The Emperor's New Digital Clothes: The Illusion of Copyright Rights in Social Media

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THE EMPEROR’S NEW DIGITAL CLOTHES: THE ILLUSION OF COPYRIGHT RIGHTS IN SOCIAL MEDIA

MIHAIJO BABOVIC†

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I. INTRODUCTION

Increasingly, life takes place in a digital world. In 2012, Internet users across the US, UK, and Australia spent 27% of their time online participating on social media websites. More than ever before, social interactions are governed by emerging technology—yet our copyright system has been slow to react, allowing companies, which offer the services that users love, to take advantage of those same users. Plain and simple, a large portion of the content posted on social websites is copyrightable. But, through Terms of Service agreements, users license away every single exclusive right that copyright laws grant them. For this, they receive nothing. Artful contract writing allows these agreements to satisfy the law, continuing a trend where users give away their valuable content in exchange for social network access. A remedy does not yet exist, at least so far as a court would recognize, that would allow users to nullify these oppressive agreements. These agreements change the incentive structure underlying copyright law and should be constitutionally prohibited.

II. WHAT CONSTITUTES A SOCIAL MEDIA WEBSITE AND IS CONTENT POSTED TO THESE WEBSITES COPYRIGHTABLE?

Social media usage has grown exponentially since the turn of the century, and as of January 2014, 74% of Internet users above

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2 See infra Part I.
3 See infra Part II.A.1.a–d.
4 See infra Part III.
5 See infra Part IV.
the age of 18 use some form of social networking website.\(^6\) While users of these sites can likely envision exactly what constitutes a “social networking” or “social media” website, defining the term in a legal sense presents more difficulty. I propose a definition of social media: Internet-based applications and tools that allow users and communities to share, co-create, discuss, and modify information and user-generated content (UGC).\(^7\) This concept is different from that of social networking, which describes websites that “facilitate the connection of users via online technologies.”\(^8\) The distinction is a fine one, and certain websites would certainly fall into both social media and social networking categories—the important difference being a question of what the focus of user interaction is, that is, whether the focus is UGC (social media), as opposed to creating and maintaining social connections (social

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\(^7\) Andreas M. Kaplan & Michael Haenlein, Users of the World, Unite! The Challenges and Opportunities of Social Media, 53 BUS. HORIZONS 59, 61 (2010) (defining social media as “a group of Internet-based applications . . . that allow the creation and exchange of User Generated Content” creating interactive platforms through which this content can be shared and modified); see also Social Media, WIKIPEDIA, http://en.wikipedia.org/wiki/Social_media (last modified Oct. 21, 2014).

\(^8\) Steven A. Cook, Hiroaki Ogata & Mark G. Elwell, Meta-Documentation: The Dissemination of the Tacit Knowledge Inherently Attached to Organisational Documents, PROCEEDINGS OF THE 21ST INTERNATIONAL CONFERENCE ON COMPUTERS IN EDUCATION, 2 (2013), available at http://icee2013bali.org/datacenter/mainconferenceproceedingsfordin dividualdownload/c4/C4-s-164.pdf (“Social Network Services (SNS) . . . have been defined as a network of users who are typically connected offline . . . [but studies have demonstrated] that SNS is also used as a way for users to venture out and make contact with users outside their immediate circle of offline friends/acquaintances.”).
networking). So, much like the relation of squares to rectangles, social networking websites will always include UGC, but a social media site will not always include the type of community categorized as a social networking website. This article will specifically discuss four social media websites: Facebook, Twitter, LinkedIn, and YouTube. Before that discussion, however, the above provided definition of social media admittedly requires further qualification; most notably, what is UGC? Is this content copyrightable? And, if so, who owns the copyright?

A. What is User-Generated Content?

Following the conclusion that social media websites are online communities where users can interact with, post, and modify UGC, we must determine precise boundaries for what might be considered “user-generated” content. One author suggested that a “user,” in regards to social media, might be synonymous with an “amateur,” but such a statement is simply not true—to be a user simply requires an online avatar, whether famous or not, that can represent either an individual or an organization. The word “generate” is a verb used to describe the process of producing

9 See id. (explaining that users are drawn to Social Network Services for benefits such as friendship and advice giving/receiving, and eventually form connections of trust).

10 See generally Len Glickman & Jessica Fingerhut, User-Generated Content, 30 NOV. ENT. & SPORTS L. 3 (2012) (explaining that “there is no widely accepted definition of user-generated content,” and generally describing UGC as “material uploaded on the Internet by website users”).


12 Twitter Top 100 Most Followers, TWITTER COUNTER, http://twittercounter.com/pages/100 (last visited Oct. 24, 2014). This regularly updated list of the 100 most “followed” users on Twitter is comprised of actors, musicians, athletes, politicians, as well as news outlets such as CNN.
something, or causing something to be produced. User-generated content, then, means that the individual or organization has created, produced, or developed the content—the phrase in itself would seem to contain an implicit level of creativity.

Content that is user-generated implies that the user had a hand in making or editing the content to a large extent. Ultimately, however, creativity is not the primary distinction between the creation and curation of content—the latter describing the process of gathering, sifting through, selecting, and presenting content. Take for example Pinterest, where users curate content and compile “pins” that “are visual bookmarks for good stuff you find anywhere around the web.” Can the assembling of these “pins” be inherently creative? Absolutely, and the law is prepared to reward authors for such work. The contrast between curating and creating, then, must lie in the user’s role in producing the content—where “the user is not merely a casual part of a new copy of some preexisting content being reproduced.” The role of the user in creating the content, or put another way, the extent of his or her original contribution, has important implications as to the copyright protection granted to the work. Before discussing the strength of copyright protections in various UGC, we must first determine what content, if any, is copyrightable.

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13 Generate, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/generate (last visited Oct. 24, 2014) (defining generate as “to produce (something) or cause (something) to be produced”).


16 Fiest Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350–51 (1991) (“A factual compilation is eligible for copyright if it features an original selection or arrangement or facts, but the copyright is limited to the particular selection or arrangement.”).

17 Hetcher, supra note 11, at 871–872.
B. Is User-Generated Content Copyrightable?

In order to receive copyright protection, a work must be both original and fixed in a tangible medium of expression. Case law has held that copying a file to RAM fulfills the fixation requirement because the copy can be “perceived, reproduced, or otherwise communicated,” even if for a temporary period of time. Applying this standard to social media content will result in the same outcome, as the work is posted online for the purpose of being perceived and reproduced, and will thus satisfy the constitutional requirement of fixation. A more disputable question arises when UGC is forced to fulfill the requirement of originality. The long applied standard for originality in copyright is “extremely low . . . [requiring only] some creative spark, ‘no matter how crude, humble, or obvious’ it might be.” And, while novelty is not necessary, the work must “owe its origin” to the author, or—in the case of online media—to the posting user. But as a baseline, user-generated content can be copyrightable, and

20 17 U.S.C. §102(a) (2013) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .”) (emphasis added).
24 Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951) (“‘Original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’ No large measure of novelty is necessary.”) (quoting Baker, 101 U.S. at 102–103).
courts have fielded a variety of infringement actions regarding UGC and the websites that host it.\textsuperscript{25} While not all UGC posted online will meet this originality threshold, some certainly will. But where are we to draw the dividing line?

1. What UGC is Copyrightable?

Spontaneity and community, two features that make social media so unique and popular, also present the most difficult issues regarding the copyrightability of UGC. A “tweet,” an opinionated blog posting, or a Facebook “status update” come directly from the mind of the user and are posted to the internet—this is expression in its most basic sense, and would certainly seem to fulfill the originality and fixation requirements of copyright law.\textsuperscript{26} Due to its nature, however, UGC runs into problems when coping with (1) the interaction of originality and length, and (2) the related issues presented when considering the doctrine of merger.

a. The Preclusion of Copyright Protection Due to Length or the Doctrine of Merger

The social media platform Twitter, where tweets are famously limited to 140 characters, would seem to come under the heaviest scrutiny when discussing the interplay between length and originality. While there is no length requirement for a work to be eligible for copyright protection, courts are averse, for good reason, to grant protection to short phrases.\textsuperscript{27} This is not an end-all,


\textsuperscript{26} Feist, 499 U.S. at 346 (1991) (a work is original if it is “founded in the creative powers of the mind”).

\textsuperscript{27} Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541, 544 (2d Cir. 1959) (“[S]logans, and other short phrases or expressions cannot be
but it does raise the bar for copyrightability—for the “smaller the effort the greater must be the creativity in order to claim copyright protection.” For a tweet to be copyrightable, then, it would need to contain a patently original arrangement of words, or perhaps the creative fashioning of new (or combined) words. Copyrightability also hinges on the necessity that the work represents an expression, rather than an idea, and that the idea is capable of many modes of expression—certainly we would not grant copyright protection to a tweet that simply states, “So excited for the weekend!”

The doctrine of merger focuses on whether a specific idea is capable of various modes of expression, or whether the expression is “ineluctably and inextricably intertwined with the idea.”

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29 Rich Stim, Copyright Protection for Short Phrases, STANFORD UNIVERSITY LIBRARIES (Sept. 9, 2003), http://fairuse.stanford.edu/2003/09/09/copyright_protection_for_short/ (“Whether you can stop someone else from using your literary phrases is dependent upon the uniqueness and value of the phrases as well as the way in which you use them.”); see Heim v. Universal Pictures Co., 154 F.2d 480, 488 (2d Cir. 1946) (copying might be demonstrated “by showing that a single brief phrase, contained in both pieces, was so idiosyncratic in its treatment as to preclude coincidence”).

30 Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009); see Mason v. Montgomery Data, Inc., 967 F.2d 135, 139 (5th Cir. 1992) (“If the court concludes that the idea and its expression are inseparable, then the merger doctrine applies and the expression will not be protected.”); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983) (stating that the inquiry is whether the idea and its expression have merged, which occurs “when there are no or few other ways of expressing a particular idea”).
one’s self\textsuperscript{31}—can in many circumstances be so simple or common that the subject matter would be appropriated were we to award a copyright for its expression.\textsuperscript{32} Or, take a news service posting breaking stories on social media: could a short description of the story followed by a link to the entire story be copyrightable? It would seem that a summary of a factual story would necessarily be merged with the factual content it expresses, making it unfit for copyright.\textsuperscript{33} Yet, this certainly does not preclude all UGC from copyright protection—there exist a plethora of sufficiently unique UGC to be found on any social media website.

