

## AI and the Fine Print Disruption of Copyright

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### ABSTRACT

Generative AI raises foundational questions for copyright law. Companies use copyrighted works to train large language models, raising important issues regarding fair use, ownership, and the meaning of creation. Inevitably, companies will try to resolve these issues preemptively with adhesive terms referred to as terms of service (TOS). This Article examines how TOS have reshaped copyright and content ownership, and the implications for the future of AI created works.

Copyright laws permit the owner of a copyrighted work to assign, transfer, and license rights by agreement. Courts have concluded that if properly presented, TOS can be binding agreements even though consumers regularly fail to read the terms. Accordingly, companies may use unread TOS to assign, transfer, and license intellectual property rights.

The law of contracts as applied to TOS deviates from the traditional objectives and principles of contract law. These doctrinal deviations,

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outputs of the digital age, did not exist when Congress permitted the contractual transfer and assignment of intellectual property rights. Presumably, Congress did not anticipate the TOS that lurk everywhere in modern society and function as private legislation. The mass nature of TOS means that companies may alter intellectual property rights to their advantage on a mass scale. Furthermore, because adhesive terms are often used to govern the use of new technologies, their ability to establish and reallocate intellectual property rights is likely to affect innovation and competition. All of this undermines the purpose of intellectual property laws to “promote the progress of science and the useful arts” by providing an economic incentive to creators.

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#### I. INTRODUCTION

In June 2024, Adobe amended its Terms of Service (TOS) and sparked a fierce user backlash.<sup>1</sup> Adobe software is popular with graphic designers, artists, photographers, and other creators, many of whom are anxious about the potential threat that artificial intelligence (AI) poses to their livelihoods.<sup>2</sup> The TOS included language that some users believed allowed Adobe to use their creative works to train AI models.<sup>3</sup> In response

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1. See Craig Hale, *Adobe Users are Furious About the Company's Terms of Service Change to Help it Train AI*, TECHRADAR (June 7, 2024), <https://perma.cc/56LH-SLA6>; Kate Irwin, *Adobe Sparks Backlash Over AI Terms That Let It 'Access, View Your Content'*, PCMAG, <https://perma.cc/Q2C8-RABY> (June 7, 2024).

2. See Taylor Hatmaker, *Artists Across Industries are Strategizing Together Around AI Concerns*, TECHCRUNCH (Oct. 6, 2023, 4:04 PM), <https://perma.cc/UBK9-LN2B>. There are several high-profile lawsuits against companies that create generative AI systems. See Michael M. Grynbaum & Ryan Mac, *The Times Sues Open AI and Microsoft Over A.I. Use of Copyrighted Work*, N.Y. TIMES (Dec. 27, 2023), <https://perma.cc/6ZP7-XBD2>; Press Release, The Authors Guild, John Grisham, Jodi Picoult, David Baldacci, George R.R. Martin, and 13 Other Authors File Class-Action Suit Against OpenAI, <https://perma.cc/PNS3-XXJ8> (Dec. 5, 2023); Kyle Wiggers, *The Current Legal Cases Against Generative AI are Just the Beginning*, TECHCRUNCH (Jan. 27, 2023, 8:30 AM), <https://perma.cc/2G34-BPSD>.

3. See Hale, *supra* note 1; Irwin, *supra* note 1. The proposed terms stated that the company “may” access user content “through both automated and manual methods”. See

to the user backlash, Adobe revised its language to make clear that it did not plan to train generative AI models on user content.<sup>4</sup>

This incident is the latest manifestation of increasing public unease at the power that companies have over online content through their TOS. The issue even made the front page of the New York Times, which reported that companies were updating their TOS to include terms that might allow them to train their AI models on users' content, an alarming prospect with privacy, use, and ownership implications.<sup>5</sup>

The increasing digitization of products and services has expanded the opportunities to create, allocate, and restrict intangible rights ownership. The Copyright Act establishes ownership of creative works and the rights pertaining to works of authorship; however, it also permits the assignment, transfer, and licensing of those rights by agreement. Copyright law is federal law and preempts inconsistent state laws; but, it allows the parties to contractually alter many of its rules. Accordingly, state contract law determines whether the parties have in fact altered the default provisions of federal intellectual property laws. Companies frequently and unilaterally update their website TOS.<sup>6</sup> Courts have generally held that TOS are a valid contracting form even though the vast majority of consumers fail to read them.<sup>7</sup> Consequently, users may unwittingly assign, transfer, and license their intellectual property rights by clicking to accept a company's TOS.

The case law enforcing TOS deviates from contract law's traditional objectives and principles. Instead of inquiring into the parties' intent and reasonable expectations, courts adopted the standard of "reasonable notice" and "manifestation of consent."<sup>8</sup> These doctrinal deviations,

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Adobe Communications Team, *A Clarification on Adobe Terms of Use*, ADOBE BLOG (June 6, 2024), <https://perma.cc/8ACK-LJ7E>.

4. See Scott Belsky & Dana Rao, *Updating Adobe's Terms of Use*, ADOBE BLOG (June 10, 2024), <https://perma.cc/PT6Z-WBUT>.

5. See Eli Tan, *When the Terms of Service Change to Make Way for A.I. Training*, N.Y. TIMES (June 26, 2024), <https://perma.cc/MV8W-D6HY>.

6. See, e.g., Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 GA. L. REV. 657, 681 (2021) (examining 500 sign-in wrap contracts and finding that the "vast majority" permit firms to unilaterally modify the agreements); Tim R. Samples et al., *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKELEY TECH. L. J. 47, 102 (2024) (finding that nearly 95% of social platform terms of service studied contain unilateral modification clauses).

7. See, e.g., *In re Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d 767, 789 (N.D. Cal. 2019) (stating that California law "requires the Court to pretend that users actually read Facebook's contractual language before clicking their acceptance, even though we all know virtually none of them did").

8. *Specht v. Netscape Commc'ns Corp.*, 306 F. 3d 17, 35 (2d Cir. 2002) ("Reasonably 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"); *Kauders v. Uber Techs.*, 159 N.E.3d 1033, 1049 (Mass. 2021) (adopting standard of "reasonable notice of the terms" and "reasonable manifestation of assent").

outputs of the digital age, did not exist when Congress permitted the use of contracts to transfer and assign intellectual property rights. Presumably, Congress did not anticipate the TOS that lurk everywhere in modern society and function as private legislation. The mass nature of TOS means that companies may alter intellectual property rights to their advantage on a mass scale. Furthermore, because companies often utilize adhesive terms to govern the use of new technologies, their ability to establish and reallocate intellectual property rights is likely to affect innovation and competition. All of this undermines the purpose of intellectual property laws, which seek to “promote the progress of science and the useful arts”<sup>9</sup> by providing an economic incentive to creators.

The use of TOS to govern mass consumer generative AI<sup>10</sup> raises foundational questions for copyright. Companies trained large language models using copyrighted materials, raising important new and, as of yet, unresolved issues regarding fair use, ownership, and the meaning of creation.<sup>11</sup> Inevitably, companies will use their TOS to try and sidestep or unilaterally resolve many of these issues regarding ownership and use. Generally, TOS allow companies to modify their terms at any time with notice to their users.<sup>12</sup>

This Article explains how TOS have altered and shaped norms and expectations regarding copyright ownership, data, and liability. It then concludes with a discussion of the societal implications of deferring to TOS in the era of mass consumer generative artificial intelligence.

## II. MASS CONSUMER CONTRACTS MEET THE DIGITAL WORLD.

Under section 106 of the Copyright Act,<sup>13</sup> the owner of a copyright has certain exclusive rights, including the right to make copies, prepare derivative works, and distribute copies of the works. The owner may license some or all of these rights and may even transfer copyright in a written agreement.<sup>14</sup> The advent of the mass Internet raised an important question: did copyright law’s deference to private ordering and freedom of contract apply when the “agreement” between the parties was a mass consumer contract of adhesion?

Bargaining imbalances between companies and creators were common even before the digital age. Unknown artists and musicians often

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9. U.S. CONST. art. I, § 8, cl. 8.

10. I use the term “mass consumer generative AI” to include chatbots, such as ChatGPT, and consumer apps, but do not include customized large language models designed primarily for a specific business which are subject to a negotiated contract.

11. There are also issues involving privacy, as training data may also come from private sources, such as emails and text messages. *See Tan, supra* note 5.

12. *See Becher & Benoliel, supra* note 6 at 689; Samples et al., *supra* note 6, at 56.

13. *See* 17 U.S.C. § 106.

14. *See id.* § 204.

signed away their copyrights as part of one-sided deals. When they did so, it was part of a negotiated—albeit often exploitative—transaction. Consumers as a class, however, did not traditionally produce copyrightable content for commercial purposes. The issue of whether adhesive forms could transfer or alter the default rights granted under the Copyright Act did not arise until the nineties, with the advent of the personal computer and the Internet.

