two recent cases that are rather illustrative of this come from both sides of the Atlantic – in both of them, Facebook was sued by a user who claimed that his account has been wrongfully terminated. Legal memoranda that Facebook filed during the proceedings give us a valuable insight into their legal strategy.

The first case<sup>95</sup> comes from France, where Frederic Durand-Baissas, an art teacher, had his account terminated after he posted an image of a famous 19<sup>th</sup> century painting, depicting a nude woman – which was arguably prohibited by a then-current version of Facebook’s Community Standards. Frederic filed a lawsuit before the court in Paris, claiming that Facebook engaged in unlawful censorship, and asked for five thousand euros in damages.

Facebook moved to dismiss the case on the grounds of lack of jurisdiction, arguing that French court was not competent to hear the case, as Frederic accepted Facebook’s “*Statement of rights and responsibilities*”, containing an exclusive forum selection clause which stipulated that all disputes shall be resolved in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, California. Facebook further claimed that the contract between them and Frederic was not a consumer contract, that there was no imbalance of power between them, and that Facebook never intended to target any users in France with their products.<sup>96</sup>

On the other side of the Atlantic, Facebook was sued by Mustafa Fteja,<sup>97</sup> who claimed that his account had been terminated on discriminatory grounds. He claimed that, upon receiving notice of termination, he made every attempt to contact Facebook and find out what happened. He received no response. This led him to believe that his Muslim background had a role to play in the termination of his account, and he – a resident of Staten Island, New York – filed a lawsuit before the New York District Court. In response, Facebook asked for the case to be moved to Northern District of California – or alternatively, dismissed as meritless, as nothing in the “*Statement of Rights and Responsibilities*” obliged Facebook to provide any reason for shutting down user accounts, or to give any advance warning.<sup>98</sup>

In arguing that the case should be moved to California, Facebook relied on the forum selection clause. But then it argued that even if there had been no such clause in the user agreement, California is the right place to litigate this dispute:

“Beside the fact that Plaintiff agreed to litigate his claims in California, a host of other factors make the Northern District of California a more convenient and appropriate forum for litigating this case.  
[...]

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<sup>95</sup> *Frédéric X. v Facebook Inc.* [2015] Ordonnance du 5 Mars 2015 (Tribunal de Grande Instance de Paris, 4<sup>ème</sup> chambre, 2<sup>ème</sup> section)

<sup>96</sup> *Ibid*

<sup>97</sup> *Fteja v Facebook, Inc.* [2012] 841 FSupp2d 829 (United States District Court, S.D. New York)

<sup>98</sup> *Ibid*, Defendant Facebook, Inc.'s Memorandum of Law in Support of Its Motion to Transfer Venue, Motion to Dismiss, and Motion for a More Definite Statement, document 2011 WL 11817321. Document available at Westlaw Next.

First, the Northern District of California is a much more convenient forum for potential witnesses in this case. Apart from Plaintiff, all or nearly all of the witnesses will be Facebook employees who will testify as to Facebook's policies, Facebook's practices and procedures for ensuring compliance with the Statement, and any decisions made with respect to Plaintiff's Facebook account. [...]

Second, '[c]ourts routinely transfer cases when the principal events occurred . . . in another district.' That is precisely the situation here. The Facebook employees who monitor and make decisions about users' accounts work at Facebook's Palo Alto headquarters. [...]

Third, the bulk of the documents that may be relevant in this dispute are located in California.

[...]

Fifth, courts in the Northern District of California are more familiar with California law. That fact strongly favors transfer because Plaintiff has agreed that the laws of California govern any claims he might have against Facebook and it appears that the core of Plaintiff's complaint is a state-law contract claim.

Sixth, judicial economy favors transfer. [...] Transferring this case will therefore maximize judicial resources.

To summarize: Plaintiff freely and fully agreed to litigate any claims against Facebook exclusively in the courts of California. There is no reason he should be allowed to renege on that deal."<sup>99</sup>

Facebook even claimed that Fteja's assertion that he suffered from Ménière's disease – an inner ear disorder associated with spinning and dizziness, making the travel cumbersome – was irrelevant:

"Fteja also suggests that it would be unfair to transfer this case because he has a medical condition that causes 'spinning and dizziness.' However, 'a party opposing enforcement of a forum selection clause must demonstrate *exceptional* facts explaining why he should be relieved from his contractual duty.' Fteja's bare assertion that he suffers from a medical condition does not satisfy that requirement because it is unsubstantiated; his alleged symptoms are not severe; presumably he would experience the same symptoms if he litigated this case in New York; and the Northern District of California can easily accommodate his alleged symptoms."

What is evident both from *Frédéric v Facebook*<sup>100</sup> and *Fteja v Facebook*<sup>101</sup> is that reputational risk concerns did not stop Facebook from attempting to move the cases to California, and that they were more than willing to argue all the possible grounds in support of that – regardless of the impression that might leave on their current and prospective users. After all, a company that allegedly gets five new user profiles every second<sup>102</sup> can certainly afford to alienate some of its users – and some bad press might be far less dangerous than unfavorable legal precedent against the company. Therefore, forum selection clauses are not empty declarations found in a contract

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<sup>99</sup> Ibid

<sup>100</sup> *Frédéric X. v Facebook Inc.*

<sup>101</sup> *Fteja v Facebook, Inc.*

<sup>102</sup> 'Top 20 Facebook Statistics - Updated December 2015' <<https://zephoria.com/top-15-valuable-facebook-statistics/>> accessed 19 February 2016.

that nobody reads – as the companies will likely do everything in their power to have them enforced.

So what happened in the end? In *Fteja*, Facebook was successful; in *Frederic*, it was not – and to understand why, we need to look into the laws regulating forum selection clauses.

## 2.2. Laws on determining jurisdiction

### 2.2.1. European Union

Which courts can hear a case involving a foreign element is a question traditionally regulated by national laws. These jurisdictional rules – which fall within the scope of a field called private international law – can therefore, much like any other national rules, differ to a great extent.

Suppose that I, a resident of country A, have purchased a faulty computer in country B, and that this computer exploded while I was on a vacation in country C. National laws of country A might stipulate that I, as a consumer, always have the right to bring a lawsuit before the courts of my home country. Contrary to that, laws of country B might state that unless there's any agreement to the contrary, all sales agreements fall within the jurisdiction of the courts where seller is domiciled. And finally, country C might permit its courts to exercise jurisdiction in all cases where there's any damage that occurred on the territory of C, irrespective of other factors. In addition to that, each country might have different laws on how to determine which laws govern the said scenario – do we apply the laws of A, B or C? – making it further difficult to determine the venue in which I can seek redress.

These differences were especially problematic in European context. At the very core of the European integration process stands the idea that people, goods, services and capital should move freely around the EU – and to function in practice, this requires a great deal of legal certainty. This is why the Treaty on the European Economic Community, signed in 1957, obliged the Member States to enter into negotiations with each other in an effort to jointly regulate a variety of private international law issues.<sup>103</sup> The Amsterdam Treaty of 1997<sup>104</sup> introduced the wider concept of judicial cooperation and brought the core issues of private international law into the scope of the European Community; which can now be found in the Treaty of the Functioning of the European Union of 2007.<sup>105</sup> The adoption of these high-level agreements meant that the stage was set for the European Union to develop a comprehensive joint system of rules detailing which courts have the

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<sup>103</sup> Treaty Establishing the European Economic Community (Treaty of Rome) [1957] Article 220

<sup>104</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam) [1997] OJ C340

<sup>105</sup> Treaty on the Functioning of the European Union [2012] OJ C326 Article 81; for more details on the efforts to harmonize private international law, see Xandra Kramer and others, *A European Framework for Private International Law: Current Gaps and Future Perspectives*, 2012); Peter Stone, *EU Private International Law* (3rd edn, Edward Elgar Publishing 2014); Aude Fiorini, 'The Codification of Private International Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?' (2008) 23 *Tul Eur & Civ LF* 89

jurisdiction to hear a case involving foreign elements, under which laws, and how the resulting judgements are to be recognized and enforced in other EU countries.

One of the most significant results of these efforts was the adoption of the *Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, often referred to as *Brussels I Regulation* – a successor to the *Brussels Convention* of 1968.<sup>106</sup> *Brussels I Regulation* came into force in 2002 and was modified – “recast” – in 2012; it is binding on the EU Member States, and to ensure harmonization, its terms are autonomously interpreted by the Court of Justice of the European Union (CJEU).

Jurisdictional rules laid down in *Brussels I* are multi-layered: they provide for several alternatives that have to be holistically examined. This will provide a framework for our analysis.

First, there is *general* jurisdiction: *Brussels I* states that as a general rule, lawsuits are to be filed before the courts of the country in which the defendant is domiciled.<sup>107</sup> If the defendant is not domiciled in any Member State, Article 6 remits the jurisdiction of the courts of each Member State to the law of the State whose court is seized, subject to several special provisions found in *Brussels I*.<sup>108</sup> The concept of domicile is, for businesses, defined as a place where business has its statutory seat, central administration, or principal place of business; for individuals, the courts determine domicile according to their own law, or the law of the state where those individuals are claimed to be domiciled.<sup>109</sup>

It is not too difficult to come up with a scenario illustrating this general rule. Suppose that you live in Member State A, and that you have borrowed some money from a person located in Member State B. If you fail to pay back the loan, this person will have to bring the lawsuit before the courts of A, where you are domiciled. Should any controversy arise, the courts of A will apply their own laws to determine whether you are domiciled in A or not; and if you claim – or the other party does – that you are actually domiciled in B, the court will have to apply the laws on B to determine your domicile.

Secondly, *Brussels I* provides for *alternative* jurisdiction: based on the connection between a dispute and a certain Member State, it allows plaintiffs to bring a lawsuit before its courts.<sup>110</sup> For instance, in contractual matters, a lawsuit may be filed before the courts of a country where the contract

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<sup>106</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Consolidated version CF 498Y0126(01)) (Brussels I) [1968] OJ L299

<sup>107</sup> See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (Brussels I (recast)) [2012] OJ L351 Article 4

<sup>108</sup> Ibid Article 6

<sup>109</sup> Ibid Article 62-63

<sup>110</sup> Ibid Article 7-9

was (to be) performed.<sup>111</sup> One of the alternative jurisdictional rules provides that “in matters relating to tort, delict or quasi-delict, [the lawsuit may be brought] in the courts for the place where the harmful event occurred or may occur” – which is of some significance for our analysis.<sup>112</sup> It must be noted that the choice whether to file a lawsuit before the court which has general jurisdiction or before one of the alternative courts is given to the plaintiff – “it is not open to any of the courts involved to override the plaintiff’s choice on grounds such as the relative appropriateness or convenience of such courts.”<sup>113</sup> This leaves the defendant with rather narrow grounds to challenge the jurisdiction of these alternative venues; in practice, the only realistic chance of succeeding is through demonstrating that the connection which gives rise to the alternative jurisdiction does not exist in the particular case.

Suppose that you are domiciled in Member State A and that you are an immensely successful businessman, specializing in foreign investment. Most of your clients come from Member State B – and you have spent years developing close personal relationships with them. One day, a newspaper from Member State C runs a front-page article on you, falsely accusing you of numerous wrongdoings; this leads to several clients closing down their accounts. This paper is distributed in all three countries – where can you file a lawsuit?

Rules on general jurisdiction are always available: you can sue the newspaper in the country in which they are domiciled – which is C. However, you can also file a lawsuit in Member States A and B, as this is where the harmful effects of their defamatory statements have occurred. This choice is up to you: the company is not free to argue that these courts are not convenient forums – they can only challenge your claim that the harmful effects have actually occurred in these Member States.

Thirdly, *Brussels I* provides for *prorogated* jurisdiction – the kind of jurisdiction conferred by the forum selection agreements. When parties have agreed to submit their potential or existing disputes to the courts of a particular Member State, these courts will have jurisdiction to hear the dispute – exclusively, unless the parties indicate otherwise.<sup>114</sup> This agreement needs to be substantively valid under the law of the said Member State, and needs to fulfill several formal requirements set down in *Brussels I*.

However, forum selection agreements are not always upheld, even if they satisfy these validity requirements. Namely, there are two more types of jurisdiction found in *Brussels I* that limit the applicability of these agreements.

One of them is *exclusive* jurisdiction, where certain types of disputes, because of their particularly close connection with a Member State, can *only* be litigated before the courts of that state. The best

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<sup>111</sup> Ibid Article 7 (1) (a)

<sup>112</sup> Ibid Article 7 (3)

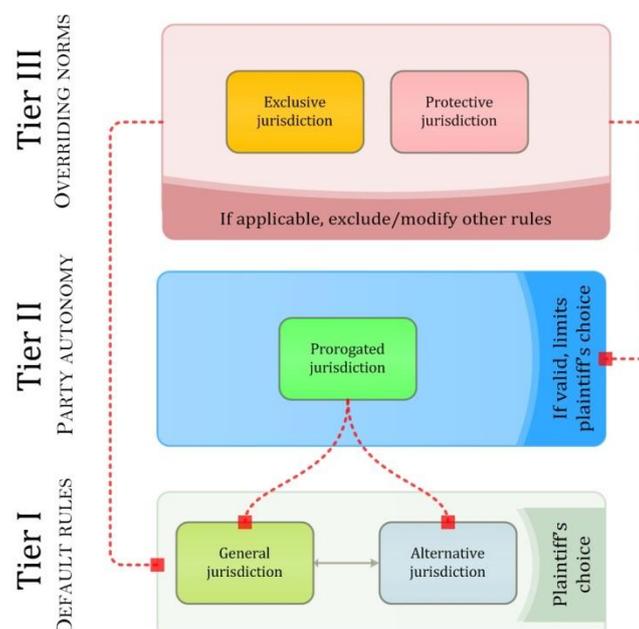
<sup>113</sup> Stone, *EU Private International Law*

<sup>114</sup> See Brussels I (recast) Article 25 (1)

example are disputes involving immovable property: because of a strong connection with a country in which they are located, disputes involving their ownership can *only* be litigated there. Notably for us, certain kinds of intellectual property disputes are subject to the exclusive jurisdiction of the country in which those rights are registered. Rules on exclusive jurisdiction supersede everything: rules on general jurisdiction, alternative jurisdiction, and any agreement of the parties.

Lastly, there is something called *protective* jurisdiction: these rules are aimed towards protecting certain kind of public interests. Most prominent – and relevant for our discussion – are those striving to protect the consumers: they stipulate that in consumer contracts, subject to certain conditions, consumers are free to bring a lawsuit before the courts of their home country, regardless of any agreement they might have entered into before the dispute arose. Some of these rules apply to insurance and others to employment contracts. They supersede – or modify – the other rules contained in *Brussels I*, save from the rules on exclusive jurisdiction.

This means that we can think of jurisdiction under *Brussels I* as a three-tiered structure. Tier I – containing the rules on general and alternative jurisdiction – is the starting point. General jurisdiction is the default rule; it is supplemented by the rules on alternative jurisdiction, and plaintiffs can choose freely between the two. Tier II is one of party autonomy – provided that the parties have agreed to bring their disputes to a specific court, and that this agreement is valid, plaintiffs can't go back on this agreement – disputes will need to be litigated before the designated court. Finally, Tier III contains overriding rules: if applicable, they shift the legal landscape, modifying or completely setting aside the rules found in Tier I and II. This chart illustrates the hierarchy of rules contained in *Brussels I*:



Therefore, in order to fully analyze jurisdictional aspects of user content licensing, we need to examine each of these tiers. We will start by looking into the overriding norms of Tier III, in an attempt to determine whether users can claim to be consumers and invoke the protective jurisdiction of their home courts. We will also briefly consider whether there can be any exclusive jurisdiction over licensing of user content, given that some IP questions traditionally fall under the scope of exclusive jurisdiction. Assuming that users cannot invoke either, we will examine whether the agreements on prorogated jurisdiction are formally valid under *Brussels I*. Finally, assuming that the agreements forming Tier II are not considered to be valid, we will discuss the venues available to users when filing tort claims against platform providers.

### 2.2.1.1. Protective jurisdiction: consumer protection

When users from EU sign up to use a social networking website incorporated in the United States, and accept the terms of site's user agreement stipulating that all disputes are to be resolved before the US courts, are they at a later stage free to bring a lawsuit in their home country? The answer will largely depend on the applicability of protective jurisdiction rules contained in *Brussels I*, enacted with a goal of protecting consumers in cross-border transactions. Consequently, we first need to establish that users are considered to be consumers within the meaning of the Regulation. However, that is not sufficient, as *Brussels I* "does not protect consumers *per se*";<sup>115</sup> rather, it protects consumers *only* in certain relationships:

"1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."<sup>116</sup>

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<sup>115</sup> Zheng Sophia Tang, 'Consumer contracts and the Internet in EU private international law' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Research Handbook on EU Internet Law, Edward Elgar Publishing 2014)

<sup>116</sup> Brussels I (recast) Article 17 (1)

Since Terms of Service agreements do not fall within the scope of subsections a) and b), we will need to examine whether and how Internet companies can be claimed to have pursued professional activities in – or directed them to – user’s home country.

Previous version of Brussels I contained an additional requirement: that defendant is domiciled (or deemed to be domiciled) in EU. This requirement has been expressly rejected in the recast version, making it possible for consumers to sue defendants from outside the EU before the courts of their home country.<sup>117</sup>This limitation is still, as discussed below, present in Lugano Convention, applicable, among other places, in Norway; however, there, users have the right to bring a lawsuit against defendants outside EU/EEA under the Civil Procedure Act. We will discuss the details in section 2.2.2, below.

Therefore, we have two questions to answer: are users consumers, and have the online companies demonstrated intention to target them with their services?

#### **2.2.1.1.1. Users as consumers**

When uploading a video to YouTube, talking via Skype or browsing LinkedIn, can you be considered to be a consumer, for the purposes of establishing jurisdiction?

*Brussels I* takes a very permissive approach when defining a consumer contract: it is, subject to a few narrow exceptions, any contract “concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession”.<sup>118</sup>This strives to cover a very wide range of contractual arrangements. The application is, however, not always completely straightforward.

One of the key difficulties in interpreting this provision lies in the somewhat abstract nature of the concept of a ‘purpose outside trade or profession’; in fact, there is significant CJEU jurisprudence on the topic, dealing with scenarios in which acquirers are acting for mixed – business and non-business purposes.<sup>119</sup>In such cases, CJEU held, the agreement is not to be considered a consumer contract, unless the non-business purpose is of negligible importance.<sup>120</sup>CJEU also re-affirmed a standard from which it occasionally departed in the past: that the contract must be concluded for the purpose of satisfying acquirer’s own needs.<sup>121</sup>However, this is now interpreted rather broadly – for instance, buying Christmas gifts to your friends would be considered as fulfilling your own

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<sup>117</sup> Ibid Article 17 (2): “A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, *regardless of the domicile of the other party*”, emphasis added.

<sup>118</sup> Ibid Article 17 (1)

<sup>119</sup> See Tang, 'Consumer contracts and the Internet in EU private international law'; C-89/91 *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECLI:EU:C:1993:15 (ECJ); C-269/95 *Francesco Benincasa v Dentalkit Srl* [1997] ECLI:EU:C:1997:337 (ECJ); C-99/96 *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1991] ECLI:EU:C:1999:202 (ECJ); C-464/01 *Johann Gruber v Bay Wa AG* [2004] ECLI:EU:C:2004:529 (ECJ); C419/11 *Česká spořitelna, a.s. v Gerald Feichter* [2013] ECLI:EU:C:2013:165 (ECJ)

<sup>120</sup> Stone, *EU Private International Law* page 133; *Johann Gruber v Bay Wa AG*

<sup>121</sup> Stone, *EU Private International Law* page 134; *Česká spořitelna, a.s. v Gerald Feichter*

need.<sup>122</sup> As such, this standard merely reaffirms that consumer must not be acting for business purposes when entering into an agreement for the protective rules to apply.

This is quite significant for our analysis of user content licensing: it means that *only* users who use online platforms for non-business purposes can rely on consumer protection provisions found in *Brussels I*. Those who, for example, go online to promote their professional singing, market their home-made products, communicate with their clients and fans – fall outside the scope of this protection.

There are, granted, some borderline cases. What happens if user starts sending work-related e-mails from his private G-Mail account, or if he reaches out to colleagues via LinkedIn, a social network aimed at professional networking? Can it be said that he/she is acting with a purpose within profession? While there is no direct case law on this point yet, it seems very likely that previously established autonomous standards would be applied rather broadly: if the business purpose is of low importance/occurrence, it will not prevail over consumer protection norms. This would be a matter of fact, to be determined by the competent courts.

It is quite worth noting that the application of jurisdictional consumer protection norms is not preempted by the fact that most online services are offered “for free”, contrary to what the online companies might claim.<sup>123</sup> *Brussels I* does not, in any part, mention the payment of a price as a prerequisite for triggering consumer protection. There is no such requirement to be found in case law, either; and in other instruments, when wanting to condition consumer protection on a payment of a sum, EU legislators made an explicit reference to the product price.<sup>124</sup>

As a result, we can conclude that most users who use online platforms as private persons – to satisfy their own needs, and not to promote their businesses – can be considered to be consumers within the scope of *Brussels I*. Jurisprudence on “fringe cases” – users which use websites for mixed purposes – is yet to evolve.

#### **2.2.1.1.2. Intention to target**

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<sup>122</sup> Stone, *EU Private International Law* page 135

<sup>123</sup> At least in the strictest sense of the word, not requiring a payment in money for basic services.

<sup>124</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive) [2011] OJ L304

As outlined above, consumer protection in *Brussels I* is not absolute – it applies only if professional has pursued activity in consumer’s country of domicile, or has directed professional activity to that country. The goal of this limit is ensuring legal certainty: it would not be reasonable to subject professionals/traders to jurisdictions of courts in far-off countries, if they have never intended to engage in professional activity there.<sup>125</sup> But how is this intention to target consumers in a certain Member State established in our case, given the borderless nature of the Internet? Is the mere fact that a website is accessible in a certain Member State sufficient to prove that a website has directed activity to that state?

The answer to this question was given by CJEU in the case of *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* and *Hotel Alpenhof GesmbH v Oliver Heller*,<sup>126</sup> which set down the standards for applying protective jurisdictional provisions of *Brussels I* to the activities on the Internet. The court ruled that the mere accessibility of a website in the Member State in which the consumer is domiciled is *not* sufficient.<sup>127</sup> The court also held that the same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which website owner – referred in to as trader – is established.<sup>128</sup>

What the court held to be of importance, however, was whether trader’s overall activity points to intention to do business with the consumers coming from a particular Member State. To establish the intention to target, the court held, “it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader’s overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer’s domicile, in the sense that it was minded to conclude a contract with them.”<sup>129</sup> The court did not attach significance to the question of website’s interactivity.<sup>130</sup> Rather, it provided a non-exhaustive list of factors that can be used as evidence to establish intention to target consumers in a certain Member State: the international nature of the activity; mention of itineraries from other Member States for going to the place where the trader is established; use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making

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<sup>125</sup> Tang, 'Consumer contracts and the Internet in EU private international law' page 266

<sup>126</sup> Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECLI:EU:C:2010:740 (ECJ)

<sup>127</sup> *Ibid* page 95

<sup>128</sup> *Ibid*

<sup>129</sup> *Ibid*

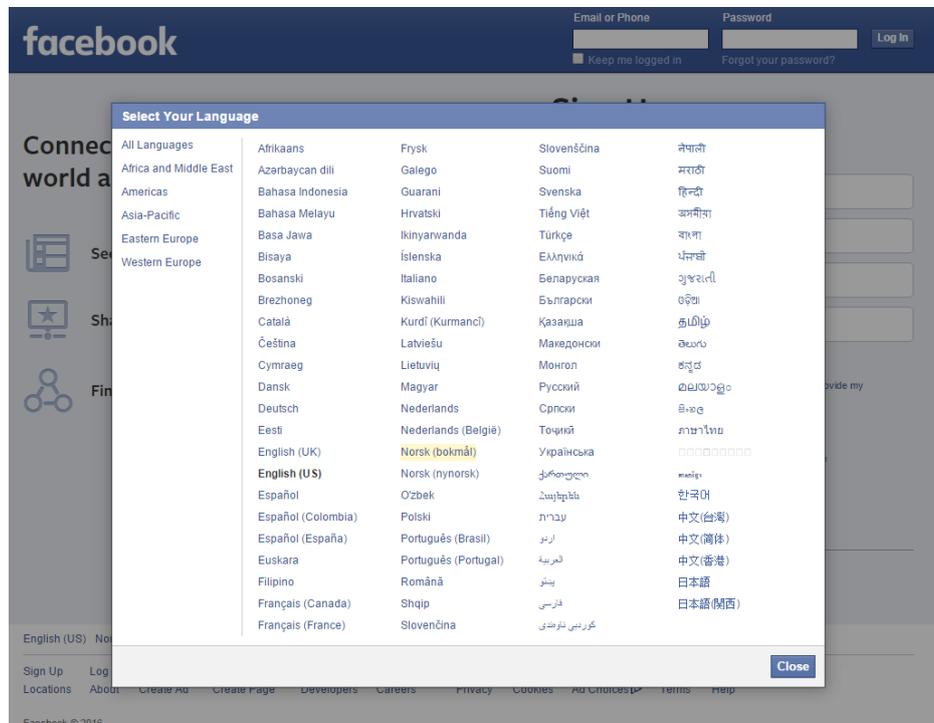
<sup>130</sup> *Ibid* page 65

and confirming the reservation in that other language; mention of telephone numbers with an international code; outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States; use of a top-level domain name other than that of the Member State in which the trader is established; and mention of an international clientele composed of customers domiciled in various Member States.<sup>131</sup>

Under this standard, it is easy to establish that online companies whose terms we are analyzing have an intention to target users domiciled in the EU.

To begin with, virtually all the companies offer their services under multiple top-level domain names. In some cases, users are even automatically redirected to a top-level domain name corresponding to their home country: for example, Norwegian users who visit “www.google.com” will automatically be redirected to “www.google.no” – a local, customized version of the website.

Secondly, websites are offered in many languages not commonly used in the United States – many of which are official languages of EU Member States. Some of these websites even automatically select or highlight the language of visitor’s country as a recommended setting:



<sup>131</sup> Ibid page 95

Third, online companies offer paid services to users coming from various Member States – including digital stores, content subscription plans, and advanced features. For instance, digital content for Google’s Android operating system can be purchased from any Member State; Spotify offers its paid service in 56 countries worldwide, covering the entire EU; and LinkedIn allows all users to upgrade to its paid, “premium” service, unlocking additional features. Whether a particular user filing a lawsuit has actually used these paid features is irrelevant: all that matters is that online companies *had an intention* of doing business with *some* consumers coming from his/her Member State.

Fourth, those companies who offer advertising services to businesses allow those businesses to target ads to consumers coming from EU Member States. For instance, as a Norwegian user of AdWords, I am capable of targeting, say, French users with my ads – with Google offering predictions on the audience I will be able to reach:

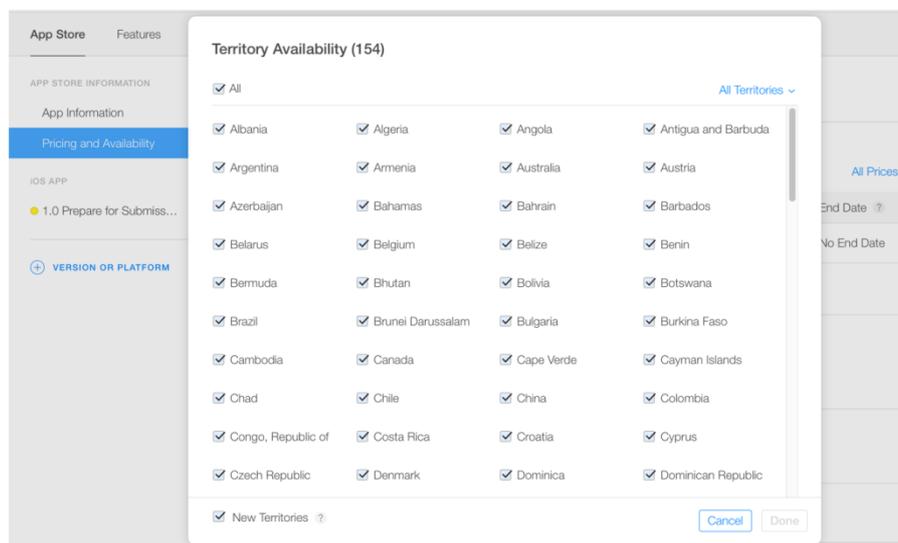
The screenshot shows the Google AdWords 'Choose your locations' interface. A map of Europe highlights France with a reach of 28,600,000. A table on the right lists the targeted location and its reach.

Targeted locations	Reach	Remove	Nearby
France - country	28,600,000	Remove	Nearby

Granted, *purchasing of* advertising services is aimed at professionals, not consumers; but the fact that they allow those professionals to target Internet users in various Member States means that platform providers are targeting them, too – as an audience to serve the ads to. The bigger the audience, the greater the advertising revenue – so the interest to continuously expand user base clearly exists, thereby corroborating the existence of the intention to target.

Fifth, many of the largest online companies – including Google, Facebook, Microsoft and Twitter – have offices in EU Member States: Google alone has presence in 24 countries in Europe.<sup>132</sup> The presence of a physical establishment in a country can be construed as a certain sign that a company has directed its professional activities to that country, and that it could have reasonably expected to be subjected to jurisdiction of the courts of that country.

Sixth, companies that primarily offer mobile applications – such as Snapchat, Instagram, Tinder, Spotify – can be held to the same standard. It is true that mobile applications, unlike websites, do not operate under a top-level domain. Still, when they are uploaded to a digital marketplace – such as Google Play Store or Apple App Store – developers need to actively select territories in which the app will be available:<sup>133</sup>



Developer’s help page for Google Play store states: “When you upload your app to Google Play, you can select the countries in which to distribute your app under Pricing and Distribution. The app will then be available to users in only the countries you select.”<sup>134</sup> This means that app developers are, when uploading an application, making a conscious choice to make an app available in a certain country. In addition, most of the applications offer premium services or digital content

<sup>132</sup> ‘Locations - Google Careers’ <<http://www.google.com/about/careers/locations/#tab=europe>> accessed 26 February 2016. European offices are located in Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom.

<sup>133</sup> ‘Viewing and Changing Your App’s Status and Availability’ <[https://developer.apple.com/library/ios/documentation/LanguagesUtilities/Conceptual/iTunesConnect\\_Guide/Chapters/ChangingAppStatus.html#//apple\\_ref/doc/uid/TP40011225-CH30-SW4](https://developer.apple.com/library/ios/documentation/LanguagesUtilities/Conceptual/iTunesConnect_Guide/Chapters/ChangingAppStatus.html#//apple_ref/doc/uid/TP40011225-CH30-SW4)> accessed 26 February 2016.

<sup>134</sup> ‘Filters on Google Play | Android Developers’ <<http://developer.android.com/google/play/filters.html>> accessed 26 February 2016.

for purchase; and those that are distributed for free are ad-sponsored, thereby falling under the same standards as websites offering those features.

The list of factors to consider may go on. What it ultimately points to is that the courts are extremely likely to hold that the overall activity of online companies demonstrates their intention to target consumers from EU Member States, thereby triggering the application of the jurisdictional consumer protection provisions. Now, which factors would be held as relevant in a specific case would depend on its factual background – after all, that is why CJEU provided us with an illustrative, non-exhaustive list of factors to consider; but the conclusion remains: online companies would have an exceedingly difficult time in arguing that they were not directing activities to consumer’s country.

### **2.2.1.1.3. Effects of jurisdictional consumer protection norms**

As we have seen, it is not difficult to establish that consumer protection norms found in *Brussels I* apply for all users coming from EU, apart from those who principally use the online platforms for business purposes. But what is the effect of these norms?

Most significantly, *Brussels I* allows consumers to bring a lawsuit before the courts of their home country: “A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.”<sup>135</sup> It is worth underlining again that this provision – modified in the recast version of *Brussels I* – now extends to all defendants, regardless of whether they are domiciled in EU or not. In our case, this means that EU users are free to bring a lawsuit against US-incorporated companies before their home courts, even though US is not a party to *Brussels I*.

The second jurisdictional effect might be just as important. In order to ensure that these protective mechanisms are not sabotaged through private ordering, *Brussels I* stipulates a list of additional requirements that forum selection agreements must fulfill if they are to be binding on the consumers. The agreement is only valid in three scenarios: if it is entered into after the dispute has arisen, if it gives consumers more fora to choose from than they would otherwise be able to, or if it is entered into between a consumer and a trader domiciled in the same country, and confers

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<sup>135</sup> Brussels I (recast) Article 18

jurisdiction on the courts of that country. Forum selection clauses found in the agreements analyzed in this book do not satisfy any of these requirements.

First, Terms of Service agreements are entered into when users sign up for the service; jurisdictional clauses found in them pertain to future, rather than existing disputes. Secondly, the agreements are restrictive in nature: they attempt to compel users to litigate disputes exclusively before the U.S. courts, and as such, strive to restrict, rather than expand users' choice of fora. Thirdly, the agreements do not confer jurisdiction upon the EU Member State in which both the user and the company are domiciled.

Accordingly, forum selection agreements are very likely to be invalidated by the European courts, and non-professional users of online platforms will be allowed to bring a lawsuit in the country of their domicile.

#### **2.2.1.2. Exclusive jurisdiction**

Another type of jurisdiction conferred by *Brussels I* is exclusive jurisdiction, which, based on the subject matter of the dispute, gives jurisdiction *only* to certain courts, regardless of any other jurisdictional rules or the agreement of the parties.<sup>136</sup> A court seized in breach of these rules must decline jurisdiction; otherwise, any resulting judgement must be refused recognition and enforcement in the other Member States.<sup>137</sup>

The rule on exclusive jurisdiction which seems most pertinent is the one dealing with registered IP rights. It provides:

“The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: [...] in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.”<sup>138</sup>

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<sup>136</sup> Ibid Article 24

<sup>137</sup> Stone, *EU Private International Law* page 147

<sup>138</sup> Brussels I (recast) Article 24 (4)

However, it is clear that this rule does not extend to copyright.<sup>139</sup> Copyrighted works are not “required to be deposited or registered”; to the contrary, the Berne Convention<sup>140</sup> clearly stipulates that copyright protection shall not be subject to any formalities.<sup>141</sup>

In addition, even if we suppose that the dispute involves trademarks – for instance, through unauthorized use of a user-owned trademark in advertisement – this section only applies to questions of registration and validity. Any contractual or infringement claim would still be governed by the rules on general and alternative jurisdiction.<sup>142</sup>

Therefore, rules on exclusive jurisdiction have largely no effect on user content licensing clauses that we are examining in the scope of this thesis.

### **2.2.1.3. Prorogated jurisdiction**

What happens if the courts were to rule that jurisdictional consumer protection rules do not apply – as unlikely as that might be – but there is still a forum selection clause to be found in user agreement? What is the legal standard under which its validity should be ascertained?

The answer differs based on whether the forum selection clause points to a court located in an EU Member State, or a court located outside EU. In the first case, *Brussels I* lies down the rules for assessing the validity of forum selection clauses. In the latter, *Brussels I* is silent, and the seized court would use its own rules of private international law to determine the rules applicable to the validity of forum selection agreements.

For agreements conferring jurisdiction on a court located in an EU Member State, *Brussels I* first stipulates a list of formal validity requirements. To be considered formally valid, the agreement must fulfill one of three alternative requirements: be in writing or evidenced in writing; be in a form which accords with practices which the parties have established between themselves; or, in international trade or commerce, be in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and

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<sup>139</sup> Stone, *EU Private International Law* citing *Pearce v Ove Arup Partnership Ltd. and Others* [2000] Ch 403 (Court of Appeal Civil Division, United Kingdom) affirming *Pearce v Ove Arup Partnership Ltd (Jurisdiction)* [1997] Ch 293 (Chancery Division of the High Court, United Kingdom); and *R Griggs Group Ltd v Evans (No.2)* [2004] EWHC 1088 (Ch) (Chancery Division of the High Court, United Kingdom)

<sup>140</sup> Berne Convention

<sup>141</sup> *Ibid* Article 5 (2)

<sup>142</sup> Tang, 'Consumer contracts and the Internet in EU private international law' and Stone, *EU Private International Law*

regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.<sup>143</sup>

Requirements of formal validity under *Brussels I* are easily satisfied in our case. The Regulation clearly stipulates that “any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’”.<sup>144</sup> Terms of Service agreements, while often found on dynamic web pages, can easily be transformed into a durable record by the user – they can be saved, printed out, screenshotted, and so forth. Companies are also very likely to keep long-lasting records of their online agreements; and some of them even offer an online repository of the user agreements which were previously in force.<sup>145</sup> This means that the first alternative condition – that the agreement is made in writing within the meaning of *Brussels I* – is clearly fulfilled.

It is worth noting that EU Member States are not allowed to impose any additional formal validity requirements: in *Elefanten Schuh v Jacqmain*<sup>146</sup> CJEU explicitly held that the formal requirements specified by *Brussels I* are exhaustive. Therefore, it would not be possible to require online agreement to be given in a certain format – with big letters, in a certain language, and so forth – for it to be *formally* valid. However, lack of such elements could potentially lead to substantive validity challenges.

As far as the substantive validity of a forum selection clause is concerned, *Brussels I* deems that it needs to be ascertained in line with the law of the court selected in the clause. The availability of substantive claims against the forum selection clause – such as allegations of unfair contractual practices, breaches of good faith, changed circumstances, problematic consent – will therefore depend on the availability of such claims under the law of the purported court. This, in itself, can seem problematic: some legal systems allow for broader challenges of validity than the others. Common Law tradition, for example, privileges predictability and narrow reading of contracts; whereas in Civil Law systems, interpreters are given rather broad discretion.<sup>147</sup> A party can therefore arguably hope to preempt broad validity challenges by selecting a court located in a Common Law country – much like it is done with the selection of US courts in online agreements – thereby subjecting the forum selection clause’s substantive validity to its law. In practice, however, such maneuvers would likely have relatively limited impact. As we will discuss in the section of this chapter devoted to choice of law issues, seized courts have certain mechanisms at their disposal, allowing them to

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<sup>143</sup> Brussels I (recast) Article 25

<sup>144</sup> Ibid

<sup>145</sup> See e.g. <<https://www.google.com/intl/en/policies/terms/archive/>>

<sup>146</sup> 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain Mugsy* [1981] ECLI:EU:C:1981:148 (ECJ); See Stone, *EU Private International Law* page 177

<sup>147</sup> See Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability*; See also Giuditta Cordero-Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7 *Global Jurist* 1934

apply core, fundamental devices of their own law even in situations in which conflict rules or party autonomy point to the application of other laws.

In case that the forum selection clause points to the court located outside EU, each country is free to design the applicable rules on formal validity and conflict rules on substantive validity. Examining them here would fall outside the scope of this book. However, the courts are not free to ignore such a clause, simply because it points to a court located outside EU: *Brussels I* seems to have had a “reflexive effect”,<sup>148</sup> making it mandatory for the seized court to apply its conflict provisions to a forum selection clause.<sup>149</sup> This was confirmed by CJEU in *Coreck Maritime v Handelsveem*.<sup>150</sup> The courts might, however, be more inclined to substantively invalidate a forum selection clause which points to a non-member country, especially if there is a discrepancy in bargaining power between the parties.

An additional factor to consider is that in an online setting, the line between formal validity and substantive validity can be somewhat blurred: many of the claims concerning online agreements will call for the examination of the agreement’s layout, presentation, and user’s ability to review its content. There is currently no CJEU case law establishing an autonomous demarcation standard.

Ultimately, making general statements on the validity of forum selection clauses found in user agreements – those not subject to consumer protection norms – is perilous. Their legal fate will depend on four factors: location of the purported court, substantive validity challenges available under the law of that court, application of the conflict rules of the court seized, and its inclination to apply norms of its own law to invalidate the forum selection clause. All of these factors, in turn, heavily depend on the factual background of the case and the legal tradition of the purported and seized court.

#### **2.2.1.4. Alternative jurisdiction**

Finally, we turn to the situation in which forum selection clauses are held to be invalid, and based on the rules contained in *Brussels I*, plaintiffs are allowed to bring their case before several different courts – the choice being left entirely to them. In this scenario, we will assume that plaintiffs are bringing a copyright infringement claim – and not a claim for a breach of contract.

How is jurisdiction determined in those cases?

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<sup>148</sup> Stone, *EU Private International Law*

<sup>149</sup> *Ibid* page 185

<sup>150</sup> C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* [2010] ECLI:EU:C:2010:606 (ECJ)

Rule contained in *Brussels I* envisages that in matters relating to tort, lawsuit may be filed before the courts of the place where the harmful event occurred or may occur.<sup>151</sup> What becomes immediately obvious is that determining such places in disputes involving online distribution of content is exceedingly difficult. Fortunately, CJEU's autonomous interpretation of *Brussels I* has shed some light on this issue; even though it has resulted in a less than fully consistent system. Namely, under current CJEU jurisprudence, determination of a place where "harmful event occurred or may occur" in an online setting depends largely on the nature of the tort claim itself. The standards are therefore complex and varied, as the tort claims inevitably vary.

Under one such standard, established in the case of *eDate Advertising GmbH v X*,<sup>152</sup> personality rights claims may be brought before the courts of the Member State in which the publisher of content is established or before the courts of the Member State in which the plaintiff has a center of interests.<sup>153</sup> Plaintiff may also, instead of an action for liability in respect of all the damage caused, bring his/her action before the courts of each Member State in the territory of which content placed online is or has been accessible.

This effectively means that the users of online platforms are free to bring a lawsuit claiming infringement of their rights before the courts of the country in which they are domiciled, or before the courts of the country with which they have a particularly close connection – under the "center of interest" standard – regardless of whether they used the platform for professional or business purposes, or whether the company operating the website had any intention to target that jurisdiction. In addition to suing the websites for the totality of damages there, they are also able to sue them in any Member State in which they are accessible, for the amount of damage incurred there. This gives plaintiffs a very wide selection of fora.

More pertinently for us, situation is different in copyright infringement cases: the concept of plaintiff's center of interests plays has no significant jurisdictional role. The plaintiffs are still free to bring an infringement lawsuit before the court of any Member State in which the allegedly infringing content is accessible online – but only for damage incurred there. This follows from

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<sup>151</sup> Brussels I (recast) Article 7 (3)

<sup>152</sup> Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH and Others v X and Société MGN LIMITED* [2011] ECLI:EU:C:2011:685 (ECJ)

<sup>153</sup> Not to be confused with domicile, *see* *ibid* paragraph 49: "The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State."

judgements in *Peter Pinckney v KDG Mediatech AG*<sup>154</sup> and *Pež Hejduk v EnergieAgentur.NRW GmbH*.<sup>155</sup> CJEU's reasoning in the latter case provides some interesting insights.

The factual background might be rather illustrative. The case involved Ms Hejduk, a professional photographer of architecture from Austria, who allowed EnergieAgentur, a German company, to use her photographs during a conference. Subsequently, EnergieAgentur, without Ms Hejduk's consent and without providing a statement of authorship, made those photographs available on its website for viewing and downloading. Taking the view that her copyright had been infringed by EnergieAgentur, Ms Hejduk brought an action before the Austrian court, relying on Article 7(3) of the Brussels I Regulation. EnergieAgentur objected to Austrian court's jurisdiction, pointing out that that its website was not directed at Austria and that the mere fact that a website might have been accessed from Austria was insufficient to confer jurisdiction on that court. Austrian court in turn referred the question to CJEU.

In the opening paragraphs, CJEU emphasized that Article 7(3)<sup>156</sup> must be interpreted autonomously and strictly, and only as a derogation of a fundamental principle of general jurisdiction – one of defendant's domicile. The court went on to highlight that, under the standard previously established in *Coty Germany*,<sup>157</sup> the special rule contained in Article 7(3) covers both the place where the damage occurred and the place of the event giving rise to it.

Considering the event which gave rise to damage – the causal event – the Court found insufficient connection with the court seized. Since the alleged tort consisted in the infringement of copyright through placing of photographs online, the Court reasoned that the activation of the process for the technical display of the photographs on that website must be regarded as the causal event. The event giving rise to a possible infringement of copyright, in Court's reasoning, therefore was in the actions of the owner of that site – a company whose seat was located in a Member State other than that of the court seized; therefore, this connecting factor could not have been used to confer jurisdiction upon this court.

As for the second connecting factor contained in Article 7(3) – place where the damage occurred – the court reminded that under *Pinckney*, “the place where the alleged damage occurred within the meaning of that provision may vary according to the nature of the right allegedly infringed, but also that the likelihood of damage occurring in a particular Member State is subject to the condition that the right whose infringement is alleged is protected in that Member State”. Given that plaintiff's copyright was protected in throughout the EU – the Court referred to the InfoSoc Directive – the only issue left for CJEU to consider was whether damage could have been claimed

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<sup>154</sup> C-170/12 *Peter Pinckney v KDG Mediatech AG* [2013] ECLI:EU:C:2013:635 (ECJ)

<sup>155</sup> C441/13 *Pež Hejduk v EnergieAgentur.NRW GmbH* [2015] ECLI:EU:C:2015:28 (ECJ)

<sup>156</sup> At that time Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) [2000] OJ L12 Article 5 (3)

<sup>157</sup> C-580/13 *Coty Germany GmbH v Stadtsparkasse Magdeburg* [2015] ECLI:EU:C:2015:485 (ECJ)

to have occurred in the country of the court seized, even if that country was not actively targeted by the website owner. The Court answered positively – citing *Pinckney*, it reminded that Article 7(3) did not require, in particular, that the activity concerned be ‘directed to’ a Member State of the seized court.

What does this mean for users of online platforms? Following the general standard, when bringing a lawsuit for copyright infringement against the online companies, they could sue in the place where the companies are domiciled – but this might not be the most practical choice. Even the few online companies that have branches in the EU might be located in Member States which are far away from plaintiff’s home country. The other alternative – suing them in any Member State where the website is accessible – seemingly has the significant limitation in terms of the damages that the courts of such a state would be able to rule on. However, that limitation might not be so significant in practice. On one hand, plaintiffs can still bring a wide variety of non-monetary claims – such as those asking for the content to be taken down or destroyed. On the other, litigation strategy might dictate that, even if plaintiff has suffered damage in several countries, it might be easiest to *prove* damage suffered in his/her country of residence; and establishing a strong litigation position there may at the later time be used to force the online company to settle the entire case.

Therefore, in claims of torts involving violations of personality rights and infringement of copyright, EU-domiciled users have a broad choice of courts before which they can bring a lawsuit. While the jurisdictional standards are more plaintiff-friendly in the first case, the latter also allows for some beneficial strategizing.

#### **2.2.1.5. EU jurisdictional rules: conclusion**

As we have seen, *Brussels I* lays down a rather complex web of jurisdictional provisions. Studying all of these rules in depth – and their application to the online environment – would, in itself, require several doctoral theses. But what we can conclude from our overview is that there is a very, very strong chance that EU users would be able to find a way to bring a case against platform providers before the courts of their home counties. This is especially clear in the case of non-professional users.

This is not to say that the current system is always predictable. In relation to consumer protection provisions, the standard of using an online platform “outside the trade or profession” needs to be further developed, accounting for non-traditional professions and use of websites primarily aimed at professional development. There is also a significant area *not* regulated by *Brussels I*: prorogated

jurisdiction in favor of non-EU courts, as well as invocation of alternative jurisdiction against non-EU defendants. These questions remain governed by the national laws, and can result in varying levels of protection across the EU – for the users *not* considered to be consumers. These inquiries, however, as outlined in Chapter 1, fall outside the scope of this thesis. Still, we can note that these questions might be harmonized in future iterations of *Brussels I*; after all, even consumer protection norms were modified to extend to non-EU defendants only recently. Such reforms will certainly be welcome.

### 2.2.2. Norway

As mentioned at the outset of this chapter, rules of private international law can come from various legal sources – ranging from purely domestic ones, to those found in binding international conventions. This sometimes results in a complex, intertwined web of rules, which can only be applied properly once one has gained a deeper understanding of an underlying relationship between the applicable sources. Norway is an excellent example of such situation: the aforementioned European sources significantly influences how jurisdictional questions are likely to be resolved, but this result is achieved in a rather indirect way.<sup>158</sup>

*Brussels I Regulation*, described above as a main source of regulation of jurisdictional questions in EU, is not directly applicable in Norway. However, the country is a party to *Lugano Convention*,<sup>159</sup> an instrument designed to extend the application of Brussels-regime to EFTA states outside EU. The Convention closely resembles *Brussels I*: not only are most of the articles identically worded, but there's also a positive legal duty to interpret the Convention autonomously, which also entails a duty to give due deference to sources interpreting *Brussels I*. On the surface, this makes it seem like the bulk of analysis outlined above can directly be applied in cases brought before the Norwegian courts.

However, that cursory look is rather deceptive, as Lugano Convention has not been updated to match the text of the *recast* version of Brussels I; meaning that the application of this Convention does not principally extend to defendants domiciled outside EU/EEA, even if the wording of the article appears identical to the wording used in *Brussels I Recast*. Given that most platform providers are incorporated in the United States, this creates real problems for consumers wishing to rely on the wording of the Article 16, granting consumers the right to bring a lawsuit against foreign

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<sup>158</sup> See Giuditta Cordero-Moss, *Internasjonal privatrett på formuerettens område*, Universitetsforlaget (2013)

<sup>159</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007/712/EC

defendants before the courts of their home states – as its application cannot be extended to third-country defendants.

Since potential disputes against platform providers are consequently unlikely to fall within the scope of Lugano Convention, jurisdictional questions for disputes filed before Norwegian courts are most likely to be resolved under Norwegian Civil Procedure Act. As far as consumer relationships are concerned, the Act stipulates:

“A consumer who has entered into an agreement with a professional party supplying goods or services for personal use can bring a case against a professional party before the courts of his/her general jurisdiction [i.e. place of residence].”<sup>160</sup>

It is important to note that the Act does not distinguish between defendants located in EU/EEA and those residing/established in third countries; this article appears to be universally applicable. The Act additionally stipulates that in order to be binding on a consumer, any forum selection agreement must be entered into *after* the dispute has arisen.<sup>161</sup>

It is also significant to note that the provisions of Civil Procedure Act generally also need to be interpreted consistently with the provisions of the Lugano Convention, which, in turn, means that the CJEU case law on *Brussels I* will have certain impact when interpreting the scope of jurisdictional norms found in Norwegian Civil Procedure Act. The position is reflected both in preparatory acts for the Civil Procedure Act, as well as in several Supreme Court cases (whose jurisprudence on the topic seemingly also opens for the possibility of discretionary rulings, and remains therefore somewhat inconsistent with Lugano Convention.)

While it is quite apparent that the end result for users is likely to be substantially similar to the one under *Brussels I Recast* – i.e. they will be able to bring their disputes before Norwegian courts, regardless of where defendants are domiciled, as long as they qualify as ‘consumers’ – the sheer lack of coherence in sources calls for reforms. A very obvious place to start would be the reform of the Lugano Convention to match the updated wording of *Brussels I Recast*, as already proposed by Cordero-Moss.<sup>162</sup>

### 2.2.3. United States

Situation is different in the United States: jurisdictional standards tend to be far less consumer-friendly, and are not embodied in a single instrument – rather, jurisdictional questions are regulated through a complex web of legal codes and case law, both at the state and federal level. We will therefore limit our focus solely on examining how US legal system treats forum selection clauses,

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<sup>160</sup> Norwegian Civil Procedure Act §4-5 (7)

<sup>161</sup> Norwegian Civil Procedure Act §4-6 (3)

<sup>162</sup> See Giuditta Cordero-Moss, *Revisjon av Luganokomvensjonen?*, Lov og rett 01/2016

taking special interest in legal standards governing the use of those clauses in consumer and online contracts.

### 2.2.3.1. Forum selection clauses: from illegality to omnipotence

“The Supreme Court really, really loves forum-selection clauses. The Court has enforced every forum-selection clause in an international contract that has come before it.”, writes Mullenix.<sup>163</sup>

Yet for a significant period of time, US courts have been actually deeply skeptical of forum selection clauses, at least in a domestic setting.<sup>164</sup> The courts viewed them as waivers of available legal remedies – given that, by agreeing to a forum selection clause, a party waives a right to access the court that it would otherwise be able to access. Since parties had no right to provide by contract a remedy prohibited by law, the courts concluded that parties should not have had the right to contract away a remedy provided by law, either. We find such reasoning in the case of *Home Ins. Co. of New York v. Morse*<sup>165</sup> from 1874:

“Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”<sup>166</sup>

In reaching this conclusion, the Supreme Court relied on a long line of cases, dating back to 1746. The Court also referred to a famous British case of *Scott v Avery*,<sup>167</sup> which dealt with the question of enforceability of contractual provisions allowing one party to stay the proceedings in favor of

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<sup>163</sup> Linda S. Mullenix, 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses' (2015) 66 *Hastings Law Journal* 719

<sup>164</sup> See e.g. James C. McNeal, 'Civil Procedure and Contract Law-Contractual Forum-Selection Clauses in Erie Cases: More than Substance or Procedure' (2012) 34 *U Ark Little Rock L Rev* 439

<sup>165</sup> *Home Insurance Company of New York v Morse* [1874] 87 US 445 (Supreme Court of the United States)

<sup>166</sup> *Ibid*, citations omitted

<sup>167</sup> *Scott v Avery* [1856] 10 ER 1121 (House of Lords, United Kingdom)

arbitration. The courts made clear that any pre-dispute agreements allocating jurisdiction are to be considered void.<sup>168</sup>

There might have been other reasons contributing to such deep hostility towards forum selection clauses. Namely, Judge Learned Hand once stated that it was his guess that “this judicial aversion dates from the time when judges were paid by the case and accordingly viewed arbitration and choice of forum provisions as devices that were likely to curtail their income”.<sup>169</sup> The same phenomenon was elaborated on in the *Scott v Avery* case, which mentioned judges’ jealousy of arbitrators, perceived as robbing judiciary of their income:

“That as formerly the emoluments of the judges depended mainly or almost entirely upon fees and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil ... They had great jealousy of arbitrations, whereby Westminster Hall was robbed of those cases which came neither into the Queen’s Bench, nor the Common Pleas, nor the Exchequer. Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law.”<sup>170</sup>

Based on such strong tradition, US courts kept invalidating forum selection clauses until as late as 1972, when in *M/S Bremen v. Zapata Off-Shore Co.*<sup>171</sup> the Supreme Court made a drastic departure from its previous jurisprudence. The case is well worth examining in detail.

In November 1967, respondent Zapata, a Houston-based American corporation, contracted with petitioner Unterweser, a German corporation, to tow Zapata's ocean-going, self-elevating drilling rig Chaparral from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea, where Zapata had agreed to drill certain wells. The contract required any dispute arising out of the agreement to be resolved before the High Court of Justice in London, England. A storm caused damage to Zapata's rig in the Gulf of Mexico, and Zapata, ignoring the forum-selection clause, brought suit in the United States District Court for the Middle District of Florida seeking to recover damages. The court denied a motion to stay the limitation action and to compel the tug owner from proceeding further in the London Court of Justice. On appeal by the tug owner, the Court of Appeals affirmed, and the Supreme Court granted certiorari.

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<sup>168</sup> An interesting historical side-question here: how could arbitration exist under such regime? *Scott v Avery* established that no cause of action accrues in arbitration until the award has been made – because the right of a party to an action is a claim for the sum specified by the arbitral tribunal.

<sup>169</sup> Willis L. M. Reese, 'The Contractual Forum: Situation in the United States' (1964) 13 Am J Comp L 187

<sup>170</sup> See Andrew Tweeddale and Keren Tweeddale, 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' (2011) 77 Arbitration 423, citing *Scott v Avery*

<sup>171</sup> *M/S Bremen v Zapata Off-Shore Co.* [1972] 407 US 1 (Supreme Court of the United States)

The Supreme Court upheld the forum selection clause, even though it recognized that they have historically not been favored by the US courts.<sup>172</sup> In establishing the new standard, the Court went as far as to hold that forum selection clauses are to be treated as presumptively valid, and should be enforced unless the resisting party can show that enforcement would be unreasonable and unjust.

We must note that *Zapata* was an admiralty case involving sophisticated business parties, which seems to have influenced Court's analysis. It underlined that the expansion of American business and industry would "hardly be encouraged"<sup>173</sup> if, notwithstanding contracts, the Court insisted on "a parochial concept that all disputes must be resolved under our laws and in our courts".<sup>174</sup> The Court went on to elaborate how there were compelling reasons "why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect",<sup>175</sup> noting that the transaction was far from routine, that the ships had to traverse waters of many jurisdiction, and that this gave rise to significant legal uncertainty. The Court held that the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties was an indispensable element in international trade, commerce, and contracting, and that there was strong evidence that the forum clause was a vital part of the agreement.

The Court also addressed the issue of invalidating forum selection clauses, although in a rather broad manner. It stated that forum selection clauses should be given legal effect if unaffected by fraud, undue influence, or overweening bargaining power – thereby seemingly embracing the

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<sup>172</sup> Ibid: Note 10 of the opinion lays this down in detail: "Many decisions reflecting this view are collected in Annot., 56 A.L.R.2d 300, 306—320 (1957), and Later Case Service (1967). For leading early cases, see, e.g., *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174 (1856); *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N.E. 678 (1916); *Benson v. Eastern Bldg. & Loan Assn.*, 174 N.Y. 83, 66 N.E. 627 (1903).

The early admiralty cases were in accord. See, e.g., *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (CA2 1930); *The Ciano*, 58 F.Supp. 65 (E.D.Pa.1944); *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387 (S.D.N.Y.1918); *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y.1889).

In *Insurance Co. v. Morse*, 20 Wall. 445, 22 L.Ed. 365 (1874), this Court broadly stated that 'agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.' Id., at 451. But the holding of that case was only that the State of Wisconsin could not by statute force a foreign corporation to 'agree' to surrender its federal statutory right to remove a state court action to the federal courts as a condition of doing business in Wisconsin. Thus, the case is properly understood as one in which a state statutory requirement was viewed as imposing an unconstitutional condition on the exercise of the federal right of removal. See, e.g., *Wisconsin v. Philadelphia & Reading Coal & Iron Co.*, 241 U.S. 329, 36 S.Ct. 563, 60 L.Ed. 1027 (1916).

As Judge Hand noted in *Krenger v. Pennsylvania R. Co.*, 174 F.2d 556 (CA2 1949), even at that date there was in fact no 'absolute taboo' against such clauses. See, e.g., *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N.E. 425 (1903); *Daley v. People's Bldg., Loan & Sav. Assn.*, 178 Mass. 13, 59 N.E. 452 (1901) (Holmes, J.). See also *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (CA2 1951)."

<sup>173</sup> Ibid

<sup>174</sup> Ibid

<sup>175</sup> Ibid

analysis under the doctrine of unconscionability. At the same time, Court seemed to limit the reach of this doctrine. Stating that “it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations”,<sup>176</sup> the Court concluded that “whatever ‘inconvenience’ Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.”<sup>177</sup>

*Zapata* therefore created a system which was extremely favorable to enforcement of forum selection clauses: they were not only held presumptively valid, but could not be successfully challenged as long as the party seeking enforcement could show that their enforcement was foreseeable at the time of contracting, either. Needless to say, this is a very difficult bar to pass. One author observes: “If one sifts through the thousands of reported federal forum-selection clause decisions since *Zapata* -- and there are thousands of such decisions -- one cannot help but be struck by the following fact: in virtually every case the party seeking enforcement of the clause wins, and the party seeking to invalidate the clause loses.”<sup>178</sup>

At the same time, *Zapata* left several open questions. Procedurally, it was unclear whether the party seeking to enforce a forum selection clause could ask for the dismissal of the case brought in breach of such a clause, or if it had to bring a motion to transfer the case to a proper venue.<sup>179</sup> Supreme Court addressed this question in 2013, in the case of *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*,<sup>180</sup> holding that the latter option is the only proper recourse. In so doing, however, the Court went further, and sought to tip the scales in favor of forum selection clauses even more.