Another example is a photograph uploaded to a social media website. Our copyright system has long recognized copyright protection for photographs, so long as they are “original conceptions of the author.”\textsuperscript{34} The fact that the author of a photograph, a user, uploads the photo onto a social media website does not exhaust his or her interest in controlling the distribution of the work—no compensation was paid, meaning that this situation

\begin{flushright}
\textsuperscript{31} Sonia Livingstone, \textit{Taking Risky Opportunities in Youthful Content Creation: Teenagers Use of Social Networking Sites of Intimacy, Privacy and Self-Expression}, 10(3) NEW MEDIA & SOC’Y 393, 397 (2008) (explaining that teenagers use Facebook as a medium to express who they are and what they are feeling to others in their online community).

\textsuperscript{32} 2 William F. Patry, \textit{PATRY ON COPYRIGHT} § 4:46 (WestlawNext Database updated Sept. 2014) (“[I]t is necessary to say that subject matter [merged with its expression] would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated.”).


\textsuperscript{34} Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (“We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.”); \textit{see} Latimer v. Roaring Toyz, Inc., 601 F.3d 1224 (11th Cir. 2010) (analyzing a case of alleged infringement of digital photographs and shows that copyright can indeed be granted to photos that exist only in digital format).
does not implicate the “first sale” doctrine.\textsuperscript{35} Similarly, a user who recounts a story via a Facebook status update could claim copyright ownership to that writing, so long as a grant of copyright would not be precluded by the doctrines discussed above. Or, even a joke being told via Twitter\textsuperscript{36} can certainly possess the originality required to receive copyright protection in the work. Take for instance original videos, scholarly articles, and blog posts; the examples are plenty, and users clearly have copyright interests in original content uploaded to social media websites. This framework is more complicated, however, when considering compilation works where users have appropriated content from all over the web.

\textit{b. Modifying or Combining Previously Posted Works}

In the case of a compilation work where the user has not created any of the compiled material, the compilation only receives limited protection to the extent that the “selection, coordination, or arrangement” of the material is original.\textsuperscript{37} So in the case of a Pinterest user’s “pins,” the user would need to show that an infringer had copied an original element of the compilation—this

\begin{itemize}
  \item \textsuperscript{35} Sebastian Int’l, Inc. v. Consumer Contacts, Ltd., 847 F.2d 1093, 1095 (3d Cir. 1988) (“The copyright statutes have been amended repeatedly in an attempt to balance the authors' interest in the control and exploitation of their writings with society's competing stake in the free flow of ideas, information and commerce. Ultimately, the copyright law regards financial reward to the owner as a secondary consideration.” (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)) (citation omitted)).
  \item \textsuperscript{36} E.g., @Jay_FrickinLynn, TWITTER (May 7, 2014, 5:05 PM), https://twitter.com/Jay_FrickinLynn/status/464164101665476610 (“Stabbing yourself in the gums with a chip is God's way of fat shaming you.”).
  \item \textsuperscript{37} Fiest Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (“[C]opyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement” of material); see 17 U.S.C. § 103(b) (2012) (“The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”).
\end{itemize}
would certainly not be an easy task. Similarly, a user who modifies a work or object from the public domain would receive thin copyright protection for the new work. This grant of copyright would only protect original expressions that the user actually contributed to the underlying idea. In both cases, the ability of the user to safeguard his or her work is extremely limited because of the reduced copyright protection interests therein.

Alternatively, because of the ease of appropriating content illegally online, there are issues with the copyrightability of much posted content—namely, that these works do not “owe [their] origin” to the posting user (the purported author). Under these circumstances, the appropriating user could consider a fair use defense; however, the availability of such a defense is contingent on the user’s purpose for reproducing the original. The Copyright Act lists a four-factor analysis for fair use; however, such a determination is “an open-ended and context-sensitive inquiry.”

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38 Fiest, 499 U.S. at 361 (“[T]he selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever . . . .”).

39 Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003) (An artist who created a jellyfish sculpture was only granted copyright protection to the extent that the artistic choices were not governed by jellyfish physiology. The court explained that this protection is “thin” in that the artist “may prevent others from copying the original features he contributed, but he may not prevent others from copying elements of expression that nature displays for all observers . . . .”).

40 Id. at 813 (“An artist may . . . protect the original expression he or she contributes to these ideas. An artist may vary the pose, attitude, gesture, muscle structure, facial expression, coat, or texture of animal.”).

41 Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951). This is assuming the user does not attribute the material to its author or home website.

42 17 U.S.C. § 107 (2012) (The fair use defense applies so long as the original work was appropriated “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . .”).

43 Blanch v. Koons, 467 F.3d 244, 250–51 (2d Cir. 2006); see 17 U.S.C. § 107 (1–4) (listing the factors to determine the existence of fair use: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work
Because fair use is fact intensive and many social media Terms of Service agreements prohibit illegal posting of material, user appropriation of otherwise copyrighted material is outside the scope of this article’s discussion. Additionally, because of their reduced copyright protection interests, curated works (compilations) and those with thin copyright protection also fall somewhat outside of this discussion.

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44 Most, if not all, social media websites are immune from liability for infringing material uploaded by its users via the mechanisms outlined in § 512 of the copyright act. This section lists takedown requirements for websites that host user material, which, if followed, allow the site to gain immunity from contributory infringement claims. Because of this, social media sites hold little responsibility regarding user posted material infringing copyrights within their domains. For more information on these requirements see 17 U.S.C. § 512 (2012).

45 See Statement of Rights and Responsibilities, § 5.1, FACEBOOK (last updated Nov. 15, 2013), https://www.facebook.com/legal/terms [hereinafter Facebook Rights & Responsibilities] (The user must agree to “not post content or take any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law.”); Terms of Service, § 9, TWITTER (last updated Sept. 8, 2014), https://twitter.com/tos [hereinafter Twitter Terms of Service] (“Twitter respects the intellectual property rights of others and expects users of the Services to do the same. We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us.”); User Agreement, § 11, LINKEDIN (last updated Mar. 16, 2014), https://www.linkedin.com/legal/user-agreement [hereinafter LinkedIn User Agreement] (“[T]his Agreement requires that information posted by Members be accurate and not in violation of the intellectual property rights or other rights of third parties.”); Terms of Service, § 6.F, YOUTUBE (last updated June 9, 2010), https://www.youtube.com/static?template=terms [hereinafter YouTube Terms of Service] (“YouTube does not permit copyright infringing activities and infringement of intellectual property rights on this Service, and YouTube will remove all Content if properly notified that such Content infringes on another’s intellectual property rights.”).
C. Who Owns Copyrightable Content on Social Media Websites?

The Copyright Act states that a “copyright in a work protected under this title vests initially in the author or authors of the work.”\(^{46}\) In many cases, this analysis is very straightforward: a user creates a song, video, or text posting from scratch, and uploads it to the social media site of their choice—thus there is little question as to who owns the copyrighted content.\(^{47}\) Issues of ownership, however, do arise, sometimes in ways that are unique to social media, and in ways that are not. These questions span topics from collaborative work\(^ {48}\) and works made for hire\(^ {49}\) to infringement and associated penalties.

1. Implications of Joint Authorship in Social Media

A joint work is defined in the Copyright Act as one that is “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”\(^ {50}\) This requires a specific mental state, and in the absence of a contractual agreement, courts will look to whether the

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\(^{46}\) 17 U.S.C. § 201(a) (2012) (also relevant is that “authors of a joint work are coowners of copyright in the work”).

\(^{47}\) Will Clark, Copyright, Ownership, and Control of User-Generated Content on Social Media Websites 8, CHI.-KENT COLL. L. REV. (2009), http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20Clark%20final%20Copyright%20Ownership%20and%20Control%20of%20User-Generated%20Content%20on%20Social%20Media%20Websites.pdf (listing examples of a mother posting a picture of her child on Facebook, or an independent band uploading a self-made music video on YouTube).

\(^{48}\) See generally Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000) (establishing a framework for determining, the point at which a contributor can be considered an author in joint work, for “that authorship is not the same thing as making a valuable and copyrightable contribution”).

\(^{49}\) See generally Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (establishing a balancing test for determining when an author is an employee, as described using common law agency principles, for the purposes of whether a created work is a “work made for hire”).

contributing artists expected to be viewed as “co-authors.” While in some ways social media brings nothing new to the joint authorship table (artists corresponding digitally to co-author a book, a virtual band, etc.), there are ways in which digital interaction differs fundamentally from the real world.

Take, for example, a conversation on Facebook taking place through a single “post” and numerous “comments” on that post (for simplicity’s sake, let us assume this is a two-user conversation). Quite obviously, it is unlikely that the users had the intent to create any work, let alone a unitary work with any consideration of joint authorship. Such a conclusion is unsurprising; yet, it does not end our analysis. First, the call-and-response nature of online chat interaction lends itself well to an implicit intent to create a joint work. Surely, both users understand that they are contributing only part of the original material in the work, and intend the final chat dialog to be a summation of both users’ responses to one another. Objectively, and assuming the users contributed a relatively equal amount to the original post and various comment responses, there would seem to be intent to create a joint work. While either user would have a difficult time showing subjective intent to create a work (simply because neither user considers their chat to be the creation of a work at all), intent of the parties can also be determined through their actions in

51 Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991) (explaining that the inquiry is whether the authors “entertain in their minds the concept of joint authorship, whether or not they understood precisely the legal consequences of that relationship”); see also Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069 (7th Cir. 1994) (“Even if two or more persons collaborate with the intent to create a unitary work, the product will be considered a ‘joint work’ only if the collaborators can be considered ‘authors.’”).


53 Therese M. Brady, Manifest Intent and Copyrightability: The Destiny of Joint Authorship, 17 FORDHAM URB. L.J. 257, 269 (1989) (“The authors’ objective contributions to a joint work determine ownership.”).
creating the work.\textsuperscript{54} Such a determination would ultimately be fact intensive, but, as a general matter, two users writing and responding to one another certainly seem to have a mutual intent to create a chat dialog.\textsuperscript{55}

Along with intent to create a joint work, each party’s contribution must be independently copyrightable.\textsuperscript{56} Without a specific chat interaction to analyze, this discussion will remain relatively rudimentary. The originality threshold for copyrightable works is low—assuming that the summation of each user’s chat contributions was somewhat significant and creative, there should be no issue in regards to originality.\textsuperscript{57} Once a chat response is posted, it has been fixed in a tangible medium, the second requirement of copyrightability.

So, it would seem that two users could be granted joint authorship protection for a combined chat dialog. But, does the same reasoning apply in a more complicated context where users contribute independently to a much larger whole?

\textsuperscript{54} Id. at 277 (“[T]he court in Strauss v. Hearst Corp. followed the common design doctrine by determining the intent of the parties from their actions in creating the work.”); see Strauss v. Hearst Corp., 1988 WL 18932, #6 (“Here there is no doubt that Strauss and Popular Mechanics intended that ‘their contributions be merged into inseparable or interdependent parts of a unitary whole.’ In fact, it is hard to imagine a set of facts that is any clearer on that point.”).