The collision of the mass Internet with consumer contracts raised the question of whether form agreements could restrict the *use* of content, copyrighted or not. In a prescient article published in 1994, Professor Pamela Samuelson discussed the possibility of “header contracts” altering rights to intellectual property:

Some believe that contractual strategies will supplement, or possibly even supplant, technological strategies for protecting intellectual property rights in digital networked environments . . . some envision an even broader future for contractual means of protecting intellectual product in digital form through use of ‘header contracts’ for obtaining rights to use digital information . . . .

Imagine that you are a person in need of information of a particular sort. You know that the information must be out there on the Net somewhere, but you don’t know exactly where, and you don’t know under what conditions it will be made available to you. To assist you in your search, you call upon a ‘knowbot,’ an intelligent search program that has been trained to be attentive to your particular preferences. You send the ‘knowbot’ out into cyberspace to search for the information you need. When it has located sources that contain the information, the ‘knowbot’ sends you messages about each source. The header for each source informs you of the conditions under which the information will be made available to you. After you choose the source from which you wish to order the information, you reply to the source’s header. By replying, you will have ordered the information and will have bound yourself to the terms described in the header.<sup>15</sup>

Samuelson added that the “need for copyright law itself would become questionable if one could bind every user to limitations on access to every information product available in the market.”<sup>16</sup>

In an article published in 1999, Mark Lemley argued that “intellectual property is a prime example of an area in which we cannot simply rely on ‘the agreement of the parties’ to choose our public policy.”<sup>17</sup> His statement

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15. Pamela Samuelson, *Will the Copyright Office Be Obsolete in the Twenty-First Century?*, 13 CARDOZO ARTS & ENT. L.J. 55, 60–61 (1994).

16. *Id.* at 61.

17. Mark Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 169 (1999).

is even more compelling when that “agreement” is unilaterally drafted and non-negotiated; in other words, when it is not an actual meeting of the minds but only a “reasonable notice” to which the user “constructively” assents. According to Lemley, intellectual property licenses are already “notoriously fallible as indicators of the ‘intent’ of the parties.” But when they are in the form of adhesive contracts, “the philosophical basis for private ordering disappears as well,”<sup>18</sup> as they affect more than the parties to the contract:

Intellectual property is a deliberate, government-sponsored departure from the principles of free competition, designed to subsidize creators and therefore to induce more creation. This departure from the competitive model affects third parties who are not participants in the contract. If I agree not to criticize, parody, reverse engineer, improve, adapt, or extend your work, I am not the only one who pays the price for that agreement. All those consumers who would have bought my new product lose value as well, and that value simply isn’t accounted for in the deal between the parties.<sup>19</sup>

For decades, scholars have raised concerns about the lack of consent to mass consumer contracts because of their adhesive nature. But Samuelson and Lemley raised concerns beyond bargaining power; they were worried about the way that non-negotiated contracts could alter copyright law’s underlying policy objectives. Copyright law allows authors to transfer and license rights by contract, but it presumes a level of intentionality and awareness that is absent with adhesive forms.

During the nineties, a period of rapid technological change and innovation occurred not just for consumer products and services but also for contract law and contracting itself. Software companies started to bundle adhesive contracts with their software packages, raising questions about the nature of assent and the meaning of contract. Rather than having customers sign a piece of paper on a signature line before paying for an item, as they would if they were buying a car, software companies wrapped the contract in plastic to the CD containing the software. The “shrinkwrap license”<sup>20</sup> created an existential crisis for contracts and contract law. What *was* a contract, and could one be formed without a

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18. *Id.* at 169–70.

19. *Id.* at 170.

20. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (noting that the “‘shrinkwrap license’ gets its name from the fact that retail software packages are covered in plastic or cellophane ‘shrinkwrap,’ and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package”).

signature *after* a sales transaction was concluded? Traditional rules of offer and acceptance would say *no*.<sup>21</sup>

When the matter came before a federal district court in *ProCD v. Zeidenberg*,<sup>22</sup> a case involving the copying of a database of telephone directory listings, the court found that the license agreement was “an attempt to avoid the confines of copyright law” and that ProCD could not “use a standard form to make an end run around copyright law.”<sup>23</sup> Accordingly, the district court found that section 301(a) of the Copyright Act, which preempts any “legal or equitable rights” that are “equivalent” to any of the exclusive rights protected by the Copyright Act, preempted the contract claim.<sup>24</sup>

On appeal, the Seventh Circuit disagreed, finding that “ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure.”<sup>25</sup> Furthermore, according to Judge Frank Easterbrook’s opinion, rights created by contract were not “equivalent to any of the exclusive rights within the general scope of copyright.”<sup>26</sup> The court distinguished rights protected by copyright from rights created by contract. The former were “rights established by *law*—rights that restrict the options of persons who are strangers to the author”<sup>27</sup> while a contract granted rights only to the contracting parties and “strangers may do as they please.”<sup>28</sup> Stating that “courts usually read preemption clauses to leave private contracts unaffected,” Judge Easterbrook noted that the significant difference between copyright and contract was “(t)erms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets.”<sup>29</sup>

The defendant in the case, Matthew Zeidenberg, could hardly claim ignorance of the license agreement or the transfer restrictions. Not only was there a shrinkwrap license but notice of the terms appeared across the screen after installing the program.<sup>30</sup> Furthermore, Zeidenberg purchased a package of the SelectPhone product on three separate occasions. Even if

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21. See *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91, 108 (3d Cir. 1991) (finding contract formed when software was purchased); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1332 (D. Kan. 2000) (expressly rejecting the rolling contract theory).

22. 908 F. Supp. 640 (W.D. Wis. 1996), *rev’d*, 86 F.3d 1447 (7th Cir. 1996).

23. *Id.* at 659.

24. *Id.* at 656–59.

25. *ProCD, Inc.*, 86 F.3d at 1452.

26. *Id.* at 1454 (citing 17 U.S.C. § 301(a)).

27. *Id.*

28. *Id.*

29. *Id.* at 1455.

30. See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644–45 (W.D. Wis. 1996) (“Defendants were aware of the computer screen warning message notifying them that Select Phone™ was subject to the agreement contained in the user guide. Defendants disregarded the screen warnings because they did not believe the license to be binding.”), *rev’d*, 86 F.3d 1447 (7th Cir. 1996).

he did not know about the license agreement when he bought the first package, he likely knew about it when he made his second and third purchases.<sup>31</sup> Judge Easterbrook noted that purchasers often order software over the Internet without seeing a box<sup>32</sup> and that “(i)ncreasingly, software arrives by wire.”<sup>33</sup> Expressing concern about the potential impact to the software industry, Judge Easterbrook wrote:

On Zeidenberg’s arguments, these unboxed sales are unfettered by terms—so the sellers had made a broad warranty and must pay consequential damages for any shortfalls in performance, two ‘promises’ that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.<sup>34</sup>

Unfortunately, subsequent courts overlooked these facts regarding the prominence of the license agreement and Zeidenberg’s knowledge of the restrictions. In an example of bad facts making bad law, *ProCD* established the precedent that “money first, terms later” transactions, which became known as “rolling contracts,”<sup>35</sup> were valid contracting forms. Moreover, after *ProCD*, a rolling contract could alter copyright law, thus disrupting the policy objectives Congress carefully balanced in enacting the Copyright Act. The case opened the floodgates to contracting forms that diluted the meaning of consent. After *ProCD*, online contract formation required only a “manifestation of consent” after receipt of “reasonable notice”—and with the appearance of TOS on websites, even that measly requirement seemed to disappear.

Understanding *ProCD* requires some context. In the early days of mass consumer software, it was not entirely clear whether copyright law protected software.<sup>36</sup> The issue was resolved in 1980 when Congress approved amendments to the Copyright Act that expressly included

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31. See *id.* at 651. The district court noted that because software companies might change the terms between initial and later versions, users should be given the opportunity to review the terms “each and every time they contract.” *Id.* at 654.

32. *ProCD, Inc.*, 86 F.3d at 1451.

33. *Id.*

34. *Id.* at 1452.

35. The rolling contract theory has not been uniformly adopted. Judge (now Justice) Neil Gorsuch has said that the rolling contract theory is “about as controversial an idea as exists today in the staid world of contract law.” *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 982 (10th Cir. 2014). The rolling contract theory has been expressly rejected as contrary to California law by the 9th Circuit. See *Velasquez-Reyes v. Samsung*, 777 Fed.Appx. 241, 241 (9th Cir. 2019) (stating that “[u]nder California law, silence or inaction generally does not constitute acceptance of a contract” and California courts have not adopted the “in-the-box” theory of assent).

