User-Generated Content and the Future of Copyright: Part Two - Agreements Between Users and Mega-Sites

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This article examines issues surrounding the ownership of user generated content (UGC). In particular, it examines the contractual relationships that exist between the creators of UGC and the mega-sites that host the content. Furthermore, this article argues that many contracts, particularly those between minors and UGC mega-sites, are unconscionable and thus invalid on their terms. This means that these mega-sites are infringers on the copyright protected creative output of large numbers of their users.
I. INTRODUCTION

This is the second article in a series of three articles about user-generated content (UGC) and its importance to the future of copyright. The first article looked at foundational ownership issues regarding UGC.¹ Having settled some basic issues pertaining to initial investiture and ownership, the present article can proceed in a logical manner to the next set of issues that arise—those dealing with contractual exchange or alienation of this intellectual property. One thing that different forms of property have in common—be they physical or virtual—is that until there is investiture, there will be no ownership of property such as to allow for transactions. The sequel to the present article will take the analysis of the private law side of UGC to its logical conclusion by examining the core tort issues pertaining to UGC.

The previous article considered ownership issues pertaining directly to the creation of UGC. We saw that in the simplest type of situation, a user-generated work will be owned by the user who created it, but that complications arise for the sorts of UGC that may have features that potentially require such works to be characterized as joint works, compilations, collective works, or works for hire.² We saw that not only is much UGC copyrightable and hence capable of being owned in copyright, but that it may be valuable in the economic sense that viable business models may be created to monetize it.³ Such monetization is bound to involve exchange relationships for the obvious yet fundamental economic reason that not all UGC will be in the hands of those who most value it in virtue of the set of entitlements that emerge through initial investiture.

This is of course not to say that all such property will come through commercial means into the hands of those who value it but who currently lack legal entitlements to it. For the narrowly self-interested rational actors presumed by conventional economic analysis, there are always alternatives to obtaining property through either creative means—such as initial investiture, as examined in the prequel to this article—or legal means—such as exchange via contract, as examined here. Those alternative means involve tort and crime; that is, one may gain access to creative content through civil or

². Id.
³. Id.
criminal infringement, or to use the word that encompasses both categories, piracy.\textsuperscript{4} Torts and crimes in an offline world often occur between strangers—albeit strangers at arm’s length in the literal rather than metaphorical/legal sense of that term. So too, copyright infringement in an online world often, perhaps predominantly, occurs among strangers. Most notably, the billions of songs that have been illegally downloaded in recent years have typically involved piracy among parties who are, legally-speaking, third-parties to one another.

When it comes to UGC, however, torts and crimes tend to occur between parties who are not third-parties, but rather who exist in a contractual relationship with one another. This is another reason for examining the contractual relationships that occur in relation to UGC prior to examining the tort and criminal relationships. Since the torts and crimes occur in the context of pre-existing contractual relationships, the injurious activities can only be fully understood when these relationships are taken into account; after all, prior understandings codified in the contract regarding expected behavior may have an important impact on the types of behavior that are permissible between the parties. It is also fitting to look at contract first as more basic given that, if one accepts the rule of law as a grundnorm, contract is more central in the sense that once an individual has ownership, others can contract with this individual while maintaining the civil order, and more broadly, the social order; whereas with torts and crimes, something has gone wrong, someone has been wronged.\textsuperscript{5} Another way to think about this is that a world consisting solely of property and contract is preferable to a world consisting solely of property and torts or property and crime. Contract is in this normative sense prior to tort and crime, just as property was seen to be logically prior to contract.

Exploring the largely unexplored terrain of the contractual side of issues that arise pertaining to UGC is of interest for academic

\textsuperscript{4} The fact that UGC involves everyday users uploading creative content for the world to see has quickly raised the specter of other sorts of injuries as well. One concern is privacy and its continued diminution in a digital environment. Another type of harm to rear its ugly head in this new context is that of defamation. It does not gainsay the importance of these topics to note that in the present context of user-generated content, a type of intellectual property, these other concerns will only be touched upon to the extent they arise in the context of UGC.

\textsuperscript{5} It is worth noting that this claim would not hold true on an economic model. For economists, there are no intrinsic wrongs definable outside the instrumentalist logic of the welfarist desiderata. In other words, just as there may be efficient breach in contract, there may be efficient tort and efficient crime. Thus, for the economist, the rule of law is merely a rule of thumb. Accordingly, doing right, in the sense of maximizing expected social welfare, may entail committing a crime or a tort and, conversely, acting legally may entail committing a wrong.
reasons, but I will argue that this exploration brings us to a startling practical finding; namely that millions upon millions of such agreements—particularly those between UGC mega-sites and minors—are unconscionable and therefore invalid on their terms. Since the agreements are invalid, the copying by UGC mega-sites of users’ content is an infringement. These claims will be developed in Part III. Part II will first examine a few of the small number of cases that have emerged thus far dealing with users and their agreements with the UGC mega-sites. Special attention will be paid to Facebook, as it is one of the fastest growing and dominant sites that engages in particularly problematic behavior. As an examination of the cases will demonstrate, the agreements that prove to be of legal significance turn out to be both written and oral. I will argue that we should also utilize the concept of implied agreements as part of a proposed solution to the difficulties encountered in Part III.

II. AGREEMENTS BETWEEN USERS AND UGC MEGA-SITES

It is worth noting at the outset that to refer to "agreements" at all may be a legal conclusion, given the nature of the interaction between users and mega-sites. These agreements, to the extent that they are contained in writings, are clearly contracts of adhesion in the sense that they are form contracts. The more difficult and more important question is whether they are contracts of adhesion in the more loaded sense that they are illegitimate and thus either not enforceable or not fully enforceable. This inquiry is necessary if we are to make further progress in understanding who owns what when it comes to UGC, as disputed exchanges inevitably involve ownership claims.

The first case to be discussed, Bragg v. Linden Research, Inc., involves a claim arising in the virtual world setting of Second Life. For reasons that will become clear, it will make sense to first examine this case despite the fact that it does not involve UGC but rather virtual land created by the website itself. The second lawsuit discussed below, Chang v. Virgin Mobile USA, LLC, has recently been filed against the photo sharing site, Flickr, and the Creative

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6. A contract of adhesion is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (quoting Armendariz v. Found. Health Psychcare Serv., 24 Cal. 4th 83, 113 (2000)).


Commons as a co-defendant. Plaintiffs in this case had the cheek to personally serve papers on Larry Lessig as representative of the Creative Commons. The third case that will be discussed is Viacom v. YouTube. In this case, Viacom alleges that YouTube and its owner, Google, are massive direct and secondary infringers of a variety of content owned by Viacom and the other defendant. This case is of great significance to the issue of infringement in the context of UGC and hence will figure prominently in the third article of this series. Nevertheless, this case merits brief discussion here as well, inasmuch as the contractual agreements, or perhaps the lack thereof, between users and YouTube will be seen to be an important background consideration upon which the infringement analysis may properly commence.

A. Bragg v. Linden Labs

Bragg v. Linden Labs is a case about one type of virtual property—virtual real estate. This term is not exactly self-explanatory, given that real estate—by definition—seems to be contrasted with virtual. Virtual real estate is like real estate in many crucial respects. In the present context, the real estate at issue exists in the persistent virtual world named Second Life, which is owned and operated by Linden Labs, a private company located in California.

In this virtual world, real estate functions like it does in the actual world in many respects. One can buy it and sell it and use it as a foundation for the standard sorts of structures such as houses and commercial buildings, and non-habitable structures such as fences or carports.

However, real estate in Second Life has some important features distinguishing it from traditional real property, the most obvious of which is that, at the physical level, it exists as 1s and 0s rather than as

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13. Bragg, 487 F.Supp.2d at 596:

We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users’ property rights is a necessary step toward the emergence of genuinely real online worlds.
a composite of minerals, decomposing organic matter, timber, shingles and the like.\textsuperscript{14} This is an essential difference. Other differences are significant yet contingent. For example, all land in Second Life is owned initially by Linden Labs. This has no direct parallel in the domestic property law, as many fee simples were already in private hands at the formation of the U.S. Republic. It is plausible to think that a reasonable person in Bragg's shoes would implicitly think that she held the virtual equivalent of a fee simple, given that the site promises her ownership of property and does not go on to say that this property is unlike the usual sort of property that users are accustomed to, apart from its virtual nature of course. However, just because property is virtual does not mean it cannot be held in fee simple; it is just that it would be held in the virtual analog of fee simple. In other words, one would possess the usual bundle of sticks of property rights that one learns about in first-year property class.

In \textit{Bragg}, Plaintiff bought a few parcels of land. The dispute arose in particular with regard to a parcel named "Taessot," which Bragg purchased for $300.\textsuperscript{15} Linden apparently found some behavior of Bragg's to be untoward, and Linden basically kicked Bragg off its site for a claimed violation of its policies.\textsuperscript{16} There is no exact parallel between what Linden Labs did and what can be done with respect to real property. De-activating Bragg's account had the effect that he could not access his property. Such summary taking of Bragg's real property without legal process is plausibly seen as contrary to what Bragg reasonably thought he owned.

Bragg argued that he relied on Linden's efforts to induce him into believing he would own property.\textsuperscript{17} Due to hundreds of years of

\textsuperscript{14} The court appears to assume that because the dispute arises in a digital realm that accordingly the property in dispute is hence intellectual property. \textit{Id.} at 595. ("In November 2003, Linden announced that it would recognize participants' full intellectual property protection for the digital content they created or otherwise owned in Second Life."). While this is not the venue to explore the nature of virtual property, it should be noted that, \textit{prima facie}, the property at issue functions more like a virtual analog of real property rather than copyrighted creative content. We are only in the initial stages of understanding the nature of property and other interests such as rights of personality that are beginning to emerge in virtual worlds. \textit{See generally} Woodrow Barfield, \textit{Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars}, 39 AKRON L. REV. 649 (2006).