\textsuperscript{55} Thomson v. Larson, 147 F.3d 195, 201–02 (2d Cir. 1998) (“[T]he contribution even of significant language to a work does not automatically suffice to confer co-author status on the contributor . . . a specific finding of mutual intent remains necessary.”).

\textsuperscript{56} Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071 (7th Cir. 1994) (applying a two-pronged test for joint authorship, requiring: (1) that the parties intended to be joint authors at the time of work creation, and (2) that their contribution were independently copyrightable).

\textsuperscript{57} Nimmer, supra note 28, § 2.01[A] (“Originality in the copyright sense means only that the work owes its origin to the author, \textit{i.e.}, is independently created, and not copied from other works.”).
a. The Wikipedia Conundrum

Wikipedia is “a multilingual, web-based, free-content encyclopedia project . . . [that] is written collaboratively by largely anonymous Internet volunteers who write without pay.” Wikipedia is “a multilingual, web-based, free-content encyclopedia project . . . [that] is written collaboratively by largely anonymous Internet volunteers who write without pay.” Wikipedia is “a multilingual, web-based, free-content encyclopedia project . . . [that] is written collaboratively by largely anonymous Internet volunteers who write without pay.” Wikipedia is “a multilingual, web-based, free-content encyclopedia project . . . [that] is written collaboratively by largely anonymous Internet volunteers who write without pay.” Wikipedia is “a multilingual, web-based, free-content encyclopedia project . . . [that] is written collaboratively by largely anonymous Internet volunteers who write without pay.”

These circumstances seem most comparable to a film, a large-scale project where the legal question yearning for an answer is whether a particular contributor is an author of the joint work under the purposes of 17 U.S.C. § 101. The court in Aalmuhammed v. Lee outlined important factors when looking for joint authorship in absence of a contract:

1. the degree of control exercised over the work;
2. an objective manifestation of shared intent to be coauthors; and
3. the share of each contribution in the work’s success cannot be appraised.

Because of the wide range of interactions and contributions that might arise on Wikipedia, there are some circumstances where the Aalmuhammed test is fulfilled, and many where it is not.

Consider two specific fact scenarios: First, where a group of five users write an entire Wikipedia article about the company that they work for together. Second, where a few unacquainted users

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59 Aalmuhammed v. Lee, 202 F.3d 1227, 1232 (9th Cir. 2000) (holding that authorship is statutorily required for the formation of a joint work, and that “authorship is not the same thing as making a valuable and copyrightable contribution”); see 17 U.S.C. § 101 (2012).

60 It is recognized that Wikipedia contributors must agree to the website’s Terms of Use, which is a contract. And while the lack of reference to joint authorship in these terms is telling, there is potential joint authorship between the many contributors of a particular article, and certainly these independent writers have not signed a contract between one another. See Terms of Use, WIKIMEDIA FOUNDATION, http://wikimediafoundation.org/wiki/Terms_of_Use [hereinafter Wikimedia Terms of Use] (last modified July 8, 2014).

61 See Aalmuhammed, 202 F.3d at 1234 (“Control in many cases will be the most important factor.”).
submit content on a large Wikipedia article (let’s say, Spider-Man\textsuperscript{62}) that is in turn edited by another set of users (this is the common practice on the website).\textsuperscript{63} Looking to the first set of facts and applying the \textit{Aalmuhammed} factors, the Wikipedia article could be found to be a joint work (relying on some important assumptions about the users’ conduct). Control, the first factor, looks to exercising superintendence over the work; in other words, creating or giving effect to the ideas.\textsuperscript{64} To fulfill this element, the users would need to work on a level playing field, where no single writer would tell the others what to write or have the ability to unilaterally veto contributions of the others.\textsuperscript{65} Running on this assumption, the users would likely each contribute a comparable amount to the work, and through these efforts could be said to have met the second factor by making an “objective manifestation of intent to be coauthors.”\textsuperscript{66} And finally, because each user would equally help bring about the ultimate whole, the “audience appeal of the work” would turn on their collective, not individual, contributions.\textsuperscript{67} These facts are, admittedly, quite specific and

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\textsuperscript{63} Henry Blodget, \textit{Who the Hell Writes Wikipedia, Anyway?}, BUSINESS INSIDER (Jan. 3, 2009, 8:39 AM), http://www.businessinsider.com/2009/1/who-the-hell-writes-wikipedia-anyway (“The bulk of the original content on Wikipedia is contributed by tens of thousands of outsiders, each of whom may not make many other contributions to the site. The bulk of the changes to the original text, then, are made by a core group of heavy editors who make thousands of tiny edits.”).

\textsuperscript{64} \textit{Aalmuhammed}, 202 F.3d at 1234 (“[A]n author ‘superintend[s]’ the work by exercising control.” (quoting Burrow-Giles v. Sarony, 111 U.S. 53, 61 (1884))).

\textsuperscript{65} See id. at 1234–35. In \textit{Aalmuhammed}, Spike Lee was in control of the creation of a movie because Lee was not bound to accept any recommendations and ultimately chose what was included in the film and what was not.

\textsuperscript{66} Id. at 1235.

\textsuperscript{67} Id. at 1234 (“[T]he audience appeal of the work turns on both contributions and ‘the share of each in its success cannot be appraised.’” (quoting Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944))).
\end{small}
somewhat unrealistic, but they do illustrate that a group of users could contribute to a Wikipedia article, and have an expectation of copyright ownership in it.

The more common occurrence on Wikipedia is one where multiple authors contribute a bulk of the substance, which is in turn edited by a number of other users. Clearly, there is no control by any one user over the work—indeed, any Internet user can make changes to a Wikipedia page.\(^{68}\) It is this same characteristic that makes it impossible for all contributors to a work to hold any expectation of joint authorship: edits can be made anonymously and without approval of previous writers/editors.\(^{69}\) The ability to appraise each contribution need not be discussed, for the first two elements weigh strongly against the determination that a joint work has been created.\(^{70}\)

Regardless, Wikipedia states in its Terms of Service agreement that users who submit copyrightable work agree to license such work under either (or both) the Creative Commons Attribution-ShareAlike 3.0 Unported License or the GNU Free Documentation License.\(^{71}\) The Creative Commons license allows other users to share and adapt uploaded content (even commercially) so long as proper attribution is given, and additional restrictions are not added

\(^{68}\) See Wikimedia Terms of Use, supra note 60 ("We welcome you (‘you’ or the ‘user’) as a reader, editor, author, or contributor of the Wikimedia Projects, and we encourage you to join the Wikimedia community."); see also Blodget, supra note 63 ("What users love about Wikipedia is the ability to make minor contributions (on the fly) to an existing piece of work—they don't want to read or vote on a handful of competing ‘articles’ and petition a single author to make changes.").

\(^{69}\) See Aalmuhammed, 202 F.3d at 1235 (noting as significant that none of the parties expressed any intention of co-authorship). Likewise, a heavy content contributor on Wikipedia could not express an intention to be considered a co-author with an editor whom he or she knows nothing about.

\(^{70}\) Id. ("[A]bsence of control is strong evidence of the absence of co-authorship.").

\(^{71}\) Wikimedia Terms of Use, supra note 60.
to the content. The GNU license carries very similar terms. Wikipedia contributors must agree to apply one of these licenses to their copyrighted work, so it is of little consequence whether or not a joint work has been created. However, such issues could arise on other social media platforms and illustrate a complex and unique copyright issue presented by Internet usage in conjunction with authorship.

b. Social Media and Employment

The use of social media within the employment sphere presents unique issues in regards to the ownership of UGC. If an employee uses his or her social media avatar to develop business contacts, court new clients, or post company information, could this not be part of their work on behalf of the employer? The Copyright Act provides for two circumstances in which a work will be one that was made for hire: (1) the work is prepared by an employee in the scope of his or her employment, or (2) the work is specially ordered or commissioned. Of those two mechanisms for creating

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72 Attribution 3.0 United States, Creative Commons, https://creativecommons.org/licenses/by/3.0/us/ (last visited Oct. 21, 2014) (defining “Share” as “copy and redistribute the material in any medium or format” and Adapt as “remix, transform, and build upon the material.”). Also worth noting is that the “licensor cannot revoke these freedoms as long as you follow the license terms.” Id.

73 GNU Free Documentation License, GNU Operating System § 2 (Nov. 3, 2008), http://www.gnu.org/copyleft/fdl.html (“You may copy and distribute the Document in any medium, either commercially or noncommercially, provided that this License, the copyright notices, and the license notice saying this License applies to the Document are reproduced in all copies, and that you add no other conditions whatsoever to those of this License.”).

74 See G. Ross Allen & Francine D. Ward, Things Aren’t Always as They Appear: Who Really Owns Your User Generated Content?, 3 No. 2 LANDSLIDE 49, 52 (2010) (“A business's social media policy should be sure to address how employees may reference and use business property such as communications, press releases, and trademarks, when mixing such content with the employees' personal property.”).

75 17 U.S.C. § 101 (2012) (“A ‘work made for hire’ is . . . a work specially ordered or commissioned for use as a contribution to a collective work . . . if the
a work made for hire, the former can create much more substantial issues for employees.

What does it mean for content to be prepared in the scope of employment? Statutory interpretation of this part of the Copyright Act has led to the adoption of common-law agency principles for determining what constitutes the scope of employment. Looking to those principles, an employee is acting within the scope of employment if: (1) it is the kind of work “he is employed to perform”; (2) “it occurs substantially within the authorized time and space limits”; and (3) “it is actuated, at least in part, by a purpose to serve” the employer. As is evident, these limits go beyond the use of a company avatar in social media, and could very easily extend to UGC posted from an employee’s personal account.

III. TERMS OF SERVICE AND THEIR USE IN SOCIAL MEDIA

Terms of Service, also referred to as Terms of Use or Terms and Conditions, are a series of rules or conditions one must agree to in order to use a web service. Earning the name “clickwrap” agreements, such terms have been upheld by courts so long as users are given a clear opportunity to read through the agreement.


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parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”

76 See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (“[W]e have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”).

77 RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (listing a fourth factor: “if force is intentionally used by the servant against another, the use of force is not unexpectable by the master”).

78 Hancock v. AT&T Co., 701 F.3d 1248, 1256 (10th Cir. 2012) (“Courts evaluate whether a clickwrap agreement’s terms were clearly presented to the consumer, the consumer had an opportunity to read the agreement, and the consumer manifested an unambiguous acceptance of the terms.”); see also Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 32–35 (2d Cir. 2002) (“[W]here consumers are urged to download free software at the immediate
While each social media site drafts and implements its own terms, the agreements share many similarities—unsurprising considering how comparable the services offered through the various websites are. So long as the terms of service do not bury specific terms so as to surprise users, the contracts are enforceable. Thus, users are faced with a choice to either accept the terms or refrain from taking part in social media.

