

WOLVES OF THE WORLD WIDE WEB: REFORMING SOCIAL NETWORKS' CONTRACTING PRACTICES

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INTRODUCTION

Seventeen percent of all American adults online use Instagram, a social media platform whose motto is, "Capture and Share the World's Moments."¹ Instagram is one of the most popular social networks because it enables users to post photographs as well as videos and share them on Facebook, Twitter, and Tumblr.² Every Instagram registrant is bound by its user agreement, which is structured as a browsewrap.³ Instagram's terms of use ("TOU")

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1. *Skilling for 2014*, BW BUSINESSWORLD (Jan. 27, 2014), <http://www.businessworld.in/news/business/internet/skilling-for-2014/1206417/page-1.html>; see INSTAGRAM, <http://instagram.com/#> (last visited Oct. 10, 2014).

2. INSTAGRAM, *supra* note 1; see *Skilling for 2014*, *supra* note 1 ("Eighteen per cent [sic] of adults online in the US now use Twitter; 71 per cent [sic] use Facebook and 17 per cent [sic] use Instagram, according to Pew Research.").

3. *Terms of Use*, INSTAGRAM, www.instagram.com/legal/terms/ (last visited Sept. 21, 2014). See generally Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 35-36 (2013) ("Many Browsewrap contracts center on a 'Terms of Service Agreement' whereby a user visits a website and by viewing the website, using the website or even just navigating to the website, the user agrees to be

predicates contract formation on merely “accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications).”⁴ Instagram unilaterally modified its single-spaced, ten-pages-long (5122 words) TOU that was to apply to all members after January 15, 2013.⁵ Instagram users “who decline to accept Instagram’s new privacy policy ha[d] one month to delete their accounts, or they w[ould] be bound by the new terms.”⁶ Instagram users pushed back against the proposed TOU revision in which the social media provider claimed that it owned intellectual property rights to user-generated content.⁷ Shortly after announcing the proposed changes, public outcry prompted the social network “to retreat partially, . . . deleting language about displaying photos without compensation.”⁸ Instagram users nonetheless filed class action lawsuits challenging the new TOU.⁹

Instagram’s revised TOU prohibits consumers from challenging its terms of use by initiating or joining class action lawsuits or class-

bound by the Term of Service located elsewhere.”). For clarity, this Article will refer to social media website terms as Terms of Use (“TOU”), although many are arbitrarily labeled as Terms of Service.

4. *Terms of Use, supra* note 3. Instagram’s TOU is structured as “take it or leave it.” *See id.* Users can either agree to the terms or, if they disagree, leave the service: “These Terms of Use affect your legal rights and obligations. If you do not agree to be bound by all of these TOU, do not access or use the Service.” *Id.*

5. *See Anita Ramasastry, Instagram’s Terms of Service Revision: Why It Strained the Bounds of Fair Contracting*, JUSTIA.COM (Dec. 21, 2012), www.verdict.justia.com/2012/12/21/instagrans-terms-of-service-revision#sthash.1PgEGopt.dpuf; *Terms of Use, supra* note 3; *see also* Joshua Brustein, *Anger at Changes on Instagram*, N.Y. TIMES BITS (Dec. 18, 2012, 4:05 PM), <http://bits.blogs.nytimes.com/2012/12/18/anger-at-changes-on-instagram/> (discussing Instagram users’ anger in anticipation of the new Terms of Use set to go into effect January 16, 2013).

6. Gerry Shih & Alexei Oreskovic, *Instagram Tests New Limits in User Privacy*, REUTERS (Dec. 19, 2012, 12:34 PM), <http://www.reuters.com/article/2012/12/19/us-instagram-privacy-idUSBRE8BI05A20121219>.

7. Ramasastry, *supra* note 5 (“Within a day of its doing so, it faced a large public outcry—mainly because of a term that would allow Instagram to share a user’s photos with Facebook and marketing affiliates for the purpose of creating paid advertisements—with the revenues going to Instagram, and not the photo owner. The backlash was quick. Users were concerned that a photo meant to be shared with friends would now be used in an ad, and possibly viewed by strangers[.] And even if the photo happened contained [sic] an image of someone who never uses Instagram, the ad might seem to imply that the person depicted was a user.”).

8. Dan Levine, *Instagram Furor Triggers First Class Action Lawsuit*, REUTERS (Dec. 24, 2012, 2:45 PM), <http://www.reuters.com/article/2012/12/24/us-instagram-lawsuit-idUSBRE8BNOJI20121224>.

9. *See Rodriguez v. Instagram, LLC*, No. 3:12-cv-06482-WHA, 2013 WL 1156106 (N.D. Cal. Mar. 6, 2013); *Funes v. Instagram, Inc.*, No. C 12 6482 NC, 2012 WL 6640774 (N.D. Cal. Dec. 21, 2012).

wide arbitration.¹⁰ “The clause effectively cripples users who want to legally challenge the company because lawyers will not likely represent an individual plaintiff.”¹¹ “Its new [TOU] require[s] users with a legal complaint to enter arbitration, rather than take the company to court. It prohibits users from joining a class action lawsuit unless they mail a written ‘opt-out’ statement to Facebook’s headquarters in Menlo Park within 30 days of joining Instagram.”¹² On July 15, 2013, a California federal court dismissed the class action filing against Instagram and denied the plaintiffs’ motion to file a second complaint because there was no federal subject-matter jurisdiction.¹³

Under Instagram’s arbitration clause, which mandates the American Arbitration Association (“AAA”) as the arbitral provider, consumers must essentially waive their Seventh Amendment right to a jury trial and liberal discovery.¹⁴ As of October 27, 2014, no Instagram user has filed a consumer arbitration proceeding with the AAA, which is hardly surprising given that the social media provider’s TOU has foreclosed the possibility of warranties and other meaningful remedies.¹⁵ Instagram’s TOU seems reasonable on the surface because a user can opt out of arbitration.¹⁶ However, a more cautious reading reveals that the user had only thirty days

10. *Terms of Use*, *supra* note 3 (“Neither you nor Instagram will participate in a class action or class-wide arbitration for any claims covered by this agreement. You also agree not to participate in claims brought in a private attorney general or representative capacity, or consolidated claims involving another person’s account, if Instagram is a party to the proceeding.”).

11. Shih & Oreskovic, *supra* note 6 (quoting Professor Michael L. Rustad).

12. *Id.*

13. *Rodriguez v. Instagram, LLC*, No. C 12-06482 WHA, 2013 WL 3732883, at *1–2 (N.D. Cal. July 15, 2013) (“District courts ‘shall decline to exercise jurisdiction’ under Section 1332(d)(2) where ‘two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.’ This is known as the home-state controversy exception to CAFA.”).

14. *Terms of Use*, *supra* note 3. *But see* Paul Bennett Marrow, *When Discovery Seems Unavailable, It’s Probably Available*, 80 N.Y. ST. B. ASS’N. J. 44, 44 (2008), available at <http://www.marrowlaw.com/articles/pdf/Journal-oct08-marrow.pdf> (“[I]t may come as a surprise that reasonable discovery is almost always available for the asking . . .”). This is supported by Rule 22 of the AAA, which grants discretion to the arbitrator on how much discovery to permit. *See Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS’N, https://www.adr.org/aaa/showproperty?nodeId=ucm/ADRSTG_00 (last visited Oct. 10, 2014). Arbitral providers will sometimes permit general discovery, but this requires an application to the arbitrator and is subject to the arbitrator’s discretion. *See Marrow, supra*.