\textsuperscript{15} \textit{Bragg}, 487 F.Supp.2d at 597.

\textsuperscript{16} \textit{Id.} ("Linden sent Bragg an email advising him that Taessot had been improperly purchased through an 'exploit.' Linden took Taesot [sic] away. It then froze Bragg's account, effectively confiscating all of the virtual property and currency that he maintained on his account with Second Life.").

\textsuperscript{17} \textit{Id.} at 598:
practice and legal decision, it is reasonable that Bragg understood the word "property" as the term is used in ordinary language and life, outside of the context of the setting of a particular virtual world such as Second Life. In particular, it is common understanding that if one owns property, another cannot simply take it away without legal process.\(^1\) Even if one's property is subject to a lien or mortgage and one is not living up to one's obligations under the agreement, the other party cannot simply show up and physically remove the occupant from the property.\(^2\) Instead, one must invoke the legal system.

Linden Labs can respond that there are no courts in Second Life to provide such legal process. The owners of Second Life are the lords of their domain and they explicitly state in the Terms of Use that they can deactivate users for any reason or no reason.\(^3\) However, Bragg has two compelling responses to Linden Labs on this point. First, Linden Labs should not promiscuously tell users that they can own property if the property they are capable of owning does not have the features of property that one can reasonably expect. Importantly, Linden could have easily qualified its promise of ownership by explaining that the ownership it promises is unlike the usual sort of ownership in important ways that disadvantage the user. Most important, Linden should have informed potential owners that the real estate they purchase with real U.S. dollars (as exchanged for Linden dollars) can be taken away at Linden’s discretion and the so-called owner will have no avenue of redress.\(^4\) The fact that Linden did not seek to explain this crucial difference can only be seen as an attempt

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In support of the Court's exercising personal jurisdiction over Rosedale, Bragg relies on various representations that Rosedale personally made in the media "to a national audience" regarding ownership of virtual property in Second Life. Bragg maintains that Rosedale made these representations to induce Second Life participants to purchase virtual property and that such representations in fact induced Bragg to do so. Bragg also relies on the fact that he "attended" town hall meetings hosted in Second Life where he listened to Rosedale make statements about the purchase of virtual land.

18. Ownership of property implies "the right to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title" 63 AM. JUR. 2D Property § 1 (1997).


20. Bragg, 487 F.Supp.2d at 608 (noting that the Terms of Service state, "Linden has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you.").

21. Id. at 595-96 n.5.
on its part to deceive the user into thinking that the user was entitled to true ownership of property when in fact he was conferred some lesser interest.

Second and more decisive, Linden Labs made representations outside of the contract that promised property in an unqualified sense of the term. Thus, the four corners of the contract did not control the legal outcome. Even if Linden could plausibly argue that the user took the property as promised in the Terms of Service subject to the term that made cancellation at Linden’s discretion, the representations outside of the written contract between the parties did not come qualified in this manner and hence could reasonably be understood by the potential owner as conveying the analog of a fee simple. It is partly based on these representations outside of the Terms of Service that plaintiff alleged, inter alia, fraud, conversion, and breach of contract.

 Sadly for those who wish for case law guidance pertaining to virtual worlds, the court did not reach the substance of Bragg’s charges. Instead, the case turns on the purported unconscionability of Linden Lab’s choice of law provisions, arbitration provisions, and its forum selection clause. Nevertheless, the court made it clear that it took Bragg’s grievance seriously. Bragg contended that key terms of the agreement proffered by Linden Labs were unconscionable. The court found much to quibble with in these terms. In particular, the court focused on the fact that there was surprise due to hidden or missing terms because there was no notice of the serious expense and inconvenience to the plaintiff having to spend ten to twenty thousand dollars to pay the arbitrators in addition to having to go to California from Pennsylvania in order to take part in the arbitration. In essence, the court said that the terms left plaintiff with no effective remedy.

22. Id. at 596 (“Rosedale recently gave an extended interview for Inc. magazine, where he appeared on the cover stating, ‘What you have in Second Life is real and it is yours. It doesn’t belong to us.’”). Land in Second Life also had indicia of typical land ownership such as the fact that owners were taxed on the land. Id. at 597 n.7.
23. Id. at 597 n.8.
24. Id. at 603.
25. See id. at 602 (“Additionally, Pennsylvania has a substantial interest in protecting its residents from allegedly misleading representations that induce them to purchase virtual property.”); id. at 595 (“Ultimately at issue in this case are the novel questions of what rights and obligations grow out of the relationship between the owner and creator of a virtual world and its resident-customers. While the property and the world where it is found are ‘virtual’ the dispute is real.”).
26. See id. at 606-07, 609.
27. Id. at 611:
The court applied California law in its analysis of the contract. It noted that to find unconscionability in California, it must find both procedural and substantive unconscionability. It found both elements and concluded that the arbitration clause was unconscionable. It remanded to a court in Pennsylvania for further proceedings in accordance to Bragg’s preference and contrary to the preference of Linden.

B. Chang v. Virgin Mobile USA, LLC.

Consider next Flickr, a mega-site built on the advertising-based business model, in which users post their original photographs to the site. Flickr offers its users the option to post their content pursuant to one of the various possible Creative Commons licenses. Despite the fact that the UGC creator, Justin Ho-Yee Wong, dedicated his work to the public via a creative commons license, an important copyright issue arose with regard to Wong’s UGC such that he and the subject of the photograph in question, Susan Chang, are now suing Virgin Mobile. Chang, a 16-year-old, learned that a photo of her was appearing on a billboard in Australia promoting Virgin Mobile. This was done through no fault of her own, without her permission, and with no benefit to her.

This strange situation arose due to the following event: Mr. Wong, Ms. Chang’s youth group counselor, took a picture of Ms. Chang engaged in horseplay holding up a peace sign during a church
fundraiser. The photographer, an avid poster to Flickr, posted the photo there, where it joined thousands of others he had previously posted. Wong chose the Creative Commons license whereby the photo could be used for any means—including commercial means—so long as the work was attributed to the photographer. The telephone company Virgin Australia found the picture online and took advantage of the photographer's permission to use the photo on a billboard, but Virgin Australia did so without acknowledging the source and contrary to Wong's reservation of an attribution right.

In the Complaint, Chang alleged that the billboard casts her in a negative light because beneath her photo is the caption, "DUMP YOUR PEN FRIEND." The Complaint alleges that the photo has caused the girl to "suffer humiliation, severe embarrassment, frustration, grief, and general mental anguish damages, all of which, in reasonable probability, will subsist in the future." Chang might have sued Wong since he posted the photograph without her permission. There are obvious reasons, however, why one might hesitate to sue one's youth counselor for an innocent act that had unfortunate consequences. In addition, Mr. Wong is presumably comparably impecunious, at least in comparison to Virgin Mobile. And on the merits, Virgin Mobile is the proximate bad actor, while Wong, although negligent to be sure, obtained no benefit and indeed purports to have suffered injury himself, in that Virgin did not credit Wong with the photograph in violation of his copyright under the Creative Commons license. Presumably he will suffer harm to his reputation as well, for surely it cannot be a youth counselor's best day on the job when he inadvertently takes an action that results in one of his charges being the subject of ridicule and embarrassment half a world away and even in the halls of her own school.

Together, plaintiffs allege an impressive list of charges: Invasion of Privacy, Libel Per Se, Libel Per Quad, Breach of Contract, Negligence, and Copyright Infringement. The charges of interest in the present context are the last three. The negligence allegation pertains to defendant Creative Commons. Plaintiffs allege that the Creative Commons was negligent in the manner in which it set up and administers the Creative Commons licenses and that this negligence

32. Id. ¶ 37; see also Cohen, supra note 10.
34. Id. ¶ 19.
35. Id. ¶¶ 37-39.
36. Id. ¶¶ 16-39.
was the proximate cause of plaintiffs' injuries.\textsuperscript{37} This is of interest for the study of UGC generally, since Flickr is not the only UGC mega-site to utilize Creative Commons licenses. Thus, if the Creative Commons is found negligent in this case, it is clearly vulnerable in other future settings, given that Creative Commons took no special actions in connection to plaintiffs. In fact, if the Creative Commons is negligent here, then it will be vulnerable in all circumstances in which one party posts UGC that incorporates unauthorized creative content. Given that a number of mega-sites are using Creative Commons licenses, there may indeed exist a massive number of UGC works licensed pursuant to a Creative Commons license that may likewise contain unauthorized content. Below I will discuss one type of problem that arises from the treatment by certain sites, such as Facebook, of users' creative content.