A. Licensing the Use of User-Generated Content

A user does not relinquish ownership or rights in copyrightable material merely by agreeing to the terms of service of a particular social media website. For example, a Twitter user grants Twitter “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.” The agreement also allows Twitter to share this content with other companies “with no compensation paid” to the user. But even though the user retains ownership of the content, he or she 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 . . . . [R]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.” (footnote omitted); Serrano v. Cablevision Sys. Corp., 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012) (“In the context of agreements made over the internet, such “click-wrap” contracts are enforced under New York law as long as the consumer is given a sufficient opportunity to read the end-user license agreement, and assents thereto after being provided with an unambiguous method of accepting or declining the offer.”).

79 Compare Facebook Rights & Responsibilities, supra note 45, with Twitter Terms of Service, supra note 45, and LinkedIn User Agreement, supra note 45, and YouTube Terms of Service, supra note 45.

80 Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606 (E.D.Pa. 2007) (explaining that burying an arbitration provision in a lengthy paragraph under the heading “GENERAL PROVISIONS” caused surprise to the user).

81 Twitter Terms of Service, supra note 45.

82 Id.
effectively loses the right control the dissemination of the work. Terms of service agreements, in general, license a significant chunk of exclusive rights associated with copyright, and have vague limitations on such a license. However, each should be individually examined to determine exactly what rights a user forfeits by registering an account on the specific website.

What follows is an analysis of the intellectual property license provisions found in the Terms of Service agreements of four social media websites: Facebook, Twitter, LinkedIn, and YouTube. When interpreting contracts, the “fundamental objective . . . is to give effect to the expressed intentions of the parties.” The objective intent of the parties governs the interpreted meaning, and when the contractual language is unambiguous, “the instrument alone is taken to express the intent of the parties.” If ambiguity does exist as to the terms of a contract, the principal purpose of the parties is given great weight (if ascertainable); the writing is interpreted as a whole; and, unless a different intention is manifested, words are given their prevailing meaning. If the

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83 Klos v. Lotnicze, 133 F.3d 164, 168 (2d Cir. 1997).
84 Swaminathan v. Swiss Air Transp. Co., 962 F.2d 387, 389 (5th Cir. 1992) (“When interpreting the meaning of a contract it is the objective, and not the subjective intent of the parties which controls. When a contract is unambiguous, the instrument alone is taken to express the intent of the parties.”) (citing Fuller v. Phillips Petroleum Co., 872 F.2d 655 (5th Cir. 1989); Shelton v. Exxon Corp., 921 F.2d 595 (5th Cir. 1991)); see also Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd., 525 F.3d 409, 421 (6th Cir. 2008) (Where contract language is unambiguous, “a court should not use extrinsic evidence to ‘attempt to discern the intent of the parties,’ but rather should determine their intent from ‘the plain language of the contract.’” (quoting United States v. Donovan, 348 F.3d 509, 512 (6th Cir. 2003))).
85 RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981); see also Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551 (Ct. Cl. 1971) (“[T]he language of a contract must be afforded the meaning derived from the contract by a reasonably intelligent person acquainted with the contemporary circumstances.”) (citing Hol-Gar Mfg. Corp. v. United States, 169 Ct. Cl. 384, 388 (Ct. Cl. 1965); Deloro Smelting and Refining Co. v. United States, 161 Ct. Cl. 489, 495 (Ct. Cl. 1963)).
contract contains technical terms, those terms are given their meaning within the technical field. Given that this analysis will look to the Terms of Service agreements devoid of specific factual circumstances, a few generalizations must be made about both users and social media websites to help ascertain their respective “principal purpose(s)” for entering into an agreement.

Users utilize social media to stay in touch with friends and family, reconnect with old friends, and connect with others sharing similar hobbies or interests. To engage in such behavior, users will chat directly with one another; post their own pictures, thoughts, and creations; and recommend links to various web pages they personally found interesting. Users agree to Terms of Service agreements in order to gain access to the networks that the websites provide. Social media websites are often operated as corporations and as such, make a profit (usually through advertising or subscriptions) for each new user that the service is able to attract. Social media websites, then, want to increase the number of users, and likely, the number of ways that active users can ultimately interact; these interactions draw early users to a

86 Aaron Smith, Why Americans Use Social Media, PEW RESEARCH INTERNET PROJECT (Nov. 15, 2011), http://www.pewinternet.org/2011/11/15/why-americans-use-social-media/ (finding that 67% and 64% of polled users responded that staying in touch with current friends and family members, respectively, is a major reason they use social media; 50% also listed reconnecting with old friends a major reason; and 14% listed connecting with others who shared hobbies as a major reason, 35% as a minor reason, for their social media use).

particular social media site, and the establishment of networks ultimately will bring the hordes.

The principal purpose for users and social media websites to enter into an agreement with one another is inextricably linked: users want to join large networks for the social benefits they provide, and social media sites want to provide large networks for the advertising revenue they generate. Intellectual property is an ancillary bargaining chip of these desires, in that the use of a wide variety of UGC—text posting, chat interaction, videos, pictures, music, et cetera—will draw more users, create larger networks, and allow for more diverse interactions. When interpreting these agreements, then, it is important to keep in mind that users are most likely willing to license their intellectual property in order to gain access to the full benefits that the various social media websites offer.

1. Facebook

The Facebook terms of service regarding posted intellectual property state that the user specifically grants the website a “non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook.”\(^{88}\) The agreement later goes on to state that the user grants Facebook:

\(^{88}\) *Facebook Rights & Responsibilities, supra* note 45, § 2.1 It is worth noting that the terms qualify this license as being subject to the user’s privacy settings, which can be changed to restrict access to posts or pictures only to the user’s “friends” or even further limited to specific contacts on the website; *see also id.* §§ 18.3, 4, 6, 7 (defining (section 3) “information” as facts and other information about the user, including actions taken by users and non-users who interact with Facebook; (section 4) “content” as anything you or other users post on Facebook that would not be included in the definition of information; (section 6) “post” as post on Facebook or otherwise make available by using Facebook; and (section 7) “use” as use, run, copy, publicly perform or display, distribute, modify, translate, and create derivative works of).
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 . . . . 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.

There are a number of ambiguities contained in the preceding quoted sections that should be discussed and resolved before continuing.

First is the scope of the license that users grant Facebook. The clause “on or in connection with Facebook” could mean two things: either it refers to how Facebook can use posted intellectual property, or it states where UGC must be posted in order for Facebook to receive the license. The definitions listed in the agreement do provide guidance here, as “post” specifically refers to posting on Facebook, thus, this license grants Facebook a right to use UGC “on or in connection with” Facebook. You might find yourself asking, what does it mean for something to be “in connection with Facebook?” Unfortunately for users, the answer is vague at best.

The phrase “in connection with” is seen with relative frequency in legal writing and seems to be synonymous with “in relation to” or “in association with.” Thus, users grant Facebook a broad

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89 Id. §10.1–2. Paragraph 2 of this section states “we do not give your content or information to advertisers without your consent”; a small consolation considering the user’s consent is required for them to post content or information. Id.

90 See BLACK’S LAW DICTIONARY 165 (9th ed. 2009) (defining “conveyancing” as “the art or science of preparing documents and investigating title in connection with the creation and assurance of interests in land. Despite its connection with the word ‘conveyance’, the term in practice is not limited to use in connection with old system title but is used without discrimination in the context of all types of title.”) (quoting Peter Butt, Land Law at 7 (2d ed. 1988)); id. at 57 (describing “attribution right” as “[a] person’s right to be credited as a
license to utilize UGC posted on the website for any use in relation to Facebook—including the sale of user information or copyrighted work for profit—with no compensation to the posting user. Any limitations on this IP license are difficult to find. Facebook can simply sublicense UGC to the highest bidder, or it could feature user content in advertising, all without compensation to the user. Users should be wary of the broad license they grant when registering for the website, but unfortunately, such content licenses seem to be the industry standard.

2. Twitter

Much like the Facebook Terms of Service, Twitter’s terms first explain that the user retains his or her rights to any content posted on the website. The user goes on to grant Twitter a “worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute [posted] Content in any and all media or distribution methods.” This agreement expressly includes:

[T]he 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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91 Twitter Terms of Service, supra note 45, § 5 (“You retain your rights to any Content you submit, post or display on or through [Twitter’s] Services.”).
92 Id.
93 See id. (defining “Services” as Twitter’s various websites, SMS, Application Programming Interfaces (APIs), email notifications, applications, buttons, widgets, ads, and commerce services). The terms further go on to define
The terms and conditions mentioned above do provide some safeguards for users—namely, requiring user permission before: (1) using user content on a commercial durable good or product, (2) creating an advertisement that implies sponsorship or endorsement on the user’s behalf, and (3) using content in a manner inconsistent with Twitter’s display requirements.\textsuperscript{94} While the gesture of requiring user permission is admirable, there is no mention of user compensation. There is, however, a clause in the developer terms that states: “In cases where Twitter Content is the primary basis of the advertising sale, we require you to compensate [Twitter].”\textsuperscript{95}

The Twitter Terms of Service essentially grant the website a license to exercise every applicable exclusive right granted to a copyright owner.\textsuperscript{96} Through this agreement, users allow Twitter to sell or license for profit users’ copyrightable material and use any UGC posted material to advertise Twitter’s services.\textsuperscript{97} While these terms are more defined than those found in the Facebook Terms of Service agreement, the breadth of authorized uses for UGC posted on Twitter is quite astounding. This author, at least, is hard pressed

\textsuperscript{94} Rules of the Road, TWITTER DEVELOPERS, https://dev.twitter.com/overview/terms/rules-of-the-road (last updated Sept. 16, 2014) (“We encourage you to create advertising opportunities around Twitter content that are compliant with these Rules.”); see also Display Requirements, TWITTER DEVELOPERS, https://dev.twitter.com/overview/terms/display-requirements (last visited Oct. 16, 2014) (outlining requirements for displaying Tweets—namely, requiring attribution to the author of the tweet, a visible timestamp, the Twitter logo, and that the tweet “must not be altered or modified in any way.”).

\textsuperscript{95} Rules of the Road, supra note 92.

\textsuperscript{96} Compare 17 U.S.C. § 106 (2012) (granting copyright owners the right to: (1) reproduce, (2) prepare derivative works, (3) distribute, and (4) display, publicly, the copyrighted work), with Twitter Terms of Service, supra note 45, § 5 (the user grants Twitter a license to “use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute” posted content).