15. “THE SERVICE, INCLUDING, WITHOUT LIMITATION, INSTAGRAM CONTENT, IS PROVIDED ON AN ‘AS IS’, ‘AS AVAILABLE’ AND ‘WITH ALL FAULTS’ BASIS.” *Terms of Use*, *supra* note 3. The terms further state that all warranties are disclaimed “TO THE FULLEST EXTENT PERMISSIBLE BY LAW.” *Id.*

16. *Id.*

to opt out of arbitration after the revised terms first applied—a period that has long since expired.¹⁷

It is improbable that many existing Instagram users reviewed the amended terms, let alone weighed the decision to opt out of the revised terms. The concept of the “meeting of the minds” is a legal fiction when it comes to online TOU boilerplate. A New York University Law School research team concluded that only one or two in a thousand users who accessed a major website read its TOU.¹⁸ Of the very few consumers who do pause to review terms, still fewer will observe that the arbitration opt-out provision expired within thirty days of Instagram posting its new terms. The opt-out clause is labeled inconspicuously and is entombed 3689 words (sixty-one paragraphs) into a TOU that lacks an index or any other navigational guide.¹⁹ Instagram users without training in law are unlikely to appreciate the clause’s importance because the TOU’s truncated discussion makes no mention that the pre-dispute mandatory arbitration clause extinguishes the user’s Seventh Amendment right to a civil jury trial and the user’s right to liberal discovery. Previous to the research studies presented in this Article, no empirical evidence existed regarding whether Instagram’s TOU, which the social media provider structures as a browwrap,²⁰ is typical of social media contracting practices. In the absence of systematic data, policymakers have no alternative but to enact laws and regulations governing TOUs without the “behavioral and empirical research necessary for crafting cost-effective regulations.”²¹ Our study enables reformers to evaluate TOUs

17. *Id.* (“You may opt out of this agreement to arbitrate. If you do so, neither you nor Instagram can require the other to participate in an arbitration proceeding. To opt out, you must notify Instagram in writing within 30 days of the date that you first became subject to this arbitration provision.”).

18. *Aggressive Sales Tactics on the Internet and Their Impact on American Consumers: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 27 (2009) [hereinafter *Hearing on Aggressive Sales Tactics*] (statement of Florencia Marotta-Wurgler) (testifying that her research is drawn from a statistical analysis of the online browsing behavior of more than 45,000 households accessing sixty-six websites).

19. *See Terms of Use*, *supra* note 3. While the opt-out clause is buried fairly deep in the TOU, the third paragraph of the very first page warns the reader in bold, all capital letters about the opt-out exception and otherwise binding arbitration clause. *Id.*

20. *See id.* (“By accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications) made available by Instagram (together, the ‘Service’), however accessed, you agree to be bound by these terms of use”); *see also* Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1642 (2011) (“Browwrap agreements dictate that additional browsing past the homepage constitutes acceptance of the contract.”).

21. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 172 (2010).

based on objective data drawn from an examination of hundreds of websites as opposed to individual cases and anecdotes.

Part I explains how we conducted our study, selected our sample, and determined which sites qualified as social media sites. In this Part, we develop a heuristic typology accounting for 329 of the most significant social media sites around the world based upon their predominant purpose.²² In Part II, we measure the readability of TOUs and rights-foreclosure clauses (i.e., warranty disclaimers, limitations of liability, and predispute arbitration provisions).²³ Part III presents our empirical analysis, which demonstrates that the social media providers almost universally draft excessively one-sided arbitration clauses that have the effect of depriving users of a meaningful right to redress.²⁴ The pre-dispute arbitration provisions deployed by social media often contain unbalanced features, such as pro-provider choice-of-forum and choice-of-law clauses.²⁵ The rights-foreclosure clauses in social media contracts not only deliberately obfuscate but also shield the provider by imposing warranty limitations, anti-class action waivers, and hard caps on total recovery that make pursuing arbitration cost prohibitive. Few of the social media providers' mandatory arbitral clauses explain that this private justice system forecloses fundamental rights, such as the right to a written opinion, a jury trial, class action, discovery, and small claims pursuits.²⁶ As a result of this extreme compromising of consumer rights, only a handful of social media users ever filed arbitration claims, as confirmed by our secondary analysis of AAA and Judicial

22. See *infra* Part I. Some social media sites arguably fit into more than one category of our typology. Our decision rule was to determine each of the social networking sites' ("SNS") "predominant purposes," the thrust of each site, after reviewing the mission statement and primary features of each site. Both authors also conducted extensive Google searches to learn about the mission of these social media sites. Intercoder reliability was used to resolve variations in coding decisions between us. This SNS sample was updated as of July 1, 2014. While there is no authoritative list of SNS, we are confident that our sample is broadly representative of social media sites claiming 100,000 or more registrants.

23. See *infra* Part II.

24. See *infra* Part III. These one-sided arbitration clauses violate numerous provisions of the AAA's Consumer Due Process Protocol. See AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES 1 (1998), available at https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 ("All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.").

25. See Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 656 (2012); see, e.g., *Terms of Use*, CARING BRIDGE (Sept. 3, 2014), <http://www.caringbridge.org/terms-of-use>.

26. See Rustad et al., *supra* note 25, at 645.

Arbitration and Mediation Service (“JAMS”) databases. This empirical finding on the scarcity of social media filings casts doubt on whether the substantive and procedural interests of consumers are adequately protected in cyberspace.

Based on our statistical findings in Parts I, II, and III, which demonstrate that TOUs are systematically unfair and imbalanced, we propose procedural and substantive reforms in Part IV that will fortify the rights of consumers entering into these adhesive TOUs.²⁷ Our hybrid reform model begins with U.S.-style procedural reforms to expand the readability and standardize the disclosures in these online TOUs in order to make them easier for consumers to understand. Requiring clearer disclosures of what procedural and substantive rights consumers foreclose when they accede to mandatory arbitration, caps on damages, anti-class action waivers, and clauses that shorten statutes of limitations is an indispensable initial reform, but is not sufficient to make these boilerplate provisions exportable to Europe or countries in other regions with mandatory consumer regulations or directives.

Coupling U.S.-style disclosure and readability reforms with EU-style mandatory minimum terms in consumer contracts is a possible model for reforming social media contracts for the global Internet. Following the lead of the European Union, we propose a “blacklist” of prohibited terms and a “graylist” of terms that are presumed to be unfair to address the structural imbalance between social media sites currently empowered to dictate rights without remedies. Under our proposed reform, nominal caps on damages, shortened statutes of limitations, anti-class action waivers, and mandatory arbitration would be blacklisted. A number of other standard terms, such as choice-of-forum or choice-of-law clauses, would be presumptively unenforceable. These substantive reforms reduce the risk of court or regulatory action against U.S. social networking sites (“SNS”) in the European Union. At present, social media sites with U.S.-style boilerplates will violate the Unfair Contract Terms Directive and other mandatory EU consumer regulations.²⁸

27. See *infra* Part IV.

28. A French court struck down America Online’s terms-of-service agreement in *Union Fédérale des Consommateurs v. AOL France*, R.G. No. 02/03156, Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, 1e ch., June 2, 2004, tgin020604 (Fr.).