\textbf{C. Viacom v. YouTube}

As with \textit{Bragg, Viacom v. YouTube}\textsuperscript{38} might seem at first be a case with no direct connection to UGC. The reason is that while Viacom creates a great deal of content, it is professionally-created content rather than UGC. Viacom is a multinational entertainment conglomerate owning such venerable properties as MTV, the Daily Show with Jon Stewart, and Sponge Bob Square Pants.\textsuperscript{39} In addition, the Viacom lawsuit seems to have no connection to UGC since it is directed against defendants who are themselves large corporations.\textsuperscript{40} This rules out UGC, which by definition does not merely involve uploading of whole works or large corporations, but rather the actions of amateurs.\textsuperscript{41}

It is not that plaintiffs could not sue creators of UGC if they chose to—after all, there are a large number of user-generated videos posted to YouTube that incorporate commercial content controlled by plaintiffs. One obvious reason not to sue UGC creators is perhaps a matter of public relations. Viacom might reasonably conclude that it would be the recipient of bad publicity and customer wrath were it to sue creators of UGC. Viacom would be within its legal rights to do so, as unauthorized use is an infringement unless plaintiffs could

\textsuperscript{37} \textit{Id.} \textsuperscript{34-37}

\textsuperscript{38} Viacom Int'l Inc. v. YouTube, Inc., No. 07-cv-2103 (S.D.N.Y. 2007)

\textsuperscript{39} Complaint for Declaratory and Injunctive Relief and Damages at ¶ 3, Viacom Int'l Inc. v. YouTube, Inc., No. 07-cv-2103 (S.D.N.Y. 2007).

\textsuperscript{40} Plaintiffs allege that defendants are liable as direct infringers and secondary infringers. \textit{Id.} \textsuperscript{46-89}.

\textsuperscript{41} Hetcher, \textit{supra} note 1 (forthcoming 2008).
successfully mount a fair use defense. One response to this possible reason is that the content industry has demonstrated a willingness to incur such bad press in as much as it has engaged in suing everyday consumers by the tens of thousands in the context of file sharing for the past five years. The content industry has continued to engage in this legal strategy despite much bad publicity and negative consumer response. But these situations are not as comparable as they might at first seem. While file sharing is clearly not a fair use, the situation for UGC is unclear. Certainly, in principle, if cases involving much of this UGC were litigated, there would likely be many instances in which the creators would prevail in a fair use argument. Such works often: (1) are created for purposes of parody or criticism and as such are protected as a transformative use; (2) are not used pursuant to a profit motive; (3) involve a small amount of protected material in comparison to the overall work; and (4) likely do not cause market harm in most situations, as the UGC works will not serve as substitutes for the complete works owned by plaintiffs. All of these factors would count in favor of particular UGC works being found to be fair uses.

This point is academic, however, in that it will almost never make sense for any particular UGC creator to defend herself in a lawsuit if sued by the owner. Defending copyright infringement lawsuits is very expensive, and indeed the very fact that the creators are making no money from their unauthorized copying is all the more reason that they will have no incentive to mount a fair use defense. Thus, for the content industry to sue UGC creators would, in all likelihood, force UGC creators into settlements, which is what has uniformly been the resolution in the lawsuits against file sharers.

Thus, the basis for not initiating suit is not a fear that plaintiffs would not prevail, for in the practical sense they could force individual creators to settle. Thus, there is likely some other explanation. In fact, there would appear to be two.

First, even though plaintiffs could force settlements, nevertheless, in principle, creators will often have a good fair use defense. One response to this possible reason is that the content industry has demonstrated a willingness to incur such bad press in as much as it has engaged in suing everyday consumers by the tens of thousands in the context of file sharing for the past five years. The content industry has continued to engage in this legal strategy despite much bad publicity and negative consumer response. But these situations are not as comparable as they might at first seem. While file sharing is clearly not a fair use, the situation for UGC is unclear. Certainly, in principle, if cases involving much of this UGC were litigated, there would likely be many instances in which the creators would prevail in a fair use argument. Such works often: (1) are created for purposes of parody or criticism and as such are protected as a transformative use; (2) are not used pursuant to a profit motive; (3) involve a small amount of protected material in comparison to the overall work; and (4) likely do not cause market harm in most situations, as the UGC works will not serve as substitutes for the complete works owned by plaintiffs. All of these factors would count in favor of particular UGC works being found to be fair uses.

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argue in principle.\textsuperscript{46} Thus, to force these putative fair users to settle would likely incur very bad publicity. This is a key difference from the situation of file sharers, who were after all guilty of infringement. File sharers may not like to be sued, but at least they could not argue that they were being picked on by big companies who could sue them into expensive settlements despite their probable innocence as fair users.

Second, another important difference from file sharing is that with file sharing the actions for everyday users—uploaders and downloaders—were at the core of the content industry’s problems. These everyday users were involved in unauthorized copying of literally billions of files. While it was the commercial providers of software that enabled file sharing—Napster, Aimster, Grokster, etc.—that bore the brunt of the content industry’s legal scorched earth policy,\textsuperscript{47} nevertheless, but for the actions of the millions of individual uploaders and downloaders, these commercial software providers would have been harmless. This is not the case, however, with UGC. The main problem for the content industry is the uploading and viewing of entire songs or segments of TV shows and movies that can be uploaded in segments \textit{seriatim} so as to make complete shows across a series of files. By contrast, the number of unauthorized uses that get incorporated into UGC works are relatively small as a percentage of the totality of unauthorized copying.\textsuperscript{48}

In Part III, Facebook will be considered in detail. I will argue that based on the above examination of some of the cases that have emerged thus far in the context of user-generated content, we are in a position to draw a very startling conclusion regarding Facebook.

\textsuperscript{46} 17 U.S.C. § 107.
\textsuperscript{48} I would suggest that a norm is beginning to emerge in the entertainment industries that so-called “cut-and-paste” creative works, as long as non-commercial, are to be tolerated. Commercial owners will not have the same antipathy toward cut-and-paste creators as these users are not merely using whole copies for free and thus displacing sales. And further, unlike say cut-and-paste creators making documentary films, for the typical small-scale, one-off UGC work, there is less possibility for seeking permission. Many uses will be given privileged treatment by copyright—enthusiast uses, educational uses, etc. These sorts of uses, \textit{per se}, are less likely to irk copyright owners. For example, the music industry appears to tolerate mixtapes, so long as they do not enter the stream of commerce. Kelefa Sanneh, \textit{With Arrest of D.J. Drama, the Law Takes Aim at Mixtapes}, N.Y. TIMES, Jan. 18, 2007, at E3. See also U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), http://www.copyright.gov/orphan/orphan-report-full.pdf; Exploring the “Fair Use” of Copyrighted Materials on You Tube, http://www.squidoo.com/bannedbyyoutube (last visited April 20, 2008).
III. FACEBOOK AS A MASSIVE INFRINGER OF ITS USERS' COPYRIGHTS

In this Part, I argue that there is good reason to believe that Facebook is engaged in offering unconscionable contracts to millions of people, especially to the millions of minors who spend time on the site. Not only are the contracts unconscionable but they are nullities. Since they are nullities, the creative content that user's purport to convey to Facebook is not in fact conveyed, which means that Facebook is engaging in acts of infringement on a massive scale, due to its unauthorized copying of UGC. The tables have turned; with Web 1.0, users massively infringed upon large-scale owners of copyright, such as the record labels, through online file-sharing services. Now with Web 2.0, it is the users who are the owners of creative content and it is the large-scale corporations, the UGC mega-sites, which are engaged in massive copyright infringement. While I think this claim may be plausibly made out for a number of the mega-sites discussed in Part II, the focus here will be on Facebook as it is the worst offender, given that it has the largest percentage of underage users of all the UGC mega-sites. 49

A. General Unconscionability of Facebook's Contracts with Users

Of the various lessons that may be learned by drawing out larger themes from the few cases involving mega-sites that were discussed in Part II, the most important one is derived from Bragg v. Linden Labs. 50 The important lesson comes from considering the manner in which the court in Bragg treats the agreement between Bragg and Linden Labs. The most obvious lesson of Bragg is that a court that

49. See Paula Lehman, What Facebook Could Learn from Myspace, Bus. Wk. (Oct. 5, 2007), available at http://www.businessweek.com/technology/content/oct2007/tc2007104_796128.htm?chan=top+news_top+news+index_technology. Things could even be worse, at least from an infringement standpoint, but for Facebook's elitist and arguably racist policy of seeking to only provide its service to minors in high school or college. Facebook, Terms of Use, www.facebook.com/terms.php (last visited Apr. 17, 2008) [hereinafter Facebook] (“This site is intended solely for users who are thirteen (13) years of age or older, and users of the Site under 18 who are currently in high school or college.”). Given the strong positive correlation in this country between race and social class on the one hand, and social class and educational attainment on the other hand, Facebook’s policy has the effect of skewing its population of faces away from those of minority groups. See, e.g., Soren Svanum & Robert G. Bringle, Race, Social Class, and Predictive Bias: An Evaluation Using the WISC, WRAT, and Teacher Ratings, 6 INTELLIGENCE 275 (1982).

found Second Life’s Terms of Use in part unconscionable\textsuperscript{51} may do so as well for other sites with comparable terms. The first consideration then is whether the UGC mega-sites, such as Facebook, have comparable terms. We will see that they do, and that in particular, Facebook does.