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<sup>176</sup> Ibid

<sup>177</sup> Ibid

<sup>178</sup> Mullenix, 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses'

<sup>179</sup> Dismissal would be under 28 Code of Laws of the United States of America (U.S. Code) [1926] H.R. 10000 § 1406 (a) or Rule 12(b)(3)

<sup>180</sup> *Atlantic Marine Const. Co., Inc. v U.S. Dist. Court for Western Dist. of Texas* [2013] 134 SCt 568 (Supreme Court of the United States)

Namely, *Atlantic Marine* Court held that the presence of a valid forum-selection clause<sup>181</sup> required “adjustment of the usual analysis of a motion to transfer venue for the convenience of parties and witnesses, in the interest of justice” in three ways: first, the plaintiff’s choice of forum should merit no weight; second, the courts should not consider arguments about the parties’ private interests and may consider only public-interest factors when ruling on the motions; and third, when party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a transfer of venue will not carry with it the original venue’s choice-of-law rules. The second adjustment of the rules governing motion to transfer might be of the biggest significance: it virtually eliminated all reasonableness claims based on private interests. As the Court explained: “a court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties’ private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum.”<sup>182</sup>

Therefore, party seeking to resist enforcement of a forum selection clause stands no chance to win, unless it can show strong public policy considerations against enforcement of such a clause, or unless it successfully invokes state law claims such as fraud or undue influence. The first alternative presents a miniscule chance of success, given the Court’s stance that public policy favors enforcement of forum selection clauses. The latter is subject to widely varying standards: for example, there is a deep split between the states as to what constitutes fraud, and in some states, it is not sufficient for a party to demonstrate fraud in the inducement of the contract as a whole in order for the court to invalidate the forum-selection clause; rather, the specific clause designating

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<sup>181</sup> The Court did not, however, stipulate under which laws the validity of such clause is to be established, creating “chicken or egg” problem. See Mullenix, 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses'

<sup>182</sup> *Atlantic Marine Const. Co., Inc. v U.S. Dist. Court for Western Dist. of Texas*; for commentary see e.g. Randy E. Barnett, 'Consenting to Form Contracts' (2002) 71 Fordham L Rev 627; Daniel D. Barnhizer, 'Inequality of Bargaining Power' (2005) 76 U Colo L Rev 139; Charles L. Knapp, 'Taking Contracts Private: The Quiet Revolution in Contract Law' (2002) 71 Fordham L Rev 761; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 U Chi L Rev 1203; Michael I. Meyerson, 'The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts' (1993) 47 University of Miami Law Review 1263; Linda S. Mullenix, 'Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction' (1992) 27 Tex Int'l LJ 323; Erin A. O'Hara and Larry E. Ribstein, 'From Politics to Efficiency in Choice of Law' (2000) 67 U Chi L Rev 1151; Jane Rutherford, 'The Myth of Due Process' (1992) 72 BU L Rev 1; Joel P. Trachtman, 'International Regulatory Competition, Externalization, and Jurisdiction' (1993) 34 Harv Int'l LJ 47; Mary Twitchell, 'The Myth of General Jurisdiction' (1988) 101 Harv L Rev 610

the forum must *itself* have been obtained by fraud.<sup>183</sup> Consequently, the system surrounding enforcement of forum selection clauses in commercial contracts is practically airtight.

### **2.2.3.2. Consumer protection in forum selection clauses**

All of this might have had a limited impact on everyday life, had the Supreme Court kept the doctrine applicable solely to sophisticated business parties, like the ones in *Zapata* and *Atlantic Marine*. However, in a rather surprising ruling from 1991, the Court extended its presumptions in favor of forum selection clauses to contracts of adhesion – non-individually negotiated, “boilerplate” agreements, found in almost every aspect of the modern life.

The deciding case was *Carnival Cruise Lines, Inc. v. Shute*,<sup>184</sup> in which the Shutes, a Washington State couple, purchased passage on a ship owned by Carnival Cruise Lines, a Florida-based company. Carnival Cruise sent them travel tickets, containing a forum selection clause in favor of Florida courts; the clause was printed in small type on the back of the ticket. The face of the ticket included a statement “SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT-ON LAST PAGES 1, 2, 3”.<sup>185</sup>

The Shutes boarded the ship in California. While the ship was in international waters off the Mexican coast, Mrs. Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. She filed a suit against Carnival Cruise Lines in the Washington, claiming that her injuries had been caused by the negligence of the company and its employees. The suit was dismissed by the District Court, but the Court of Appeals reversed, holding that the forum-selection clause should not be enforced under *Zapata* because it was not “freely bargained for,” and because its enforcement would operate to deprive the Shutes of their day in court. The case made its way to the Supreme Court, which upheld the forum selection clause.<sup>186</sup>

The Supreme Court noted key dissimilarities from its previous cases, stating that, unlike in *Zapata*, in which sophisticated parties carefully negotiated the contract, “respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines.”<sup>187</sup> Yet the Court concluded that reasonableness criteria

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<sup>183</sup> McNeal, 'Civil Procedure and Contract Law-Contractual Forum-Selection Clauses in Erie Cases: More than Substance or Procedure'

<sup>184</sup> *Carnival Cruise Lines, Inc. v. Shute* [1991] 499 US 585 (Supreme Court of the United States)

<sup>185</sup> *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas* page 582

<sup>186</sup> *Ibid*

<sup>187</sup> *Ibid*

established in *Zapata* had to be accordingly altered *in favor* of forum selection clauses, not against them.

The decision thus expressly rejected Court of Appeals' determination that a non-negotiated forum-selection clause in a form contract is never enforceable simply because it is not the subject of bargaining. The Court explained that “it would be entirely unreasonable [...] to assume that respondents – or any other cruise passenger – would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line”.<sup>188</sup>

The Court also found economic reasons for enforcing non-negotiated clauses: among others, in keeping litigants from wasting both their time and the court's time in determining the appropriate forum for the suit,<sup>189</sup> as well as in minimizing defendants' legal expenses, which, the Court reasoned, consumers would ultimately benefit from. (“[...] passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”)<sup>190</sup>

The Court did emphasize that forum-selection clauses contained in standard form contracts were still subject to judicial scrutiny for fundamental fairness – but it seemed that the reach of such examination remained very limited. In this case, the Court held that there was no indication that Carnival Cruise Lines set Florida as the forum with the goal of discouraging cruise passengers from pursuing legitimate claims, simply because the company had its principal place of business in Florida, and many of its cruises departed from and returned to Florida ports.<sup>191</sup> Furthermore, The Court underlined that Shutes had conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.<sup>192</sup>

The fallout of this decision was severe. For the first time, the Court deemed that the difference in bargaining power was not to be considered as a relevant factor when analyzing forum selection clauses – greater weight was to be attached to the fact that consumers received notice of the terms and could therefore have rejected them. The decision thus extended Court's overwhelmingly forum selection-friendly jurisprudence to a vast array of contracts; in so doing, it drew sharp

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<sup>188</sup> Ibid

<sup>189</sup> *Berkson v Gogo LLC* [2015] 97 FSupp3d 359 (United States District Court, E.D. New York.)

<sup>190</sup> *Atlantic Marine Const. Co., Inc. v U.S. Dist. Court for Western Dist. of Texas* page 584

<sup>191</sup> Ibid

<sup>192</sup> Ibid

criticism.<sup>193</sup> Voices were repeatedly raised against *Carnival Cruise Lines* – the decision itself came with a scathing dissenting opinion, and the Congress amended the law applicable to cruise tickets – but to this day, it governs the enforcement of forum selection clauses in consumer contracts, making it virtually impossible to challenge them.

### **2.2.3.3. The ever-important wording: getting around forum selection clauses**

This still leaves the party opposing the enforcement of a forum selection clause with one option: claiming that dispute at hand does not fall under the scope of the clause. As forum selection clauses are based on party autonomy, courts are bound by the agreement of the parties – they cannot, for example, extend the forum selection clause to tort claims, if the contract stipulates that it pertains to matters of contract validity. This is why drafters of forum selection clauses – much like those who draft arbitration clauses – tend to use broad and all-encompassing language, stipulating that forum selection clauses cover “any and all disputes, controversies or claims” which “arise out of”, “relate to” or “are in connection with” the contract.

While it is natural that the language of forum selection clauses varies, the effect of such variations may be vast. This is because the American legal system, in line with the Common Law tradition, places very heavy emphasis on the wording of the contract, and miniscule differences in contract’s phrasing may give rise to immensely different legal outcomes. Such practice has deep historical roots – ranging from England’s selective reception of Roman law-based natural law doctrines, to its historic need to, above other considerations, ensure predictability in maritime contracting, thus favoring *caveat emptor* principle over application of the overarching principles such as good faith.<sup>194</sup> As Cordero-Moss explains:

“Under English law, the interpreter of a contract is expected to establish the mutual intention of the parties on the basis of the document itself. The wording of the provisions has to be understood according to its plain and literal meaning [...] It is not unusual to read English court decisions that give effect to the wording of a contract, while at the same time admitting that they consider the result unsatisfactory. [...] The English judge does not have the task of creating an equitable balance between the parties, but has to enforce the deal that the parties have voluntarily entered into. The parties are expected to take care of their own interests, and they expect from the system a predictable possibility of enforcing their respective rights in accordance with the terms of the contract. A

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<sup>193</sup> See Brussels I (recast) Article 7(1) (a); for more commentary see Kevin M. Clermont, 'Governing Law on Forum-Selection Agreements' (2015) 66 Hastings Law Journal 643; Leandra Lederman, 'Viva Zapata: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases' (1991) 66 NYU L Rev 422; Jason A. Lien, 'Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court's Pending Review of Atlantic Marine' (2013) 33 Constr Law 27; McNeal, 'Civil Procedure and Contract Law-Contractual Forum-Selection Clauses in Erie Cases: More than Substance or Procedure'; Maxwell J. Wright, 'Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform' (2011) 44 Loy LA L Rev 1625

<sup>194</sup> Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* page 85

correction or integration of these terms would run counter to these expectations, and the English judge does not, consequently, assume that role (unless specific statutory rules require him to do so, which happens mainly in the context of consumer contracts). This is seen as the most appropriate attitude for a system where commercial and financial business flourishes.”<sup>195</sup>

One instance of such interpretative practices is of particular interest to us, as it regards copyright licensing: the case law shows that forum selection clauses in such contracts have to be worded very carefully, as the use of standardized forum selection language might not be entirely fit to cover all the potential disputes.

Case on point is *Phillips v. Audio Active Ltd*,<sup>196</sup> in which Second Circuit was presented with a question whether a copyright infringement claim brought against record company falls under the scope of a forum selection clause found in a licensing agreement. The clause stated that “[t]he validity[,] construction[,] and effect of this agreement and any or all modifications hereof shall be governed by English Law and any legal proceedings that may arise out of it are to be brought in England.”<sup>197</sup> The court held that claims could not have been considered to “arise out” of the contract, reasoning:

“To decide whether Phillips' copyright claims arise out of the agreement, we are therefore required to determine if Phillips' rights—here predicated on valid ownership of the copyrights to the 15 songs—originate from the recording contract. We hold they do not. Appellant does not rely on the recording contract to establish his ownership of the relevant copyrights, but on his authorship of the work, a status afforded him as the composer who translates an idea into a fixed, tangible musical expression entitled to copyright protection. [...] Copyright claims of recording artist for direct and contributory copyright infringement did not originate in recording contract, and therefore were not governed by forum selection clause in contract, since substance of claims were that defendant music companies impermissibly manufactured and distributed songs to which artist retained valid copyright; although companies were expected to invoke contract as defense, artist denied that contract had any role or relevance whatever with respect to his copyright claims.”<sup>198</sup>

Court's logic was clear: the existence of the license was not relevant for the existence of a valid copyright or the possibility to bring an infringement claim, and therefore the case could not be treated as “arising out of” the contract (although the license might have been relevant as a defense against these claims). In reaching this conclusion, *Phillips* court consulted dictionaries, explaining that it did *not* “understand the words ‘arise out of’ as encompassing all claims that have some possible relationship with the contract, including claims that may only ‘relate to,’ ‘be associated with,’ or ‘arise in connection with’ the contract” and thus “saw no reason to presume the parties meant anything other than the dictionary definition of the term: to originate from a specified

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<sup>195</sup> Ibid page 81 and 84

<sup>196</sup> *Phillips v Audio Active Ltd* [2007] 494 F3d 378 (United States Court of Appeals, Second Circuit)

<sup>197</sup> Ibid

<sup>198</sup> Ibid

source.”<sup>199</sup> Consequently, given that copyright originated from the act of fixation, rather than a license, forum selection clause did not apply.

In a comparable case,<sup>200</sup> the court held that plaintiff’s claims for trademark infringement and dilution were not “resulting from” license agreements with defendant: the court reasoned that plaintiff could advance its claims without any reference to the contracts containing the forum selection clauses.<sup>201</sup>

Impact of such cases on users of online services could be vast: if user agreements stipulate that forum selection clauses refer to disputes “arising out” of the agreement or the use of services, then users can file copyright infringement claims when their content is being inappropriately used, regardless of the license and the forum selection clause. The problem is – the agreements are nowadays rarely phrased as to *solely* rely on this phrase. Rather, in addition to pertaining to disputes “arising out of”, they often stipulate that they cover disputes “related to” or “in connection with” the agreement or the services. Such clauses, the courts have held, cover all disputes that have some possible relationship with the contract. As the court explained in *Mendoza v. Microsoft*:<sup>202</sup>

“In any event, the forum-selection clause covers all disputes *related to* either the contract or the Xbox LIVE Service, and the term ‘related to’ is typically defined more broadly while not being necessarily tied to the concept of a causal connection. Webster’s Dictionary defines ‘related’ simply as ‘connected by reason of an established or discoverable relation.’ Webster’s Third New International Dictionary 1916 (1986). As the “related” definition would suggest, forum-selection clauses covering claims ‘relating to’ an agreement are broad in scope. *TGI Friday’s Inc. v. Great Nw. Restaurants, Inc.*, 652 F.Supp.2d 750, 759 (N.D.Tex.2009) (citing *MaxEn Capital, LLC v. Sutherland*, H–08–3590, 2009 WL 936895, at \*6 (S.D.Tex. Apr. 3, 2009) (“Such clauses are broad, encompassing all claims that have some possible relationship with the contract, including claims that may only ‘relate to’ the contract.”); *Smith v. Lucent Techs., Inc.*, 2004 WL 515769, at \*8 (E.D.La. Mar. 16, 2004) (“The term ‘related to’ is typically defined more broadly and is not necessarily tied to the concept of a causal connection.”)); cf. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397–98, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (labeling as “broad” a clause requiring arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement”).”

Lawyers drafting the user agreements seem to be aware of this – and thus widely implement such broad terms. Analysis of the Terms of Service agreements shows that “arising out of” terms are as equally represented as the “relating to” ones:

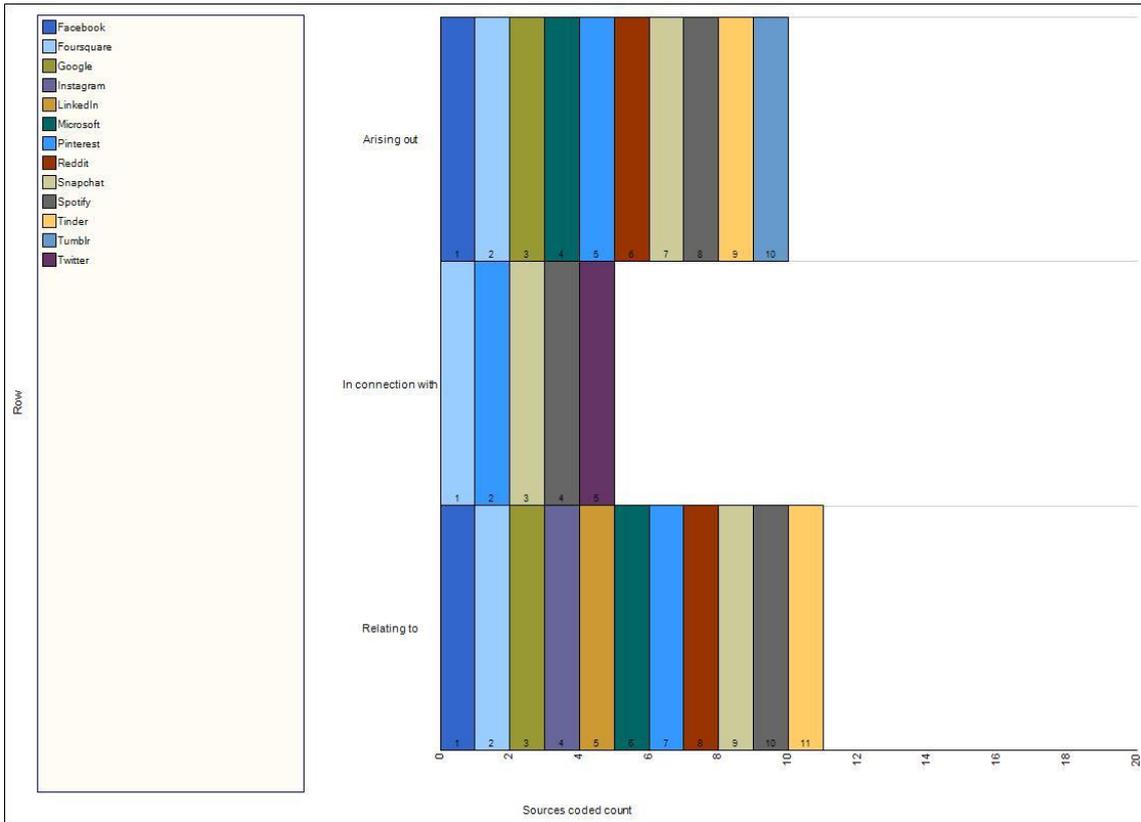
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<sup>199</sup> Ibid

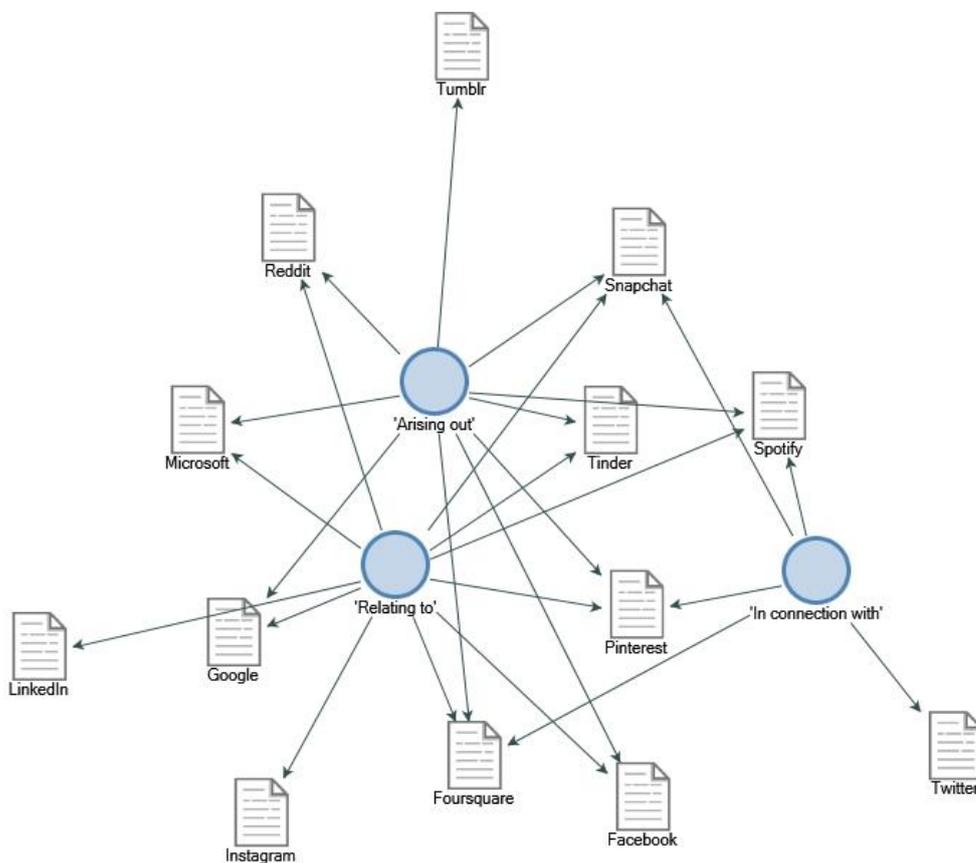
<sup>200</sup> *Altwater Gessler-J.A. Baczenski Intern. (USA) Inc. v Sobieski Destylarnia S.A.* [2009] 572 F3d 86 (United States Court of Appeals, Second Circuit)

<sup>201</sup> Ibid

<sup>202</sup> *Mendoza v Microsoft, Inc.* [2014] 1 FSupp3d 533 (United States District Court, W.D. Texas, San Antonio Division)



Additionally, connection map demonstrates that user agreements tend to combine several categories of terms, in order to ensure that forum selection clauses pertain to as many cases as possible:



The only analyzed agreement which arguably relies primarily on the “arising out” language – thus being subject to *Phillips* decision – is the one offered by Tumblr. The section containing a forum selection clause states: “*You and Tumblr agree that we will resolve any claim or controversy at law or equity that arises out of this Agreement or the Services in accordance with this Section or as you and Tumblr otherwise agree in writing.*”<sup>203</sup> However, even this agreement adds, at a later point: “*You agree that any claim or dispute you may have against Tumblr must be resolved exclusively by a state or federal court located in New York County, New York, except as otherwise agreed by the parties.*”<sup>204</sup> Therefore, there might be grounds to argue that the latter sentence expands the scope of the former, making a forum selection clause all-encompassing.

What we can conclude is that, while grounds to dispute the scope of the forum selection clauses are possible to find, in practice, they might be severely limited through careful and sweeping drafting.

#### **2.2.3.4. Forum selection clauses in digital agreements**

This leaves one question open: are there any specific rules governing the enforcement of the forum selection clauses found in digital agreements? Or does the digital form bear no significance? The answer is not completely straightforward.

Short time after the Supreme Court ruled in the *Carnival Cruise* case, something significant happened: advances in technology gave rise to widespread use of personal computing. As the costs dropped rapidly, computers suddenly ceased being devices reserved for business and governmental operations and found their way into our homes. Along with these computers came long manuals and manufacturer warranties, usually bundled in the same box. As the hardware advanced, so did the software; and new programs came with agreements of their own; as software was – and remains – licensed, rather than sold,<sup>205</sup> and most copies were accompanied by End-User License Agreements (EULAs). At first, these agreements were bundled with physical disks used to ship the software – the package would usually stipulate that by opening it, you agree to the enclosed

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<sup>203</sup> Tumblr Terms of Use

<sup>204</sup> *Id.*

<sup>205</sup> To understand historical reasons behind this phenomenon, see e.g. Douglas E. Phillips, *The Software License Unveiled: How Legislation by License Controls Software Access* (Oxford University Press 2009)

terms. Later on, they became digital: to install new software, users would have to indicate that they agree to its terms by clicking on a dialog box. Finally, with the rise of Internet, some companies began simply posting their terms online, and indicating that by using the website, users agree to be bound by its terms.

These types of agreements – respectively known as shrinkwrap, clickwrap and browsewrap – gave rise to many legal dilemmas. On one hand, they seemed completely at odds with the basic notions of contract law – such as one that contract requires clearly communicated mutual assent, an exchange of offer and acceptance. On the other, their invalidation might have caused severely negative economic outcomes, and sometimes, outright unfair results. This issue has a tremendous bearing on our topic – as we have to understand why, how, and under which conditions digital adhesion agreements came to be enforceable, if we are to understand the current system of user content licensing. We will explore these issues in depth in the next chapter. For now, though, we will focus solely on the question of enforceability of forum selection clauses found in digital agreements – with a somewhat limited view, given the discussion to follow.

Simply put, American courts have long strived to apply the standards of *Carnival Cruise Lines* to digital contracts. “While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract”, wrote a court in *Register.com, Inc. v. Verio, Inc.*<sup>206</sup>, echoing the desire of American courts to continue doing “business as usual”, without fundamentally changing the principles of contract law in light of the new technological advancements. (They were not really successful in this endeavor, as we will see.)<sup>207</sup> Many courts thus applied decades old case-law to wrap contracts, and retained a two-prong approach to examining validity of forum selection clauses: first, analyzing whether selection of the forum was made with the goal of depriving plaintiffs of their day in court – or, as some courts have phrased it, whether it was unreasonable; and secondly, inquiring whether users had been notified of the terms in advance, and had an opportunity to reject them.

Remarkably, some US courts have claimed that *Carnival Cruise Lines* does *not* impose the requirement to reasonably notify consumers of the terms, as in that case, the Shutes have conceded that they received notice, and the Supreme Court did not address the question of notice any further. In *Mendoza v. Microsoft, Inc.*,<sup>208</sup> an action brought against Microsoft for violation of user privacy in connection with their Xbox LIVE online service. Plaintiffs disputed forum selection clause found in Terms of Use and claimed that it had not been properly communicated, relying on *Carnival Cruise Lines*. The court remarked that it “has searched in vain for any passage from *Carnival Cruise Lines* requiring that a forum-selection clause be reasonably communicated” (!); despite this, it proceeded

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<sup>206</sup> *Register.com, Inc. v. Verio, Inc.* [2004] 356 F3d 393 (United States Court of Appeals, Second Circuit)

<sup>207</sup> Chapter 3 reference

<sup>208</sup> *Mendoza v. Microsoft, Inc.*

to analyze the way in which the terms were presented. Court's reasoning seemed to completely ignore the context in which the Supreme Court mentioned notice of terms – in the very *paragraph* discussing the possibility of scrutinizing forum selection clauses for fundamental fairness.

The first requirement – selecting a reasonable forum – is not dependent on the electronic form of the agreement and is one that online companies never seem to have any trouble satisfying. If we look back into Supreme Court's reasoning on why Florida was a reasonable forum – because Carnival Cruise had its offices there, and because that was the place from which its ships departed – it's easy to see how selection of fora in which the companies are headquartered is seen as reasonable. Facebook, for example, can claim that its selection of California as an exclusive forum fulfills the reasonableness standard: given that it has principal offices in California, runs its operations from there, and has a significant interest in reducing the litigation costs through an exclusive forum selection clause, given the worldwide nature of its activities. In addition to this, prevailing legal standard clearly indicates that plaintiffs would have to prove *substantial* difficulties in litigating in a chosen forum, rather than merely claim inconvenience.

As the Court reasoned in *Mendoza*: “Plaintiffs do not argue that litigating this claim in Washington will be an inconvenient forum, much less deprive them of their day in court. Rather, Plaintiffs discuss how it is ‘very convenient’ for them to litigate this claim the Western District of Texas and how Plaintiffs’ counsel ‘can easily make court hearings in the Western District of Texas’ (Resp. at 23.) Plaintiffs also devote extensive briefing to the ‘Goliath’-like bargaining power of Microsoft, recounting Defendant’s ‘virtually limitless resources’ and ‘thousands of attorneys at its disposal’— factors that are irrelevant for purposes of the enforcement of a forum-selection clause under *Haynsworth*. (Id. at 20, 23.) In the absence of any evidence that litigating this claim would be substantially burdensome (as opposed to ‘very convenient’) for Plaintiffs, the Court finds that this factor weighs in favor of enforcing the forum-selection clause.”<sup>209</sup>

The second part of the analysis – communication of the terms – has recently caused some divide between the courts. This discussion falls under the scope of the bigger one – on the general validity of terms in electronic boilerplate contracts – but forum selection clauses do add some interesting elements to the discussion. For quite some time, courts have treated their enforceability as a straightforward question. This is best shown through District Court's reasoning in *Fteja v. Facebook*, which analogized Facebook's digital Terms of Use with Carnival Cruise's terms printed on the back of the ticket, explaining that average consumer would have no trouble understanding that Terms of Use constitute a binding legal agreement:

“What is the difference between a hyperlink and a sign on a bin of apples saying ‘Turn Over for Terms’ or a cruise ticket saying ‘SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3?’ The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook

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<sup>209</sup> Ibid

access allegedly caused him mental anguish would understand that the hyperlinked phrase ‘Terms of Use’ is really a sign that says ‘Click Here for Terms of Use.’

So understood, at least for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. [...] Here, Fteja was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.”<sup>210</sup>

But some courts had trouble accepting *Fteja* court’s notion that clicking the hyperlinked phrase was “the twenty-first century equivalent of turning over the cruise ticket”: they pointed to empirical and anecdotal data suggesting that users might not understand the legal ramifications of using signing up for a website which presents Terms of Use as a hyperlink. Leading among those is *Berkson v. Gogo LLC*,<sup>211</sup> where in a 55-pages long opinion Judge Weinstein observed:

“The phrase ‘for those to whom the internet is an indispensable part of daily life’ in *Fteja* is curious. It presupposes intensive and extensive use of the internet, an assumption not easily justifiable when the user is buying only one or a few items through this system. What of those less devoted to computers? Should a survey be taken on how they view some of these directions? Judges and law clerks tend to be sophisticated about navigating the internet and website. Are they attributing their superior knowledge to that of ‘read-less and run’ types? A ‘hyperlink,’ which is activated by clicking on an underlined word or term, with its serious legal ramifications, may not be fully understood by many consumers.”

On the other end of the spectrum, we have courts that do not engage in such broad policy discussions, nor examine the empirical data in an attempt to establish what kind of conduct would be reasonable for the average user of the Internet. Instead, after examining the factual pattern (often striped down to the way in which the terms were presented to users), they seem to construe the standard of reasonableness completely out of the thin air.

In *Mendoza v. Microsoft*,<sup>212</sup> for instance, users of Xbox Live online service made an attempt to invalidate a forum selection clause “presented in a 4-point font”, relying on a case in which a forum selection clause printed in a very small font on the back of a ski-lift ticket had been invalidated as improperly communicated.<sup>213</sup> The Court found no reason to hold that the clause had not been reasonably communicated:

“Here, in contrast [to O’Brien], the opening lines to Xbox LIVE’s Terms of Use read, in bold: **‘This Is a Contract between You and Microsoft.’** Unlike a ski-lift ticket, which by itself does not suggest a binding contract with a forum-selection clause embedded within, the Xbox LIVE Terms of Use explicitly and expressly tell subscribers, like Plaintiffs, that subscribing to the Service results in a binding contract with certain terms of use as specified by Microsoft. Also unlike a ski-lift ticket,

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<sup>210</sup> *Fteja v Facebook, Inc.*

<sup>211</sup> *Berkson v Gogo LLC*

<sup>212</sup> *Mendoza v Microsoft, Inc.* page 543-544

<sup>213</sup> *O’Brien v Okemo Mountain, Inc.* [1998] 17 FSupp2d 98 (United States District Court, D. Connecticut)

subscribers, like Plaintiffs, are required to review the Terms of Use *prior to* subscribing to the Service. In fact, the Xbox LIVE registration does not allow consumers to access the Service unless they affirmatively assent to the Terms of Use. (*See* Coon Decl. ¶ 5 ('Before subscribers are able to access or use the Xbox LIVE service, they must enter into a contract with Microsoft under which they agree to be bound by the Xbox LIVE TOUs.');

*see also* Dkt. # 4, Ex. A-1 ¶ 1 ('If you do not agree to this contract, in its entirety ... you must select 'DECLINE' and discontinue your registration, and you will have no right to use the Service.'))

Moreover, although Plaintiff takes issue with the clause's lack of bolding and highlighting and characterizes the text as font size 4, a forum-selection clause 'need not be so conspicuous'" *Doe v. Cultural Care, Inc.*, 09-CV-6126, 2010 WL 3075711, at \*4 (N.D.Ill. Aug. 3, 2010). Indeed, while a clause 'buried in illegible fine print' may be unenforceable, one that can be comfortably read will be considered valid, even if the font size is quite small. *See Nw. Nat. Ins. v. Donovan*, 916 F.2d 372, 377 (7th Cir.1990) (noting, despite 'heavily corrected middle-aged eyesight,' that Judge Posner could still make out the forum selection clause, even though the print was small and provided to the court in pale, underexposed photocopies). The photocopy of Xbox LIVE's Terms of Use that Plaintiffs tendered to the Court does not contain text that is a size 4 font. (*See* Dkt. # 6, Ex. 3.) Quite the contrary—the font size of the Xbox LIVE Terms of Use is only slightly smaller than that used by Plaintiffs in their briefing. Although the Court agrees that Microsoft could have more prominently displayed the forum-selection clause to the subscriber, the text is entirely legible and can be comfortably read."<sup>214</sup>

This mix of legal approaches followed by the courts had one side-effect: some online companies concluded that the way in which their terms are laid out might be closely examined by the courts in potential litigation, and started modifying their user agreements to appear more legible – capitalizing, bolding or highlighting key sections, such as warranty disclaimers and forum selection clauses.

At a first glance, this might seem like a beneficial development: making terms user-friendly and legible might be a way to ensure that users make informed, rational decisions. But we have by now seen that this is not the case: we know for a fact that users suffer from a range of cognitive biases, and we know that they overwhelmingly do not review the terms before accepting them.<sup>215</sup> Companies' focus on improving the *presentation* of their terms is simply another victory of form over substance – which is to a degree understandable, given that US courts tend to focus on the form. But in essence, it might serve to further entrench the current practices and draw the attention away from the substantive unfairness of forum selection clauses.

What current jurisprudence purposefully ignores is that as large as the fonts might be, as funny and casual as the language selecting the forum gets,<sup>216</sup> it can still have devastating effects on users'

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<sup>214</sup> *Mendoza v Microsoft, Inc.* page 543-544

<sup>215</sup> Böhme and Köpsell, *Trained to Accept? A Field Experiment on Consent Dialogs*; on information asymmetries between users and platform providers, see more in Chapter 3.

<sup>216</sup> Google states on its Google Toolbar page: "**PLEASE READ THIS CAREFULLY; IT'S NOT THE USUAL YADA YADA**". <http://toolbar.google.com/prdlg.html>. This gave rise to sharp criticism, see David Gewirtz, 'Dear Google: our privacy is not the usual yada, yada' ZDNet <<http://www.zdnet.com/article/dear-google-our-privacy-is-not-the-usual-yada-yada/>> accessed 27 September 2017. *See also* Pinterest ToS, Chapter 2: "The Bay Area is

right to bring a case against platform providers. Consider the fact that the average price for a hotel room in San Francisco is nearly 400 dollars per night;<sup>217</sup> and that this is also roughly the price of a return ticket from New York to San Francisco. Not accounting for a cent of legal expenses – which plaintiffs would have to cover in their home jurisdictions as well – this lays a heavy financial burden on users, who would have to spend days far away from home, pay for housing during hearings and depositions, and take time off work, further straining their finances. As long as the US courts keep refusing to hear these arguments, only a miniscule portion of US residents will get a chance to try a case against online companies, no matter the way in which they claim their rights have been violated. Mechanically applying standards of *Zapata*, *Atlantic Marine* and *Carnival Cruise*, especially in conjunction with jurisprudence on electronic contracting favoring “constructive” notice over assent, is therefore simply no longer justified.

Reforming the current system might not be easy. In my belief, this is not because of the long-standing argument that big online companies have too much lobbying power and thus leave a great impact on the American law-making process. Rather, it seems that this entire system, as flawed as it might be, was conceptually designed around the economic logic geared towards maximizing profit for the companies and – crucially – the benefit for the consumers: Supreme Court told us as much in *Carnival Cruise*, stressing that passengers would benefit from reduced ticket fares if the companies were allowed to minimize their legal expenses. First step in systemic reform would therefore be to disprove this stance: we need economic analysis of law to step in and demonstrate whether minimization of legal expenses contributed to proliferation of affordable goods and services, or if it was simply transferred into additional profit for the companies. If the evidence of clear and prevalent benefits cannot be found, the system clearly needs to be changed.

Even if economic studies show that consumers ultimately benefit from restrictive forum selection clauses, their unfairness in individual cases should be capable of being tackled through more robust tools. This is not to say that US legal system needs to immediately and fully adopt European-style consumer protection norms in jurisdictional matters, allowing consumers to file lawsuits in their home states. Courts or legislative bodies may, for example, impose higher standards of reasonableness, based on empirical studies of behavior of Internet users. They may opt to continue to focus on the form of the agreements, but in so doing, they could tailor a new standard, requiring

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beautiful this time of year. It doesn't matter what time of year it is, that's what's so great! Anyway, you'll have to sue us here.”

<sup>217</sup> Nadja Brandt, 'San Francisco Hotels Are World's Priciest as Rates Surge' Bloombergcom <<http://www.bloomberg.com/news/articles/2015-06-30/san-francisco-hotels-are-world-s-priciest-as-rates-surge>> accessed 19 September 2017

increased level of consent the more inconvenient the forum is: for instance, users from far-away jurisdiction may be required to type out an e-mail with text “I agree to resolve all disputes in California” if their consent is to be held as valid. Authorities may also decide to, mirroring *Brussels I* and CJEU case law, exclude certain disputes from the scope of forum selection clauses – and this decision can be based on economic rationale. The courts could distinguish from *Atlantic Marine’s* prohibition against consideration of private factors when assessing reasonableness of a selected forum,<sup>218</sup> but keep the list of factors to consider subject to strict balancing tests.

Plenty of alternative models can thus be identified, and their economic impact can be carefully tracked. But realization that the US system might have erred when designing dealing with jurisdictional questions in consumer disputes – becoming too radical and biased in the process – brings with itself some hope. If the system, at its core, demonstrates preoccupation with maximization of consumer benefits, as misguided as the implementation might have been, it shows some degree flexibility. It also indicates that the gap between American and European system might not be as deep as it initially seems. And it certainly gives hope that, once its underlying premises are exposed to scrutiny, the system can be changed or dismantled.

We know that the Supreme Court of the United States made a strong reversal in its forum selection policies in the previous century. We can now only hope that it will do it again – in this one.

### **3. Applicable law**

As we have seen, jurisdictional questions are important. Which court gets to hear a case can have a vast bearing on its result – and often, as the previous section argued, can influence whether the case even gets filed at all. But the question which is just as critically important is – under which *law* will the case be decided?

In an entirely domestic context, that question is not so pressing: two residents of the same country, engaging in a legal relationship which has no foreign ties, will usually have their disputes resolved under the law of their country.<sup>219</sup> But in a cross-border setting, it becomes necessary to determine which law governs which part of the transaction that the parties have entered into. Here, once again, we depend on the rules of the private international law to make that determination; and the system closely resembles the one we described when discussing jurisdictional questions. National

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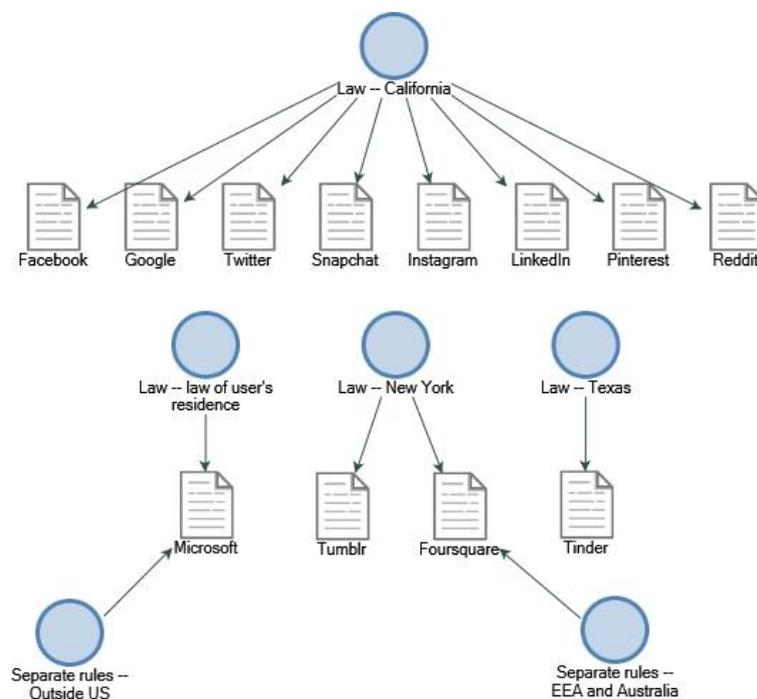
<sup>218</sup> In the context of a motion to transfer under 28 U.S. Code § 1404

<sup>219</sup> Although party autonomy in choice of law can, depending on the applicable rules of that country, sometimes extend to domestic context as well.

rules of private international law contain “default” provisions describing factors which need to be taken into account when determining the applicable law. But in a vast majority of countries,<sup>220</sup> party autonomy is given a central place: much like parties can use the forum selection clauses to agree which court can hear their dispute, so can they resort to choice-of-law clauses to agree which law will govern it. And just as forum selection clauses are subject to restrictions imposed by the law governing them – being contractual in nature – so are the choice-of-law clauses subject to applicable laws. This means that the same two-level inquiry is mandated here: we will first look into choice-of-law provisions found in user agreements and identify common patterns, and will then proceed to assess the impact of those clauses.

### 3.1. Contractual terms on applicable laws

Choice-of-law clauses found in online agreements offered by some of the major online companies largely resemble forum selection clauses analyzed above, insofar as they principally select the American law to govern any potential disputes with the users, regardless of where those users come from. In virtually all the cases, they select the applicable American *state* law, and that choice tends to follow the location in which companies have their principal place of business:



Vast majority of user agreements consequently contain a choice-of-law clause in favor of the law(s) of state of California. The only agreement which deviates from the model of selecting the law of

<sup>220</sup> There are certain narrow exceptions; see Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability*; Giesela Ruhl, 'Consumer Protection in Choice of Law' (2011) 44 Cornell Int'l LJ 570

a single US state as applicable is one offered by Microsoft, which states that the law of users' state of residence will govern the agreement: *"If you acquired the application in the United States or Canada, the laws of the state or province where you live (or, if a business, where your principal place of business is located) govern the interpretation of these terms, claims for breach of them, and all other claims (including consumer protection, unfair competition, and tort claims), regardless of conflict of law principles."*<sup>221</sup>

As far as the separate provisions for international users are concerned, only two companies include them in user agreements: Microsoft, through a provision which states that the agreement will be governed by the law of the country in which user acquired the application, and Foursquare, which stipulates that agreements between the company and users located in EEA and Australia will be governed by the laws of England.

As with forum selection clauses, we can therefore conclude that there is a high degree of standardization across the industry, and that insertion of choice-of-law clauses in favor of the American law is an established and prevalent practice. We find no evidence that companies would be reluctant to invoke the application of the choice-of-law clause due to reputational risk concerns.<sup>222</sup>

### **3.2. Effects of choice-of-law clauses**

Tumblr's user agreement starts with a bold proclamation: *"Tumblr is a U.S. company and subject only to U.S. laws and jurisdiction, so for the moment these Terms of Service (and any other terms, policies, or guidelines that we provide to you) are only available in English."*<sup>223</sup>

Is this true? Can a choice-of-law clause ensure that *only* the American law will be applied to any potential disputes between a company and its users? Or are there some limits to its reach, to this self-proclaimed supremacy? We will attempt to answer that question by looking into the ways in which non-American<sup>224</sup> law might be applied to a copyright licensing agreement between a user and an online platform provider. We will limit our analysis to users coming from EEA – taking particular note of Norwegian sources – and examine the scenarios in which the laws of their home countries may apply. In so doing, we will trace the outer boundaries of the effects of the choice-of-law clauses.

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<sup>221</sup> 'Microsoft Services Agreement' (Annex 1).

<sup>222</sup> See *Frédéric X. v Facebook Inc.*, see note 97

<sup>223</sup> 'Tumblr' (Annex 1).

<sup>224</sup> Simply because choice-of-law clauses always point to American law.

### 3.2.1. Cross-border content licensing: EU framework and application in Norway

But first, let us describe the general legal framework within EU. When it comes to cross-border copyright licensing, three areas of law are critically important: copyright law, contract law and private international law. License is, after all, a *contractual* arrangement which allows one party to exploit other's *copyrighted* material – and, in a cross-border domain, *foreign elements* are clearly present, making it necessary to determine the applicable laws and competent courts. All of these areas are harmonized to a different degree in the European Union, making it difficult to claim the existence of a unified international copyright licensing framework.

To begin with, copyright law is currently only partially harmonized. Its harmonization has been an ongoing process since the early 1990s, when copyright protection was extended to the computer programs<sup>225</sup> and the term of copyright protection was harmonized across the EU.<sup>226</sup> Later on in the process, European Commission undertook to harmonize the scope of authors' economic rights,<sup>227</sup> as well as certain aspects of enforcement of IP rights.<sup>228</sup> Questions of liability of Internet intermediaries were tackled,<sup>229</sup> and rules were laid down for harmonizing copyright in fields ranging from computer databases<sup>230</sup> to satellite broadcasts.<sup>231</sup> More recently, as part of its Digital Market Strategy, Commission launched a Communication on copyright entitled 'Towards a modern, more European copyright framework', as well as a legislative proposal for ensuring cross-border portability of online content services.<sup>232</sup> More reforms are planned for the future.

This step-by-step harmonization process is far from over, however. First, as authors note, despite the fact that the core economic rights are regulated by the current directives, there are still areas in

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<sup>225</sup> See Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs (Computer Programs Directive) [2009] OJ L111

<sup>226</sup> See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights (Copyright Term Directive) [2006] OJ L372/12

<sup>227</sup> See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Copyright Directive) [2001] OJ L167

<sup>228</sup> See Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (Corrigendum to Enforcement Directive) [2004] OJ L157

<sup>229</sup> See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Electronic Commerce Directive) [2000] OJ L178

<sup>230</sup> See Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases (Database Directive) [1996] OJ L77

<sup>231</sup> See Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Satellite and Cable Directive) [1993] OJ L248

<sup>232</sup> European Commission, *Commission takes first steps to broaden access to online content and outlines its vision to modernise EU copyright rules* (2015)

which the national laws remain disharmonized in this regard.<sup>233</sup> This is because the directives provide only for a minimum level of protection, leading the Member States to extend exclusive rights to other groups of right holders or provide for additional or broader exclusive rights in certain fields. In addition to that, the vast majority of exceptions and limitations to copyright are optional, and Member States are not only free to implement the limitations they want, but also to decide how they will implement each limitation.<sup>234</sup> There's no consensus on whether this list of exceptions or limitations is open or closed, either: some argue that Member States are free to impose additional exceptions and limitations, as far as they follow their obligations under the Berne Convention. And finally, there are entire areas of copyright which are not substantially addressed in the directives – ranging from protection requirements,<sup>235</sup> to questions such as moral rights, which are left entirely to national laws. One of such fields is – licensing.

The principal reason why we find no harmonized rules on copyright *licensing* is because such rules would require a high degree of harmonization of contract law – and contract law is not harmonized in EU, despite ongoing efforts to create harmonizing instruments. Laying down specific rules on license validity, interpretation, termination and remedies cannot be done before there is a general-level harmonization of such rules. Otherwise, instead of EU-level licensing rules acting as *lex specialis* and modifying the application of general contract law provisions, they would need to be interpreted in line with differing national standards, rendering the harmonization unattainable, and the results unpredictable. This is why copyright licensing is still regulated at the national level; yet national laws impose different requirements for licensing, and can vary to a great extent.

This is where private international law comes in: if there are no unified, harmonized substantive licensing rules to be found on the European level, legal certainty can, in theory, be obtained through conflict provisions and party autonomy, letting the parties choose the law governing their licensing arrangement, or, in the absence of such choice, making it clear which law will govern the transaction.

As we have seen in the previous section, there *are* certain instruments that harmonize key aspects of private international law in the European Union. We have discussed *Brussels I* in the context of determining jurisdiction; in the context of determining the applicable law, we have *Rome I Regulation*

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<sup>233</sup> P. Bernt Hugenholtz and others, *The Recasting of Copyright & Related Rights for the Knowledge Economy: Final Report*, 2006)

<sup>234</sup> Ibid

<sup>235</sup> Requirement of originality is not, for example, addressed substantially in the directives, but has been harmonized to a degree through CJEU decisions.

– for determining the law(s) applicable to contractual obligations – and *Rome II Regulation*<sup>236</sup> – for identifying the law(s) applicable to non-contractual ones. It is within this general framework that choice-of-law aspects of copyright licensing are regulated in the EU. In other words, there are no copyright-specific instruments that comprehensively deal with determining the laws applicable to cross-border licensing. Even within *Rome I* and *II* framework, provisions dealing with copyright are scarce: the only provision that is directly on point is the one stipulating that in infringement cases, the law of the country where protection is sought is applicable, and that parties cannot change this through a contract. For contractual aspects, we find no such rules, making it necessary to apply the generic framework applicable to all contractual obligations.

There are currently two soft law instruments that attempt to further harmonize private international law aspects of intellectual property: CLIP principles, issued by the European Max Planck Group on Conflict of Laws in Intellectual Property, and ALI (American Law Institute) Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. While they remain an important contribution, they have no binding force.

Therefore, summarizing the current cross-border licensing framework, we can identify three main characteristics: partial harmonization of substantive copyright law, absence of harmonization of copyright licensing rules (leading to application of differing national laws), and dominant application of the general rules of private international law (as opposed to IP-tailored ones) to contractual obligations.

Given that this dissertation assumes that Norwegian courts might be able to exercise jurisdiction over licensing disputes, a few words on the applicability of this framework in Norway are in order.

European instruments of private international law are generally not directly applicable in Norway, given that the country is not bound by either *Rome I* or *Rome II Regulation*. However, as we have seen in section 2.2.2 above, European instruments might still be found applicable in certain scenarios. In questions relating to choice of law, Norwegian Supreme Court has in one case held that “to the extent that there is no legislation to the contrary, considerations of legal uniformity dictate that due regard is to be given to solutions chosen by EU countries”.<sup>237</sup> Other cases seem to confirm this line of reasoning.<sup>238</sup> It is also expressed in different preparatory works and in legal literature.<sup>239</sup>

Norwegian law *does*, seemingly, contain a rule on choice of law in consumer agreements, which largely reflects the solution contained in *Rome I Regulation*.<sup>240</sup> However, this provision is applicable solely to questions related to “reasonableness of the terms”, and does not, arguably, apply to questions of contract formation, interpretation, availability of remedies, and so forth. In these areas, one could argue that relevant European instruments should be applied directly.

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<sup>236</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (*Rome II*) [2007] OJ L199

<sup>237</sup> See Cordero-Moss, G, *Internasjonal privatrett* (2013), 28, citing Rt. 2009 p. 1537, n. 34

<sup>238</sup> *Id.*, citing Rt. 2006 p. 1008, Rt. 2011 p. 531

<sup>239</sup> *Id.* at 27

<sup>240</sup> See Norwegian Contract Act §37

Against this background, we will proceed to identify the limits of the choice-of-law clauses found in online user agreements. We can identify at least six distinct ways in which non-American law may be applied in a dispute between an EU (and by proxy Norwegian) resident and an online company which had a choice-of-law clause in its user agreement.

### **3.2.2. Limitations of the effects of choice-of-law clauses in user agreements**

#### **3.2.2.1. Subject-matter limits to party autonomy**

When parties insert a choice-of-law clause in their agreement, they are often under the impression that *all* the aspects of their legal relationship will be governed by the chosen law; they are, however, wrong in making this assumption.<sup>241</sup> Even though party autonomy in choice of law is widely recognized, its reach is not absolute; and while parties are generally free to choose the laws governing *contractual* – and to an extent, tortious – elements of their relationship, there are other legal aspects, in which determination of the applicable law is based on the conflict principles, rather than party autonomy.<sup>242</sup> Classic examples of such scenarios are contracts for sale of immovable property, shareholder agreements, agency contracts, and other contracts with strong implications for third parties.<sup>243</sup> Whereas parties to such contracts are free to select the law governing the contract *itself*, party autonomy cannot modify the underlying law and its third-party effects. Therefore, regardless of parties' choice of law governing the contract, it does not reduce the influence of the (otherwise applicable) intellectual property, company, consumer, employment, criminal, and other laws.

This is clearly quite important in the context of intellectual property licensing. If choice-of-law clause affects only the applicable contract law, that means that it has no effect on the copyright law applicable to content in the dispute – and this can have a vast bearing on the case, as some of the key questions might fall under the scope of copyright, rather than contract law. As authors explain:

“Transferability of industrial property rights (including the issue of whether a license or transfer may be granted), conditions of validity of the transfer and license and issues concerning third party effects of these transactions – such as those related to their entry in public registries and the priority between transfers and licenses – are typically considered as elements inherent to the industrial property rights and hence falling within the scope of application of the conflict of law rule on the rights as such. Therefore these issues are governed by the respective law of protection regardless of the law applicable to the contract. [...] The foregoing has very significant practical implications, since parties are not allowed to exclude the application to those issues of the respective *lex loci protectionis*.”

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<sup>241</sup> Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* page 177

<sup>242</sup> *Ibid*

<sup>243</sup> *Ibid*

Application of the law of protection concerned to those questions remains unaffected by the choice between the parties of the law applicable to the contract. By contrast, a contractual characterization prevails in particular with respect to the formation of the contract, its interpretation, its performance, the payment and royalties, the consequences of a breach of obligations, the ways of extinguishing obligations and the consequences of nullity of the contract.”<sup>244</sup>

This has a large bearing on user content licensing as well.

Suppose that user wants to bring a lawsuit against an online platform provider because his/her status updates were distributed in a new digital format, and that s/he claims that license was invalid, and his/her copyright infringed. User’s claims are partially based on the fact that copyright law of his home country has a prohibition against granting licenses for future modes of exploitation. The company, as a defense, raises a claim that statuses were not entitled to copyright protection, as they were too short and unoriginal.

Most aspects of such a case would be resolved under the governing copyright law, which is unaffected by the parties’ choice of contract law. Whether content in question has met protection requirements clearly falls under the scope of copyright law; so do the conditions under which certain economic rights may be licensed – the rules governing the validity of transfer. Now, if user had challenged the validity of the license based on contract formation – for example, by claiming that there was no adequate mutual assent – that would (generally) be considered to be a contractual issue, subject to choice of law.

This is not to say that distinction between copyright and contractual questions is always easy to make: in the field of licensing, lines may become increasingly blurred. Defining a particular legal issue as falling under the scope of one area of law or another – also known as characterization – is important in the domestic context: it may lead to application of different bodies of law (for example, contract or administrative law). But in an international setting, as we have seen, characterization of a dispute has an additional dimension: it controls the solution of the conflict of laws.<sup>245</sup> Countries may indeed have almost identical conflict of law rules and might even have nearly identical jurisprudence on interpreting the connecting factors; yet, should a legal issue be classified differently at the outset of a dispute, different rule will be applied, ultimately subjecting the dispute to a completely different law.<sup>246</sup>

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<sup>244</sup> Jacques de Werra, *Research Handbook on Intellectual Property Licensing* (Edward Elgar Publishing 2013) page 315

<sup>245</sup> Veronique Allarousse, 'A Comparative Approach to the Conflict of Characterization in Private International Law' (1991) 23 Case W Res J Int'l L 479

<sup>246</sup> We must also consider the characterization issue as the one possessing a problem of the governing law on its own: under which law should the classification of a legal problem be made, if there is a choice of law clause present? Doctrinal controversy is running high, as some argue that legal issues should be characterized according to the *lex fori*, whereas others claim that *lex contractus* should be applied to the characterization. The characterization process by the *lex fori* has been described as “an inescapable consequence of the domestic nature of the systems of conflict of laws” and has been justified by “sovereign necessity to limit the ambit of each law”. As Allarousse explains: “If we consider that the conflict rule has for our immediate purpose the delimitation of the legislative sovereignties and therefore the limitation of the sovereignty of the state which has enacted it, it is likely that the state concerned wants to know how important the limitation to which it consents is”. This approach seems to be dominant. On the other hand, argument for applying *lex contractus* is that “it is a flagrant contradiction to use the forum's characterization and to pretend at the

In the EU context, however, potential for vastly differing outcomes stemming from different characterization seems minor. This is because European framework of private international law establishes an autonomous standard for categorizing issues as contractual (or, *argumentum a contrario*, as non-contractual). The concept of a contract, for the purpose of the Rome I, is to be given an independent meaning, defined by European Union law in the light of the purposes of the Regulation and of the general trend which emerges from the laws of the Member States, viewed as a whole, rather than being remitted to the law of the forum country.<sup>247</sup> Furthermore, Articles 10–12 and 18 of Rome I provide for the application of the “proper law of contract” to questions of formation; essential validity; formal validity; interpretation; performance; remedies; discharge; time limitation; the consequences of nullity; presumptions and the burden of proof; and modes of proof.<sup>248</sup> Finally, any recurring difficulties in characterizing an aspect of a dispute as contractual or copyright in nature would likely be addressed by CJEU, ensuring harmonization.

This still leaves one question open: if parties cannot choose the law applicable to copyright questions, *which* copyright law is applicable? In most cases, the answer is *lex loci protectionis* – the copyright law of the country where copyright protection is sought. *Rome II* states in a recital that in infringement matters “the universally acknowledged principle of the *lex loci protectionis* should be preserved”, and Article 8 consequently stipulates that “the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.”<sup>249</sup> Similarly, while not expressly acknowledged in EU directives, it is widely established the law that governs transferability, registration of contracts, scope of protection, possibility of waiving moral rights, limitations and exceptions to copyright and the possibility to waive them is the law of the country for which protection is claimed.<sup>250</sup> The reason behind *lex loci protectionis* being so widely embraced as a conflict rule lies in the territorial nature of IP rights, combined with Berne Convention’s requirement of non-discrimination of works based on their origin: through application of their local laws to all copyrighted works, countries offer the same level of protection to all the works in their territories, irrespective of the work’s origins.

The only wide exception to application of *lex loci protectionis* is found in cases involving disputes over initial ownership of works – those are usually solved in line with the law of the country of origin, *lex originis*. However, as mentioned in Chapter 1, cases in which ownership of content is in dispute are outside the scope of this dissertation.

What does this mean for users of online platforms? As we have seen in previous section, users from EU have significant freedom in bringing a lawsuit against platform providers before EU courts, despite the forum selection clauses found in user agreements: most notably, non-

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same time that one is abiding by the foreign law”. The strongest case for resorting to this approach is when a foreign institution unknown to the local law needs to be characterized. *See* *ibid* page 442.

<sup>247</sup> Stone, *EU Private International Law* page 303

<sup>248</sup> *Ibid*

<sup>249</sup> Rome II Article 8

<sup>250</sup> Werra, *Research Handbook on Intellectual Property Licensing* page 318

professional users can bring a lawsuit before the courts of their country of residence. Those courts will then proceed to apply the copyright law of their country to any questions falling under the scope of the copyright law. Determination of scope of protection given to user content, limitations and exceptions to that protection, transferability of rights, validity of waivers – these issues are likely to have a central place in any case against platform providers: they will all fall outside the scope of choice-of-law clause found in user agreements, severely limiting its reach.

### **3.2.2.2. Scope of a choice-of-law clause**

The second limitation on the effects of a choice-of-law clause comes not from the absence of party autonomy, but rather, from the way and the degree in which parties choose to exercise that autonomy. In other words, parties may choose whether the choice-of-law clause will pertain to all disputes among them, only certain type of disputes, only disputes that occur before or after a certain point in time, and so forth. So, are there some restrictions as to clauses' scope to be found in user agreements, or are they all-encompassing?

The choice-of-law clauses found in user agreements are virtually identical to the previously examined forum selection clauses, insofar as they principally pertain to be applicable to disputes (or in some cases “any and all disputes”, or “disputes, controversies and claims”) “arising out of” or “relating to” the contract and services. Being a contractual clause, however, choice-of-law clause is subject to interpretation; and its scope is construed in accordance with American law, as it is the law that would govern the contract if the clause were valid.<sup>251</sup>As we have seen, American law tends to interpret contractual terms very literally, and notably, under the *Phillips* case, clauses that extend to disputes “arising out” of the contract might not be found to be applicable in certain copyright licensing cases.

However, while this limitation on the effectiveness of the choice-of-law clause points to the need to draft contracts carefully and use broad wording, there is not, as previously discussed in regard to forum selection clauses, evidence that suggests that this is not being done across the industry. Be that as it may, wording of the clause should be closely examined by anyone challenging its applicability.