The AOL France case is not an isolated case but reflects a larger trend to challenge U.S. style software contracts. In Germany, consumers associations have challenged successfully the terms of CompuServe, AOL, and Microsoft: the first one was subject to a default judgment; the other two agreed to a binding cease-and-desist declaration. All three American companies have entered into settlement agreements agreeing to change their marketing practices.

I. THE WORLDWIDE WAIVER: AN EMPIRICAL STUDY OF SOCIAL NETWORK TERMS OF USE

A. *Research Methods*

Courts and commentators employ “legal fictions” in acting as if TOUs²⁹ possess the essential qualities of contracts studied by first-year law students: offer, acceptance, and consideration.³⁰ In reality, social media TOUs consist of “a unilaterally imposed set of terms which the drafter purports to be legally binding and which is presented to the nondrafting party in a nontraditional format.”³¹ Social media providers impose these adhesive online forms on consumers who have no choice but to accede to “take-it-or-leave-it”³² terms, assuming consumers are even aware that the terms exist. Online boilerplate invariably eradicates warranties and remedies in order to reallocate the risk of software failure from the social media providers to the user community.³³ Social media TOUs are the latest iteration of mass-market license agreements because they grant a right to use content, while often claiming rights in user-generated content.³⁴

To complete the first empirical overview of TOUs, we compiled a sample of 329 of the most significant U.S.- and foreign-based SNS, using manifold sources that included Wikipedia’s list of Social

Michael L. Rustad & Maria Vittoria Onufrio, *The Exportability of the Principles of Software: Lost in Translation?*, 2 HASTINGS SCI. & TECH. L.J. 25, 79 (2010) (footnote omitted).

29. Common clauses in social networking TOUs address user submissions, prohibited content (e.g., pornography, intellectual property control and rights, rights of publicity, commercial content or endorsements, promotions, sweepstakes, software viruses, and other malicious or illegal content), community norms, responsibility for submissions posted on the service, ownership of the site, refusal to post or removal of postings, termination of accounts, ownership of content choice of law, choice of forum, privacy policies, warranty disclaimers, limitations of liability, intellectual property infringement, notice and takedown provisions, licenses to use submissions, third party websites and services (no endorsements), provisions for modifying the agreement, integration or merger clauses, and provisions for the termination and modification of the agreement. See, e.g., *Terms of Use*, *supra* note 25 (specifying the conditions in which user-generated content may be used).

30. As Nancy Kim writes: “The legal enforceability of promises has two aspects to it. The first has to do with formation. A promise is not enforced as a contract if the contract has not been properly formed. Proper contract formation requires offer, acceptance, consideration, and mutual assent.” NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 7 (2013).

31. *Id.* at 2.

32. Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1111 (2012).

33. See Michael L. Rustad, *Commercial Law Infrastructure for the Age of Information*, 16 J. MARSHALL J. COMPUTER & INFO. L. 255, 296 (1997).

34. See Rustad & Onufrio, *supra* note 32, at 1111–13.

Network Sites,³⁵ Alexa's Top Sites by Category,³⁶ a list of leading social media sites,³⁷ a compilation of publicly traded SNS,³⁸ various articles reporting about the top social media websites worldwide, and information provided by JD and LLM students from a variety of foreign nations.³⁹ At a minimum, we included the top ten SNS in every country, using multiple methods to determine which sites were popular in a given country. To qualify for inclusion in our social media sample, the website had to enable significant interactivity among users through online activities, enable the construction of personal profiles, or allow for instant messaging capabilities. A few websites were excluded from our sample because they began as an SNS but later eliminated their essential social networking attributes by shifting their focus to providing specific products or services, such as music, online videos, or games. For each of the 329 TOUs, we coded 110 variables,⁴⁰ building a database using the Statistical Package for the Social Sciences ("SPSS"). This social media contracting-practices database was used to compile our empirical findings in the rest of this Article.⁴¹

35. *List of Social Networking Websites*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_social_networking_websites (last modified Oct. 19, 2014). We also examined *Comparison of Online Dating Websites*, WIKIPEDIA, http://en.wikipedia.org/wiki/Comparison_of_online_dating_websites (last visited Oct. 11, 2014).

36. *Top Sites by Category*, ALEXA, http://www.alexa.com/topsites/category/World/Italiano/Computer/Internet/Comunicare/Social_Networking (last visited Sept. 10, 2014).

37. Craig Smith, *How Many People Use 700 of the Top Social Media, Apps and Digital Services?*, DIGITAL MARKET RAMBLINGS, <http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/> (last updated Oct. 24, 2014).

38. John Coviello, *Publicly Traded Social Networking Companies That Are Alternatives to Facebook*, HUBPAGES, <http://rocknj.hubpages.com/hub/Publicly-Traded-Social-Networking-Stocks-To-Play-The-Facebook-IPO> (last updated Nov. 8, 2013).

39. Google and LEXIS news searches identified other potential social media websites to be included in the study. Each of the SNS from these rankings was accessed and reviewed by both authors to determine whether it was classifiable as a social network site of sufficient importance to be included in the sample. SNS may be broadly defined as platforms that enable members to create, manage, and share interests online. See *Social Media Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Sept. 23, 2014).

40. We downloaded, read, discussed, and coded all available terms of service agreements and privacy policies to determine which social media providers included mandatory arbitration clauses or some other alternative dispute resolution method. We created a comprehensive set of variables to describe both the physical characteristics of the arbitration clause (e.g., number of words, location in the larger document, and conspicuousness) and its substance (e.g., form of arbitration, costs, and reserved rights).

41. We coded the 110 variables in an SPSS database. For more information about SPSS databases, see *SPSS Software*, IBM, <http://www-01.ibm.com/software/analytics/spss/> (last visited Sept. 22, 2014).

B. Social Network Site Sample

The social network TOUs included in our sample include substantially all of the world's most popular social networking websites, thus accounting for billions of online users around the globe. All data is up to date as of July 31, 2014.⁴² Social media first evolved in the United States, but SNS are increasingly based in foreign nations.⁴³ The United Kingdom was the home base of twenty-six of the social networks in the sample (8%), followed by China with twenty-two sites (7%). Germany (N=8), India (N=7), and Russia (N=6) accounted for the next largest number of sites. Seventy-eight percent of the SNS in the sample claimed 30 million or more regular users,⁴⁴ but user numbers varied widely. The average SNS in our sample had 102 million members with 11% of

42. One of the fundamental difficulties in conducting an empirical study of TOUs is that there is no clear distinction as to what constitutes a social networking site as opposed to a general website or an application with interactive capabilities. Another problem is that sites are continually evolving and devolving. Several SNS in the sample were founded in the past two years and several others disappeared during that brief period. Open Diary, for example, closed its site on February 7, 2014. *The Open Diary Is Now Closed*, BEYOND EDGE (Feb. 7, 2014), <http://vivid13.wordpress.com/2014/02/07/the-open-diary-is-now-closed/>. Wisier.org shut down on April 22, 2014. *Wiser.org*, FACEBOOK (Apr. 22, 2014), <https://www.facebook.com/WiserEarth>. My Opera went dark on March 3, 2014. *My Opera Is Now Closed*, MY OPERA, <http://www.opera.com/whereismyopera> (last visited Sept. 12, 2014). Google announced that it was shutting down its decade-old social media site, Orkut, in September 2014. *Google Is Shutting Down Orkut, Its Oldest Social Networking Platform*, INQUISITR (June 30, 2014), <http://www.inquisitr.com/1327287/orkut-shut-down/> ("Google has finally decided to shut down its once popular networking website, Orkut. The website . . . had long lost the social networking battle to rivals like Facebook and Twitter. While it might not have been very popular in Europe and North America, for a long time, Orkut was the top ranked social networking site in several countries—notably, countries like Brazil and India.").