\textsuperscript{97} Twitter Terms of Service, supra note 45, § 5.
to find uses that could not qualify as the “syndication, broadcast, distribution or publication” of UGC.\footnote{Id.}

3. LinkedIn

Perhaps the most all-encompassing of the discussed Terms of Service agreements was that of LinkedIn, an online professional network with over 300 million users.\footnote{About Us, LINKEDIN, https://www.linkedin.com/about-us (last visited Oct. 16, 2014) (boasting users in over 200 countries, LinkedIn’s mission is to “connect the world’s professionals to make them more productive and successful.”).} The social networking site recently modified its terms\footnote{User Agreement, LINKEDIN, https://www.linkedin.com/legal/user-agreement (last visited Jan. 31, 2015).} to become much more user-friendly. But until October 23, 2014, users provided LinkedIn the following license for their content:

[A] nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty-free right to us to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information you provide, directly or indirectly to LinkedIn, including, but not limited to, any user generated content, ideas, concepts, techniques, and/or data to the services, you submit to LinkedIn, without any further consent, notice and/or compensation to you or to any third parties.\footnote{LinkedIn User Agreement, supra note 43, § 2.2. The agreement does allow users to request the deletion of content/information they post on the website, unless it has been shared with others who have not deleted the content or if it has been copied/stored by other users. See id.}
There are a number of features within this license that make it significantly less desirable for the user than those granted to other users of social media websites.\textsuperscript{102}

First, the license a user grants to LinkedIn is irrevocable. Defined as “unalterable,”\textsuperscript{103} this quality means that LinkedIn retains a license to UGC even after users terminate the agreement. Content can only be deleted upon request and even this is contingent on whether other users have also deleted the content.\textsuperscript{104} Next, the agreement allows LinkedIn to commercialize user content “in any way now known or in the future discovered.”\textsuperscript{105} In theory, this would seem to allow the website to publish and sell lists of professionals (users) in a particular field or location, or compile and sell a book of business advice written entirely by users, without compensating the creators of the content. Lastly, the license allows LinkedIn to use any information provided “directly or indirectly” by the user.\textsuperscript{106} “Indirectly” is colloquially interchangeable with “incidentally,” meaning that this clause could be interpreted as granting LinkedIn a license to use information about a user that was provided by a third party.\textsuperscript{107} The scope of this license greatly exceeds what would seem to be the norm for Terms of Service agreements found on social media websites, and

\textsuperscript{102} It should be noted that LinkedIn is issuing a wide variety of changes to its Terms of Service agreement. Among these changes is a simplification of the contractual language with more limitation on LinkedIn’s licensed uses (and the addition of a user ability to revoke the license in any of their content simply by deleting the content from LinkedIn), and additional “layman’s” explanations of contractual language. These proposed changes are available at https://www.linkedin.com/legal/preview/user-agreement.
\textsuperscript{103} BLACK’S LAW DICTIONARY (9th ed. 2009) (defining irrevocable as “[u]nalterable; committed beyond recall”).
\textsuperscript{104} LinkedIn User Agreement, supra note 43.
\textsuperscript{105} Id. § 2.2.
\textsuperscript{106} Id.
\textsuperscript{107} This is, admittedly, more of a privacy issue than a copyright ownership problem.
contains what is certainly the broadest content use license that this author came across in his research.

4. **YouTube**

Lastly, we look to the Terms of Service agreement found on YouTube, a widely used social media hub that “allows billions of people to discover, watch and share originally-created videos.” In what is likely the broadest allowance for commercial use, by signing the agreement, a user grants YouTube:

[A] worldwide, nonexclusive, royalty-free, sublicensable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube’s (and its successors’ and affiliates’) business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels.

What is initially obvious in this license, as compared to those analyzed above, is that YouTube’s agreement would have users grant the website the exclusive rights associated with copyright

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109 *YouTube Terms of Service, supra* note 45, § 6.C.
110 *Id.; see also id.* § 2.A (“‘Content’ includes the text, software, scripts, graphics, photos, sounds, music, videos, audiovisual combinations, interactive features and other materials you may view on, access through, or contribute to the Service. The Service includes all aspects of YouTube, including but not limited to all products, software and services offered via the YouTube website such as the YouTube channels, the YouTube ‘Embeddable Player,’ the YouTube ‘Uploader’ and other applications.”).
almost verbatim.\textsuperscript{111} Moreover, much like the Facebook Terms of Service, we see that YouTube is licensed the right to use UGC “in connection with” its service and business (and the business of its successors and affiliates).\textsuperscript{112} It is consistent with the canons of statutory interpretation to read this license as giving YouTube the right to capitalize UGC for at least “promoting and redistribut[ing]” the YouTube Service. The breadth with which YouTube can use UGC would hinge on an interpretation of the language “including without limitation.” There would seem to be two logical interpretations of that passage as it appears in the Terms of Service agreement: first, it could define uses of UGC in connection with the service as “promoting and redistributing,” or second, the phrase could simply mean that “promoting and redistributing” are merely types of usages that would fall within the “in connection with the Service” language—meaning that the clause is simply illustrative. Case law and Black’s Law Dictionary suggest that the latter interpretation is correct, and that “promoting and redistributing” the service are simply examples of how YouTube might utilize UGC “in connection with the Service.”\textsuperscript{113}

This license, particularly because it can be used by YouTube’s successors and affiliates business, allows the website to hugely commercialize, or at least profit from, UGC. These agreements share many similarities with one another, and they are all very

\textsuperscript{111} Compare 17 U.S.C. § 106 (2012) (granting copyright owners the right to: (1) reproduce, (2) prepare derivative works, (3) distribute, (4) perform publicly, (5) and display publicly the copyrighted work), \textit{with YouTube Terms of Service, supra} note 45, § 6.C (users license YouTube the right to “reproduce, distribute, prepare derivative works of, display, and perform” user uploaded content).

\textsuperscript{112} See \textit{supra} Part II.A.1.a.

\textsuperscript{113} Optimal Interiors, LLC v. HON Co., 774 F. Supp. 2d 993, 1010 (S.D. Iowa 2011) (quoting \textit{BLACK’S LAW DICTIONARY}, 831 (9th Ed. 2009) (“[D]efining the word “include” and noting that “some drafters use phrases such as \textit{including without limitation} and \textit{including but not limited to}—which mean the same thing”. Thus, the phrases ‘including, without limitation,’ and ‘including, but not limited to’ both introduce items that comprise a part of a greater group, class, or aggregate”).
broad. Especially given the scale of these IP licenses, a user’s ability to terminate the agreements (or licenses) is extremely important to the exercise of their exclusive copyright rights.

B. Termination of the License Granted to Social Media Websites

Most of these agreements do allow the user to terminate them, at any time and for any reason simply by deactivating their account and discontinuing use of the service. However, and again using Twitter’s terms as an example, the “Terms will terminate . . . except that the following sections shall continue to apply: 4, 5.” Sections 4 and 5 in the Twitter Terms of Service govern the content posted by users and, most notably, includes the license granted to Twitter to use, copy, modify, and distribute the UGC. The application of these terms, then, survives the user’s termination of use—meaning that the user effectively has no way to limit how often or with whom Twitter shares the user’s content after posting it, so long as any sharing would fall under the Terms of Service. After seeing how broad a license users must give social media websites in order to participate in their online networks, the question of how long such a license lasts begs to be answered.

1. Facebook

Terminating an account on Facebook is relatively straightforward. A user can either disable or completely delete an account at the click (or a few clicks) of a button. However, a user need not even delete his or her account to remove specific content. As explained by the Terms of Service, “[t]his IP license ends when you delete your IP content or your account unless your

114 See, e.g., Twitter Terms of Service, supra note 45.
115 Id.

116 How Do I Permanently Delete My Account?, FACEBOOK, https://www.facebook.com/help/224562897555674 (last visited Oct. 2, 2014) (explaining that deactivating your account makes you invisible on the website, but your profile information is saved; you can also permanently delete your account, which leaves no option for information recovery).
content has been shared with others, and they have not deleted it.” So while users can delete their content (or entire profile) from Facebook, the ability to actually remove content from Facebook is contingent on whether other users have done so as well. While a user does have the power to severely limit the number of other users who can access their “shared” content, the default settings share a wide variety of content with the user’s “friends.” Given that the average number of friends any given user has on Facebook is 338, the amount of difficulty a single user might face deleting even a single photo from the website

117 Facebook Rights & Responsibilities, supra note 45, §2.1–2.2 (“When you delete IP content, it is deleted in a manner similar to 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.”)).

118 How To Post & Share, FACEBOOK, https://www.facebook.com/help/333140160100643/ (Oct. 2, 2014) (“You can use the audience selector to change who can see stuff you share on your Timeline after you share it. Keep in mind that when you share something on someone else’s Timeline, they control the audience for the post.”).

119 Christo Wilson, Bryce Boe, Alessandra Sala, Krishna P.N. Puttaswamy & Ben Y. Zhao, User Interactions in Social Networks and their Implications, EUROSY S’09 205–06 (2009), available at http://www.cs.ucsb.edu/~ravenben/publications/pdf/interaction-eurosys09.pdf (“By default, a user’s profile, including birthday, address, contact information, Mini-Feed, Wall posts, photos, and photo comments are viewable by anyone in a shared network. Users can modify privacy settings to restrict access to only friends, friends-of-friends, lists of friends, no one, or all.”); see also Larry Magid, Facebook Changes New User Default Privacy Setting to Friends Only—Adds Privacy Checkup, FORBES (May 22, 2014, 9:00 AM), http://www.forbes.com/sites/larrymagid/2014/05/22/facebook-changes-default-privacy-setting-for-new-users/ (explaining that Facebook just changed new user default privacy settings last summer from “public” to share content with “friends”; this change “will have no impact on existing users”).

120 Aaron Smith, 6 New Facts about Facebook, PEW RESEARCH INTERNET PROJECT (Feb. 3, 2014), http://www.pewresearch.org fact-tank/2014/02/03/6-new-facts-about-facebook/. Among adults, the average (mean) number of friends is 338, the median is 200; it is also clear that younger generations tend to have larger networks, with 27% of users aged 18–29 having more than 500 friends. Id.
seems staggering. To some extent, the ability of a user to remove original UGC from Facebook is out of the user’s hands if any other user with whom the content was “shared” has not deleted it as well.

All might not be lost, though, as it would seem that Facebook does limit its ability to utilize UGC after the user’s account has been terminated. The provision on account termination states:

If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account. You may also delete your account or disable your application at any time. In all such cases, this Statement shall terminate, but the following provisions will still apply: . . . 9.18, 10.3 . . .