With regard to provisions for arbitration, Facebook’s terms are more nuanced than those of Second Life. With regard to non-IP claims, Facebook’s Terms of Use require mandatory arbitration. It states that: “YOU AND COMPANY AGREE THAT ... THE SOLE AND EXCLUSIVE FORUM AND REMEDY FOR ANY AND ALL DISPUTES AND CLAIMS RELATING IN ANY WAY TO OR ARISING OUT OF THESE TERMS OF USE ... SHALL BE FINAL AND BINDING ARBITRATION.”\textsuperscript{52}

Interestingly, the Terms draw a distinction between intellectual property and other sorts of rights. After stating the above provision, the Terms then provide the following exception:

\textit{[E]xcept that:} (a) to the extent that either use in any manner infringed upon or violated or threatened to infringe upon or violate the other party’s patent, copyright, trademark or trade secret rights ... the parties acknowledge that arbitration is not an adequate remedy at law and that injunctive relief or other appropriate remedy may be sought.\textsuperscript{53}

Thus, at least with respect to non-IP claims, Facebook’s terms mirror those of Second Life in mandating binding arbitration.\textsuperscript{54} These terms requiring mandatory arbitration in order for users to resolve disputes may be found unconscionable for the same reasons provided in \textit{Bragg}. For instance, there was inadequate notice of the expense involved in arbitration\textsuperscript{55} which, given its relative magnitude and proportion to the amount at issue in the dispute, would similarly leave potential Facebook plaintiffs without an effective remedy.\textsuperscript{56} In particular, the value to potential plaintiffs of nullifying these unconscionable agreements will vary according to the value of particular plaintiff’s creative content. For a large number of plaintiffs, this value, at least in objective and commercial terms, may be

\textsuperscript{51} See id. at 605-12.
\textsuperscript{52} Facebook, \textit{supra} note 49.
\textsuperscript{53} Id.
\textsuperscript{54} See \textit{Bragg}, 487 F. Supp. 2d at 603-04 (discussing the Second Life arbitration clause).
\textsuperscript{55} Id. at 608-10.
\textsuperscript{56} See Facebook, \textit{supra} note 49.
relatively small. Hence, the cost of arbitration will be relatively significant in proportion to the value of a particular plaintiff's content.

In another respect, however, Facebook's Terms of Use may be more attractive than those of Second Life, at least facially, as the Terms of Use provide:

Arbitration under this Agreement shall be conducted by the American Arbitration Association (the "AAA") . . . The location of the arbitration and the allocation of costs and fees for such arbitration shall be determined in accordance with such AAA Rules . . . If such costs are determined to be excessive in a consumer dispute, the Company will be responsible for paying all arbitration fees and arbitrator compensation in excess of what is deemed reasonable. 57

These terms are more user friendly, as they do not attempt to force potential litigants to pursue their claims in California nor force them to unavoidably incur significant costs to pursue their claims, as we saw was the case with Linden Lab's Terms of Service. 58 Instead, the precise location and costs of arbitration will be up to the discretion of the AAA.

However, the Bragg court considered not only the presence of certain terms but also whether terms were buried in the text so as to cause unfair surprise, and also whether other terms were lacking—such as terms explaining that the arbitration would entail significant costs to the potential plaintiff seeking redress. 59 Similarly, Facebook's terms are not set off or highlighted, and similarly, Facebook fails to inform its bargaining partners of the potentially significant cost of arbitration, noting merely that if such costs are "excessive," Facebook will pay without providing any content to the vague term "excessive." 60 Nevertheless, Facebook's arbitration terms are fairly seen to be more favorable than those of Second Life in material ways in that at least if fees are deemed excessive, assuming a reasonable interpretation, the user will not be on the hook, which is not the case for Linden Labs. 61

In addition to offering more attractive arbitration terms than Second Life, Facebook can point to another potentially important difference: the facts in Bragg are egregious in that the CEO of Second

57. Id.
58. Bragg, 487 F. Supp. 2d at 610.
59. Id. at 606-07.
60. Facebook, supra note 49.
Life made important statements outside of the four corners of the agreement that were in clear tension with terms in the agreement and with Second Life's behavior in de-activating Bragg's account and confiscating his property.\textsuperscript{62} By contrast, there is no evidence that Facebook is making statements outside of the four corners of the contract that contradict those in the contract.

This truth provides little salvation to Facebook, however, for two reasons. First, while the court in \textit{Bragg} appeared especially outraged at Linden's misleading statements made in extra-contractual settings, it appears that Second Life's statements within the four corners of the contract were sufficiently misleading in this regard.\textsuperscript{63} The court's unconscionability analysis regarding arbitration is confined almost exclusively to the terms contained within the Terms of Use.\textsuperscript{64} Likewise, Facebook's statements made within the four corners of the contract are sufficiently misleading in their own right. As will be shown below, additional difficulties are created when these terms are compared to those in Facebook's Privacy Policy. This point is off the mark, however, as it goes to the purported misrepresentations of Second Life regarding ownership of property. Facebook's terms with regard to arbitration, however, are not likely to be deemed unconscionable. Facebook's terms are better than other UGC megasites besides Second Life, as some of these sites offer comparable or even worse terms than those of Second Life.\textsuperscript{65}

This does not let Facebook off the hook, however. Facebook's Terms of Use contain provisions that are fundamental misrepresentations that include contradictions in terms, such that the

\textsuperscript{62} One of the factors the court in \textit{Bragg} appeared to find significant was that Second Life did not merely passively provide a term that allowed for ownership but it actively promoted this feature. \textit{Id.} at 595-96. ("Defendant Rosedale personally joined in efforts to publicize Linden's recognition of rights in virtual property. . . . [and] continued to personally hype the ownership of virtual property on Second Life"). While this is true, there is no indication that the court found this oral representation dispositive or an essential element to the claim of misrepresentation. Courts may follow \textit{Bragg} in showing a willingness to look outside the four corners of the contract in making a judgment regarding what constituted the agreement between the parties. As a practical implication, this means that these sites must monitor what they say about UGC in other contexts besides the Terms of Service. It also means that potential plaintiffs will want to determine what the sites may have said about ownership in other contexts besides the Terms of Service.

\textsuperscript{63} \textit{Id.} at 611.

\textsuperscript{64} \textit{Id.} at 605-11.

\textsuperscript{65} For example, the Terms of Use for YouTube state that "the YouTube Website shall be deemed a passive website that does not give rise to personal jurisdiction over YouTube, either specific or general, in jurisdictions other than California." YouTube, Terms of Use, ¶ 14, \url{www.youtube.com/t/terms} (last visited Apr. 17, 2008) [hereinafter YouTube].
key terms regarding copyright licenses pertaining to UGC must be rendered a nullity. Recall that in Bragg, the substantive misappropriation and fraud alleged by Bragg concerned Second Life’s statements concerning ownership of property.66 Other UGC sites also contain terms pertaining to ownership of property by users. These other sites do not tell users that they may come to own property. Rather, these sites acknowledge that users already own property, presumably by virtue of the fact that the users and creators of the property and the works are not works-for-hire and hence ownership would vest in the users although the Terms of Use and Terms of Service of these sites merely acknowledge the fact of user ownership.67 The relevant terms do not pertain to how users may come to own property but instead to how the sites may come to take an interest in this UGC by means of terms in the Terms of Use.

Let us now consider the terms in Facebook’s Terms of Use that pertain to ownership of UGC. The Terms of Use prints out as eight single-space pages. The first mention of “User Content” comes in Paragraph 4, under the heading, “Property Rights in Site Content, Limited License,” where the text distinguishes “Site Content” in which Facebook claims exclusive ownership from “User Content,” with regard to which the Terms of Use note, “[e]xcept for your own User Content, you may not upload or republish Site Content on any Internet, Intranet or Extranet site or incorporate the information in any other database or compilation, and any other use of the Site Content is strictly prohibited.”68 In Paragraph 8, under the heading, “User Content Posted on the Site,” the Terms of Use notes:

Facebook does not assert any ownership over your User Content; rather, as between us and you, subject to the rights granted to us in these Terms, you retain full ownership of all of your User Content and any intellectual property rights or other proprietary rights associated with your User Content.69

Subsequently, the Terms of Use states, “[w]hen you post User Content to the Site, you authorize and direct us to make such copies

68. Facebook, supra note 49.
69. Id.
thereof as we deem necessary in order to facilitate the posting and storage of the User Content on the Site.”\(^7\) This fairly innocuous term is followed in the same paragraph by an extraordinary grab for the copyright interests of users.

By posting User Content to any part of the Site, you automatically grant . . . to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing.\(^7\)

To dispel what may appear to be an inconsistency, it is worth first noting that a grant of a non-exclusive license would not create an ownership interest, as the Copyright Act provides that whereas exclusive licenses create an ownership interest, non-exclusive licenses do not.\(^7\) Note the relationship between the two bits of text just quoted. By general interpretive norms of paragraph construction, the first section of the text should be the dominating term as it heads the paragraph. Thus, on a natural reading of the paragraph, conventions of draftsmanship would lead one to intuitively take the second bit of text to be a further specification of the provision contained in the first, which heads the paragraph. This would be a false impression, however, as the legal logic of the two terms is the opposite. The second quote is the more general and encompassing provision in which Facebook claims a very broad, sweeping, albeit, non-exclusive right to users’ UGC, including the extraordinary claim to a right to sublicense for “any purpose” including “commercial purposes” as long as the activity is “in connection with Site or the promotion thereof.” Most striking is the capaciousness of the term, “in connection with the Site.” Unless one of Facebook’s employees was on a frolic and detour, by definition any activity that the site rationally chose to pursue will be in connection to the site. Indeed, if and when Facebook becomes a publicly-traded company, its corporate actors

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70. Id.
71. Id.
will have a fiduciary duty to only take actions that have some rational "connection" to the site.\textsuperscript{73}

Note for example that were Facebook to surreptitiously sublicense user content to pomo.com for commercial purposes, this would fall squarely within the license Facebook purports to be granted by users. It is fair to say that the vast majority of Facebook users would be extremely surprised to learn that the only thing stopping Facebook from legally sublicensing their creative and personal content to pomo.com or anyone else is the fact that the site currently does not perceive such activity to be in its interest.\textsuperscript{74}

Getting back to the relationship between this more capacious second quote, and the one that heads the paragraph, the latter renders the former a legal redundancy. Of course, if the site can do what it pleases with user content, then it can "make such copies thereof as we deem necessary in order to facilitate the posting and storage of User Content."\textsuperscript{75} Indeed, without a lawyer's training, one might be inclined to think that because the lead sentence claimed authorization by users to Facebook to make copies in order to facilitate posting and storage, that the second block of text was merely an explication of this leading idea. In other words, the structure of the paragraph itself is such as to cause deliberate misunderstanding in the lay reader. Perhaps not surprising, the misunderstanding tends to work to the user's detriment. Thus, in the above discussion, we have seen that Facebook artfully drafts the terms of the paragraph to create the impression that they will use the user's content for purposes of the site's general functioning, when in fact they purport to take a much broader and thus more valuable license in users' content. This is a clear instance of the deceptive and surprising terms that the Bragg court focused on in finding unconscionability.\textsuperscript{76}

As was seen in Part II, in the designation of contract of adhesion, courts look at such things as whether the terms were conspicuous.\textsuperscript{77} Facebook's claim to a license that would allow it to secretly

\textsuperscript{73} See 18B Am. Jur. 2d Corporations § 1460 (2007).