### **3.2.2.3. User consent potentially subject to contract law of user's residence**

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<sup>251</sup> Stone, *EU Private International Law*

Third limitation on the effects of choice-of-law clauses regards the law which governs users' assent to contractual terms. General rule established in *Rome I* is that the existence and validity of a contract, or of any of its terms, is to be determined under the law which would govern it if the contract or the term were valid.<sup>252</sup> In our case, this means that (contract-related) material validity of content licensing terms – including question of validity of users' assent to online agreements, or the invalidation of agreements on the grounds such as mistake, fraud, and unconscionability – will generally be governed by the law stipulated in the choice-of-law clause, which, in our case, is American law.

However, *Rome I* contains an exception to this general rule: article 10(2) stipulates that, regardless of the general principle, a party, in order to establish that it did not consent to the contract, may rely upon the law of the country in which it has habitual residence. Nonetheless, this provision is applicable *only* if it appears from the circumstances that it would not be *reasonable* to determine the effect of party's conduct in accordance with the law found in the choice-of-law clause.

Applied to user content licensing, this means that users would be able to rely on contract law of their home countries to establish that they did not consent to platform providers' online agreements, but only if they can demonstrate that it is unreasonable to determine the effects of their conduct in accordance with the American law.

It is not easy to predict how successful such claim would be: while jurisprudence varies, courts have generally interpreted article 10(2) very restrictively. English courts have particularly stressed that “in evaluating such a defence, the court should adopt a dispassionate, internationally minded approach”.<sup>253</sup> In one case, English court held that the fact that choice-of-law clause contained in an international shipping agreement violated public policy of one party's country of residence was not, on its own, a sufficient reason to demonstrate that this party did not give consent to such a clause, or that it would be unreasonable to hold them to their bargain.<sup>254</sup> On the other hand, courts from civil law jurisdictions might instinctively reach for devices allowing for broad assessment of reasonableness and good faith, which they commonly employ in domestic contracts. While interpreters' background might have a marked effect on the application of this provision, certain

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<sup>252</sup> Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L177/6 Article 10 (1)

<sup>253</sup> Stone, *EU Private International Law* page 322

<sup>254</sup> *Ibid* citing *Horn Linie GmbH & Co v Panamericana Formas e Impresos SA* [2006] EWHC 373 (Comm) (High Court of Justice Queen's Bench Division Commercial Court, United Kingdom)

factors contribute to the likelihood of its successful invocation in disputes between users and online companies.

First, users of online platforms do not tend to be sophisticated business parties, and the courts would consequently employ less stringent standards of reasonableness, thereby making it easier to apply the law of users' residence to formation questions. Whereas business parties routinely engage in international transactions, and can predict the effects of choice-of-law clauses, negotiate them, and need to be held to their choice-of-law bargains to ensure the viability of international commerce, this is less true for typical website users, who might not understand or intend to be bound by any terms of the contract they enter into, and who do not routinely engage in cross-border transactions.

Secondly, it is evident that article 10(2) of *Rome I* has been employed in instances where there were noticeable differences between jurisprudence governing the *acts* which constitute consent to a contract, and reasonableness weighted against the application of foreign law.<sup>255</sup> Classical example of this would be a scenario in which under one legal system, silence amounts to consenting to a contract, and a party moves to establish that it is unreasonable to hold it to that standard, as the law of its home country does not treat silence as consent. This is significant because, as we will explore in the chapter on contract formation rules, American law construes consent to terms of digital agreements in a broad manner: users can be deemed to have entered the contract even if they were not aware of contract's terms: in *Fteja* court's terms, whether user reads the agreement or not is irrelevant for establishing consent.<sup>256</sup> In so doing, American law virtually substitutes exchange of offer and acceptance with constructive (not necessarily actual) notice of terms as a basis for the conclusion of a contract. Some European courts might therefore be inclined to find the application of this standard to users' consent to be unreasonable.

Finally, the unreasonableness of applying foreign law might be ascertained based on the differences in protective mechanisms offered by the foreign law and the law of user's residence. Local law might, for instance, impose certain formal requirements aimed at protecting weaker contractual party: in the field of copyright licensing, we find numerous laws which require a license to explicitly include information on scope of rights transferred, duration of a license and a remuneration paid (even if zero); we find no such requirement in the American law, and the courts might decide the application of local law is consequently reasonable. Such scenario is, however, quite unlikely: it

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<sup>255</sup> Stone, *EU Private International Law*

<sup>256</sup> This is the so-called principle of constructive notice: whether or not user reads the terms is irrelevant, as long as the "reasonable person" would have read the terms under the same conditions.

would call for a significantly wide reading of the article, far outside its intended scope; and besides that, *Rome I* contains other mechanisms that would allow local courts to apply such protective rules, provided that they are deemed to be protecting essential interests, or that they are protecting consumers.<sup>257</sup>

Overall, we can conclude that the potential application of local law to the questions of consent to website terms is a significant limitation on the effects of a choice-of-law clause. As the next chapter will discuss, local laws might either impose higher requirements for user consent than the American law does; or might offer more robust tools for invalidating such consent. Successful invocation of article 10(2) would therefore potentially allow users to invalidate the entire agreement with an online platform provider – relying primarily on the local law.

#### **3.2.2.4. Consumer protection in choice of law**

We have already seen that there are *jurisdictional* norms aimed at protecting EU consumers entering into cross-border transactions. In *Rome I*, we find rules designed to protect consumers from the harmful effects of *choice-of-law clauses*; these rules present yet another limitation to their effects, and lead to potential application of a non-American law to a dispute between EU users and online platform providers.

However, this protection is not universal: just as under *Brussels I*, it extends only to those considered to be *consumers* under the Regulation, and only in certain scenarios – notably, when a professional party is *targeting* consumer’s country of residence with its activities. As the standard is identical to one under *Brussels I*, and the same case law is applicable, we will not repeat the analysis here. We will just remind that this protection will extend to all the users who use the website outside their trade or profession, and that a CJEU’s non-exhaustive list of factors to consider when determining website’s intention to target EU countries weighs heavily in favor of finding such intention.<sup>258</sup> Therefore – with an exception of users who use online platforms primarily to pursue their professional activities – these protective norms will be widely applicable. But what is their effect?

First, *Rome I* establishes that in the absence of choice, law of consumer’s habitual residence will govern the contract. This might be significant in cases where the user agreement, including the choice-of-law clause, gets invalidated (such as in a previously discussed scenario in which the

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<sup>257</sup> See Chapter IV, section 3.2.2.6

<sup>258</sup> See section 2.2.1.1

courts decide to apply local laws to determine whether a user has consented to an agreement, or in a scenario where choice-of-law clause is invalidated as a substantively unfair term). In such situations, absence of a (valid) choice-of-law clause would lead the court to apply the conflict rules to determine the applicable law; and the application of the law of user's country of residence, as a special rule, preempts the other conflict norms. Consequently, contract would be governed by the law of consumer's residence.

Second effect of consumer protection norms found in *Rome I* regards contract formation: formal validity of a consumer contract is governed *exclusively* by the contract law of consumer's country of residence.<sup>259</sup> This is a departure from Regulation's general validation principle, under which a contract is considered to be formally valid in a wide array of cases – if it is formally valid under either the governing law, the law of the country in which both parties were present at the time of the conclusion, or the law of a country in which either party has residence.<sup>260</sup> Main goal of departure from this provision is to ensure that consumers do not find themselves bound by the agreements which might not have legal effect under their law. This can have a bearing on the questions of the validity of online agreements; given that formal requirements can vary to a significant degree – especially when we take into account the content licensing aspect of user agreements. As mentioned in the previous section, some laws will impose significant formalities on licensing agreement, with the goal of protecting authors, which tend to be weaker parties in contracts. *Rome I* allows for direct application of such rules to consumer contracts, irrespective of a choice-of-law clause, and thereby shields the interests of user authors.

Thirdly, while *Rome I* does allow the parties to choose the law governing a consumer contract, it curtails the effects of such a choice. Namely, Regulation states that choice-of-law clause may not have the result of depriving a consumer of the protection afforded to him/her by the mandatory provisions<sup>261</sup> of the law of consumer's residence. Therefore, an issue-by-issue comparison between the chosen law and the mandatory law of the consumer's habitual residence needs to be carried out. If the chosen law provides for more protection, it governs the contract; if it does not, the contract is governed by a mix of laws: the chosen law (insofar as it offers sufficient protections) and the mandatory provisions of the law of the consumer's residence.<sup>262</sup>

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<sup>259</sup> Rome I Article 11 (4)

<sup>260</sup> Ibid Article 11 (2)

<sup>261</sup> See section 3.2.2.6

<sup>262</sup> Ruhl, 'Consumer Protection in Choice of Law'

Authors explain that the intended effect of this limitation is to give the consumer the *cumulative* benefit of the protective rules of the chosen law and those of the law of his residence, as well as to prevent the emergence of “market for lemons in choice of law”, a situation in which professionals would “race to the bottom”, always resorting to choosing the law with the lowest level of consumer protection.<sup>263</sup> However, some authors point out that this solution creates more problems than it solves: first, in order for the legal provisions of the country of consumer’s residence to apply, they need to be of “protective” character – in addition to being mandatory – and it might be difficult to ascertain which provisions are *protective* and which are not. Secondly, when comparing legal systems issue-by-issue, it might be very difficult to establish which system is *more protective*: different laws sometimes use different methods to protect the same interests, and it is not entirely clear which criteria are to be employed when assessing the level of protection granted. Thirdly, applying multiple laws in a single case can be both time-consuming and expensive, and can lead to unpredictable results, especially in a setting where issues are inherently intertwined. Therefore, a question has to be posed: when it comes to user content licensing, how efficient is the protection offered under *Rome I*?

#### **3.2.2.4.1. Difficulties in applying “more protective law”: license to use content in currently unknown ways**

We will seek to address that question through a case study on licensing clauses giving companies the right to exploit user content in currently unknown ways. Such clauses are rather common; their background lies in the very nature of the technological progress. If there is one thing we can say about technology, it is that it evolves swiftly. Processing power grows rapidly over time, storage capacity gets increased, connectivity gets improved, and algorithms for processing data get better and more efficient. This gives rise to new modes of exploiting content, which quite often radically push the boundaries and turn into everyday reality that which was thought to be unimaginable only a short time ago.

Take posting of a picture online, for example. Whereas a few years ago that picture would likely be presented on a static webpage, Web 2.0 environment made it possible to interact with other users, comment, ‘like’, share and manipulate it with unprecedented ease. But even that environment is not static: the more processing power platform providers have, the more they can do with our content. Nowadays, when uploading a photo online, it takes only a fraction of a second

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<sup>263</sup> Stone, *EU Private International Law*; Ruhl, 'Consumer Protection in Choice of Law'; Tang, 'Consumer contracts and the Internet in EU private international law'

for a computer to run a facial recognition algorithm on it, determining, with rather high certainty, who the person in the photo is, what their age, race and gender are, and even which mood they are in. And who knows what might be possible tomorrow? This obviously gives rise to the question of whether big online companies should be allowed to use our presently-uploaded content in new, currently unknown ways.

In order to ensure that they will have the right to use user content in a way which might not be foreseeable now, some of the platform providers expressly include a provision in ToS agreements authorizing them to do so. A good example of this is found in Twitter's ToS, which reads, in part:

“By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content *in any and all media or distribution methods (now known or later developed)*.”<sup>264</sup>

Whereas the need to have this kind of license might seem justified – after all, it is hard to imagine innovation without allowing those who have the content to manipulate it in new ways – it is still at odds with mandatory provisions of quite a few national laws. The problem is – those laws vary greatly, and it is difficult to establish which laws offer better protection to consumers.

In the European Union, this issue is not harmonized at all. In Austria, the Copyright Act itself contains no prohibition against the transfer of rights in future forms of exploitation; and yet, the Supreme Court has held such transfers invalid.<sup>265</sup> The Court dealt with the contract signed in 1984, and ruled that the use of works on the Internet and on CD-ROM was unknown media at the time when the contract was concluded, or at least, they were such that the author could not foresee the economic impact at the time of conclusion of the contract, thereby ruling that no license for electronic use has been granted.<sup>266</sup> In the Netherlands, in a comparable case, the court found infringement not only of the authors' economic rights, but of their moral rights as well.<sup>267</sup> In Italy, the Copyright Act stipulates that “future rights which may be afforded by subsequent laws and which provide copyright protection of wider scope or longer duration may not be included in the transfer”,<sup>268</sup> yet it would appear from the case law that “this provision protects authors from

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<sup>264</sup> ‘Twitter / Twitter Terms of Service’ <<https://twitter.com/tos>> accessed 7 May 2016., emphasis added

<sup>265</sup> Lucie Guibault and P. Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union: Final Report* 2002)

<sup>266</sup> Ibid

<sup>267</sup> Ibid page 49

<sup>268</sup> Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Italian Copyright Act) [1941] LEGGE 22 aprile 1941, n. 633 Article 119

assigning or licensing their rights with respect to forms of exploitation that are not yet technically possible at the time of conclusion of the contract”.<sup>269</sup>

German approach to regulating licenses that encompass unknown modes of exploitation is quite unique and offers some valuable insights into just how dynamic this field might be. For many years, the German Copyright Act specifically stated that “the grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect.”<sup>270</sup> Even before the enactment of this provision in 1965, the German case-law on the subject was rather broad, as the court decisions prohibiting the extensive interpretation of the licensing clauses in such a way as to cover the unknown modes of exploitation date back to the 1920s.<sup>271</sup> Following the codification of this prohibition, the courts continued to invalidate over-reaching licensing clauses, finding, in one case, that “the copyright to the new VHS technology was not transferred in a 1968 license granting the rights to all known and future uses” and that “the publication rights to newspaper articles did not extend to CD-ROM technology”.<sup>272</sup> The mode of exploitation could be deemed unknown not only if it did not exist as a technological possibility, but also in the case it had no economic significance.<sup>273</sup>

However, the German courts began to alter their approach in the 1990s, and established the practice of allowing licensing agreements which gave rights to use the licensed works in a manner that is technologically known but economically insignificant, deeming these to be “risk agreements”.<sup>274</sup> Given that the strict prohibition against giving licenses for unknown modes of exploitation was increasingly being perceived as “a clear obstacle to the international publishing, music and film industry”,<sup>275</sup> German law was reformed in 2008, and the said prohibition has been revoked.<sup>276</sup> The law now explicitly allows for this kind of agreements, stipulating that “a contract where the author grants rights in respect of unknown types of exploitation, or where he undertakes the obligation to do so, shall be drawn up in writing”.<sup>277</sup> However, as a way of safeguarding the interests of the authors, the law now gives them the possibility to revoke the said license within

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<sup>269</sup> Guibault and Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union: Final Report* page 96

<sup>270</sup> Gesetz über Urheberrecht und verwandte Schutzrechte (German Copyright Act) [1965] BGBl. I S. 3037 § 31 (4)

<sup>271</sup> Kate Darling, 'Contracting About the Future: Copyright and New Media' (2012) 10 Nw J Tech & Intell Prop 485 *see* page 492

<sup>272</sup> *Ibid* page 493

<sup>273</sup> Alexander R. Klett, Matthias Sonntag and Stephan Whilske, *Intellectual Property Law in Germany* (Beck 2008) *see* page 65

<sup>274</sup> Darling, 'Contracting About the Future: Copyright and New Media' page 493

<sup>275</sup> Klett, Sonntag and Whilske, *Intellectual Property Law in Germany* page 66

<sup>276</sup> Darling, 'Contracting About the Future: Copyright and New Media' page 493

<sup>277</sup> German Copyright Act § 31 a (1)

three months upon receiving the notice of intended use in a new way,<sup>278</sup> unless the author and the licensee agree on a new equitable remuneration for the author, pursuant to the law. The commentators observe that, while the revocation of the strict prohibition against granting of licenses for the future modes of exploitation is to be commended, new solution does not necessarily bring an increase in legal security and decrease in litigation.<sup>279</sup> Specifically, given that authors now have a non-waivable right to separate equitable remuneration for modes of exploitation developed in the future, it will still be necessary to determine when a form of use is new and when the licensees began exploiting the content in the new way in each case – not to mention, the need to carry out the determination of an actual amount of remuneration that can be deemed equitable.<sup>280</sup> Authors fear that these issues might give rise to a lot of future disputes in Germany.<sup>281</sup>

Legal landscape is also interesting in France, where the Intellectual Property Code states that “any assignment clause affording the right to exploit a work in a form that is unforeseeable and not foreseen on the date of the contract shall be explicit and shall stipulate participation correlated to the profits from exploitation.”<sup>282</sup> While seemingly allowing for licenses pertaining to unknown modes of exploitation to be given, this provision needs to be interpreted bearing in mind another mandatory rule of French IP Code, which stipulates that “transfer of authors’ rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration”.<sup>283</sup> Naturally, methods of exploitation that are presently unknown cannot possibly satisfy this requirement, and thus the courts have routinely invalidated most of licenses covering unknown methods of exploitation on the grounds of failure to comply with this provision.<sup>284</sup> The French courts went as far as to explicitly hold that “distribution methods without explicitly defined scope and purpose are not part of the contract and constitute infringement”.<sup>285</sup>

Laws of some EU countries do contain explicit provisions prohibiting licenses which cover unknown modes of exploitation. Belgian law states that “notwithstanding any provision to the contrary, the assignment of rights in respect of as yet unknown forms of exploitation shall be null

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<sup>278</sup> Ibid

<sup>279</sup> Klett, Sonntag and Whilske, *Intellectual Property Law in Germany* page 66

<sup>280</sup> Ibid

<sup>281</sup> Ibid

<sup>282</sup> Code de la propriété intellectuelle (French Intellectual Property Code) [1992] loi no 92-597 Article L131-6

<sup>283</sup> Ibid Article L131-3

<sup>284</sup> Darling, 'Contracting About the Future: Copyright and New Media' page 496

<sup>285</sup> Ibid page 497

and void”.<sup>286</sup> Yet, in other countries – notably, Nordic countries and the United Kingdom, there are no mandatory provisions against licensing works in such a manner to cover currently unknown modes of exploitation. In those countries, attempting to invalidate such a license would have to rely on broader principles of contract law, or principles of copyright law (e.g. Norwegian principle of specificity),<sup>287</sup> with varying chances of success.<sup>288</sup>

Situation is not radically different in the United States, where the law takes a rather permissive approach and allows the parties to transfer rights to exploit works in presently unknown manner, provided that there is either an explicit agreement to that effect, or a full transfer of copyright.<sup>289</sup> In the case of ambiguous licensing clauses, or if the will of the parties cannot be discerned at all, US courts apply the general principles of contract law in each specific case to determine whether a certain type of content exploitation is covered by the licensing clause.<sup>290</sup> Some of these cases result in very restrictive readings of licensing clauses, whereas in others the courts have held that “licensees should have all the rights that are reasonably within the scope of the distribution method and purpose”.<sup>291</sup> However, there is a special mechanism found in the US law that is designed to protect the interests of the authors after the contract has been concluded: the termination right enacted in the US Copyright Act of 1976, which gives authors a right to terminate a copyright grant or license 35 years after its execution, “notwithstanding any agreement to the contrary”.<sup>292</sup> Termination right therefore does not protect authors during the contracting stage; rather, it gives them a chance to “change their mind” after 35 years, and changes in technological landscape, including the development of new ways to exploit content, would likely be among the factors that the authors would consider. Authors are further protected by the fact that this right is not waivable.

Therefore, in the context of consumer protection provisions found in *Rome I*, the obvious question is: how are the courts supposed to establish which one of these laws offers *greater* protection to consumers? What should the courts even be looking into? Should they compare only the mandatory norms as such – isolated – or should they also look into their interaction with other norms of the foreign law, the case law governing the interpretation, the reason behind the adoption

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<sup>286</sup> Loi relative au droit d'auteur et aux droits voisins (Belgian Copyright Act) [1994] loi du 30 juin 1994, modifiée par la loi du 3 avril 1995 Article 3 (1)

<sup>287</sup> See Chapter 5, 3.2

<sup>288</sup> See generally Séverine Dusollier and others, *Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States*, 2014)

<sup>289</sup> Darling, 'Contracting About the Future: Copyright and New Media' page 490

<sup>290</sup> Ibid

<sup>291</sup> Ibid

<sup>292</sup> 17 U.S. Code § 203

of such norm, enforcement statistics? The first approach threatens to produce erroneous results: laws which offer protection through case law rather than statutory instruments (such as Austrian law), those that *seemingly* allow license grants for unknown modes of exploitation, but curtail the possibility through supplementary norms (such as French law) or those that are silent on the topic, but offer recourse through application of overarching principles of protection of weaker parties and duty of good faith (such as Norwegian law) might be unjustly disfavored. On the other hand, examining foreign laws in great detail would be a very timely, unpredictable and costly affair. On top of that, there is a problem of “comparing apples and oranges”: how can Belgian direct prohibition of licenses for unknown modes of exploitation be meaningfully compared with German solution, which allows such licenses, but grants authors the right to additional remuneration? They both offer high level of protection; they just use a different technique to secure that protection. And finally, what if there is not enough case law or empirical data to assess just how protective a legal system is? This is the case with American law, where the right of termination only recently became possible to exercise in practice (as the Copyright Act was enacted in 1976 and authors can exercise this right only 35 years after the original grant).

The conclusion of this study is not that consumer protection regime under *Rome I* has *no* merit when it comes to user content licensing: it most certainly does, and it *can* protect the users who find themselves bound by abusive agreements. The problem is, these norms are not such a “silver bullet” when it comes to complex, multi-faceted questions where different laws use different solutions to protect the interest of users – both as authors and as consumers. This is certainly often the case in copyright law-related issues, as different countries use different mechanisms to achieve balance between the interests of the public and the authors. In these situations, other ways to apply the protections of the local law might offer a more straightforward solution: for instance, in our case, courts could hold that the question of giving licenses for future modes of exploitation is not a contractual, but a copyright law question, and thus hold that party autonomy in choice of law is excluded. Alternatively, the term might be invalidated as substantively unfair under the EU consumer protection law. Finally, as we will explore shortly, they might assert that these provisions, enacted with the goal of protecting authors as weaker parties, are essential to the balance of copyright law of their countries, and as such, are applicable irrespectively of the presence of a choice-of-law clause. While such measures curtail party autonomy in choice of law, and bring a certain measure of unpredictability of their own, they might be preferable to engaging in long and burdensome comparison of different legal systems. In the end, likely being a less expensive solution, these alternative approaches might even offer consumers a higher level of protection in practice.

### 3.2.2.5. EU substantive consumer protection law

Another limit to party autonomy in choice of law comes from the EU's substantive rules on consumer protection, which are harmonized in different aspects through a series of directives.<sup>293</sup> Some of these directives contain specific rules dealing with choice-of-law clauses in consumer contracts, and their application is not affected by the *Rome I*, as article 23 specifies that the Regulation does not prejudice the application of provisions of European Union law which, in relation to particular matters, lay down conflict rules relating to contractual obligations.<sup>294</sup>

In particular, article 6(2) of the Unfair Terms Directive states that “Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.” In other words, if the contract contains certain terms which are considered to be unfair (and thereby void) under the Directive, but which would be valid under the chosen law, the choice-of-law clause is to be disregarded, and the specific term is to be invalidated.

We must note, however, that the Directive's approach to consumer protection in choice of law offers a more straightforward approach to analyzing content licensing clauses than *Rome I* does. It does not call for an issue-by-issue evaluation of the (somewhat abstract) *level of protection* offered by different laws; rather, it requires the court to assess the fairness of the term under the Directive, and its enforceability under the US law. If there is a discrepancy, the license is to be invalidated – which is why this mechanism might be one of the most significant ways of subjecting licensing clauses found in user agreements to local law's fundamental fairness checks, despite the presence of a choice-of-law clause.

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<sup>293</sup> Stone, *EU Private International Law* page 349; see Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (Unfair Contract Terms Directive) [1993] OJ L95 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L149 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (Sales and Guarantees Directive) [1999] OJ L171 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (Price Indication Directive) [1998] OJ L80 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising (Misleading and Comparative Advertising Directive) [2006] OJ L376 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interests (Injunctions Directive) [2009] OJ L110

<sup>294</sup> Rome I Article 29

### 3.2.2.6. Overriding mandatory norms and public policy

Sixth limitation to the effects of choice-of-law clauses comes from *Rome I*'s declaration that “nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.”<sup>295</sup> This means that there are certain provisions of the law of the forum which are deemed to be applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract – thereby limiting the effects of a choice-of-law clause.

*Rome I* clarifies, however, that not *every* mandatory provision of the law of forum will have overriding character; rather, it states that “overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization”.<sup>296</sup> This also follows from Regulation’s recitals, which underline that “the concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively.”<sup>297</sup>

Distinction between overriding and non-overriding mandatory norms is not always easy to make, as it calls for a careful interest analysis, and requires the courts to be mindful of the extraordinary and narrow nature of this mechanism. As Stone explains:

“As is confirmed by the reference in Article 9(1) to a country’s interests, Article 9(2) utilises the concept of interest analysis, which was isolated in the United States by Brainerd Currie and has become a major choice-influencing factor in American case-law in recent decades. [...] Where the *lex fori* contains an invalidating substantive rule, Article 9(2) authorises the forum country (by legislation or judicial decision) to define its interests in the application of its substantive rule; to weigh them against other choice-influencing considerations, such as the general policies favouring party expectations, the convenient conduct of international trade, legal certainty and uniformity of result (regardless of forum), which underlie the proper law doctrine; and ultimately to determine the circumstances (if any) in which the forum country’s invalidating interest will be given overriding effect in its courts. But the forum country is expected to proceed with caution before concluding that its interest is of sufficient importance to justify derogation from the operation of the proper law, and the assertion of an overriding interest by the forum country under Article 9(2) should rarely occur.”<sup>298</sup>

Despite this *general* reluctance to deem a norm to be overriding, there are reasons to believe that courts might resort to using this mechanism in cases involving a dispute over user content licensing practices. Namely, website users are practically always a weaker contractual party – as authors, consumers, parties with significantly less bargaining power; and it is well-established in the EU

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<sup>295</sup> Ibid Article 9 (2)

<sup>296</sup> Ibid Article 9 (1)

<sup>297</sup> Ibid Recital paragraph 37

<sup>298</sup> Stone, *EU Private International Law* page 339

that the norms protecting such parties can be – and indeed often are – deemed to be overriding.<sup>299</sup> This is primarily because protection of weaker parties can be seen as essential to safeguarding country’s interests – and if such parties were to lose protection of their national laws due to their lack of bargaining power and a presence of a choice-of-law clause, those interests would be impaired. CJEU has also weighed in on the issue, and has taken a rather permissive approach. While it underlined that countries must still be safeguarding an essential interest when protecting weaker parties through overriding norms, it found that the sheer act of adopting widely protective legislation can amount to such a claim of essentiality:

“It is thus for the national court, in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a ‘mandatory rule’, to take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned. As the Commission pointed out, such a case might be one where the transposition in the Member State of the forum, by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive, offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals.”<sup>300</sup>

Aside from protecting authors as weaker contractual parties, national laws which impose protective norms in the field of copyright licensing serve an additional function: they are an integral part of country’s efforts to establish a balanced, fair copyright regime. Because authors have less bargaining power than publishers do, they can find themselves bound by exploitative agreements, tailored to serve the publishers’ interests, and minimize the benefits for authors. Such agreements would negatively affect the economic incentives geared towards stimulating creation of content, and as such, would threaten to undermine the foundations of copyright protection regime. Safeguarding the balance of copyright is therefore an additional essential function of national licensing rules, and another factor in favor of finding that they are directly applicable.

This is not to say that all the licensing norms are equally likely to be deemed overriding. Their mandatory nature and link with protection of weaker parties or copyright balance would still have to be established on an individual basis, despite the fact that this, in itself, would not be a difficult bar to pass. Because the goal of this chapter is to present the *possible* limitations of choice-of-law

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<sup>299</sup> Stone observes that “despite the reference in Article 9(1) to a country’s public interests, and to its political, social or economic organisation, there is no reason to doubt that Article 9(2) can be applied to mandatory rules of the *lex fori* which are designed to protect weaker parties, such as small businesses when transacting with large or medium-sized businesses.”

<sup>300</sup> C184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* [2013] ECLI:EU:C:2013:663 (ECJ)

and forum selection clauses, we will not engage in a deeper analysis of *which exact* licensing norms may be held to be overriding in practice. Still, some are worth noting here.

In some countries, licensing rules require that each mode of exploitation be listed in the licensing clause, alongside its duration and territory.<sup>301</sup> Some laws state that statutory provisions may not be superseded by “shrink-wrap agreements” or other unilateral reservations.<sup>302</sup> As we have seen in the previous section, several legal systems deem the grant of a license for an unknown type of use to be void.<sup>303</sup> A number of national laws require that the author remuneration be expressly included in the licensing agreement.<sup>304</sup> Some of them even allow authors to claim an additional fee if the exploitation of work has led to substantial benefits to the other party.<sup>305</sup> All of these norms are enacted with the goal of protecting authors and the balance of copyright, and as such, would likely be deemed to be overriding, and consequently, directly applicable to user content licenses.

In some cases, courts do not need to derive the overriding nature of licensing norms through an interest-test-based functional analysis, because the legislators have, in the interest of predictability, created specific conflict rules which ascertain the overriding nature of local licensing rules.<sup>306</sup> We find such a solution in German law, which explicitly states that its rules on appropriate author remuneration are subject to mandatory application, if German law were to be applied to contract in the absence of choice, or if the subject matter of the contract are “significant acts of exploitation” in the territorial scope of application of German law.<sup>307</sup>

What we must bear in mind, however, is that courts have a mechanism allowing them to apply the aforementioned protective norms more easily: through classifying them as incidental to copyright, and thereby falling outside the scope of a choice-of-law clause. In other words, deeming the rules on licensing to be questions of copyright, rather than contract law, would allow the court to apply them directly, without resorting to interest analysis or the application of special conflict rules. This approach seems to be embraced in practice.<sup>308</sup>

Finally, public policy of the country of the forum additionally limits the effects of choice-of-law clauses. *Rome I* states that “the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public

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<sup>301</sup> See e.g. French Intellectual Property Code Article L131-3

<sup>302</sup> Ole-Andreas Rognstad, 'Scandinavia (Norway, Denmark and Sweden)' in Reto M. Hilty and Sylvie Nérissou (eds), *Balancing Copyright - A Survey of National Approaches*, vol 18 (Balancing Copyright - A Survey of National Approaches, Springer 2012)

<sup>303</sup> See e.g. German Copyright Act § 31

<sup>304</sup> See e.g. Belgian Copyright Act Article 3

<sup>305</sup> See e.g. French Intellectual Property Code Article L131-5

<sup>306</sup> See generally Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* page 193

<sup>307</sup> See e.g. German Copyright Act § 31

<sup>308</sup> Paul Torremans (ed), *Research Handbook on Cross-Border Enforcement of Intellectual Property* (Research Handbooks in Intellectual Property, Edward Elgar Publishing 2015); Werra, *Research Handbook on Intellectual Property Licensing*; Dusollier and others, *Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States*

policy (*ordre public*) of the forum.”<sup>309</sup> Whereas overriding mandatory norms serve to allow the courts to apply their local laws (if they can ascertain the essential interest for doing so), public policy allows them to *refuse* to apply foreign law. This can, however, only be done after the courts have engaged in a result-based assessment: would the application of foreign law lead to a result manifestly incompatible with core principles of forum’s legal system?

Needless to say, public policy exception is a mechanism which is meant to be used sparingly. In the field of user content licensing, its potentially greatest value comes from the potential to exclude the applicability of certain waivers found in user agreements. Notably, several website agreements ask the users to agree to waive any moral rights claims over content that they upload – and in some countries, particularly France, protection of moral rights is seen as an integral part of public policy.<sup>310</sup> In addition, liability waivers and damage capping provisions routinely found in user agreements – such as those claiming that “IN NO EVENT WILL THE INSTAGRAM PARTIES TOTAL LIABILITY TO YOU FOR ALL DAMAGES, LOSSES OR CAUSES OR ACTION EXCEED ONE HUNDRED UNITED STATES DOLLARS (\$100.00)”<sup>311</sup> – can be declined enforcement on public policy grounds, rendering the choice-of-law clause obsolete.

In conclusion, while generally exceptional in nature, overriding mandatory norms and the public policy exception round-off the system of limitations to party autonomy in choice of law outlined in this chapter. They are usually thought of as an emergency mechanism, securing the interests of the forum country when all the other safeties fail. Still, in our context, they are a more readily accessible tool: they give courts a robust, if somewhat cumbersome way, to protect the users from overly predatory contract drafting practices.

## 4. Conclusion

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<sup>309</sup> Rome I Article 21

<sup>310</sup> See Hanan Mohamed Almwala, 'Moral rights in The Conflict-of-Laws: Alternatives to the Copyright Qualifications' (Doctoral thesis, Queen Mary, University of London 2012). See Cyrill P. Rigamonti, 'Deconstructing moral rights' (2006) 47 Harv Int'l LJ 353; Marketa Trimble, 'Advancing National Intellectual Property Policies in a Transnational Context' (2015) 74 Maryland Law Review 203; Jean-Luc Piotraut, 'An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared' (2006) 24 Cardozo Arts & Ent LJ 549; Andreas P. Reindl, 'Choosing Law in Cyberspace: Copyright Conflicts on Global Networks' (1998) 19 Mich J Int'l L 799; Stephen Fraser, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure' (1997) 15 J Marshall J Computer & Info L 759; Paul Edward Geller, 'Copyright History and the Future: What's Culture Got to Do with It?' (2000) 47 Journal of the Copyright Society of the USA 209; Paul Edward Geller, 'How To Practice Copyright Law Internationally in Perplexing Times?' (2013) 60 Journal of the Copyright Society of the USA 167; Natalie C. Suhl, 'Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?' (2002) 12 Fordham Intell Prop Media & Ent LJ 1203; Irma Sirvinskaite, 'Toward Copyright Europeanification: European Union Moral Rights' (2010-2011) 3 J Int'l Media & Ent L 263

<sup>311</sup> Instagram Terms of Service, Annex I

“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.”<sup>312</sup> So begins a Declaration of the Independence of Cyberspace, a manifesto written in 1990s, echoing the sentiment that Internet should be open, free, and ultimately – not subject to any laws and controls imposed by the national governments.

This libertarian sentiment has diminished. Practicalities of life have settled in, and the need to regulate the Internet became long apparent. Even John Barlow, the Declaration’s author, remarked at a later stage that “we all get older and smarter”, seemingly backing away from his bold statements.<sup>313</sup>

Yet nowadays, there is another – more subtle, and indefinitely more dangerous – myth floating around. It’s the myth that the relationship between countless users scattered around the globe, and US-based companies offering them critical services, is exclusively subject to the American law and the jurisdiction of the American courts. Origins of this myth are to be found in the poor understanding of the rules of private international law: they stem from the belief in absolute and unrestricted power of contractual terms. For one not well-versed in the subtleties of private international law, after all, this is an easy mistake to make; especially so when user agreements start with a proclamation – “we are a U.S. company and subject only to U.S. laws and jurisdiction”.

The myth of an all-American web is a *dangerous* one. Evidently, its devastating consequence is that users who believe in it, believe that they have to travel to California if they want to sue Google, Facebook or Twitter. At the same time, they consider that they have waived any right to protections granted by their local laws.

From platform provider’s perspective, this might be perceived as a blessing. *It is not*. When a company lawyer, believing in self-sufficiency of the contract and unlimited reach of the American law, advises a company to introduce a feature in breach of foreign norms, he is creating a major compliance risk. As any risk, it might never materialize, and the company may continue offering its features perpetually. But all it takes for this tower of cards to fall down, is one user who will want to test the (faulty) premise that in cyberspace, American law rules supreme. From that point on, the company is engaged in a long and unpredictable legal battle; and ultimately, it will have to

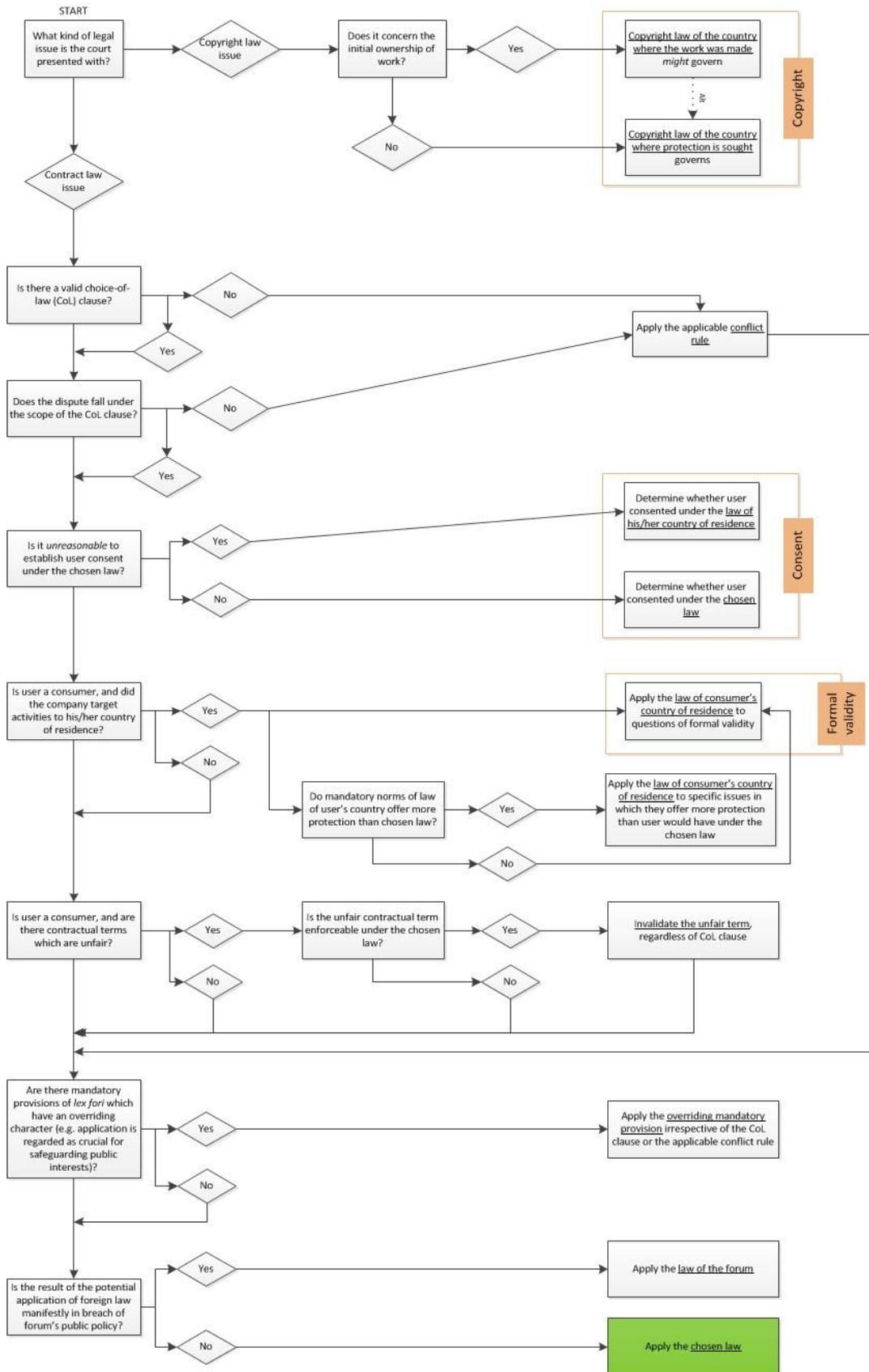
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<sup>312</sup> John Perry Barlow, 'A Declaration of the Independence of Cyberspace' Electronic Frontier Foundation <<https://www.eff.org/cyberspace-independence>> accessed 19 September 2017

<sup>313</sup> Brian Doherty, 'John Perry Barlow 2.0' Reason.com <<http://reason.com/archives/2004/08/01/john-perry-barlow-20/3>> accessed 19 September 2017

cover the full costs of non-compliance with local laws – but this time, on the court’s terms, and with volatile fallout, directly jeopardizing interests laid down in the previous chapter.

This chapter laid down the limits to party autonomy in choice of law in user agreements. It established that EU users will very likely succeed in bringing the claim before the courts of their home country, and explained the ways in which local laws might come into play. The following chart summarizes the analysis that the a European – and, arguably, Norwegian – court needs to carry out to determine which law governs a particular question linked with user content licensing:



Therefore, there are two ways to view the conclusions of this chapter. One of them is rather narrow: as a practical matter, the determination that local courts are likely to exercise jurisdiction and hear the largest part of the case under the local law, sets the tone for the discussion in the chapter to follow – the one examining how content licenses would be treated under different laws. But the question that we also need to raise is just how *effective* the current European system is, and whether user content licensing should, from a private international law standpoint, be subject to specialized rules.

This question, for the sake of preserving the scope of research, will not be tackled here. What we can note, nevertheless, is that protections the current system offers are *numerous*, but not *coherent*. This is certainly more preferable than if there were no protections at all. Still, forcing users to potentially litigate all the questions presented on a previous chart is likely to expose them to severe financial strain. A far better protective mechanism would, in that regard, be the one which curtails party autonomy in choice of law altogether, and subjects contractual questions related to content licensing to the law applicable to copyright. From platform provider's perspective, this alternative approach might be preferable: it would offer a significantly increased degree of legal certainty, allowing the companies to plan their features with regulatory compliance considered in advance. Just as critically, it would ensure that the courts do not find themselves in difficult situations in which one law governs the copyright and another the contract, or where several laws govern different contractual questions.

## Chapter V      Law of the Lands: Validity of User Content Licensing Clauses Under National Laws

### 1. Introduction

In this Chapter, we will turn to the validity of user content licenses under different national laws. In other words, we have seen that various laws may govern various aspects of content licensing; we will now examine whether this, in practice, amounts to a meaningful difference.

We will start our analysis under the US law. The American contract law is deemed to be the one governing virtually every user agreement surveyed, and the need to assess the validity of content licenses under its provisions remains paramount, notwithstanding limits to party autonomy discussed in Chapter 4. (In fact, as we have explored, the very *applicability* of some of these limitations might depend on the difference between the way that the chosen – US – law and the law otherwise applicable treat the subject-matter.) In addition to this, the US courts have developed significant jurisprudence on electronic contracting, which, in turn, largely shapes the behavior of online companies. In other words, even though there are numerous scenarios in which the US law might not be legally applicable to a particular relationship between an online company and its users, it will nevertheless fundamentally define that relationship in practice.

Natural way to mirror the structure of the previous chapter would be to look into EU/EEA regulations which are relevant to licensing of user-generated content. However, such inquiry would paint a rather limited picture. First, European regulation is for the most part silent on a number of key issues – contract law is not fully harmonized within EU, and consequently, no harmonized framework on copyright licensing has yet emerged. Secondly, even in the areas in which we find relevant legal instruments – notably, within copyright and consumer protection law – levels of harmonization vary, as these instruments are differently transposed in different national systems. Accordingly, in order to survey the validity of user content licenses in a trans-Atlantic setting, we need to analyze them at the level of national laws, while taking note of how EU/EEA instruments affect these laws.

In this chapter, we will make such analysis under the Norwegian law. The principal reason for this lies in the contrast with the American legal system, under which the first part of the analysis will be carried out. Norwegian and American legal traditions differ to a large degree. Whereas in the US contracts tend to be enforced as close to their text as possible, Norwegian courts are willing to subject them to broad fairness checks. In Norway, consumers enjoy a high level of protection; in

the US, commentators lament the way that it is nigh-impossible for them to even get a day in court. Copyright laws differ, too: uses which might be deemed infringing in Norway could be considered fair in the US; so do the available remedies.

This contrast is not offered with a goal of demonstrating that one system is better than another. Rather, it serves a purpose of exploring the unique challenges posed by licensing of user content in various legal settings, and helping us determine which factors, and to which extent, impact the validity of licenses and the availability of remedies. Through studying such impact of the diverging regulations, we will more easily identify problematic aspects of content licensing, as well as the best ways to address them.

In this chapter, we will limit our discussion to the law as it stands today. We will address the systemic concerns and reform proposals in the subsequent chapters.

## 2. United States

In the United States, copyright licensing is not subject to a uniform set of legal sources; rather, it is regulated through a mix of overlapping federal and state regulations.

The principal source of copyright law in the United States is the federal Copyright Act of 1976, which encompasses a wide set of rules, ranging from those on subject-matter and scope of copyright, to those on infringement and remedies.<sup>314</sup> However, the Act barely touches upon private licensing of copyrighted works. Section 201(d) lays down the rules on transfer of copyright ownership:

“(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”<sup>315</sup>

Yet, §101 makes it clear that “a ‘transfer of copyright ownership’ is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any

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<sup>314</sup> See generally 17 U.S. Code

<sup>315</sup> Ibid § 201 (d)

of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, *but not including a nonexclusive license*".<sup>316</sup>

Therefore, the most explicit way in which Copyright Act authorizes the copyright owners to grant non-exclusive licenses is found in §106: "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following [...]"<sup>317</sup>

Now, given that the Copyright Act does not contain extensive rules on copyright licensing, and that the licenses are contractual in nature, their scope and validity are to be assessed in line with the applicable state law. Yet, this application of state contract law is a rather delicate task: should the state law be in conflict with either the express terms of the Copyright Act, or its *underlying purposes*, it will be preempted and held non-applicable.<sup>318</sup> As the court explained in *SOS v. Payday*:

"The license must be construed in accordance with the purposes underlying federal copyright law. Chief among these purposes is the protection of the author's rights. We rely on state law to provide the canons of contractual construction, but only to the extent such rules do not interfere with federal copyright law or policy. *See Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 482–83 (5th Cir.1981) (state law rules of contract construction not preempted by federal law; however, application of state law to supply implied terms in copyright license would raise preemption question)."<sup>319</sup>

In addition to the problems associated with preemption of state law, authors claim that "while federal courts do sometimes raise issues under state contract law in the course of deciding implied license cases, much of the time they rely on a body of precedent created by federal courts out of whole cloth."<sup>320</sup> In other words, instead of applying the governing state law, the courts tend to create and follow independent, federal precedents.

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<sup>316</sup> *Ibid* § 101, emphasis added

<sup>317</sup> *Ibid* § 106

<sup>318</sup> Christopher M. Newman, "What Exactly Are You Implying?": The Elusive Nature of the Implied Copyright License' (2014) 32 *Cardozo Arts & Ent LJ* 501 *see* page 553: "While federal courts generally regard themselves as applying state contract law in the construction of such licenses, they do so subject to the proviso that state law will be superseded should it conflict, not merely with the express terms of the Copyright Act itself, but with what the federal courts understand to be the purposes underlying federal copyright law."

<sup>319</sup> *S.O.S., Inc. v Payday, Inc.* [1989] 886 F2d 1081 (United States Court of Appeals, Ninth Circuit) citing *Coben v Paramount Pictures Corp.* [1988] 845 F2d 851 (United States Court of Appeals, Ninth Circuit); *Harris v Emus Records Corp.* [1984] 734 F2d 1329 (United States Court of Appeals, Ninth Circuit); *Fantastic Fakes, Inc. v Pickwick Intern., Inc.* [1981] 661 F2d 479 (United States Court of Appeals, Fifth Circuit, Unit B); *Heston v Farmers Ins. Group* [1984] 160 CalApp3d 402 (Court of Appeal, Second District, Division 3, California).

<sup>320</sup> Newman, "What Exactly Are You Implying?": The Elusive Nature of the Implied Copyright License' citing among others *Estate of Hevia v Portrio Corp.* [2010] 602 F3d 34 (United States Court of Appeals, First Circuit); *Latimer v Roaring Toys, Inc.* [2010] 601 F3d 1224 (United States Court of Appeals, Eleventh Circuit); *Asset Marketing Systems, Inc. v Gagnon* [2008] 542 F3d 748 (United States Court of Appeals, Ninth Circuit); *National Ass'n For Stock Biscuit Auto Racing, Inc. v Scharle* [2006] 184 F App'x 270 (United States Court of Appeals, Third Circuit); *John G. Danielson, Inc. v Winchester-Conant Properties, Inc.* [2003] 322 F3d 26 (United States Court of Appeals, First Circuit); *Nelson-Salabas, Inc. v Morningside Development, LLC* [2002] 284 F3d 505 (United States Court of Appeals, Fourth Circuit); *Korman v HBC Florida, Inc.* [1999] 182 F3d 1291 (United States Court of Appeals, Eleventh Circuit)

This means that our inquiry into validity of user content licenses needs to be carried out in the light of state contract law, the emerging federal common law of express copyright licenses, the express provisions of the Copyright Act (where applicable), and Copyright Act's underlying purposes – in all of the relevant stages.

## 2.1. Contract formation under US law

We will first turn to the questions of contract formation. As we have noted at the outset of this chapter, not every promise constitutes a contract. Licensing clauses therefore have to be carefully scrutinized against the governing law's formation requirements.

Subject to certain exceptions, the essential contract formation elements are largely harmonized between the US states. Primary elements for determining whether an enforceable contract has been formed are the existence of mutual assent (proven objectively, and established by showing an offer and acceptance) and consideration.<sup>321</sup> Unlike many other legal systems,<sup>322</sup> American law does not require the presence of *animus contrahendi*, “the expressed or implicit intention that a contract should emerge as a result of the language or conduct of the alleged parties” – to the contrary, *Restatement (Second) of Contracts* clearly states that “neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract”.<sup>323</sup>

Therefore, in order to establish whether licensing clauses found in user agreements constitute properly formed contracts, we will first assess whether they are based on the mutual assent, and whether there is adequate consideration.

### 2.1.1. Mutual assent

*Restatement* defines mutual assent as a requirement “that each party either make a promise or begin or render a performance”,<sup>324</sup> continuing to specify that “the manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance

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<sup>321</sup> The American Law Institute (ed), *Restatement (Second) of Contracts* (Restatement of the Law, American Law Institute 1981) § 17: “(...) the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”

<sup>322</sup> In Norway: “The promise principle is subject to certain reservations. The promise principle does not attach to declarations that a party does not intend should have legal consequences.” see Daniel A. Nye, 'Formation of Contracts: The Law in Norway' (1987) 12 NC J Int'l L & Com Reg 187. For other jurisdictions, see e.g. G. H. L. Fridman, *The Law of Contract in Canada* (4th edn, Carswell Legal Publications 1999)

<sup>323</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 21; But see Gregory Klass, 'Intent to contract' (2009) 95 Virginia Law Review 1437

<sup>324</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 18

by the other party or parties”.<sup>325</sup>In other words, in order to establish the existence of mutual assent, we need to establish that there was a valid *offer* and *acceptance* of licensing terms.

### **2.1.1.1. Offer**

The primary definition of an offer given in *Restatement* simply states that “an offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it”.<sup>326</sup> It seems clear that the basic intent is to once again underline that whether something constitutes an offer should be construed using an objective, i.e. reasonable person standard.<sup>327</sup>Under the *Restatement*, offer needs to be definite and properly communicated.

#### **2.1.1.1.1. Definiteness**

American legal system requires offers to be sufficiently definite, as a proposal that is too ambiguous, vague or uncertain “would leave a reasonable recipient believing that the party making the proposal was inviting further negotiations rather than inviting full acceptance”.<sup>328</sup> In addition, even if a party agrees to be bound by such uncertain terms, courts would have trouble construing this agreement, i.e. attempting to determine whether it has been breached and to rule on the remedy.<sup>329</sup> Echoing these concerns, *Restatement* stipulates that “even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain”,<sup>330</sup> and goes on to establish that the terms are reasonably certain “if they provide a basis for determining the existence of a breach and for giving an appropriate remedy”.<sup>331</sup> Likely in an effort to allow appropriate remedies, *Restatement* further emphasizes that “the fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance”.<sup>332</sup>

This is of extreme significance for our analysis, bearing in mind the areas of ambiguity explored in Chapter 3. The question, then, becomes whether this ambiguity is of such an extent, as to make the courts invalidate user content licenses on the grounds of lack of assent? This does not seem

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<sup>325</sup> Ibid § 22

<sup>326</sup> Ibid § 24

<sup>327</sup> Bix, *Contract Law: Rules, Theory, and Context* page 19

<sup>328</sup> Ibid

<sup>329</sup> Ibid

<sup>330</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 33 (1)

<sup>331</sup> Ibid § 33 (2)

<sup>332</sup> Ibid § 33 (3)

very likely: courts have, over the years – and especially in California – developed a strong preference against invalidating contracts on the grounds of ambiguity.

“The law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained”, held the court in *Rivers*.<sup>333</sup> Similarly, in *Amaral*,<sup>334</sup> the court held that “the modern trend of the law favors carrying out the parties' intentions through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty”. And quite pertinent to issues before us, the court in *Denver D. Darling*<sup>335</sup> ruled that “if the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left”.

In other words, should the courts determine the presence of an ambiguous term in a contract – a term which can be reasonably interpreted in more than one way – they are likely to proceed to construe the “correct” meaning of the said term based on the intent of the parties. In so doing, they need to consider factors such as the remaining content of the agreement, the nature of a contractual relationship, conduct of the parties, and the prevailing industry standards. In user content licensing cases, this would manifest as a three-step inquiry: 1) can the licensing terms be reasonably interpreted in more than one way?; 2) how do the scopes of potential licenses differ in their conflicting interpretations?; 3) does one of the conflicting interpretations adequately reflect the intent of the parties, as assessed in the light of the aforementioned factors? Yet, in a leading case where the issue of ambiguity of content licenses has been litigated, the court failed to follow these steps, ruling on ambiguity of licensing provisions in a rather perplexing – and almost improvised manner.

The case, *Cohen v. Facebook*,<sup>336</sup> revolved around use of user content, name and likeness in Facebook's Friend Finder service. Facebook used to promote this service by periodically placing notifications on the home pages of users' accounts, stating that certain of their Facebook friends have utilized the service to locate persons they know, and encouraging the users to “[g]ive it a try!”<sup>337</sup> The notices included the names and profile pictures of the friends who have allegedly used

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<sup>333</sup> *Rivers v Beadle* [1960] 183 CalApp2d 691 (District Court of Appeal, First District, Division 1, California)

<sup>334</sup> *Amaral v Cintas Corp. No. 2* [2008] 163 CalApp4th 1157 (Court of Appeal, First District, Division 3, California)

<sup>335</sup> *Denver D. Darling, Inc. v Controlled Environments Const., Inc.* [2001] 89 CalApp4th 1221 (Court of Appeal, Second District, Division 4, California)

<sup>336</sup> *Cohen v Facebook, Inc.*

<sup>337</sup> *Ibid*

the service.<sup>338</sup> A group of users brought a class action against Facebook, claiming that it has used their names and profile pictures to promote the Friend Finder service without their knowledge or consent, and, in the case of some of them, despite the fact that they have not actually ever used the service.<sup>339</sup> Plaintiffs contended that Facebook had thereby misappropriated both their names and likenesses for its own commercial purposes, and that such conduct was actionable under a variety of common law and statutory theories.<sup>340</sup>

Facebook moved to dismiss, making two arguments: that it was perfectly within its rights under user agreements to engage in such conduct, and that plaintiffs have not alleged any cognizable injury from the alleged practices, because their names and profile pictures were merely displayed to their Facebook “friends,” who already had access to them, and because they had no commercial interests in their names and likenesses.<sup>341</sup>

On the first point, Facebook argued that user content license authorizes them to use user material ‘in any manner on Facebook’:

“Though Plaintiffs allege use of their names and/or likenesses was without consent, the SRR [Statement of Rights and Responsibilities] contains terms which expressly permit Facebook to use a User’s name and/or likeness in the manner alleged. First, the section titled “Sharing Your Content and Information” states: ‘For content that is covered by intellectual property rights, like photos and videos (‘IP content’), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (‘IP License’).’ This contractual term unambiguously gives Facebook the right to use any photos, including Plaintiffs’ profile photos, in any manner on Facebook, subject to Users’ privacy and application settings.’<sup>342</sup>

Plaintiffs filed a memorandum to oppose dismissal, claiming Facebook’s terms to be ambiguous:

“Facebook’ generic statement that it has the right to display copyright and trademark protected works uploaded by users, Statement of Rights and Responsibilities (“SRR”) § 2.1, does not say that Facebook has a worldwide perpetual prepaid license to project users’ names and likenesses to any or all 500 million Facebook users as endorsements of any service or product of Facebook choosing. Facebook’s reading of SRR § 2.1 is not only strained, but contradicted by Facebook own ‘Principles,’ a user-friendly manifesto declaring that users own and have close control over information they supply to Facebook. Facebook has not offered users the ability to manipulate privacy settings to consent or decline use of name or likeness to project endorsements to other Facebook users. Nor do Facebook other suggested terms, concerning use of information for advertisements, apply. Facebook says that it can employ user information to serve tailored advertising *to that user’s page*, so that, for example, Facebook can serve ads for online games to teenagers and cholesterol medication

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<sup>338</sup> Ibid

<sup>339</sup> Ibid

<sup>340</sup> Ibid

<sup>341</sup> Ibid

<sup>342</sup> Ibid, Facebook, Inc.’s Motion to Dismiss Class Action Complaint, document 2011 WL 940690, citation omitted. Document available at Westlaw Next.

to retirees. However, nowhere do Facebook's terms say that Facebook can employ user information to project endorsement of goods or services *outward to other Facebook users*.

[...] Facebook's terms are ambiguous, if susceptible at all to the reading urged by Facebook, and thus the Court should deny the motion to dismiss, and defer consideration of parol evidence and interpretation of Facebook's terms to summary judgment or trial.”<sup>343</sup>

In turn, Facebook’s legal team reiterated its arguments on lack of ambiguity, clarifying how in their view, only one reading of its user agreement would be reasonable:

“Although Plaintiffs strive to inject ambiguity, the terms are susceptible to only one plausible reading. As discussed in the Motion to Dismiss, Plaintiffs were informed that Facebook could and would use their names and/or likenesses to provide services related to Facebook, including Friend Finder, which help Users find and connect with one another. The SRR informed Users that for ‘photos and videos’ that they ‘post on or in connection with Facebook,’ Users grants Facebook a worldwide license to use this content. By using the website, Users thus consented to Facebook's use of their profile photo. The SRR also informed Users that the Privacy Policy contained ‘important disclosures about how you can use Facebook to share with others and how we collect and can use your content and information.’ The Privacy Policy informed Users that ‘we use the information we collect to provide our services and features to you.’ Lastly, the Privacy Policy clearly states that ‘Facebook is designed to make it easy for you to find and connect with others. For this reason your name and profile picture do not have privacy settings.’ Thus, Users were informed that Facebook would use certain information to provide its services, and that they could not select privacy settings to hide their names and/or likenesses. Plaintiffs' continued use of the website constituted consent to such services.

Although the Opposition asserts that Users were not informed of each potential use Facebook might employ, the disclosures they were given included the use about which they now complain. Plaintiffs seem to be arguing that any governing license and disclosure would be invalid unless Facebook lists in minute detail every feature or service of the website in which their names and/or likenesses might be used. The only plausible reading of the terms is that Users consented to use of their names and likenesses to provide services, including services such as ‘Friend Finder.’”<sup>344</sup>

Ruling on the motion to dismiss, the court partially agreed with the plaintiffs, holding that the text of the license was open to interpretation, and that it could not insulate Facebook from all of the plaintiffs’ claims. The court did so without even entertaining the possibility that the license might have been *so* ambiguous as to be rendered void; but on the other hand, it did not really adequately explain which provisions are ambiguous *enough* to render it necessary to determine their meaning, in which way, or what the conflicting interpretations might be:

“Facebook contends that the quoted provision of the Statement of Rights and Responsibilities [user content license], standing alone, ‘unambiguously gives Facebook the right to use any photos, including Plaintiffs' profile photos, in any manner on Facebook, subject to Users' privacy and application settings.’ This interpretation of the ‘unambiguous’ effect of the provision is curious, as it simultaneously inserts a limitation (uses ‘on Facebook’) and an explication (‘in any manner’), neither of which are apparent in the plain words of the text. A more natural reading of the provision is that

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<sup>343</sup> Ibid, Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss Class Action Complaint, document 2011 WL 940691. Document available at Westlaw Next.