Of particular importance is § 10.1, which is noticeably not listed as an active provision following account termination. Provision 10.1 authorizes Facebook to sell user data to businesses or “other entities” without compensation to the user—a very important prospect for users. Most of the provisions that remain active post-termination concern the use of Facebook’s source code, advertising, and the use of other users’ content and are generally beyond the scope of this article. The fact that Facebook eliminates its ability to monetize user content is of the utmost importance for the user to maintain control over his or her copyrightable content (and is a little bit surprising). Lastly, note the

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121 Facebook Rights & Responsibilities, supra note 45, § 15.
122 Id. § 10.1 (“[Y]ou 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.”).
123 Id. at § 15. The full list of provisions that continue to apply after termination are sections: “2.2, 2.4, 3-5, 8.2, 9.1-9.3, 9.9, 9.10, 9.13, 9.15, 9.18, 10.3, 11.2, 11.5, 11.6, 11.9, 11.12, 11.13, and 15–19.” Id.
unilateral nature with which Facebook can cease the operations of a particular user’s account. By violating the provisions of the Terms of Service agreement or otherwise creating “risk or possible legal exposure,” a user’s account can be terminated. This precise provision, and Facebook’s action through it, has been challenged and upheld in court.\footnote{See Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1118 (N.D. Cal. 2011) (plaintiff’s claim failed because she did not allege that Facebook terminated her account despite her compliance with the terms; thus Facebook did not violate the implied covenant of good faith and fair dealing).} Given the unilateral nature that a user can end the agreement with Facebook, it is not altogether unfair that Facebook can do the same—it is worth noting that Facebook’s business incentivizes the website to increase the number of active users on the website and the duration of their use.

2. Twitter

Twitter’s Terms of Service, however, are not so user-friendly. Users “may end [their] legal agreement with Twitter at any time and for any reason by deactivating [their] accounts and discontinuing [their] use of the Services.”\footnote{Twitter Terms of Service, supra note 45, § 10 (“You do not need to specifically inform Twitter when you stop using the Services. If you stop using the Services without deactivating your accounts, your accounts may be deactivated due to prolonged inactivity under our Inactive Account Policy.”); see also Inactive Account Policy, TWITTER, https://support.twitter.com/articles/15362-inactive-account-policy (last visited Oct. 3, 2014), (“[B]e sure to log in and Tweet (i.e., post an update) within 6 months of your last update. Accounts may be permanently removed due to prolonged inactivity.”).} Following deactivation, about half of the Terms of Service agreement continues to apply, including the section containing the UGC license.\footnote{Twitter Terms of Service, supra note 45, § 10 (“[Following account deactivation], the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: 4, 5, 7, 8, 10, 11, and 12.” The user IP license is contained in section 5.).} This would seem to indicate that, even following account deactivation, Twitter maintains the right to use UGC “with
no compensation paid to [the user].” At this point you might ask, can a user do anything to revoke the license granted to Twitter for the use of the content?

When a user deactivates a user account, Twitter only retains the “user data for 30 days from the date of deactivation, after which it is permanently deleted.” Having said that, Twitter’s Terms of Service do not define what constitutes user data and whether or not user data includes UGC. The agreement defines content as “any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the services.” Data, on the other hand, has a very broad definition. The qualifier “user” seems to indicate that the data can somehow identify a particular user. If this is the case, then “user data” might be synonymous with “personally identifiable information”—which refers to a person’s name, address, telephone number, social security number, or credit card information. However, because a user is not required to provide any such information to Twitter when registering an account (indeed, a user can operate an account through a pseudonym), defining “user data” as “personally identifiable information” seems somewhat inapt. But, particularly

127 Id. § 5.
128 Deactivating Your Account, TWITTER, https://support.twitter.com/articles/15358-how-to-deactivate-your-account (last visited Oct. 20, 2014) (containing additionally the simple steps a user must follow to deactivate their Twitter account: (1) sign in, (2) go to account settings and click the “deactivate account” button, (3) read account deactivation information and click “Okay, fine, deactivate account,” and (4) enter their password for verification).
129 Applying canons of statutory interpretation that would require consistency and meaning in each term is inappropriate here, because the statement regarding the deletion of user data is not contained within the contract.
130 Twitter Terms of Service, supra note 45.
132 E.g., 11 U.S.C. § 101(41A) (2012) (providing an equivalent definition for “personally identifiable information” as it applies to the bankruptcy code).
given that “user data” is referred to when an account is deactivated (as opposed to terminated), the term may be used to refer to account-specific information provided by the user. If this were the case, a more suitable synonym for “user data” might be “user identifiable information” (or “avatar identifiable information”). This class of data would include a user’s profile name, profile picture, biographical information, and location as the user chooses to display them on Twitter. If this is the case, then perhaps “user data” refers to some of the user-uploaded content but does not encompass the term.

Assuming that such a conclusion is proper, then Twitter maintains a license to use some user uploaded “Content” even after account termination. The Terms of Service agreement at no point references the ability of a user to remove content from the website, but Twitter does “reserve the right at all times to remove or refuse to distribute any Content on the Services.” The stark reality is that users grant Twitter an irrevocable license to use much of the content that they upload on the website, and these same users appear to lack any control over their UGC once it has been posted.

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133 Indeed, termination as contemplated by the agreement most likely takes place at the point that the user data is permanently deleted.
134 See generally Lance Ulanoff, Twitter’s New Profiles: Everything You Need to Know, MASHABLE (Apr. 8, 2014), http://mashable.com/2014/04/08/twitter-s-new-profiles-what-you-need-to-know/ (explaining some changes Twitter made to their profile layouts, as well as how to organize and set up profile information).
135 See Twitter Terms of Service, supra note 45 (defining “Content” to include “any information... uploaded, downloaded or appearing on” Twitter; thus, the definition would seem to include a user’s profile information).
136 Id. § 8 (“We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to [the user].”); see also id. § 9 (“We reserve the right to remove Content alleged to be infringing without prior notice, at our sole discretion, and without liability to [the user].”).
3. *LinkedIn*

Much of the LinkedIn user agreement also survives account termination. The agreement provides:

You may terminate this Agreement, for any or no reason, at any time, with notice to LinkedIn pursuant to section 9.3. This notice will be effective upon LinkedIn processing your notice. LinkedIn may terminate this agreement and your account for any reason or no reason, at any time, with or without notice . . . . Upon termination of your LinkedIn account, you lose access to the Services. The terms of this Agreement shall survive any termination, except Section 3 (‘Your Rights’) and Sections 4.1., 4.2., and 4.3. (‘Our Rights and Obligations’).  

The notice requirement as written into the agreement by LinkedIn is fair, albeit slightly unusual and seemingly cumbersome for the user. Regardless, the user content license, as contained in section 2.2 of the agreement, survives account termination. And much like the Twitter Terms of Service agreement, LinkedIn’s agreement does not contain any provision detailing the ability of users to remove their content from the website. It is worth noting, however, that LinkedIn is in the process of changing this aspect of its agreement. Prior to these changes taking effect, the LinkedIn Terms of Service make no mention of the ability of the user to

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137 *LinkedIn User Agreement, supra* note 43, §§ 7.1, 7.3; *See also id.* § 9.3 (providing a link to a question submission form and a mailing address for providing notice to LinkedIn).

138 Email from LinkedIn Messages, LinkedIn Customer Service, to author (Oct. 3, 2014, 9:37 CST) (on file with author) (Effective as of October 23, 2014, the user will have the ability to remove their content from the control of LinkedIn. “If you delete something from our platform, we won’t use it anymore.”).
remove content from the website. So, the pending changes to LinkedIn’s content termination policy are extremely user-friendly.

Additionally, the clause granting LinkedIn the ability to commercialize user content survives account termination. The maintenance of such a right, coupled with the inability of the user to remove posted content from the website, essentially allows LinkedIn to appropriate user content for its own monetary benefit, even long after the user has deleted his or her account from the website. The language granting LinkedIn the right to commercialize user content is completely missing from the pending update to the Terms of Service agreement.\footnote{LinkedIn User Agreement, supra note 43, § 2.2 (“[Y]ou grant LinkedIn a . . . right to . . . use and commercialize, in any way now known or in the future discovered, any information you provide, directly or indirectly to LinkedIn, including, but not limited to, any user generated content, ideas, concepts, techniques and/or data to the services, you submit to LinkedIn, without any further consent, notice and/or compensation to you or to any third parties.”).}

The conclusions to draw here are mixed. On one hand, LinkedIn’s Terms of Service agreement as it currently stands exploits user content to a much higher degree than those of similar services; on the other hand, the proposed changes to the agreement are significantly more favorable to the user. Here is to hoping that LinkedIn can set the gold standard for years to come, as a harbinger of user-friendly terms of service agreements on social media.

4. YouTube

YouTube’s license to user video content posted online, in sharp contrast to the other agreements discussed, is contingent on when the user removes the content from YouTube’s website. The Terms of Service agreement provides “licenses granted by [the user] in video Content [submitted] to the Service [to] terminate within a
commercially reasonable time after [the user] remove[s] or delete[s] [the] videos from the Service.”\textsuperscript{141} The users “understand and agree, however, that YouTube may retain, but not display, distribute, or perform, server copies of [the] videos that have been removed or deleted.”\textsuperscript{142} Finally, the licenses\textsuperscript{“} granted by [the user] in user comments [they] submit are perpetual and irrevocable.”\textsuperscript{143}

More so than the other analyzed agreements, YouTube’s Terms of Service allow a user to maintain control over the dissemination of the content they upload to the website. But, what is a “commercially reasonable time?” Both case law and statutory provisions direct that this is to be a highly fact-intensive determination.\textsuperscript{144} Certainly, it would be unreasonable for YouTube to continue to distribute a user’s video (through the power of the license) six months after the user removed the video from YouTube. How about one month? One week? One day? Given the speed of transactions available via the Internet, a commercially reasonable time likely does not extend beyond one month. Ultimately, however, this determination would only be made if necessitated by litigation—it suffices to say that the language is not facially burdensome for users.

A larger cause for concern arises from the perpetual and irrevocable license in user comments. Certainly, comments are less likely to contain very strong copyright protection interests, but users could claim protection in them, assuming the material is copyrightable.\textsuperscript{145} And quite honestly, YouTube’s reason for maintaining a right to the comments is likely more for the purpose

\textsuperscript{141} YouTube Terms of Service, supra note 45.
\textsuperscript{142} Id.
\textsuperscript{143} Id. § 6(C).
\textsuperscript{144} See First Nat. Bank of Chicago v. Jefferson Mortg. Co., 576 F.2d 479, 492 (3d Cir. 1978) (“Ordinarily, the circumstances of the particular market involved should determine the duration of a ‘commercially reasonable time.’”); U.C.C. §1-205(a) (2013) (“Whether a time for taking an action . . . is reasonable depends on the nature, purpose, and circumstances of the action.”).
\textsuperscript{145} See supra Part I.B.1.
of maintaining and facilitating popular discussion topics than monetizing user content. However, the ability to commercialize comments continues to exist, and with it the ability of YouTube to exploit UGC.