36. See Bradford L. Smith & Susan O. Mann, *Innovation and Intellectual Property Protection in the Software Industry: An Emerging Role for Patents?*, 71 U. CHI. L. REV. 241, 243–44 (2004).



computer programs within its scope.<sup>37</sup> Despite this clarity regarding its eligibility, software companies were still concerned about protecting their easily duplicable products.<sup>38</sup>

The Supreme Court decision, *Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*,<sup>39</sup> inflamed those concerns. In *Feist*, the Supreme Court found that to receive copyright protection, a database needs to demonstrate sufficient originality in its selection and arrangement. The telephone directory at issue in the case, which simply arranged listings in alphabetical order, did not.<sup>40</sup> Software companies, unable to rely on copyright, turned to contracts. In *ProCD*, Judge Easterbrook acknowledged the impact of *Feist* on database compilers like ProCD,<sup>41</sup> which had invested “more than \$10 million” to compile the database.<sup>42</sup> He also applauded the company’s discriminatory pricing that charged a lower price to the general public for personal use and a higher price to its business customers who presumably found the product more useful and could afford to pay more.<sup>43</sup>

The *ProCD* opinion skillfully danced around a century-old precedent established by the Supreme Court in *Bobbs-Merrill Co. v. Straus*.<sup>44</sup> In that case, defendants had purchased copies of a book containing a notice on the page following the title page and immediately below the copyright notice that stated:

The price of this book at retail is \$1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as infringement of the copyright.<sup>45</sup>

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37. See 17 U.S.C. §§ 101, 117 (Supp. V 1980) (as amended by the Computer Software Copyright Act of 1980).

38. As law professor Maureen O’Rourke writes, “Millions of dollars may be invested in software design and coding. However, once the software is distributed on disk, or made electronically accessible, it is easily copied and distributed to others.” Maureen O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 486–87 (1995).

39. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 381 (1991).

40. See *id.* at 361–62.

41. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996). As the Court of Appeals for the Seventh Circuit stated:

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information . . . is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service*.

*Id.* (citations omitted).

42. *Id.* at 1449.

43. See *id.* at 1449–50.

44. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350–51 (1908).

45. *Id.* at 341.

The defendants, having purchased the copies from wholesale dealers, resold the copies for eighty-nine cents each, and the owner of the copyright, the Bobbs-Merrill Company, sued. The Supreme Court, considering the matter as one of first impression,<sup>46</sup> noted that there was “no claim in this case of contract limitation, no license agreement”<sup>47</sup> and framed the question as follows:

Does the sole right to vend . . . secure to the owner of the copyright the right, after a sale of the book to a purchase, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum?<sup>48</sup>

The Supreme Court concluded that it did not, finding that a copyright does not “create the right to impose, by notice” a limitation “with whom there is no privity of contract.”<sup>49</sup> The opinion made clear that the first sale doctrine could not be restricted by a notice; however, it left open the question as to whether—and to what extent—it may be restricted by a *contract*.

While Judge Easterbrook was sensitive to the impact of *Feist* on the fledgling software industry, he seemed unbothered by the potential impact of the decision on nearly a century of precedent. Instead, he made only a passing reference to it, noting that “(w)hether there are legal differences between ‘contracts’ and ‘licenses’ (which may matter under the copyright doctrine of first sale) is a subject for another day.”<sup>50</sup> By collapsing the distinction between a contract and a notice, *ProCD* and its progeny opened a Pandora’s box for copyright law.

The *contract v. license* issue deflected by the *ProCD* court implicated the *license v. sale* issue in the context of software and networked or “smart” goods. The Copyright Act’s first sale doctrine limits the exclusive right to distribute by allowing the owner of a copy of a work to sell or otherwise dispose of that copy.<sup>51</sup> However, if a copyrighted work is *licensed*, and not sold, the first sale doctrine is not invoked. But could the parties by contract characterize a transaction as a license even though it

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46. See *id.* at 346 (“We therefore approach the consideration of this question as a new one in this court, and one that involves the extent of the protection which is given by the copyright statutes of the United States to the owner.”).

47. *Id.* at 350.

48. *Id.*

49. *Id.* at 350.

50. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

51. See 17 U.S.C. § 109; see also *Bobbs-Merrill Co.*, 210 U.S. at 350–51 (finding that a copyright owner does not have the right to impose by notice a restriction on the ability to resell a book). The first sale doctrine only permits the reselling or transfer of a copy and does not permit reproduction or the creation of derivative works.

had the characteristics of a sale? Would the answer change if that contract was an adhesive form?

The answers involve disentangling complex issues involving the law of contracts, intellectual property, and commercial law, and remain unresolved by the courts. The Supreme Court in *Impression Products, Inc. v. Lexmark International, Inc.*<sup>52</sup> came close to those questions without addressing them in the context of patent exhaustion, the patent law equivalent of the first sale doctrine.<sup>53</sup> In *Lexmark*, the Supreme Court held that the sale of a product subject to post-sale contract terms exhausted the patent rights to that product,<sup>54</sup> but it did not tackle the question of whether licensing rather than selling a product circumvented the patent exhaustion doctrine.

Parties to a contract cannot *characterize* a transaction as something that it is not; however, they may structure it, using the vehicle of a contract, so that it fits the characterization of a certain type of transaction. *ProCD* twisted the meaning of a contract into a notice, so that unread, unilaterally drafted fine print can state that the consumer agrees to an action (the licensing of a product instead of a sale) even when the consumer's actual conduct (the payment of money in exchange for complete possession of the physical product) indicates a different understanding altogether.

The power of adhesive terms to characterize the parties' actions *without the consumer's awareness* transformed the nature of ownership with the increasing digitization of goods and services.<sup>55</sup> Mass consumer software and the advent of the personal computer unleashed new products that had intangible features. Goods such as toasters, cars, and watches incorporated software. Some products traditionally purchased in tangible form were soon available entirely in digital form, such as books and music. These products were, and are, typically accompanied by terms that state the product or service is licensed, not sold. Companies often integrate these digital terms into the product itself rather than present them on a separate document contained "in the box."

In addition to the digitization of products, the rise of the mass Internet meant more companies offered online services, and that unleashed a torrent of digital adhesive terms. The use of TOS to notify users of the parameters of a website's service seems unobjectionable, but companies presented these terms not simply as a disclosure of the company's service offerings, but as *contracts*. Consumers ostensibly "agreed" to these

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52. 581 U.S. 360, 382 (2017).

53. *See id.* at 369.

54. *See id.* at 377.

55. AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 2 (2016) ("[D]igital retailers insist that ownership depends on the terms of an end user license agreement.").

contracts when they clicked on an icon or even simply proceeded on the website. Gradually, companies used TOS not only to state the terms by which they provided their services and to limit their liability, but also to *extract* significant rights from the consumer.<sup>56</sup>

As courts accepted passive, implied, and increasingly attenuated forms of consent, businesses became more aggressive about the terms they included, confident in the growing post-*ProCD* caselaw that established these notices as contracts. Websites that hosted user-generated content typically included TOS that contained broad license provisions. These provisions are often much broader in scope than necessary to provide the relevant services. If a user posts original creative expression on a website, that website needs a license to copy and distribute that content. However, such a license is implied by the user's conduct. The license grant provisions contained in TOS are typically much broader, giving companies worldwide, perpetual, and often irrevocable, rights to use the content for any purpose.

Given the ease with which companies may add and subtract terms without attracting user attention, courts should require a more robust form of consent for the license or transfer of *any* important rights, including intellectual property rights. Creators often use these sites for business purposes and likely do not read the fine print or understand what it means. Even if they do read the initial terms, they might not read any modifications or updates to those terms unless there is a public kerfuffle over them, as there was in 2012 when Facebook purchased Instagram. Following the acquisition, Instagram announced it would update its TOS to allow the site to use posted photos in paid ads.<sup>57</sup> Creators responded with a #BoycottInstagram movement<sup>58</sup> and a class action lawsuit.<sup>59</sup> Instagram quickly backed off and said it would revert back to its 2010

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56. Law professor Viva Moffatt argues, this “new prototypical contract of adhesion, the consumer agrees not to use the content of the website in a variety of ways that might be fair uses under the Copyright Act.” Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 58 (2007). Furthermore, even if they are actually unenforceable, “they are likely to have in terrorem effects, frightening readers into complying with the terms and deterring otherwise lawful activities” with the result being “an overall reduction in the fair uses engaged in by individuals.” *Id.* at 57.

57. See Jenna Wortham & Nick Bilton, *What Instagram's New Terms of Service Mean for You*, N.Y. TIMES (Dec. 17, 2012, 5:02 PM), <https://perma.cc/G2PP-ZX67>; see also Declan McCullagh, *Instagram Says It Now Has the Right to Sell Your Photos*, CNET (Dec. 17, 2012, 9:54 PM), <https://perma.cc/R7T2-4X44>.