\textsuperscript{74} In addition to their legitimate property claims, given the frequent incidence of data theft, it is completely reasonable for users to prefer that extra copies of their personal profiles not lie around in some company's archives. In Facebook's short existence, it has already made significant missteps with regard to its respect for its users' personal data. See Robert Verkaik & Jerome Taylor, Facebook Backlash Over Sale of Personal Data, INDEPENDENT Nov. 24, 2007, http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-backlash-over-sale-of-personal-data-760221.html.

\textsuperscript{75} See Facebook, supra note 49 and accompanying text.


\textsuperscript{77} Id.
 sublicense user content to porno.com is the opposite of conspicuous; it is artfully hidden, both by its location within the paragraph, and more artfully, by the implicit interpretive canons of paragraph construction.

Unconscionability analysis looks to the overall character of the bargaining situation. The following examples are even more damaging for Facebook. As we saw in Bragg, Second Life ostensibly promised users that they could own their content but, in the fine print of the contract, qualified this term to such a degree as to render it substantially false. We saw earlier that the term purportedly allowing Second Life to cancel Bragg’s account, at its discretion, with the mandatory expensive arbitration terms, combined to leave Bragg without an effective remedy. There is a parallel situation in the context of Facebook, although one not involving virtual real estate but instead UGC.

In paragraph 9, just discussed, the Terms of Use state that “[y]ou may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.” First off, I must note that this text supports the above interpretative analysis in which I claim that the second portion of text legally encompasses the first. Moreover, Facebook implicitly agrees, for the above quote notes that if the user wants to remove her content, the license granted to Facebook will expire. This expiration of the non-exclusive license nullifies the second bit of text in Paragraph 8, in which the user is purported to grant a non-exclusive license. No mention is made in the text with regard to the first bit of text in which the Site purports to receive authorization to make copies, “in order to facilitate the posting and storage of the User Content on the Site.” No parallel new term is proffered that will nullify the authorization granted in this first term. Thus, Facebook is caught on the horns of a dilemma. Either this first term is encompassed in the second more capacious term, as I argued above, and thus does not require independent nullification, as it is nullified when the second encompassing term is nullified by the text stating that the non-exclusive license will automatically expire

78. See Bragg, 487 F. Supp. 2d at 605.
79. Id. at 595-97.
80. Id. at 595-97, 605-611.
81. Facebook, supra note 49.
82. Id.
when the users removes her content thus supporting my interpretation above. Alternatively, the first term is not encompassed in the second term, in which case it would need to be independently nullified. Since it is not independently nullified, then it is still be operative even after the user has removed her content. But if this latter interpretation is the better one concerning the relationship between the first and second bits of text in Paragraph 8, then another problem is created for Facebook that again offers witness to an unconscionability of terms. On either interpretation then, Facebook's terms in this paragraph are unconscionably vague.

Continuing with further examination of the text from Paragraph 8, additional vagueness issues are seen. The specific portions that are so vague as to be seriously misleading are the pair of claims stating 1) that when the user takes her content off the site, the non-exclusive license held by Facebook is revoked, but 2) also say that Facebook retains the right to keep the archived copy. What is the legal status of this so-called archived copy? The notion of an archived copy has no established meaning in copyright law. It is not defined in the Copyright Act's definitional section 101. Section 117 of the Copyright Act uses the concept of an "archival copy" in the context of computer software, in creating an exception to general copyright rules such that in certain conditions a software purchaser can make an archival copy in case the first copy is damaged or rendered unusable. Is an archived copy like a physical copy in the sense that one may own a copy of a book but not retain any copyrights with respect to the book? If this is correct, then it might be consistent to say that an ownership interest is retained under the First Sale Doctrine.

83. Id.
84. 17 U.S.C. § 101 (2000). With regard to this term, Facebook is outdone by YouTube, which retains the right to keep a "server copy." YouTube, supra note 65, ¶ 6C. Given that the context is digital, any copy will be a server copy and the adjective is completely vacuous. In other words, YouTube retains a right to keep a copy and says nothing further about how they may use such copy. Without any qualification as to use, they thus retain the right to use server copies that have been removed or deleted in whatever manner is legal.
85. 17 U.S.C. § 117(a)(2) (2000) ("Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided...such new copy or adaptation is for archival purposes."). Note, however, that this provision further provides, "that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful." Id.
86. 17 U.S.C. § 109(a) (2000) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person
the First Sale Doctrine, then indeed it would be true that Facebook retained no copyright interest, or at least not one that was not an exception under the Copyright Act, as the First Sale Doctrine is an exception to the copyright owner's right of distribution. Perhaps this is what Facebook has in mind when it refers to an archived copy.

Three points are pertinent on this construction of an archived copy. First, this would entail that Facebook would have no right to make copies of the archival copy. This would mean that Facebook would not be permitted to make copies even if only to do searches of the text if doing so entailed even making RAM copies. Facebook would, however, have the right to distribute this copy in the sense that under the First Sale Doctrine an owner of a copy of a book may not copy it but she can distribute it. For example, selling the book to a used bookstore or giving the book to a friend would count as a distribution. Thus, if the archived copy is best understood in terms of the First Sale Doctrine, then Facebook could not copy its copy but it could still sell it to pomo.com.

Most important, however, even if indeed this is really what Facebook intends, this would still be in contradiction to the Terms of Use. For as previously indicated, Facebook goes further than promising to give the intellectual property rights back, it says the user retains all "proprietary rights." The notion of a proprietary right does not have a precise definition but in the manner in which it is used, it would be reasonable for adult users to understand this as meaning all other possible property and property-like interests, that is, anything of value pertaining to the user's creative content. Such an archived copy would presumably have commercial value—otherwise Facebook would not spend money to maintain these copies. But if it has commercial value, then Facebook cannot be said to have returned to the user all that is of proprietary interest. Thus, this combination of contractual terms is worse than ambiguous, worse than surprising and intentionally vague. These terms are a downright contradiction when juxtaposed to one another. The user is told both that she retains all intellectual property and other proprietary interests in her content and is also told that she grants a perpetual right to Facebook to retain an archived copy—but since an archived copy can only be understood as

87. See MAI Sys. Corp. v. Peak Computer, Inc. 991 F.2d 511 (9th Cir. 1993) (finding a RAM copy sufficiently permanent for purposes of satisfying test for fixation).
88. Facebook, supra note 49.
a proprietary interest, the user is promised both x and not-x, which is a contradiction. As one learns in any introductory logic class, if a contradiction is true, all other propositions can be proven. Thus, we can only conclude that the Terms of Use regarding users’ ownership of their intellectual property and other proprietary interests are non-propositional nonsense. This is an extremely strong factor in drawing the conclusion that to apply such terms to the disadvantage of a user would be unconscionable. If the site were actually interested in full and complete disclosure, it would explain what an archival copy is, how such copies are currently being used, and how they might be used.\textsuperscript{89}

Consider next a second contradiction contained within the Terms of Use. The Terms provide that, “[t]hese Terms of Use constitute the entire agreement between you and Company regarding the use of the Site and/or the Service, superseding any prior agreements between you and Company relating to your use of the Site or the Service.”\textsuperscript{90} The Terms of Use note, as well, that “[w]ithout limiting any of the foregoing, you also agree to abide by our Facebook Code of Conduct that provides further information regarding the authorized conduct of users of Facebook.”\textsuperscript{91} The text for “Code of Conduct” provides a link to this Code. Later, the Terms of Use states, “In addition to these Terms of Use, Facebook Pages are subject to and governed by certain Additional Terms Applicable to Facebook Pages. The Additional Terms Applicable to Facebook Pages control in the event of any conflict between them and the Terms of Use.”\textsuperscript{92} In other words, any terms in the Terms of Use are purportedly rendered meaningless by a contrary term in the Additional Applicable Terms. Whereas the language introducing the Code of Conduct states that “you agree to abide by our Facebook Code of Conduct,” no such terms connoting exchange are provided with regard to the Additional Applicable Terms. That is, the user is not told that by using the service she agrees to be bound by the Applicable Terms. Given that the user is told that she must agree to abide by the Code of Conduct but is not told this with regard to the Applicable Additional Terms, she is reasonable in concluding that she has therefore not agreed to the Additional Applicable Terms. Facebook’s reply will be obvious; given that the

\textsuperscript{89} One site does make an effort to explain legal jargon in plain English, which demonstrates at the least that it is possible to make such an effort. See MySpace, supra note 67, p. 6.1.

\textsuperscript{90} Facebook, supra note 49.

\textsuperscript{91} Id.