IV. THE APPLICATION OF THE UNCONSCIONABILITY DOCTRINE TO SOCIAL MEDIA TERMS OF SERVICE AGREEMENTS

Users, because they have agreed to the terms of service, may look to raise unconscionability as a remedy applicable to contracts generally. Unconscionability requires a showing of two components: (1) procedural—looking for unequal bargaining power and hidden terms; and (2) substantive—“satisfied by overly harsh or one-sided results that ‘shock the conscience.’” A determination of unconscionability “cannot be determined merely by examining the face of the contract,” but requires inquiry into “the circumstances under which the contract was executed, its purpose, and effect.” Given that users certainly do not hold an equal bargaining position as compared to social media websites and the expansive licensing achieved through the Terms of Service agreements could “shock the conscience,” users who post UGC on social media sites may have a strong case on their hands.

A. Procedural Unconscionability

“A contract, or a clause within that contract, is procedurally unconscionable if it is a contract of adhesion.” The term

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147 Id. The two elements interact such that “the more significant one is, the less significant the other need be.” Id.
148 Id.
149 Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 605 (E.D. Penn. 2007); see also Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (en banc) (“Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including ‘[t]he manner in which the contract was entered,’ whether each party had ‘a reasonable opportunity to understand the terms of the
**unconscionable** contemplates a contract “imposed and drafted by the party of superior bargaining strength, [which] relegates the subscribing party only the opportunity to adhere to the contract or reject it.” Terms of Service agreements are contracts of adhesion—they are presented on a take-it-or-leave-it basis. While there are few market alternatives—as many social media websites have similar terms—the unconscionability inquiry also looks to surprise or the extent to which the “terms of the bargain are hidden.” This analysis warrants a case-by-case inquiry, as each websites terms of service are presented differently. However, on the whole, these terms are contracts of adhesion, and some do contain hidden clauses that dictate rights and licenses of user content.

1. **Oppression**

“Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.” Users, when subscribing to various social media websites, are given no opportunity to negotiate the terms of the contract and are simply required to assent to the terms of the contract, and whether ‘the important terms [were] hidden in a maze of fine print.’”

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151 See Bragg, 487 F. Supp. 2d at 606 (explaining that Second Life’s terms were a contract of adhesion because a potential participant could either assent to the agreement and enter, or refuse and be denied access).

152 See Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) (“[T]he availability of other options does not bear on whether a contract is procedurally unconscionable.”).

153 Bragg, 487 F. Supp. 2d at 606 (internal quotation marks omitted).

154 Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 722–23 (N.D. Cal. 2012) (“While California courts have found that consumer choice can reduce how procedurally unconscionable an arbitration clause is, consumer choice is not determinative of whether there is any procedural unconscionability.”).
agreement in order to utilize the offered services. Plain and simple, the Terms of Service agreements used by social media websites are “standardized contract[s], imposed upon the subscribing party without an opportunity to negotiate the terms”155—in other words, they are contracts of adhesion. “An adhesion contract fulfills the requirement of procedural unconscionability, although this alone is insufficient to render an arbitration clause unenforceable.”156

2. Surprise

Surprise looks to whether the particular clause was hidden within the terms of a contract.157 Considerations affecting this analysis are length of the contract, typeface used, and location of the particular clause within the contract.158 The intellectual property license found in Terms of Service agreements posted on social media sites could be found to constitute surprise, but the argument is certainly not one-sided. The agreements examined in this paper are well labeled, relatively short, and often include a layman’s explanation of contractual language – showing a clear effort to increase access to legally uneducated users.

Facebook’s content license is not necessarily a “surprise” clause under legal analysis, but such a finding would not be unreasonable. The clause can be found on page one of a seven page agreement and may be considered “set apart from the rest of

155 Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983 (9th Cir. 2007) (quoting Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006)).
156 Newton, 854 F. Supp. 2d at 723 (“[U]se of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives.”) (citing Sanchez v. Valencia Holding Co., 135 Cal. Rptr. 3d 19, 31 (Cal. Ct. App. Nov. 23, 2011)).
157 Id. at 722–23 (“Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce [the disputed terms].”).
158 See, e.g., Estate of Myhra v. Royal Carribean Cruises, 695 F.3d 1233, 1246 (11th Cir. 2012).
the agreement,"¹⁵⁹ in that it is one of five clauses under the specific heading “Sharing Your Content and Information” (which is the second main heading in the agreement).¹⁶⁰ However, the user agrees to the terms by simply clicking a “Sign Up” button when registering his or her account—at no point is a user forced to actually examine the agreement.¹⁶¹ This specific issue was thoroughly discussed in Fteja v. Facebook, Inc.¹⁶² In that case, the court explained that Facebook’s Terms of Service agreement was not a classic “clickwrap” agreement¹⁶³ because it does not “contain any mechanism that forces the user to actually examine the terms before assenting.”¹⁶⁴ The court instead determined that Facebook’s Terms of Service agreement was a hybrid

¹⁵⁹ See Zaborowski v. MHN Gov’t Servs., Inc., 936 F. Supp. 2d 1145, 1152 (N.D. Cal. 2013) (“The arbitration clause appears in paragraph twenty of twenty-three paragraphs. It is not set apart from the rest of the agreement in any way, such as highlighting or outlining; the signature line is on the following page, and it does not require a separate signature.”).

¹⁶⁰ Facebook Statement of Rights & Responsibilities, supra note 45, § 2.

¹⁶¹ FFACEBOOK, https://www.facebook.com/ (last visited Oct. 24, 2014). When a new user visits the website, he or she is prompted to enter a name, email/phone number, password, birthday, and gender. To complete the registration process, a user must click the “Sign Up” button, above which is written: “[b]y clicking Sign Up, you agree to our Terms and that you have read our Data Use Policy, including our Cookie Use.” The words “Terms,” “Data Use Policy,” and “Cookie Use” are all hyperlinked, but, quite literally, are found on different pages. Id.


¹⁶³ Id. at 837 (“Yet Facebook’s Terms of Use are not a pure-form clickwrap agreement . . . .”). “On the internet, [sic] the primary means of forming a contract are the so-called ‘clickwrap’ (or ‘click-through’) agreements, in which website users typically click an ‘I agree’ box after being presented with a list of terms and conditions of use . . . .” Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

¹⁶⁴ Fteja, 841 F. Supp. 2d at 838; see also Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004) (“[U]nder a clickwrap arrangement, potential licensees are presented with the proposed license terms and forced to expressly and unambiguously manifest either assent or rejection prior to being given access to the product.”).
clickwrap/“browsewrap” agreement. In reasoning that terms provided via hyperlink were akin to multiple pages of a contract, the court concluded that the user assented to the terms of the agreement in registering a Facebook account—instrumental to this finding was the familiarity the user had with using the Internet. This ruling clearly puts the burden on the user to show that the IP license was a surprise, but much like Atlas, the weight of the world often rests on the shoulders of a single, average Internet user.

The crux of this argument would lie in differentiating a forum selection clause from an intellectual property license. As a preliminary matter, “[t]he general rule is that forum selection clauses are regularly enforced.” While such has never been said in regards to copyright licenses, grants of nonexclusive licenses do not require a writing (the exclusive transfer of copyrights do).

165 Fteja, 841 F. Supp. 2d at 838 ("Facebook's Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else—click “Sign Up”—to assent to the hyperlinked terms. Yet, unlike some clickwrap agreements, the user can click to assent whether or not the user has been presented with the terms."); see also Hines, 668 F. Supp. 2d at 366 (defining a “browsewrap” agreement as one “where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen”).

166 Fteja, 841 F. Supp. 2d at 839–41 ("[A]t least for those to whom the internet is in [sic] 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.").


168 Foad Consulting Group, Inc. v. Azzalino, 270 F.3d 821, 825 (9th Cir. 2001) (“[G]rants of nonexclusive copyright licenses need not be in writing."); see 17 U.S.C. § 204(a) (2012) (“A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or
Given that a “nonexclusive copyright license may be granted orally or by implication,” it would seem difficult to require separate assent for the license when a user agrees to the Terms of Service agreement. However, implied copyright licenses “simply permit the use of a copyrighted work in a particular manner” and are extremely uncommon. Obviously the license at issue is a written one, but trouble may arise because users are not forced to read—or even look at—the agreement before assenting to a license (an entire agreement, really) that is found on a separate page. This factor was important when analyzing the surprise of an arbitration clause. A copyright license, particularly one as broad as the implied one, should be given due consideration—I do not see why social media websites should be spared for making clear what its users are agreeing to.

The IP license in Twitter’s Terms of Service is contained in section 5 of the contract, which is titled “Your Rights” and found on page two of a seven-page agreement. Immediately below the license, Twitter writes a “tip” that states: “This license is you authorizing us to make your Tweets available to the rest of the memorandum of the transfer, is in writing and signed by the owner of the rights conveyed...”).

169 Foad, 270 F.3d at 826.
170 I.A.E., Inc. v. Shaver, 74 F.3d 768, 775 (7th Cir. 1996).
171 Estate of Hevia v. Portrio Corp., 602 F.3d 34, 41 (1st Cir. 2010) (“We do not mean to suggest that implied licenses are an everyday occurrence in copyright matters. The opposite is true: implied licenses are found only in narrow circumstances.”).
172 See Fteja, 841 F. Supp. 2d at 837–38 (“While the Terms of Use require the user to click on ‘Sign Up’ to assent, they do not contain any mechanism that forces the user to actually examine the terms before assenting.”).
173 See Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 605 (E.D. Penn. 2007); see also Lau v. Mercedes-Benz, No. CV 11-1940, 2012 WL 370557, at *8 (N.D. Cal. 2012) (“Although the paragraph on the front mentions the arbitration clause on the back, the language lies imbedded inconspicuously within a paragraph of the same font size, and on the opposite side of the page where the Mr. Lau’s signature was required.”).
174 Twitter Terms of Service, supra note 45, § 5.
world and to let others do the same.\textsuperscript{175} The desire to inform users as to what the agreement states is admirable, and a showing that a user understood the contract can weigh against a finding of procedural unconscionability.\textsuperscript{176} However, Twitter’s “tip” doesn’t adequately describe the license. While Twitter is likely explaining a majority of its uses under the license, the actual conveyance of rights is far greater than what a reader might assume. Further, there is no explanation of the terms explaining that users will receive no compensation for the use of their work. While the comparison might leave something to be wanting, I would argue that an IP clause should require the same kind of treatment within a contract as a class-action waiver. In such scenarios, courts have required that the particular clause be in all-caps font and presented in a “conspicuous manner.”\textsuperscript{177} The IP license could be labeled with more clarity, explained more honestly, and all-caps font could be used to focus readers in on more important parts of the license. While none of this is done, as explained above, it is quite clear that a nonexclusive copyright grant is not as central of a right to a user as the ability to participate in a class-action lawsuit. Ultimately, the element of surprise is most likely not fulfilled, as the IP license is easy to find and easy to read (the same can be said of the other analyzed Terms of Service agreements).