<sup>344</sup> Ibid, Facebook Inc.'s Reply in Support of Motion to Dismiss Class Action Complaint, document 2011 WL 940692, citations omitted. Document available at Westlaw Next.

it gives Facebook a worldwide license to reproduce any pictures or text posted by a user, subject to any privacy settings, that would insulate it from any *copyright* claims by the user, whether or not the reproduction was made ‘on Facebook.’ Although the term ‘use’ is not defined, it does not necessarily follow that the result should be that any use is permissible, rather than a conclusion that the provision is ambiguous, at best. Of course, regardless of what rights this provision may give Facebook to use profile pictures posted by its users, it does not even purport to give it rights to use their names. [...]

Plaintiffs may indeed have consented to the disclosure of their names and profile pictures to their Facebook friends and even to Facebook users at large, but Facebook has not established that they consented to the particular uses in dispute here.”<sup>345</sup>

The court’s passing remark that “a more natural reading of the provision is that it gives Facebook a worldwide license to reproduce any pictures or text posted by a user, subject to any privacy settings, that would insulate it from any *copyright* claims by the user, whether or not the reproduction was made ‘on Facebook”” is highly troublesome. First, the court made this determination as a matter of law – which is wrong, given that, if the licensing provision was uncertain (which is what the court seemed to suggest in the opening of the paragraph), the intent of the parties should have been determined as a matter of *fact*, as a result of inquiry into parties’ intent. Secondly, prior to making this kind of determination, the court should have construed the scope of the license, and explain why, and to which extent (in conflicting interpretations) it shields Facebook from copyright liability. Instead, the court simply assumed that the license shields Facebook from *all* the copyright law liability, without substantiating such holding.

Granted, this was a publicity law case; copyright infringement was not initially pleaded by the plaintiffs, and the court dealt with the copyright license only insofar as it was pertinent as a defense to the publicity claim. Yet, by making assumptions of the scope of the license without adequate construction of its scope or substantiated inquiry into its ambiguity, the court created dangerous precedent. This became clear in the very same case: plaintiffs proceeded to claim copyright infringement, only to be met with the following response by Facebook:

“Furthermore, even if Plaintiffs’ ‘(intellectual) property’ allegation were properly supported (which it is not), it would still fail. First, the Court has already found that, even under a more limited reading of Facebook’s SRR than Facebook asserts, the SRR “gives Facebook a worldwide license to reproduce any pictures or text posted by a user, subject to any privacy settings, that would insulate it from any copyright claims by the user ...”. Plaintiffs’ claim thus would clearly fail if it is premised on copyright law.”<sup>346</sup>

This case did not get much further. The court went on to grant the motion to dismiss, holding that users failed to show any harm resulting from the service, and that their claims were thereby

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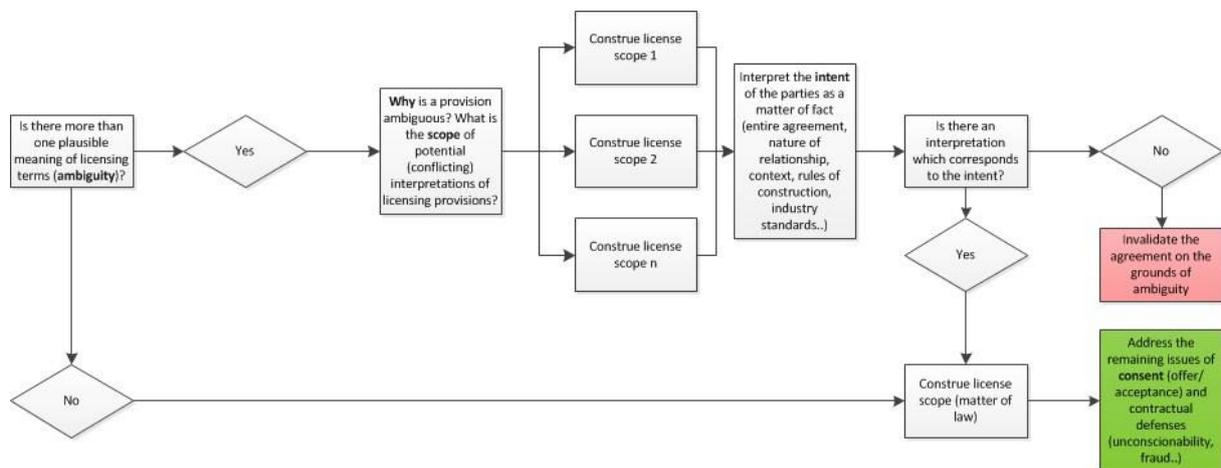
<sup>345</sup> Ibid, emphasis in the original

<sup>346</sup> Ibid, Facebook, Inc.’s Motion to Dismiss First Amended Class Action Complaint, document 2011 WL 4592718. Document available at Westlaw Next.

precluded; as well as that they failed to allege commercial interest in their names, precluding the “false association” or “false endorsement” claims under the Lanham Act.<sup>347</sup>

What *Cohen* and the similar line of cases<sup>348</sup> seem to suggest is that the courts would be willing to examine whether users have consented to particular uses of their content, but that they still seem to be lacking a coherent framework for addressing the issues of ambiguity, intent, consent, and scope: they are jumping between these issues in an erratic manner, rendering their rulings unsystematic and unpredictable. This is understandable, to an extent: issues are intertwined, and the courts have addressed them typically early on in the proceedings, ruling on the motions to dismiss, without having an opportunity to delve into the factual examinations.

The following flow chart illustrates the steps that the court ruling on license ambiguity claims is supposed to take under the current law, if the courts follow the approach embodied in *Restatement*:



So what would be the likely outcome of such in-depth assessment of ambiguity, if we put aside the *Cohen* court’s decision?

The courts would likely find sufficient ambiguity in licensing terms to open an inquiry into their meaning, to be established based on the intent of the parties. After all, it is clear that the terms such as “right to use”, “those we work with” and “things you post in connection with our service” can be interpreted in several different ways. Yet, in establishing the meaning of the said terms, the courts are not supposed to assess how *reasonable* it would be for a party to *accede* to an agreement. Instead, the court needs to take a totality of circumstances into account – looking into the other terms of the agreement, the nature of the relationship between the parties, their respective conduct,

<sup>347</sup> Ibid

<sup>348</sup> *Fralely v Facebook, Inc.*, Second Amended Class Action Complaint for Damages

as well as the industry standards – but only in an attempt to construe proper (i.e. objective) *meaning* of the disputed terms.

Such an analysis is likely to yield results which go in favor of platform providers. Largely standardized wording of the agreements, as explored in Chapter 3, points to platform providers' desire to include licenses which are as broad as possible, which cover all of the authors' economic rights, which give them the right to modify content in as many ways as possible, and which shield them from any kind of infringement liability. This means that, ruling on the ambiguity challenge, the courts would be likely to construe terms in a rather broad manner – as little evidence can be found to substantiate the claims that the included terms have a narrow scope.

Consider, for example, the term “right to use”: bringing a lawsuit against platform provider, a user may claim that this term is ambiguous. The court is likely to agree, opening an inquiry into the meaning of the term. Yet, while the platform provider can present troves of evidence supporting the claim that this term is meant to cover all of the licensable rights, there is virtually no evidence to support the claim that the term is actually restrictive in nature. Of course, the fact that the term may be construed at this stage does not mean that it will actually be held valid and enforceable – user will still be able to challenge it on other formation grounds (e.g. lack of adequate notice) or raise contractual defenses such as unconscionability.

Consequently, raising an ambiguity challenge is more likely to lead to a construction of broad licensing terms by the courts, rather than an invalidation of a contract. This approach is advantageous as a matter of a general principle – certainly, the courts should respect the principle of party autonomy, and should make every effort to enforce their bargains whenever possible; it is the very foundation upon which the contract law is built. But one cannot help but wonder – how much uncertainty is too much? Users do not know to whom they have licensed their content. They do not know for how long they have given this license. They do not know which exclusive rights they have given. Shouldn't that be enough to invalidate *any* contract – not knowing what you have given, to whom, and for how long?

It is worth noting that federal copyright policy seems unlikely to preempt state law on questions of contractual ambiguity. In California, this issue was litigated in the case of *Foad Consulting Grp., Inc. v. Azzalino*, when it became necessary to determine whether Californian flexible parole evidence rule (which required courts to consider extrinsic evidence of possible contractual ambiguity even where the terms appeared to be unambiguous) was in conflict with the federal Copyright Act. The court held that this was not the case:

“We must ask, then, whether California's parol evidence rule conflicts with federal copyright law or policy. The principle effect of the California parol evidence rule is to lessen the importance of written contracts. It does so because the rule requires courts to consider extrinsic

evidence of possible ambiguity even where the terms of the contract appear unequivocal. And if a party's extrinsic evidence creates the possibility of ambiguity, a court may not rely on the text of the contract alone to determine the intent of the parties.

The Copyright Act places great emphasis on the necessity of writings to grant exclusive licenses, but not when it comes to granting nonexclusive licenses: As we have noted, nonexclusive licenses may be granted orally. Thus, if a copyright holder and another have a contract that clearly does not grant the other an exclusive copyright license, in a copyright infringement suit the other may nonetheless introduce nonwritten evidence—such as testimony, course of conduct, and custom and practice—to show that the copyright holder orally granted her a nonexclusive license. Since the Copyright Act itself places no particular emphasis on writings in the case of nonexclusive licenses, we conclude that application of California's parol evidence rule in interpreting a contract that a party purports to have granted an implied copyright license does not conflict with the Act or its underlying policies.”<sup>349</sup>

Yet, one could argue that upholding the agreements which use unconventional licensing terms (e.g. “right to use” instead of enumeration of exclusive rights under §107) undermines legal certainty, which is consequently against the Copyright Act’s underlying goal of ensuring appropriate level of legal security in copyright licensing transactions. In the case of user content licenses, however, such an argument is not too likely to succeed: given that user content licenses are virtually always non-exclusive, and that Copyright Act imposes no formalities on such license grants, the courts are likely to follow the lead of the *Foad Consulting* court, holding that the absence of legally imposed formalities leaves parties free to use the form and language that they deem appropriate. Accordingly, claims of preemption are unlikely to succeed.

#### 2.1.1.1.2. Communication

To be valid, an offer needs to be properly communicated.

A classical American approach to offer communication is contained in *Restatement*, which stipulates that “the manifested intention of the offeror determines the person or persons in whom is created a power of acceptance”, and further explains that “an offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise or renders a specified performance”.<sup>350</sup>

Yet, an online provider is not required to prove that their terms have *actually* been communicated to the users who are challenging them: they simply need to establish that they have given *reasonable notice* of the disputed terms. “Where purported assent to contract is largely passive, contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of term at issue, i.e., where there is no actual notice of term, offeree is still bound by provision if he or she is on inquiry notice of term and assents to it through conduct that a reasonable person would understand to constitute assent; ‘inquiry notice’ is actual notice of circumstances sufficient

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<sup>349</sup> *Foad Consulting Group, Inc. v Azzalino* [2001] 270 F3d 821 (United States Court of Appeals, Ninth Circuit), inner citation omitted

<sup>350</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 29

to put prudent man upon inquiry”.<sup>351</sup> This doctrinal approach – oftentimes referred to as the constructive notice principle – significantly lowers the threshold for holding that the offer has been properly communicated to the offeree.

We have already explored some of the ways in which the American courts have dealt with notice requirements in Chapter 4, when we discussed certain rulings on validity of forum selection clauses in digital agreements.<sup>352</sup> We have seen that the courts have imposed different standards based on the presentation of the terms, and that consequently, layout of the website, choice of fonts, dialog format and other elements of form can have a considerable bearing on the adequacy of the notice.

When is the notice held to be adequate?

The case is most straightforward with “clickwraps”<sup>353</sup> – the agreements which present users with dialog boxes that require them to click on an “I Agree” (or a similar) button to proceed. The courts have held that they provide users with sufficient notice of terms in virtually all the cases in the past two decades.<sup>354</sup> They have also upheld clickwrap agreements which contained multiple pages of text in a scrollable box.<sup>355</sup>

The courts are more hesitant to find sufficient notice in “browsewrap” agreements, however. These agreements do not ask users to actively show their consent by click a button; rather, they are merely posted on the website, usually under a hyperlink captioned “Terms”, “Policies” or “Legal”. In early decisions, the courts refused to uphold these agreements; but after landmark cases such as *Register* and *Specht*, the tide has shifted in favor of finding sufficient notice, unless the terms of the agreement are presented in a completely obscured manner (e.g. hyperlink is not underlined, its color matches the color of the background, hyperlink is visible only from certain sub-pages, and so forth).

Now, as we have seen in the previous chapter, most of the user agreements today are a combination of the “clickwrap” and “browsewrap” paradigm. Users are presented with a link leading to these agreements during the sign-up process; while they do not have to click and actually read the terms, there is usually a caption which indicates that “By clicking ‘Sign up’ you agree with

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<sup>351</sup> *Schnabel v Trilegiant Corp.* [2012] 697 F3d 110 (United States Court of Appeals, Second Circuit) page 120

<sup>352</sup> See Chapter 4, 2.2.3.1

<sup>353</sup> See Kim, *Wrap Contracts: Foundations and Ramifications*: “Clickwrap agreements do not permit a user to progress until and unless the user clicks on a box containing the words ‘I agree’ or some similar expression of agreement.”

<sup>354</sup> *CompuServe, Inc. v Patterson* [1996] 89 F3d 1257 (United States Court of Appeals, Sixth Circuit); Mark A. Lemley, “Terms of use” (2006) 91 Minn L Rev 459

<sup>355</sup> *Caspi v Microsoft Network, L.L.C.* [1999] 732 A2d 528 (Superior Court of New Jersey, Appellate Division)

the terms”. The terms can also be accessed by the users after they complete the registration process – there is usually a clearly visible hyperlink captioned “Terms” on the service’s homepage. There is consequently little ground to suspect that the courts would invalidate these agreements on the grounds of insufficient notice.

This follows from the holistic reading of the current case law on notice requirements. The seminal case for holding the online agreements invalid on the grounds of insufficient notice is *Specht v. Netscape*,<sup>356</sup> where plaintiffs alleged that Netscape was unlawfully tracking their Internet communication through their SmartDownload program. As Netscape’s terms of use contained an arbitration clause, Netscape moved to compel arbitration and stay the proceedings.

Ruling against Netscape, the court held that Netscape failed to present its user agreement in a manner which would put a reasonable man on notice. Namely, the users were not required to click an “I Agree” or similar button prior to installing the software; while Netscape’s website had a hyperlink which stated “Please review and agree to the terms of the Netscape SmartDownload software license agreement”, users needed to scroll down on the software download page to actually see the link.<sup>357</sup> Justice Sotomayor, a district judge at the time, wrote in the opinion:

“We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. Thus, plaintiffs’ “apparent manifestation of ... consent” was to terms “contained in a document whose contractual nature [was] not obvious.” Moreover, the fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms. In their deposition testimony, plaintiffs variously stated that they used the scroll bar “[o]nly if there is something that I feel I need to see that is on—that is off the page,” or that the elevated position of the scroll bar suggested the presence of “mere[] formalities, standard lower banner links” or “that the page is bigger than what I can see.” Plaintiffs testified, and defendants did not refute, that plaintiffs were in fact unaware that defendants intended to attach license terms to the use of SmartDownload.

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. The SmartDownload webpage screen was “printed in such a manner that it tended to conceal the fact that it was an express acceptance of [Netscape’s] rules and regulations.” Internet users may have, as defendants put it, “as much time as they need[]” to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are “free” and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm’s-length bargaining. In the next two sections, we discuss case law and other legal authorities that have

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<sup>356</sup> *Specht v Netscape Communications Corp.* [2002] 306 F3d 17 (United States Court of Appeals, Second Circuit)

<sup>357</sup> *Ibid*

addressed the circumstances of computer sales, software licensing, and online transacting. Those authorities tend strongly to support our conclusion that plaintiffs did not manifest assent to SmartDownload's license terms.”

Yet the other courts ruling on the validity of contemporary notices have had no trouble distinguishing from the *Specht* ruling. In *Feldman v. Google*,<sup>358</sup> the court held that Google gave sufficient notice to the users of its AdWords service:

“The facts in *Specht*, however, are easily distinguishable from this case. [...]

[T]he AdWords Agreement gave reasonable notice of its terms. In order to activate an AdWords account, the user had to visit a webpage which displayed the Agreement in a scrollable text box. Unlike the impermissible agreement in *Specht*, the user did not have to scroll down to a submerged screen or click on a series of hyperlinks to view the Agreement. Instead, text of the AdWords Agreement was immediately visible to the user, as was a prominent admonition in boldface to read the terms and conditions carefully, and with instruction to indicate assent if the user agreed to the terms.

That the user would have to scroll through the text box of the Agreement to read it in its entirety does not defeat notice because there was sufficient notice of the Agreement itself and clicking “Yes” constituted assent to all of the terms. The preamble, which was immediately visible, also made clear that assent to the terms was binding. The Agreement was presented in readable 12–point font. It was only seven paragraphs long—not so long so as to render scrolling down to view all of the terms inconvenient or impossible. A printer-friendly, full-screen version was made readily available. The user had ample time to review the document.

Unlike the impermissible agreement in *Specht*, the user here had to take affirmative action and click the “Yes, I agree to the above terms and conditions” button in order to proceed to the next step. Clicking “Continue” without clicking the “Yes” button would have returned the user to the same webpage. If the user did not agree to all of the terms, he could not have activated his account, placed ads, or incurred charges.”<sup>359</sup>

As discussed in Chapter 2, validity of notice in Facebook’s user agreement was confirmed in *Fteja* court’s holding:

[...] The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase “Terms of Use” is really a sign that says “Click Here for Terms of Use.” So understood, at least for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. [...]

Here, *Fteja* was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.”<sup>360</sup>

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<sup>358</sup> *Feldman v. Google, Inc.* [2007] 513 FSupp2d 229 (United States District Court, E.D. Pennsylvania)

<sup>359</sup> *Ibid*

<sup>360</sup> *Fteja v. Facebook, Inc.*

The courts have reached similar conclusions in many cases with similar facts.<sup>361</sup>

Does the substantive content of the agreement – i.e. licensing provisions – affect the notice standards?

There are few reasons to believe that the agreements would be held to a heightened standard of notice adequacy simply because they include copyright licensing provisions. In other words, there are no federal copyright policies requiring the notice of licensing terms to be more conspicuous than the notice of other contractual terms. This follows from the Copyright Act's silence on non-exclusive copyright licensing formalities (non-exclusive licenses can be granted even orally), as well as the preparatory acts, which considered – and expressly rejected – the proposed recordation of non-exclusive licenses:

“Under subsection (f) of section 205, a nonexclusive license in writing and signed, whether recorded or not, would be valid against a later transfer, and would also prevail as against a prior unrecorded transfer if taken in good faith and without notice. Objections were raised by motion picture producers, particularly to the provision allowing unrecorded nonexclusive licenses to prevail over subsequent transfers on the ground that a nonexclusive license can have drastic effects on the value of a copyright. On the other hand, the impracticalities and burdens that would accompany any requirement of recordation of nonexclusive licenses outweigh the limited advantages of a statutory recordation system for them.”<sup>362</sup>

Even in the case that platform providers require an *exclusive* license to user-generated content – which, as we have seen in Chapter 3, is never really the case – it is unlikely that the courts would invalidate the “sign-up-wrap” agreements on notice communication grounds, provided that the license text is prominently displayed in the text of the agreement. This follows from the analogy with the previously reviewed case law on forum selection agreements: while those agreements contain divestments of important legal rights, courts are usually satisfied with the way they are communicated, so long as the forum selection clause is capitalized, highlighted, or otherwise placed prominently in the text.

Accordingly, we have to conclude that the courts are likely to hold that user agreements, in their present-day form, adequately put users on notice of the licensing terms, and that they are, by extension, properly communicated. Yet it must be noted that the courts have not based their findings of notice adequacy on any meaningful empirical research; nor have they, as the court in *GoGo* notes, established clear-cut standards for determining reasonableness of notice in the light of differing user bases. As we have mentioned in previous chapter, forms which are routinely used

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<sup>361</sup> For an overview, see *Berkson v Gogo LLC*; see also Kim, *Wrap Contracts: Foundations and Ramifications*; Ching, 'Liberalism's Fine Print: Boilerplate's Allusion to Human Nature'; Lemley, 'Terms of use'

<sup>362</sup> The United States Committee on the Judiciary, *House Report No. 94-1476* (HR REP 94-1476, 1976)

today do not foster reading and comprehension; consequently, a departure from current case-law on the communication of the terms might be a crucial step in reforming user-content licensing practices. We will come back to this discussion in Chapter 6, considering potential ways to reform the form of digital agreements.

### 2.1.1.2. Acceptance

As a matter of general principle, the fact that an offer is made, is held to be reasonably certain, and is properly communicated does not constitute mutual assent: an offer needs to be accepted by the offeree. In the US law, acceptance is defined as “a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer”.<sup>363</sup> Yet, as we have seen in the previous section, standard-form contracting led to an unprecedented relaxation of standards of classical contract law: the courts have, time and again, held that an offer contained in standard-form contracts was accepted when the contractual terms were communicated in a way “sufficient to put prudent man upon inquiry”.<sup>364</sup> Margaret Jane Radin, author of one of the leading books on boilerplate (standard-form) contracts vividly describes these developments:

“Assent devolves to fictional or constructive assent, then to fictional or constructive opportunity to assent, then to notice that the terms exist, and then to fictional or constructive notice of terms. Fictional or constructive notice further devolves to as-if or hypothetical consent, and from there to the elimination of consent entirely; that is, to mere (allegedly) efficient rearrangement of entitlements.”<sup>365</sup>

Radin believes that this devolution of consent requirements leads into direct normative degradation – but that it also has wide implications for the society at large; encouraging the companies to create “alternative legal universes”, deleting the rights given to citizens through legislative process, thereby degrading the very democratic principles upon which the society is based.

But how did the standards become so relaxed that a mere constructive notice of terms now suffices as a proof of assent?

Authors have persuasively linked these developments with the desire of the courts to protect the emerging business models. In “Wrap Contracts”, Nancy Kim traces the roots of the “new judicial

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<sup>363</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 50

<sup>364</sup> *Schnabel v Trilegiant Corp.*

<sup>365</sup> Radin, *Boilerplate the Fine Print, Vanishing Rights, and the Rule of Law*

activism” – relaxation of long-standing contractual doctrines in favor of protecting the emerging industries:

“There is another social benefit to contracts that has heavily influenced courts and it has less to do with transaction facilitation and more to do with development of a business and even the advancement of an entire industry. Contracts can be integral aspects of a business model and can be used to resolve a business need or address an industry-wide problem. The best early example of this may be the use of contracts to extend credit. Without contracts, we may never have heard of the Singer sewing machine or the Ford automobile. [...]

The decision of a court to enforce, or invalidate, a contract thus may significantly impact whether a particular business model or industry flourishes or withers. Certain consumer goods improve efficiency and enhance the quality of life for consumers. The enforcement of contracts enabling the purchase of these goods thus provides a social benefit. Not surprisingly, contract law developed in conjunction with societal and economic changes in order to enforce executory promises that were essential to a credit-based free enterprise system.”<sup>366</sup>

Kim proceeds to put this in the context of digital agreements; she explains how the early wrap contract cases usually involved some “evidently unfair” behavior by one party, and how the courts have, in absence of adequate legislation (given that the software industry was still emerging) relaxed doctrinal rules in an attempt to avoid reaching an unjust result:

“The problem that software and web-based businesses sought to remedy through the mechanism of contract was activity that they considered to be unfair competition. The activity at issue was not necessarily illegal, not because it was fair or just but because law and policy makers had not yet foreseen the problems created by new technologies. There were no rules or opinions governing practices such as web scraping, deep linking, or reselling digital databases (which, although costly to compile, were unprotected by copyright laws if they were lacking in originality). The technology had advanced ahead of legislation addressing these potential conflicts and conduct. Given the absence of public legislation, companies engaging in these new technologies used private legislation to craft rules to protect their business models and resolve anticipated problems.

Unfortunately, as courts issued rulings that felt instinctively right, they had to reason around existing rules that, strictly applied, would have led to different results. Thus, while courts continue to recite well-established doctrinal rules, some have engaged in analysis and rendered results that are inconsistent with a strict application of those rules in order to achieve a result that they believe is ‘fair.’ The liberties that some courts took with doctrinal rules then became binding precedent.”<sup>367</sup>

Early cases seem to corroborate this theory. In *ProCD*, the landmark case which held “shrinkwrap” contracts to be enforceable, the court dealt with a defendant who copied thousands of records from the plaintiff’s CD-ROM database of telephone directories, and made them available on the Internet – for a fee. Yet, given the dubious copyrightability of these records – under the standards set in *Feist* – the only way that the court could reach a “just” outcome in the case was through holding the defendant liable for a breach of contract. This would require a holding that the “shrinkwrap” agreement could constitute a binding contract, which, in turn, would call for a

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<sup>366</sup> Kim, *Wrap Contracts: Foundations and Ramifications* page 24

<sup>367</sup> *Ibid*

judicial embracing of the “terms later” doctrine – in other words, relaxation of standard norms of offer and acceptance.

A similar thing happened in the early “browsewrap” cases: in *Register*,<sup>368</sup> defendant Verio used information from Register’s WHOIS database to promote its own business, without obtaining permission from Register. As the court explained: “To facilitate its pursuit of customers, Verio undertook to obtain daily updates of the WHOIS information relating to newly registered domain names. To achieve this, Verio devised an automated software program, or robot, which each day would submit multiple successive WHOIS queries [...]. Upon acquiring the WHOIS information of new registrants, Verio would send them marketing solicitations by email, telemarketing and direct mail.” The court took notice of the fact that Register’s system returned query results with a legend, which stated that use of the WHOIS information for mass solicitations was prohibited; and it went on to rule that Verio was bound by these terms, despite the fact that they were delivered to the defendant only *after* the query was made. The court distinguished the case from *Specht*:

“Verio, however, cannot avail itself of the reasoning of *Specht*. In *Specht*, the users in whose favor we decided visited Netscape's web site one time to download its software. Netscape's posting of its terms did not compel the conclusion that its downloaders took the software subject to those terms because there was no way to determine that any downloader had seen the terms of the offer. There was no basis for imputing to the downloaders of Netscape's software knowledge of the terms on which the software was offered. This case is crucially different. Verio visited Register's computers daily to access WHOIS data and each day saw the terms of Register's offer; Verio admitted that, in entering Register's computers to get the data, it was fully aware of the terms on which Register offered the access. [...]

Although the first (or first few) query submissions are clearly insufficient to create a contract for the reasons discussed above, repeated exposure to the terms and conditions (via repeated submissions) would have put Verio on notice of both the general terms and the specific term stating that ‘By submitting this query, you agree to abide by these terms.’ In fact, Verio admits that it knew of Register.com's terms when it submitted queries.”

The *Register* court proceeded to interpret the act of using the service as sufficient to show acceptance, and by extension, mutual assent – even when there was no acceptance in the form of clicking “I agree” to indicate consent. The court used an analogy to elaborate: “Returning to the apple stand, the visitor, who sees apples offered for 50 cents apiece and takes an apple, owes 50 cents, regardless whether he did or did not say, ‘I agree.’ The choice offered in such circumstances is to take the apple on the known terms of the offer or not to take the apple.”<sup>369</sup>

Yet, despite the fact that the courts kept devolving requirements of assent into a requirement of a constructive notice, they maintained that they have not been changing the law. As the court

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<sup>368</sup> *Register.com, Inc. v Verio, Inc.*

<sup>369</sup> *Ibid* page 403

proclaimed in *Register*: “While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.” Kim explains why this is not the case:

“Rather than acknowledging the importance of form, courts insisted that electronic contracts were the same as paper contracts and that the same rules applied.

This may be a case of courts doth protesting too much, methinks. Despite their claims to the contrary, courts *have* created new law. They have instinctively focused their analysis on attaining the result that felt right, and have done so by maneuvering around existing rules, leaving doctrinal chaos in their wake. They recite law that originates from the paper-based contracting world to this brave new digitally based world when they might be better off acknowledging the difference that contract form and function make to the reasonable expectations of the parties. The problem with adhesion contracts is not that they are nonnegotiable or that they are unlikely to be read; the real problem is that their terms may be unexpected and unfair. Wrap contracts, by their form, permit companies to impose more objectionable terms than paper contracts of adhesion.”<sup>370</sup>

Therefore, the way that the American courts nowadays treat issues of assent is a multi-faceted phenomenon. On one hand, the traditional contractual doctrine is stretched beyond recognition: once strict requirements of definite, communicated offers and unambiguous acceptance have been subsumed by the requirement of constructive notice of terms. On the other, the courts maintain that the contract formation requirements have not changed at all – that electronic contracting represents merely an extension of the older doctrinal rules, and that it fits into the centuries-old frameworks just fine. Behind this phenomenon, lies the historical desire of the courts to protect the emerging business models, and their unwillingness to depart from the precedent established in the early wrap contract cases.

Yet, it is precisely this historical context that necessitates the re-examination of rules on mutual assent in the context of user content licensing. Unlike defendants in *ProCD* and *Specht*, users who would dispute the validity of broad licenses are most likely not doing so with a desire to obtain an unfair commercial advantage; rather, they are more likely to be challenging these licenses in an attempt to exercise control over their own content. Unlike user agreement in *ProCD*, which restricted ways in which users could use ProCD’s data, platform providers seek to actively transfer legal rights and entitlements onto themselves. Shouldn’t this justify the heightened assent requirements?

To fully answer that question, we need to consider several factors. One of them is whether there is sufficient evidence to substantiate that, relaxed as the constructive notice requirement might be, users actually *do* give a meaningful consent to these agreements. The answer needs to be based on

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<sup>370</sup> Kim, *Wrap Contracts: Foundations and Ramifications* page 125

a holistic examination of market and behavioral factors which affect user behavior. Should the answer be negative, we need to assess whether there are strong policy reasons for upholding these agreements *despite* the fact that actual consent is absent. This will call for an examination of theoretical underpinnings of contract law, as well as an analysis of the socio-economic arguments made by the proponents of mass-market standardized contracting. Finally, we need to bring this discussion into the context of copyright law: are there any reasons why *copyright licensing* should call for increased assent requirements? This discussion needs to be based on the principles and ideas underlying copyright law.

However, given that these discussions heavily turn on the theoretical and policy arguments, we will return to them in the next chapter. For now, as a matter of *lex lata*, we can conclude that the American courts are likely to hold that users have assented to agreements offered by the major companies.

### 2.1.2. Consideration

One of the core requirements for contract formation in American law is the presence of consideration, a doctrine distinctive to the Common Law systems, which requires an exchange to be “bargained for” in order to form a basis for an enforceable contract. The general goal of the doctrine is to distinguish between non-binding promises and enforceable ones, by requiring the latter to demonstrate some level of reciprocity or reliance<sup>371</sup> – but without examining the adequacy of such an exchange (although the lack of such adequacy can be raised in other contexts, notably when claiming unconscionability, or challenging the formation on the grounds of misrepresentation, fraud, or duress).<sup>372</sup>

One of the most widely used tests to determine the presence of consideration is the so-called “benefit-detriment test”, under which something can be consideration if it is of benefit to the promisee or detriment to the promisor; and according to the authors, “Anglo-American contract law came to define detriment for these purposes very broadly, as any diminishment of one’s legal freedom”.<sup>373</sup> The second test, “bargained-for test”, is defined in the *Restatement* in the following

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<sup>371</sup> Bix, *Contract Law: Rules, Theory, and Context* page 33

<sup>372</sup> See e.g. Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability*

<sup>373</sup> Bix, *Contract Law: Rules, Theory, and Context* page 33, citing *Hamer v Sidway* [1891] 79 Sickels 538 (Court of Appeals of New York, United States): “The court refused to inquire whether a youth’s promise not to smoke, drink, or gamble until the age of twenty-one was objectively to his benefit, and therefore not consideration. It was sufficient to show that the youth had a legal right to do these actions.” See also Cunningham, *Contracts in the Real World: Stories of Popular Contracts and Why They Matter*

way: “A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise”.<sup>374</sup>

On the surface, it seems rather clear that user agreements satisfy the consideration requirements under both tests. On one hand, platform providers give users access to online communication platforms. On the other, users agree to give platform providers a copyright license over their content, as well as to have their personal data processed and analyzed for different purposes. Both these actions constitute diminishment of one’s legal freedom and both of them are given in exchange for the other party’s promise.

Yet, the reason why consideration might be problematic in the context of online user agreements stems from the fact that these agreements often contain provisions allowing the platform providers to unilaterally modify – or even terminate them. As Google’s user agreement explains:

“We are constantly changing and improving our Services. We may add or remove functionalities or features, and we may suspend or stop a Service altogether. [...] Google may also stop providing Services to you, or add or create new limits to our Services at any time. [...]

We may modify these terms or any additional terms that apply to a Service to, for example, reflect changes to the law or changes to our Services. You should look at the terms regularly. We’ll post notice of modifications to these terms on this page. We’ll post notice of modified additional terms in the applicable Service. Changes will not apply retroactively and will become effective no sooner than fourteen days after they are posted. However, changes addressing new functions for a Service or changes made for legal reasons will be effective immediately. If you do not agree to the modified terms for a Service, you should discontinue your use of that Service.”<sup>375</sup>

Agreements which allow one party to unilaterally modify or terminate them were historically often considered unenforceable, instead of binding commitments, they contain “illusory promises”. While the wording of such agreements might give an impression that a valid contract has been formed, upon closer examination, it is revealed that only one party has made an actual legal commitment. An example of such an agreement is where one party says “I *may* buy your house if I win the lottery”; or “I will paint your house unless I change my mind”.

Throughout centuries, legal systems have looked unfavorably upon such statements. As Justinian’s Digest explains:

“An obligation contracted under the following condition, ‘If I wish,’ is void; for when you cannot be compelled to give anything unless you desire to do so, it is just as if nothing had been said.”<sup>376</sup>

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<sup>374</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 71 (2)

<sup>375</sup> ‘Google Terms of Service – Privacy & Terms – Google’ (Annex 1).

<sup>376</sup> *Corpus Iuris Civilis*, Digesta 44.7.8

In the English and American case law, we see strong historical tendencies of invalidating agreements with at-will modification/termination clauses. In 1938, the Supreme Court of California established: “though parties within reason are free to contract as they please and to make bargains which place one party at a disadvantage, a contract must have mutuality of obligation and an agreement which permits one party to withdraw at his pleasure is void.”<sup>377</sup>

The same principle was historically extended to intellectual property licensing cases. In 1923, Miami Coca-Cola Bottling Co. brought a lawsuit against the Orange-Crush Co.; Coca-Cola claimed an exclusive and perpetual license to manufacture Orange Crush, whereas Orange deemed the license expired. The agreement contained a unilateral cancellation right in favor of Coca-Cola:

“The instrument purports to convey a perpetual franchise to the complainant within the counties of Dade and Broward, upon the proviso that the bottler (the complainant) may upon giving written notice to the grantor (the defendant) cancel the franchise at any time desired. The grantor (the defendant) can cancel only in case any of the terms of the franchise are violated by the bottler (the complainant) upon written notice.”<sup>378</sup>

Based on the fact that Coca-Cola could terminate the agreement at will, and that the other party had no such rights, the court invalidated the agreement as illusory and lacking consideration:

“It is this difference in the rights of the parties to cancellation which destroys the mutuality of the contract on which is based the contention of the defendant.

I understand the law to be, where the consideration for a promise of one party is the promise of the other, there must be absolute mutuality of engagement, so that each party has the right to hold the other party to a positive agreement. In other words, both parties must be bound or neither will be. Apply this principle to the instant case, where the complainant had the right to terminate the agency conferred by the contract at any time by a written notice, and there can be no doubt that the contract is wanting in mutuality as to remedies. Granting for the sake of argument that the present contract is of the class in which injunction would be issued, if each party could have the remedy, yet under the instant contract, if the parties were reversed the grantor (defendant) would be utterly remediless, for the complainant could, as soon as the application was made, give the written notice and terminate all contractual relations between the parties.”<sup>379</sup>

Shouldn't this mean that online user agreements should also be held unenforceable due to the lacking consideration? Consider Facebook's arguments in *Fteja* case – that they were not required

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<sup>377</sup> *Naify v Pacific Indem. Co.* [1938] 11 Cal2d 5 (Supreme Court of California, United States)

<sup>378</sup> *Miami Coca-Cola Bottling Co. v Orange-Crush Co.* [1923] 291 F 102 (District Court, S.D. Florida, United States) aff'd sub nom. *Miami Coca-Cola Bottling Co. v Orange Crush Co. (appeal)* [1924] 296 F 693 (Circuit Court of Appeals, Fifth Circuit, United States)

<sup>379</sup> Note that the case was unsuccessfully appealed. Court of Appeals held: “We agree with the District Judge that the contract was void for lack of mutuality. It may be conceded that the appellee is liable to the appellant for damages for the period during which the contract was performed; but for such damages the appellant has an adequate remedy at law. So far, however, as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable.” See *Miami Coca-Cola Bottling Co. v Orange Crush Co. (appeal)*

to give any advance warning before shutting user accounts down, provide users with any explanation, or reply to user's requests:

"Facebook's Statement governs the rights and responsibilities of Facebook and its users. The version of the Statement in effect at the time Plaintiff alleges his account was disabled did not require Facebook to give Plaintiff advance warning before it disabled his account. Nor did that version of the Statement require Facebook to explain its specific reasons for disabling Plaintiff's account. And nothing in that Statement even suggested that Facebook was obligated to reactivate Plaintiff's account upon his request, or to follow any particular procedure for responding to Plaintiff's requests for account reactivation."<sup>380</sup>

The answer is complex. Online agreements *do* come very close to being illusory and unenforceable under the classical contract doctrine; but much like the legal standards governing mutual assent have been relaxed over time, so have the requirements of mutuality in establishing consideration – holding that one side should be bound by the agreement only if the other side is bound as well.

Historically, parts of this reluctance to continue examining mutuality of obligations might have had origins in the court's general hesitance to come anywhere close to the analysis which might be interpreted as an inquiry into the adequacy of consideration. Authors claim that the courts have therefore softened the doctrinal rules, and shifted their focus to the adequacy of remedies, hoping to reach the same results through less controversial analysis. As Ricks explains, the mutuality of obligation doctrine is therefore nowadays better understood as an affirmative, rather than negative principle: it says that if one party has *a remedy* then the other should, too.<sup>381</sup> This doctrine, requiring mutuality of remedies, has in his finding been litigated as early as 1578, and likely earlier<sup>382</sup> – and Ricks claims it to be alive and well:

"Common sense and history (though perhaps not strictly the language of judicial opinions) show that this affirmative doctrine has continued to operate only presumptively, as a weak or strong presumption depending on the judge, the times, and the case at hand. If good reason exists to enforce only one promise and not the other, courts depart from the mutuality of obligation doctrine and enforce only one of two mutual promises. Courts have taken this step in the cases commonly called "exceptions" to the mutuality of obligation doctrine. Both parties are bound unless one is an infant or fraud victim, was insane at the time, signed under duress, made a promise unenforceable under the statute of frauds or violatible of some other statute or public policy, and so on. In each of these cases, good reason exists for releasing one party, so the presumptive effect of the mutual obligation doctrine is overcome. The good reason is a defective promise or perhaps the fault of the party who caused the defect, or both. Modern law already talks of binding promises this way, in fact. The

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<sup>380</sup> *Fteja v Facebook, Inc.*, Defendant Facebook, Inc.'s Memorandum of Law in Support of Its Motion to Transfer Venue, Motion to Dismiss, and Motion for a More Definite Statement, document 2011 WL 11817321. Document available at Westlaw Next.

<sup>381</sup> Val D. Ricks, 'In Defense of Mutality of Obligation: Why "Both Should Be Bound, or Neither"' (1999) 78 Neb L Rev 491

<sup>382</sup> *Ibid* page 504

Restatement (Second)'s definition of *binding promise* is presumptive in the very way the mutuality of obligation doctrine requires.”<sup>383</sup>

Understood this way, Ricks argues, “doctrine of consideration and mutuality of obligation stand or fall together – if courts and commentators advocate abandonment of mutuality of obligation, they must also advocate abandoning the rule that mutual or bargained-for promises show a consideration or the more general notion that consideration is required”, finally concluding that “unless the law is willing to enforce arbitrarily one of the mutual promises to which parties have assented and not the other, it must be prepared to retain the mutuality of obligation doctrine at least in an affirmative, presumptive form”.<sup>384</sup>

But the debate as to whether, and to which extent, inquiries into mutuality of obligations should be considered within the framework of consideration were certainly not the only thing that contributed to the shaping of the modern legal landscape, in which the courts lean heavily towards enforcing the agreements which give one side the right to specify performance or modify at will. Tracing back the entire history of these developments falls outside the scope of this dissertation. It is still worth noting that the early cases primarily dealt with employment relationships – as a consequence of changing labor markets, courts had to deal with an increasing number of “at-will” employment contracts, which an employer could terminate unilaterally, providing no justifiable explanation. The courts have held that such agreements were not illusory (despite being subject to unilateral termination), as the employees have received benefits from those agreements prior to their termination. Regarding the right to unilaterally modify these agreements, the courts ruled that continued employment constituted an acceptance of the modified terms, and that no additional consideration was necessary. In *Pacific Bell*, the court explained these principles:

“The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required. [...] For an effective modification, there is consideration in the form of continued employee services. [...]

Plaintiffs' continued employment constituted acceptance of the offer of the modified unilateral contract. As we have observed, a rule requiring separate consideration in addition to continued employment as a limitation on the ability to terminate or modify an employee security agreement would contradict the general principle that the law will not concern itself with the adequacy of consideration. [...]

As *Pacific Bell* observes, the MESP was not illusory because plaintiffs obtained the benefits of the policy while it was operable. In other words, *Pacific Bell* was obligated to follow it as long as the MESP remained in effect. Although a permanent no-layoff policy would be highly prized in the modern workforce, it does not follow that anything less is without significant value to the employee

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<sup>383</sup> Ibid page 526

<sup>384</sup> Ibid page 547

or is an illusory promise. As long as the MESP remained in force, Pacific Bell could not treat the contract as illusory by refusing to adhere to its terms; the promise was not optional with the employer and was fully enforceable until terminated or modified.”<sup>385</sup>

This reasoning quickly expanded from the area of employment contracts to other areas of contract law. Online environment is not different in any regard: nowadays, the courts routinely uphold most agreements which can be terminated at will, provided that such termination was subject to reasonable notice; just as they hold that continued use of a service constitutes acceptance of modified terms. Two cases illustrate these standards under the Californian law.

In *TradeComet v. Google*,<sup>386</sup> a search engine TradeComet purchased advertising on Google's website through AdWords program. It subsequently brought a lawsuit alleging that Google attempted to reduce traffic at TradeComet's website both by increasing the cost of TradeComet's advertising and by entering into exclusive agreements with other websites, in violation of the Sherman Antitrust Act. TradeComet was a party to a standard online “AdWords agreement”, which contained a forum selection clause; however, the wording of this clause had been changed by Google during the course of their relationship. Ruling on TradeComet’s challenge of the enforceability of the terms as illusory, the court simply cited *Pacific Bell*, stating that “the fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement, if the exercise of the power is subject to limitations, such as fairness and reasonable notice”, and went on to uphold the agreement.

Similarly, in *Bassett v. Electronic Arts*,<sup>387</sup> the court ruled on whether an arbitration clause, contained in a digital agreement which could have been modified at will, was invalid as illusory. The court held that this was not the case under the California law, because “the discretionary power to modify or terminate an agreement carries with it the duty to exercise that power in good faith and fairly.”<sup>388</sup> The court ruled that this was sufficient to uphold the agreement, as EA’s conduct was reasonable and made in good faith:

“Thus, the analysis of whether a unilateral right to modify an arbitration agreement renders that agreement illusory and unenforceable turns on reasonableness and fair notice.

In this case, EA's power to modify the arbitration clause was subject to sufficient limitations on the exercise of that power. As Judge Gold determined, EA had an express obligation to provide Plaintiff with indirect notice of any changes, by posting such changes on its website. According to the Terms

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<sup>385</sup> *Asmus v Pacific Bell* [2000] 23 Cal4th 1 (Supreme Court of California, United States)

<sup>386</sup> *TradeComet.com LLC v Google, Inc.* [2010] 693 FSupp2d 370 (United States District Court, S.D. New York, United States), *aff'd* in part *TradeComet.com LLC v Google, Inc. (appeal)* [2011] 647 F3d 472 (United States Court of Appeals, Second Circuit), and *aff'd* in part *TradeComet.com LLC v Google, Inc. (appeal II)* [2011] 435 FedAppx 31 (United States Court of Appeals, Second Circuit)

<sup>387</sup> *Bassett v Electronic Arts, Inc.* [2015] 93 FSupp3d 95 (United States District Court, E.D. New York)

<sup>388</sup> *Ibid*

of Service, EA is required to provide updated Terms of Service on its website, which terms become prospectively effective thirty days from the date of posting. Plaintiff was able to opt-out of changes to the arbitration agreement by sending EA written notice within thirty days of the change. Furthermore, EA specifically limited the application of the arbitration agreement to the 'extent allowable by law,' which includes EA's obligations under the implied duty of good faith and fair dealing.

Although EA did modify the Terms of Service on at least one occasion, that modification was reasonable under the circumstances, and consistent with EA's duty to act in good faith. It is EA's practice to require EA Online registrants to "affirmatively accept" new versions of the Terms of Service or Privacy policy by going through a process similar to initial registration. (Indeed, Defendant's records reflect that Plaintiff was presented with and accepted both the current version and the August 25, 2011 version of EA's Terms of Service.) Thus, the Court finds that not only was Plaintiff provided with passive notice, but he was in fact given actual notice of at least one modification, which he accepted. When confronted with the Terms of Service, a reasonably prudent user in Plaintiff's position would have had notice that he was being bound by the Terms of Service, including the arbitration provision."<sup>389</sup>

The way in which largest platform providers provide notice of changed terms largely resembles EA's actions described in the opinion. Google, for instance, used the following notification to inform its users of changes in its terms:<sup>390</sup>



Facebook used a similar notification in 2015:<sup>391</sup>

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<sup>389</sup> Ibid

<sup>390</sup> Alex Chitu, 'A Cluttered Google Homepage' (*Google Operating System*, 2013) <<http://googlesystem.blogspot.no/2013/10/a-cluttered-google-homepage.html>> accessed 19 September 2017

<sup>391</sup> Thord D. Hedengren, 'Facebook pushing for their updated terms' (*TDH*, 2014) <<https://tdh.se/facebook-pushing-for-their-updated-terms/>> accessed 13 September 2017



These notifications, coupled with user's continued use of the service, are thereby sufficient to establish consideration, under the standards set in *Pacific Bell*, *TradeComet* and *Basset*, much like they are sufficient to establish mutual assent under *Register*.

Federal copyright policy does not seem likely to interfere with this standard. While it is possible to make a claim that giving one side a unilateral right to terminate or modify a licensing agreement at will threatens the authors' interests, and correspondingly copyright law's balance, such arguments are only likely to be considered when assessing whether these agreements are as oppressive as to be held unconscionable, if at all. The courts are correspondingly unlikely to modify the current case law on consideration and mutuality of obligations so that the platform providers are required to supply additional consideration when modifying or terminating the licensing agreement with their users. Correspondingly, licensing clauses satisfy the American law's requirement of consideration.

### **2.1.3. Contract formation: a conclusion**

Under the current American law, licensing clauses contained in user agreements are very likely to be held to constitute properly formed contracts. This is a result of several converging factors: the court's unwillingness to invalidate contracts as ambiguous; decades of case-law holding that sufficient notice of legal terms suffices to establish mutual assent; relaxation of standards of consideration in favor of the agreements which may be unilaterally terminated or modified. Half a century ago, upholding these agreements as properly formed would have been nearly unimaginable; nowadays, it is done almost routinely.

In this regard, licensing of user-generated content does not differ from other provisions routinely found in the terms of service agreements. The law does not explicitly impose heightened standards for the formation of licensing agreements; nor are such standards to be found in the federal common copyright law. We can, and will, however, open the inquiry into whether the relaxed contract formation requirements are in breach of the overarching principles of copyright law. Still,

this debate is based on policy and theoretical discussion, rather than the current case law, which is largely silent on the topic; as such, it will be explored in the next chapter.

The fact that online contract formation requirements are easy to satisfy under the US law, and that the courts have not carved out a special set of rules for copyright licensing cases, is not the only important finding of this section. We also have to be mindful of the historical circumstances which have led to the relaxation of standards of mutual assent, ascertained from the early cases against parties seeking to secure an unfair commercial advantage – cases like *ProCD* and *Register*. In other words, we should be aware of the potential of the judicial activism to shape the law, especially in the cases of lackluster legislation and opportunistic parties.

The fact that early cases have had such a tremendous power to shape the legal landscape is certainly a factor to consider when discussing the ways to reform the current legal framework surrounding user content licensing. Should an opportunistic plaintiff bring a far-fetched lawsuit challenging the validity of licensing clauses, the courts would likely, in the absence of legislative guidance, rule on these claims by upholding the license – in an attempt to avoid a perceived unfair result. In so doing, they would likely maintain that they are not creating new law; but in reality, they would have done exactly that – much like they did in *ProCD*. I believe that the warning is clear – relying on the court’s ability to police licensing clauses on their own, without adequate legislative guidelines on the topic, could lead to the completely unpredictable results and an ensuing doctrinal chaos, much like it happened in the early electronic contracting cases.

## 2.2. Scope of the license grant under US law

We now turn to the questions of the scope of license grant; in other words, if user content licenses constitute properly formed contracts, which rights do they convey on the platform providers, and subject to which limitations?

This is, in essence, a question of contract interpretation; which, under the American law, requires the court to search for the intent of the parties.<sup>392</sup> However, it is essential to note that, much like in the contract formation stage, questions of intent do not focus on the *subjective* intent of the parties, but rather, on the *objective manifestations* of intent. The aim of contract interpretation is therefore to “determine objectively what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language of

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<sup>392</sup> Raymond T. Nimmer and Jeff C. Dodd, *Modern Licensing Law* (2016 edn, Thomson Reuters Westlaw 2016) § 4:5

the contract to mean”.<sup>393</sup> The courts have developed an expansive set of interpretation rules to aid them in discerning the objective intent of the parties based.

We will start our inquiry by focusing on the rights conveyed through the licensing agreements. We will then turn to the questions of contractual limitations of these rights, and the ways that these affect the scope of the license.

### **2.2.1. Conveyed rights**

As we have seen in Chapter 3, licensing clauses can be drafted either as to rely on the statutory terms to define the scope of the rights conveyed (“you give us the right to reproduce...”), as to exclusively use non-statutory terms (“you give us the right to use..”), or as to combine statutory and non-statutory terms.

#### **2.2.1.1. Use of statutory terms**

US Copyright Act gives the owner of copyright the following exclusive rights:

- “(1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”<sup>394</sup>

It is fairly common drafting practice to simply enumerate these rights in the license text, using either the exact language of the statute, or some clearly synonymous terms (e.g. ‘copy’ instead of ‘reproduce’; ‘make’ instead of ‘prepare’ derivative works). As the authors note, the typical

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<sup>393</sup> Id. See also Judge Learned Hand’s reasoning from 1913: “A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words intended something else than the usual meaning which the law imposes upon them, he would still be held [obligated]. Of course, if it appear by other words of acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.” See *Hotchkiss v National City Bank of New York* [1911] 200 F 287 (District Court, S.D. New York, United States), aff’d *Ernst v Mechanics’ & Metals Nat. Bank of City of New York (appeal)* [1912] 201 F 664 (Circuit Court of Appeals, Second Circuit, United States), aff’d *National City Bank of New York v Hotchkiss (appeal)* [1913] 231 US 50 (Supreme Court of the United States), aff’d *Mechanics’ & Metals Nat. Bank v Ernst* [1913] 231 US 60 (Supreme Court of the United States)

<sup>394</sup> 17 U.S. Code § 106

assumption is that using a statutory (or directly synonymous) term means that the parties intended the license to cover that term as understood in the applicable body of law, thereby rendering the interpretation easier and more predictable.<sup>395</sup>

It seems that this drafting approach has been thoroughly followed by the online companies, as, aside the one offered by Instagram, all of the surveyed agreements enumerated the statutory rights in licensing provisions:

	<b>Copy/Reproduce</b>	<b>Distribute</b>	<b>Create derivative works</b>	<b>Make available to the public</b>
<b>A : Facebook</b>	X	X	X	X
<b>B : Foursquare</b>	X	X	X	X
<b>C : Goodreads</b>	X	X	X	X
<b>D : Google</b>	X	X	X	X
<b>E : Instagram</b>				
<b>F : LinkedIn</b>	X	X	X	X
<b>G : Microsoft</b>	X	X	X	X
<b>H : Reddit</b>	X	X	X	X
<b>I : Snapchat</b>	X	X	X	X
<b>J : Spotify</b>	X	X	X	X
<b>K : Tinder</b>	X	X	X	X
<b>L : Tumblr</b>	X	X	X	X
<b>M : Twitter</b>	X	X	X	X

Use of the statutory terms directly limits the scope of the court's interpretative discretion. The courts should, in other words, use this interpretative stage merely to assess whether a disputed use

<sup>395</sup> Nimmer and Dodd, *Modern Licensing Law* at 6:6

of user content falls under the scope of the transferred right in the current case law – e.g. whether or not the conduct in question constitutes copying, preparation of derivative works, distribution, etc. The fact that licenses are so all-encompassing practically guarantees that all of the platform provider’s copyright-related acts will be covered by the text of the license.

The broadness of the licensing texts serves another important function at the interpretation stage: the burden of proof is effectively placed on the users, who have to present evidence that particular uses of their content (by the platform providers) somehow fall outside the scope of the broad licensing text. In so doing, they are not allowed to challenge the scope based on subjective expectations or reasonableness; this can be raised as a part of an unconscionability claim, but plays no role in determination of the scope of the license. As Nimmer explains:

“Use of broadly inclusive language to describe scope indicates an intent to make a broad all-inclusive grant. Indeed, many cases are explainable by that simple premise. [...] If a license employs broad language in defining the scope of the license, the grantor who desires to narrow the scope must show that the language did not extend to particular, new uses that it may desire to reserve to itself.”<sup>396</sup>

Given that this is a very difficult bar to pass, the courts are likely to conclude that licensing agreements were drafted with the intention of conveying all the exclusive rights that can be licensed under the Copyright Act.

### **2.2.1.2. Use of non-statutory terms**

As explored in the previous chapter, we also find some agreements employing the language which is clearly not found in the statutory provisions. The most prominent among these are the provisions giving platform providers the “right to use” copyrighted content, which, as evident from §107, is not an exclusive right under the copyright law.<sup>397</sup>

Right to “use” is an exclusive right in patent law; however, it is obvious that the term is not intended to convey a patent license.

These cases call for larger interpretative efforts than the previously discussed scenarios in which statutory language is directly transposed in the license text. The courts will need to take into account the agreement as a whole, the nature of relationship between the parties, and to employ standard interpretative devices (insofar as their use is not conflicting with the federal copyright policy).<sup>398</sup> Yet, once again, subjective intent and fairness are irrelevant: the courts should simply

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<sup>396</sup> Ibid § 6:6

<sup>397</sup> Ibid: “From an intellectual property rights perspective, the term “use” has no clear relation to any specific statutory right in copyright law.”

<sup>398</sup> See *ibid*, referring to James P. Nehf, 'Writing Contracts in the Client's Interest' (1999) 51 SC L Rev 153: Some of these rules include: words should be given their plain and ordinary meaning; each part of a contract should be

establish whether the parties, in using specific terms, intended the grant to be broadly operative or contemplated a narrow grant.

Previous cases in which such terms were construed by the courts have little to no precedential value: the broadness of the terms has to be assessed in the light of the entire contractual relationship, other terms in the agreement (express and implied), as well as the standards in the particular industry. All of these factors contribute to making the determination of the scope heavily influenced by the facts and specifics of each case.

As mentioned in the section on contractual ambiguity, there is little ground to argue that the use of a term ‘right to use’ demonstrates contractual intent to grant a narrow license, i.e. a license which only extends to certain exclusive rights. To the contrary, it is relatively easy to argue that the term is designed as an all-inclusive one.

First, an argument can be made that the platform provider’s “use” of copyrighted content implicates all of the author’s exclusive rights. When you upload a new profile picture on Facebook, for instance, they need to make copies, prepare derivative works (such as thumbnails), and to make it available to the public (by making it publicly accessible). Singling out a certain §107 right as falling outside the scope of this license is therefore not justified, as the removal of any of these rights would, under this interpretation, result in platform provider’s (perceived) inability to engage in the very conduct that forms the basis of their service.

Secondly, the intention to draft broad grant can also be ascertained from the prevailing industry standards; certain agreements (notably Instagram’s) rely exclusively on this term in order to acquire rights over user content, making it logical to conclude that the term is intended to be broad, rather than narrow. This follows from the (somewhat circular) determination that most other agreements contain an enumeration of all the exclusive rights, and that Instagram, despite of using a non-statutory term, is still likely to have wanted to achieve the same goal.

Finally, the fact that some agreements include the definition of the term ‘right to use’ which consists out of enumeration of specific exclusive rights can also bear some weight: it can show that there is a common understanding of the term in the industry, and that this understanding is broad, rather than narrow.

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interpreted to carry out the agreement's general purpose; obvious mistakes of writing, grammar, or punctuation should be corrected; express terms control over trade use, course of dealing, and the like; general terms are restricted in meaning by more specific terms; a court must construe a contract as a whole to give effect to each part if reasonably possible; courts should construe agreements in a manner that makes them valid rather than void; ambiguities are to be construed against the drafter; a court will not presume that parties agreed to perform impossible acts.

Consider Facebook’s agreement: “By ‘use’ we mean use, run, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.”

Consequently, little evidence can be found to support the exclusion of certain exclusive rights from this catch-all term – and other similar terms – which will lead the courts to interpret them in a broad fashion; i.e. as pertaining to all the licensable rights.

### **2.2.2. Contractual limitations**

As we have explored in Chapter 3, there are some agreements in which the scope of the license does not appear to be limited by the contract – such as the agreements stating that the content may be used for any purpose, at the sole discretion of the platform provider. On the other end of the spectrum, we find agreements which contain provisions stating that the license is granted for the limited purposes, such as operating and developing services, as well as the agreements stating that license is subject to the service’s privacy policies.

To understand the impact of these contractual limitations, we first need to establish how they affect the scope of the license. This inquiry is necessary because, as we will see, under the American law, not every restrictive contractual provision can be interpreted as the one affecting the scope of the copyright grant.

#### **2.2.2.1. Conditions and covenants**

Suppose that I have written a book, and that I have told you that you are authorized to make five copies of it. Instead of making five copies, you make fifty, and you proceed to sell most of them at a local marketplace.

Now suppose that, in another case, I have given you a right to make five copies of my book, but that the licensing agreement also stipulates that you must wear a red hat while reproducing my works. You proceed to make five copies, as authorized, but you refuse to wear a red hat while doing so.

Are these scenarios identical? Have you, in both cases, exceeded the scope of the license, and are you correspondingly liable for copyright infringement in both instances?

To answer this question, the American courts attempt to distinguish between two types of licensing provisions: *conditions*, copyright-relevant provisions which limit the scope of the license, and *covenants*, contractual promises which have no direct copyright effect.

Distinction between covenants and conditions is not limited only to copyright law; nor is it necessarily intrinsically linked with the substance of the provision. In other words, depending on how it is phrased, the same substantive provision can be either a condition or a covenant. In a clause that reads “I promise to give you some bubble gum if you do the dishes first”, doing the dishes is a condition: if you do not do the dishes, there is no obligation for me to give you the gum. Conditions can be precedent, concurrent or subsequent; the latter resulting in a termination of a right should a condition be breached. If a clause says “I promise to give you a piece of gum subject to you doing the dishes later today”, and you fail to adhere to the condition, I can ask for my bubble gum back.