\textsuperscript{92} Id.
Terms of Use state that the Additional Applicable Terms trump, and given that the user accepts the terms in the Terms of Use as a condition of use, then by implication the user assents to the term stating that the Additional Applicable Terms trump. The user has a winning reply to this, however, which is that she assented to the Terms of Use and the Terms of Use contains a term stating that these terms she is agreeing to are trumped, but she has not thereby agreed to be bound by these additional terms. The statement in the Terms of Use, without an agreement between the parties, is merely a statement of fact. The site might as well have said that there will be a harvest moon next month.

Whether this is true and whether the Additional Applicable Terms trump the Terms of Use are both statements of fact that are either true or not, regardless of what the user thinks or does. Telling the user that the Additional Applicable Terms trump and propositioning a user to accept these terms for valuable consideration are two different things. It would be reasonable for a user to contend that if the site wanted the user to assent to these additional terms, the site would have contained language of exchange in the manner that it did with regard to the Code of Conduct. At the very least, given that there was an explicit deal offered in the Code of Conduct, a reasonable user is justified in finding the terms vague and confusing. This is precisely what the doctrine of unconscionability in the context of form contracts is meant to address and discourage. Accordingly, this sort of ambiguity would fall into the category of procedural unconscionability under the schema set out by California courts as discussed in Bragg.

More confusion yet is created by Facebook’s Privacy Policy and its relation to the Terms of Use. In the Terms of Use, the only text under the bolded heading “Privacy,” reads as follows: “We care about the privacy of our users. Click here to view the Facebook’s [sic] Privacy Policy. By using the Site or the Service, you are consenting to have your personal data transferred to and processed in the United States.”93 We see here terms of exchange similar to the language of agreement regarding the user’s agreement to abide by the Code of Conduct (and thus dissimilar to the Additional Applicable Terms).

There is a problem, however, because the Privacy Policy contains terms that are outside the scope of what may legitimately be construed as one’s “personal data.” Personal data is information about particular users. This sort of information is collected by numerous

93. Facebook, supra note 49.
websites.\textsuperscript{94} Perhaps the central reason to collect personal data is that websites can use it to more effectively market to users. Facebook's privacy policy has a provision, however, that concerns not personal data but instead a user's copyrightable content, namely, her written communications with other users. The Privacy Policy states, “[w]hen you make use of the communication features of the service to share information with other individuals on Facebook, however, (e.g., sending a personal message to another Facebook user) you generally cannot remove such communications.”\textsuperscript{95} Note that such content is not personal data, but rather UGC.

The obvious question is what this term is doing in the Privacy Policy when it concerns copyrightable content. This type of UGC is not discussed where it should be discussed, which of course is in the Terms of Use. Indeed, the one paragraph in the Terms of Use that discusses UGC does not explicitly mention these communications. Or, to be precise, those communications that display more than \textit{de minimis} originality, are copyright protected UGC.\textsuperscript{96} As such, they logically fall under the broader topic, “User Content,” as used by the Terms of Use. And as such, these communications are promised to be given back to the user when she leaves the Site, for as discussed above, users are told they can take all their “User Consent” with them except for an archived copy of this content. Thus, once again, the Terms of Use, when combined with other Facebook documents, contain a contradiction in terms. The user is both told that she can take back all her user content, except for the archived copy, and also told the opposite, namely that she cannot take all her content besides

\textsuperscript{94} The key fact about information for present purposes is that it is factual in nature and thus not creative. A fundamental requirement of copyrightable content is that it originate with the creator. By contrast, information is propositional in nature—a purported piece of information is either true or false—an original creative work fixed in a tangible medium of expression is not propositional. For example, the painting Mona Lisa is neither true nor false, although purported personal information about her such as that she wears a mustache in her Duchamp portrait is falsifiable or verifiable.


\textsuperscript{96} User's conversations, or at least those that exhibit a minimal spark of creativity, will be copyrightable, because unlike typical spoken conversations in an offline context, these conversations are fixed in a tangible medium, namely, residing on Facebook servers as stored digital content, and thus satisfy the two elements necessary for copyrightability—original expression of a more than \textit{de minimis} amount and fixation. Perhaps some bits of conversation would be too brief or lacking in originality—such as if a user merely types in the word, “yes.” Other chunks of conversation are undeniably highly creative and hence clearly copyrightable, particularly given the low threshold for copyrightability established under \textit{Feist}. See \textit{Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. 499 U.S. 340, 345-47 (1991).
the archived copy because, in addition to not getting back the archived copy, she is also not getting back the conversations referred to in the Privacy Policy. Once again, then, Facebook is guilty of making false and misleading representations in its Terms of Use.

Given the above discussed contradictions and misrepresentations regarding core aspects of the so-called agreement between users and Facebook, one can only conclude that the Terms of Use are a nullity with regard to the key terms that concern transfer of copyright interests. What is the implication of this? If there is no written agreement, then by application of section 204 of the Copyright Act, there is no valid transfer of copyright interests since such transfers must be in writing. The implication of this is that all copying of users’ UGC is done without authority, which in turn leads to the conclusion that Facebook is a massive infringer of UGC. This sort of massive infringement is on a scale the likes of which we have only seen before in cases such as Napster and Grokster. In each of those cases, the infringement was so massive, and the potential liability so devastating, that each of these companies folded. In Part IV below, I will argue that, contrary to what made sense for Napster or Grokster, the best public policy solution would not involve driving Facebook and its peers out of business due to their current status as massive infringers. First, however, I will delve further into Facebook’s unconscionable contract with the goal of driving a stake through the heart of Facebook’s pernicious Terms of Use.

B. Unconscionability of Facebook’s Agreements with Minors

This section examines the agreement between Facebook and its users who happen to be minors. The fact that a significant number of Facebook users are between the ages of thirteen and eighteen raises the question under what conditions, if any, can minors sell, license, give away, or in other ways dispose of their intellectual property. The Copyright Act does not address the topic of alienation of works by minors. Nevertheless, a core provision in the Act dealing with exchange of intellectual property interests is relevant. The Act

101. Facebook, supra note 49 ("By using the Service or the Site, you represent and warrant that you are 13 or older and in high school or college, or else that you are 18 or older, and that you agree to and to abide by all of the terms and conditions of this Agreement.")
The above provision from the Copyright Act establishes that there must be a writing. As courts have noted, this is in effect a statute of frauds provision. Such provisions are meant to protect the bargaining parties in transactions of material significance. Consequently, statutes of frauds typically have a lower dollar limit. For example, transactions valued below $500 often do not require a writing. Given this background, it is notable that the statute of frauds provision in the Copyright Act does not have a lower dollar limit. This might be read as an implicit statement by Congress that there are no transfers of copyright interests that are too insignificant to be worthy of being reduced to writing.

Another explanation, however, may be more in keeping with other parts of copyright law. A venerable principle of copyright is that it is intrinsically difficult to place a value of a work prior to its release for commercial exploitation. In recognition of this fact, Congress for example created a renewal term so that authors who may have sold or licensed their works for too little can reclaim them later, once the work’s commercial value has become established. Similarly, after thirty-five years, authors can terminate licenses. Both of these provisions are justified in part due to the inherent difficulty of accurately valuing creative works. Thus, a function of requiring a writing for all transactions can be seen as an implicit recognition that prior to commercial exploitation, it may be very difficult to say which works are worth more than $500 and which are not, because when it comes to valuing creative works, the future tells the past. Indeed, creative works present the interesting situation in which it may not be

104. Id.
105. See generally 18 AM. JUR. 2D Copyrights § 2 (2007).
108. H.R. REP. NO. 94-1476, at 124 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740 ("A provision of this sort [203] is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited").
knowable which particular works will be commercially successful and yet know that in aggregate some will be very valuable.

This is likely true of the UGC posted on sites such as Facebook considered in totost. Given the millions of minors posting content, it is inevitable that a significant portion of the next generation of famous poets, fiction writers, songwriters, visual artists, filmmakers, et cetera, will have posted their early works on Facebook.\(^{(109)}\) Given the tremendous value of early works by artists of past generations such as Picasso and Dali, there is every reason to believe that some of the creative content that ends up in Facebook’s archives will come to be of tremendous value. If we take the step, a la Justice Breyer in the Eldred dissent, we would seek to formulate the net present value of such works.\(^{(110)}\) Those works that will be very valuable in the future will accordingly have a greater discounted net present value. While we may not know which particular works have this higher value, given the many millions of such works archived by Facebook, we can nevertheless know that these works, taken in aggregate, have a significant net present value. Thus, given that some works will be of tremendous value and many others of moderate value along with the difficulty in determining up front which is which, it makes sense to require that all authors be protected by the requirement of a writing. In the end, this may be the only means to guarantee that all creators of works that end up being valuable receive the benefit provided by the statute of frauds.

This discussion provides an answer to one initial objection that may be made to the notion that the creative content of Facebook’s users is worth worrying about. Facebook might seek to maintain that concerns regarding the purported unconscionability of its Terms of Use are a tempest in a teapot, as the creative content posted by users is of de minimis value and hence the conditions under which proprietary rights in it are purportedly transferred are not worth worrying about. After all, the law lets minors buy candy bars or toy cars because the price is de minimis. The response is that by having what is in effect a statute of frauds provision, the Copyright Act clearly indicated that all such exchanges are judged by Congress to be worthy of contemplation based on the rationale just considered.

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\(^{(109)}\) Statistically, it will be the case that most content is not separately commercially valuable. Nevertheless, if one considers the fact that say 75% of eligible minors between 13-18 are on Facebook, then there is a good chance that every future Dylan, Springsteen, Cobain, etc., will have signed over a permanent copy of their youthful creative expression to be used as an archival copy.