\textsuperscript{175} Id. (The tip is referring to the IP license: “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).”).

\textsuperscript{176} Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (en banc) (weighing against a finding of procedural unconscionability because there was no indication that McGoldrick lacked adequate time to study the contract, and there was no indication that she did not understand the contract language).

\textsuperscript{177} Pleasants v. Am. Express Co., 541 F.3d 853, 857 (8th Cir. 2008) (citing Pleasants v. Am. Express Co., No. 4:06–CV–1516, 2007 WL 2407010, at *5 (E.D. Mo. Aug 17, 2007) (“[T]he class-action waiver was in all-caps font and found that the ‘conspicuous manner in which the arbitration clause was presented distinguishes this case from those which found the clauses invalid.”)).
B. Substantive Unconscionability

Substantive unconscionability focuses on the one-sidedness of the contract terms considering a number of different factors, but the most fundamental requirement is that it “shock the conscience.” Many cases on substantive unconscionability dealt with arbitration clauses instead of copyright license agreements, making their analyses somewhat inapplicable to these circumstances. Yet, an important factor that has previously been considered is that of mutuality, or whether the contractual terms contain a “modicum of bilaterality.” This analysis considers the facial neutrality of the contract as well as “the actual effects of the challenged provision.” In this particular field, other elements are certainly of importance: the user’s right to regulate the dissemination of his or her content beyond the authorized company and profits made using UGC. An application of these standards and a discussion of other relevant considerations will result in a finding that the terms of usage are substantively unconscionable.

Class action waivers found in consumer contracts have been found to be substantively unconscionable. A primary distinction

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180 Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003) (finding an arbitration provision in a contract unconscionable because the terms allowed the defendant to “impose the arbitration forum on the weaker party without accepting that forum for itself”).

181 See Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1096 (9th Cir. 2009) (explaining that the class action waiver in T-Mobile’s service agreement was substantively unconscionable because it is unilateral in effect, and it discourages consumers from litigation, effectively robbing them of their right to be
between a class action waiver and the intellectual property license at bar is, of course, that a waiver denies a right, while a license assigns rights to another. Regardless, the one-sided terms contained within the Terms of Service agreements concern termination of the IP license. Of particular issue are Facebook’s content deletion barrier and the lack of license revocation in Twitter’s and LinkedIn’s terms of service. But for this particular analysis, Twitter’s termination clause presents the best case for substantive unconscionability.

A lack of mutuality is important when considering substantive unconscionability. The Terms of Service agreement here, particularly with respect to the IP license, is absolutely one-sided. But most important is whether the agreement is “so one-sided as to shock the conscience.” A user, when agreeing to the Terms of Service, licenses Twitter a “worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute [posted content] in any and all media or distribution methods.” For this license, the user gains access to the Twitter

compensated for a claim); see also Vasquez-Lopez v. Beneficial Oregon, Inc., 152 P.3d 940, 950 (Or. Ct. App. 2007) (“[T]he opportunity that the class action ban denies to borrowers is, in many instances, a crucial one, without which many meritorious claims would simply not be filed.”).

182 See supra Part III.B.1–3.

183 When a user terminates his or her Facebook profile, Facebook loses its ability to monetize user content. Twitter does no such thing. Additionally, because LinkedIn’s Terms of Service will soon be undergoing a radical change, it makes little sense to analyze the current agreement for unconscionability.


185 But perhaps it is necessary. Twitter could not hand away its IP content and stay in business for very long.

186 Grabowski, 817 F. Supp. 2d at 1173 (quoting Davis v. O'Melveny & Myers, 485 F.3d 1066, 1075 (9th Cir. 2007)).

network and any specific activities associated with such access—the agreement expressly states that Twitter will not compensate the user for the use of his or her content.\textsuperscript{188} And, when a user decides to remove content from Twitter, the termination provision makes no guarantee that Twitter will end its use of UGC.\textsuperscript{189} In this situation, the party with more bargaining power and sophistication has acquired a large bundle of rights through the veil of a nonexclusive license. This result certainly shocks the conscience because a user to the website has traded the ability to monetize an indefinite amount of uploaded material in exchange for access to a service (that will commercialize the user’s content in his stead). Given the right facts, where Twitter has substantially profited from the unsolicited use (outside the Terms of Service agreement) of a user’s content, the website’s agreement could be found both procedurally and substantively unconscionable, rendering it legally unenforceable. However, because Twitter’s terms are significantly more one-sided, and the facts necessary are quite specific, this result would likely not apply to the agreements employed by Facebook or YouTube or LinkedIn.

V. SOCIAL MEDIA TERMS OF SERVICE AGREEMENTS AS AGAINST COPYRIGHT POLICY

In the case that a court would find the social media Terms of Service agreements conscionable, and thus valid under contract law, this author would like to argue in the alternative that enforcing these Terms of Service agreements ultimately undermines the purpose of copyrights.\textsuperscript{190} By disseminating the content of users beyond any expectation they might have when originally

\begin{itemize}
  \item \textsuperscript{188} See supra Part III.B.2.
  \item \textsuperscript{189} Eldred v. Ashcroft, 537 U.S. 186, 247 (2003) (“copyright statutes must serve public, not private, ends; that they must seek ‘to promote the Progress’ of knowledge and learning; and that they must do so both by creating incentives for authors to produce . . . .”) (quoting 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1151 (4th rev. ed. 1773)).
\end{itemize}
registering to use the service, these social media websites are lowering the incentive of users to create original work and post it to these online communities. The primary objective of copyright law is to secure to the public “the benefits derived from authors’ labors”—it is well accepted that part of this benefit is gained when original works are created.\textsuperscript{191} Additionally, copyright laws exist to “facilitate the flow of ideas in the interest of learning.”\textsuperscript{192} Protection for works, then, is granted in order to incentivize artistic creativity through the grant of a temporary monopoly over the work.\textsuperscript{193} It has been said by the Supreme Court that “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”\textsuperscript{194}

Are the terms of these agreements not effectively robbing lay users of the exclusive rights associated with their copyrights? Given that the Terms of Service agreements analyzed here confer a license that includes every single exclusive right granted to copyright owners, the user has lost control over the monopoly granted to them by the Constitution.\textsuperscript{195} This economic incentive, the “sole interest” in providing copyright protection at all, rests in the ability of the owner to control the reproduction and dissemination of his or her work. The simple fact is that lay

\textsuperscript{191} H.R. REP. NO. 100-609, at 17 (1988) (“Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors’ labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain.”).

\textsuperscript{192} Id. at 22.

\textsuperscript{193} Cnty. of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 194 (2d Cir. 2001) (“Copyright benefits the public by providing an incentive to stimulate artistic creativity through the grant of a temporary monopoly to a copyright owner.”).

\textsuperscript{194} Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

\textsuperscript{195} U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106 (2012); see supra Part II.A.1.a–d.
Internet users do not fully understand the copyrights they hold, particularly because life in a digital world demolishes the fixation barrier precluding copyright protection to mere conversations. The invention of the computer coupled with widespread internet usage means that copyrightable material is easier than ever to create, and harder than ever to control. And, while it may certainly be argued with some legitimacy that Internet users should understand the risks of posting any content online (regardless of location), the crux of the issue lies with commercialization of UGC.

By establishing a marketable right to monetize an author’s creative expression, “copyright supplies the economic incentive to create and disseminate ideas.” While a large majority of UGC posted on social media websites is uploaded and forgotten with little financial impact, social media websites clearly profit from the trafficking and distribution of the content—if they did not, why would their Terms of Service agreements include express provisions allowing the websites to sell user information and content? Under these circumstances, the incentive to disseminate still exists, but it has changed hands through the granting of a license. It is true that social media websites are better situated to profit off UGC, but is it fair to strip the providers of this content of any compensation for their original works? Ultimately, the IP

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196 Internet Watch Foundation, Study of Self-Generated Sexually Explicit Images & Videos Featuring Young People Online, p. 6, available at https://www.iwf.org.uk/assets/media/resources/IWF%20study%20-%20self%20generated%20content%20online_Sep%202012.pdf (finding that 88% of content assessed appeared on “parasite” websites, demonstrating the startling lack of control capable of being exercised once content has been circulated online).

197 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); see also Mazer v. Stein, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

198 See supra Part III.A.
license found in social media Terms of Service agreements eliminate the individualized incentive to create new works, swindle users out of any due compensation, and should be found to violate the copyright clause of the Constitution.

It might be said that many users would be willing to surrender their control over UGC that they submit; that it is understood as a price to be paid in order to participate in social media and social networking generally. And while this may be true—forums and message boards are certainly social media hubs for beginning and participating in discussions—users at the very least should be informed of the property rights they ultimately relinquish. If nothing else, users should be aware of the copyrights they own and should be required to explicitly agree to each commercial use of their UGC—ideally with the ability to negotiate for fair compensation. This would seem to strike a balance between creation incentives and corporate monetization interests. By allowing users to refuse to commercialize their content, they would retain control over the dissemination of their work beyond the specific social media website on which it was posted.

Control. In a digital age, the ability to control your content is paramount, and allowing users retain this right is the best way to serve copyright interests.

VI. CONCLUSION

Right now, as humanity experiences an Internet revolution, or better yet, a digital renaissance, it is more important than ever to adapt our intangible property laws with the times. Widespread Internet usage presents a vast array of unique and troubling copyright problems, many of which have yet to be solved or struggle to function under antiquated laws. Users across the world participate in social media and submit content, which is subject to copyright protection, online for free and without the expectation of compensation. Social media sites hosting the material manage to commercialize user content and reap substantial benefits from its utilization. Contract law is unable to solve the problem created
under these circumstances, but a fix should be rooted in the underlying policy of copyright law. A compromise will best temper the competing interests of user rights and social media (corporate) interests. By granting users the right of first refusal in regard to monetizing their content, we can keep the control of copyrightable works where it belongs, in the hands of the creator. Social media offers a beautiful beacon of human creation—of pure, raw expression—we need only protect its potential, and the rest, as they say, is #history.