43. "The number of social network users worldwide will increase from 1.47 billion last year to 1.73 billion this year." Will Sigsworth, *Report: Almost 1 in 4 People Worldwide Are Using Social Media*, SOC. MEDIA FRONTIERS (June 24, 2013), <http://www.socialmediafrontiers.com/2013/06/report-almost-1-in-4-people-worldwide.html#UyYAAqPldUdU>. "The majority of user growth will be in Africa, Asia-Pacific and the Middle East, according to the report's findings, while Asia-Pacific has the largest social media user base, with 777 million of Asia-Pacific's inhabitants expected to use a social media platform by the end of the year." *Id.*

44. The number of users is difficult to gauge, and there is an additional problem distinguishing between active users and mere registrants. We used multiple measures, including the social media network's estimate of users for SEC filings. The best and most comprehensive source for our estimates was Smith, *supra* note 37. It should be noted that this source is updated every few weeks, and the figures used in this study were current as of June 2014.

the sites claiming 100 million or more users, but the median SNS in our sample claimed only 4.25 million customers.⁴⁵

Facebook, the world's most popular SNS,⁴⁶ reported 757 million total daily users and 1.23 billion monthly visitors as of the third quarter of 2013.⁴⁷ Facebook continues to expand rapidly, claiming 1.28 billion customers as of June 30, 2014.⁴⁸ Many of the largest SNS have a global reach, serving more foreign than U.S. users.⁴⁹ Eighty-one percent of Facebook customers, for example, live outside of the United States.⁵⁰ India will shortly have the largest population of Facebook registrants.⁵¹ Three-quarters of Twitter's

45. The mean of 102 million users was skewed by billion-member sites such as Facebook. Craig Smith, *By the Numbers: 155 Amazing Facebook User & Demographic Statistics*, DIGITAL MARKETING RAMBLINGS, <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/#.VAzjhPldWTF8> (last updated Oct. 20, 2014). Determining the number of SNS users is an inexact science. SNS may have an incentive to inflate numbers because the larger the site, the greater the advertising revenue. False or empty profiles are commonly used by social media to drive up their reported number of users. Tom Foremski, *The Hollow Emptiness in Social Media Numbers—Most Accounts Are Fake or Empty*, ZDNET (Feb. 14, 2012, 5:45 PM), <http://www.zdnet.com/blog/foremski/the-hollow-emptiness-in-social-media-numbers-most-accounts-are-fake-or-empty/2175>.

46. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RES. INTERNET PROJECT (Dec. 30, 2013), www.pewinternet.org/2013/12/30/social-media-update-2013/.

Overall, 42% of online adults use two or more of these social networks, while 36% use only one (the remaining 22% did not use any of the five specific sites we asked about). Among those who only use one major social networking platform, 84% say that Facebook is the single site that they frequent. However, other "single platform" social networking site users have adopted a site other than Facebook as their platform of choice. Among those who use just one social networking site, 8% use LinkedIn, 4% use Pinterest, and 2% each say that Instagram or Twitter is their sole social networking site.

Id.

47. Prasant Naidu, *Facebook India Numbers: 93M Monthly Active Users, 73M Access from Mobile*, YAHOO! SMALL BUS. ADVISOR (Feb. 4, 2014, 8:26 AM), www.smallbusiness.yahoo.com/advisor/facebook-india-numbers-93m-monthly-active-users-73m-132656750.html.

48. Smith, *supra* note 37.

49. See *Company Info*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/company-info/> (last visited Sept. 12, 2014); Youkyung Lee, *Twitter Appeal Wanes in Parts of Asia*, AP BIG STORY (Nov. 7, 2013, 9:22 AM), <http://bigstory.ap.org/article/twitter-appeal-wanes-parts-asia> ("International users accounted for about three quarters of Twitter's members . . .").

50. In December 2013, Facebook claimed 757 million daily active users on average. *Company Info*, *supra* note 49. Approximately 81% of Facebook's daily active users are outside the United States and Canada. *Id.* And as of June 30, 2014, Facebook claimed a total of 1.32 billion monthly active users. *Id.*

51. "The [United States] remains the single country with the greatest number of Facebook users, at 146.8 million this year, and India comes in a distant second." Suresh Ivaturi, *India To Have World's Largest Facebook Population by 2016*, NEW INDIAN EXPRESS (Nov. 20, 2013, 1:38 PM),

customers reside outside of the United States and Canada, and “25 percent of Twitter’s 232 million active users are in Asia.”⁵² Since Internet users routinely transfer data across national borders at the click of a mouse, social networks must offer their goods and services in a multifarious, globalized legal environment. The fact that 43% of the social network providers are headquartered in foreign countries (N=141), and that major U.S. social media providers are targeting foreign consumer markets, demonstrates the importance of not attempting to impose U.S.-style boilerplate on citizens from legal systems with mandatory consumer protection.

Table 1 (below) depicts the frequency of the six major types of social network sites in social media typology: (1) general SNS specializing in social connections, (2) multimedia sharing sites (music, video, gaming, anime, etc.), (3) professional, educational, self-advancement, and goal-setting SNS, (4) shared interest SNS including niche sites (e.g., arts, culture, language, religion, travel, and ethnicity), (5) rating, dating, and mating SNS that include free and paid-for dating sites, sexual interests, and clubbing, and (6) blogging, microblogging, and instant messaging SNS.⁵³ When the social network had features in overlapping categories, we conducted further research on the website to determine its predominate category.⁵⁴ Research assistants from Europe, Latin America, and Asia assisted us in translating TOUs and making decisions as to how to categorize foreign SNS.

<http://www.newindianexpress.com/lifestyle/tech/India-to-have-worlds-largest-Facebook-population-by-2016/2013/11/20/article1901378.ece>.

52. Lee, *supra* note 49.

53. Social media sites in this sample included networks targeting the arts, expatriates, foreign languages, foreign cultures, experiences, microblogging, education, family and genealogy, experiences, photo sharing, scientific researchers, travel, video sharing, music sharing, film reviews, religious groups, Asians and East Asians, religions, social causes, gaming, anime, medical, women, bookmarking, homosexuals, sexual fetishists, senior citizens, teenagers, children, patients, hospitality, wealth, governmental workers, talent, international invites, hobbies, news sharing, mobile text messaging, sharing couches, ranking of Internet influence, Vampire enthusiasts, Goths, prisoners, runners, bicycle racers, e-commerce users, inspiring images, polling, political parties, crowd funding, asking questions, dog and cat lovers, and goal-setters.