58. See Adrian Chen, *#BoycottInstagram Takes off After Instagram Moves to Sell Users' Photos*, GAWKER (Dec. 18, 2012, 12:05 PM), <https://perma.cc/88D3-VUUY>.

59. See Tom Cheredar, *Instagram Hit with Class Action Lawsuit over Terms of Service Change*, VENTUREBEAT (Dec. 24, 2012, 11:58 AM), <https://perma.cc/PVF9-NM97>.

TOS.<sup>60</sup> The 2010 TOS, however, gave Instagram broad rights to use the user's content anyway,<sup>61</sup> highlighting the fact that content creators didn't actually read and understand the terms when they signed up to the site. The license provision became salient only after journalists publicized the change.

The public reaction to the Instagram TOS controversy revealed that the public did not sufficiently understand how fine print can alter the default rules of copyright law and how it can do so in unanticipated ways. In one case, class action plaintiffs sued Facebook, alleging that the company had misappropriated their names and likenesses to promote their "friend finder" service.<sup>62</sup> The company claimed that its Statement of Rights and Responsibilities "unambiguously gives Facebook the right to use any photos, including Plaintiff's profile photos, in any manner on Facebook, subject to Users' privacy and application settings."<sup>63</sup> The relevant section of the Statement of Rights and Responsibilities stated that:

For content that is covered by intellectual property rights, like photos and videos ('IP content'), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sublicensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ('IP License').<sup>64</sup>

Although Facebook could not use the photos in *any* manner, as it contended,<sup>65</sup> the court found that the provision insulated the company from copyright claims.<sup>66</sup>

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60. See Kevin Systrom, *Updated Terms of Service Based on Your Feedback*, INSTAGRAM BLOG (Dec. 20, 2012), <https://perma.cc/G5EY-EC8W>; Steven Musill, *Instagram Rolls Back Terms of Service After Ownership Dustup*, CNET (Dec. 20, 2012, 4:51 PM), <https://perma.cc/P767-MBGG>; Declan McCullagh & Donna Tam, *Instagram Apologizes to Users: We Won't Sell Your Photos*, CNET (Dec. 18, 2012, 2:13 PM), <https://perma.cc/5JUY-EXCD>.

61. In any event, Facebook's objective in purchasing Instagram was not to sell users' photographs to advertisers. The real value of Instagram was its users and their data because more information about more users meant that Facebook could offer advertisers better targeted advertisements. See Ricardo Bilton, *Instagram Will Share User Data with Facebook Starting Jan 16*, VENTUREBEAT (Dec. 17, 2012, 8:44 AM), <https://perma.cc/FZ84-66F5> (noting that the acquisition of Instagram by Facebook allows integration of data across services so that "Facebook and Instagram can learn a lot more about you, which makes you a lot more valuable to advertisers").

62. See *Cohen v. Facebook*, 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011).

63. See *id.* at 1095.

64. *Id.* at 1094–95.

65. See *id.* at 1095.

66. *Id.* (stating that Facebook had a "worldwide license to reproduce any pictures or text posted by a user, subject to any privacy settings, that would insulate it from any *copyright* claims by the user, whether or not the reproduction was made 'on Facebook.'"). The court ultimately dismissed the plaintiffs' claims, concluding that even if plaintiffs succeeded in alleging misappropriation, they did not allege injury in fact. See *id.* at 1098.

In another case, *Harrison v. Facebook*,<sup>67</sup> the plaintiff, Tami Harrison, sued Facebook, alleging that the company publicly displayed copyrighted images that she owned. Harrison's agent had placed images for her on Facebook but when her agent left her employ in 2016, Harrison was no longer able to log on and manage her account.<sup>68</sup> She requested that Facebook remove all the content on her pages but claimed that Facebook continued to "unlawfully publicly display the unauthorized work."<sup>69</sup> Facebook moved to dismiss on the basis that the plaintiff failed to state a claim for copyright infringement.<sup>70</sup>

The court stated that "to qualify as conduct constituting direct infringement, the plaintiff needs to show that defendant itself uploaded or downloaded the [photos]."<sup>71</sup> Because the plaintiff (through her agent) had uploaded the content to Facebook, the company argued that it was not liable.<sup>72</sup> Harrison argued that although she had originally consented to Facebook publishing her content, she withdrew her consent when she repeatedly asked Facebook to remove the images after she was no longer able to log in to the account.<sup>73</sup> The court agreed with Facebook because the company's TOS "explicitly require that Plaintiff delete the content herself or close her account."<sup>74</sup> The court acknowledged that the plaintiff could not delete, manage, or close the account, but concluded that Facebook had not engaged in "volitional conduct needed to state a claim for direct copyright infringement."<sup>75</sup> It encouraged Facebook to meet with Plaintiff "to determine if there is a mechanism for taking down the pages and deleting the content, so as to prevent the ongoing display of the copyrighted images" on Facebook.<sup>76</sup>

In an unpublished decision, a panel of two judges on the Ninth Circuit agreed with the district court, finding that Harrison "consented to Facebook's [TOS] when the content was uploaded"<sup>77</sup> and that by doing so, she "gave Facebook a license to display the copyrighted works"<sup>78</sup> that expires "only when the user deletes the images or the entire Facebook account – neither of which Harrison has done."<sup>79</sup> The Ninth Circuit's

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67. No. C 19-01547, 2019 WL 11343562 (N.D. Cal. July 2, 2019), *aff'd*, 816 Fed. Appx. 228 (9th Cir. 2020) (mem.).

68. *See id.* at \*1.

69. *Id.*

70. *See id.*

71. *Id.*

72. *See id.* at \*1–2.

73. *See id.* at \*2.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See Harrison v. Facebook, Inc.*, 816 Fed. Appx. 228 (9th Cir. 2020) (mem.).

78. *See id.*

79. *See id.*

response ignores the important fact that Harrison did not have the password to her account and *could not* delete her account.

The grant language in TOS is often broad, encompassing everything short of an assignment. Because it is so broad and all-encompassing, courts are often at a loss as to what the license *does not* permit. In *Sinclair v. Ziff Davis, LLC*,<sup>80</sup> the plaintiff, Stephanie Sinclair, a professional photographer, sued Mashable and its parent company, Ziff Davis, for copyright infringement. Sinclair had posted a copy of her photograph to Instagram and made it publicly viewable.<sup>81</sup> Mashable tried to license the photograph for use in an article, but Sinclair refused.<sup>82</sup> Mashable published the article and included a copy of the photograph anyway by “embedding” it, a process by which an image is displayed on a website (here, Mashable) even though it is hosted on a third party server (in this case, Instagram).<sup>83</sup> Instagram’s policies permitted users to use an API (application programming interface) to access and share content posted by other users in public mode.<sup>84</sup>

The defendants claimed that Mashable’s use of the photograph did not infringe Sinclair’s copyright because Sinclair had granted Instagram the right to sublicense the photograph. According to the defendants, Instagram had validly sublicensed it to Mashable when Mashable created an Instagram account and agreed to its Terms of Use.<sup>85</sup> Instagram’s Terms of Use at the time stated that by posting content, a user “grant[s] to Instagram a non-exclusive, fully paid, and royalty-free, transferable, sublicensable, worldwide license to the Content that you post on or through [Instagram], subject to [Instagram’s] Privacy Policy.”<sup>86</sup> According to the defendants, because Sinclair uploaded the photograph to Instagram in public mode, she agreed to allow Mashable, “as Instagram’s sublicensee,” to embed the photograph on its website.<sup>87</sup> Sinclair objected, arguing that Instagram’s agreements were “complex and subject to different interpretations.”<sup>88</sup> She also argued that the purported sublicense was created by a series of “complex, interconnected documents”<sup>89</sup> and while the Terms of Use granted Instagram a sublicensable right to use, the scope of the sublicense was detailed in Instagram’s Platform Policy and Privacy Policy. The judge, Judge Kimba Wood, rejected Sinclair’s arguments,

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80. 454 F. Supp.3d 342 (S.D.N.Y. 2020).

81. *See id.* at 343.

82. *See id.*

83. *See id.*

84. *See id.* at 344.

85. *See id.*

86. *See id.* at 345.