A covenant, on the other hand, would be phrased differently: “I promise to give you some bubble gum. You promise to do the dishes.” – there is no link between two obligations; your failure to do the dishes gives me a narrower choice of remedies.

The difference is not a purely academic one: as we will see later in the chapter, it critically affects which remedies are available to a non-breaching party. In short, breaching a condition gives rise to copyright infringement liability, which, in turn, allows plaintiffs to, among other things, seek disgorgement of profits and/or statutory damages (i.e. recover statutory amounts without need to prove any harm suffered). By contrast, breach of a covenant is treated as a breach of contract, and usually requires plaintiffs to establish harm; the damages they can recover are (almost exclusively) compensatory in nature. This creates a world of difference in plaintiff’s position. Yet, how are the courts to distinguish between these cases?

On its face, this might look like a simple task of contract interpretation: the courts will generally look into the wording of the agreement and the (objectively established) intent of the parties, and characterize a term as contractual or copyright-related.<sup>399</sup> But the court’s interpretative discretion is limited in several important regards.

The first limitation stems from the American law’s rule that terms should generally be interpreted as covenants (i.e. contract-related), not as conditions (i.e. property-related). Because breach of the condition results in much more serious consequences than a breach of covenant – including forfeiture of all underlying contractual rights – the courts are naturally hesitant to interpret contractual terms as being conditional in nature.

Suppose that we have entered into a contract in which I agree to sell you my house, and you agree to pay the price and to paint the walls in yellow within two years. Three years pass, you do not paint the walls, and I file a lawsuit. If painting of the walls is to be considered a condition of the sale, you can claim the ownership of the house back; if it is considered a covenant, you can sue me for any harm that resulted from me not following through with the painting. Because the first case has much more severe consequences, and because it undermines legal certainty, the courts construe contractual terms as covenants, whenever possible.

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<sup>399</sup> Nimmer and Dodd, *Modern Licensing Law* § 6:5: “The distinction lies not in what the limits are or whether the limits are contractual in nature or whether they contain an implicit promise to not exceed them, but in how the parties draft the license and, ultimately, how a court interprets the license terms.”

Californian courts have long followed this interpretative approach. In 1915, in *Firth v. Los Angeles Pacific Land Co.*, the court held that “where there is doubt whether a conveyance contains a condition subsequent or a mere covenant, the court will consider it as a covenant, if a construction as a condition subsequent would tend to destroy the estate of the vendee.”<sup>400</sup> The Supreme Court of California adopted the same view, holding in 1923 that “if from the language employed in a deed it was doubtful whether a clause is a condition or a covenant, it will be construed to be a covenant.”<sup>401</sup>

This general rule does not extend to the cases in which the parties have clearly intended that certain provisions are to be considered conditional: “Conditions in a conveyance, breach of which would work a forfeiture, will be construed as covenants *merely when this can be done without violence to the clear intent of the parties.*”<sup>402</sup> But the courts are hesitant to find such intent.

This is perhaps best visible in the cases which involved the term ‘subject to’ (which is more than relevant in our context – you might recall from Chapter 3 that certain user agreements state that you give platform providers a license to use your content “subject to Privacy Policy”). Many courts have held that this phrase – alongside some similar ones – is typically used to denote a condition:

“Although no particular form of words is necessary in order to create an express condition, such words and phrases as ‘if’ and ‘provided that,’ are commonly used to indicate that performance has expressly been made conditional; as have the words ‘when,’ ‘after,’ ‘as soon as,’ or ‘subject to.’”<sup>403</sup>

Yet, time and again, the courts have found ways to infuse even these words with ambiguity, and to carve out an entire array of cases in which they declined to rule that these phrases actually gave rise to the creation of a condition. This is perhaps best illustrated in the case of *Fantastic Fakes v. Pickwick*,<sup>404</sup> in which the parties entered into a licensing agreement that read as follows:

“2. Grant of Rights. “LICENSOR” hereby grants to “LICENSEE” a nontransferable, nonassignable and nonexclusive License for a period of 2 (TWO) years from the date hereof, to use the “ORIGINAL MASTER RECORDINGS” listed and identified on the schedule incorporated by reference herewith, *and subject to and in accordance with the following:*

(a) [...]

(b) “LICENSEE” shall cause to appear on all sound recordings, including cartridge tapes, produced from “ORIGINAL MASTER RECORDINGS” a copyright notice such that said notice appears on

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<sup>400</sup> *Firth v Los Angeles Pacific Land Co.* [1915] 28 CalApp 399 (District Court of Appeal, Second District, California, United States)

<sup>401</sup> See e.g. *McBride v Freeman* [1923] 191 Cal 152 (Supreme Court of California, United States)

<sup>402</sup> *Anderson v Palladine* [1918] 39 CalApp 256 (District Court of Appeal, First District, Division 1, California, United States), emphasis added

<sup>403</sup> *Chirichella v Erwin* [1973] 270 Md 178 (Court of Appeals of Maryland, United States) page 182

<sup>404</sup> *Fantastic Fakes, Inc. v Pickwick Intern., Inc.* page 481-482

the surface of the copies of the recording or on the label or container, in such a manner and location as to give reasonable notice of the claim of copyright. [...]”<sup>405</sup>

Pickwick, the licensee, failed to provide a copyright notice that designated Fantastic Fakes as a copyright owner, thereby breaching its obligation under 2(b); the court was subsequently presented with the question of whether this term was a covenant or a condition.

In its ruling, the court relied on three principles: that promises in a contract should be construed as covenants rather than conditions if the text permits; that terms of an agreement should be interpreted to avoid a forfeiture of contract benefits; and that all doubt as to the intended meaning of a contract should be resolved against the party who drafted it.<sup>406</sup> Yet the legal analysis behind establishing that the express terms did not create a condition was laconic at best:

“Applying these principles, we note that section 2(b) does not contain any express words of condition. The phrases ‘subject to’ and ‘in accordance with’, which are used in the agreement, are ambiguous.

Additionally, as the district judge noted, ‘(o)f the four requirements set forth in section 2, only two impose any obligation of performance upon defendant; the remaining provisions, sections 2(c) and 2(d), are covenants by plaintiff Fantastic.... (I)t is unlikely that section 2, when read in its entirety, attempts to impose conditions solely upon defendant.’”<sup>407</sup>

There is definitely a striking similarity between the agreement in *Fantastic Fakes* and the agreements offered by the online companies; recall, for a moment, the limitations on use of user content set forth in LinkedIn’s user agreement, explored in Chapter 2.<sup>408</sup> When discussing LinkedIn’s agreement, we used the strikethrough fonts to eliminate the paragraphs which did not present an actual *limitation* of the scope, merely dismissing them as irrelevant. But the court’s reasoning in *Fantastic Fakes* seems to imply that inclusion of such “irrelevant” language can have significant legal consequences. If the license text says, for example, “this license is subject to following limitations”, but proceeds to enumerate both the terms that are limitations and those that are not, it will infuse ambiguity in the term ‘subject to’, and will be used to construe the enumerated terms as contractual promises – i.e. covenants, rather than conditions subsequent.

Therefore, the American courts are *generally* hesitant to hold contractual terms to be conditions rather than covenants, and often find ways to avoid reading even the most explicit terms as being conditional in nature. But this takes new heights in the field of intellectual property licensing: it becomes *even more* difficult to prove that the term is conditional in nature, and that its breach

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<sup>405</sup> Ibid, emphasis added

<sup>406</sup> Ibid

<sup>407</sup> Ibid

<sup>408</sup> See Chapter 2, 2.5

correspondingly constitutes copyright infringement. This follows from the fear that such interpretations could irritably harm the balance of the nation's copyright regime. As Ard eloquently explains:

“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. 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. Even the most trivial or idiosyncratic breach under this regime would yield mandatory statutory damages starting at \$750.”<sup>409</sup>

Yet the early case law dealing with this problem is not too illuminating: the courts have expressly acknowledged that “the enforcement of a copyright license raises issues that lie at the intersection of copyright and contract law, an area of law that is not yet well developed”, and, in the early cases, proceeded to issue rulings based on the close examination of the text of the contract, rejecting the idea of developing new legal doctrines to help them distinguish between copyright- and contract-related terms.<sup>410</sup> This meant that, in a few cases where the issue had been raised, the resulting opinions carried little precedential value.

One of such early cases was *Sun Microsystems, Inc. v. Microsoft Corp.*, in which Sun, developer of Java programming language, sued Microsoft, which had licensed the Java technology for use in its Windows operating system. Sun had created Java so that programmers could write a single program that would work on any operating system; because Sun wanted Java to remain cross-platform compatible, the licensing agreement included compatibility requirements, which Microsoft failed to satisfy. The court focused on the structure and the language of the agreement, noting that “[t]he license grants in sections 2.1 [...] allow Microsoft to distribute the Technology and Derivative Works of the Technology as part of a Product but say nothing about the license grants being subject to, conditional on, or limited by compliance with the compatibility obligations set forth in Section 2.6 [...]”; the court also noted that these parties have included explicitly conditional language in other parts of the agreement, and proceeded to rule that compatibility provisions were contractual covenants, not limitations of the scope of the license.

Then, in a landmark case of *MDY v. Blizzard*, the Ninth Circuit took a drastic departure from the previous American jurisprudence on the topic. The court held that, in order to establish that certain

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<sup>409</sup> B. J. Ard, 'Notice and Remedies in Copyright Licensing' (2015) 80 Mo L Rev 313

<sup>410</sup> *Sun Microsystems, Inc. v. Microsoft Corp.* [1999] 188 F3d 1115 (United States Court of Appeals, Ninth Circuit, United States)

actions constituted a breach of copyright, a plaintiff must show that there was a connection between the violated term of the license and one of the copyright holder's exclusive rights – in addition to showing that the term was a condition rather than a covenant. In other words, only certain types of conditions would be capable of restricting the scope of the license.

The case revolved around Blizzard's game World of Warcraft (WOW) – a “massive multiplayer online role-playing game” which allowed the players to interact in the virtual world by controlling a character that progressed through many levels. The more time player would invest into the game, the more powerful his character would be – allowing him to defeat other players with greater ease. The game was immensely popular: it had millions of subscribers from around the world. But some of them were willing to cheat – and even to pay in order to cheat.

Enter MDY, a company that developed Glider – a piece of software that would automatically play the game for players, so that they would not have to invest as much time into character progression. Such pieces of software are known as “bots”; their use was expressly prohibited by the WOW user agreement, as the section headed “Limitations on Your Use of the Service” stipulated that “You agree that you will not ... (ii) create or use cheats, bots, ‘mods,’ and/or hacks, or any other third-party software designed to modify the World of Warcraft experience; or (iii) use any third-party software that intercepts, ‘mines,’ or otherwise collects information from or through the Program or Service.”<sup>411</sup> Following cease-and-desist demands from Blizzard, MDY brought an action for a declaratory judgment to establish that its Glider sales do not infringe Blizzard's copyright or other rights, and Blizzard asserted counterclaims for contributory and vicarious copyright infringement, violation of DMCA § 1201(a)(2) and (b)(1), and tortious interference with contract. Blizzard's argument was straightforward: use of bots was a violation of the licensing agreement; this violation resulted in copyright infringement every time a game was run simultaneously with bots; and since MDY encouraged people to use bots, and thereby infringe Blizzard's copyright, it was liable for contributory and vicarious infringement. In order to succeed with this argument, however, Blizzard had to show that the prohibition against the use of bots was a condition, the breach of which resulted in a copyright infringement, rather than a covenant.

The court thus, in line with the previous jurisprudence, decided to first construe the term in accordance with interpretative principles of contract law, and then to analyze to which extent those principles were compatible with the federal copyright policy. Starting from the general contractual principles which state that the terms are to be construed as covenants whenever possible, the court

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<sup>411</sup> *MDY Industries, LLC v Blizzard Entertainment, Inc.* [2010] 629 F3d 928 (United States Court of Appeals, Ninth Circuit)

found that the language of the agreement points to the fact that the provision in question was not a condition of the license:

“Applying these principles [of contract interpretation], ToU § 4(B)(ii) and (iii)'s prohibitions against bots and unauthorized third-party software are covenants rather than copyright-enforceable conditions. [...] (“[H]eadings and titles are not meant to take the place of the detailed provisions of the text,” and ... “the heading of a section cannot limit the plain meaning of the text.” [...] Although ToU § 4 is titled, ‘Limitations on Your Use of the Service,’ nothing in that section conditions Blizzard's grant of a limited license on players' compliance with ToU § 4's restrictions. To the extent that the title introduces any ambiguity, under Delaware law, ToU § 4(B) is not a condition, but is a contractual covenant.”<sup>412</sup>

Analyzing the copyright policy dimension of the case, the court clarified that, even if the term were found to be a condition, its violation would not necessarily give rise to copyright infringement. The court held that “the potential for infringement exists only where the licensee's action (1) exceeds the license's scope (2) in a manner that implicates one of the licensor's exclusive statutory rights”, and explained how in the current case, user agreement contained a host of provisions which did not implicate Blizzard's exclusive rights:

“Here, ToU § 4 contains certain restrictions that are grounded in Blizzard's exclusive rights of copyright and other restrictions that are not. For instance, ToU § 4(D) forbids creation of derivative works based on WoW without Blizzard's consent. A player who violates this prohibition would exceed the scope of her license and violate one of Blizzard's exclusive rights under the Copyright Act. In contrast, ToU § 4(C)(ii) prohibits a player's disruption of another player's game experience. Id. A player might violate this prohibition while playing the game by harassing another player with unsolicited instant messages. Although this conduct may violate the contractual covenants with Blizzard, it would not violate any of Blizzard's exclusive rights of copyright. The antibot provisions at issue in this case, ToU § 4(B)(ii) and (iii), are similarly covenants rather than conditions. A Glider user violates the covenants with Blizzard, but does not thereby commit copyright infringement because Glider does not infringe any of Blizzard's exclusive rights. For instance, the use does not alter or copy WoW software.”<sup>413</sup>

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<sup>412</sup> Ibid page 940

<sup>413</sup> Ibid page 914. Note that this reasoning has been criticized as a departure from MAI RAM copying doctrine, *see e.g.* Joshua A. T. Fairfield, 'Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds' (2011) 38 Wm Mitchell L Rev 43: “The court appears to hold that a contractual clause unrelated to a core right granted under § 106 of the Copyright Act cannot be a condition of an intellectual property license. This holding, clear on its face, in fact undermines the Ninth Circuit's adherence to MAI, which has been roundly criticized in the academic legal literature. Here is why: the MDY court requires that there be a nexus between the clause in the contract and the exercise of some right granted under § 106. The court's common-sense ruling was that Warden was not a copy-protection program: it sought to prevent the use of unauthorized add-ons, not to prevent copying of the WoW executable. Indeed, Blizzard has little interest in preventing the copying of the WoW executable and in fact hands it out for free. Since users must pay for an account and a subscription, Blizzard makes its money not from selling the software client but from the account subscription fees. Thus, there are no copy protections on Blizzard clients--one can simply download the latest client for free from the Internet. Of course, in order to play the game one must set up an account and a subscription.”

The court thus held, vitally, that “for a licensee's violation of a contract to constitute copyright infringement, there must be a *nexus* between the condition and the licensor's exclusive rights of copyright”,<sup>414</sup> explaining the strong policy reasons for such a holding:

“Were we to hold otherwise, 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. The rationale would be that because the conduct occurs while the player's computer is copying the software code into RAM in order for it to run, the violation is copyright infringement. This would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners.”<sup>415</sup>

Court’s reasoning is certainly compelling. Yet, the main problem with the *MDY* decision is that the court failed to identify any *specific* steps that could be taken in order to establish whether such a nexus between a licensing condition and an exclusive right exists. This question went largely unanswered in the subsequent case law, too – creating considerable legal uncertainty.<sup>416</sup>

Several authors have proposed different approaches to interpreting the “nexus test”. Bauman argues that a nexus should be found only where federal copyright law would find infringement if the allegedly violated term was not in the license at all.<sup>417</sup> Bauman claims that this test is compatible with the outcome of *MDY*, and that it provides a clear and reliable framework for assessing whether there is a connection between an exclusive right and a licensing condition. On the other hand, Van Houweling argues that one way of understanding the Ninth Circuit's nexus requirement is that “enforceable license conditions are only those that forbid behavior that would – when viewed in isolation – violate an exclusive right of the copyright holder if undertaken without a license”.<sup>418</sup> She criticizes this interpretation as potentially incompatible with the result of *MDY*,<sup>419</sup> and goes on to propose a “purposive nexus”, an interpretation in which it should be determined “whether there is a nexus between the condition and the *purposes* served by the exclusive rights of the copyright holder.”<sup>420</sup> Other authors have relentlessly criticized the nexus test as being harmful

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<sup>414</sup> *MDY Industries, LLC v Blizzard Entertainment, Inc.*, emphasis added

<sup>415</sup> *Ibid*

<sup>416</sup> See e.g. *Adobe Systems Incorporated v A & S Electronics, Inc.* [2015] 153 FSupp3d 1136 (United States District Court, N.D. California, Oakland Division); *Actuate Corporation v Fidelity National Information Services, Inc.* [2014] 2014 WL 4182093 (United States District Court, N.D. California, San Francisco Division); *Montalvo v LT's Benjamin Records, Inc.* [2014] 56 FSupp3d 121 (United States District Court, D. Puerto Rico); *Oracle America, Inc. v Oregon Health Ins. Exchange Corp.* [2015] 80 FSupp3d 1168 (United States District Court, D. Oregon)

<sup>417</sup> See Erik Bauman, 'The Nexus Analysis: License Enforcement in the Wake of *Mdy v. Blizzard*' (2012) 27 Berkeley Tech LJ 503

<sup>418</sup> Molly Shaffer Van Houweling, 'Touching and concerning Copyright: Real Property Reasoning in *MDY Industries, Inc. v. Blizzard Entertainment, inc*' (2011) 51 Santa Clara L Rev 1063

<sup>419</sup> *Ibid*: “But if this is how to understand “nexus,” then it 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.”

<sup>420</sup> *Ibid*, emphasis added

to innovation – seeing no reason why licensing conditions could not be controlled by the general principles of contract and antitrust laws – but did not offer alternative interpretations.<sup>421</sup>

It will inevitably take some time for the courts to resolve this doctrinal confusion. Regardless of the existing uncertainty in implementing the nexus test, there are cases in which it *does* offer clear guidance. Consider the scenario from the start of this section, the one in which someone asks you to wear a red hat while copying his/her book: no matter which of the alternative interpretations of the nexus test you subscribe to, it is clear that there is no link between an act of wearing a hat and author’s exclusive rights. For our analysis on user content licenses, such broad guidance might well suffice in delineating conditions from covenants.

Let us consider the text of potential limitations found in user agreements in greater detail:

<b>Service</b>	<b>Limitation(s)</b>
<b>A : Facebook</b>	“... you specifically give us the following permission, subject to your privacy and application settings”
<b>B : Foursquare</b>	“We may use your User Submissions in a number of different ways in connection with the Site, Service and Foursquare’s business as Foursquare may determine in its sole discretion...”
<b>C : Goodreads</b>	“for any purpose at the sole discretion of Goodreads”
<b>D : Google</b>	“The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones.”
<b>E : Instagram</b>	“...license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy...”
<b>F : LinkedIn</b>	<p>“These rights are limited in the following ways:</p> <ul style="list-style-type: none"> <li>a. You can end this license for specific content by deleting such content from the Services, or generally by closing your account, except (a) to the extent you shared it with others as part of the Service and they copied or stored it and (b) for the reasonable time it takes to remove from backup and other systems.</li> </ul>

<sup>421</sup> See e.g. Fairfield, 'Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds'; see also Christopher M. Newman, 'A License is Not a 'Contract Not to Sue': Disentangling Property and Contract in the Law of Copyright Licenses' (2013) 98 Iowa L Rev 1101

	<p>b. We will not include your content in advertisements for the products and services of others (including sponsored content) to others without your separate consent. However, we have the right, without compensation to you or others, to serve ads near your content and information, and your comments on sponsored content may be visible as noted in the Privacy Policy.</p> <p>c. We will get your consent if we want to give others the right to publish your posts beyond the Service. However, other Members and/or Visitors may access and share your content and information, consistent with your settings and degree of connection with them.</p> <p>d. While we may edit and make formatting changes to your content (such as translating it, modifying the size, layout or file type or removing metadata), we will not modify the meaning of your expression.</p> <p>e. Because you own your content and information and we only have non-exclusive rights to it, you may choose to make it available to others, including under the terms of a Creative Commons license.”</p>
<b>G : Microsoft</b>	“To the extent necessary to provide the Services to you and others, to protect you and the Services, and to improve Microsoft products and services, you grant ...”
<b>H : Reddit</b>	“...or publicly display your user content in any medium and for any purpose, including commercial purposes, and to authorize others to do so.”
<b>I : Snapchat</b>	“This license is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones.”
<b>J : Spotify</b>	“...create derivative works from, and distribute any of your User Content <i>in connection with the Service</i> through any medium, whether alone or in combination with other content or materials..”
<b>K : Tinder</b>	N/A
<b>L : Tumblr</b>	<p>“The rights you grant in this license are for the limited purposes of allowing Tumblr to operate the Services in accordance with their functionality, improve the Services, and develop new Services.</p> <p>The reference in this license to ‘creat[ing] derivative works’ is not intended to give Tumblr a right to make substantive editorial changes or derivations, but does, for example, enable reblogging, which allows Tumblr Subscribers to redistribute Subscriber Content from one Tumblr blog to another in a manner that allows them to add their own text or other Content before or after your Subscriber Content.”</p>

<b>M : Twitter</b>	“You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.”
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Which of these limitations could be enforced as licensing conditions?

Not too many. This follows, first, from the drafting technique routinely employed by the platform providers. Terms are to be construed as covenants whenever possible, barring the explicit language to the contrary – and we very few of these agreements use the conditional language. Consider Google’s statement that “[t]he rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones.”<sup>422</sup> It is clear that this statement is not drafted as a condition of a license grant – as it employs no conditional phrases (“subject to”, “provided that”.); consequently, it is not necessary to consider where is a nexus between this promise and an exclusive right, given that the promise is a covenant. (And even if it were held to be a condition, and a nexus were to be found, given, violation of this provision would be difficult to establish – given the broad operative language, virtually no use would fall outside the scope of this limit. We will come back to this when discussing potential contractual remedies.)

We can also eliminate provisions which resemble limitations, but do not in fact have limiting character – such as those that re-state that users remain owners of their own works, or those that stipulate that the companies are allowed to use the content for any purpose at their sole discretion.

We are correspondingly left with the following list of the potential conditions:

<b>Service</b>	<b>Limitation(s)</b>
<b>A : Facebook</b>	<b>“... you specifically give us the following permission, subject to your privacy and application settings”</b>
<b>B : Foursquare</b>	[Deleted: not a limitation]
<b>C : Goodreads</b>	[Deleted: not a limitation]

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<sup>422</sup> Google ToS, Annex I

<b>D : Google</b>	[Deleted: no conditional language]
<b>E : Instagram</b>	<b>"...license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy..."</b>
<b>F : LinkedIn</b>	[Deleted: no conditional language]
<b>G : Microsoft</b>	[Deleted: no conditional language]
<b>H : Reddit</b>	[Deleted: not a limitation]
<b>I : Snapchat</b>	[Deleted: no conditional language]
<b>J : Spotify</b>	[Deleted: no conditional language]
<b>K : Tinder</b>	N/A
<b>L : Tumblr</b>	[Deleted: no conditional language]
<b>M : Twitter</b>	<b>"You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use."</b>

These three provisions have one thing in common: they state that user content license is given subject to service's Privacy Policy.<sup>423</sup> Yet, should the platform provider use user content in a way which violates these policies, users would be unlikely to succeed in bringing a copyright infringement claim – not because these provisions are not conditional, but rather, because there is no nexus between privacy rights and exclusive rights under the Copyright Act.

This follows from the simple principle that copyright law does not protect facts or ideas; it only protects the expressions of an idea.<sup>424</sup> Authors are not allowed to forbid others from disseminating the facts which are found in their works, nor from using their ideas, as long as they are *expressed* differently. Holding that there is a nexus between privacy and copyright in the context of licensing

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<sup>423</sup> Although, as noted in Chapter 3, a question should be raised as to whether Facebook's licensing clause reference to settings rather than policies was made on purpose. The courts would, however, be likely to frown upon the contention that Facebook was merely referring to technical settings for sharing content.

<sup>424</sup> See 17 U.S. Code § 102 (b)

would therefore be unprecedented. It would be the judicial equivalent of allowing you to sue someone for copyright infringement because they tell their friends that they've seen your photo in which you look happy. This does not mean that other grounds for suing are entirely eliminated: in this case, you might have an option of bringing tort claims such as defamation and false light; in the case of platform providers and privacy policies, you can bring an action for a breach of contract. But the fact remains: you have no copyright remedies at your disposal when the only conditional restriction on the scope of the license is privacy-related. Holding otherwise would result in an unjustifiable expansion of author's rights.

The case law under which the courts have dealt with this specific issue in the licensing context is relatively limited. However, court's analysis in *Garcia v. Google*<sup>425</sup> is valuable, as it provides insight into the court's strong preference for separating copyright claims from those grounded in privacy or other human rights.

In this case, the plaintiff, Cindy Lee Garcia, was featured in a controversial film "Innocence of Muslims", which sparked outrage in the Muslim community – to the point that Garcia received numerous death threats. At the time of the recording of the film, however, Garcia had no idea that she would be participating in the creation of such a film; she was told that the movie would be called "Desert Warrior", and the lines which she delivered (which were later dubbed over) were not offensive in any way. Her performance was about 30-seconds long. The trailer for "Innocence of Muslims" was later uploaded to YouTube, and the death threats started pouring in; Garcia sued Google, asking for the trailer to be taken down. She asserted a copyright claim in her performance and filed for a preliminary injunction. The case went back and forth, until her claim was dismissed in Ninth Circuit's *en banc* ruling. What is of interest for us, however, is the court's clear willingness to treat the questions of copyright law in a narrow and consistent manner, separating them from privacy claims:

"In this case, a heartfelt plea for personal protection is juxtaposed with the limits of copyright law and fundamental principles of free speech. The appeal teaches a simple lesson—a weak copyright claim cannot justify censorship in the guise of authorship.

[...]

As Garcia characterizes it, 'the main issue in this case involves the vicious frenzy against Ms. Garcia that the Film caused among certain radical elements of the Muslim community.' We are sympathetic to her plight. Nonetheless, the claim against Google is grounded in copyright law, not privacy, emotional distress, or tort law, and Garcia seeks to impose speech restrictions under copyright laws meant to foster rather than repress free expression. Garcia's theory can be likened to 'copyright cherry picking,' which would enable any contributor from a costume designer down to an extra or

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<sup>425</sup> *Garcia v Google, Inc.* [2015] 786 F3d 733 (United States Court of Appeals, Ninth Circuit) page 736

best boy to claim copyright in random bits and pieces of a unitary motion picture without satisfying the requirements of the Copyright Act. Putting aside the rhetoric of Hollywood hijinks and the dissident's dramatics, this case must be decided on the law.

[...]

Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from—and incompatible with—copyright and copyright's function as the engine of expression.

In broad terms, 'the protection of privacy is not a function of the copyright law.... To the contrary, the copyright law offers a limited monopoly to encourage ultimate public access to the creative work of the author.' [...] Likewise, authors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works. [...]

In short, Garcia's harms are too attenuated from the purpose of copyright.<sup>426</sup>

This ruling therefore fully substantiates that no meaningful nexus can be found between author's exclusive rights and conditions which incorporate privacy policies, and that these conditions are therefore not enforceable as a matter of copyright law.

We thereby find that, insofar as user agreements contain provisions which limit their rights to use user content, failure to adhere to these provision results in potential liability under the contract and tort law, but gives no rise to copyright infringement claims.

### **2.2.3. Scope of the grant: a conclusion**

We have seen in the chapter two that the license grants tend to be all-encompassing. Under the American contract law, this broad nature of license grant plays a significant role at the contract interpretation stage: it is used to establish intent when construing the terms, and given the broad scope of the grant, this results in the construction of vastly broad licensing provisions, regardless of whether they enumerate the exclusive rights found in §106, or use non-statutory provisions.

While some contractual limitations as to how user content may be used are found in licensing agreements, as we have previously explored, those tend to be worded very broadly, and in practice do not restrict platform provider's ability to use user content in any way desired. More pressing concern, however, is whether some of these limiting provisions restrict the scope of the license in a way which gives user a right to sue for copyright infringement. Following the survey of the case law on copyright licensing, and in the light of the general principles of the American law, the

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<sup>426</sup> Ibid

conclusion is that such options are severely limited. The licenses are broad, the limitations are narrow, and those that do exist, cannot be enforced as a matter of copyright law.

### **2.3. Limitations to contract enforcement under US law**

There is one thing we cannot overlook in our analysis: not every contract will be enforced by the courts, even if it is found to be properly formed under the governing law. As Maximilian Weber wrote in the beginning of the twentieth century:

“With every extension of the market, [...] legal transactions become more numerous and more complex. However, in no legal order is freedom of contract unlimited in the sense that the law would place its guaranty of coercion at the disposal of all and every agreement regardless of its terms. *A legal order can indeed be characterized by the agreements which it does or does not enforce.*”<sup>427</sup>

Under the American law, there are three primary mechanisms for challenging the enforcement of an otherwise properly formed contract; the doctrines of unconscionability, reasonable expectations, and conflict with the public policy.<sup>428</sup>

#### **2.3.1. Unconscionability**

Doctrine of unconscionability is the primary mechanism for challenging oppressive contractual terms under the American law. It provides that a court may refuse to enforce any contract or clause thereof on a finding that the contract or a clause was unconscionable at the time that it was made. Historically, the unconscionability doctrine had its basis in the common law of contracts, rather than any explicit statutory terms. Nowadays, it is codified in the Uniform Commercial Code § 2-302 and recognized in the Restatement (Second) of Contracts § 208; in California, it is implemented through California Civil Code § 1670.5, which reads:

“(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. “

The doctrine of unconscionability has historically been seen as being somewhat at odds with the general principle of the American law that court inquiries into the adequacy of consideration are

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<sup>427</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol 2 (New edn, University of California Press 1978) page 668

<sup>428</sup> Note that we do not discuss formation defenses such as mistake, fraud or undue influence here – primarily because they virtually have no chance of being successfully raised.

impermissible. As the courts struggled to police the unconscionable terms without delving into the question of adequacy of exchange, they ended up narrowing the application of the doctrine of unconscionability to only the most oppressive of the terms. An opinion from 1935 illustrates this reasoning, building up on the earlier English cases:

“An unconscionable contract is said to be one ‘such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other’. To what extent inadequacy of consideration must go to make a contract unconscionable is difficult to state, except in abstract terms, which give but little practical help. It has been said that there must be ‘an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it’<sup>429</sup> Another form of stating the rule is that ‘where the inadequacy of price is so great that the mind revolts at it, the Court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract’<sup>430</sup> It is also said that a contract will be regarded as unconscionable if the inadequacy is so gross as to shock the conscience.”<sup>429</sup>

Preparatory works and comments on the legislative materials further clarify that the principal aim of the doctrine is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.<sup>430</sup>

Under the modern law, to characterize a term as unconscionable thus “requires a showing that the contract was both procedurally and substantively unconscionable when made – i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>431</sup> Procedural unconscionability is determined based on “what led to the formation of the contract”;<sup>432</sup> it is “broadly conceived to encompass not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power.”<sup>433</sup> On the other hand, substantive unconscionability “involves questions about the fundamental fairness of the agreement or clauses within the agreement”;<sup>434</sup> a term is “substantively unconscionable” where it is “one-sided or overly harsh, shocking to the conscience, monstrously harsh, or exceedingly calloused”.<sup>435</sup>

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<sup>429</sup> *Carter v Boone County Trust Co.* [1935] 338 Mo 629 (Supreme Court of Missouri, United States) page 651-652; for more historical context, see *Hume v U.S.* [1889] 132 US 406 (Supreme Court of the United States); see also *Earl of Chesterfield and Others Executors of John Spencer v Sir Abraham Janssen* [1751] 28 ER 82 (Court of Chancery, United Kingdom) page 100

<sup>430</sup> Civil Code of California (California Civil Code) [1872] § 1670.5

<sup>431</sup> *Bynum v Maplebear Inc.* [2016] 160 FSupp3d 527 (United States District Court, E.D. New York); see also Raymond T. Nimmer, ‘§ 12:47 Unconscionability and reasonable expectations online’ in Raymond T. Nimmer (ed), *Information Law* (Information Law, 2017 edn, Thomson Reuters Westlaw 2017)

<sup>432</sup> *Berkson v Gogo LLC*

<sup>433</sup> *Ibid*, citing *American Airlines, Inc. v Wolens* [1995] 513 US 219 (Supreme Court of the United States) page 249

<sup>434</sup> *Berkson v Gogo LLC*

<sup>435</sup> *Gandee v LDL Freedom Enterprises, Inc.* [2013] 293 P3d 1197 (Supreme Court of Washington, United States)

Commentators remark that “ordinarily a clause or contract should not be refused enforcement under this doctrine unless both forms of unconscionability are present”, yet note that “reported cases, however, do not always conform to that rule but are generally reluctant to invalidate terms”, concluding that “there have been few reported decision in the past decade in which a court invalidates a term on this basis”.<sup>436</sup>

Empirical surveys corroborate the fact that the courts are applying the doctrine restrictively and cautiously. In 2014, Landrum carried out a twenty-state-wide survey of the 460 appellate court opinions in cases decided between 1980 and 2012, in an attempt to determine how often the claims of unconscionability were likely to succeed when brought against arbitration agreements, as compared with other contexts in which such claims may be brought.<sup>437</sup> She reports that the application of the unconscionability doctrine outside the arbitration context is stunningly low:

“In all, courts found contract provisions, whether involving arbitration or not, unconscionable in approximately twenty-three percent of cases. That number further breaks down as follows. Out of the 237 arbitration unconscionability cases surveyed, state courts determined that arbitration clauses were unconscionable and refused to enforce the arbitration agreements, either in whole or in part, in sixty cases. Thus, in twenty-five percent of arbitration cases, the courts determined that the challenged clause was unconscionable. In contrast, courts found unconscionability in forty-six out of 231 non-arbitration cases, amounting to twenty percent of those cases. These numbers demonstrate that although there is a difference between the percentage of arbitration agreements with unconscionable provisions and the percentage of non-arbitration provisions found unconscionable, the difference is not huge and, in fact, may not be considered that significant.

There was one major surprise in the statistics, however. Although there was not a significant difference over time in the percentage of cases found unconscionable, there was a significant difference in the number of cases in which appellate courts considered the unconscionability issue for arbitration cases but remanded to the trial court for further unconscionability analysis. Since 1980, the state appellate courts remanded only thirteen non-arbitration cases to the trial courts for further unconscionability analysis, amounting to approximately 5.63% of all non-arbitration unconscionability cases.”

The same holds true for Californian courts. Broome writes that between 1982 and 2006 only five agreements were held to be unconscionable, not counting for the arbitration cases.<sup>438</sup>

Despite the courts’ general (and vast) reluctance to invalidate contractual terms on the grounds of unconscionability, how would such claims fare when it comes to user content licensing?

There are two principal reasons why user content licensing agreements are unlikely to be held unconscionable: first, because unconscionability is determined according to the letter of the

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<sup>436</sup> Nimmer, '§ 12:47 Unconscionability and reasonable expectations online'

<sup>437</sup> Susan Landrum, 'Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements' (2014) 97 Marq L Rev 751

<sup>438</sup> Stephen A. Broome, 'An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary is Circumventing the Federal Arbitration Act' (2006) 2 Hastings Bus LJ 39

agreement and at the time of contracting; and secondly, because in ruling on unconscionability claims, the courts largely turn to industry standards to determine whether a term is oppressive or not.

The first factor plays a key role. As reflected in the statutory language, the unconscionability must be judged as of the time of contracting; the occurrence of unanticipated events or the discovery of unknown information following the execution of the contract does not render it unconscionable.<sup>439</sup> The courts cannot, in other words, proceed to look into how platform providers *actually used* user content: the scope of unconscionability analysis does not allow for this inquiry. Rather, they may simply inquire whether the licensing provision, as contained in the agreement at the time when user signed up for the service, was, in isolation from any further use of content, so oppressive as to be held unconscionable.

This claim is easily dismissed. Platform providers will make an argument that the acquisition of a broad license was necessary as a matter of delivery of basic services. A license to make derivative works is necessary to make thumbnails; a license to publicly display works is necessary in order to index them on search engines; a right to sublicense works is necessary in order to display content to other users – the argument will go. Regardless of the fact that these provisions would, later, allow platform providers to use user content in any way they want – they cannot be invalidated as unconscionable at the time of contracting. The only counter-argument which users could bring would be that the licensing provision is unconscionable as it does not include enough limitations for future use; the chances for prevailing on such argument are virtually non-existent, and, given the covenant/condition dichotomy previously discussed, even the inclusion of such terms would have relatively limited effect.

The second reason why the unconscionability analysis is unlikely to yield any results is the standardization of the substantive terms. As we have seen in Chapter 3, licensing provisions found in user agreements are very much alike; and the courts are much less likely to invalidate the clauses which are perceived as an industry standard. “Unconscionability may depend on whether other sellers in the geographical areas are doing the same thing, in which case it becomes difficult for a court to find an industry-wide boilerplate scheme unconscionable”, writes Radin.<sup>440</sup> In the same vein, Kim remarks that “the network effect of terms helps establish industry norms more

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<sup>439</sup> “The fairness of the bargain is to be viewed in the light of the circumstances as they existed at the time the bargain was struck and not at the time the parties seek to enforce the rights based upon their earlier contract.” An increased value is immaterial, as is a decrease in value or other similar changes. *See* Ann Taylor Schwing and Martin D. Carr (eds), *California Affirmative Defenses* (Expert Series, 2nd edn, Thomson Reuters Westlaw 2017), § 55:1.

<sup>440</sup> Radin, *Boilerplate the Fine Print, Vanishing Rights, and the Rule of Law* page 129

quickly—which in turn may make a court less likely to find these norms surprising or unconscionable”, and explains how this standardization of the norms was instrumental in shaping the current legislative landscape on online privacy:

“Wrap contracts were instrumental in creating norms that led to this market failure in online privacy. At a time when the legality of tracking practices was uncertain, contracts gave them legitimacy by allowing companies to claim customers consented. They reframed the discussion, so that instead of one that focused on whether these practices should be permitted, it became one replete with the rhetoric of free will and choice. The claim that users had consented kept claims of privacy invasion at bay, at least for a while. Companies, under cover of contract and emboldened by court decisions finding assent in the unlikeliest of places, swapped their old terms for ever more intrusive ones.”<sup>441</sup>

This means that boilerplate terms become more difficult to challenge the more standardized they are, and that they, as noted by Radin, thus effectively swap the legislative legal landscape with the one of their own choosing, through endless self-reinforcement.

These two factors create such a strong barrier to overcome that any further analysis of the minutiae details of the licensing provisions and the corresponding procedural and substantive unconscionability is simply not merited here. The unconscionability analysis will inevitably fail under the current American case law – not because these provisions are inherently fair, but because the courts have to assess their fairness in a very narrow context (i.e. at the time the contract was entered into), while ignoring key issues (i.e. the way that content was actually used) and in the light of prevailing industry practices (which support broad license grants).

### **2.3.2. Reasonable expectations**

The doctrine of reasonable expectations, as formulated in *Restatement*, stipulates that “where the other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”<sup>442</sup> As explained in the comments to the *Restatement*, it allows the courts to hold that an unexpected term is not binding on a non-drafting party:

“Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure. Similarly, a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or

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<sup>441</sup> Kim, *Wrap Contracts: Foundations and Ramifications* page 81

<sup>442</sup> American Law Institute (ed), *Restatement (Second) of Contracts* § 211 (3)

from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.”<sup>443</sup>

At the first sight, the doctrine of reasonable expectations might thus seem like a mechanism well-suited to police licensing clauses for unfair terms. However, it suffers from several crucial limitations.

First, the doctrine is applied extremely narrowly and restrictively, even more so than the unconscionability doctrine. It is not incorporated in the Uniform Commercial Code – in fact, its application was explicitly rejected in its revisions; the same way it was expressly excluded from Uniform Computer Information Transactions Act. The doctrine has been adopted in a very few states, and in cases where it has, its scope of application has been traditionally limited to insurance contracts.

Secondly, the doctrine suffers from the same deficiencies when it comes to policing licensing agreements as does the doctrine of unconscionability: the reasonableness is to be determined at the time of contract formation, and it is easy to argue that each broad term of the license had a justifiable basis. Similarly, standardization of the terms goes against showing of unreasonableness.

Finally, when assessing the reasonableness of the terms, the doctrine assumes that consumers are rational market actors. We will explore the deficiencies of this reasoning in greater detail in the next chapter.

This doctrine is therefore unlikely to be successfully invoked in the context of licensing of user content.

### **2.3.3. Voidness as a matter of public policy**

Contract enforcement may also be denied if the agreement is held to be void as a matter of public policy. The doctrine is applied very narrowly; the dominant position being that the court must rely on explicit legal authority in order to reach such a finding:

“In construing a contract, public policy is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests as the term ‘public policy’ is vague, and there must be found definite indications in the law of sovereignty to justify the invalidation of

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<sup>443</sup> Ibid § 211

the contract as contrary to that policy. The only authentic and admissible evidence of public policy of a state is its constitution, laws, and judicial decisions.”<sup>444</sup>

Given this, the courts would be hard-pressed to find any grounds for holding that user-content licenses are, if too broad in the scope, contrary to the public policy.

Even if such argument could be raised, however, it is important to note that it would be preempted by the federal copyright law. In other words, state public policy, as applied to contracts, would not be applicable in the cases where it applies to the subject-matter concurrently with the federal Copyright Act, insofar as it affects the rights given under the Act.

Could an argument then be raised that licensing practices are void for being contrary to the federal copyright policy? No explicit legislation or case law on the topic exists, making such an argument difficult to raise in practice.

Consequently, we must conclude that the enforcement of licensing clauses is not likely to be denied on the grounds of those clauses being contrary to the public policy; which, coupled with findings of previous sections, means that *there are virtually no contractual enforcement defenses which may be successfully invoked against licensing clauses under American law.*

## 2.4. Copyright infringement defenses under US law

The fact that content licensing clause found in user agreement might be held to be invalid or inapplicable in a particular case – either by the virtue of formation deficiencies, the use falling outside the scope of a grant, or through a successful invocation of the enforcement defense – does not, still, mean that platform provider’s use of user content will be found to be infringing. Platform provider may raise two principal defenses against any infringement claim: that user gave an implied license to use the content in a disputed manner; and/or that such use of content constituted fair use. Success on either ground would absolve platform provider of the infringement liability.

Third possible copyright defense would be based on the doctrine of copyright misuse. This defense has not been recognized by every circuit, nor has it been explicitly recognized by the Supreme Court.<sup>445</sup>The doctrine has its roots in the patent misuse doctrine – which, similarly to the “unclean hands” doctrine in tort law, bars infringement suits by patentees who have “misused” their patent grant, by using the patent to violate the competition laws or by extending their patent monopoly in some other way.<sup>446</sup>Given the doctrine’s focus on the market effects of the IP owner’s behavior, it remains virtually inapplicable as a defense to the claim of user content infringement – as platform

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<sup>444</sup> Sonja Larsen, '§ 3:3 Contracts Contravening Public Policy', *Georgia Jurisprudence: Business and Commercial Law: Contracts* (Georgia Jurisprudence: Business and Commercial Law: Contracts, 2017 edn, Thomson Reuters Westlaw 2017); Radin, *Boilerplate the Fine Print, Vanishing Rights, and the Rule of Law* page 128

<sup>445</sup> Ilan Charnelle, 'The Justification and Scope of the Copyright Misuse Doctrine and Its Independence of the Antitrust Laws' (2002) 9 UCLA Ent L Rev 167

<sup>446</sup> Mark A. Lemley, 'The Economic Irrationality of the Patent Misuse Doctrine' (1990) 78 Cal L Rev 1599

providers will be unlikely to furnish any evidence showing that users are abusing their rights so far as to create market distortions and foster uncompetitive behavior.

### 2.4.1. Implied licenses

There are several situations in which the American law deems the license to be granted, even absent any express agreement of the parties. Such licenses are called “implied licenses”, and have their basis either in parties’ conduct, the commercial context of the parties’ relationship (if any) and/or various quasicontractual doctrines. Nimmer notes that “of all the contract law topics associated with licensing, [implied licensing] is the most confused and uncertain conceptually”, as it mixes and blends various doctrines with little to no consistency.<sup>447</sup>

In the largest number of cases, the courts find an implied license based on the conduct of the parties; such licenses are called “implied-in-fact”, and reflect the general position of contract law that agreements may be entered into by conduct. If, approaching the newsstand, I take the newspaper and leave money on the counter, which the seller proceeds to take – we have entered into an agreement, despite the fact that no words were uttered. The same holds true in the field of licensing: uploading my photograph on a webpage accessible to everyone, I am giving every visitor an implied license to make a temporary copy of that image in their RAM memory.<sup>448</sup>

Then there are licenses which are “implied-in-construction”; those cases in which conduct or agreement of the parties do not support finding of a license, but the context of their relationship necessitates such finding. These licenses are based on the notion that the commercial circumstances warrant the finding of the license, and that the failure to find a license would frustrate parties’ bargain.<sup>449</sup> They fill in the agreement with the terms that a court would ordinarily expect to be present in the type of relationship involved; yet they are used only in a very narrow amount of cases, and in as restrictive of a manner as possible. As Nimmer explains:

“The nature of the underlying intellectual property may very well counsel conservatism in implying a license. Thus, when a copyright owner grants the right to prepare a derivative work—say, a movie based on a novel—that grant does not imply the right to prepare a wholly different derivative work—say, a new novel. A contract to sell my Mercedes does not imply an agreement to sell my Porsche even though I own both cars. This theme sometimes manifests itself in the rule that as a matter of federal copyright law ‘copyright license are assumed to prohibit any use not authorized.’ The fact is that implied-in-fact and implied-in-law licenses as to copyrights are found with some frequency when the language and context merit it; federal law erects no absolute barrier to doing so, although the nature of the rights involved and the potential effect of such analyses on those rights may often

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<sup>447</sup> Nimmer and Dodd, *Modern Licensing Law* § 10:1

<sup>448</sup> Although this license would not be always necessary to grant; consider e.g. fair use doctrine or the Copyright Directive Article 5 (3), under which viewers of website would not be liable for infringement.

<sup>449</sup> Nimmer and Dodd, *Modern Licensing Law* § 10:8

require a court to be very circumspect in finding agreement or permission where none has been clearly given.<sup>450</sup>

Finally, there are licenses which rely on doctrines such as promissory estoppel and unjust enrichment; in such cases, a license is deemed to be granted in order to avoid a result which would be unjust. Such licenses are known as “implied-in-law”; they are, in essence, a remedy imposed out of considerations of fairness and equity.<sup>451</sup> Consider the doctrine of promissory estoppel: it is based on the existence of a representation or a promise which induced justifiable reliance in another party, to the point that the law deems it necessary to protect such reliance. For example, I could make public statements that I will never sue anyone for copyright infringement; and then, after ignoring infringing activity for years, proceed to file a lawsuit against anyone who copies my book. Because my public statements and continued inactivity have lead other parties to rely on my promise not to sue, they could raise the doctrine of equitable estoppel, and the court could find that I have given them a license.

Exploring the taxonomy and case-law surrounding implied licensing any further would be far outside the scope of this chapter. What we can immediately note, however, is that the courts would be very likely to find that users *do* grant platform providers an implied license when they upload a piece of content online. This conclusion is reached regardless of which doctrinal tool the court uses to assess whether or not such grant is given.

Suppose that I e-mail a photograph using Gmail, and that Google’s user agreement contains no licensing provisions (or is invalidated as improperly formed or unconscionable). Can I claim that Google has infringed my copyright based on the fact that it made copies of my work, or that it created derivative works (e.g. thumbnails)? Of course not: my conduct (i.e. uploading the photo to Google’s e-mail service) will be interpreted as an implied license grant; the court might alternatively look into the relationship between me and Google and conclude that a licensing provision is integral to its existence; or it can conclude that my actions have created reliance on Google’s part, and that failure to find a license would result in an unjust outcome.

But the problem with implied licenses is not whether or not such license is likely to be found – but what its *scope* might be. If I have given Google an implied license to create derivative works of my photograph so it can turn it into a thumbnail, have I also given them a license to use that photograph in an advertisement?

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<sup>450</sup> Ibid § 10:23

<sup>451</sup> Ibid § 10:33

The discussion here is nearly identical to the one of construction of the scope of the license where the text of the grant includes non-statutory language: the court will attempt to discern the (objective) intent of the parties, whether the conduct of the parties points to the intention of granting a narrow or a broad grant, what the industry standards are, and what kind of reliance parties' conduct might have created. This will, in our context, result in a broad license grant.

We will not repeat the analysis here. We must, however, note that the industry standards might have an even larger role to play in establishing the scope of an implied license than in construing the scope of an express grant.

Consider the previous scenario with use of an image in an ad. If this is a common type of use of user content – say, apart from Google, other companies do it routinely as well; if the user has previously seen Google using someone's content in that way; or, in the most drastic scenario, if Google has used *this user's* content in ads before without that user complaining – an implied license is likely to be found.

We are therefore re-encountering a familiar topic: one of the way in which standardization of practices affects the legislative landscape, and the way that these practices become *lawful* simply because they are *dominant*. Viewed this way, implied licenses are yet another mechanism of reinforcing industry practices, potentially at the cost of making users relinquish control over their content.

#### **2.4.2. Fair use**

Another possibility for defending against an infringement claim stems from the fact that exclusive rights given to authors are subject to certain exceptions and limitations; in other words, there are circumstances in which rights holders cannot exercise their rights to prevent the others from engaging in a certain (otherwise infringing) conduct. Codified in §107 of the US Copyright Act, the doctrine of fair use is arguably the most important limitation of author's rights in the United States; it limits *all* of the author's exclusive rights, subject to court's consideration of the four different factors:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>452</sup>

Fair use has purposefully been codified as a broad, open-ended standard, meant to withstand the test of time – i.e. to be technologically neutral – and to give courts enough flexibility to balance the interests of the authors with the interests of the public; which is why the Congress did little to provide the courts with any guidance in interpreting the four factors laid down in the §107.

Much has been written about the doctrine of fair use over the past decades.<sup>453</sup> Some commentators believe that no coherent jurisprudence has emerged around the doctrine, and that the four fair use factors have been interpreted in an inconsistent and erratic manner. They point to the cases in which all the factors favored fair use, yet no fair use was found; or the opposite – where all the factors weighed against it, and the courts still found fair use.<sup>454</sup> As Nimmer writes:

“In the ultimate analysis, my review of the cases convinces me that the high correspondence in judicial opinions between the individual fair use factors and courts' ultimate disposition, as opposed to the absence of any meaningful correspondence in the chart, reflects an important insight into how judges actually resolve fair use cases: Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.”

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<sup>452</sup> 17 U.S. Code § 107

<sup>453</sup> See e.g. Wendy J. Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory' (1989) 41 Stanford Law Review 1343; Ned Snow, 'The Forgotten Right of Fair Use' (2011) 62 Case Western Reserve Law Review 135; Pierre N. Leval, 'Toward a Fair Use Standard' (1990) 103 Harv L Rev 1105; Pamela Samuelson, 'Unbundling Fair Uses' (2009) 77 Fordham L Rev 2537; Randall P. Bezanson and Joseph M. Miller, 'Scholarship and Fair Use' (2010) 33 Columbia Journal of Law & the Arts 409; Matthew Sag, 'God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine' (2005) 11 Mich Telecomm & Tech L Rev 381; Haochen Sun, 'Fair Use as a Collective User Right' (2011) 90 North Carolina Law Review 125; L. Ray Patterson, 'Free speech, copyright, and fair use' (1987) 40 Vand L Rev 1; Stephen M. McJohn, 'Fair Use and Privatization in Copyright' (1998) 35 San Diego Law Review 61; Michael W. Carroll, 'Fixing Fair Use' (2007) 85 North Carolina Law Review 1087; Ned Snow, 'Fair Use as a Matter of Law' (2011) 89 Denv U L Rev 1; Ben Depoorter and Francesco Parisi, 'Fair Use and Copyright Protection: A Price Theory Explanation' (2002) 21 International Review of Law and Economics 453; Mark A. Lemley, 'The Economics of Improvement in Intellectual Property Law' (1997) 75 Tex L Rev 989; Jessica D. Litman, 'Copyright Compromise and Legislative History' (1987) 72 Cornell L Rev 857; Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 Yale LJ 283; Rebecca Tushnet, 'Content, Purpose, or Both?' (2015) 90 Wash L Rev 869

<sup>454</sup> David Nimmer, "‘Fairest of them All’ and Other Fairy Tales of Fair Use' (2003) 66 Law & Contemp Probs 263 page 263, discussing *Robinson v Random House, Inc.* [1995] 877 FSupp 830 (United States District Court, S.D. New York), modified *Robinson v Random House Inc. (modified)* [1995] 35 USPQ2d 1635 (United States District Court S.D. New York), and *Kelly v Arriba Soft Corp.* [2002] 280 F3d 934 (United States Court of Appeals, Ninth Circuit), opinion withdrawn and superseded on denial of reh'g *Kelly v Arriba Soft Corp.* [2003] 336 F3d 811 (United States Court of Appeals, Ninth Circuit)

Other commentators disagree. Samuelson argues that there is more predictability to be found than initially meets the eye, due to what she refers to as ‘policy clustering’:

“[...] Fair use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or ‘policy-relevant clusters’. The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users. If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair. Policy-relevant clustering is not a substitute for appropriate consideration of the statutory fair use factors, but it provides another dimension to fair use analysis that complements the four-factor analysis and sharpens awareness about how the statutory factors, sometimes supplemented by other factors, should be analyzed in particular contexts.”<sup>455</sup>

Regardless of one’s stance on the predictability of doctrine’s application, it must be stressed that any fair use inquiry is going to be heavily influenced by the facts of the case before the court. This is why it is difficult to predict how this doctrine might impact the licensing of user-generated content: it is hard to say without factoring in all the relevant facts. We can, however, note several decisions which might be broadly relevant.

First, platform providers seemingly enjoy a wide-ranging freedom to use unlicensed content in order to provide searching, indexing and caching services – even when this includes relatively large portions of the original work. This follows from cases like *Kelly v. Arriba Soft*<sup>456</sup> and *Perfect10 v. Amazon*,<sup>457</sup> where the courts held that search engine’s caching of images and creation of thumbnails constituted fair use. Large portion of the analysis turned on how such uses were transformative

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<sup>455</sup> Samuelson, 'Unbundling Fair Uses'

<sup>456</sup> *Kelly v. Arriba Soft Corp.*: Notably: “Fair use factor, that looked at amount and substantiality of portion of copyrighted work used, weighed neither for nor against either party in copyright infringement action brought by owner of copyrighted images that were displayed on Internet web sites against operator of visual search engine, which displayed search results as “thumbnail” pictures; although operator copied each of owner's images as a whole, it was reasonable to do so in light of operator's use, which was to allow users to recognize image and decide whether to pursue more information about the image or originating web site.”

<sup>457</sup> *Perfect 10, Inc. v. Amazon.com, Inc.* [2007] 508 F3d 1146 (United States Court of Appeals, Ninth Circuit): “Statutory fair use factor that looked at purpose and character of the use of a copyrighted work weighed in favor of defendant operator of Internet search engine in copyright infringement action brought by owner of copyrighted photographs, based on operator's display of thumbnail images of owner's works in response to searches by users, even if thumbnail images were derived from infringing third-party websites and showed the image in its entirety, because operator's use of works was highly transformative; search engine provided social benefit by incorporating an original work into a new work, namely, an electronic reference tool, and to extent that operator's use was commercial and could supersede owner's sale of images, such use was not presently significant.”

Regarding caching: “Even if search engine users who linked to websites showing owner's copyrighted photographs automatically made ‘cache’ copies of full size images of the works, and such action amounted to direct infringement of owner's right of reproduction, such automatic copying was fair use of copyrighted images; such copying was a transformative use, the cache copied no more than was necessary to assist the user in Internet use, and the copying had no more than a minimal effect on owner's rights, while having a considerable public benefit.”

(something commonly referred as the “fifth factor” of the fair use analysis), and how they did not harm the market for the original works.

This can have a large bearing on licensing of user-generated content: a significant portion of uses not authorized by the user can fall under the scope of this exception. Consider uses like Facebook’s Graph Search, which gives users an unprecedented freedom to combine search terms (“show me all the photos liked by the people who live in Oslo and have posted about cinema”); or Google’s Vision API, discussed in Chapter 3 (“show me my photos of cars”). It is relatively clear under *Kelly* and *Perfect10* that such uses would be considered fair; but the implications of this go beyond the mere caching and creation of thumbnails. In order to provide these services, platform providers need to data-mine user content; and while normally, a copyright license would be necessary in order to engage in such an activity (as it inevitably involves copying), here, such copying would be an integral part of providing a search service – and thereby likely ruled fair. (The fact that the data extracted could then be retained for other purposes is unlikely to be factored into the analysis.)

Secondly, even uses which cannot easily be related to searching and caching can be deemed fair, regardless of the fact that they involve unauthorized, verbatim copying of large amounts of copyrighted content.

The case that best illustrates this is *Authors Guild v. Google*,<sup>458</sup> in which the court ruled on the legality of the Google Books project. Google has, between 2004 and 2013, scanned about twenty million books, and provided libraries with the digital copies. It has also, however, made snippets of these books available online, accessible to everyone; and has used the scanned books in a variety of other ways – for instance, they formed a basis for the Google Translate service. Google has not, however, obtained any permission from the authors of these works, which led to a copyright infringement lawsuit.

The district court held (and the Second Circuit later upheld) that Google’s use of books constituted fair use. The court’s analysis was grounded in the transformative character of the use (“operator transformed expressive text into comprehensive word index that helped readers, scholars, researchers, and others find books, operator opened new fields of research and allowed use of words in books in a way they had not been used before”); the fact that the books were otherwise available to the public (“vast majority of the books were non-fiction, and the books were published

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<sup>458</sup> *Authors Guild v. Google, Inc.* [2015] 804 F3d 202 (United States Court of Appeals, Second Circuit) cert. denied sub nom. *The Authors Guild v. Google, Inc.*, 136 S. Ct. 1658, 194 L. Ed. 2d 800, 84 USLW 3357, 84 USLW 3586, 84 USLW 3581, 2016 WL 1551263 (2016)

and available to the public”); the fact that scanning an entire book was essential to providing the service (“although operator limited the amount of text it displayed in response to a search, full-work reproduction was critical to operator's functioning”); and that there was no adverse effect on the market for the work (“it was not likely that someone would take time and energy to input countless searches to try and get enough snippets to comprise an entire book, and operator enhanced sales of books to benefit of copyright holders, by providing a way for authors' works to become noticed”).

This decision significantly expands the possibilities to use user content without obtaining any permission to do so. As long as the use is transformative – which might not be a high bar to meet, considering the nature of services provided by today’s platform providers; and as long as it does not compete with the work – which it rarely will, considering that majority of user content is not made with an intention to be marketed (think of e-mails, selfies, Facebook comments, YouTube mashups) – fair use is likely to be found, rendering consent irrelevant.

There is one area in which users might claim that the market for their work has been negatively affected by the platform provider’s unauthorized use: when platform providers use user content in ads. However, case law suggests that this argument might fail; and even if it does not, other factors would likely weigh in favor of platform providers, making the outcome uncertain.