54. One of the difficulties of categorizing social media is that some sites defy classification, while others fit into two or more categories. Our decision was to review each of the SNS and determine its “predominant purpose.” The predominant purpose test focuses on which category most accurately characterizes one of the SNS. Generalist sites such as Facebook, for example, can be classified as shared interests and also as social connections. We classified this mega social network site as predominately based upon social connections.

TABLE 1: TYPOLOGY OF SOCIAL MEDIA TYPES IN THE SAMPLE

Category of Social Network Sites	Number and Percentage	Representative Examples
Social Connections	58 (18%)	Neighborhood, Family, General
Multimedia Sharing	55 (17%)	Video Sharing, Anime, Game Sharing, Movie Sharing, Music Sharing
Business/Professional/Educational/Self-Advancement	40 (12%)	Professional Networking, Science, Educational, Language, Career Goals
Shared Interests & Niche	79 (24%)	Knitting, Sexual Fetishism, Ethnic Identification, Expatriates, Travel, Books
Rating, Dating & Mating	57 (17%)	Match.com, MeetUp,
Blogs/Microblogs/Mobile Communications Centered ⁵⁵	40 (12%)	Blogger, Twitter, Klout, Mobile Social Networks, Skype

As Table 1 depicts, the largest number of SNS in our sample were classifiable as shared social interest and niche sites, comprising 24% of the sample (N=79). This largest category of SNS was diverse, representing social networks devoted to the arts, expatriates, cultures, foreign languages, experiences, religion, travel, ethnic groups, films, books, hospitality, racing results, senior citizens, and shared hobbies. Shared interests in our SNS sample varied widely, ranging from sexual fetishism to knitting enthusiasts. General social connection networks constituted 18% (N=58) of the sample. These social connection networks enable friends and families to stay in touch and develop new friendships by sharing thoughts and exchanging pictures.

55. Microblogging involves real-time content and position broadcasting. Twitter is the emblematic forum for microblogging. New media microblogging is also popular outside the United States. QQ instant messenger and Sina Microblog are two popular SNS in China.

Rating, dating, and mating sites accounted for 17% of the sample (N=57), including paid-for sites such as Match.com, Ashley Madison, and Don't Stay In, a clubbing social network.⁵⁶ Seventeen percent of the sample were classified as video sharing, game sharing, anime, music sharing, film sharing, and other forms of interactive multimedia social networks (N=55). Thirty-seven SNS (12%) centered on educational, career, and business advancement, including sites devoted to wealth management, science, and entrepreneurial advancement, such as LinkedIn and Academia.⁵⁷ Twelve percent of the SNS focused on blogging, microblogging, or mobile communications (N=40).

TABLE 2: REVENUE SOURCES FOR SOCIAL NETWORK WEBSITES IN THE SAMPLE

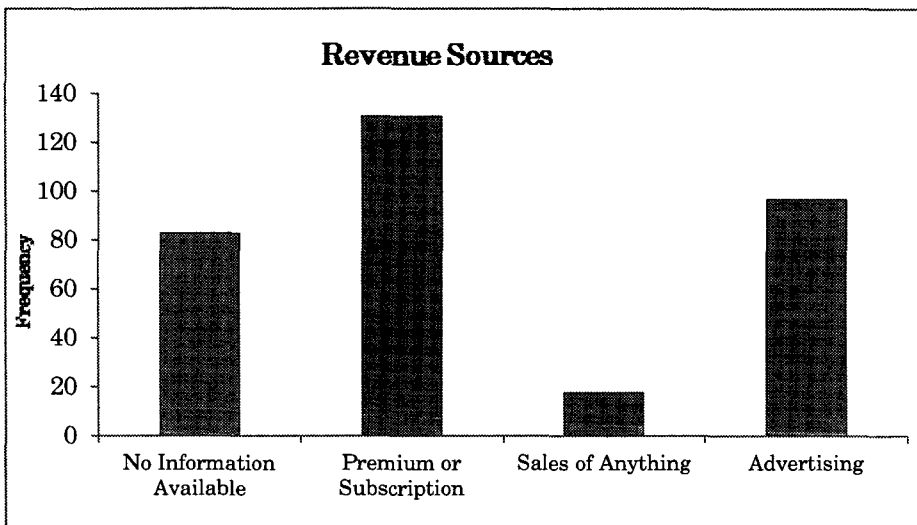


Table 2 (above) reveals that 40% of the 329 sites (N=131) required users to pay a basic subscription fee or had a premium subscription revenue model (often referred to as “freemium”).⁵⁸

56. *About Us*, DON'T STAY IN, <http://www.dontstayin.com/about/about-us/> (last visited Sept. 12, 2014). Many dating sites were owned by a single company with the same terms of use. In these cases, we coded only one of the dating sites since the terms of use were shared.

57. See generally *About LinkedIn*, LINKEDIN PRESS CENTER, <http://press.linkedin.com/about> (last visited Sept. 12, 2014); *Our Mission*, ACADEMIA.EDU, <https://www.academia.edu/hiring#mission> (last visited Sept. 12, 2014).

58. “For a monthly fee, [LinkedIn] members can upgrade to a paid ‘premium’ subscription which grants them increased networking tools and capabilities. Members who purchase a premium account agree to the same terms and services of the User Agreement and Privacy Policy as if they were

Thirty percent of the sample (N=97) were free social networks, which are financed by collecting and selling data. Users trade their privacy and personal information to the SNS, which commodify personally identifiable information by aggregating it for use by advertisers. These social media providers depend primarily upon advertising as the chief source of revenue. Sales of virtual furniture, currency, or other intangible goods constitute other common social network business model (N=18, 5%). Some SNS combine both membership fees and advertising revenue to commodify their service. Nearly every dating site requires users to pay a monthly fee for basic services and also assesses additional charges for a premium membership. No reliable information about social network revenue sources exists for eighty three out of the 329 sites (25%). A small number of these social networks rely chiefly on donations or volunteers rather than paid employees.

The largest social networks are publicly traded companies, which can be very profitable. *Forbes Magazine* identified Facebook as “[t]he one stock to own in 2014” because its revenue has grown at a rate of 150% per year.⁵⁹ Facebook recently purchased the popular mobile application WhatsApp, a messaging platform, for \$19 billion, “betting that the future of social networking will depend not just on broadcasting to the masses but also the ability to quickly and efficiently communicate with [one’s] family and closest confidants.”⁶⁰ WhatsApp is highly valued because of its ability to commodify access to 465 million users and because of its ability to deliver the type of robust, feature-rich messaging that will upgrade Facebook’s capabilities.⁶¹ Messaging is rapidly emerging as a primary form of

non-paying members.” *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089, 1091 (N.D. Cal. 2014); *see also Terms of Use*, EXPLOROO, <http://www.exploroo.com/terms.php/> (last visited Sept. 23, 2014) (detailing Gold Membership and Free Membership features).