Accordingly, if minors can transfer their copyright interests, they can only do so by means of a writing. Thus, we are led to the question; what instrument was signed by the minor or her duly authorized agent? The answer is of course being that minors, like other users who wish to remain on the site, click a button to signify acceptance of the Terms of Use. Given the nature of this procedure, the question naturally arises as to whether the Terms of Service constitute a contract of adhesion, and if so, an unconscionable one. This question was considered in the previous Section for a non-specified Facebook user with the implicit assumption that such a person was in a position to bargain with Facebook. We see now that when it comes to minors, even this assumption must be questioned. Therefore, the question of unconscionability must also be raised again in the context of minors. For those acts that are unconscionable when done to adults, it will be hard to resist the inference that they are even more unconscionable when done to minors. Thus, it is highly significant to the issue of whether Facebook treats minors unconscionably, that Facebook was seen in the last Section to treat adults unconscionably.

Given that the Terms of Use, Additional Applicable Terms, Privacy Policy and Code of Conduct are the same for adults and minors, a close examination of these documents leads to the conclusion that because the Terms of Use are unconscionable with regard to certain key terms with regard to adults, they are more so unconscionable for minors. As a general rule, minors are not allowed to sign contracts, for the obvious reason that because they are minors, they have not yet reached the age of reason so as to be able to rationally enter into business transactions.111 If we don’t let children sign away their inheritance or buy and sell items such as autos and houses, why is it they should be able to transact away what may be very valuable intellectual property rights? In general, the law requires a parent or guardian to oversee decisions of financial significance to minors.112 Without such laws, the world being what it is, it is predictable that some adults, or even other minors, would prey on minors.113 Indeed, I will contend that precisely this sort of exploitation

111. See 7A AM. JUR. 2D Contracts § 28 (2007).
112. See Id. (as applied to financial contracts).
113. One can draw a parallel with the manner in which musicians were allegedly mistreated by their record labels in the past. From a laissez faire point of view, it is indeed true that the artists signed agreements and received consideration and yet the substantive unfairness of these agreements is legendary. See Edna Gundersen, Rights Issues Rock the Music World, USA TODAY Sept. 16, 2002, at 1D, http://www.usatoday.com/life/music/news/2002-09-15-
is taking place between Facebook and its under-age and vulnerable users.

Thus, there is an independent reason for claiming that the terms should be a nullity when it comes to minors, namely, that as a matter of policy, we should not allow minors to contract away what might be valuable property. The difference between legal adults and minors is very important in contract law. While it may be a legal fiction to do so, we hold adults to the terms of contracts, even when they are very complex contracts full of legal jargon that realistically we could not expect non-lawyers to comprehend.\(^{114}\) We hold adults to the terms of these contracts nevertheless because adults who cannot understand a contract are expected to appreciate this fact and so, if it matters enough to them, they can hire an attorney. But, as a general rule, courts are much more protective of minors; we think that minors are not fully rational when it comes to judging the meaning of a complex legal document like the Terms of Service, or being able to judge that their understanding is inadequate and hence that they need to consult a lawyer.\(^{115}\) Suppose a fourteen-year old somehow accessed one-hundred thousand dollars that had been given to her and bought an expensive car on eBay. No judge would uphold this contract if challenged in court. Thus, it is worth asking whether contracting away one’s UGC is more like buying a candy bar, or whether it is like a more significant transaction, such as buying an expensive car.

IV. A PROPOSED NORMATIVE SOLUTION THROUGH IMPLIED LICENSES

As the above discussion has demonstrated, Facebook is indeed a bad corporate actor in that it proffered an unconscionable contract upon millions of users including millions of minors. This of course raises the question as to what is to be done since this situation cannot rightfully continue. Comparing the present situation with that of Napster and Grokster, the important difference is that these earlier sites had business models that were inherently contradictory to a regulatory regime that protected copyrights in songs, movies, and other content. It is simply impossible to have peer-to-peer file sharing available to users for free while also protecting the copyrights of

\(^{114}\) See generally 17A AM. JUR. 2D Contracts § 28 (2007).

owners of the shared works against piracy. Thus, one must go. Either we dramatically reshape copyright law such that making literally billions of unauthorized copies of commercially viable creative works available to be freely copied is allowed, or we shut down the business built on providing this service. By contrast, Facebook does not present an inherent tension with established rights of copyright law.

Facebook may well think that it deserves to have an interest in the UGC since Facebook gives much of this content much of its value. The value of an individual’s content will often depend in large part on being found in the same place as the content from all the other people on the site. Thus, the site might well argue on fairness grounds that it is the one that is in the stronger position to claim ownership, given that users are allowed to use the site for free and receive what are clearly tremendous benefits from participation in the site, at least by their demonstrated preferences—nothing else besides the perception of receipt of tremendous value could explain the amazingly rapid growth in users.

There is a telling response to this claim, however, which is that while this view may have some merit as a normative, fairness-based argument, it does not have a legal basis. The position of Facebook amounts to a version of a sweat of the brow doctrine, which is rejected in modern copyright law. Even if the site has some raw, normative claim, nevertheless, copyright law rewards the creators of original content, not those who provide the creators a venue to create or the tools to facilitate such creation. The creators are the owners. Thus, the sites must bargain to get ownership. In other words, the users are the owners of the content because it vests with them due to their role as creators. This raises the question as to why Facebook does not simply put in the Terms of Service the term that in exchange for access to the site, the user relinquishes its rights in its creative product. This seems like a realistic option, as generally speaking, users likely do not read these Terms of Service. And even if they did, it is surely the case that most would not understand very well what they were agreeing to. For the small number of people who both read the terms and understand them, some might think that access to the site was worth the exchange of their content. Others might not want to use the site under these conditions, but as long as the number of these people was not large, the site could likely tolerate the loss.

117. For there to be ownership, the site would have to include language claiming an exclusive license. It might be enough for the site’s intended purposes to claim a non-exclusive
This raises the question as to why the site does not seek such licenses. One possible answer is that the site is like Second Life in that it seeks to offer more to the user in order to compete with other sites by offering more favorable terms. This explanation is belied, however, by the fact that Facebook does not promote its competitive advantage in the manner that Second Life does. Recall that the CEO of Second Life appeared in a town forum to promote the prospect of ownership in Second Life. In the case of Facebook, if it really sought to promote a competitive advantage by providing favorable ownership provisions, it would have been obvious to Facebook why merely providing the relevant terms in the Terms of Use would not work to promote these terms to users—because the terms are in legalize that the average user would not understand even if she read the long complex Terms of Use. This is clearly why Second Life took steps to promote its competitive advantage above and beyond merely including the relevant terms in the Terms of Service. Namely, it knew that if it merely put the statement that users could own and buy and sell their property in Second Life in the Terms of Service, no one would come to know this fact as people do not generally read these terms.

There is an option we have not considered, however. Perhaps the UGC mega-sites do not want to have ownership of the UGC. Furthermore, they might argue that the very fact that they do not desire to own the work is evidence that they would not make misrepresentative statements to users in order to get it. The obvious question is why would the sites have such a preference? The content obviously has value as indicated by the fact that advertising driven business models are being built around this content and sites such as MySpace and YouTube have been sold for large sums of money.

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perpetual license to use the work. A non-exclusive license is not property. See Peter S. Menell, Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis, 22 BERKELEY TECH. L.J. 733, 786 (2007) ("Nonexclusive licenses are viewed as conferring personal, as opposed to property, rights.").

118. The idea is that ownership will allow an economy to burgeon as users develop products and bring them to market. In the short existence of Second Life, such an economy is in the process of developing.


120. See Bambi Francisco, Buying MySpace as the Centerpiece, MARKET WATCH, July 18, 2005 (MySpace sold for $580 million); Michael Arrington, Google Has Acquired YouTube, TECHCRUNCH, Oct. 9, 2006, http://www.techcrunch.com/2006/10/09/google-has-acquired-youtube/ (YouTube sold for $1.65 billion).
There is indeed an important reason why the sites might not want to claim ownership. Such ownership might compromise the position of the sites when it comes to seeking safe harbor from infringement liability as a compliant ISP under section 512 of the Copyright Act, or for defeating defamation claims as a distributor rather than a publisher under section 230.121 Thus, when Facebook and YouTube provide terms in the Terms of Service that state "you own the content," they are not being magnanimous but instead laying the groundwork for their legal defense should they be sued for infringement or defamation. Indeed, YouTube is currently being sued by Viacom in a massive infringement lawsuit.122 Predictably, YouTube is seeking to come within the section 512 safe harbor. On the facts, it seems like an open question at this point whether YouTube will be able to successfully mount a section 512 defense. Clearly the plaintiffs do not think so. Viacom, et al., allege both indirect and direct infringement.123 The closer YouTube is to the content, in terms of ownership, the harder it would be to distance itself when it comes to invoking the section 512 safe harbors. Thus, we see that Second Life may be in a significantly different position than other mega-sites in affirmatively wanting its users to be aware of the fact that they may be owners. Second Life has reason to trumpet this fact as a competitive advantage. By contrast, sites such as Facebook want to have these terms in the Terms of Service in order to put themselves in the best position to offer a section 512 safe harbor defense. But the goal may be served without users' awareness. This also helps to explain why Facebook would have reason to make misrepresentations. It wants to have its cake and eat it too; for users to be owners for purposes of section 512 of the Digital Millenium Copyright Act but for Facebook to have use of the UGC nevertheless.