The reason why the courts might be willing to find fair use in advertisement cases lies in the alignment of general principles of intellectual property law with the advertising’s function of promoting free competition. As Samuelson explains:

“Commercial advertisements may infringe copyrights if their makers unfairly copy expression from an earlier work. But courts should be careful about infringement claims in advertising-related fair use cases because ads play such an important role in promoting competition among goods and services. Courts should probably not presume that a use in an ad is unfair based on its commerciality because, generally speaking, ads are not marketed as copyrighted products in the same manner as books, photographs, and sound recordings. The goal of an ad is to persuade consumers to buy some other good or service, not to buy the ad itself. So harm from copying an ad is unlikely to affect the market for the ad. Courts should also be wary of cases in which claims of copyright infringement are being asserted in order to thwart effective competition.”<sup>459</sup>

Finding of fair use is especially likely in “truthful advertisements”, ads which incorporate copyrighted content to give factual information about the products.<sup>460</sup> In *Consumers Union of United States v. General Signal*,<sup>461</sup> a lawsuit was filed against General Signal, manufacturer of vacuum

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<sup>459</sup> Samuelson, 'Unbundling Fair Uses' page 2347

<sup>460</sup> Ibid

<sup>461</sup> *Consumers Union of United States, Inc. v General Signal Corp.* [1983] 724 F2d 1044 (United States Court of Appeals, Second Circuit) page 1049-1050

cleaners, for including several sentences from Consumer Union’s famous publication, Consumer Reports, in its ads. Despite the fact that only a few sentences were used and that the ad clearly stated that Consumer Reports was not affiliated with Regina (a division of General which made an ad), Consumer Union had a strong policy against allowing businesses to use the statements from Consumer Reports in advertising, and therefore sued for infringement. The court found that the use in question was fair; it assessed that “CU cannot prevent Regina from accurately reporting facts about the results of CU's independent testing, irrespective of Regina's motive in doing so. Regina wants to communicate Consumer Reports' favorable rating of its product. Regina uses CU's words in the interest of accuracy, not piracy.”<sup>462</sup> It also held that CU’s claim that the use in question could harm their public perception and therefore have clearly negative economic consequences for their business was not something to be considered within the scope of the fair use analysis:

“The district court accepted CU's argument and stated that ‘Regina's commercial use of the article could be the demise of Consumers Union since such commercial use could lead the public to view Consumers Union as [an] unfair tester of products.’ We believe that this conclusion is based on a faulty premise. The Copyright Act was not designed to prevent such indirect negative effects of copying. The fourth factor is aimed at the copier who attempts to usurp the demand for the original work. [...] The copyright laws are intended to prevent copiers from taking the owner's intellectual property, and are not aimed at recompensing damages which may flow indirectly from copying.”<sup>463</sup>

If the courts were to follow this standard today, they would likely rule that platform provider’s use of user-generated content in ads does not represent *copyright* violation, as long as those ads convey factual information. (“Your friend Anne wrote that Tinder is ‘the best dating app ever!’”; “Your friend Bob was in Hawaii this summer! [picture]”) Of course, there are endless variations of the facts, and, as generally noted above, the particular details of the case would play a large role in determining whether a particular use is fair or not.

When it comes to truthful advertising, however, one might wonder if the courts could have taken a more elegant approach: instead of engaging in the cumbersome fair use analysis, they could apply the merger doctrine, which states that expressions which incorporate ideas which can only be expressed in one way are not copyrightable. Because there is only one way to say that the vacuum cleaner ranked 5<sup>th</sup> out of 500 on a test, holding that no copyright protection can be granted due to the merger doctrine would be a faster, more judicially economical way of resolving the case.

Therefore, while carrying out a deeper analysis of the case law on fair use would fall outside the scope of this chapter (and would be questionably useful without the facts of the case), we have to conclude that the doctrine of fair use certainly plays a significant role in licensing of user content. Should the platform providers find themselves exploiting user content without a license, the

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<sup>462</sup> Ibid

<sup>463</sup> Ibid

doctrine may be invoked to avoid infringement liability; and the case law seems to suggest that they might be likely to succeed – especially given how transformative their uses tend to be, and how limited the options to market individual pieces of user content are. Fair use defense is, therefore, a rather serious limitation on user’s ability to control their content under the American law.

## 2.5. Remedies under US law

Lastly – and briefly: what kind of relief can users of online platforms hope to obtain under the American law in case that their copyrighted content is used in a manner which they haven’t authorized? The answer largely depends on the claim that they have brought. As noted in part 2, should the users succeed in proving copyright infringement, they might be entitled to broader remedies than if they were to bring a claim for breach of contract; yet, not every breach of license will constitute copyright infringement.<sup>464</sup> We will therefore start our inquiry by distinguishing between copyright and non-copyright remedies; our discussion will largely focus on assessing the scope of the potential relief and the practicalities of obtaining it.

### 2.5.1. Copyright remedies

In a (rare) case where users manage to prove that platform provider’s use of their content was infringing, they can obtain two types of relief under the Copyright Act: they can either claim actual damages and infringer’s profits, or, if their work was timely registered, they can claim statutory damages and attorney’s fees instead.<sup>465</sup>

*Actual damages* are monetary damages which are compensatory in nature: their amount is calculated based on the impact of the infringing activity on the market for the work. Alongside this, plaintiffs can claim the defendant’s profits attributable to infringement, as long as those profits are not “taken into account in computing actual damages”.

The reason for allowing plaintiffs to recover both actual damages and *profits* stemming from infringement are rooted in the basic legal notion that nobody should benefit from their wrongdoing. As the legislative history of the Copyright Act explains:

“In allowing the plaintiff to recover ‘the actual damages suffered by him or her as a result of the infringement,’ plus any of the infringer’s profits ‘that are attributable to the infringement and are not taken into account in computing the actual damages,’ section 504(b) recognizes the different

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<sup>464</sup> See Chapter V, subsection 2.2.2.1

<sup>465</sup> 17 U.S. Code § 504

purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.”<sup>466</sup>

The courts have held that plaintiffs can principally recover both “direct profits”, generated by selling an infringing product, and “indirect profits” – revenue that has “a more attenuated nexus to the infringement”; however, they have also held that a copyright holder must establish the existence of a causal link before indirect profits damages can be recovered.<sup>467</sup>

In the Ninth Circuit, this was first affirmed in *Frank Music Corp. v. Metro–Goldwyn–Mayer*,<sup>468</sup> where the plaintiff, a music publisher, alleged that MGM infringed its copyright to several songs from the musical “Kismet” by including them without prior authorization in a Las Vegas show. After concluding that MGM had infringed the songs' copyrights, the court held that the publisher could recover indirect damages, such as profits from the hotel's casino, that had been boosted by the show's promotional value provided that the profits were “ascertainable.”<sup>469</sup>

But establishing this casual nexus between infringing activity and profits might be more challenging than initially meets the eye.

Consider the case of *Mackie v. Rieser*, in which artist Mackie brought claim for indirect profits and actual damages against Rieser, who photographed some of his famous sculptures, and used those photographs in a brochure promoting its symphonies. The court held that the use of images in the brochure did not give rise to a valid indirect profit claim, as there was no nexus between the infringement and the profits:

“Remarkably, Mackie's own expert stated that he could not ‘understand’ how it would be possible to establish a causal link between the Symphony's infringing use of ‘The Tango’ and any Pops series revenues generated through the inclusion of the collage in the direct-mail literature.

We agree entirely with the expert's original conclusion. Intuitively, we can surmise virtually endless permutations to account for an individual's decision to subscribe to the Pops series, reasons that have nothing to do with the artwork in question. For example, was it because of the Symphony's reputation, or the conductor, or a specific musician, or the dates of the concerts, or the new symphony hall, or the program, or the featured composers, or community boosterism, or simply a love of music, or ... ? In the absence of concrete evidence, Mackie's theory is no less speculative than

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<sup>466</sup> United States Committee on the Judiciary, *House Report No. 94-1476* page 161

<sup>467</sup> See e.g. *Mackie v Rieser* [2002] 296 F3d 909 (United States Court of Appeals, Ninth Circuit) page 914

<sup>468</sup> *Frank Music Corp. v Metro-Goldwyn-Mayer, Inc.* [1985] 772 F2d 505 (United States Court of Appeals, Ninth Circuit) page 517

<sup>469</sup> *Ibid*

our effort in this paragraph to enumerate even a relatively short list of the myriad factors that could influence an individual's purchasing decisions. [...]

[Mackie's] supposition that the Symphony's goal of generating a 1.5% response rate to its direct-mail brochure was somehow directly correlated with revenue generated by individuals who subscribed because of Rieser's art is a virtual non-sequitur. Even if such an aspirational yield percentage could be applied to determine how many people subscribed because of the brochure, such a rudimentary analysis cannot determine how many of those individuals subscribed *because of Rieser's work*.<sup>470</sup>

If claimant succeeds in establishing the link between infringement and infringer's gross revenue, the burden of proof shifts, and an infringer bears burden of apportioning profits that were not result of infringement, which certainly helps plaintiff's position.<sup>471</sup>

Alternatively, there are *statutory damages*: they allow a plaintiff to elect to recover, instead of actual damages and profits, an award of damages prescribed by the statute – ranging from \$750 to \$150,000 per infringement, depending on whether or not infringement was “willful”. A plaintiff does not need to show any harm suffered as a consequence of an infringement: statutory damages may be claimed regardless of whether there is adequate evidence of actual damages or profits taken by a defendant.<sup>472</sup> As such, statutory damages remain an extremely powerful tool in plaintiff's arsenal.

There is an important caveat regarding statutory damages, however: in order for a plaintiff to be able to claim them, the published work has to be registered with the US Copyright Office within three months of publication. If the work is unpublished, no statutory damages may be awarded for the infringement which commenced before registration.

Where does this leave licensing of user-generated content?

First, it is clear that most users will have a hard time claiming any meaningful actual damages. As noted before – and as we will explore in more depth in the next chapter – market for user-generated works is limited in most instances. Consider Facebook's use of your photo in an ad shown to your friends, or Google's use of two sentences from your e-mail: how does it impact the market for your work? The work was likely never meant to be marketed; and proving that there was a market might be an excruciating task. Even if one manages to claim the existence of the viable market for the work, there will likely be no overlap of markets, rendering it nearly impossible to prove any actual damages.

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<sup>470</sup> *Mackie v Rieser*

<sup>471</sup> *William A. Graham Co. v Haughey* [2009] 568 F3d 425 (United States Court of Appeals, Third Circuit)

<sup>472</sup> See e.g. John W. Hazard Jr. (ed), *Copyright Law in Business and Practice* (Revised edn, Thomson Reuters Westlaw 2017) § 9:20

Secondly, it will be difficult to claim part of platform provider's profits. On the surface, the fact that evidentiary rules shift the burden of proof to the defendant (requiring him/her to prove which parts of profit were *not* attributable to infringement) seems to offer users a key litigation advantage. But, as illustrated in *Rieser*, courts still require the plaintiffs to establish a link between the infringing activity and the platform provider's profits before proceeding with disgorgement. Platform provider's *overall* profits do not play a significant role at this stage – not unless there's a nexus between them and an *individual*, disputed instance of infringement.

At best, users can hope to regain the *direct* profits that providers have obtained by using their content – say, the amount that advertisers paid to them for someone's click on an ad. Yet, even in these instances, platform providers may argue that it is doubtful whether other users clicked on an ad because it featured someone's content, or because they were genuinely interested in an offer – and given the court's reasoning in *Reiser*, such arguments might be viewed favorably by the courts. Should the users nevertheless prevail, they do not stand to gain much from recovering direct profits: usually, these will be limited to few dollars per infringing use. (And then there are uses which arguably do not result in any recoverable profit – such as uses in data mining, deep learning algorithm-training, behavioral research, and others discussed in Chapter 3.)

This means that users stand to gain little from opting to seek actual damages and disgorgement of profits. How about statutory damages?

Requiring no proof of harm and no link with the profits, statutory damages seem to offer the most reliable option for obtaining relief. However, as a practical matter, only a handful of users will be entitled to claim them in the first place, due to the requirement of registration with the US Copyright Office. Not only do we have to be mindful of the fact that online platforms are used by a wide international audience – many of whom might not be aware of the requirements of the US law; but we also have to keep in mind that the US law calls for a mandatory deposit of two copies of the work with the Library of Congress, and that the lowest registration fee at the Copyright Office is currently set at \$55.<sup>473</sup> How many users would – especially internationally – choose to protect their (seemingly mundane) pieces of content this way? How many would deliver food photographs, work-emails, draft articles, family photographs to the Library of Congress of the US? And how many would pay \$55 for each photo, video, comment they upload?

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<sup>473</sup> 17 U.S. Code § 407; see also “Schedule of Fees” <<http://www.copyright.gov/about/fees.html>>

Even if someone does, let us reiterate once again: proving copyright infringement by the platform providers is nearly impossible in the first place. Demonstrating that certain conduct fell outside the scope of the license is, given the broad drafting language and the condition/covenant dichotomy, a daunting task. In most cases, users can only resort to claiming that certain conduct constituted a breach of contract or that it was tortious; which changes the scope of the available remedies.

### 2.5.2. Non-copyright remedies

Let's suppose that Facebook prints out all of your messages and sells them to a highest bidder – or that Instagram sells your photos on coffee mugs. The court construes a broad license, according to the general interpretative principles, and concludes that these companies are shielded from copyright liability. It also holds that there is no nexus between your privacy interests and the copyright license; you then proceed to claim that companies' conduct amounted to a breach contract (specifically, their privacy policies), and gave rise to tort liability (under the applicable privacy/publicity torts). What do you stand to gain?

Under the American law – not a whole lot, at least on the surface. The main principle in the contract and tort law is the one of restitution; the law seeks to restore the position in which the plaintiffs would have been were it not for the defendant's illegal conduct. The remedies are therefore, in most cases, limited to those of specific performance and actual damages (plus profits), requiring plaintiffs to show, by preponderance of evidence, actual harm that they have suffered due to the conduct in question. Such harm, much like discussed above, may be very difficult to show.

Consider the case of *In re Northwest Airlines Privacy Litigation*,<sup>474</sup> where plaintiffs were the customers of Northwest Airlines. After September 11, 2001, NASA requested that Northwest provide NASA with certain passenger information in order to assist NASA in studying ways to increase airline security. Northwest supplied NASA with passenger name records (“PNRs”), which are electronic records of passenger information. PNRs contained information such as a passenger's name, flight number, credit card data, hotel reservation, car rental, and any traveling companions. The basis for most of plaintiffs' claims was that Northwest's website contained a privacy policy that stated that Northwest would not share customers' information except as necessary to make customers' travel arrangements, as it provided: “When you reserve or purchase travel services through Northwest

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<sup>474</sup> *In re Northwest Airlines Privacy Litigation* [2004] 2004 WL 1278459 (United States District Court, D. Minnesota). See also *In re Jetblue Airways Corp. Privacy Litigation* [2005] 379 FSupp2d 299 (US District Court, E.D. New York)

Airlines nwa.com Reservations, we provide only the relevant information required by the car rental agency, hotel, or other involved third party to ensure the successful fulfillment of your travel arrangements”. Plaintiffs contended that Northwest's provision of PNRs to NASA violated Northwest's privacy policy, giving rise to their legal claims.

The court held that the privacy policy did not constitute a binding contract and that the plaintiffs have failed to allege damages. As the court reasoned:

“The usual rule in contract cases is that ‘general statements of policy are not contractual’. [...] The privacy statement on Northwest's website did not constitute a unilateral contract. The language used vests discretion in Northwest to determine when the information is ‘relevant’ and which ‘third parties’ might need that information. Moreover, absent an allegation that Plaintiffs actually read the privacy policy, not merely the general allegation that Plaintiffs ‘relied on’ the policy, Plaintiffs have failed to allege an essential element of a contract claim: that the alleged ‘offer’ was accepted by Plaintiffs. Plaintiffs' contract and warranty claims fail as a matter of law.

Even if the privacy policy was sufficiently definite and Plaintiffs had alleged that they read the policy before giving their information to Northwest, it is likely that Plaintiffs' contract and warranty claims would fail as a matter of law. Defendants point out that Plaintiffs have failed to allege any contractual damages arising out of the alleged breach. As Defendants note, the damages Plaintiffs claim are damages arising out of the torts alleged in the Amended Complaint, not damages arising out of the alleged contract. Damages are an essential element of a breach of contract claim, and the failure to allege damages would be fatal to Plaintiffs' contract claims.”<sup>475</sup>

In a similar case, a bank customer brought a class action against the bank, alleging that bank's disclosure of customers' e-mail addresses was in violation of its own consumer privacy policy and constituted a deceptive business practice under New York law, breach of fiduciary duty, breach of contract, and negligent misrepresentation.<sup>476</sup> The court dismissed all the claims, holding that the customer has not pled sufficient injury to state a claim for relief.

In the aforementioned case of *Cohen v. Facebook*, plaintiff's publicity claim was dismissed largely due to their inability to show how Facebook's use of their name and likeness to promote the Friend Finder service caused them any harm. As the court reasoned:

“Here, plaintiffs' sole allegation relating to injury is the conclusory assertion, repeated at least twice in the complaint, that they ‘have suffered injury-in-fact by having their name[s] and likeness[es] misappropriated without their knowledge or consent.’ Plaintiffs have not even alleged that they suffered ‘injury to [their] feelings,’ which Slivinsky notes is ‘gist’ of a misappropriation claim. Moreover, even if plaintiffs had included a conclusory assertion of ‘hurt feelings,’ they have alleged no facts that would suffice to show a plausible entitlement to relief. Plaintiffs have not shown how the mere disclosure to their Facebook friends that they have employed the Friend Finder service

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<sup>475</sup> *In re Northwest Airlines Privacy Litigation* page 5-6

<sup>476</sup> *Cherry v Emigrant Bank* [2009] 604 FSupp2d 605 (United States District Court, S.D. New York)

(even assuming some of them did not) causes them any cognizable harm, regardless of the extent to which that disclosure could also be seen as an implied endorsement by them of the service.”<sup>477</sup>

We do find cases in which the courts were willing to embrace a broader theory of harm – such as the publicity cases of *Perkins v. LinkedIn*, *Fraleley v. Facebook* and *CMD v. Facebook*. These cases have revolved around the use of plaintiff’s content in promotional e-mails and “Sponsored Stories” ad campaigns; and the courts found sufficient evidence of harm. Consider the reasoning in *Perkins*:

“The Court notes that this type of injury, using an individual’s name for personalized marketing purposes, is precisely the type of harm that California’s common law right of publicity is geared toward preventing. The California Court of Appeal has recognized that the ‘first step toward selling a product or service is to attract the consumers’ attention’ and that a defendant may ‘gain a commercial advantage’ by appropriating an individual’s name or likeness to accomplish this goal.

In sum, the Court finds that individuals’ names have economic value where those names are used to endorse or advertise a product to the individuals’ friends and contacts. This is so because an advertisement bearing the imprimatur of a trusted or familiar source, such as a friend or acquaintance, has concrete value in the marketplace. Here, Plaintiffs allege that their names were misappropriated by LinkedIn to create personalized endorsements.”<sup>478</sup>

None of these cases, however, have resulted in a binding verdict; the cases were settled, and the settlement terms merely required the companies to re-phrase sections of their user agreements to make it clearer that they had the right to use user content in promotional materials. Some of the settlement agreements also obliged platform providers to establish a mechanism allowing users to opt out of certain uses of content.<sup>479</sup>

But how is the line between two categories of cases to be drawn? There are no answers to be found in the current case law.

The current framework for assessing harm (if there’s one to speak of) consequently lacks coherence. Why is Facebook’s use of user content in Sponsored Stories harmful, whereas the use of same content in Friend Finder is not? It seems that the courts are, once again, following the pattern discussed by Kim and Nimmer: the one of reaching the results which feel instinctively right, and then tailoring the legal interpretation to fit that conclusion, causing doctrinal chaos in the wake.

Allowing the courts to follow their “feelings” is more problematic than it might seem. Not only does it cause astounding legal uncertainty, which harms users and platform providers alike – giving

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<sup>477</sup> *Cohen v Facebook, Inc.*

<sup>478</sup> *Perkins v LinkedIn Corp.* [2014] 53 F Supp 3d 1190 (United States District Court, N.D. California, San Jose Division)

<sup>479</sup> *Fraleley v Facebook, Inc.*, *Fraleley v Facebook, Inc.*, Plaintiffs’ Memorandum in Support of Motion for Final Approval of Class Action Settlement, document 2013 WL 9659751. Document available at Westlaw Next.

them no clear idea as to how user content may be legally used – but it also hampers the development of the law, as it results in a patchwork of improvised decision with little common threads. What happens then when a new use emerges then? Is data-mining user content closer to *Perkins* or *Cohen*? What about the use of user content to train deep learning algorithms?

Answering these questions falls well outside the scope of this dissertation. We can, however, note that the way in which the courts have ignored copyright aspects of the cases before them – treating them as a mere nuisance on the way to resolving publicity and contractual claims, if at all – has resulted in a creation of a legal landscape in which the legality of a particular use of content revolves around court’s intuitive perception of (non-copyright) harm, and not the questions of quality and scope of user consent, or the compatibility of such reasoning with the protection of user’s intellectual property interests. Such impromptu landscape is consequently one riddled by pitfalls.

## **2.6. Licensing of user content under US law: a conclusion**

What is to be concluded about licensing of user content under the American law?

First, we face a vast preponderance of case law suggesting that platform providers will virtually never be held liable for infringing user’s copyright. Licenses are very likely to be upheld as properly formed contracts – despite the fact that they are poorly communicated, ambiguous at times, and can be terminated at platform provider’s whim. They are likely to be construed very broadly, and violation of any contractual limitations of the scope is unlikely to give rise to an infringement claim. Doctrines challenging the validity of licenses on the grounds of reasonableness are narrow in scope and in reach; their procedural role of an enforcement defense limits their practical significance even further. Even absent an express license, platform providers can successfully claim that an implied license has been given; and should an act of use nevertheless be successfully challenged as infringing, they might be able to successfully raise a defense of fair use.

Secondly, in the discussion on which uses of user content are permissible and which are not, copyright law is unjustifiably taking a back seat: the litigated cases principally revolved around privacy and publicity claims, leaving copyright aside. The courts have missed an opportunity to acknowledge that these rights might be overlapping with those transferred through a copyright license, and have not, in any way, developed a framework for determining the legal consequences of such overlaps.

Third, we must note the recurring role of judicial discretion and the perils that the “new judicial activism” brings to the shaping of the legal landscape. By their erratic and unsystematic jumps

between the issues of scope, ambiguity, consent and interpretation, coupled with their convenient overlooking of licensing issues, and equally non-systematic approach to issues of privacy and publicity harms – based on their notions of fairness – the American courts are greenlighting certain uses and forbidding the others. This translates into business practice, which grows into an industry standard, which eventually becomes unchallengeable due to its dominance.

Fourthly, user consent is rendered almost completely irrelevant. Aside from a quick glance within the scope of the discussion on contract formation (in which consent requirement has devolved to completely fictional opportunity to assent), the courts are not examining its quality. Nor are they examining the compatibility of their online consent requirements with the federal copyright policy, geared towards protection of author's interests.

Lastly, American legal system encourages a creation of industry-wide, consumer-unfriendly licensing schemes. Because it defers to industry standards at so many critical points – when assessing ambiguity, scope, unconscionability, implied rights – yet gives courts very limited room to police them – it encourages the companies to obtain as wide licenses as possible. This is, due to the form of user agreements, largely not followed by any meaningful loss of consumer goodwill.

All of this creates a perfect storm: one in which users become utterly incapable of exercising their intellectual property rights in order to control how platform providers use their content. Under American law, such relinquishment of control is effectively mandated by the courts – despite its inherent incompatibility with the core postulates of intellectual property laws.

### **3. Norway<sup>480</sup>**

#### **3.1. Contract formation in Norway**

Formation of contracts under Norwegian law may, in a fashion that follows our discussion under the US law, be carried out as an inquiry into the existence and exchange of binding statements or acts between two parties. Whereas US law required the existence of objectively proven mutual assent – as evidenced by a binding offer and acceptance – and presence of consideration, Norwegian law takes a more permissive approach: it deems contracts to be formed based on an exchange of qualified promises, which become binding once they've reached other party's

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<sup>480</sup> In the following Norwegian jurisprudence will be cited in the same format as foreign jurisprudence. In national tradition the cases are however only indexed by their case number, e.g. HR-2010-2060-A, or, for Supreme Court cases prior to 2016, by their official publication number, e.g. Rt. 2004 s. 675. The cases can be found in Norwegian in the Norwegian online database [www.lovdato.no](http://www.lovdato.no) by searching by their case number or official publication number.

knowledge, and requires no consideration or *causa* to deem a contract legally binding.<sup>481</sup> At the same time, Norwegian judges have far more discretionary power when ruling on matters of contract formation than their American counterparts – as Norwegian law of contract formation centrally features several discretionary doctrines.<sup>482</sup>

The first one of these is the one of freedom of form: under Norwegian law, it means that the parties are (generally) capable of entering into contracts in any manner they see fit, so long that the qualified exchange of promises has taken place. While this might, on the surface, seem similar to the American rejection of contracting formalities, we will see that the principle has broader application in Norway. This results in less technical approach to contract formation than the one routinely employed by the US courts: for instance, a discussion on differences between different kind of wrap agreements would be uncharacteristic in the Norwegian setting.

Another doctrine of central importance is the one of reasonable expectations in contract formation – which, somewhat simplistically stated, forbids parties from inserting surprising terms into agreements.<sup>483</sup> The doctrine of reasonable expectations may be also seen as reflective of parties' duty of loyalty to each other, which, under Norwegian law, also extends to pre-contractual stages; thus giving Norwegian judges significant corrective mechanisms.

In light of these remarks, this chapter will first turn to the existence of valid assent – in terms of a binding offer and acceptance. While realizing that this is not *the only* model of entering into the contract under the Norwegian law (considering the above described promise principle),<sup>484</sup> such inquiry is the most practical one: not only is the exchange of an offer and acceptance the dominant model in Norwegian Contract Act, but it is also the one directly applicable in the context of digital user agreements. In addition to this, following this structure allows for better comparisons between the Norwegian and American model, thus making it easier to identify the contrasts and common grounds between the two systems. After the chapter is done exploring the validity of mutual assent in general, it will turn to the discretionary doctrines in Norwegian law and assess how specific terms might fare if they are to be applied to licensing agreements.

### 3.1.1. Offer

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<sup>481</sup> See Geir Woxholth, *Avtalerett*, chapter 2; Hov and Høgberg, *Alminnelig avtalerett*, chapter 3; Johan Giertsen, *Avtaler*, chapters 5-9.

<sup>482</sup> See Giertsen, page 47-58; Woxholth, page 90-109; Hov and Høgberg, page 128-157.)

<sup>483</sup> See NCA §36

<sup>484</sup> See Woxholth, page 71-72; Giertsen, page 42-43; Hov and Høgberg, page 114-115.

The Norwegian Contract Act<sup>485</sup> does not contain an explicit definition of an offer; nor does it enumerate the requirements of its validity – apart from designating the moment when it becomes binding on the offeror. This is why the discussion on what can be seen as a binding offer must largely be built upon the case law; which, depending on a particular aspect of offer-making, may be more or less developed.

In general, to form a binding offer under Norwegian law, it can be said that the statement needs to contain the essential elements of the contract (i.e. identify them or make them identifiable by reference); that it needs to be made with an (objectively established) intention to be bound (i.e. not as a joke, by mistake, etc.); that it needs to be communicated to the offeree and to reach his/her consciousness. In light of this, and following the structure of our discussion under the US law, we will therefore turn to the questions of definiteness of the terms and standards of communication.

### **3.1.1.1. Definiteness**

The first step in determining whether digital user agreements contain legally valid offer lays in determining the legal fate of ambiguous and vague terms. As we have established in the previous chapter, digital user agreements typically contain a number of terms that can be interpreted in several conflicting ways – sometimes featured centrally in the copyright licensing clause.<sup>486</sup> Can this ambiguity lead to the conclusion that no contract had been formed?

This would be unlikely to happen under Norwegian law. Indeed, terms such as “right to use”, “those we work with”, and “meaning of your expressions” are open to interpretation; and they well might be pertaining to the very core obligations assumed by the parties. Still, Norwegian courts remain bound by two principles: promise principle, which states that party’s unilateral promises become binding when they reach other party’s knowledge; and principle of protecting justified expectations – which gives courts the broad discretionary power to deem terms to be binding or non-binding, assessed in the light of different relevant circumstances. These two principles create a powerful synergy: courts can decide whether enforcing ambiguous terms would, in a specific case before them, be justified from a standpoint of legal certainty.

It is worth noting that this approach is not directly incorporated in the Contract Act; rather, it is extrapolated from case law dating back as early as nineteenth century. Norwegian courts are not following a particular bright-line test to establish whether certain ambiguous statements are too

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<sup>485</sup> Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (Norwegian Contract Act) [1918] LOV-1918-05-31-4

<sup>486</sup> See Chapter 2

ambiguous to be upheld; rather, they focus on expectations that those statements create, assessed in the light of general circumstances of the case, and (where possible) prevailing practices in the field.

A long line of cases illustrates this point, starting with Rt-1924-929,<sup>487</sup> where a debtor's father wrote a letter inquiring about his son's debt. Having received a reply from a creditor, he wrote a letter apologizing for the delay in payments, and wrote "we'll see what we can do"; creditor later assessed that this communicated his willingness to take over his son's debt. The court disagreed, noting that these particular words were all too common, and that they did not reflect a desire to be bound. In Rt-1998-761,<sup>488</sup> a bank customer attended a meeting with a bank representative, in order to discuss a potential large-sum loan agreement; bank representative stated that they will "take him to the goal"; which the customer later claimed constituted a binding offer. Supreme Court disagreed, holding that in the light of the circumstances – a large, risky investment; lack of definition of some of the essential terms; prevailing industry practices – such statement could not be seen as binding; in fact, the court went as far as to say that such perception of this statement may amount to negligence. In Rt-2010-1478,<sup>489</sup> Supreme Court dealt with a case in which two parties negotiated a joint construction project; in ruling that they had not entered into a binding agreement, the Court took note of the fact that the parties have not reached an agreement on the price or the ownership of the finished building.<sup>490</sup> The court explicitly stated that the parties could not have had a justified expectation that an agreement had been formed, given that so many central points were never discussed.

At the same time, agreements which contain terms open to interpretation, yet which simultaneously create a justified intention of being bound, will be treated as properly formed: in these instances, uncertainty will simply be addressed as a question of interpretation. This follows from the application of the principle of protection of reasonable expectations. If the courts were to invalidate agreements with ambiguous terms, rather than attempt to construe their meaning through interpretation, parties' justified expectations – and, in the broader picture, legal certainty itself – would certainly be undermined.

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<sup>487</sup> *M. O. Lilletvedt v O. Homve* [1924] Rt 1924 s 929 (Supreme Court of Norway)

<sup>488</sup> *Bjørn Hansen Invest AS, Bjørn Hansen AS, Bjørn Hansen, Kari Thorbjørnsen and Synnøve Hansen v Christiania Bank og Kreditkasse ASA* [1998] Rt 1998 s 761 (Supreme Court of Norway)

<sup>489</sup> *Morten Aadalen v Kjell Busk, Erik Engebretsen and Dirk Klusmeier* [2010] Rt 2010 s 1478 (Supreme Court of Norway)

<sup>490</sup> For a commentary, see: Geir Woxholth, 'Når er bindende avtaler inngått? - Høyesteretts dom 3. desember 2010 (HR-2010-2060-A)' (2011) 1 *Nytt i privatretten* 8. Lower courts have followed the same lines of reasoning, *see e.g. Increased Oil Recovery Limited v DNO International ASA* [2014] LB-2013-142037 (Borgarting High Court, Norway); *A v B* [2013] LA-2012-105891 (Agder High Court, Norway); *Oceansaver AS v Bollfilter Nordic ApS* [2013] LB-2013-91174 (Borgarting High Court, Norway)

The question still remains: how does this general approach extend to ambiguous licensing clauses?

On one hand, in cases where licensing agreement contains uncertain terms – or, more precisely, fails to clearly designate which economic rights purport to be licensed – an argument may be made that no agreement is entered into, following the Supreme Court cases in Rt-2010-1478 or Rt-1998-761. Licensing copyrighted content is, after all, similar to complex construction or financial agreements, in a sense that there are numerous key elements on which parties need to reach an agreement. Using a generic term – such as “right to use content” – may therefore be seen as a non-binding statement, as its lack of specificity could, arguably, directly result in inability to prove justified expectations of contract formation.

This argument, however, is rather flawed. Norwegian courts have shown the clear willingness to assess the contractual terms in a broader context: they won’t only look at the wording of the clause itself, but also at its purported purpose, relationship between the parties, industry practices, and other relevant factors. In the context of user-content licensing, holding that *simple use* of an ambiguous term amounts to the lack of justified expectation of contract formation does not hold up. Several factors are of the essence here.

First, it is evident that the courts are preoccupied with refusing to uphold ambiguous agreements in the instances where parties have not express a clear intention to be bound. In the present case, platform providers *do* intend the clause to be binding on the users – as evidenced by their explicit statements. Their use of broad and ambiguous terms is not, in other words, a result of a hesitance to be bound by an agreement: rather, it flows from the previously discussed desire to draft agreements as broadly as possible.

This, of course, does not mean that all the terms which are included into the agreement will be binding, simply because platform providers *intend* them to be so: after all, users have their reasonable expectations as well, and some terms might be in breach of those expectations. Given that this problem is not merely associated with *ambiguous*, but rather *surprising* terms, it is discussed in greater depth below.

Secondly, it is also evident that the established industry practices go in favor of using terms which may be interpreted in several ways. This use of non-statutory terms may be explained by several different factors – ranging from platform provider’s desire to use user-friendly language, to their attempts to make the agreement compatible with as many governing laws as possible. In that regard, standardization of ambiguous terms across the industry makes it difficult to establish, in particular cases, that essential elements of the agreement have not been agreed upon. These elements are thereby much more likely to be construed during an interpretations stage.

Lastly, invalidating licensing clauses as improperly formed would, if carried out solely on the basis of ambiguous wording, effectively result in a situation where the courts require parties to use a short set of pre-determined licensing terms. Differently put, outright invalidation of licensing agreements which use ambivalent, non-statutory terms, would in effect require all parties to adhere to pre-defined lists of terms – “magic phrases” that give rise to an enforceable licensing deal. This would, of course, be unacceptable from the standpoint of Norwegian law: such heavy formalism would undermine the principles of freedom of form and, in extreme cases, party autonomy itself.

One may reasonably question whether the use of broad, open and ambiguous licensing terms is in line with other principles of Norwegian law; notably, its interaction with (Norwegian) copyright law’s principle of specialty (i.e. narrow interpretation of licensing terms, discussed below), may be called into question. This is, however, a question closer to the problems of interpretation than formation.

Consequently, to summarize: under Norwegian law, unclear licensing terms do not, by the virtue of being ambiguous, lead to contract invalidation on the grounds of improper formation. This holds true provided that other formation requirements are fulfilled, and that the term *can* be given a meaning at the interpretation stage. This meaning may, as we will discuss later, be construed using various interpretative devices and in light of varying criteria, ranging from the plain meaning of the words, to circumstances surrounding the contract conclusion.

Such approach seems, on the surface, to be directly aligned with the above-discussed approach followed in the United States: after all, both systems will – whenever possible – hold that a contract had been formed, despite ambiguity in its terms. Both legal systems cite certainty and protection of parties’ reasonable interests as grounds for doing so – and while these principles may be construed somewhat differently, the hesitance to invalidate the agreements remains the same.

### **3.1.1.2. Communication**

In order to become binding, an offer must be communicated to the offeree. This rule is not explicitly stated in the Norwegian Contract Act; although its essential elements may be extrapolated from §7, which deems that an offer is irrevocable, unless recalled prior to reaching offeror’s knowledge. In other words, an offer becomes legally binding under Norwegian law only from the

moment that an offeree becomes aware of its contents; and thereby, any offer which is not properly communicated to an offeree, fails to serve as a basis for contract formation.<sup>491</sup>

In construing whether an offer was properly communicated, Norwegian law resorts to an objective test, asking whether an offeree has had a reasonable opportunity to review the terms before an agreement was entered into.<sup>492</sup> It is clear that whether s/he *actually* read the terms is irrelevant;<sup>493</sup> but very few decisions discuss the way that the terms are presented in any significant depth. So far, Norwegian courts seem to be more preoccupied with temporal aspects of contracting – i.e. assessing whether the terms were reasonably accessible *at the time of contracting*, or if they were provided at a later point. This results in an analysis which is far less form-oriented and technical than the one employed by the U.S. courts.

A case illustrative of this is Sandefjord District Court's decision of April 14 2009,<sup>494</sup> in which plaintiff Skogland went to a dog exhibition show and received a flyer advertising photographic services. The flyer stated: "Use this chance to get photos that you can use in ads, on personal webpages, keep in albums or on your walls!". The flyer was distributed by Fagervik, a professional photographer – and Skogland proceeded to purchase several of his photographs. These were given to her as high-resolution digital files, recorded on a CD; this CD also contained a document which stipulated that they may neither be modified, nor made available on the Internet in their original resolution. Skogland cropped a photo and used it in a newspaper ad for dog sale, and she uploaded a high-resolution image to her personal website, bringing Fagervik to file a lawsuit. Skogland claimed that she never opened the Word document containing the licensing terms.

The court held that Skogland did not infringe on Fagervik's rights, as the licensing terms delivered with photos were not binding:

"The conditions contained in the Word document recorded on the CD cannot be seen as a part of the agreement. This is because the defendant was not presented with those terms before entering into an agreement, and because she did not become aware of them before using the photographs."

Even in cases where courts make remarks about how effectively the terms were communicated, such remarks are principally made in an attempt to paint a picture of a broader relationship between the parties, and assess which terms could have been reasonably expected in an agreement of that particular type. In *Rt-2004-675*, a cucumber producer suffered a large economic loss when

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<sup>491</sup> See Woxholth, *Avtalerett*, page 71; Giertsen, *Avtaler*, page 40; Hov and Høgberg, *Alminnelig avtalerett*, page 114-116.

<sup>492</sup> Jo Hov and Alf Petter Høgberg, *Alminnelig avtalerett* (Calax 2009); Viggo Hagstrøm, *Obligasjonsrett* (2. utg. edn, Universitetsforl. 2011)

<sup>493</sup> Id

<sup>494</sup> *Åsfrid Ann Larsen Fagervik v Eva Skogland* [2010] TSAFO-2009-184676 (Sandefjord District Court, Norway)

his plants became infected by a fungus carried via the bamboo sticks, which were used to provide support for the growing plants. Bamboo sticks were delivered with an invoice, which stated that seller's liability would be limited to the amount of the invoice. The Supreme Court held that this provision was not binding on the buyer, as it "contained a significant transfer of risk between a buyer and seller", but "was not given a prominent place in the agreement, and was, instead, placed in the end-part of the document, alongside provisions on interest fees, changes of price due to currency fluctuations, and final return dates", nor was "a part of negotiations between the parties".<sup>495</sup> In a similar case from 1968, the Supreme Court held that reservations printed out on a sheet of paper enclosed with a purchase could not bind the purchaser, as it was not reasonable to expect that this medium would be used to convey contractual reservations.<sup>496</sup>

Case law involving *digital* agreements is very sporadic; in a few cases where the courts were asked to assess their validity, the analysis failed to include any review of the layout of the terms, their wording or prominence. Granted, cases usually involved commercial parties, and the courts might have more stringent requirements when it comes to presenting the terms to the consumers; but even in this case, analysis is likely to stay at the high level of abstraction.

There is little evidence in the current case law to suggest that the terms contained in the digital user agreements would be held *prima facie* invalid on the grounds of being improperly communicated. The courts *will* require the platform providers to show that users had *an opportunity to review* the agreement before they started using their services; but in the context of licensing of user-generated content, this will very usually hold true. This follows from our observation made in Chapter 3 – that online platform providers nowadays routinely present their terms to the users as a combination of a clickwrap and browsewrap design, where users are given an option to open an account, alongside a link to the governing terms. Shrinkwrap agreements might be problematic – but they are hardly relevant in the context of participative Web.

Courts would also be likely to take a pragmatic approach and hold that whether or not the terms have reached the offeree's (user's) knowledge needs to be assessed through the standard of reasonableness, especially in the light of common practices in the industry. In this regard, they might take note of the fact that most Internet users would, if presented with a hyperlink which leads to legal terms, understand that clicking this hyperlink would allow them to review the said

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<sup>495</sup> *Vekstmiljø AS v Aase Gartneri AS* [2004] Rt 2004 s 675 (Supreme Court of Norway), commonly referred to as "Agurkpinne-dommen"

<sup>496</sup> *Trestandard A/S v Halling Tekstil v/Olav A. Nakken* [1968] Rt 1968 s 1188 (Supreme Court of Norway), commonly referred to as "Pakkseddel-dommen", at page 1193

terms. Thereby, the courts might end up with a conclusion superficially similar to Second Circuit's ruling in *Fteja*: that the terms are properly communicated so long as the 'prolific Internet user' understands them to be accessible.<sup>497</sup>

At the same time, it may be argued that the substantive content of the agreement in question – in our case, the inclusion of copyright licensing clauses – would give rise to an increased scrutiny in regards to communication of the terms. Drawing an analogy to the *Agurkpinne* case, a court might look into a digital user agreement and state that copyright licensing clauses do not take a prominent enough of a place to put users on notice of their existence; or, in line with *Pakkeseddel*, that users usually do not expect such clauses to be found in the online agreements.

The problem with these arguments is that they cannot be made on a general scale – as pertaining to the practice of licensing user content *as such*. Rather, the court will likely assess whether a particular clause was in line with user's reasonable expectations – and this, in turn, will depend on a plethora of factors, including how the terms were communicated, what the industry standards are, what can be deemed reasonable in light of the particular use of content in question, and so forth. Proper communication of the terms therefore becomes an interpretative moment – a fact that the courts will look into when trying to establish the reasonable *scope* of the licensing clause – rather than a way of striking down licensing clauses as improperly formed. Such device would not, however, be a creation of the law's quest for formalism – rejected both in copyright licensing and general contract law – but rather, an inherent feature of a system grounded in principles of reasonableness and good faith.

To put it in a less abstract manner: we can imagine a scenario in which one licensing clause authorizes several uses – some of which may be reasonably expected by the users, and some which may not. For instance, Facebook's acquisition of a right to create derivative works from uploaded videos would (arguably) make it reasonable for the users to expect that the video will be encoded, resized and optimized; but it may be unreasonable to expect that Facebook has the rights to make substantive editorial changes, write a book based on the video, and so forth. In establishing which of these uses are authorized, the court will interpret the licensing agreement – and in the process of doing this, will take note of the way that the terms were presented. (In the present example, it might hold that Facebook should have obtained a more explicit permission to write a book based on uploaded videos.) This way, communication of the terms is more likely to be taken into account

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<sup>497</sup> See Chapter 2, 2.1

when construing the scope of the license, than as a tool for holding that no license had been formed at all.

Consequently, licensing terms, as employed today, are unlikely to be invalidated on the grounds of improper communication alone – although the presentation of the terms may have a role to play in the construction of their scope, as discussed in greater depth below.

### **3.1.2. Acceptance**

For the parties to enter into a binding agreement, an offer given by one party needs to be accepted by another. Under Norwegian contract law, there are no strict rules on the form in which acceptance needs to be made. Aside from acknowledging that acceptance needs to fully conform to the offer (at the very least in relation to its substantial elements), the law does not impose formal restrictions on conduct which can amount to contractual acceptance. In practice, this means that an offer may be accepted through a wide range of means –from an explicit declaration by a party, its conclusive conduct, or, in special circumstances, even through party’s inaction.

Therefore, stated generally, Norwegian courts treat acceptance of proposed contractual terms in the same light they treat offers: they assess whether – in the light of a particular transaction – party’s conduct could reasonably (i.e. objectively) be interpreted as an acceptance, in a sense that it would create reasonable reliance on other party’s behalf.<sup>498</sup> This assessment is made on a case-by-case basis, and is heavily influenced by the applicable fact pattern; notably, it gives courts broad discretionary mechanisms aimed at preserving legal certainty and balance between the parties.

Much as when determining what constitutes a proper communication of an offer, the discussion is hardly ever technical – the courts are not bogged down by overly specific rules pertaining to certain types of conduct. Case law addressing the acceptance of terms in digital contracts is sparse; and while some analogies may be drawn from general contract law cases, there is no consistent analytical framework to speak of.

An illustration of this principle may be seen in TOBYF-2016-69076, where a salesman of used cars brought a lawsuit against FINN.no, Norway’s largest digital marketplace. Several of his ads had been reported by other users of the website as violating the terms; at the same time, his company happened to be under police investigation for fraudulent conduct. When FINN became

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<sup>498</sup> See Hagström, *Obligasjonsrett*

aware of this fact, it deleted his user profile. He filed a lawsuit, asking the court to order FINN to re-open it.

FINN claimed that they were not legally bound to do this; part of their argument relied on the view that they had never entered into a binding contract with this user – a contract which would oblige them to give him access to their platform. They pointed to the fact that no general user agreement existed at the time, and that users had to enter into separate agreements with FINN *each time* they would post a new advertisement (by clicking to indicate that they agree with these terms before an ad could be uploaded). The court was therefore presented with a question: can these series of acceptances of individual terms, pertaining to individual advertisements, amount to entry into a contract relationship which governs the entire use of the website, and crucially, can such general agreement include an obligation not to terminate user accounts without proper cause?

The court's reasoning was very laconic:

“The court holds that a contractual relationship is formed between FINN and the user when s/he opens a user account, and that FINN cannot terminate user accounts without cause. An exclusion of a user must be grounded in user terms, and in this case, [FINN's] terms of advertising. The court takes note of the fact that terms of advertising regulate when FINN can delete individual ads from their service. Such regulation seems unnecessary if FINN were otherwise able to terminate user accounts freely.”

This case illustrates the point: the courts will look at the facts of an individual case, and will establish the existence of consent based on the broader principles of reasonableness, which, in terms of *general* accession to user agreements offered by most online platform providers, will lead to finding consent. In other words, from a contract formation standpoint, the courts are likely to find that users have entered into an agreement with platform providers.

However, the situation becomes far more complex when discussing the accession to *individual terms*; unlike their American counterparts, Norwegian courts have the power to deem that users have entered into an agreement with online platform providers, but that they have only accepted *some* of its terms. Already at the formation stage, therefore, Norwegian courts can deem certain terms not binding on users – without resorting to the use of enforcement defenses. This can be achieved through two primary mechanisms: either by the application of the doctrine of surprising terms, or by deeming that the acceptance of the terms was made under a “hidden dissent”. I will present the doctrinal framework first, and then turn to the application to the specific terms.

### **3.1.2.1. Surprising terms**

The doctrine of surprising terms is grounded in the principle of protection of reasonable expectations, and is especially used in controlling standardized agreements. It gives courts broad discretionary powers to assess whether a certain term is so unexpected in the agreement of a certain type, that it would be unreasonable to hold that it forms a part of the (otherwise fully binding) agreement. This essentially gives courts a “red pen” with which they can simply strike certain terms out of the agreement.

Factors which the courts take into account when determining whether a certain agreement is surprising (and consequently non-binding) vary from case to case. Presentation of the terms can have a very significant impact: the more prominently visible the term is, the more difficult it will be to invalidate it as surprising. Classical examples of surprising terms in the legal literature therefore include terms written in small letters, placed in unexpected places, or written in a foreign language.<sup>499</sup>

Bergsåker explains that these requirements are not necessarily cumulative: “It can easily be held unreasonable to uphold contractual terms which are well-hidden (small font and/or hidden placement), or which are formulated in a way which is difficult to understand (e.g. in a foreign language). However, the unreasonableness does not grow stronger if both circumstances are present. As consumer ombudsman Hans Petter Lundgaard explained in a radio interview: if something is written in a font so tiny as to make it unreadable, it does not matter in which language it cannot be read.”<sup>500</sup>

*Content* of a specific clause can also be taken into account when assessing whether or not it is of surprising character; here, the courts will usually look into the prevailing practices in the industry and the pre-existing relationship between the parties. In Rt. 1973 s. 967, for instance, the Supreme Court took note of the fact that the terms in question were practiced for over 50 years within the industry – and could therefore not be seen as surprising. Similarly, in the aforementioned *Pakkeseddel* case, the Supreme Court simply stated that it would be unreasonable to expect the parties to use packaging slips to communicate contractual clauses in a current setting.<sup>501</sup> In a similar vein, Giertsen gives an example of a cellphone subscription plan which contains a termination period which is much longer than the one that consumers usually expect in the field. He claims that such terms would be seen as non-binding.

Courts may also take note of the way that individual terms affect the balance between the parties. Should they find that a particular term is especially onerous on the non-drafting party – and especially so in the case where that party also happens to be a consumer – the courts may opt to

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<sup>499</sup> See Trygve Bergsåker, 'Kontraktsrettslige generalklausuler' (1980) *Jussens Venner* 133; Johan Giertsen, *Avtaler* (3rd edn, Universitetsforlaget 2014) page 84

<sup>500</sup> Bergsåker, 'Kontraktsrettslige generalklausuler' page 143

<sup>501</sup> *Trestandard A/S v Halling Tekstil v/Olav A. Nakken* page 1193

discretionally hold that the individual term is not a part of an agreement. Usually, the courts will find grounds to hold that such imbalance exists in the cases where contractual terms significantly deviate from the default rules of the applicable law; combined with a potentially surprising presentation of the said term, invalidation on the grounds of improper formation seems likely. Giertsen names the *Agurkpinne* case as a prime example of this: the terms were invalidated as improperly formed *both* because they were presented in a surprising way (on a delivery invoice, at the end of the document), *and* because they put the drafting party (seller) in a materially better position than s/he would have been if the default rules of the Sales Act were applicable.

### 3.1.2.2. Hidden dissent

Another situation in which courts may invalidate individual terms as improperly formed arises when parties have a different understanding of a particular term; since there is no (real) match between the will of the parties in the regard of the said term, it cannot be seen as part of the contract.<sup>502</sup> The party wishing to prove hidden dissent would, in line with the doctrine of protection of reasonable expectations, have to establish that their interpretation of the contractual terms was objectively plausible. Following this, the court would assess the consequences of such dissent.

First option at court's disposal is the invalidation of the entire agreement. A classical example comes from the case Rt. 1915 s. 1030, in which the parties entered into an agreement which stipulated that ship "Jenny" would carry ice to London on "three consecutive trips". However, it soon became clear that the parties had a different understanding of the term "consecutive trips"; while one party thought it designated carrying of the cargo in both directions, the other one assumed that the ship would be returning from London without any cargo. The court concluded that this meant that the parties had not entered into a binding agreement – as they did not agree on the essential terms. In similar cases, where disputed terms lie at the very center of the agreement, courts are likely to hold the same.

On the other hand, there are cases in which the courts can recognize that hidden dissent exists, but still choose to uphold the agreement, filling in any potential gaps with the applicable default rules. This approach is used whenever it can be justified in the light of upholding legal certainty and reasonable expectations of the parties.

A good example would be a sales agreement in which parties interpret a non-essential term in different ways; there could, for example, be a forum selection clause stipulating that "all disputes will be resolved in Paris", which one party may interpret as "Paris, France", and the other one as "Paris, Texas, USA". In such instances, Norwegian courts would deem the forum selection clause to be

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<sup>502</sup> See also: Woxholth, *Avtalerett*, page 79-80; Giertsen, *Avtaler*, page 68-69.

non-binding, given the hidden dissent; they would then proceed to resolve the question of jurisdiction based on the applicable default rules (in this case, those of private international law), while still upholding the sales agreement.

It must be noted that this doctrine has not, so far, not been extended to standardized contracts, and that it remains uncertain to which extent the courts would extend its application to non-individually negotiated terms.

### 3.1.2.3. Unilateral reservations

There is a third doctrine which is relevant to acceptance of standardized terms: the doctrine of unilateral reservations, developed through two landmark Supreme Court cases.

The first Supreme Court case, Rt-1940-450, pertained to the right to broadcast gramophone recordings, and the scope of unilateral conditions. The Norwegian Broadcasting Corporation (Norsk rikskringkasting) had acquired a number of gramophone records, with the intention of broadcasting them over the radio. In 1932, following a series of failed negotiations between the Norwegian Broadcasting Corporation and five gramophone manufacturers, the gramophone manufacturers printed a notice on the records, *prohibiting the broadcasting of them*. The Norwegian Broadcasting Corporation did, however, continue broadcasting the gramophone records. The question before the Supreme Court was whether the broadcasting was illegal from the time the gramophone manufacturers started printing the said prohibitions. The Supreme Court did not find the printed prohibition to, in itself, make the broadcasting illegal; the printed prohibition was not meant to be serious, but rather a “reservation” for future legal steps should they be broadcast.<sup>503</sup> Gramophone records acquired before the manufacturer sued the Norwegian Broadcasting Corporation could therefore be broadcast legally. Gramophone records acquired *after* these legal steps had been taken, however, could not, according to the Court, be broadcast legally. At this time, the Norwegian Broadcasting Corporation had received a clear notice of the manufacturer’s intention with its ban on broadcasting.<sup>504</sup>

A similar case arose in Rt-1955-536. The defendant, Lindberg Radio, had rented out speakers for entertainment purposes. Lindberg Radio had oftenly, but not also, also disposed of the gramophone records used with the speakers. The Norwegian chapter of The International Federation of the Phonographic Industry approached Lindberg Radio, informing him on the

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<sup>503</sup> *The Gramophone Company Limited and Norges Musikkhandlerforbund v Norske Rikskringkasting* [1940] Rt 1940 s 450 (Supreme Court of Norway) page 453. See also Ole-Andreas Rognstad, 'Opphavsrettens balanse. Avtale eller lovregler?' in Antonina Bakardjieva Engelbrekt and others (eds), *Festskrift till Marianne Levin* (Festskrift till Marianne Levin, Norsteds Juridik AB 2008) page 525.

<sup>504</sup> *The Gramophone Company Limited and Norges Musikkhandlerforbund v Norske Rikskringkasting* page 453

prohibition against public broadcasting of gramophone recordings, and asking him to conclude a contract with them. The gramophone records contained a written prohibition of broadcasting. As in the aforementioned case, the question before the Supreme Court was whether the broadcasting of the gramophone records was illegal. A majority of the Supreme Court found the prohibition to be effective from the time Lindberg Radio had received a notice from the The International Federation of the Phonographic Industry, citing *inter alia* the case from 1940.<sup>505</sup> The minority of the court dissented, and voted in favor of Lindberg Radio. The minority reached this result, in part, because the prohibition of broadcasting had not been properly accepted by Lindheim Radio.<sup>506</sup> *The unilateral condition was not of a contractual nature, and could not be seen as being contractually binding.*<sup>507</sup> The minority accepted that unilateral conditions could be regarded as binding in contractual situations with a stronger connection between the producer and consumer, but not in more complicated contractual relations pertaining to mass-produced articles, as in this case.<sup>508</sup>

The minority's view has, according to Rognstad, made the biggest impact on Norwegian copyright law, with legislation expressing skepticism towards unilateral conditions.<sup>509</sup> In the *travaux préparatoires* of 1983, regarding legislative changes in the Norwegian Copyright Act, the working group expresses that unilateral conditions normally will not be contractually binding, citing the minority's views in Rt-1955-536.<sup>510</sup>

#### 3.1.2.4. Application to licensing clauses

The doctrine of surprising terms, hidden dissent and unilateral reservations have a strong bearing on licensing of user generated content; as already at the contract formation stage, they equip the Norwegian decision-maker with a set of robust tools for holding that users are not bound by certain licensing terms.

It seems clear, however, that those terms would have to be of a particular character:

- they would need to be presented in a surprising way; and/or
- differ drastically from the established business practices; and/or
- be made to the detriment of the consumer, especially in the light of default rules; and/or

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<sup>505</sup> *Lindberg Radio A/S and Tono v Electric Musical Industries, The Decca Gramophone Co. Ltd. and A/S Nera* [1955] Rt 1955 s 536 (Supreme Court of Norway) page 544

<sup>506</sup> *Ibid* page 546

<sup>507</sup> *Ibid* page 546

<sup>508</sup> *Ibid* page 546

<sup>509</sup> See Rognstad, 'Opphavsrettens balanse. Avtale eller lovregler?' page 526-527

<sup>510</sup> Justisdepartementet (Norwegian Ministry of Justice), *NOU 1983:35 Endringer i åndsverkløven m.v* (Norsk offentlig utredning, 1983) page 62-63

- the consumer should be capable of demonstrating that s/he relied on a (objectively reasonable) interpretation of the term which differed from the one that the platform providers had in mind.

It seems clear that the *core licensing terms* – those pertaining to the transfer of individual economic rights – do not fall within the scope of this umbrella. That platform providers will have the right to copy, modify, and publicly display things which users post online is rather natural; even if there were no contractual clauses to that effect, an implied license would likely be found – as they would not be able to provide their services without the ability to dispose of user content in this way. These terms are, as shown in the previous chapter, present in the entire industry; all of which makes it clear that they are neither particularly surprising, nor particularly onerous – at least *prima facie*.

As an extension of this, even if the user claims that s/he understood certain core licensing terms in a way which preclude certain *uses* that platform providers rely upon, the courts are unlikely to hold that the core licensing term has not been agreed upon. Rather, they would raise this as a question of interpretation, in order to establish whether certain uses fall within the scope of the licensed right.

For example, users may claim that they did not understand Facebook’s “right to publicly display” content as the one extending to physical public display of user’s photos in an art gallery. Given that there were, however, some uses falling within the scope of this right which were (objectively assessed) agreed upon – such as displaying of the same content on user’s Facebook “timeline” – the court is unlikely to invalidate the licensing term as improperly formed. Rather, it will try establishing whether the disputed use fell within its scope through the process of interpretation.

Situation changes drastically, however, when we start talking about *ancillary* terms – such as those stipulating that licenses are royalty-free, worldwide, given for all modes of exploitation, sublicensable, transferrable, perpetual, irrevocable, and so forth. First, as we have seen, these terms are standardized to a lesser extent; while some of them appear in virtually all user agreements (‘worldwide’, ‘royalty-free’), others are less frequent (‘unrestricted’, ‘use in future mediums’, ‘irrevocable’, ‘perpetual’).<sup>511</sup> Secondly, empirical studies already testify that these terms are much less anticipated by Internet users than core licensing terms – making it easier to assess their surprising character.<sup>512</sup> Thirdly, they create a framework which is drastically more onerous on users than the one which would exist if default rules (i.e. implied licenses) were in place.

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<sup>511</sup> See Chapter 3

<sup>512</sup> Casey Fiesler, Cliff Lampe and Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation* (ACM 2016)

This makes it very likely that Norwegian courts would hold that most drastic and onerous of ancillary licensing terms are not legally binding. The mechanisms they would employ are flexible enough to be adjusted to details of each individual case, and would certainly be heavily context-dependent. This makes it difficult – and, given that the technology changes every day, even perilous – to assess which individual terms would be “most likely” to be invalidated. However, some general observations may be made about the factors influencing individual ancillary terms, in order to illustrate the diversity of analytical frameworks likely to be employed by Norwegian courts.

*Royalty-free* licenses are unlikely to be invalidated as improperly formed, provided that the website does not function as a marketplace for user-generated content; that such content is not exploited commercially in unforeseen ways; and that no mandatory/default rules on author remuneration are in place to protect user’s interests. Reasonable expectations are a key factor here. In today’s world, for example, it is natural to expect that websites such as Facebook, YouTube and Twitter won’t pay a license to host their user’s content. However, other websites – such as Shutterstock, which sells stock photography – would have a harder time proving that this term is not surprising (and consequently non-binding).

Licenses extending to *unknown future uses* or those allowing companies to use content in an *unrestricted* way may be invalidated, but in this regard, the court would have one additional consideration to make: the regard to be had for the principle of specificity in copyright licensing. This principle is especially important as an interpretative factor (and is thus discussed below); but in simple terms, it states that agreements are to be construed as only transferring the rights they explicitly mention, and that interpretative risk is to be borne by a non-author party. Should a particular future use depart drastically from technological features existing at the time of user’s accession to the licensing agreement, the court may find the term to be surprising and invalid; and the discussion here is likely to be blended with the discussion on the interpretation of the scope of license.