87. *See id.*

88. *See id.*

89. *See id.* at 346.

stating that these policies were incorporated by reference and that “by posting the Photograph to her public Instagram account, Plaintiff made her choice. This Court cannot release her from the agreement she made.”<sup>90</sup>

On a motion for reconsideration, the *same* judge revised the court’s previous holding and found that there was “insufficient evidence to find that Instagram granted Mashable a sublicense to embed Plaintiff’s Photograph on its website.”<sup>91</sup> The court stood by its previous holding that by agreeing to its Terms of Use, Sinclair authorized Instagram to grant API users a sublicense to embed her public Instagram content;<sup>92</sup> however, it found “insufficient evidence” that Instagram had exercised its right to grant a sublicense because the language in the Platform Policy could be interpreted in different ways.<sup>93</sup> Because a “license must convey the licensor’s ‘explicit consent’ to use a copyrighted work,”<sup>94</sup> Mashable’s argument that it had a sublicense was insufficient to dismiss the plaintiff’s claim.<sup>95</sup>

The reasoning in another case, *McGucken v. Newsweek LLC*, seemed to have influenced Judge Wood’s decision in *Sinclair II*. In that case, McGucken, a photographer, posted a photograph of an ephemeral lake in Death Valley to his public Instagram account.<sup>96</sup> Newsweek published an article about the lake and embedded an image of McGucken’s photograph. McGucken sued for copyright infringement, and Newsweek claimed it had a valid sublicense to display the image because the photographer had publicly posted it to Instagram.<sup>97</sup> Judge Katherine Polk Failla favorably referencing Judge Wood’s decision in *Sinclair I*, found that Instagram had the right to sublicense the photograph but concluded that there was no evidence that it had exercised that right, as none of the relevant user agreements expressly granted a sublicense to users who embedded the content of others.<sup>98</sup>

Although copyright owners typically set the terms by which their copyrights are licensed, platforms take away that power through their (typically unread) TOS, diminishing the rights of creators without their awareness. According to these three cases (*Sinclair I*, *Sinclair II*, and *McGucken*), Instagram’s TOS altered the default law so that the company, and not the copyright holder, had the right to decide whether third parties could use the copyrighted work.

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90. See *Sinclair*, 454 F. Supp. at 347.

91. *Sinclair v. Ziff Davis, LLC*, 2020 WL 3450136, at \*1 (S.D.N.Y. 2020).

92. See *id.*

93. *Id.*

94. *Id.* (citations omitted).

95. See *id.* at \*2.

96. See *McGucken v. Newsweek, LLC*, 464 F. Supp. 3d 594, 600 (S.D.N.Y. 2020).

97. See *id.* at 600–01.

98. See *id.* at 603.



### III. GENERATIVE AI: THE NEW FRONTIER

We are once again at an inflection point with a new technology that presents challenges to intellectual property law: artificial intelligence. The thorniest issues involve copyright and liability. Companies have trained their large language models on mass amounts of publicly available materials, including copyrighted works.<sup>99</sup> The ingesting process is almost certain to be considered copying, one of the exclusive rights reserved to copyright holders. Will using copyrighted material to train AI models be considered fair use or infringement? Although that issue is currently being litigated,<sup>100</sup> it will likely be several years before the question is definitively answered.<sup>101</sup>

Generative AI also raises foundational questions about the meaning of “creator” and ownership.<sup>102</sup> Who owns AI generated output—the user who crafted the request, the creator of the AI product, another entity—or will it be considered in the public domain? (As of this writing, the chatbot or app would not have a copyright to the work, because only humans may be authors).<sup>103</sup> Does the user have the copyright to the user’s inputs, queries, or command prompts? (If sufficiently creative, maybe in the

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99. See Derek Slater, *Generative AI and Copyright Policy from the Creator-User’s Perspective*, TECH POL’Y PRESS (Apr. 19, 2023), <https://perma.cc/73UR-XBGK> (noting that the “core copyright concern with generative AI is that many tools are trained on massive datasets that contain copyrighted works, where this training has not been specifically licensed.”).

100. See sources cited *supra* note 2.

101. Many scholars have weighed in, although the courts have yet to resolve the issue. See Enrico Bonadio & Luke McDonagh, *Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity*, INTELL. PROP. Q. 112 (2020) (discussing issues regarding both ownership and infringement from AI systems); Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 748 (2021) (stating that there are “good policy reasons” that machine learning systems should be able to use databases for training purposes “whether or not the contents of that database are copyrighted.”); see also Andres Guadamuz, *A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs*, 73 GRUR INT’L 111, 111 (2024) (discussing copyright issues relating to the inputs and outputs of AI models).

102. See Daniel Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2064 (2020) (proposing a test to determine which AI produced works should be protected); see also Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA: L. REV. FRANKLIN PIERCE CTR. INTELL. PROP. 431, 431 (2017) (proposing a redefinition of authorship to include non-humans).

103. See *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 146 (D.D.C. 2023) (finding that the U.S. Copyright Office did not err in denying copyright registration to visual art generated by an artificial intelligence computer system because “[h]uman authorship is a bedrock requirement of copyright”); see also *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018) (holding that a crested macaque could not sue because “all animals, since they are not human” lack statutory standing under the copyright act).

prompts but probably not in the output).<sup>104</sup> Does the AI company own rights to the user's content? These questions involve copyright's default rules, which apply when the parties have not specifically addressed the issue of ownership or use.

As a practical matter, companies will likely use their TOS to sidestep or unilaterally resolve most of these questions. The TOS for consumer AI tools are likely to contain terms that, while not assigning the copyright to the generated output, grant the AI company a broad, perpetual, worldwide license to use it. For example, when Snap first released its AI feature, Dreams, it imposed terms that extracted broad, "irrevocable," and "perpetual" rights to the user's AI generated *selfie* image for both commercial and non-commercial purposes:

By using Dreams, you grant Snap, our affiliates, other users of the Services, and our business partners an unrestricted, worldwide, royalty-free, irrevocable, and perpetual right and license to create derivative works from, promote, exhibit, broadcast, syndicate, reproduce, distribute, synchronize, overlay graphics and auditory effects on, publicly perform, and publicly display all or any portion of generated images of you and your likeness derived from your AI Selfies, in any form and in any and all media or distribution methods, now known or later developed, for commercial and non-commercial purposes.<sup>105</sup>

(Snap has since deleted terms specific to Dreams, but the general Snap TOS contain nearly identical language).<sup>106</sup>

The TOS of another popular AI generating tool, BeFake, is even more explicit (and repetitiously so) about its grab for broad rights to user generated content for "any business purpose," including "advertising." Even more surprising, it extracts rights to the output *and the user's input*:

You also agree that we hold all right, title and interest to any content that you submit to the Services and Platform, and that we may use such content for any business purpose including research, testing, making derivative works, sublicensing, advertising, marketing and display on the app . . . .

You agree that we have a royalty-free, perpetual, exclusive and unrestricted license to any and all content submitted to by any

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104. See U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY 12–21 (2025) (discussing copyrightability of AI generated outputs and prompts).

105. *Snap, Inc. Dreams Terms*, SNAP INC., Internet Archive, <https://perma.cc/L38L-SKRQ> (Aug. 28, 2023).

106. See *Snap, Inc. Terms of Service*, SNAP INC., <https://perma.cc/7UJ7-PF86> (Apr. 7, 2025).

mechanism and/or to any content posted on the Platform and/or utilizing the Services or our site . . . .

By submitting, posting or displaying User 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 (for clarity, these rights include, for example, curating, altering, translating, transforming and applying AI to alter your submitted content). This license authorizes us to make your User Content available to the rest of the world and to let others do the same. You agree that this license includes the right for to provide, promote, and improve the Services and to make User Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, promotion or publication of such User Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by us, or other companies, organizations or individuals, is made with no compensation paid to you with respect to the User Content that you submit, post, transmit or otherwise make available through the Services as the use of the Services by you is hereby agreed as being sufficient compensation for the User Content and grant of rights herein . . . .

You or the owner of your User Content still own the copyright in User Content transmitted through the Services (excepting any portion of the User Content depicting any alteration or transformation applied or caused by us, the Platform or the Services, but by submitting User Content to including via the Services, including your username, image, voice and/or likeness, you hereby grant to an unconditional irrevocable, nonexclusive, royalty-free, fully transferable, perpetual worldwide license to use, modify, alter, transform, adapt, reproduce, excerpt, make derivative works of, publish and/or transmit, and/or distribute and authorize other users of the services and other parties to view, access, use, download, modify, alter, transform, adapt, reproduce, make derivative works of, publish and/or transit your User Content in any format and on any platform, either now known or hereinafter invented, including for any purpose including commercial purposes, marketing, research and testing.<sup>107</sup>

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107. *Terms of Service*, BEFAKE, <https://perma.cc/9TMT-PR9U> (last visited Jan. 26, 2025).