While it is understandable that Facebook would want both, nevertheless, it can do with less. The reason is that Facebook's basic service is not in tension with the copyright status quo. After all, users create their own content and benefit from allowing Facebook to copy the content to the extent that such copying is necessary to provide the sorts of functionality that users desire from their participation in the site. The question then is whether Facebook can maintain a scope of use for their users' creative content that is both acceptable from a

123. Id.
public policy perspective and also will be enough for Facebook to retain its present status as a viable, and indeed thriving, business model.

Facebook would appear to have two basic choices. First, it can come clear and openly disclose to its users the full scope of rights and interests it is now attempting to deceptively pilfer away from them. In particular, Facebook could disclose that despite whatever sterling intentions it might possess, in claiming the non-exclusive right to sublicense users' content for any commercial purpose, if the site were to be sold or taken public, the new owners would have an intolerably wide scope of options regarding what they could do with the users' content. In other words, it should be disclosed that certain plausible scenarios for sublicensing content could be extremely deleterious to the interests of a vast number of users. The site should also disclose that all the "archived" copies that it retains, as well as the user conversations it retains, are potentially commercially valuable proprietary interests in the former case, and potentially commercially valuable copyright protected UGC in the latter case. This would mean that Facebook would have to remove the terms in its Terms of Service that falsely state that it returns all intellectual property and proprietary rights to users who choose to leave the site.124

Indeed, Facebook might intentionally make the decision that disclosure is the preferable course of action. After all, people in large part do not read the Terms of Use and so they might be none the wiser were Facebook to openly disclose its now camouflaged behavior. But such a strategy has its risks. While Facebook can pretty much count on the fact that the overwhelming majority of users will not change their behavior because of reading the Terms of Use, Privacy Policy, Code of Conduct, et cetera, nevertheless, an awareness of the nature of Facebook's practices may be brought to the attention of its users through other means. For example, Facebook's competitors or potential competitors might advertise Facebook's practices to consumers in an effort to convince these consumers that their own practices are more in line with users' expectations and desires.125 After all, this is what Second Life intended in trumpeting to the world the claim, however exaggerated and misleading, that in contrast to

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124. In addition, of course, Facebook would need to follow through on this promise, contrary to its behavior up to this point. See Maria Aspan, How Sticky is Membership on Facebook? Just Try Breaking Free, N.Y. TIMES, Feb. 11, 2008, at A1, http://www.nytimes.com/2008/02/11/technology/11facebook.html.

125. See Facebook, supra note 49.
other persistent virtual world sites, it allowed users to own property. Second, the savvy minority of users or non-user consumer advocates might take up the cause of making consumers aware of the true nature of Facebook's claims. Given these risks of exposure, Facebook might well choose a different course of action. It might decide that the additional benefit it receives from retaining the archival copy and the user conversations is not worth the potential bad publicity. After all, its basic business model does not depend on either of these activities.

It should also be noted that while the terms left Facebook in a position to surreptitiously " sublicense" user creative content for "commercial purposes" to entities like porno.com without notifying the user, there is, nevertheless, no evidence that Facebook has to date engaged in such abuses. True, Facebook presumably has amassed archived copies of the creative content of former users as well as the conversations of these users. This database could be destroyed, however. This would not of course erase the wrongs that have already been committed. Given that the copies were made pursuant to unconscionable terms that consequently should be voided, the implication is that those copies of copyright protected content were made without authorization, and are infringements. Thus, the creators of this UGC would have infringement actions against Facebook. While these wrongs should not be minimized, nevertheless, from a conventional policy perspective, this is water under the bridge. In terms of promoting copyright's welfarist desiderata, what matters is whether on a going-forward basis, it makes sense for Facebook and the Facebooks of the world to exist. Users vote with their feet; Facebook is among the fastest growing websites of all time. On a going-forward basis, the unconscionable Terms of Use can be amended in the manner described above.

Note, however, that while this solves the illegitimacy problem vis-à-vis adults, it would not change the situation vis-à-vis minors. It is impermissible to contract with minors for valuable consideration even when all terms are openly and adequately disclosed. One solution would require all minors to get actual verifiable consent of a parent or legal guardian before being allowed to alienate their

126. It is not clear that there are many former users. The fact that Facebook has made it difficult for former users to remove content is yet another sign of its bad faith in dealing with its users vis-à-vis the provisions contained in the Terms of Use. See Aspan, supra note 124.

property to Facebook via the click through agreement. This solution sounds right in principle as it comports with how we treat children in other contexts; that is, they are treated as too young to make important decisions and thus those decisions can only come through the consent of an adult. For example, this is the tack that the Federal Trade Commission has taken with the collection of online personal data from children under the age of thirteen, requiring that such information can only be collected from them with explicit parental consent. Perhaps this approach could be adapted for the transfer of UGC from minors from the ages of thirteen to eighteen on Facebook.

This possible solution has one huge problem as a practical matter, however. No matter how desirable it might be in principle for minors to have their decisions regarding the transfer of rights to potentially valuable property subject to adult supervision, in practice the transactions costs would likely be extremely high, such that Facebook would have a much more difficult time developing its large user base. Experience with the Children’s Online Privacy Protection Act has shown this to be the case. The transactions costs of getting explicit parental consent has significantly limited the number of such sites and significantly raised the cost of business for those sites that do exist. Sites such as Facebook plausibly have a more consumer friendly mix of costs and benefits than do sites that rely heavily on collecting personal data from young children, such that they should not be heavily discouraged in the same manner as the young children’s sites.

Yet the model whereby minors between thirteen and eighteen years of age are understood to form contracts with the sites by which they may potentially alienate very valuable rights by means of a click is deeply problematic. What is needed is a compromise solution under which participation by minors in Facebook may be continued but under greater supervision. This would be in contrast to the interpretive norm in contract law whereby courts are loath to question consideration. If minors are to be allowed to contract without explicit


130. Or at least to minors who admit to being under thirteen. A child under thirteen can generally enter a site for those above thirteen simply by stating that his or her age is thirteen or above. Julia Angwin, E-Business: New Children’s Privacy Rules Pose Obstacles for Some Sites, WALL ST. J., April 24, 2000, at B8 (noting the potential transaction costs for complying with COPPA).
adult supervision, then courts should play a background supervisory role. This need not come through courts playing any sort of day to day supervisory role. Instead, courts can most effectively supervise by demonstrating a willingness to find implied contracts. Judges could apply tests to these agreements that go beyond the minimal requirement that there be consideration. The best outcome would be for courts, when called upon to do so, to find an implied non-exclusive license to use the uploaded content created by minor users while on the site for those purposes that are transparent to users of the site. This would allow for the sorts of copying necessary to provide the set of services for which users seek out and willingly participate in the site.

There is one obvious objection to this approach. How can it make sense to find an implied license between under-age users and Facebook when I am claiming that minors should not be allowed to form explicit licenses? Why is an implicit license any better than an explicit license? My suggestion, however, is that the implied license should be understood to run between Facebook and the parents or guardians of the minors whose UGC is sought. An important advantage of this more minimal interpretive principle is that it would presumably disallow Facebook or its successors in interest from claiming permanent UGC interests at some later time, on the basis of capacious, largely incomprehensible lawyerly jargon, located in a form contract the person clicked through years earlier when a minor. For example, by application of the interpretive principle, the claim to ownership of an archival copy would seem completely unjustified, since it is in no way implied by the scope of copying necessitated by the use of the site.

V. CONCLUSION

This article began as an examination of the contractual relationships that exist between the creators of user-generated content and the UGC mega-sites that host this content. We examined this issue through the prism of the few cases that have emerged thus far that deal with this relationship. The three cases surveyed above allow

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131. See Effects Assocs., Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990) (finding an implied license); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §10.03[A][7] (2007) ("[N]onexclusive licenses may . . . be granted orally, or may even be implied from conduct.").

132. It is no surprise that this is the scope of use that Facebook misleadingly represents itself as utilizing. Facebook, supra note 49.
for a preliminary understanding of the basic legal landscape surrounding UGC mega-sites and the people who use these sites. We saw that each has specific features of interest. In Bragg, we saw that while Second Life is a wildly popular site and one in which users are allowed to create and own UGC, nevertheless, the case did not involve UGC but instead virtual real estate that was created by Linden Labs and then conveyed to Bragg. The case Chang v. Virgin Mobile USA, LLC, involved UGC created by one of the plaintiffs, whose content was inappropriately copied by one defendant, Virgin Mobile, in part through the negligence of the other defendant, Creative Commons. Finally, in Viacom v. YouTube, while the site is one of the most popular UGC sites, nevertheless, the infringement action alleged in the lawsuit involved copying of plaintiffs' complete commercial works by YouTube and its users rather than the unauthorized copying of plaintiffs' works that are regularly incorporated into UGC works found on the site. While differing in their particulars, each of these cases was informative regarding the overall set of relationships between users and UGC-mega-sites.

We saw that of the three cases examined in Part II, Bragg v. Linden Labs was the most significant in terms of illuminating a particular issue—unconscionable contracts of adhesion between users and the mega-sites—that appears likely to resonate more broadly on a going-forward basis. In particular, we saw that there is a strong argument for the conclusion that the hugely popular social networking site, Facebook, is engaged in unconscionable, and thus by extension, infringing behavior against literally millions of its users, and moreover, its most vulnerable users, minors. Despite this massive infringement, I argued that for public policy reasons, it made sense to formulate the relationship in terms of an implied license. While some of the present behavior of the site would likely be found intolerable, yet an alternative way to go forward is possible, that would allow for the tremendous social benefits provided by Facebook while avoiding the massive unconscionable behavior that now accompanies the provision of these social benefits.