*Perpetual* licenses would very likely be invalidated. All the factors that the courts may take into account would count for such holding. Such licenses are unduly burdensome on users; they may create conflict with mandatory norms of other areas of law (e.g. rules on data retention); users are not able to foresee the consequences of giving these licenses (having no knowledge on how the technology may develop over the years); and they certainly tilt the balance established by the default rules in platform provider’s favor. The same holds true for *irrevocable* licenses – although these may also be invalidated on the grounds of conflict with mandatory norms, as discussed later.

What all of these cases have in common is the heavy role of judicial discretion in balancing different factors and determining which terms can “reasonably be perceived as accepted”; not so far away from what Radin describes as “wildcard doctrines”. This raises an immediate question – which consequences does this have for stakeholder’s interests in predictability; and/or does it help establish a reasonable balance between the rights of the parties? We will address this question in greater depth in the next chapter.

### **3.1.3. Formation in Norway: a conclusion**

At a first glance, writing about formation of licensing agreements under Norwegian law seems like an exercise in futility: case law is sparse, and no coherent analytical framework has emerged to address the specific challenges of electronic contracting. The courts are not focusing on technicalities of term presentation, and the centuries-old model of an exchange of an offer and acceptance is interpreted loosely and flexibly.

But the moment one looks closer, it becomes obvious that, in comparison to the United States, Norwegian contract law confers significantly more power on judges: it allows them to effectively police user agreements for unreasonable terms at the earliest of stages – and this shifts the discussion from the one focused on technical presentation of the terms (browsewrap/clickwrap), to the one focused on the fundamental fairness of the terms.<sup>513</sup>

## **3.2. Contract interpretation in Norway**

Even though Norwegian law gives the courts a possibility to rule that some terms do not form a part of an agreement between a user and an online platform, majority of the terms will still be considered to form a part of the contract. In that case, it becomes necessary to determine the scope of the rights transferred upon platform providers through a process of contractual interpretation.

Much like under the American law, the discussion here can be separated into two inquiries: interpretation of the scope of transferred rights, and interpretation of the scope of contractual limitations on those transfers. Norwegian law, however, differs from American in one key regard: when interpreting contracts, the court will be able to use a wide array of sources, as well as interpretative moments and gap-filling devices. In other words, literal text of the agreement

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<sup>513</sup> This, in result, has direct legal consequences: if Norwegian law is more protective than US law, it may be applicable by the virtue of private international law, despite the presence of a choice-of-law clause. *See generally* Chapter IV.

becomes just one of the many considerations that the court will take into account;<sup>514</sup> which is why we will present these sources first, explain their hierarchy, and then proceed to discuss their application to Terms of Service agreements.

The goal will not, of course, be to assess interpretation of individual terms in great depth; rather, much like under American law, the discussion will primarily be focused on interpretative devices that judges may have at their disposal, as well as the implications of application of these devices to licensing agreements.

### 3.2.1. Contractual text

Starting point in contract interpretation before Norwegian courts is the text of the agreement; as the Supreme Court declared in Rt. 2011 s.1641: “[contractual] text will always be a central element in contract interpretation”.<sup>515</sup>

That contractual text is *relevant* for interpretation of a contract is straightforward and obvious: after all, it is presumably the most accurate reflection of the parties’ will.<sup>516</sup> But how is it to be *interpreted*?

Initially, it should be observed that Norwegian courts generally adhere to the principle of objective contract interpretation: interpreter’s goal is to establish the meaning of the contract in the light of parties’ reasonable expectations; and subjective intent of a party (i.e. what a party *meant* to say) is rarely seen as a decisive factor in construing the scope of the agreement.<sup>517</sup> By resorting to objective interpretation of contractual terms, the legal system protects foreseeability and third party interests.

On its face, this approach seems directly aligned with the one followed by the American courts, where, as we have seen, “a contract has, strictly speaking, nothing to do with the personal or individual intent of the parties”.<sup>518</sup> And yet, concluding that Norwegian notion of objective interpretation fully corresponds to the American one would be utterly misguided. As Cordero-Moss warns: “If one is content with comparing how each justice system *describes* its own rules and

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<sup>514</sup> See *Skanska Norge AS and Entreprenørforeningen Bygg og Anlegg (EBA) v Florø Idrettssenter AS* [2010] Rt 2010 s 961 (Supreme Court of Norway): “That terms must be interpreted objectively does not, however, mean that they are to be exclusively interpreted through their natural linguistic meaning. Their text must be read in the light of the goals they are protecting, as well as other policy considerations.” See also Giuditta Cordero-Moss, 'Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger - noen komparativrettslige betraktninger' (2016) 51 Jussens Venner 276

<sup>515</sup> *Anne Kjellberg, Ellen Kjellberg and Halvor Kjellberg v Bygdøy Boligspareklubb for Eldre and Samarbeidende DES-klubber i Norge* [2011] Rt 2011 s 1641 (Supreme Court of Norway) paragraph 53. In this case, the contract in question was the statutes of a housing cooperation («borettslag»), in which subjective elements of interpretation will have a less prominent role compared with «regular» contract interpretation.

<sup>516</sup> Erlend Haaskjold, *Kontraktsforpliktelser* (2nd edn, Cappelen Damm Akademisk 2013). However, exceptions exist in certain fields (e.g. testament-writing)

<sup>517</sup> Hov and Høgberg, *Alminnelig avtalerett* page 252

<sup>518</sup> *Hotchkiss v National City Bank of New York*, aff'd *Ernst v Mechanics' & Metals Nat. Bank of City of New York (appeal)*, aff'd *National City Bank of New York v Hotchkiss (appeal)*, and aff'd *Mechanics' & Metals Nat. Bank v Ernst*; see note 388

principles, there is a risk of overlooking how the law is actually applied. The understanding which each legal system has of its own terms (what lies behind language such as ‘objective interpretation’ or ‘good faith’) may differ from system to system, even if similar words are used in both systems.”<sup>519</sup> Consequently, a closer look at Norwegian way of interpreting contractual text is required; various interpretative devices will first be laid down descriptively, after which a direct application to licensing terms will be discussed together with consideration of other interpretative sources.

### **3.2.1.1. “Natural understanding” of text**

Since reasonable expectations play a vital role in contract interpretation, courts usually start by interpreting terms in their common linguistic meaning.<sup>520</sup> The Supreme Court has invoked “natural understanding” of the terms on numerous occasions, and has expressed that “when it comes to interpretation, a starting point must be contract’s objective content, [ascertained] from a natural understanding of its language”.<sup>521</sup>

It may happen that within certain fields, expressions are commonly used in a way which departs from their natural linguistic meaning; in this case, the courts would usually use the field-specific interpretation. However, when it comes to consumer contracts, as per Contract Act §37, such interpretation would only be applicable if it is more advantageous to the consumer than the one based on the common meaning of the term. (For a more detailed discussion on §37, see section IV below.)

### **3.2.1.2. Legal definition of contractual terms**

Contracts sometimes contain terms which may be found in different legislative materials: a prime example of such use is the enumeration of statutory rights in copyright licensing agreements (“right to reproduce, create derivative works of, publicly display, etc.) In such instances, barring clarifying statements from the parties, legal terms that are used in the contracts will be interpreted in a way that corresponds to their meaning in the relevant legal sources (e.g. laws and case law).<sup>522</sup> This would, in theory, mean that, in a similar fashion discussed under the U.S. law, scope of rights

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<sup>519</sup> Cordero-Moss, 'Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger - noen komparativrettslige betraktninger', emphasis added

<sup>520</sup> See further: Giertsen, *Avtaler*, page 120-124; Woxholth, *Avtalerett*, page 389-394; Hov and Høgberg, *Alminnelig avtalerett*, page 255-257.

<sup>521</sup> *Cigna Insurance Company of Norway SANV v A* [1997] Rt 1997 s 1807 (Supreme Court of Norway); Giertsen, *Avtaler* page 120; *Julie Bakke v Lars Ottar Grebstad* [1988] Rt 1988 s 1317 (Supreme Court of Norway)

<sup>522</sup> See e.g. *A v UNI Forsikring - gjensidig skadeforsikringselskap* [1989] Rt 1989 950 (Supreme Court of Norway); Haaskjold, *Kontraktsforpliktelser* page 214

transferred by the use of statutory terms would correspond to the way that those terms are explained in the Copyright Act, its preparatory works, judgements and the legal literature.

This rule of interpretation follows from the simple premise that the parties wanted to use legal terms in their original meaning, and, consequently, that they were aware (or should have been aware) of the consequences of using such terms (or, more precisely, aware of their content and scope). This is not seen as an infringement of freedom of contract: parties are always free to supplement the “legislative” meaning of legal terms in their contract with definitions of their own (to the extent permitted by party autonomy).

This, however, requires clear contractual wording. In the Norwegian Supreme Court case Rt-2012-1779 (*Victocor*), the parties disputed, *inter alia*, whether or not the contract exhaustively regulated the contractual relationship between the parties. A provision of the Contract read as follows:

“The Contract constitutes the whole agreement between the parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter it covers.”<sup>523</sup>

One of the parties, Hydro Aluminium AS, claimed that the question of notices of defect was to be solved exclusively after the contract. However, the Supreme Court disagreed with Hydro. After interpreting the word “contract”, the Supreme Court did not find sufficient evidence that the said provision was also meant to regulate its relationship to Norwegian law. Hence, the contract could be supplemented with Norwegian law. The Supreme Court proceeded, supplementing the contractual requirement of sending in a notice of defect, with the general requirements for sending notices of defect under Norwegian law, even though the contractual relationship itself was not directly regulated by a specific Norwegian piece of legislation.<sup>524</sup>

An interesting question may be raised in light of private international law dimension: when parties use legal terms in their contract, and do not supply them with any definitions of their own, which law should determine the scope of the right transferred? For example, if user from Norway gives Facebook ‘right to copy’ his material, is the scope of the term ‘copy’ to be determined in line with Norwegian law, or in line with American law?

On one hand, this can be seen as a pure question of interpretation, and insofar as American law is chosen to govern the contract (subject to limitations discussed in the previous chapter), its own rules on copyright law should be used to assess the meaning of the term. On the other hand, an argument may be made that these core terms fall within the scope of copyright law, and consequently outside the scope of party autonomy in choice of law. In other words, since parties cannot choose copyright law which will govern their transaction, they should not be able to use that copyright law to determine the scope of their obligations, either. Given that different systems can define terms in widely diverse ways, this can have vast impact on the interpretation of contract.

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<sup>523</sup> *Hydro Aluminium AS v Victocor Technologies SA* [2012] Rt 2012 s 1779 (Supreme Court of Norway) paragraph 53

<sup>524</sup> *Ibid* paragraph 54-56

As per our discussion in the previous chapter, however, this question might be of limited significance in a consumer relationship.<sup>525</sup> Within EU, when dealing with choice of law clauses, the court should, per Rome I Regulation, assess the impact of diverging interpretations and select the one more favorable for the consumer. In Norway, the same result is likely to be reached – not only through the application of a specific conflict principle, but through the application of Contract Act §37, discussed below.

### 3.2.1.3. Unclear principle (*contra proferentem* doctrine)

If a particular term is ambiguous – i.e. capable of being interpreted in several different ways – Norwegian courts will apply a specific interpretative device known as the ambiguity rule, which states that the agreements are to be interpreted against the party who drafted them, the party who had the best chance of reducing the ambiguity of the terms, or against the party with more resources and knowledge.<sup>526</sup> As the Supreme Court stated in 2006: “an unclear agreement is to be interpreted against a party which *should have* expressed itself more clearly”.<sup>527</sup> In other words, this party will assume the risk for contractual uncertainty.<sup>528</sup>

The rule has a long history in case law, and is seen as one of the central interpretative devices in Norwegian law. Given that some degree of ambiguity can be found in various terms, application of this doctrine has led to substantial shifts in contractual rights and obligations between the parties.

Several cases are illustrative of this.

In Rt. 1997 s. 1807 (Cigna), the case related to the interpretation of an insurance policy. The parties disagreed on how the term “invalidity” was to be interpreted – the insurance company claimed that the term was to be interpreted as “medical invalidity”. The Supreme Court disagreed with the insurance company, and found the wording of the insurance policy to be ambiguous. Unclear terms in insurance policies will normally be interpreted in disfavor of the author.<sup>529</sup>

Rt. 1929 s. 1106: This case also relates to the interpretation of an insurance policy. In this case, the insurance policy in question was a life insurance. The parties disagreed on how to interpret the widow’s declaration of deposit, and how this affected the widow’s right to collect the said life insurance. After finding the insurance policy to be unclear, the majority of the Supreme Court interpreted the contract in the widow’s favor, explicitly stating that the contract was to be interpreted strictly after its wording when the other party was a professional party (in this case a bank).<sup>530</sup> In legal

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<sup>525</sup> See generally Chapter IV

<sup>526</sup> Haaskjold, *Kontraktsforpliktelse* page 317

<sup>527</sup> *Tønnevoldsgate 30 AS v Are Grobeim Berntsen, Signe Marie Bråten, Erik Charles Johannessen, Thordis Johansen, Åse Nesbu, Martha Herdis Nylund, Berit Olsen, Inger Margrete Terland, Marta Kornelia Torvildsen and Per Arne Kvinge* [2006] Rt 2006 s 1715 (Supreme Court of Norway), emphasis added; Giertsen, *Avtaler* page 132

<sup>528</sup> Hov and Høgberg, *Alminnelig avtalerett* page 285

<sup>529</sup> *Cigna Insurance Company of Norway SANV v A* page 1813. See also Hilde Hauge, 'Unfair Contract terms in Nordic Contract Law' (2015) *The Nordic Contract Law* 157, see page 162

<sup>530</sup> *Den norske Creditbank v fru Dagny Petersen* [1926] Rt 1926 s 1106 (Supreme Court of Norway) page 1106-1107

theory, this judgment has been cited as an expression for the “rule of professionalism”, in which unclear contractual terms are to be interpreted against the professional party.<sup>531</sup>

Rt. 1994 s. 1: The contract in question related to the delivery of electric power, specifically which price the power was to be sold for. Regarding the question of interpretation, the Supreme Court found the relevant terms to be unclear. In the relationship between the parties, the author of the contract had a special responsibility to make the relevant terms clearer – consequently, the terms should as a starting point be interpreted against the author when the circumstances changed.<sup>532</sup>

Rt. 2009 s. 160: In this case, the dispute related to the interpretation of a construction contract, specifically on when a period of notice was to start. The Supreme Court noted that when the contract was unclear as to when the period was to start, this should be interpreted in the disfavor of the party which authored the contract.<sup>533</sup>

Given that this general rule has its special application both within the field of copyright and consumer protection law, we will not explore its general form in greater depth here.

#### **3.2.1.4. Interpretation in favor of a consumer**

While the general unclarity principle has its basis in case law, rather than legislative acts, there are special rules pertaining to interpretation of consumer contracts to be found in the Norwegian Contract Act. Namely, its §37 clearly stipulates that “The terms which are not individually negotiated, and which are part of an agreement between a professional and a consumer, the following applies: [...] 3. When in doubt about the interpretation of a contractual term, the term is to be interpreted to consumer’s advantage.”<sup>534</sup> This provision was introduced into Norwegian Contract Act in 1995,<sup>535</sup> as means of implementing the EU Unfair Terms Directive Article 5, which states that “where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.”<sup>536</sup>

It appears clear from the preparatory acts that this provision is only to be applied if the term is ambiguous:

“This provision shall apply only if there is *doubt* about the interpretation of a contractual term which is not individually negotiated. If a clear interpretation of the relevant condition emerges from the wording [of the agreement], possibly supplemented with other interpretative devices, section [37] does not provide grounds to take consumer interests into account in this context.”<sup>537</sup>

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<sup>531</sup> Alf Petter Høgberg, 'Tolkningsstiler ved kontraktstolkning – en introduksjon' (2006) 41 Jussens Venner 61, *see* page 99-100

<sup>532</sup> *Tinfos Jernverk A/S v Vest-Agder Energiverk* [1994] Rt 1994 s 1 (Supreme Court of Norway) page 12

<sup>533</sup> *Stryn Energi AS v NCC Construction AS* [2009] Rt 2009 s 160 (Supreme Court of Norway) paragraph 45

<sup>534</sup> Norwegian Contract Act § 37

<sup>535</sup> Lov om endring i lov av 31. mai 1918 nr. 4 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (Amendments to the Norwegian Contract Act) [1995] LOV-1995-01-06-1

<sup>536</sup> Unfair Contract Terms Directive Article 5

<sup>537</sup> Justis- og politidepartementet (Norwegian Ministry of Justice and Police), *Ot.prp.nr.89 (1993-1994) Om lov om endring i avtaleloven* (Odelstingsproposisjon, 1994), emphasis on the original

At the same time, Giertsen warns against drawing conclusions from the fact that this rule of interpretation has its roots in the *Unfair Terms Directive*; as one should note that §37 gives rise to eliminating *any* conflicting interpretation of a particular term, provided that such interpretation is favorable to the consumer. In other words, if there are two ways of interpreting a particular provision of the agreement, neither one of which is unfair or unreasonable, the one more favorable to the consumer would prevail, despite the fact that the other provision would not be so unfavorable to the consumer as to qualify as unfair.<sup>538</sup>

Case law on the provision remains relatively sparse. Courts seem to rely on the broader application of principle of unclarity even in consumer relationships; and rarely take provisions of §37 (and consequently, the Directive) into account.<sup>539</sup>

However, it seems like the tide is shifting; over the last years, there has been a marked increase in reliance on these provisions, which Giertsen attributes to rising awareness/competence withing the field of EU law among the Norwegian lawyers.<sup>540</sup>

### 3.2.1.5. Copyright licensing: specificity principle (*in dubio pro autore*)

Some interpretative devices may be applicable on the basis of the substantive content of the agreement, and in the field of copyright licensing, one such interpretative device is known as the ‘specificity principle’.

This principle is stated in Norwegian Copyright Act §39a as follows: “if the author has assigned the right to use the work in a specific manner or by specific means, the assignee shall not have the right to use it in another manner or by other means”. While the term ‘specificity principle’ is not used in the legislative text itself, it is well-established in the case law and literature.<sup>541</sup> Yet its meaning is significantly wider than what can initially be assessed from the wording of §39a; as Rognstad explains:

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<sup>538</sup> Giertsen, *Avtaler* page 136

<sup>539</sup> Supreme Court’s jurisprudence illustrates this in practice, see *A v Danica Pensjonsforsikring AS* [2014] Rt 2014 s 379 (Supreme Court of Norway) that pertained to the interpretation of an insurance contract. The claimant, A, entered into the insurance policy in 1999. In January 2002, he sustained a head injury. The injury led to the medical invalidity of 15%. Because A failed to pay the insurance premium, the insurance policy was terminated in December 2002. In November 2012, the same head injury led to the full medical invalidity of A. A claimed that, since the head injury was sustained at a time when he was covered by the insurance, he had the right to receive insurance, even though the insurance policy was terminated almost 10 years before the injury led to full medical invalidity. The Supreme Court disagreed with the claimant. According to the Supreme Court, the specific terms of the insurance policy were not ambiguous when interpreted in light of the general terms of the insurance – and when the contract was not ambiguous, the ambiguity rule did not come into play.

<sup>540</sup> *Ibid*

<sup>541</sup> Ole-Andreas Rognstad, *Opphavsrett* (Universitetsforlaget 2009) page 343. See also *Posten Norge BA v Knut Løkke-Sørensen* [2001] Rt 2001 s 872 (Supreme Court of Norway); *Norsk rikskringkasting AS v Margaret Emdal and Norsk Filmforbund* [2006] Rt 2006 s 752 (Supreme Court of Norway)

“Taken literally, the provision does not state more than what is already obvious: a limited transfer of right is limited, and cannot be expanded further than what is agreed upon. But if the provision is to have some independent meaning, it must be interpreted more broadly. It is commonly accepted that this provision must be seen as an expression of a principle of restrictive interpretation in favor of the author, in instances where the scope of the limited transfer of rights is *unclear*.”<sup>542</sup>

In support of this conclusion, Rognstad invokes two cases: Rt. 2001 s. 872, and Rt. 2006 s.752.

The first case, Rt. 2001 s. 872, concerned the question of property rights to postal stamps. The parties disagreed on how the agreements were to be interpreted. The Supreme Court notes, under reference to § 39a, that the assignee will receive the rights directly derived from the agreement; the author retains all other rights. Consequently, unclear contracts will be interpreted restrictively, and in favor of the author. Therefore, the assignee must hold the risk and responsibility for unclear or ambiguous contractual terms.<sup>543</sup>

The latter case, Rt. 2006 s. 752, concerned the use of a logo without the author’s consent. The claimant, who had previously worked for the defendant as a graphic designer, argued that the defendant’s use of her intellectual property was in breach of her rights after the Copyright Act. The Supreme Court interpreted the contract, and concluded that the contract in question was not unclear. Accordingly, there was no need for the court to apply the principle of specificity.<sup>544</sup>

It may be observed that this principle possesses a degree of international recognition: in that regard, Norway is not unique in interpreting licensing agreements in favor of authors. Rognstad explains that the principle is rooted in two primary considerations: protecting author’s relationship with his/her own work, and ensuring that authors, as presumably weaker contractual parties, are adequately protected in contractual arrangements.<sup>545</sup>

Of course, as we have seen, the same conclusion – that an agreement should be interpreted against the stronger party – can be achieved either through the application of the unclarity principle, or, in our case, through the application of §37 of Contract Act. Rognstad still claims that the application of Copyright Act’s specificity principle is inherently valuable: not necessarily because the outcome reached under its application would otherwise be unattainable, but because it “serves as a useful reminder that there are special considerations to be taken into account when interpreting agreements in the field of copyright law”.<sup>546</sup>

I believe that this observation is *vital* to interpretation of user content licensing clauses under Norwegian law. Without Copyright Act’s specificity principle, an interpreter would be left with the general tools available when interpreting mass-market consumer contracts; s/he would know that terms are to be interpreted in consumer’s favor, but would be left with little guidance on which terms *are actually* more favorable. Specificity principle solves this dilemma by introducing copyright

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<sup>542</sup> Rognstad, *Opphavsrett* page 344, emphasis in the original

<sup>543</sup> *Posten Norge BA v Knut Løkke-Sørensen* page 879

<sup>544</sup> *Norsk rikskringkasting AS v Margaret Emdal and Norsk Filmforbund* paragraph 62

<sup>545</sup> Rognstad, *Opphavsrett* page 345

<sup>546</sup> *Ibid* page 346

interests into the equation, thus providing the answer: *the more favorable interpretation is the one which would result in a more limited transfer of rights.*

This follows not only from the wording of specificity principle and theoretical observations on the *ratio* of its existence, but was also stated explicitly in the preparatory acts for the new Norwegian Copyright Act:

“If there is some doubt [about how the term is to be interpreted], the interpretation is to be carried out in favor of the author. This will normally mean that in cases where several natural alternatives exist, the alternative which *gives the most limited transfer of copyright* is to be chosen.”<sup>547</sup>

The application of this principle therefore gives an interpreter a clear set of guidelines to follow when interpreting licensing agreements, while, at the same time, it allows for a retention of a high degree of flexibility. We will discuss its direct application to user content licensing clauses together with the application of other interpretative devices, at section X below.

### **3.2.1.6. Copyright licensing: conditions and covenants**

As we have seen in this and previous chapter, licensing provisions sometimes contain limiting text: an illustrative provision might be: “you give us a license to use your content, *subject to your privacy settings, for the limited purposes of operating this service*”. It seems clear from the foregoing that such limiting text would be interpreted in favor of users – or, better said, that its scope would be broadly construed. But we are still faced with the similar dilemma we have raised when discussing American law: if such a term is breached by a platform provider, would this constitute copyright infringement, or would it constitute a breach of contract? As we have seen, the answer may be crucial to determining which remedies users may have access to.

For the sake of simplicity, I will adhere to the same terminology used when discussing American law: copyright-relevant provisions which limit the scope of license will be designated as “conditions”, whereas purely contractual provisions will be called “covenants”. Note, however, that this terminological distinction is largely absent from Norwegian law.

Starting point in Norwegian law is that conditions *can* be separated from covenants, and that this is an interpretative question to be solved on a case-by-case basis. The case law on the topic is, however, rather surprisingly sparse;<sup>548</sup> and it is clear that, unlike in under American law, there are no general presumptions in favor of interpreting terms as covenants to be found.

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<sup>547</sup> Kulturdepartementet (Norwegian Ministry of Culture), *Høringsnotat: Forslag til ny lov om opphavsrett til åndsverk mv.* (Høringsnotat, 2016) page 245

<sup>548</sup> Rogstad, *Opphavsrett, with reference to Det norske Aktieforlag v Hans Brække* [1902] Rt 1902 s 22 (Supreme Court of Norway). Also known as the "Robinson Crusoe"-case. Verdict not available online.

Norwegian law does not, at least in a general form, contain a rule equivalent to the one claiming that terms are to be assessed as covenants rather than conditions whenever possible. One could, however, wonder if the *opposite* result may be reached under Norwegian law if specificity principle is to be strictly applied. In other words, if contractual terms are to be interpreted in favor of author, and they could be seen either as conditions (giving author access to copyright-specific remedies) or covenants (denying access to such remedies), shouldn't the first interpretation prevail? At the same time, *for the principle to be applicable*, one could claim that a *prima facie* showing needs to be made that the term being interpreted is a copyright-relevant term; in which case the unclarity principle and §37 Contract Act would be applicable. Whatever the answer might be, such interpretation, even if it were to be adopted, would unlikely rise to a *general* presumption that terms are to be interpreted as conditions, given that the courts would need to consider the broader implication of such holding for the balance of copyright system.

In literature, often influenced by Danish, Swedish and German case-law, one finds attempts to draw a line between the terms which are directly tied to *exercising* of an exclusive right, and terms which are a *consequence* of having certain rights.<sup>549</sup> The distinction remains somewhat abstract, as authors acknowledge that there could be cases of overlaps between the two types of terms, and cannot therefore be used to draw any clear lines.

Another approach embraced in the literature is to treat terms as conditions if they have a *separate economic or market value* (e.g. they target a new market),<sup>550</sup> and if they (sometimes cumulatively assessed) are *connected to exclusive rights*.<sup>551</sup> This seems largely analogous with the “nexus test” approach established by American courts in MDY;<sup>552</sup> interpretative problems remain abundant, and identifying best practices would take a doctoral thesis of its own.

For our purposes, though, it is sufficient to note that Norwegian courts, much like American ones, would have a hard time sanctioning all breaches of licensing terms as cases of copyright infringement. A deeper inquiry, carried out on a case-by-case basis, would be needed; and in light of diverging policy considerations counting for both findings, a line may be difficult to draw. Which exact consequences this will have on consumers will inherently vary on how different the remedies they might be entitled to receive— which are briefly discussed in section 3.4.

### 3.2.1.7. Contractual text: a conclusion

As we have shown in this section, interpretation of contractual text in Norway may differ significantly from the widespread practices in the United States. Whereas American law privileges certainty and literal contract interpretation, and contains presumptions about intention to give

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<sup>549</sup> Ole-Andreas Rognstad, *Spredning av verkseksemplarer: om konsumpsjon av rettigheter i eksemplarer av vernede åndsverk* (Cappelen Akademisk Forlag 1999) page 334

<sup>550</sup> Ibid page 336

<sup>551</sup> Terje Lundby Michaelsen, 'Opphavsrettsavtaler. Med særlig sikte på opphavsrettskrenkelser og kontraktsbrudd' (Master thesis, Universitetet i Oslo 2006)

<sup>552</sup> See Chapter V, subsection 3.2.1.5

broad licensing grants, Norwegian law builds upon principle of reasonableness and assigns ambiguity risk to the stronger party. Central to this thesis is the finding that Norwegian interpretative devices explicitly ask interpreter to *minimize the scope of transferred rights* whenever there is any uncertainty to be found in the agreement.

However, this is not where our discussion on interpretation of licensing terms can end: while we have seen how *contractual text* is likely to be construed, one must note that Norwegian courts see text of a contract as only one source of interpretation. We therefore now turn to other sources which may be relevant.

### 3.2.2. Other interpretative sources

#### 3.2.2.1. Contract-related circumstances

It is often pointed out in the Norwegian legal literature that, alongside the text of the contract, *all relevant contract-related circumstances* will be assessed when interpreting its scope; these can include pre- and post-contractual relationship between the parties, details of negotiations, goals that the agreement attempted to attain, industry practices, interpretation of similar contracts in other industries, and so forth.

This gives an interpreter broad discretion to carry out an in-depth inquiry into the “true will” of the parties; and contractual clauses which aim to limit this ability, such as an ‘entire agreement’ clause, are of limited effect.<sup>553</sup>

Several cases are illustrative of this. See e.g. Rt. 1989 s. 122 (Rørmateriell), where the Supreme Court interpreted the contract in a way which was the most able to fulfil the object of the contract. In this case, the parties disagreed on which party that was contractually obligated to cover the maintenance costs. Between the lessor and the lessee, the Supreme Court found the latter party to have the strongest interests in the maintenance of the building.<sup>554</sup> Hence, the contract should be interpreted so that the lessee would be the party obligated to bear these costs.

See also Rt. 1973 s. 967, in which the Supreme Court presumed that, where there were no clear indications otherwise, a contract was presumed to conform to the existing industry practice on the field.<sup>555</sup>

Equipped with such tools, courts can effectively set aside unreasonable terms – not by claiming that they are unreasonable *per se*, but by “reading in” alternative meanings of contractual terms in

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<sup>553</sup> Viggo Hagstrøm, 'The Nordic Tradition: Application of Boilerplate Clauses Under Norwegian Law' in Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Boilerplate Clauses, International Commercial Contracts and the Applicable Law, Cambridge University Press 2011)

<sup>554</sup> *Stavanger kommune v Rørmateriell Pipe Supply A/S* [1989] Rt 1989 s 122 (Supreme Court of Norway) page 128

<sup>555</sup> *Industrimaskiner A/S' konkursbo v G. Mathisen Spedisjon A/S* [1973] Rt 1973 s 967 (Supreme Court of Norway) page 971

light of the broader circumstances. Given that the courts are still bound by interpretative rules of §37 of the Contract Act and §39a of Copyright Act, however, any conclusions to be drawn from such circumstances *are to be made to the benefit of consumer*. Contrasted with the American approach, this works as an important safety valve: as we have seen, under American law, standardization of the broad licensing terms *leads the courts to holding that agreements need to be interpreted broadly*; whereas in Norway, this standardization may *only* be taken into account if it shows that a narrow, rather than a broad, grant is to be found.

This means that, at least in theory, Norwegian law avoids the pitfall of perpetuating unfair terms simply because they are prevalent on the market; and thus, it ensures that the scope of rights transferred remains minimal.

### 3.2.2.2. Default rules

Another important source of contract interpretation under Norwegian law are the default rules of the applicable law. In other words, courts will sometimes use legislative text to interpret the contract, despite the fact that the applicable rule is not of a mandatory character and that it may be superseded by exercise of party autonomy.

In so doing, the courts will not explicitly *override* will of the parties; rather, they will start from the presumption that the default rules are established as to guarantee the proper balance between rights and obligations of each party, and that the parties, when entering into a contract, would presumably like to preserve this balance.<sup>556</sup> If the approach strikes as overly paternalistic, it should be borne in mind that it can simply be perceived as yet another reflection of the system's application of the principles of good faith and reasonableness. The more that the terms depart from a reasonable balance established by the default rules, the more heavy evidentiary burden on the side relying on them is imposed.

According to Hov/Høgberg, some key aspects in this regard would be the degree of deviation from the default rules, the relation between the contracting parties, and the nature of the default rules the contractual terms deviate from. Because of the relationship between the contracting parties in standard contracts between consumers and professional parties, the courts may be more prone to use the default rules in interpreting the contract, at least compared to standard contracts between two professional parties.<sup>557</sup>

Generally, the court will understand the wording of the contract as an expression for the parties' will. See e.g. Rt. 2003 s. 1132, where the Supreme Court pointed out that contracts between professional parties was to be interpreted objectively, in lieu of clear indications that the parties had a common

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<sup>556</sup> Hov and Høgberg, *Alminnelig avtalerett* page 277

<sup>557</sup> *Ibid* page 279

understanding which deviated from the natural understanding of the contract's wording.<sup>558</sup> The party which claims that the contract is to be interpreted contrary to an objective understanding of the wording bears the evidentiary burden of proof, see Rt. 2002 s. 1155.

Within the field of copyright licensing, one can think of several categories of default terms that would be pertinent for contract interpretation. First, as we will see in section 3.3.2 below, licenses are generally treated as non sub-licensable or transferrable. Secondly, some transfers of rights are subject to special waivers, as we will see when discussing moral rights in section 3.3.2.2. Lastly, specificity principle itself may be seen as an expression of background law, especially given the context that follows from the preparatory works, case law and literature.

Such factors may crucially be taken into account when establishing the scope of rights transferred, and will, again, count towards finding that the license which users grant to platform providers is narrow, rather than broad.

### **3.2.2.3. Policy considerations (*reelle hensyn*)**

It is well-established in Norwegian law that the courts are free to base their rulings on *policy considerations*; the term is somewhat vague, but it essentially entails that the courts can rule in the individual cases based on their notion of fairness and reasonableness of the outcome. This will usually happen in the areas where laws are silent or regulate matter in an ambiguous way, but policy considerations are best seen as a source of law of their own; in theory, they could override clear meaning of the legal provisions in cases where its application in a specific case would lead to an unreasonable result.

It is difficult to generally say what falls within the scope of *policy considerations*. It is clear that the term is significantly different than the one we have used when discussing private international law's notion of public policy. Here, the field of application is both wider and deeper. Judges can use general principles of prohibition against misuse of rights, standards of good faith and reasonableness to assess to which extent the outcome of the case would be *fair*; or they can look into the public policy considerations in the individual areas of law – the legislative goals behind adoption of certain laws being the most obvious consideration.

In the field of user-content licensing, Norwegian courts could likely employ this device to hold that the scope of the license that users have granted is narrow, rather than broad. Starting point may be the desire to protect users as weaker parties; but the courts may also look into the copyright

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<sup>558</sup> *Fornebu Boligspar AS v AS Norronafly* [2003] Rt 2003 s 1132 (Supreme Court of Norway) paragraph 34-35

policy reasons which would go against finding broad licensing grants (discussed in next chapter), and decide to construe terms narrowly – or ignore them entirely.

### **3.2.3. Application to licensing clauses; conclusion**

We have now see the plentitude of sources and interpretative devices that Norwegian judges have at their disposal. The question is: what does this mean for the interpretation of user-content licenses? An equally pertinent question would be – how does this compare with the American approach, and what are the consequences of these divergences?

We can generally observe that the first consequence of applying Norwegian copyright and contract law to a licensing clause would result in a *severe narrowing of its scope*. Whereas American law privileged broad reading of licensing terms, largely based on their standardization and explicit meaning, Norwegian law applies the principle of specificity and its embodiment of Unfair Terms Directive to render the scope of license as narrowly as possible.

This would certainly extend to *core licensing terms*. While their meaning may, in theory, be ascertained from legislation, in cases where any doubt emerges as to whether a particular use falls within the scope of a particular clause, the courts are to presume that the use is infringing.

To give a (somewhat recurring) example: a term “right to create derivative works” can entail creation of thumbnails, but it can also entail creation of a canvas painting based on an uploaded photo. *The moment that user of an online platform can show that there is reasonable doubt as to whether or not the term encompassed a specific use, Norwegian court is to presume that it did not.* The court will therefore assume that the right to create derivative works only extended to thumbnails, relying on devices ranging from specificity principle and §37 Contract Act, to policy considerations.

*Ancillary* licensing terms (‘perpetual’, ‘worldwide’, ‘royalty-free’) are also to be interpreted narrowly and in favor of the author. However, their wording usually leaves much less space for interpretation than the one presented by the core licensing terms. As such, they are more likely to be invalidated as surprising (i.e. deemed non-binding), or as unreasonable under §37. The court may still decide to depart from their meaning based on policy considerations and other applicable sources.

When it comes to limitations of the scope of the clause (“for the limited purpose of operating our service”, “for any purpose we see fit”), the scope of limitation is to be interpreted as widely as possible, as this will result in a narrower license grant. The courts would be given the freedom to look beyond the very literal application of the limiting text – in contrast to American courts – and

would be able to interpret these limitations in a way which would give more deference to consumer's reasonable expectations. If a limitation is not truly a limitation – or if it expands the scope of the license – the court would be given more freedom to depart from the express provisions in the contract and reduce the scope of the licensing clause on the grounds it deems fit.

All in all, this means that Norwegian interpreter is left with a broad discretion when interpreting licensing agreements – and that any interpretation carried out by a Norwegian court, under Norwegian law, would severely restrict platform provider's ability to exploit user content; especially so in unforeseeable ways.

### **3.3. Enforcement defenses in Norway**

As we have noted while discussing the validity of user content licenses under American law, even if an agreement is deemed to be properly formed, it will not necessarily be enforced; in the US, those who owe a performance of an agreement can, as we have explored in some depth, invoke doctrines of unconscionability, reasonable expectations and voidness as a matter of public policy to prevent the other side from enforcing an (otherwise binding) agreement against them. In Norway, we find several of legal mechanisms which serve this function; here, we will focus on the reasonableness requirements set down in §36 and §37 of Norwegian Contract Act, as well as compliance with mandatory provisions of Copyright Act.

#### **3.3.1. Standards of reasonableness: §36 and §37 Contract Act**

Norwegian Contract Act contains a general provision aimed at preserving standards of reasonableness in individual contracts; in its §36, introduced in 1983, the Act states:

“A contract may be fully or partially set aside or modified insofar as it would appear unreasonable or be contrary to good commercial practice to make it enforceable. The same applies to unilaterally binding dispositions.

When reaching a decision, regard is to be had not only to the content of the agreement, the parties' [relative] positions and conditions under which the agreement was entered into, but also to the subsequent relationships and other general circumstances.”<sup>559</sup>

This article has drawn a lot of attention in the Norwegian case law and legal literature; it is apparent from wording itself that its intention is to give judges a set of flexible tools to protect reasonable expectation of the parties by setting aside or modifying terms which would lead to unreasonable results.

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<sup>559</sup> Norwegian Contract Act § 36

Yet, despite the fact that the article is often invoked in court proceedings, it seems well-established that its provisions are to be applied restrictively. As Supreme Court held in Rt. 2013 s. 769: “it must be continually underlined that a starting point [in any assessment] is that contracts are to be upheld, and that this provision [§36] represents a rather narrow exception.”<sup>560</sup> Despite this starting point, Norwegian courts employing §36 have a much broader field of discretion than American courts applying the doctrine of unconscionability.<sup>561</sup>

Authors agree that it is difficult to generally state how unreasonable a term must be to qualify for invalidation under §36: it is to be assessed in the light of too many factors that may differ drastically between different cases.<sup>562</sup>

One could note such diverging factors relevant to the assessment of reasonableness of licensing terms. First, being part of the standardized terms prepared by a party in a stronger bargaining position, they will be easier to invalidate than most other contractual terms.<sup>563</sup> As Haaskjold states: “if the terms seem affected by the misuse of bargaining power, the threshold for invalidation will be lower than if the term were employed in a more balanced contractual relationship.”<sup>564</sup> However, they are also largely standardized: and this will usually result in an increased likelihood of refusing to apply §36 to invalidate or modify the term. Yet, policy considerations and “all other circumstances” might once again shift the balance towards finding that the term is unreasonable; and it is thus difficult to make general observations.

Rt. 1993 s. 777 concerned the question of whether or not §36 could be applied to set aside an arbitration clause. The Supreme Court Appeal Committee (Høyesteretts kjæremålsutvalg) did not find §36 applicable. The Supreme Court emphasized that the arbitration clause was compiled by an international organization, and was widely recognized.<sup>565</sup>

In Rt. 2007 s. 431, one of the contracting parties claimed §36 as a basis for setting aside a liability disclaimer. The Supreme Court disagreed that §36 was applicable. In this case, the court highlighted the claimants’ ability for insurance against the type of damage incurred.<sup>566</sup> The Supreme Court also noted that the policy consideration of consumer protection has less relevance in contractual relationships where the contractual object is a communal service, and the contract affects a great

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<sup>560</sup> *A v If Skadeforsikring NUF* [2013] Rt 2013 s 769 (Supreme Court of Norway). Similar reasoning is to be found in preparatory acts, see Justis- og politidepartementet (Norwegian Ministry of Justice and Police), *Ot.prp.nr.5 (1982-1983) Om lov om endringer i avtaleloven 31 mai 1918 nr 4, m.m. (generell formuerettslig lempingsregel)* (Odelstingsproposisjon, 1982) page 30

<sup>561</sup> See also Viggo Hagstrøm, *Obligasjonsrett*, page 290-291, where he argues that the existence of § 36 is a directive for the courts to seek “reasonable solutions”, even outside of the scope of § 36.

<sup>562</sup> Haaskjold, *Kontraktsforpliktelser*, page 426. See also Hagstrøm, *Obligasjonsrett*, page 287-292.

<sup>563</sup> Haaskjold, page 429.

<sup>564</sup> Haaskjold, page 429.

<sup>565</sup> *Icelandair AS v SAS Scandinavian Airlines System* [1993] Rt 1993 s 777 (Supreme Court of Norway, Appeals Division) page 780

<sup>566</sup> *If Skadeforsikring NUF v Stavanger kommune* [2007] Rt 2007 s 431 (Supreme Court of Norway) paragraph 49

number of parties.<sup>567</sup> In a case like this, the revision of the contract would affect a great number of contracting parties negatively.

One should note, however, that §36 may not be applicable to a licensing agreement between a user and a platform provider in its entirety. This is because users will, in most instances – and as discussed in previous chapter – be acting as consumers when giving these licenses; and Norwegian Contract Act contains a special provision applicable to unreasonable terms in consumer contracts. The provision was introduced into Norwegian Contract Act in 1995, in an attempt to introduce the Unfair Terms Directive into Norwegian law; we have already seen in section X how it influences contract interpretation. But the provision also acts as a special enforcement defense, as it states that “if one or more terms of the agreement bring forth a significant imbalance of power between rights and obligations of the parties, to the detriment of a consumer, a consumer may, in a decision involving the application of §36, demand that the agreement continues to be binding on the parties, if it can continue operating with unchanged content.”

This means that there is effectively a twofold system of assessing reasonableness in practice. The “qualified unreasonableness” – the one between a consumer and a professional, which leads to a significant imbalance in rights to the detriment of a consumer – will be decided under §37; any other cases of unreasonableness – such as those leading to less significant imbalance of rights – will be adjudicated under the §36. To understand the importance of this provision in practice, one must bear in mind the fact that, given its basis in the Unfair Terms Directive, §37 binds Norwegian courts to the jurisprudence of the CJEU; which, in turn, has a large bearing on courts interpretative freedom and means of sanctioning unreasonableness.

Crucially, one can name the example of *modifying* terms of the agreement: as we have seen, under §36, a Norwegian court is allowed to modify any terms of the contract that it finds unreasonable. When interpreting the Unfair Terms Directive, however, CJEU held that such judicial practice would constitute a breach of UTD; therefore, when applying §37, Norwegian courts would *only* be able to invalidate disputed terms, not modify them.

In C-618/10, the Court reasoned that such tools would lead to results incompatible with Directive’s goals: “In that context, it is clear, as the Advocate General observed in points 86 to 88 of her Opinion, that, if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect, the order in *Pohotovost’*, paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that,

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<sup>567</sup> Ibid paragraph 50

even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.”<sup>568</sup>

In line with the court’s *general* hesitation to apply §36 liberally and expansively – and in light of the previously discussed lack of case law under §37 – one can take a closer look at how the article is being applied to copyright licensing agreements. It seems that Norwegian courts have been *very reluctant* to invalidate copyright licensing agreements by applying §36; as the line Ministry stated in preparatory acts for the new Copyright Act, “the practice indicates *that much is required* before a [licensing] agreement may be invalidated by this provision”.<sup>569</sup>

In Rt. 1997 s. 160, the question before the Supreme Court was whether the winner of a designing competition for sweaters in connection with the 1994 Olympic Winter Games was entitled to compensation for the production of sweaters in addition to the money she received as a prize. Neither the majority (three judges) nor the minority (two judges) of the court found any unfairness giving rise to the application of §36.<sup>570</sup>

Case law from lower courts confirms the courts’ reluctance to apply §36. In LB-1997-3221 (Henning Kvitnes), the contract in question contained a “life of copyright” clause. Due to the artist’s alcoholism, he sought the contract to either be terminated or revised. The Court of Appeals did not find §36 to be applicable. In its reasoning, the court emphasized that there was no apparent imbalance between the parties, that the contract was in line with industry practice, and that the author had considerable experience in the field. Nor in LB-2000-3184 (Motorpsycho) did the court find §36 applicable. This case did also, as the aforementioned Henning Kvitnes-case, concern a contract between artists and a record company. In contrast to the Henning Kvitnes-case, the artists had considerably less experience in the field. Nevertheless, the Court of Appeals did not find the contract to be so unfair that it gave rise to the application on § 36.

However, there are examples from case law in which lower courts have found §36 to be applicable. RG 2001 s. 1538 (Pogo Pops) concerned a contract between a rock band and their management. Because of the imbalance between the contracting parties, where one party had full control, and the other party had the full financial risk, the majority found §36 to be applicable. Accordingly, the court revised the contract, to restore a proper balance between the contracting parties. In the

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<sup>568</sup> C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* [2012] ECLI:EU:C:2012:349 (ECJ) paragraph 69

<sup>569</sup> Ministry of Culture), *Høringsnotat: Forslag til ny lov om opphavsrett til åndsverk mv.* page 262, *emphasis added*

<sup>570</sup> See *Margaretha Finseth v Dale Garn & Trikotasje AS* [1997] Rt 1997 s 160 (Supreme Court of Norway) page 166 and 168. As pointed out by *Hagstrøm*, the fact that the contractual terms could have been fairer, is not sufficient to apply § 36, see *Hagstrøm, Obligasjonsrett*, page 259 and 298.

“Pushwagner”-case, the City Court emphasized the imbalance between the parties, both economically and personally, and applied §36 to invalidate the contract.<sup>571</sup>

All of these factors make it rather difficult to predict how the provisions of §36-7 would be applied to user content licensing agreement. I believe that, lacking clear instructions to do so from CJEU, Norwegian courts would be hesitant to outright invalidate licensing agreements as unreasonable under §37; and given existing case law on copyright licensing and §36, they are unlikely to do so under that paragraph either. What the courts could be expected to do, in my opinion, is to use the so-called “covert techniques” to avoid unreasonable outcomes *without invalidating the term as unreasonable*. As explained in preparatory acts for §36, the courts have used such measures for a long time before a general rule on unreasonable contracts made its way into the Contract Act:

“The method the courts have used to circumvent the application of unfair contractual terms is often called ‘covert techniques’. By applying this method – as stated in the synopsis of various legal works mentioned above – the courts will circumvent the unfair terms either by saying that the terms was not a part of the contract – the term was not accepted by the contracting party – or by applying a relatively rough interpretation of the said term, so as to avoid the unfair consequences this way. The latter method is based on the rule of interpretation in which terms favoring one contractual party should be interpreted narrowly, and that the contract should be interpreted in disfavor of the contracting party which should have been clearer, e.g. against a party which has attempted to provide themselves special advantages.”<sup>572</sup>

The effect of such rulings would be the creation of the effectively three parallel standards of reasonableness: two of them being explicit (under §36-7) and one being implicit (based on judge’s ideas of fairness in a particular case). While such an approach might be desirable in terms of flexibility, overreliance on it could significantly undermine legal certainty; uttermost caution is therefore to be advised.

### **3.3.2. Compliance with norms of Copyright Act**

#### **3.3.2.1. Prohibition against transfers**

The Norwegian Copyright Act explicitly prohibits the sub-licensing of a copyright *without author’s consent*.<sup>573</sup> According to Rognstad, the prohibition against transfers applies to all instances where a

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<sup>571</sup> *A v B* [2009] TOSLO-2009-10444 (Oslo District Court), commonly referred to by the artist's name as the "Pushwagner"-case.

<sup>572</sup> Justisdepartementet (Norwegian Ministry of Justice), *NOU 1979:32 Formuerettslig lempningsregel* (Norsk offentlig utredning, 1979)

<sup>573</sup> Lov om opphavsrett til åndsverk m.v. (Norwegian Copyright Act) [1961] LOV-1961-05-12-2 § 39 b (2)

licensee gives another party the right to use the work in question.<sup>574</sup> Whether or not consent is given is assessed on a case-by-case basis.

In regards to the rationale behind this prohibition, the preparatory works refer to the relation between the author and the licensee, which is often characterized by mutual trust and a personal relationship.<sup>575</sup> According to Rognstad, the burden to prove that a consent has been given should be heavier the stronger the author's moral interests in relation to who the licensee is.

In theory, this provision could stop online platforms from sub-licensing user content to third parties; however, as we have explored in Chapter 2, virtually all the licensing agreements already stipulate that licenses are transferrable and sub-licensable, which means that platform providers could avoid the application of this provision by simply claiming that users have already consented to such transfers.

### 3.3.2.2. Moral rights: right of integrity

Norwegian Copyright Act also recognizes that authors have an interest in protecting the integrity of both their works and their artistic reputation – and that these interests should be protected independently of author's economic rights. In order to cater for these interests, the Act introduces the category of *moral rights* – non-economic rights which give authors a recourse in cases their works are exploited in ways harming their – or author's – integrity; applicable even if author has not suffered direct economic harm.<sup>576</sup> As the Act explains:

“If another person has the right to alter a literary, scientific or artistic work or to make it available to the public, this must not be done in a manner or in a context prejudicial to the author's literary, scientific or artistic reputation or to his individuality, or prejudicial to the reputation or individuality of the work itself.

The author may not waive his rights under the first and second paragraphs, unless the use of the work in question is limited in nature and extent.”<sup>577</sup>

It seems apparent that this provision is meant to be interpreted broadly; Rognstad points to the fact that the courts usually interpret its scope in line with general, author-protective principles of the Act, and warns against literal (i.e. potentially narrow) interpretation of the provision.<sup>578</sup>

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<sup>574</sup> Rognstad, *Opphavsrett* page 342

<sup>575</sup> Kirke- og undervisningsdepartementet (Norwegian Ministry of Church and Education), *Ot.prp.nr.26 (1959-1960) Om lov om opphavsrett til åndsverk* (Odelstingsproposisjon, 1960). See also Rognstad, *Opphavsrett* page 341-342.

<sup>576</sup> Note that aside from the right to integrity the act introduces other moral rights as well – such as the right to be named as the author of the work, right of access to work, and certain rights associated with the protection of classical works. These are not examined in greater detail here.

<sup>577</sup> Norwegian Copyright Act § 3

<sup>578</sup> Rognstad, *Opphavsrett* page 198

Right of integrity can therefore take on many different forms, and can protect authors and works from a wide range of undesirable situations. Notably for our analysis, it can be used to prevent others from modifying the work in certain disruptive ways – for example, by inserting commercial messages into the work – or from creating situations in which authors would be associated with certain (usually commercial or potentially obscene) messages they do not support.<sup>579</sup>

This might strike one as a perfect tool to tackle challenges posed by licensing of user-generated content. After all, it would give users the right to bring legal claims in cases where they cannot prove that they have suffered some economic harm – and it could be used to stop platform providers from associating user’s works with controversial messages, hampering unreasonable exploitation. However, there are important limitations to be aware of.

First, broad enforcement of moral rights gives rise to serious concerns: the wider the scope of such enforcement becomes, the more chilling effects it can have on other fundamental freedoms, such as freedom of speech. Right of integrity should not become a tool of censorship, used by authors to suppress any messages they disagree with – and to ensure that, the courts do not take into account author’s *subjective* notions of what is disrespectful; rather, they look into what is *objectively*, from a standpoint of a reasonable person, a breach of one’s integrity.

Such an approach is certainly logical: but, given that we live in a world where online platform providers have the power to *standardize and normalize* certain behaviors, we might see that the right of integrity will become increasingly narrow in scope – as, for example, fewer and fewer people find association of their work with commercial messages to be worrisome.

An image widely circulated on the Internet illustrates how such norm-shifting has worked in the field of data privacy. Image depicts Google Home, an always-listening device. Caption reads: “In the 60s, people were worried that governments would wiretap their homes. Today: ‘Hey, wiretap, can cats eat pancakes?’”

The second reason why moral rights offer very limited protection to online users lies in the fact that Norwegian law makes it somewhat difficult to obtain compensation for their violation, at least in cases where no economic harm has been suffered. As laid down in section 3.4 below, there is little predictability and consistency in the way that such damages are awarded by the courts, and especially so in the cases involving corporate entities acting as infringers.

Lastly, while moral rights *principally* cannot be waived, the Act explicitly states that waivers can be made, provided that the use of work is limited in nature and extent. This provision could

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<sup>579</sup> See Rognstad, *Opphavsrett* page 205, citing NJA 2008 s. 309, and NIR 1995 s. 687

potentially allow platform providers to use various mechanisms for getting users to waive their right of integrity before they engage in exploitation of their works.

Consequently, moral rights cannot be seen as a mechanism providing sufficient protection to user's core interests.

### 3.4. Remedies under Norwegian Copyright Act

Chapter 7 of the Norwegian Copyright Act contains provisions on remedies for the authors.

As a starting point, the Act gives the author who has had his or her intellectual property violated the right to *economic compensation*, referring to the “general principles of tort law”. In accordance with these principles, the author must prove that s/he has suffered an *economic loss* because of the infringing action, that there is a legally recognizable link between the defendant and the tortious action, and that there are legal grounds making the action tortious.<sup>580</sup> This largely resembles the situation with *actual damages* under the American law: for the authors of user-generated content, the first condition – economic loss – can be especially difficult to prove, rendering this remedy virtually ineffective. Rognstad argues for the existence of a non-statutory rule of compensation for violation of intellectual property rights, regardless of the economic character of the loss.<sup>581</sup>

Under the Norwegian Copyright Act, the author also has the right to *compensation for non-economic harm* if the tortfeasor has violated his or her intellectual property either *willfully* or *grossly negligently*. For violations of authors' moral rights, this will often be the only way for authors to receive economic compensation, according to Rognstad.<sup>582</sup>

On the surface, this might sound like a perfect remedy for users of online platforms: after all, they could recover damages even in cases where they can't prove any economic harm.

Yet, users would have a rather hard time obtaining any compensation, as a requirement of a *willfully* or *grossly negligently* committed infringement requires a qualified act to be *carried out by an individual*.<sup>583</sup>

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<sup>580</sup> Viggo Hagstrøm and Are Stenvik, *Erstatningsrett* (Universitetsforlaget 2015) page 17

<sup>581</sup> Rognstad, *Opphavsrett* page 403

<sup>582</sup> Ibid page 405-406

<sup>583</sup> *Trumf AS v Stokke AS, Peter Opsvik AS and Peter Opsvik; and Peter Opsvik v Trumf AS* [2012] Rt 2012 s 1062 (Supreme Court of Norway) paragraph 125-126. However, the condition of willful or grossly negligent relates to the factual circumstances. As the Supreme Court noted, the assessment under §55 disregards the tortfeasor's own legal assessment of the legality.

An actual person can commit the said acts. A legal person, on the other hand, cannot – as a non-personal subject cannot commit such qualified actions under Norwegian law.<sup>584</sup> Hence, compensation for non-economic loss requires an *actual person* to have acted in a qualified way.<sup>585</sup> This is also stated in the preparatory works of the NCA § 55.<sup>586</sup>

What this means, is that the so-called *employer's liability* is not applicable when it comes to compensation for non-economic loss.<sup>587</sup> However, the preparatory works state that the so-called *director's liability* is still effective. The director's liability is, in short, an identification between the legal person and the actual persons acting on behalf of the legal person.<sup>588</sup>

In the Supreme Court case of Rt-2012-1062, in which the Supreme Court assessed *inter alia* whether or not a company was to compensate the non-economic loss, the court debated whether or not the director's liability comes into play. A central problem in this regard, was that the alleged wrongful act was not committed by a superior in the company, but by an employee. In other words, the crux of this question was whether or not the alleged wrongful act should fall under the *employer's* or the *director's* liability. The Supreme Court concluded that this case fell under the *director's* liability, as the employee had been “delegated competence to make decisions in one of the company's main areas of interest”, citing “policy considerations”.<sup>589</sup> In other words, the Supreme Court used a holistic approach when determining the scope of the director's liability for compensation for non-economic loss after the NCA § 55. The said case is the first, and so far the only, Supreme Court case in which compensation for non-economic loss has been given to the author for violation of their moral rights.<sup>590</sup>

In this relation, another problem arises. Compensation for non-economic loss for the infringement of an author's moral rights also requires that one can single out a specific wrong-doer. Will this compensation still be a viable alternative where the use, which may or may not be violating moral rights, is systematic? As opposed to the aforementioned Supreme Court case of Rt-2012-1062, where the infringed author was able to identify a single person who had made the decision to infringe, the case is another one for online companies.

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<sup>584</sup> Hagstrøm/Stenvik (2015) page 250.

<sup>585</sup> Hagstrøm/Stenvik (2015) page 523.

<sup>586</sup> See Ot.prp. nr.34 (1987-1988) page 57, see also the Norwegian Supreme Court judgment Rt-2012-1062 (114).

<sup>587</sup> Hagstrøm/Stenvik (2015) page 523, Ot.prp. nr.34 (1987-1988) page 57.

<sup>588</sup> See NOU 2004: 23, chapter 6.1.7.

<sup>589</sup> Rt-2012-1062 (122).

<sup>590</sup> See also Lund, Astri M., «Høyesteretts dom om Tripp Trapp-stolen – et gjennomslag for Thrap? Vern for verket eller også for den kunstneriske idé som det uttrykker.», Nordisk immaterielt rettsskydd, nr. 2, 2014, s. 178-203 on page 202-203.

The situation might change in the future. In its consultation memorandum for the revision of the Norwegian Copyright Act, the Ministry of Culture proposed a revision of the provisions on remedies. According to the proposal, the compensation would be the highest of the three following compensation methods:<sup>591</sup>

- (1) A “reasonable” compensation for the illegal use, in addition to compensation for damages following the harmful action which would not have occurred with an agreement for use;
- (2) Compensation for damages following the harmful action, or;
- (3) Compensation equivalent to the enrichment obtained by the harmful action.

Still, the three aforementioned remedies would also apply *only* to cases in which the tortfeasor acted in a willful or negligent manner. If the tortfeasor acted willfully or grossly negligent, the author could also get compensation equivalent to double the amount of a “reasonable license fee”. Furthermore, the courts would also take non-economic harm “into account” when determining the compensation.<sup>592</sup>

Therefore, as attractive as this proposed compensation model seems on the surface, it, too, suffers from the same flaw: it requires a willful act or gross negligence on platform provider’s behalf – which might be exceedingly difficult to prove in the courts.

Considering the following, we must conclude that the situation with copyright remedies under Norwegian law does not differ drastically from the situation under the US law: the existing remedies are simply not fit to protect user’s interests. Typically economic value of their content, coupled with the difficulties inherent in proving that a party acted in a grossly negligent manner, render most of these remedies simply inefficient in our context.

#### **4. Conclusion**

This section started with a seemingly simple question: if validity of user content license were to be decided under the Norwegian, instead of the American law, would the result be any different? We have now established that it would be – even radically so – and that these differences pertain to all the stages of licenses’ lifespan.

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<sup>591</sup> Kulturdepartementet (Norwegian Ministry of Culture), *Prop.104 L (2016-2017) Lov om opphavsrett til åndsverk mv.* (Proposisjon til Stortinget (lovvedtak), 2017) page 280

<sup>592</sup> *Ibid* page 371

Norwegian law, unlike its American counterpart, empowers the decision-makers to redact contractual terms heavily, with a view on protecting users – both as authors and consumers. It allows the courts to deem that some terms do not form a part of the agreement, as they are too surprising to be binding; and allows them to invalidate those terms it deems unreasonable. In its largest departure from the American approach, it actually *requires* the judges to interpret licensing provisions as narrowly as possible, if there is any chance that an agreement may be infused with ambiguity. It also gives judges a full access to circumstances surrounding the case, regardless of the contractual provisions to the contrary, and it empowers them to use policy considerations as a separate source of law, as to reach a balanced and fair outcome.