59. Adam Hartung, *Facebook—The One Stock to Own in 2014*, FORBES (Jan. 8, 2014, 4:34 PM), <http://www.forbes.com/sites/adamhartung/2014/01/08/facebook-the-one-stock-to-ownbuy-in-2014/> (noting that Facebook’s revenue continues to grow rapidly since reaching \$1 billion).

60. Jenna Wortham, *WhatsApp Deal Bets on a Few Fewer “Friends,”* N.Y. TIMES, Feb. 22, 2014, at A1, *available at* http://www.nytimes.com/2014/02/22/technology/whatsapp-deal-bets-on-a-few-fewer-friends.html?_r=0.

61.

[WhatsApp is] a messaging app you can use in place of your wireless carrier’s regular texting service. You enter your phone number and WhatsApp looks through your contact list for other people who are using the app. Then you can message those users all you want without limits or overage charges. The app is available on many platforms and is free to download and has no ads, but it costs \$1 per year after the first year.

Jared Newman, *Facebook’s WhatsApp Acquisition Explained*, TIME (Feb. 20, 2014), <http://techland.time.com/2014/02/20/facebooks-whatsapp-acquisition-explained/#ixzz2upE1MLqv>.

communication among younger users,⁶² and SNS have to adapt quickly to the mobile-centered environment.

Social media is a realm of boom and bust as evidenced by rapid turnovers, takeovers, and SNS that disappear overnight because of their inability to develop a sustainable business model.⁶³ Before Facebook acquired WhatsApp, the social media giant offered to pay billions of dollars for Snapchat.⁶⁴ In June 2014, Twitter purchased Snappy TV in order to develop its video-editing features.⁶⁵ Movie2K, one of the world's most admired movie-streaming portals, disappeared suddenly in May 2013, but Movie4k soon took its place in the social media arena.⁶⁶ Bahu, a popular SNS for musicians, with a million users in southern and eastern Europe, went offline in 2009.⁶⁷ Linden Labs, the developer of Second Life, acquired Swedish SNS Avatars United that once boasted twenty-two million registered users and shut down the website in September 2010.⁶⁸

62. See Amanda Lenhart et al., *Teens and Mobile Phones*, PEW RES. INTERNET PROJECT (Apr. 20, 2010), <http://www.pewinternet.org/2010/04/20/teens-and-mobile-phones/>; Sherna Noah, *Texting Overtakes Talking as Most Popular Form of Communication in UK*, INDEPENDENT (July 18, 2012), <http://www.independent.co.uk/news/uk/home-news/texting-overtakes-talking-as-most-popular-form-of-communication-in-uk-7956016.html>.

63. Pets.com, Boo.com, Webvan.com, and SixDegrees.com were once popular SNS that were shuttered by the time of this study. Listverse Staff, *Top 15 Defunct Websites*, LISTVERSE (Apr. 28, 2009) <http://listverse.com/2009/04/28/top-15-defunct-websites/>.

64. Mark Scott, *WhatsApp Plans to Add Internet Voice Calls to Message Service*, N.Y. TIMES, Feb. 25, 2014, at B2.

65. Jing Cao & Pui-Wing Tam, *Twitter To Buy Video Startup SnappyTV in Media Expansion*, BLOOMBERG (June 19, 2014, 4:19 PM), <http://www.bloomberg.com/news/2014-06-19/twitter-says-it-is-acquiring-video-startup-snappytv.html>.

66. *Movie2K Down: The Mystery and Possible Reincarnation Revealed*, TORRENTFREAK (May 31, 2013), <http://torrentfreak.com/movie2k-down-the-mystery-and-possible-reincarnation-revealed-130531/> ("Earlier this week the hugely popular Movie2K streaming movie portal disappeared off the face of the Internet without a trace. No official explanation has been given for the site's demise but following the trail of digital breadcrumbs reveals quite a few interesting developments over the past two weeks.").

67. *Bahu*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Bahu> (last modified Mar. 1, 2014, 12:15 AM).

68. Jack Linden, *Farewell, Avatars United*, SECOND LIFE (Sept. 29, 2010, 1:28 PM), <http://community.secondlife.com/t5/Featured-News/Farewell-Avatars-United/ba-p/667617>; *Avatars United*, WIKIPEDIA, http://en.wikipedia.org/wiki/Avatars_United (last modified July 26, 2014, 11:14 PM) ("Avatars United was a web community for avatars of online games and virtual worlds. It was launched in March 2008 by Sweden-based Enemy Unknown and closed in October 2010. It was owned by Linden Lab. On September 23, 2010 Linden Lab announced the closure of Avatars United.").

II. READABILITY OF SOCIAL MEDIA TOU AND RIGHTS-FORECLOSURE CLAUSES

Consumer contracts are enforced on the theory that both parties have read, understood, and agreed to every clause. For most [social media] consumers, that theory is patent fiction. Nearly all consumer contracts are based on mass-produced, nonnegotiable forms. Although some businesses have simplified contract forms in recent years, consumers still do not read the contracts they sign [or click agreement to], and would not understand them if they did. Furthermore, consumers often have no real alternative [but to assent to mass-market] contracts.⁶⁹

A. *Why Readability Matters for Contract Formation*

Prior to the 1990s, U.S. courts categorically refused to enforce shrinkwrap licenses, reasoning that these mass-market forms were procedurally flawed or unconscionably one-sided.⁷⁰ TOUs morphed out of clickwrap agreements,⁷¹ which the software industry deployed in the 1990s, which in turn evolved out of shrinkwrap boilerplate, which first appeared in the 1980s.⁷² Since the late 1990s, however, U.S. courts have consistently upheld mass-market, end-user license agreements (“EULAs”).⁷³ In the United States at least, “EULAs are

69. Bernard Black, Note, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 255 (1981); see also Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 160 (2007) (stating that “consumers rarely read or understand” predispute mandatory arbitration agreements).

70. See David L. Hayes, *Shrinkwrap License Agreements: New Light on a Vexing Problem*, 10 HASTINGS COMM. & ENT. L.J. 653, 654–55 (1993); Michael Rustad & Lori E. Eisenschmidt, *The Commercial Law of Internet Security*, 10 HIGH TECH. L.J. 213, 292 & n.409 (1995) (citing *Step-Saver Data Sys. v. Wyse*, 939 F.2d 91, 105 (3d Cir. 1991) (“[B]ecause a ‘box-top’—i.e., shrink-wrap—license agreement substantially altered the distribution of the risk between the buyer and the seller as a matter of law, it did not constitute a final and complete agreement between the parties.”)). Sixty-five percent of the attorneys belonging to the Computer Law Association favored the broad enforceability of mass-market license agreements. *Id.* at 292.

71. With a clickwrap agreement, the user manifests assent to the user agreement by clicking the acceptance or registration button. Michael L. Rustad & Diane D’Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 DUKE L. & TECH. REV. ¶ 1, ¶ 39 (2011).