In exchange for this comically broad (and poorly drafted) license from the user, and even if the user is paying for a subscription,<sup>108</sup> BeFake provides its services without warranty.<sup>109</sup> BeFake's terms require the user to grant it a perpetual and irrevocable license to user content, even though the company may terminate its services to the user at the company's "sole discretion, at any time and without notice."<sup>110</sup> Furthermore, the user generally is restricted from monetizing user content,<sup>111</sup> although the company "may generate revenues" from the user's use of the Service "without limitation," and the user has "no right to share in any revenue, goodwill or value whatsoever."<sup>112</sup>

The terms are not always harmful for consumers and creators. Many AI companies' TOS, for example, state that they do not claim ownership to outputs or to works created with their models.<sup>113</sup> They may also contain moral and ethical restrictions on use.<sup>114</sup> But companies are unlikely to enforce them on behalf of their users or to protect third parties; rather, they are more likely to use them to protect themselves from liability for any misuse.<sup>115</sup> Furthermore, most TOS contain a modification at will clause.

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108. Subscriptions range from \$2.99/week, \$9.99/month or \$99.99/year. See Sarah Perez, *AI-Powered BeFake Is a Real App, Not a BeReal Parody . . . and It Has \$3m in Funding*, TECHCRUNCH (Aug. 31, 2023, 6:00 AM), <https://perma.cc/B3QT-ZM9P>.

109. See *Terms of Service*, *supra* note 107 ("We make no promises or guarantees that the Services or any content on them will always be available, uninterrupted, or error-free . . . . USE OF THE SERVICES IS AT YOUR SOLE RISK. THE SERVICES AND CONTENT ARE PROVIDED ON AN 'AS IS' BASIS, WITHOUT WARRANTY OF ANY KIND.").

110. See *id.*

111. See *id.* As stated in the BeFake Terms of Service:

You further acknowledge that, except as specifically permitted by us in these Terms in or another agreement you enter into with us, you (i) have no right to receive any income or other consideration from any User Content or as applicable your use of any musical works, sound recordings or audiovisual clips made available to you on or through the Services, including in any User Content created by you, and (ii) are prohibited from exercising any rights to monetize or obtain consideration from any User Content within the Services or any third party service (e.g. you cannot claim user content that has been uploaded to a social media platform such as YouTube for monetization).

*Id.*

112. See *id.*

113. See Peter Henderson & Mark A. Lemley, *The Mirage of Artificial Intelligence Terms of Use Restrictions* 2–3 (Princeton Univ. Program in L. & Pub. Affs., Research Paper No. 2025-04, 2025) (explaining that generative AI companies "generally claim no interest in or ownership of the content the AI creates").

114. See *id.* at 3.

115. See Lance Fortnow & Nancy S. Kim, *Contract and Commercial Law Challenges with AI Products and Services*, in THE CAMBRIDGE HANDBOOK OF EMERGING ISSUES AT THE INTERSECTION OF COMMERCIAL LAW AND TECHNOLOGY 317, 318 (Stacy-Ann Elvy &

This means that even if the TOS do not extract broad license or ownership rights, the company preserves the ability to do so at a later date. For example, users initially wary about using Open AI's chatbot, ChatGPT, due to ownership or licensing concerns, may have their concerns assuaged by the company's terms of use, which state that the user owns all rights to inputs and user-generated outputs.<sup>116</sup> But the terms of use also contain a modification at will clause.<sup>117</sup> If, at a later date, Open AI modifies its terms to grant a broad license to itself, the user may be unaware of the change or may have grown too reliant upon ChatGPT's services to stop using it.

AI companies will almost certainly include terms that limit their liability and shift responsibility for infringement onto their users, such as indemnification clauses and warranty disclaimers. The question of liability is an important one given the propensity of AI systems to provide inaccurate or misleading information.<sup>118</sup> For example, Open AI's TOS contain an indemnification clause, a warranty disclaimer, and a clause limiting Open AI's liability to a maximum of \$100. The TOS also contain a mandatory arbitration clause and a class action waiver.<sup>119</sup>

The license agreement for Meta's AI product, Llama, contains the following clause that stifles lawsuits:

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Nancy S. Kim eds. 2025) (explaining how TOS of AI companies shift liability for their offerings to their users).

116. See *Terms of Use*, OPENAI, <https://perma.cc/4U46-9BWF> (Dec. 11, 2024). As stated in the OpenAI Terms of Use:

You may provide input to the Services ("Input"), and receive output generated and returned by the Services based on the Input ("Output"). Input and Output are collectively "Content." You are responsible for Content, including ensuring that it does not violate any applicable law or these Terms. You represent and warrant that you have all rights, licenses, and permissions needed to provide Input to our Services . . . . As between you and OpenAI, and to the extent permitted by applicable law, you (a) retain your ownership rights in Input and (b) own the Output. We hereby assign to you all our right, title, and interest, if any, in and to Output.

*Id.*

117. See *id.* The modification at will clause states:

We are continuously working to develop and improve our Services. We may update these Terms or our Services accordingly from time to time . . . . We will give you at least 30 days advance notice of changes to these Terms that materially adversely impact you either via email or an in-product notification. All other changes will be effective as soon as we post them to our website. If you do not agree to the changes, you must stop using our Services.

*Id.*

118. See Michael Atleson, *Keep Your AI Claims in Check*, FTC (Feb. 27, 2023), <https://perma.cc/7UEE-5K5J>; MICHAEL ATLESON, COMBATting ONLINE HARMS THROUGH INNOVATION 6 (2022), <https://perma.cc/7MWY-G7VN>.

119. See *Terms of Use*, *supra* note 116.

If you institute litigation or other proceedings against Meta or any entity (including a cross-claim or counterclaim in a lawsuit) alleging that the Llama Materials or Llama 2 outputs or results, or any portion of any of the foregoing, constitutes infringement of intellectual property or other rights owned or licensable by you, then any licenses granted to you under this Agreement shall terminate as of the date such litigation or claim is filed or instituted. You will indemnify and hold harmless Meta from and against any claim by any third party arising out of or related to your use or distribution of the Llama Materials.<sup>120</sup>

The clause in the first sentence seeks to deter those who might bring an infringement claim against Meta. Although of dubious enforceability,<sup>121</sup> this type of clause is not uncommon and can guard against opportunism and claims brought in bad faith. But the use of this clause in the context of AI raises unique concerns. Copyright law permits the creator of a derivative work to copyright that work only if the creator had a license from the owner of the underlying work.<sup>122</sup> The outputs of Llama users may be considered derivative works (although that issue is, as of now, unresolved).<sup>123</sup> Thus, someone using Llama to create a work may be creating a derivative work, and that work would be protected by copyright only if the incorporation of Llama into the work was authorized. If a user seeks to sue Meta for infringement of an output, the termination of the license to use Llama would presumably terminate the user's license. Accordingly, the derivative work would no longer be authorized, subverting the user's infringement claim.<sup>124</sup>

TOS have already given a substantial advantage to the winners of Web 2.0.<sup>125</sup> The terms of social media sites contain broad licenses that

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120. *Llama 2 Community License Agreement*, META, <https://perma.cc/3SGT-3X3H> (July 18, 2023).

121. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 668 (1969) ("The uncertain status of licensee estoppel in the case law is a product of judicial efforts to accommodate the competing demands of the common law of contracts and the federal law of patents . . . . The result has been a failure.").

122. *See Schrock v. Learning Curve Int'l*, 586 F.3d 513, 522–23 (7th Cir. 2009) (stating that "[t]o be copyrightable, a derivative work must not be infringing" and it is "a copyright infringement to make or sell a derivative work without a license from the owner of the copyright on the work from which the derivative work is derived" (citations omitted) (quoting *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 930 (7th Cir.2003))).

123. *See Andersen v. Stability AI Ltd.*, 700 F. Supp. 3d 853, 868 (N.D. Cal. 2023) (granting leave to amend derivative works claim to allow plaintiffs to allege given output images are substantially similar to plaintiffs' styles).

124. *See Lear, Inc.*, 395 U.S. at 674 (finding that licensee was not estopped from attacking validity of patent); *Canon, Inc. v. Tesser Ltd.*, 115 F. Supp. 3d 391, 395–97 (S.D.N.Y. 2015) (finding that covenants barring future challenges to the validity of a patent were unenforceable).

125. Web 2.0 is the term used to refer to the shift from static web pages to user generated content on social media sites. *See Web 2.0*, WIKIPEDIA, <https://perma.cc/LY22->

plausibly give these companies the right to use user-generated content as training data.<sup>126</sup> For example, Reddit, one of the most popular user-generated content websites,<sup>127</sup> states in its TOS:

When Your Content is created with or submitted to the Services, you grant us a worldwide, royalty-free, perpetual, irrevocable, non-exclusive, transferable, and sublicensable license to use, copy, modify, adapt, prepare derivative works of, distribute, store, perform, and display Your Content and any name, username, voice, or likeness provided in connection with Your Content in all media formats and channels now known or later developed anywhere in the world. This license includes the right for us to make Your Content available for syndication, broadcast, distribution, or publication by other companies, organizations, or individuals who partner with Reddit. You also agree that we may remove metadata associated with Your Content, and you irrevocably waive any claims and assertions of moral rights or attribution with respect to Your Content.<sup>128</sup>

Some companies are even more transparent and explicit about their plans to use user content to train AI models. X, formerly known as Twitter, updated its Privacy Policy to expressly state that it may use the information it collects and public tweets to train its machine learning models.<sup>129</sup> Its TOS expressly incorporate its Privacy Policy.<sup>130</sup>

In this way, TOS remove hurdles for Web 2.0 companies that are firmly in place for other companies seeking to enter the field of AI. For

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WYHM (Jan. 2, 2025, 1:55 PM); William L. Hosch, *Web 2.0*, BRITANNICA, <https://perma.cc/LWY7-ZUV8> (last visited Feb. 8, 2025).