Yet, some similarities between the systems exist, too. In both systems, the courts are hesitant to resort to enforcement defenses and employ them to invalidate licensing terms, as evidenced by our discussion on American doctrine of unconscionability and §36 of Norwegian Contract Act. Perhaps most crucially, neither system seems to offer predictable and targeted remedies for users, and in both systems, typically low economic value of the user-generated content stands in the center of the problem.

## Chapter VI      **Abort, Retry, Ignore: How national laws affect stakeholder's interests**

### **1. Introduction**

So far, we have established that different national laws may govern various aspects of user content licensing, as well as that these national laws may vary to a substantial degree. To prove this, we analyzed the differences between American and Norwegian law; we concluded that the validity and scope of licenses might be construed very differently under these two systems. Now, we turn back to the bigger picture of user content licensing: whereas previous chapter dealt with how *individual* licenses would fare under different laws, we will now try to assess the effects which different approaches may have on *general* stakeholder interests described in Chapter 3. In other words, we will attempt to assess how diverging interests held by users and platform providers may be systemically affected by certain devices of national laws, and to which extent these tools promote or undermine these interests.

### **2. User's interests: control**

It is relatively straightforward to conclude that user's interest in exercising *control* over their content is not sufficiently protected or promoted by the devices of American or Norwegian contract and copyright law. Differently stated, existing legal tools do not provide users with meaningful mechanisms to decide to whom they give a license, of which scope, for how long, or in which context their content may be used.

#### **2.1. Control through contract formation**

In the previous chapter, we have shown that American and Norwegian approach to contract *formation* have something in common: neither American nor Norwegian courts would be likely to hold user agreements to be improperly formed.<sup>593</sup> Norwegian courts, however, sometimes employ the doctrine of surprising terms, in order to hold that the most unexpected of the terms contained in the agreement do not form its integral part.<sup>594</sup>

Still, neither of these systems truly empower users to exercise control over their content. By upholding (virtually) all agreements as properly formed, American law essentially actively

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<sup>593</sup> See Chapter 5

<sup>594</sup> *Id.*

undermines this interest. Platform providers are left free to inscribe any terms they see fit into the agreement; given that they will be seen as binding, user's only hope in maintaining a degree of control over their content is to file a lawsuit first (which few people will do); and then turn to contractual enforcement defenses, with slim chances of succeeding. To state it more simply: as onerous, ambiguous and all-encompassing these terms are, once they're seen to constitute an integral part of the agreement, a degree of control is already relinquished.

Yet, it would be a mistake to conclude that Norwegian approach – of striking out the most onerous terms at formation stage – would be truly empowering to users. Certainly, it may reduce the scope of the license and protect users from “the worst of the worst terms” – but it cannot, by any stretch of imagination, contribute to user's decision-making autonomy. To say that perpetual or irrevocable licenses are invalid sounds justified on the surface – but what good does that do to empower users to be able to decide *whether* they want to give such a license? Some users might, after all, be perfectly content with giving certain companies broad and perpetual rights over their content. Norwegian system simply swaps platform provider's boilerplate with judge's notion of fairness; but it does not recognize that *protecting users from onerous licensing terms is not the same thing as giving them control over their content*. In other words, this thesis strongly postulates that even the most consumer-protective system may simply fail to be autonomy-enhancing, as it simply fails to provide users with meaningful choice.

## **2.2. Control through contract interpretation**

The same analysis of user's control interest carries into contract *interpretation* devices. American law, with its broadly construed license scopes, directly undermines users' interest in controlling how their content is used. Erratic jurisprudence, where the courts either shy away from dealing with copyright questions at all, or treat copyright license as a mere liability shield, gives (for the time being) platform providers a blanket right to use user content as they see fit.

Norwegian law on contract interpretation is admittedly more protective of user's interests than its American counterpart. Judges are likely to take into account all the relevant circumstances of the case, narrow down the scope of the license significantly, and attempt to strike a reasonable balance between user's and platform provider's interests.

But what good does this do? Once again, users are not empowered to control the scope of license *themselves*; in case of American law, given the broad interpretative tradition, the scope will largely

be determined by the platform providers, whereas in Norway, the scope will be more narrowly defined by the courts; not by users who created content.

To prove that this is not merely an abstract shortcoming, consider the following hypothetical scenario: users A, B and C upload their photos on Google Photos, service which offers unlimited free cloud storage. Text of the license stipulates that users give Google a right to create derivative works and to use uploaded content commercially. Soon, Google starts doing three different things with uploaded photos: they offer users an option to purchase hard copies of their digital albums; they process the uploaded photos using an API in order to extract as much personal information from them as possible; and they start using user's photos in advertisements shown to user him/herself.

Users A, B and C may have completely different preferences when it comes to these scenarios. A might be completely opposed to all of these uses of content; s/he might simply be using the service for the convenience of backing the photographs up. In contrast, user B may want to purchase photo print-outs, but would not want his/her photos featured used in ads (even if these ads are not publically shared); user C may enjoy the convenience of being able to buy digital prints, the "star-effect" of being featured in ads, and the increased personalization of online services brought forward by extraction of personal data. Yet even this user might like to authorize *some* ads, and prohibit others.

Who's to say that all of these preferences are not equally legitimate, and that users, as *authors* of content, should not be able to decide which of these *exact* uses they consent to? Yet, it is precisely such granular control that is acutely missing from both American and Norwegian law. The former system's broad, or the latter system's narrow licenses are simply not *flexible* enough to cater to individual user's preferences, rendering contractual interpretation devices an unwieldy tool for enhancing user autonomy.

### **2.3. Control through enforcement defenses**

This becomes even more painfully obvious once we consider *enforcement defenses*, rudimentary fairness checks embodied in American and Norwegian jurisprudence – such as the doctrine of unconscionability, reasonable expectations, protection against unfair terms, etc. These doctrines, too, lack flexibility and granularity – rendering them virtually useless as means of exercising control over content.

Imagine, again, that a website claims the right to feature user content in ads – and that some users are content with such uses, while others are not. How do these individual preferences factor into court’s analysis? In addition, how are the courts to assess all individual, potential uses falling under the scope of such a license? After all, ads generated under broad license may range from widely acceptable (local restaurants) to utterly controversial (adult websites). If the courts are presented with one licensing clause, two billion users who subscribe to it, their widely varying preferences and conceptions of reasonableness, and infinite number of actual uses of content arguably falling under the scope of such a license – enforcement defenses are simply an unsuitable tool.

This is, still, not the *only* criticism aimed at these mechanisms. Indeed, even if they could be applied more granularly – their effectiveness would remain questionable on a larger scale. As Radin explains:

“The virtue of standard-like legal doctrines is that the decision-maker can use discretion to tailor the decision to fit the individual case. Their vice is that discretionary decision-making is not consistent and predictable, but results in a patchwork that does not appear to treat like cases alike. It is because of the inconsistency and unpredictability of these oversight doctrines that I am calling them "wild-card" doctrines.

Application of the doctrine of unconscionability is a process of relentless case-by-case adjudication, with many discretionary judgment calls in each case. Perhaps with the exception of truly egregious cases, outcomes are extremely unpredictable. Moreover, the fact that the doctrine is formulated so as to address particulars of individual cases makes it difficult to apply to mass-market contracts in the aggregate. It is not, therefore, a judicial oversight method well suited to evaluating and limiting large-scale boilerplate rights deletion schemes. Although thousands, or even hundreds of thousands of people may be subject to such a boilerplate scheme, only a few will bring a suit challenging it, and the results in different courts may be half for and half against the challengers. This kind of jurisprudence neither validates nor invalidates such a scheme for everyone else who is subject to it.”<sup>595</sup>

We must also note the significance of these doctrines being *procedurally* implemented as enforcement defenses, and the consequences this has on the remedies available to consumers. Courts may use these doctrines to refuse enforcement of a contract – but the enforcement of the licensing provision is unlikely to be judicially sought in the first place. In other words, Facebook is unlikely to sue users in order to enforce its right to, say, make derivative works of their content. The only way that these doctrines can realistically be invoked in litigation setting would be if users were to claim that Facebook infringed their copyright, Facebook proceeded to raise the existence of a license as a defense, and the user, in turn, raised one of the enforcement defenses as means of proving that license was invalid. Differently put – doctrines such as unconscionability, reasonable expectations and voidness as a matter of public policy are only likely to be raised as a

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<sup>595</sup> Radin, *Boilerplate the Fine Print, Vanishing Rights, and the Rule of Law* page 137

defense against a defense; their best-case outcome for consumers being that specific enforcement of the licensing provision will be denied. Yet this (far-fetched) invalidation of the licensing provision would be of little use either to user, or to those similarly situated; in the individual case, it would not, on its own, give rise to any remedies; and on a large scale, it would carry little to no precedential value.

Consequently, one cannot argue that contractual enforcement defenses enhance user's control over their content; they do little to boost user's autonomy, they lack granularity, and they cannot be easily scaled to a large, predictable system.

This means, in effect, that traditional tools of contract law – formation, interpretation and enforcement defenses – do not, and very likely *can* not – secure user's interest in controlling to whom a license is given, for how long, of which scope, and in which context.

## **2.4. Copyright law**

Next logical step is to turn to the norms of copyright law – the very norms *designed* to enhance authors' control over their content.

Following our analysis of American and Norwegian law, we conclude that the limitations of copyright law's ability to secure online users' interests stem from three principal sources: its reliance on general contract laws, lack of a *sui generis* balancing regime for licensing of user-generated content, and context-inefficient system of remedies.

### **2.4.1. Copyright's reliance on general contract law**

There is a single undeniable – and extremely basic – truth about copyright licensing: it depends *heavily* on devices of national contract laws. This dependence is both natural and understandable: having exclusive rights over *anything* would mean little if one did not have means of transferring those rights further. General contract law – supplemented with few special copyright-related considerations – provides a framework for doing exactly this. Stated more succinctly, copyright law confers certain rights on authors and deems most of these rights to be transferrable; contract law determines *the existence and scope* of the said transfer.

The latter part, though an indispensable part of copyright regimes, is problematic when it comes to empowering users' control interests. Unless copyright law specifies certain *special conditions* for transfer of rights – and it largely does not – then copyright license is treated by contract law just

like any other boilerplate agreement. Individual terms may be upheld or invalidated by the courts – *if* one is to file a lawsuit – but under the previously discussed, and demonstrated inadequate, devices of general contract law.

Initially, this might seem to signal an end to any hope that users' content-controlling interests may be protected through copyright laws. After all, there are two stages of divesting users of direct control over their content: first, when they purportedly agree to boilerplate licensing terms – each and every one of them specified by the platform provider; and secondly, when the said terms are interpreted by the courts. Both of these remove decision-making power from the user, yet they both seemingly fall outside the scope of copyright's direct reach: a license is, after all, a contract.

Still, there might be ways to extend this reach. Most importantly, copyright law *already* possesses a device aimed at tweaking the levels of contractual consent required – through imposing *licensing formalities*. These formalities may be used to heighten the level of consent requirements, as well as its granularity, separating copyright licenses from other mass-market contracts. We will come back to this point in the next chapter, when discussing potential reforms; for now, though, *de lege lata* point stands: any semblance of control given to users as authors through copyright law is rendered meaningless if it can be devolved through unfiltered application of general devices of contract law, which nowadays have diminished *actual* autonomy beyond recognition.

#### **2.4.2. Copyright law fails to recognize the special nature of user-generated content**

Another current limitation on copyright law's ability to protect users' controlling interests lies in its failure to recognize that special interests involved with user-generated content may call for a specialized interest-balancing regime; and that *sui generis* norms can and should be implemented to reflect this.

Granted, copyright law has always been preoccupied with establishing a balance between the rights of the authors and the rights of the general public. Most copyright rules stemming from these policy considerations have a long history – and a long list of justifications. Rules expanding the scope of the exclusive rights; doctrines of fair use and copyright misuse; distinction between conditions and covenants; imposition of criminal and statutory fines – they all strive to protect and promote author's interests, while preserving a (perceivably fair) level of public access to the works of authorship.

The problem is that the *very nature* of non-commercial user-generated content calls for this balance to be redefined. Consider a family video recorded by my aunt, versus a Lord of the Rings movie; consider a long, poetic e-mail exchanged between two people versus a scientific article. Does the public have the *same* legitimate interest in accessing, copying and distributing *both*? Or, differently stated, does the public suffer the same harm if denied access to either of these categories of content, or upon making access to that content contingent on compliance with author's expectations? Yet, by failing to make adequate distinctions between these types of content, copyright law becomes an ineffective tool for securing user's control interests.

Let us look into an example. Recall, for instance, American court's rationale for refusing to hold that a breach of a "purely contractual" licensing term – one lacking a nexus with an exclusive right – can lead to a claim of copyright infringement, discussed in depth in Chapter 5:

“Were we to hold otherwise, 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>596</sup>

Certainly, court's reasoning seems more than compelling: public interest would be severely undermined if right-holders could, for all intents and purposes, *contractually define* what constitutes copyright infringement. We find warnings against such overreaches in Norway as well, where Rognstad and others caution against agreements that expand the scope of author's rights – once again, with good justifications.<sup>597</sup>

Yet, as we have shown in the previous chapter, the unrestricted extension of this reasoning also means that there are many claims that Internet users cannot enforce under the scope of copyright laws. For example, a platform provider that breaches a licensing clause stating “*you give us the right to use your content subject to your privacy settings*” by plastering user's photos all over his/her hometown would, following the standards set in *MDY* and *Garcia*, and the warnings echoed in the literature, still leave the said user without access to any *copyright* remedies.

But *why* should this be the case?

Is it not apparent that the position of users of online platforms cannot be meaningfully equated with the position of software giants like Blizzard Entertainment? If nothing else, these users,

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<sup>596</sup> *MDY Industries, LLC v Blizzard Entertainment, Inc.*, see note 406

<sup>597</sup> Rognstad, 'Opphavsrettens balanse. Avtale eller lovregler?'; Harald Irgens-Jensen and others, 'Preseptoriske immaterialrettsregler, og virkningene av dem' in Erling Hjelmeng (ed), *Ugyldighet i privatretten - minnebok for Viggo Hagstrøm* (Ugyldighet i privatretten - minnebok for Viggo Hagstrøm, Fagbokforlaget 2016)

despite being authors of content, are not in the position to *draft licensing terms themselves*, and cannot, therefore, threaten copyright law's balance by imposing unreasonable terms.

Copyright laws, consequently, need to develop tools for re-assessing the existence, scope and validity of user-generated content licenses *while* taking into account the specific nature of the content and the interests involved.

### **2.4.3. Inefficient remedies**

User's content-controlling interests are also harmed by the lack of copyright remedies which could realistically be claimed against platform providers.

As we have seen, both American and Norwegian law provide authors with various kinds of remedies; yet, in case of user-generated content, most of these are exceedingly difficult to successfully claim, have a significantly limited practical impact, and are challenging to deploy on a large scale. Without repeating too much of the analysis here, consider some of the highlights from the previous chapter: the fact that *actual* damages are difficult to establish because of the (generally) negligible market for user-generated content; that *moral* damages may or may not be applicable depending on the facts of the case, and that the compensation paid is anything but certain; the fact that *statutory* damages in the US call for pre-registration of work, or that retrievable *profits* stemming from use of a single piece of content tend to be relatively miniscule. This means that even if users were to prove that their copyright had been infringed – which might be a difficult task, as we have established – they still do not stand much to gain, which could certainly discourage them from bringing the lawsuits against platform providers.

Consider a somewhat similar scenario in property law. Suppose that an owner of a house rents it to a party which has vast financial resources, and that they proceed to tear down the walls in the apartment, play loud music at night, and host annual extremist meetings. Imagine that the owner, weighing down his/her legal options, finds out that there are simply no legal remedies that would give any meaningful effect.

Users of online platforms are in this exact position: given the lack of meaningful remedies, their choice is either to stop using online platforms – which, as we have already argued, is not in their interest – or just accept that these platforms have a blank check to use their content as they please.

Granted, one could argue that traditional copyright remedies would not be a suitable tool for boosting user's control interest, even if they were more readily available and offering a larger financial compensation to users. After all, being able to reclaim damages for someone's infringing use of

content does not empower the author of that content to make meaningful decisions about how and when his/her content will be used.

### 3. User's interests: other interest clusters

If national laws do not adequately secure user's *control* interest, how do they affect other interest clusters – such as foreseeability, transparency, and continued access to platforms? It seems that their reach is rather limited in this regard as well.

For instance, user's interest in *foreseeability* (i.e. being able to foresee how his/her content will be used by a platform provider) and *transparency* seem nominally protected by some devices of Norwegian contract law, such as the duty of loyalty, principle of good faith and reasonableness, and interpretation of contracts in favor of consumer. Yet, if one scratches beneath this surface, it becomes apparent that these norms are often too abstract, and that they cannot compensate for the lack of a more *concrete* duty to inform users on the *particularities* of *each use scenario*.

To illustrate this point, let us go back to an example of a company which asks for a license to create derivative works, and a license to use them commercially. For the first five years of its operation, the company refrains from using user ads in its content; but then, they start featuring user content such as status updates and photos in ads for travel agencies (“Your friend A traveled to Rome recently!”) and in political ads (“Support Extreme Party like your friend B!”). Users *may* challenge some of these use scenarios – but it would still be exceedingly hard to prove that, in order to serve user's transparency interest, the principle of good faith requires a company to *continuously* provide user with a list of *all* individual derivative works created under a license (e.g. a list of *all* the ads created from user's content). Even if one could do that, there would still be a lot of unclarity and uncertainty: exactly which information is the company supposed to provide to fulfill its obligation? When? In which form? A broad principle therefore cannot compensate for specific legal obligation in this context; as it is the sheer lack of *specificity* that makes it impossible for such broad doctrines to meaningfully contribute to user's interests in transparency and foreseeability.

### 4. Platform providers' interests

How are platform providers' interests affected by the various devices of Norwegian and American law we have discussed?

On the surface, it seems relatively straightforward to conclude that their *legal risk minimization* interest is better preserved under American, rather than Norwegian law. Its liberal approach to

contract formation, coupled with rather literal interpretation of licensing terms, and lack of meaningful enforcement defenses, stands in stark contrast to Norwegian doctrine of invalidation of surprising terms, interpretation in favor of authors, and consumer-protective norms embodied in the Contract Act. *However*, when one takes into account the lackluster copyright remedies available under either one of these systems, it seems that the differences begin to diminish rapidly: platform providers stand little to lose, if users cannot obtain meaningful compensation for infringing uses of their content.

This is also apparent when discussing platform provider's *flexibility* interest. There is no doubt that a Norwegian court would construe a license narrower in scope than the one construed by an American court. In theory, this would mean that Norwegian law puts a limit on platform provider's ability to use user content as flexibly as they would like. But if users are unlikely to bring a lawsuit against them – and unlikely to obtain any significant compensation – which incentive do platform providers have to *actually restrict* the ways they use user content in practice? As we have argued in Chapter 3, platform provider's flexibility interest is not threatened unless other interest clusters – such as legal risk minimization, reputation management and economic interests – are jeopardized in some way; which is simply not the case under the current American and Norwegian law.

*Reputational* and *economic* interests connected to content licensing seem rather unfazed by these national laws as well. As we have seen in Chapters 3 and 4, reputational risk usually emerges when online platforms are *perceived* as exploitative; quite often, all it takes to defuse this risk are user-friendly PR statements, in the vein of “you still own your content”. Court's construction of an actual scope of license, or invalidation of certain terms, can hardly damage platform provider's reputation in any realistic way. Similarly, given that the remedies available to users do not seem to create significant legal risk, or result in reduced flexibility when using content, economic interests are unlikely to suffer.

What all of this seems to suggest is that even legal systems with *vastly diverging* interpretative practices currently have minimal practical effects on platform providers' core interests.

## **5. Societal interest in preserving fair licensing practices**

So far, it seems clear that users' interests are not – and *cannot* – be adequately protected through the described devices of national laws, regardless of the differences in their respective approaches. It also appears as if platform providers' interests are not truly threatened – and that they, *in practice*,

if not always in theory, enjoy a broad freedom to use user content in any way they see fit. What are the consequences of this for the society at large?

On a positive side, such broad freedoms given to online platforms might serve as a significant boost to innovation and economy. As we have explored in Chapter 3, countless new – and potentially life-changing technologies – *depend* on this. Machine learning algorithms, trained on trillions of pieces of individual content, can have application in everything from cancer diagnostics to space flight simulations. Increased sales stemming from incorporation of user content in ads may significantly boost different economies. Users may get access to new, inventive features at breakneck speed.

At the same time, the risk of loss of trust between users and online platforms looms large on the horizon. If national laws do little to protect users from over-exploitation of their content, users may simply opt to post less content online – or might start boycotting entire online platforms. In other words, lack of control and decision-making autonomy could directly lead into lack of trust, which would lead to less content-sharing, and, ultimately, less content creation.

## Chapter VII    The Road Ahead: Potential Reforms

### 1. Introduction

It feels as if the previous chapters have painted a rather dystopian picture. Long, unintelligible, and nearly hidden agreements ask users to give up the rights over their most personal, most expressive content – and, if they wish to partake in modern world, users have little choice but to comply. Legal tools that would invalidate such clauses are hard to deploy on a larger scale; and, ultimately, even if such deployment could realistically be imagined, would hardly contribute to users’ decision-making autonomy and content-controlling interest.

What can be done, then? Is any hope of providing users with a measure of control over their content to be relinquished?

In this Chapter, we will present one potential path to reforming user-generated content licensing practices, taking into account the societal interest in securing both users’ and platform providers’ interests.

### 2. Proposed model

#### 2.1. Specific assent

The most significant step towards reforming licensing of user-generated content would be an imposition of a specific assent requirement as a formal condition of a valid license grant. In other words, national copyright laws should require platform providers to obtain *specific permission* for *each new use of each copyrighted work* that users upload online. Burden of proof that such permission has been granted would lay on platform providers.

This might sound extreme at first. After all, wouldn’t such a solution sky-rocket transactional costs and information burdens? Upon closer inspection, however, it becomes clear that such solution is indefinitely preferable to the development of new interpretation doctrines or enforcement defenses.

Consider a scenario in which a website wishes to obtain a right to create derivative works based on user’s photo, in order to create thumbnails of this photo, incorporate it in its e-newsletter sent to user’s friends, and feature it in sponsored ads. Under the current model of consent, which stays at the level of an economic right, the moment user started using a website, s/he has purportedly

agreed to all three uses, relinquishing virtually all control. If user wanted to challenge one of these uses, even under consumer-protective Norwegian law, s/he would have to prove one of the following: that the licensing agreement was not properly formed, that the term ‘create derivative works’ was surprising and consequently non-binding, that the right to create derivative works does not extend to the use in question, or that the agreement was unreasonable.

By contrast, if assent were to be tied to individual *uses* of content, rather than individual *rights*, users could simply decline to assent to any of the named uses; should a platform provider nevertheless engage in such a use, users could immediately claim remedies.

One could say that a model which relies on specific assent will inevitably run into fragmentation problems: national courts may interpret this provision differently, as outlined in previous chapters, resulting in reduced protection in the systems which construe assent broadly. However, following the solution of the European Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (commonly known as General Data Protection Regulation, GDPR),<sup>598</sup> some minimal consent requirements may be incorporated directly into the model.

For instance, GDPR generally postulates that consent should be “freely given”,<sup>599</sup> and explains that this means it should be “given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement.”<sup>600</sup> GDPR then provides even further specification, stating that “this [indication of agreement] could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data.”<sup>601</sup> Lastly, it stipulates that “silence, pre-ticked boxes or inactivity should not therefore constitute consent.”<sup>602</sup>

There is no reason why such minimal assent requirements could not be incorporated into the model reforming user content licensing as well.

True, the model may result in an increased informational burden, in a sense that users could get easily overwhelmed by the hundreds, if not thousands, of requests to authorize certain uses of their content. This information load may be reduced, however, if the proposed specific assent model were to stipulate that platform providers are released from a duty to obtain specific assent, in cases where they already have obtained *prior specific consent to use the identified piece of content in a compatible way*. For instance, an online photo editing app may contain a list of hundreds of ‘filters’, allowing users to change color tones, contrast, brightness, and other elements of a photograph.

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<sup>598</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons With Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119

<sup>599</sup> Ibid Article 4 (11)

<sup>600</sup> Ibid Recital paragraph 32

<sup>601</sup> Ibid

<sup>602</sup> Ibid

Rather than obtaining *new specific consent* once a user changes a filter, platform provider could rely on the *initial compatible consent* that user gave when s/he initially uploaded the photo.

Of course, the legal standard of compatible/equivalent uses would be rather broad, and would need to be further fleshed out by the courts; but this would provide such licensing model with adaptability and robustness that it needs. It could also, should a need arise, be supplemented by further legislative guidance on how to determine which uses are to be considered compatible. Such an approach would closely resemble the concept of compatible data processing purposes found in European data protection legislation.

The biggest advantage of such licensing model would be that it would provide users with actual, meaningful *control* over how their content is used, while not sacrificing much of *flexibility* on platform providers' behalf. While users would be free to decline certain rights to platform providers, the number of users who *actually decide to do so* in practice might not be too great – especially if platform providers are perceived as trustworthy and non-exploitative.

User's interest in *transparency* would greatly benefit from licensing based on specific assent; as would their interest in *foreseeability*. If platform providers had to obtain authorization each time they engaged in new uses of content, users would get much better insight into the consequences of uploading such content online. Given that user's consent would be a given *prior* to actual uses of content took place, platform provider's *legal risk minimization* interest would stand to benefit, too: they would have a much better idea of which uses are infringing, and which are not.

Licensing based on specific assent would also bring the most oppressive licensing practices to a grinding halt. If consent is tied to individual uses – or categories of equivalent uses – it would bring certainty and predictability to the system that currently has little to none.

If the consent requirement appears to be too hard to meet, the model could be expanded to include additional legal grounds for valid license grants modeled on GDPR provisions – for instance, in cases where license grant is clearly necessary for the performance of an independent contract, or where it serves platform provider's legitimate interest, and does not prejudice user's copyright interests. Such provisions should, however, be added with care, and interpreted restrictively.

## **2.2. Reduction of party autonomy in choice of law**

Additionally, to successfully reform licensing practices, specialized rules of private international law should limit party autonomy in choice of law, and make it clear that questions related to licensing of user-generated content are to be resolved *exclusively* under the law of the country of consumer's habitual residence, in contractual and copyright questions alike.

As we have seen in Chapter 4, European instruments of private international law already include guarantees that consumers may not lose protection granted by mandatory norms of their home countries. Yet, an issue-by-issue comparison between the chosen law and the mandatory law of the consumer's habitual residence needs to be carried out. As explained in that chapter, if the chosen law provides for more protection, it will govern the contract; if it does not, the contract is governed by a mix of laws: the chosen law (insofar as it offers sufficient protections) and the mandatory provisions of the law of the consumer's residence.<sup>603</sup> However, establishing *which law is more protective* is a daunting task; on top of this, given how difficult – and unpredictable – it is to separate between contractual and copyright issues in a licensing agreement – legal uncertainty looms large on the horizon.

Elimination of party autonomy would consequently serve a twofold purpose. For platform providers, it would make it easier to comply with any particularities of the national licensing regimes – and minimize their compliance costs. In other words, if they were certain which law governed the interaction with users coming from certain geographical regions, they could roll out features compliant with local law's requirements, including those for specific consent.

For users, eliminating party autonomy in choice of law would make it possible to bring lawsuits without engaging in a long, drawn-out battle on the applicable law. In its current form, party autonomy in these contracts is already curtailed; in its half-alive-half-dead form, it serves no legitimate purpose, and should be put to complete rest. Otherwise, any infringement action filed by users is likely to meet an untimely end, as platform providers will simply outspend them – arguing that users are not really consumers, that they have never had an intention to target their home countries, or that the law identified in choice-of-law clause is actually more protective of user's interests.

### **2.3. Remedies and fines**

Thirdly, in order to successfully reform content licensing, we need to re-think the system of remedies and fines surrounding licensing practices.

As a starting point, users *should* be able to claim any economic and non-economic losses they have suffered as a result of platform provider's infringing conduct. However, as we have seen in the

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<sup>603</sup> See Chapter 4

previous chapters, given the low economic value of user-generated content, such claims are likely to be rather ineffective.

This is why a parallel system of mandatory fines should be introduced: platform providers should be sanctioned for each use of user content for which they did not obtain specific consent. Such fines could either be payable to the users whose content was used – in which case they would function similarly to statutory damages in the US; or they could be imposed as administrative fines, in a manner resembling the upcoming General Data Protection Regulation. In either case, the *amount* of the fines should not be connected to the value of the work, or the licensing fee that the user would be likely to obtain on a market; nor to the profits stemming from platform provider’s use of individual pieces of content. Rather, they should be tied to platform provider’s global turnover – once again, in a solution mimicking European GDPR.

The goal behind such measures would be to ensure that specific consent requirements are not simply left ignored by platform providers. Unless there is a real, measurable and impactful compliance risk created by failing to adhere to these norms, platform providers are unlikely to change their licensing practices – due to simple economics. In other words, the costs of non-compliance (i.e. the costs imposed by administrative fines) must outweigh the costs of compliance (e.g. costs of technologically implementing new consent requirements, lost opportunities to profit on exploitation of content in specific ways, etc.); otherwise, heightened consent requirements would remain “all bark and no bite”.

### **3. Proposed text**

The core features of the reformed model of user-content licensing have been outlined above; needless to say, there are many different ways that such model may actually be turned into legislative text. To gain better insight into the structure of the proposed model, however, it might be useful to present it as a draft of an actual legislative piece – here, a Regulation which may potentially be adapted at the European level.

## Draft Regulation on Licensing of User-Generated Content

### Article 1

#### Definitions

For the purposes of this Regulation:

- 1) 'user' is a natural person using platform provider's services outside the scope of an economic activity;
- 2) 'platform provider' is any individual or organization providing services at a distance, by electronic means, and at the individual request of a recipient of services, whether for remuneration or free of charge;
- 3) 'platform provider services' are any services that give platform providers access to user's content;
- 4) 'user content' is any material, or collection of materials, entitled to receive copyright protection, and owned by user;
- 5) 'use of content' is any copyright-relevant act which would, failing to obtain a permission from a right holder, result in liability.

### Article 2

#### Specific consent and further compatible uses

- 1) Platform providers' use of any individual piece of user content shall be lawful only if that user has given specific prior consent for the individual use in question.
- 2) Other uses of content should be allowed only where they are clearly compatible with the uses for which specific consent has already been obtained. In order to ascertain whether a new use is compatible with the use for which consent has been obtained, the platform provider, after having met all the requirements for the lawfulness of the original consent, should take into account, *inter alia*: any link between those purposes and the purposes of the intended further use; the context in which the user content been obtained, in particular the reasonable expectations of users based on their relationship with the online platform as to their further use; the nature of the content; and the consequences of the intended further use for users and content.

### Article 3

#### Conditions for consent

- 1) Platform provider shall be able to demonstrate that the user has consented to individual uses of his/her content.
- 2) Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the user's agreement to the use of his or her content in an individually designated way, such as by a written statement, including by

electronic means, or an oral statement. Silence, pre-ticked boxes or inactivity should not therefore constitute consent.

- 3) If user's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language.
- 4) User shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of use of content based on consent before its withdrawal. Prior to giving consent, the user shall be informed thereof. It shall be as easy to withdraw as to give consent.
- 5) When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to use of user content that is not necessary for the performance of that contract.

#### Article 4

##### Territorial scope

- 1) This Regulation applies to the use of user content in the context of the activities of an establishment of a platform provider in the Union, regardless of whether the actual use of content takes place in the Union or not.
- 2) This Regulation applies to the use of user content of users who have habitual residence in the Union by a platform provider not established in the Union, where the use of content is related to the offering of goods or services, irrespective of whether a payment by the user is required, to such users in the Union.

#### Article 5

##### Jurisdiction

- 1) Courts of the Member State where user has his or her habitual residence shall have the exclusive jurisdiction to rule on any dispute involving platform provider's use of user content, provided that platform provider pursues commercial or professional activities in this Member State, by any means, directs such activities to that Member State or to several States including that Member State.

#### Article 6

##### Applicable law

- 1) Any dispute involving platform provider's use of user content shall be resolved under the law of the country where user has his or her habitual residence.

#### Article 7

##### Right to compensation

- 1) Any user who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the platform provider for the damage suffered.
- 2) Alternatively to claiming actual damages, Member States may allow users to claim statutory damages for each instance of unauthorized use of their content. Such damages will not require users to demonstrate any suffered harm, and will be awarded independently of the market value of the work. Their individual amounts shall be prescribed by the Member States.

## Article 8

### Administrative fines

- 1) Infringements of the provisions of this Regulation be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.
- 2) Administrative bodies shall ensure that imposition of such fines shall in each individual case be effective, proportionate and dissuasive.
- 3) When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:
  - (a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the use concerned as well as the number of users affected and the level of damage suffered by them;
  - (b) the intentional or negligent character of the infringement;
  - (c) any action taken by the platform provider to mitigate the damage suffered by users;
  - (d) any relevant previous infringements by the platform provider;
  - (e) the categories of works affected by the infringement;
  - (f) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the platform provider notified the infringement;
  - (g) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

## 4. Conclusion

“Many problems that are associated with wrap contracts specifically and adhesive contracts generally could be resolved by putting teeth into existing rules relating to the construction and interpretation of contracts”, wrote Nancy Kim.<sup>604</sup> Commentator after commentator seemed to agree: the path to eradicating abusive contracts is through the reform of the existing doctrines of contract law.

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<sup>604</sup> Kim, *Wrap Contracts: Foundations and Ramifications* page 201

But, as we have seen, that would simply not work in case of user-content licensing. License is not “just another contract”; the inherent interests present in user-content licensing deals are as wide as they are varied, and they have systemic implications for the very existence of the Web as we know it.

One path to reforming the current practices has been outlined in this Chapter. It would secure that licensing agreements are governed by user’s national law, that this law requires platform providers to obtain specific consent for individual (or further compatible) uses, and would, in cases of grave breaches of this duty, heavily penalize online platforms, without requiring users to show that they have suffered direct economic harm.

This approach is certainly not the only possible solution; but, as argued above, it solves the central problem presented in this thesis: it allows users to retain a degree of control over their content, while still giving platform providers enough flexibility to introduce new features. It seems to be, at this moment in time – the most we could hope to achieve.

## Conclusion

Human experience is shaped – or rather, *defined* – by our desire to express ourselves.

Our creations tell the story of who we are, whom we love, and who we hope to become. From the first cave paintings, to the endless stream of tweets, snaps and status updates – they have been telling our most personal stories. They have preserved a bit of our souls in time – for endless generations to come.

The Internet is a perfect catalyst for expression. For the first time in the history of mankind, we find ourselves being able to reach out to the entire world – and to hear the world speak back. This makes an impulse to create and share nearly irresistible.

But this sharing might come at a hidden cost.

If we fail to define what online platform providers *may* – and *may not* – do with user content, we are likely to see an exponential increase in uses which have little to do with user's original expression. If broad contractual freedoms to exploit user content are upheld, platform providers will devise endless new ways to extract value out of the content they hold – whether users expect this or not. This threatens the very core of participative Web as we know it – the trust between users and online platforms.

Currently, copyright and contract laws do not seem to offer devices which are capable of addressing this issue in a comprehensive manner. The core of the problem lies in the fact that any solution would have to take into account a wide variety of interests involved in user-content licensing; and that it would, simultaneously, need to be adaptable to a variety of situations and preferences. Simply saying that broad licensing provisions need to be invalidated as unfair would fail to give users what they truly need – an ability to make meaningful decisions about their own content – and would jeopardize flexibility that online platforms need when handling this content.

One possible solution – modeling consent requirements for *copyright licensing* based on those followed under *data protection* laws – has been outlined in this dissertation. Such model would principally ensure a degree of predictability and adaptability unmatched by devices of copyright law.

Regardless of which road is taken, it is immensely important to start having a more open, vocal debate on this topic. We cannot allow ourselves the luxury of seeing broad licensing clauses as *yet another* harmless boilerplate term. The stakes are simply too high.

## Annex 1: Terms of Use as of 05/04/2016

<p><b>Facebook</b></p>	<p><b>Sharing Your Content and Information</b></p> <p>You own all of the content and information you post on Facebook, and you can control how it is shared through your <a href="#">privacy</a> and <a href="#">application settings</a>. In addition:</p> <ol style="list-style-type: none"> <li>1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your <a href="#">privacy</a> and <a href="#">application settings</a>: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.</li> <li>2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).</li> </ol> <p><b>Definitions</b></p> <ol style="list-style-type: none"> <li>1. By "Facebook" or "Facebook Services" we mean the features and services we make available, including through (a) our website at <a href="http://www.facebook.com">www.facebook.com</a> and any other Facebook branded or co-branded websites (including sub-domains, international versions, widgets, and mobile versions); (b) our Platform; (c) social plugins such as the Like button, the Share button and other similar offerings; and (d) other media, brands, products, services, software (such as a toolbar), devices, or networks now existing or later developed. Facebook reserves the right to designate, in its sole discretion, that certain of our brands, products, or services are governed by separate terms and not this SRR.</li> <li>2. By "Platform" we mean a set of APIs and services (such as content) that enable others, including application developers and website operators, to retrieve data from Facebook or provide data to us.</li> <li>3. By "information" we mean facts and other information about you, including actions taken by users and non-users who interact with Facebook.</li> <li>4. By "content" we mean anything you or other users post, provide or share using Facebook Services.</li> <li>5. By "data" or "user data" or "user's data" we mean any data, including a user's content or information that you or third parties can retrieve from Facebook or provide to Facebook through Platform.</li> <li>6. By "post" we mean post on Facebook or otherwise make available by using Facebook.</li> <li>7. By "use" we mean use, run, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.</li> <li>8. By "application" we mean any application or website that uses or accesses Platform, as well as anything else that receives or has received data from us. If you no longer access Platform but have not deleted all data from us, the term application will apply until you delete the data.</li> <li>9. By "Trademarks" we mean the list of trademarks provided <a href="#">here</a>.</li> </ol>
<p><b>Foursquare</b></p>	<p><b>User Submissions.</b></p> <p>We may use your User Submissions in a number of different ways in connection with the Site, Service and Foursquare's business as Foursquare may determine in its sole discretion, including but not limited to, publicly displaying it, reformatting it, incorporating it into marketing materials, advertisements and other works, creating derivative works from it, promoting it, distributing it, and allowing other users to do the same in connection with their own websites, media platforms, and applications ("Third Party Media"). By submitting User Submissions on the Site or otherwise through the Service, you hereby do and shall grant Foursquare a worldwide, non-exclusive, royalty-free, fully paid, sublicensable and transferable license to use, copy, edit, modify, reproduce, distribute, prepare derivative works of, display, perform, and otherwise fully exploit the User</p>

	<p>Submissions in connection with the Site, the Service and Foursquare's (and its successors and assigns') business, including without limitation for promoting and redistributing part or all of the Site (and derivative works thereof) or the Service in any media formats and through any media channels (including, without limitation, third party websites and feeds). You also hereby do and shall grant each user of the Site and/or the Service, including Third Party Media, a non-exclusive license to access your User Submissions through the Site and the Service, and to use, edit, modify, reproduce, distribute, prepare derivative works of, display and perform such User Submissions in connection with their use of the Site, Service and Third Party Media. For clarity, the foregoing license grant to Foursquare does not affect your other ownership or license rights in your User Submission(s), including the right to grant additional licenses to the material in your User Submission(s), unless otherwise agreed in writing with Foursquare.</p> <p>You represent and warrant that you have all rights to grant such license to us without infringement or violation of any third party rights, including without limitation, any privacy rights, publicity rights, copyrights, contract rights, or any other intellectual property or proprietary rights.</p> <p>You understand that all information publicly posted or privately transmitted through the Site is the sole responsibility of the person from which such Content originated; that Foursquare will not be liable for any errors or omissions in any Content; and that Foursquare cannot guarantee the identity of any other users with whom you may interact in the course of using the Service.</p> <p>When you delete your User Submissions, they will be removed from the Service. However, you understand that any removed User Submissions may persist in backup copies for a reasonable period of time (but following removal will not be shared with others) or may remain with users who have previously accessed or downloaded your User Submissions.</p>
<b>Goodreads</b>	<p><b>3. License Grant</b></p> <p>By posting any User Content on the Service, you expressly grant, and you represent and warrant that you have a right to grant, to Goodreads a royalty-free, sublicensable, transferable, perpetual, irrevocable, non-exclusive, worldwide license to use, reproduce, modify, publish, list information regarding, edit, translate, distribute, publicly perform, publicly display, and make derivative works of all such User Content and your name, voice, and/or likeness as contained in your User Content, in whole or in part, and in any form, media or technology, whether now known or hereafter developed, and to grant and authorize sublicenses of the foregoing for any purpose at the sole discretion of Goodreads. If you submit works to the Service via the “My Writing” or “Ebook” features, our Terms of Use for Writers apply to those works.</p> <p>Subject to the terms and conditions of this Agreement, you are hereby granted a non-exclusive, limited, personal license to use the Service. Goodreads reserves all rights not expressly granted herein in the Service and the Goodreads Content (as defined below). Goodreads may terminate this license at any time for any reason or no reason.</p>
<b>Google</b>	<p><b>Your Content in our Services</b></p> <p>Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours.</p> <p>When you upload, submit, store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content. The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones. This license continues even if you stop using our Services (for example, for a business listing you have added to Google Maps). Some Services may offer you ways to access and remove content that has been provided</p>

	<p>to that Service. Also, in some of our Services, there are terms or settings that narrow the scope of our use of the content submitted in those Services. Make sure you have the necessary rights to grant us this license for any content that you submit to our Services.</p> <p>Our automated systems analyze your content (including emails) to provide you personally relevant product features, such as customized search results, tailored advertising, and spam and malware detection. This analysis occurs as the content is sent, received, and when it is stored.</p> <p>If you have a Google Account, we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1's, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts. We will respect the choices you make to limit sharing or visibility settings in your Google Account. For example, you can choose your settings so your name and photo do not appear in an ad.</p> <p>You can find more information about how Google uses and stores content in the privacy policy or additional terms for particular Services. If you submit feedback or suggestions about our Services, we may use your feedback or suggestions without obligation to you.</p>
<p><b>Instagram</b></p>	<p><b>Rights</b></p> <ol style="list-style-type: none"> <li>1. Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy, available here <a href="http://instagram.com/legal/privacy/">http://instagram.com/legal/privacy/</a>, including but not limited to sections 3 ("Sharing of Your Information"), 4 ("How We Store Your Information"), and 5 ("Your Choices About Your Information"). You can choose who can view your Content and activities, including your photos, as described in the Privacy Policy.</li> <li>2. Some of the Service is supported by advertising revenue and may display advertisements and promotions, and you hereby agree that Instagram may place such advertising and promotions on the Service or on, about, or in conjunction with your Content. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you.</li> <li>3. You acknowledge that we may not always identify paid services, sponsored content, or commercial communications as such.</li> <li>4. You represent and warrant that: (i) you own the Content posted by you on or through the Service or otherwise have the right to grant the rights and licenses set forth in these Terms of Use; (ii) the posting and use of your Content on or through the Service does not violate, misappropriate or infringe on the rights of any third party, including, without limitation, privacy rights, publicity rights, copyrights, trademark and/or other intellectual property rights; (iii) you agree to pay for all royalties, fees, and any other monies owed by reason of Content you post on or through the Service; and (iv) you have the legal right and capacity to enter into these Terms of Use in your jurisdiction.</li> <li>5. The Service contains content owned or licensed by Instagram ("Instagram Content"). Instagram Content is protected by copyright, trademark, patent, trade secret and other laws, and, as between you and Instagram, Instagram owns and retains all rights in the Instagram Content and the Service. You will not remove, alter or conceal any copyright, trademark, service mark or other proprietary rights notices incorporated in or accompanying the Instagram Content and you will not reproduce, modify, adapt, prepare derivative works based on, perform, display, publish, distribute, transmit, broadcast, sell, license or otherwise exploit the Instagram Content.</li> <li>6. The Instagram name and logo are trademarks of Instagram, and may not be copied, imitated or used, in whole or in part, without the prior written permission of Instagram, except in accordance with our brand guidelines, available here: <a href="https://www.instagram-brand.com/">https://www.instagram-brand.com/</a>. In addition, all page headers, custom graphics, button icons and scripts are service marks, trademarks and/or trade dress of Instagram, and may not be copied, imitated or used, in whole or in part, without prior written permission from Instagram.</li> </ol>

	<p>7. Although it is Instagram's intention for the Service to be available as much as possible, there will be occasions when the Service may be interrupted, including, without limitation, for scheduled maintenance or upgrades, for emergency repairs, or due to failure of telecommunications links and/or equipment. Also, Instagram reserves the right to remove any Content from the Service for any reason, without prior notice. Content removed from the Service may continue to be stored by Instagram, including, without limitation, in order to comply with certain legal obligations, but may not be retrievable without a valid court order. Consequently, Instagram encourages you to maintain your own backup of your Content. In other words, Instagram is not a backup service and you agree that you will not rely on the Service for the purposes of Content backup or storage. Instagram will not be liable to you for any modification, suspension, or discontinuation of the Services, or the loss of any Content. You also acknowledge that the Internet may be subject to breaches of security and that the submission of Content or other information may not be secure.</p> <p>8. You agree that Instagram is not responsible for, and does not endorse, Content posted within the Service. Instagram does not have any obligation to prescreen, monitor, edit, or remove any Content. If your Content violates these Terms of Use, you may bear legal responsibility for that Content.</p> <p>9. Except as otherwise described in the Service's Privacy Policy, available at <a href="http://instagram.com/legal/privacy/">http://instagram.com/legal/privacy/</a>, as between you and Instagram, any Content will be non-confidential and non-proprietary and we will not be liable for any use or disclosure of Content. You acknowledge and agree that your relationship with Instagram is not a confidential, fiduciary, or other type of special relationship, and that your decision to submit any Content does not place Instagram in a position that is any different from the position held by members of the general public, including with regard to your Content. None of your Content will be subject to any obligation of confidence on the part of Instagram, and Instagram will not be liable for any use or disclosure of any Content you provide.</p> <p>10. It is Instagram's policy not to accept or consider content, information, ideas, suggestions or other materials other than those we have specifically requested and to which certain specific terms, conditions and requirements may apply. This is to avoid any misunderstandings if your ideas are similar to those we have developed or are developing independently. Accordingly, Instagram does not accept unsolicited materials or ideas, and takes no responsibility for any materials or ideas so transmitted. If, despite our policy, you choose to send us content, information, ideas, suggestions, or other materials, you further agree that Instagram is free to use any such content, information, ideas, suggestions or other materials, for any purposes whatsoever, including, without limitation, developing and marketing products and services, without any liability or payment of any kind to you.</p>
<b>LinkedIn</b>	<p>As between you and LinkedIn, you own the content and information that you submit or post to the Services and you are only granting LinkedIn the following non-exclusive license: A worldwide, transferable and sublicensable right to use, copy, modify, distribute, publish, and process, information and content that you provide through our Services, without any further consent, notice and/or compensation to you or others. These rights are limited in the following ways:</p> <ol style="list-style-type: none"> <li>a. You can end this license for specific content by deleting such content from the Services, or generally by closing your account, except (a) to the extent you shared it with others as part of the Service and they copied or stored it and (b) for the reasonable time it takes to remove from backup and other systems.</li> <li>b. We will not include your content in advertisements for the products and services of others (including sponsored content) to others without your separate consent. However, we have the right, without compensation to you or others, to serve ads near your content and information, and your comments on sponsored content may be visible as noted in the Privacy Policy.</li> <li>c. We will get your consent if we want to give others the right to publish your posts beyond the Service. However, other Members and/or Visitors may access and share your content and information, consistent with your settings and degree of connection with them.</li> </ol>

	<p>d. While we may edit and make formatting changes to your content (such as translating it, modifying the size, layout or file type or removing metadata), we will not modify the meaning of your expression.</p> <p>e. Because you own your content and information and we only have non-exclusive rights to it, you may choose to make it available to others, including under the terms of a Creative Commons license.</p> <p>You agree that we may access, store and use any information that you provide in accordance with the terms of the Privacy Policy and your privacy settings.</p> <p>By submitting suggestions or other feedback regarding our Services to LinkedIn, you agree that LinkedIn can use and share (but does not have to) such feedback for any purpose without compensation to you.</p> <p>You agree to only provide content or information if that does not violate the law nor anyone's rights (e.g., without violating any intellectual property rights or breaching a contract). You also agree that your profile information will be truthful. LinkedIn may be required by law to remove certain information or content in certain countries.</p>
<b>Microsoft</b>	<p><b>Your Content.</b></p> <p>Many of our Services allow you to store or share Your Content or receive material from others. We don't claim ownership of Your Content. Your Content remains Your Content and you are responsible for it.</p> <p>a. When you share Your Content with other people, you understand that they may be able to, on a worldwide basis, use, save, record, reproduce, broadcast, transmit, display (and on HealthVault delete) Your Content without compensating you. If you do not want others to have that ability, do not use the Services to share Your Content. You represent and warrant that for the duration of these Terms you have (and will have) all the rights necessary for Your Content that is uploaded, stored, or shared on or through the Services and that the collection, use, and retention of Your Content will not violate any law or rights of others. Microsoft does not own, control, verify, pay for, endorse or otherwise assume any liability for Your Content and cannot be held responsible for Your Content or the material others upload, store or share using the Services.</p> <p>b. To the extent necessary to provide the Services to you and others, to protect you and the Services, and to improve Microsoft products and services, you grant to Microsoft a worldwide and royalty-free intellectual property license to use Your Content, for example, to make copies of, retain, transmit, reformat, display, and distribute via communication tools Your Content on the Services. If you publish Your Content in areas of the Service where it is available broadly online without restrictions, Your Content may appear in demonstrations or materials that promote the Service. Some of the Services are supported by advertising. Controls for how Microsoft personalizes advertising are available on the <a href="#">Security &amp; privacy</a> page of the Microsoft account management website. We do not use what you say in email, chat, video calls or voice mail, or your documents, photos or other personal files to target advertising to you. Our advertising policies are covered in detail in the Privacy Statements.</p>
<b>Reddit</b>	<p><b>Your content</b></p> <p>You retain the rights to your copyrighted content or information that you submit to reddit ("user content") except as described below.</p> <p>By submitting user content to reddit, you grant us a royalty-free, perpetual, irrevocable, non-exclusive, unrestricted, worldwide license to reproduce, prepare derivative works, distribute copies, perform, or publicly display your user content in any medium and for any purpose, including commercial purposes, and to authorize others to do so.</p> <p>You agree that you have the right to submit anything you post, and that your user content does not violate the copyright, trademark, trade secret or any other personal or proprietary right of any other party.</p>

	<p>Please take a look at reddit’s privacy policy for an explanation of how we may use or share information submitted by you or collected from you.</p>
<p><b>Snapchat</b></p>	<p><b>3. Rights You Grant Us</b></p> <p>Many of our Services let you create, upload, post, send, receive, and store content. When you do that, you retain whatever ownership rights in that content you had to begin with. But you grant us a license to use that content. How broad that license is depends on which Services you use and the Settings you have selected.</p> <p>For all Services other than Live, Local, and any other crowd-sourced Service, you grant Snapchat a worldwide, royalty-free, sublicensable, and transferable license to host, store, use, display, reproduce, modify, adapt, edit, publish, and distribute that content. This license is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones.</p> <p>Because Live, Local, and any other crowd-sourced Services are inherently public and chronicle matters of public interest, the license you grant us for content submitted to those Services is broader. In addition to the rights you grant us in connection with other Services, you also grant us a perpetual license to create derivative works from, promote, exhibit, broadcast, syndicate, publicly perform, and publicly display content submitted to Live, Local, or any other crowd-sourced Services in any form and in any and all media or distribution methods (now known or later developed). To the extent it's necessary, you also grant Snapchat and our business partners the unrestricted, worldwide, perpetual right and license to use your name, likeness, and voice solely in Live, Local, or other crowd-sourced content that you appear in, create, upload, post, or send. This means, among other things, that you will not be entitled to any compensation from Snapchat or our business partners if your name, likeness, or voice is conveyed through Live, Local, or other crowd-sourced Services.</p> <p>For more information about how to tailor who can watch your content, please take a look at our privacy policy and Support Site.</p> <p>While we're not required to do so, we may access, review, screen, and delete your content at any time and for any reason, including if we think your content violates these Terms. You alone though remain responsible for the content you create, upload, post, send, or store through the Service.</p> <p>The Services may contain advertisements. In consideration for Snapchat letting you access and use the Services, you agree that Snapchat, its affiliates, and third-party partners may place advertising on the Services.</p> <p>We always love to hear from our users. But if you volunteer feedback or suggestions, just know that we can use your ideas without compensating you.</p>
<p><b>Spotify</b></p>	<p><b>7 Rights you grant us</b></p> <p>In consideration for the rights granted to you under the Agreements, you grant us the right (1) to allow the Spotify Service to use the processor, bandwidth, and storage hardware on your Device in order to facilitate the operation of the Service, (2) to provide advertising and other information to you, and (3) to allow our business partners to do the same. In any part of the Spotify Service, the Content you view, including its selection and placement, may be influenced by commercial considerations, including agreements with third parties. Some Content licensed or provided to Spotify (e.g. podcasts) may contain advertising as part of the Content. In such cases, Spotify will make such Content available to you unmodified.</p> <p>If you provide feedback, ideas or suggestions to Spotify in connection with the Spotify Service or Content (“Feedback”), you acknowledge that the Feedback is not confidential and you authorize Spotify to use that Feedback without restriction and without payment to you. Feedback is considered a type of User Content.</p> <p>You grant Spotify a non-exclusive, transferable, sub-licensable, royalty-free, perpetual (or, in jurisdictions where this is not permitted, for a term equal to the duration of the Agreements plus twenty (20) years), irrevocable, fully paid, worldwide licence to use,</p>

	<p>reproduce, make available to the public (e.g. perform or display), publish, translate, modify, create derivative works from, and distribute any of your User Content in connection with the Service through any medium, whether alone or in combination with other content or materials, in any manner and by any means, method or technology, whether now known or hereafter created. Aside from the rights specifically granted herein, you retain ownership of all rights, including intellectual property rights, in the User Content. Where applicable and permitted under applicable law, you also agree to waive any “moral rights” (or the equivalent under applicable law) such as your right to be identified as the author of any User Content, including Feedback, and your right to object to derogatory treatment of such User Content.</p>
<p><b>Tinder</b></p>	<p><b>Content Posted by You in the Service.</b></p> <p>You are solely responsible for the content and information that you post, upload, publish, link to, transmit, record, display or otherwise make available (hereinafter, “post”) on the Service or transmit to other users, including text messages, chat, videos (including streaming videos), photographs, or profile text, whether publicly posted or privately transmitted (collectively, “Content”). You may not post as part of the Service, or transmit to the Company or any other user (either on or off the Service), any offensive, inaccurate, incomplete, abusive, obscene, profane, threatening, intimidating, harassing, racially offensive, or illegal material, or any material that infringes or violates another person’s rights (including intellectual property rights, and rights of privacy and publicity). You represent and warrant that (i) all information that you submit upon creation of your account, including information submitted from your Facebook account, is accurate and truthful and that you will promptly update any information provided by you that subsequently becomes inaccurate, incomplete, misleading or false and (ii) you have the right to post the Content on the Service and grant the licenses set forth below.</p> <p>You understand and agree that the Company may, but is not obligated to, monitor or review any Content you post as part of a Service. The Company may delete any Content, in whole or in part, that in the sole judgment of the Company violates this Agreement or may harm the reputation of the Service or the Company.</p> <p>By posting Content as part of the Service, you automatically grant to the Company, its affiliates, licensees and successors, a non-exclusive, transferable, sub-licensable, fully paid-up, worldwide right and license to (i) use, copy, store, perform, display, reproduce, record, play, adapt, modify and distribute the Content, (ii) prepare derivative works of the Content or incorporate the Content into other works, and (iii) grant and authorize sublicenses of the foregoing in any media now known or hereafter created. You represent and warrant that any posting and use of your Content by the Company will not infringe or violate the rights of any third party.</p>
<p><b>Tumblr</b></p>	<p><b>Subscriber Content License to Tumblr:</b></p> <p>When you provide Subscriber Content to Tumblr through the Services, you grant Tumblr a non-exclusive, worldwide, royalty-free, sublicensable, transferable right and license to use, host, store, cache, reproduce, publish, display (publicly or otherwise), perform (publicly or otherwise), distribute, transmit, modify, adapt (including, without limitation, in order to conform it to the requirements of any networks, devices, services, or media through which the Services are available), and create derivative works of, such Subscriber Content. The rights you grant in this license are for the limited purposes of allowing Tumblr to operate the Services in accordance with their functionality, improve the Services, and develop new Services. The reference in this license to "creat[ing] derivative works" is not intended to give Tumblr a right to make substantive editorial changes or derivations, but does, for example, enable <b>reblogging</b>, which allows Tumblr Subscribers to redistribute Subscriber Content from one Tumblr blog to another in a manner that allows them to add their own text or other Content before or after your Subscriber Content.</p>

	<p>--</p> <p>When you upload your creations to Tumblr, you're giving us permission to make them available in all the ways you would expect us to (for example, via your blog, RSS, the Tumblr Dashboard, etc.). We never want to do anything with your work that surprises you.</p> <p>Something else worth noting: Countless Tumblr blogs have gone on to spawn books, films, albums, brands, and more. Any royalties or reimbursement you get for your creations are, needless to say, entirely yours. It's your work, and we're proud to be a part (however small) of what you accomplish.</p> <p>--</p> <p>You also agree that this license includes the right for Tumblr to make all publicly-posted Content available to third parties selected by Tumblr, so that those third parties can syndicate and/or analyze such Content on other media and services.</p> <p>---</p> <p>An example of what it means to "make all publicly-posted Content available" to a Tumblr partner for distribution or analysis would be licensing the Tumblr "firehose," a live feed of all public activity on Tumblr, to partners like search engines.</p> <p>---</p> <p>Note also that this license to your Subscriber Content continues even if you stop using the Services, primarily because of the social nature of Content shared through Tumblr's Services - when you post something publicly, others may choose to comment on it, making your Content part of a social conversation that can't later be erased without retroactively censoring the speech of others.</p> <p>---</p> <p>One thing you should consider before posting: When you make something publicly available on the Internet, it becomes practically impossible to take down all copies of it.</p> <p>---</p> <p>You also agree that you will respect the intellectual property rights of others, and represent and warrant that you have all of the necessary rights to grant us this license for all Subscriber Content you transfer to us.</p>
<p><b>Twitter</b></p>	<p><b>5. Your Rights</b></p> <p>You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).</p> <p><b>Tip:</b> This license is you authorizing us to make your Tweets on the Twitter Services available to the rest of the world and to let others do the same.</p> <p>You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.</p> <p><b>Tip:</b> Twitter has an evolving set of rules for how ecosystem partners can interact with your Content on the Twitter Services. These rules exist to enable an open ecosystem with your rights in mind. But what's yours is yours – you own your Content (and your photos are part of that Content).</p> <p>Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services. We may modify or adapt your Content in order to transmit, display or distribute it over</p>

	<p>computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media.</p>
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You are responsible for your use of the Services, for any Content you provide, and for any consequences thereof, including the use of your Content by other users and our third party partners. You understand that your Content may be syndicated, broadcast, distributed, or published by our partners and if you do not have the right to submit Content for such use, it may subject you to liability. Twitter will not be responsible or liable for any use of your Content by Twitter in accordance with these Terms. You represent and warrant that you have all the rights, power and authority necessary to grant the rights granted herein to any Content that you submit.

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