72. See Thomas Finkelstein & Douglas C. Wyatt, *Shrinkwrap Licenses: Consequences of Breaking the Seal*, 71 ST. JOHN’S L. REV. 839, 839 n.3 (“Although it is not certain when shrinkwrap licenses were first developed, ‘they were a feature of the licensing landscape by the early 1980’s.’” (quoting Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 n.5 (1995))); Garcia, *supra* note 3, at 34–35.

73. Garcia, *supra* note 3, at 31, 34.

here to stay for the foreseeable future.”⁷⁴ TOUs for social networks are the latest iteration of these boilerplate wrap contracts and, as such, are endorsed by U.S. courts.⁷⁵ These so-called “agreements” in reality create a “coercive contracting environment” because of their aggressively anti-consumer terms and the lack of opportunity for user review before becoming bound.⁷⁶ Our readability analysis of social media TOUs will cast doubt on the fundamental predicates of the contract-formation rules found in the Uniform Computer Information Transactions Act (“UCITA”).⁷⁷

American consumer law is predicated upon the untested assumption that informed consumers will make superior choices in the marketplace if providers offer them an opportunity to review terms and conditions prior to manifesting assent.⁷⁸ Internet contract-formation law updates bargained-for-exchange principles by assuming that the users and providers have a “meeting of the minds” even when the users are not aware of the existence of the TOU or lack the knowledge to understand it.⁷⁹

To ensure consumer protection, mandatory rules must assure that consumers have minimum, adequate rights and remedies. The three foremost sources of law for Internet-related contracts are the UCITA, American Law Institute’s Principles of the Law of Software Contracts,⁸⁰ and Uniform Commercial Code Article 2—Sales (“U.C.C. Article 2”).⁸¹ None of these sources of U.S. contract law recognizes mandatory consumer rules that protect the weaker party from being taken advantage of by the dominant party, in sharp contrast with EU law where mandatory consumer rules are universal.⁸²

74. Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687, 688 (2004) (concluding that EULAs “are here to stay for the foreseeable future” despite hundreds of articles criticizing this form of contracting); see also Rustad & Eisenschmidt, *supra* note 70, at 292 (explaining that a majority of attorneys belonging to the Computer Law Association favor enforceability of mass-market license agreements in support of the conclusion that they are “here to stay”).

75. See Aaron T. Chiu, Note, *Irrationally Bound: Terms of Use Licenses and the Breakdown of Consumer Rationality in the Market for Social Network Sites*, 21 S. CAL. INTERDISC. L.J. 167, 182 (2011).

76. KIM, *supra* note 30, at 4.

77. UNIF. COMPUTER INFO. TRANSACTIONS ACT (2002).

78. See Chiu, *supra* note 75, at 183–84.

79. See Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187, 201 (2008).

80. See generally PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (Proposed Final Draft 2009).

81. See generally U.C.C. art. 2 (2003).

82. European Union courts are increasingly striking down mass-market contracts provisions for the European consumer market. See, e.g., *Union Fédérale des Consommateurs v. AOL France*, R.G. No. 02/03156, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, June 2, 2004, 020604 (Fr.), *aff. d.*, *AOL France v. UFC Que Choisir*, Cour d’appel [CA]

1. UCITA's Contract Formation Rules

The UCITA, drafted by the National Conference of Commissioners of Uniform State Law ("NCCUSL") in the mid-1990s, was the "first uniform contract law designed to deal specifically with the information economy."⁸³ UCITA section 114 requires that the licensor give the potential consumer an opportunity to review the terms of a standard-form license.⁸⁴ Section 114 is fulfilled so long as the licensor furnishes the customer with an opportunity to review the terms of the license *before* the software maker delivers the software and the customer is bound to pay.⁸⁵ Under UCITA section 209(b), a licensor must present the licensee with a right to a refund if the licensee has not had an opportunity to review the terms and manifest assent prior to payment.⁸⁶ The UCITA broadly enforces Internet-related contracts if three conditions are met: (1) the user has an opportunity to review the terms of the license, (2) the user manifests assent after having an opportunity to review the terms, and (3) the actions are "attributable in law" to the user.⁸⁷ The UCITA follows the U.C.C. definition of a contract, which includes express terms plus supplemental terms.⁸⁸ An agreement is "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade."⁸⁹ The UCITA legitimizes mass-market licenses like the TOUs at issue in this Article.

[regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, JCP 2005, IV, 150905 (Fr.); Giud. Pace di Partanna, 12 novembre 2001, No. 206/2001 R.G.A.C. (It.), available at <http://www.avvocatocerutti.it/partanna.htm>; see also Jo Best, *Google, Facebook, Twitter Face Lawsuit over "Illegible, Incomprehensible" Privacy Policies*, ZDNET (Mar. 27, 2014, 11:32 AM), <http://www.zdnet.com/google-facebook-twitter-face-lawsuit-over-illegible-incomprehensible-privacy-policies-7000027780/> (reporting French consumer regulator's lawsuits over the social network providers' complex privacy policies); Gilles Cuniberti, *French Supreme Court Strikes Down One Way Jurisdiction Clause*, CONFLICTOFLAWS.NET (Oct. 3, 2012), <http://conflictoflaws.net/2012/french-supreme-court-strikes-down-one-way-jurisdiction-clause/> ("In a judgment of September 26th, 2012, the French Supreme Court for private and criminal matters (*Cour de cassation*) struck down a one way choice of court agreement governed by Article 23 of the Brussels I Regulation."); Loek Essers, *Facebook Must Comply with German Data Protection Law, Court Rules*, PCWORLD (Feb. 18, 2014, 4:05 AM), <http://www.pcworld.com/article/2098720/facebook-must-comply-with-german-data-protection-law-court-rules.html>.

83. MICHAEL L. RUSTAD, *GLOBAL INTERNET LAW* 218–19 (2014) (citing UCITA, Prefatory Note).

84. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 114.

85. *Id.* § 114(b)(1).

86. *Id.* § 209(b).

87. *Id.* § 112 cmt. 2.

88. *Compare id.* § 102(a)(4); with U.C.C. § 1-201(b)(12) (2013).

89. U.C.C. § 1-201(b)(3).

2. *The Principles of the Law of Software Contracts*

The Principles of the Law of Software Contracts (“Principles”) are a Restatement-like template “to clarify and unify the law of software transactions” for courts, contractors, and policymakers.⁹⁰ The American Law Institute (“ALI”) drafted the Principles to fill the gap created by the failure of the UCITA’s adoption beyond Maryland and Virginia.⁹¹ “[T]he near demise of [the UCITA] and the vague scope provision of amended Article 2 of the [U.C.C.] (also unlikely to be widely adopted) exacerbate the confusion, calling attention to the current legal vacuum.”⁹² Under the Principles, many of the U.S. social media TOUs would be unenforceable because they purport to predicate contract formation on merely accessing the social media site. LiveLeak, for example, uses a typical browsewrap that premises contract formation on simply using or accessing their social media site.⁹³

The Principles apply to any transfer of software, which encompasses social media TOUs.⁹⁴ Section 2.01 of the Principles applies to both standard-form contracts like TOUs and negotiated agreements.⁹⁵ The Principles import the UCITA’s concept that a user must have a reasonable “opportunity to review” the terms prior to formation.⁹⁶ The Principles’ contract-formation rules assume that “the standard form is reasonably accessible electronically prior to initiation of the transfer at issue.”⁹⁷ The Principles also validate online standard forms so long as the user has “reasonable accessibility of terms prior to the transfer.”⁹⁸ Under section 2.02(c)(4) of the Principles, a transferor must give the transferee the

90. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS intro. (Proposed Final Draft 2009).