126. For example, Facebook's Terms of Service states:

[W]hen you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings).

*Terms of Service*, META, <https://perma.cc/E3NV-3DE9> (Jan. 1, 2025). Google, in its Terms of Service, also gives the company world-wide rights to "modify and create derivative works based on your content." *Terms of Service*, GOOGLE, <https://perma.cc/BN7W-P66R> (May 22, 2024).

127. See *Reddit*, WIKIPEDIA, <https://perma.cc/86N5-H5YP> (Jan. 7, 2025, 8:54 PM).

128. *Reddit User Agreement*, REDDIT, <https://perma.cc/287U-NGEF> (Sept. 24, 2023).

129. See *X Privacy Policy*, X, <https://perma.cc/ZU5T-D8G3> (Nov. 15, 2024) ("We may use the information we collect and publicly available information to help train our machine learning or artificial intelligence models for the purposes outlined in this policy.").

130. See *X Terms of Service*, X, <https://perma.cc/FH5X-FM5S> (Nov. 15, 2024) ("Please note that these Terms incorporate our Privacy Policy (<https://x.com/privacy>) as well as other terms applicable to your use of the Services and your Content.").

example, Elon Musk owns both X and AI start-up xAI, two companies that recently merged.<sup>131</sup> xAI has access to the content posted on X, and X provides a valuable distribution channel for xAI's chatbot, Grok.<sup>132</sup>

Like X, many of the biggest winners of Web 2.0 are developing their own AI platforms and tools. Although there are an increasing number of AI startups, their use of training data may arguably constitute infringement. Lawsuits might force them into expensive and time-consuming battles, forcing them to sell to a larger company with much greater resources—such as a Big Tech company like Meta, Amazon, X, or Google. By contrast, Big Tech companies can argue that they have trained their AI systems primarily on their own user data and that their users gave them the right to do so when they clicked “Agree” to their TOS. In addition, whether the licenses in fact give them the right to do this will also be subject to litigation. Unlike startups, these Big Tech companies generate substantial revenue (*hundreds of billions* of dollars annually) and have the resources to withstand years of litigation. If courts continue to enforce TOS as valid contracts, these unread, unilaterally drafted terms will further advantage the few companies that already control much of the Internet and allow them to gain a greater monopoly over innovation.

#### IV. PROPOSAL

I propose that TOS that reallocate rights over mass new technologies, such as consumer generative AI, be considered void, and not simply unenforceable. A contract that is void has no effect. My proposal differs from proposals put forth by other scholars that seek to limit the enforceability of form contracts. For example, David Hoffman has proposed a state law *against* written forms for small dollar consumer transactions (less than \$100) and for low-wage employment (less than \$15/hour).<sup>133</sup> Under this “reverse statute of frauds,”<sup>134</sup> states could “deny enforcement of a certain set of (mostly cheap) written contracts.”<sup>135</sup> Mark Lemley proposes that if a party wants to change the default rules of contract, the party seeking enforcement must show that “both parties had a choice and actually agreed to those terms.”<sup>136</sup> Lemley's proposal

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131. See Kylie Robison, *How Elon Musi's Xai Is Quietly Taking over X*, VERGE (Jan. 10, 2025, 1:16 PM), <https://perma.cc/989Y-VAM2>; Kurt Wagner and Katie Roof, Musk's XAI deal offers unexpected win for X investors, L.A. TIMES, March 31, 2025; <https://perma.cc/PMZ3-9XC4>.

132. See *id.* (noting that xAI has a “key advantage” over competitors in the form of a “vast trove of data” from X and uses X as a “distribution channel” for its chatbot).

133. See David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1373 (2023).

134. *Id.* at 1372.

135. *Id.*

136. Mark A. Lemley, *The Benefit of the Bargain*, 2023 WIS. L. REV. 237, 268.



addresses the adhesive nature of standard forms by requiring that the drafter give the consumer a choice between the default rules of contract and the alternate, drafter-created terms.<sup>137</sup>

Neither proposal goes far enough, however, to thwart the problem of copyright disruption by TOS or the associated issues with consumer generative AI. Hoffman's proposal only applies to small dollar contracts, and he concedes that his proposal would not affect the "consumer intellectual property that sits at the center of the modern consumer economy."<sup>138</sup> Lemley's proposal, like mine, defers to existing laws. His proposal is to make contract law's default rules govern *unless* consumers affirmatively opt into the nonstandard terms. Lemley's proposal addresses the problem of adhesion but not the problem of complexity and lack of comprehension.<sup>139</sup> Average "reasonable" consumers may not fully understand the future implications of assigning away rights to their creative works or their images. More importantly, companies should not have the power to unilaterally determine something as significant as copyright and ownership of AI works.

Both Hoffman's and Lemley's proposals are susceptible to a firm's crafty drafting of TOS that technically meet the legal requirements for formation. TOS serve as a delaying tactic. They allow contested business practices to continue while litigation over other (i.e. procedural) matters raised by TOS proceeds. Big Tech companies are enormously profitable, so any delay translates into billions of dollars in revenue.<sup>140</sup> Time is not only money in this case; it also entrenches a corporate giant's power and normalizes its practices, making it much harder to reverse and regulate them.

More pointedly, critical policy involving ownership, regulation, liability, and deployment of mass new technologies, such as consumer generative AI, should not be subject to governance by TOS.<sup>141</sup> This is for two different reasons. The first is that TOS are not actually contracts and should not be enforced as such; they are unilateral statements related to a

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137. *See id.*

138. Hoffman, *supra* note 133, at 1426.

139. Hoffman is skeptical of Lemley's proposal because it fails to address the problem of form proliferation and focuses on the policing of terms. *Id.* at 1391–92. I disagree. Lemley's proposal does not prohibit certain terms (as mine does); it requires alternate terms (in other words, a choice).

140. For example, Meta reported revenues of over \$116 billion for the full year ended December 31, 2022. *See Q3 2024 Earnings*, META, <https://perma.cc/KX5Y-UCE8> (last visited Jan. 15, 2025).

141. Evan Selinger and Woodrow Hartzog have made a similar argument about the "inconsentability" of facial surveillance. *See* Evan Selinger & Woodrow Hartzog, *The Inconsentability of Facial Surveillance*, 66 LOY. L. REV. 101, 102–105 (2020).

company's business.<sup>142</sup> They are not products of a bargained-for exchange, they are not (nor are they intended to be) read, and users typically do not intend to assent to them.<sup>143</sup>

The second reason that TOS of mass generative AI systems should be void is that *even* if one were to accept that TOS are contracts and that an individual is capable of consenting to them, these terms affect third parties and so are not appropriate subject matter for private ordering.<sup>144</sup> The law has always recognized that some issues are not in the purview of a private contract.<sup>145</sup> The parties cannot redefine what constitutes an agency relationship, for example.<sup>146</sup> Their contract cannot recharacterize an employment relationship as an independent contractor relationship, particularly if third parties are affected.<sup>147</sup> Similarly, the parties to a

142. See Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 124 (2022) [hereinafter Kim, *Adhesive Terms*]; see also, *supra* note 136, at 238, 240–41 (noting that “[c]ontract law has lost its way” and that “in the modern world most contracts don’t involve any . . . actual agreement,” and further noting that deals between parties includes “implicit norms and rules” with background terms that come from a “variety of sources” including property, tort, and IP law).

143. See Samples et al., *supra* note 6, at 49. Not even consumer law scholars read the terms. See Jeff Sovern, *The Content of Content of Consumer Law Classes III*, 22 J. CONSUMER & COM. L. 2, 4–6 (2018) (reporting on a 2018 survey of law professors teaching consumer protection and finding that “[n]ot one professor” reported always reading contracts before agreeing to them and 57% said they rarely or never read them); see also Jeff Sovern et al., “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreement*, 75 MD. L. REV. 1, 2 (2015) (finding that consumer displayed a “profound lack of understanding” about arbitration clauses and other terms in their contracts).

144. As Luca Belli and Jamila Venturini argued, TOS represent a “tool of unilateral imposition of rules, despite being presented as voluntarily accepted by the involved parties through the expression of free and informed consent.” Luca Belli & Jamila Venturini, *Private Ordering and the Rise of Terms of Service Cyber-Regulation*, 5 INTERNET POL’Y REV. 3 (Dec. 29, 2016), <https://perma.cc/4AFU-6PBR>. Their discussion of a study of the TOS of 50 online platforms illustrates how TOS often contain provisions that affected users’ ability to fully engage in certain rights, including freedom of expression and innovation, the right to privacy, and due process. See *id.*

145. This is the tension between what I have referred to elsewhere as individual and collective autonomy. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 84 (1st ed. 2019).

146. See RESTATEMENT (SECOND) OF AGENCY §1 cmt. b (AM. L. INST. 1957). As the Restatement (Second) of Agency states:

[T]he relationship of agency does not depend on the intent of the parties to create it, nor the belief that they have done so. . . . [I]f the agreement results in the factual relationship between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relationship to follow.

*Id.*; see also *Howard v. Dallas Morning News*, 918 S.W.2d 178, 182–83 (Ark. 1996) (noting the court’s adoption of the Restatement definition of agency).

147. *Id.* As the Mississippi Supreme Court stated:

contract may suggest damages for breach, but the contract does not determine the enforceability of a damages clause.<sup>148</sup>

Many TOS contain mandatory arbitration clauses.<sup>149</sup> One study found that TOS essentially create a “liability-free zone in cyberspace” by combining arbitration clauses with class-action waivers and provisions.<sup>150</sup> Margaret Jane Radin has referred to the erosion of rights by boilerplate as “democratic degradation,”<sup>151</sup> meaning that fine print has altered the rules and defaults established by the legislature and through the democratic process. Mass consumer generative AI promises to be as consequential as the Internet itself. Companies should not be able to unilaterally legislate, without public scrutiny, new technologies that affect all of society.

Under my proposal, TOS governing mass consumer AI would be *void*, not merely voidable, meaning they would be without any effect whatsoever. Matters affecting society on a large-scale should fall outside the domain of a bargain. The practical reality is that the Internet’s biggest companies use TOS as *de facto* private legislation to shape important norms around data privacy, social media use, and ownership and use of software and networked goods. They have shifted the default rules of

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When a contract is made between two parties that as between themselves creates an independent contractor relationship and involves employment generally performed under a simple master/servant or employer/employee relationship, it will be upheld as between the parties. When, however, third parties are adversely affected, this Court will scrutinize the contract to see if public policy should permit the transformation of an ordinarily employer/employee relationship into that of an independent contractor.

Richardson v. APAC-Mississippi, 631 So. 2d 143, 150 (Miss. 1994).

148. See *Smith v. Royal Mfg. Co.*, 8 Cal. Rptr. 417, 422 (Cal. Ct. App. 1960) (noting that “the terms of a contract are not imperative in determining the nature of a damages clause”).

149. See Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 644–46 (2012); Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1436 (2014) (finding that mandatory arbitration clauses in social networking sites were “systematically unfair and unbalanced”); Andrea Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights*, 110 IOWA L. REV. 497, 516 (2024) (finding 66% of 100 consumer contracts studied contained mandatory arbitration clause); Samples et al., *supra* note 6, at 97 (finding, in a study of 195 contracts for seventy-five smartphone-based social platforms, that 65% contained arbitration clauses).

150. Rustad et al., *supra* note 149, at 644.

151. MARGARET J. RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 16 (1st ed. 2013) (noting that form contracts “can delete rights that are granted through democratic processes, substituting for them the system that the firm wishes to impose”).

copyright law<sup>152</sup> and created norms of licensing, instead of selling, networked products, such as e-readers and smart household appliances.<sup>153</sup>

The consequences of voiding the terms in mass AI TOS are simply that the terms do not bind the recipient to contractual obligations. It does not mean that the recipient is allowed to do anything without repercussions, nor does it mean that the recipient is *not* able to use the software or AI model. Any licenses granted *to* the recipient are valid without need for the recipient's consent.<sup>154</sup> In this context (i.e. where there is no bargain), a license operates as a waiver of the licensor's rights and may be retracted subject to notice and fairness requirements.<sup>155</sup> Voiding the TOS of AI companies may sound radical, but it merely means existing laws apply. Tort, property, intellectual property, and commercial laws govern other types of products and services, have been deemed fair and appropriate for other types of industries, and are consistent with prevailing business norms and consumer expectations.

TOS affect vast swaths of the population as hundreds of millions of people click or otherwise “manifest consent” to their terms. Even if an individual *were* capable of consenting to harm caused by a company's generative AI system, that individual and the company should not be permitted to consent to harm that those systems cause to others. New mass technologies like consumer AI have consequences that extend beyond the transaction governed by the TOS. Legislative stasis should not favor industries that release new mass technologies and benefit from their use. Rather, the default should be in favor of consumer protection and existing laws that reflect existing social norms and public values.

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152. See Nancy S. Kim, *Revisiting the License v. Sale Conundrum*, 54 LOY. L.A. L. REV. 99, 101, 103 (2022) [hereinafter Kim, *Revisiting the License v. Sale Conundrum*] (discussing a “seismic shift” in how businesses distribute goods by licensing rather than selling them).

153. See Chris J. Hoofnagle et al., *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 785 (2019) (defining “tethered” as “the strategy of maintaining an ongoing connection between a consumer good and its seller that often renders that good in some way dependent on the seller for its ordinary operation”)

154. This is an issue that I have discussed at length in other work. See Kim, *Adhesive Terms*, *supra* note 142, at 116–19 (discussing rights of licensees and licensors where there is a contract and where there is no contract); see also Kim, *Revisiting the License v. Sale Conundrum*, *supra* note 152, at 101 (discussing the use of licensing terms in sales transactions and related issues of interpretation).

155. See Kim, *Revisiting the License v. Sale Conundrum*, *supra* note 152, at 125–42 (discussing the differences between covenants and conditions and notices and contracts and the implications for the involved parties).

## V. CONCLUSION

Industry insiders have hyped both the promise<sup>156</sup> of artificial intelligence and the fears surrounding its adoption and societal effects.<sup>157</sup> Companies are encouraging consumers to use their chatbots even though the deployment of these products may be premature, and their use is currently unregulated.<sup>158</sup> Each time that users type in a query or input content, they are improving these products and enhancing their utility and value. Consumers likely do not recognize the value of their efforts or their content, just as they did not recognize the value of their data until they had already succumbed to the siren call of social media companies and were too enmeshed in their services to quit them. These companies, when caught red-handed exploiting user data, pointed to their TOS and claimed that they had done nothing wrong because consumers had consented.<sup>159</sup>

The same story is playing itself out with consumer generative AI. Consumers are blithely feeding original, creative works and images into the maw of consumer AI products, unaware that they are also giving up, often forever, the right to control those works. They may even be limiting or relinquishing the ability to monetize and use their own works. They may not yet understand that these works have real economic value. In fact, the real economic value may not be apparent for years to come. But one thing is certain: they are worth more—much more—than what these companies are currently paying consumers.

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156. See Michael Atleson, *Keep Your AI Claims in Check*, FTC (Feb. 27, 2023), <https://perma.cc/7UEE-5K5J>.

157. See FUTURE OF LIFE INST., *PAUSE GIANT AI EXPERIMENTS: AN OPEN LETTER 1* (2023), <https://perma.cc/65N2-TNTE> (calling for a “pause” in the training of AI systems in order to implement a set of shared safety protocols).

158. See Christopher Mims, *For Chat-Based AI, We Are All Once Again Tech Companies’ Guinea Pigs*, WALL ST. J., <https://perma.cc/U73P-YNFM> (Mar. 27, 2023).

159. See, e.g., *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 777 (N.D. Cal. 2019) (arguing that users consented to widespread dissemination of their personal information when they agreed to the fine print). For discussions about why consent fails to express and protect user’s interests, see Solon Barocas & Helen Nissenbaum, *On Notice: The Trouble with Notice and Consent*, PROC. OF THE ENGAGING DATA F.: THE FIRST INT’L FORUM ON THE APP. AND MGMT. OF PERS. ELEC. INFO. 1–6 (2009), <https://perma.cc/VS9S-9JQ8>; Elettra Bietti, *Consent as a Free Pass: Platform Power and the Limits of the Informational Turn*, 40 PACE L. REV. 310, 380 (2020); Selinger & Hartzog, *supra* note 141, at 104 (arguing that valid consent cannot be given for face surveillance due to irresolvable conflicts with other interests); Neil M. Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1465 (2019) (explaining how consumers can be “nudged and manipulated” to act against their interests); Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. REV. 593, 596 (2024).