91. RUSTAD, *supra* note 83, at 222–23, 248 (explaining that the Principles filled a gap left by UCITA’s “demise”).

92. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS intro.

93. *Terms and Conditions*, LIVELEAK, <http://www.liveleak.com/tos> (last visited Sept. 17, 2014) (“BY USING OR VISITING Liveleak (‘Website’), OR SUBMITTING CONTENT TO THIS WEBSITE, YOU SIGNIFY YOUR ASSENT TO (1) THESE TERMS AND CONDITIONS (the ‘Terms & Conditions’), AND (2) LIVELEAK’S PRIVACY POLICY at www.liveleak.com/privacy. These Terms & Conditions apply to all users of the Website. If you do not agree to these Terms & Conditions, the Privacy Policy, then please do not use the Website.”).

94. RUSTAD, *supra* note 83, at 252.

95. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS ch. 2, at 100.

96. RUSTAD, *supra* note 83, at 263 (“The Principles validate mass-market license agreements such as clickwrap and shrinkwrap, but do not validate browsewrap because it does not give the licensee reasonable accessibility to terms prior to the transfer.”).

97. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02(c)(1).

98. RUSTAD, *supra* note 83, at 263 (discussing formation of safe harbor principles of the ALI’s Principles of the Law of Software Contracts).

capacity to store and reproduce the license or other standard form.⁹⁹ The key to the Principles' formation safe harbor is whether "the standard form is reasonably accessible electronically prior to initiation of the transfer at issue."¹⁰⁰ "The safe harbor also requires a 'clickwrap' acceptance of terms, which means that the 'I accept' icon must appear at the end of, or adjacent to, the standard form."¹⁰¹ Contract formation is subject to limitations based upon public policy, unconscionability, and other invalidating defenses.¹⁰² Neither the Principles nor the UCITA explicitly requires that reasonably accessible terms be readable.¹⁰³

3. U.C.C. Article 2's Liberal Formation Rules

The general approach taken by the ALI in approving its Principles draws heavily upon the original and amended versions of U.C.C. sections 2-204's, 2-206's, and 2-207's liberal formation rules.¹⁰⁴ Since there is no agreed upon federal or state statute governing these standard-form agreements, U.S. judges continue to extend U.C.C. Article 2 in deciding Internet contract disputes. This gap in pertinent software-contracting law has created a "legislative void."¹⁰⁵ U.C.C. Article 2 does not mesh well with online TOUs because the essence of a sale is passage of title for a price, which is something that does not occur in an access contract.¹⁰⁶ Social network providers never pass title to information on their site; they only give a license to access that information, retaining all intellectual property rights.¹⁰⁷ U.C.C. section 2-204 states: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."¹⁰⁸

Social media TOUs are the latest evolutionary stage in rights-foreclosure schemes that masquerade in the clothing of contract. U.S. courts are willing to enforce mass-market contracts even if it is

99. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02(c)(4).

100. *Id.* § 2.02(c)(1).

101. Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 104 n.53 (2011).

102. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02(d) (noting that standard terms are subject to "invalidating defenses supplied by these Principles or outside law").

103. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT (2002); PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 cmt. d ("General contract law asks whether a reasonable person of average intelligence and education can understand the language with ordinary effort . . .").

104. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.01 cmt. a.

105. MICHAEL L. RUSTAD, *SOFTWARE LICENSING: PRINCIPLES AND PRACTICAL STRATEGIES* 534 (2010) (quoting *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 332 (D. Mass. 2002)).

106. *See* U.C.C. § 2-301 (2013).

107. Chiu, *supra* note 75, at 195–96.

108. U.C.C. § 2-204(1).

unclear how consumers manifest assent. Through a “browsewrap,” an online standard-form contract, a consumer purportedly manifests assent to the provider’s terms by simply accessing the website; the social media user legally assents to the site’s TOU even without performing any affirmative act, such as clicking on an agreement through a hyperlink or radio button.¹⁰⁹ “Private tort reform” is an apt description of how social media providers are using contracts to cannibalize consumers’ rights and remedies by inserting the following: unread, one-sided clauses mandating class-action waivers; predispute mandatory arbitration; nominal or no monetary damages; abridged statutes of limitations; and one-sided choice-of-law and forum clauses.

Consumers, often unknowingly, waive all meaningful rights, warranties, and remedies, while the social network provider asserts its interests to the limits of the law. U.S. courts have little recourse but to mechanically stretch U.C.C. Article 2 to TOUs by analogy, disregarding the empirical reality that TOUs apply to information-based transfers rather than the exchange of tangible goods. U.C.C. Article 2 allows contracts to be formed in any manner and does not impose a duty on the seller to draft terms that are readable at a given grade level. This flexibility allows courts to find contractual assent where it is clear that there is no “meeting of the minds.” Mass-market licenses are widely enforced in the United States, even though they have few attributes of traditional contracts.¹¹⁰

4. *Duty to Read, but No Duty to Make Readable*

The duty to read is a long-standing principle in Anglo-American contract law, but there is no concomitant duty of providers to make terms readable.¹¹¹ Neither U.C.C. Article 2, governing the sale of

109. Many U.S. courts enforce browsewraps even though they do not require the user to check a box or click “yes” to a radio button or box. Courts have held that “the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.” *Sw. Airlines Co. v. BoardFirst, LLC*, No. 3: 06-CV-0891-B, 2007 WL 4823761, at *5 (N.D. Tex. Sept. 12, 2007); *see also* *Molnar v. 1-800-Flowers.com, Inc.*, No. CV 08-0542 CAS (JCx), 2008 WL 4772125, at *7 (C.D. Cal. Sept. 29, 2008) (“[C]ourts have held that a party’s use of a website may be sufficient to give rise to an inference of assent to the Terms of Use . . .”).

110. The law-and-economics-based approach is often used to validate U.S. mass-market contracts such as social media TOUs:

People are free to opt for bargain-basement adjudication—or, for that matter, bargain-basement tax preparation services; air carriers that pack passengers like sardines but charge less; and black-and-white television. In competition, prices adjust and both sides gain. “Nothing but the best” may be the motto of a particular consumer but is not something the legal system foists on all consumers.

Carbajal v. H & R Block Tax Servs., Inc., 372 F.3d 903, 906 (7th Cir. 2004).

111. *See, e.g., Hoshaw v. Cosgriff*, 247 F. 22, 26 (8th Cir. 1917) (“[A] person, having the capacity and opportunity to read a contract, cannot avoid the

goods, nor the Restatement (Second) of Contracts imposes a general duty of readability.¹¹² While there is no explicit duty of readability in either UCITA or the ALI's Principles, they do each express requirements that contract terms be "conspicuous" or "comprehensible," respectively.¹¹³ Standard-form online "agreements" employ the legal fiction that TOUs are really contracts that consumers have a duty to read,¹¹⁴ despite the fact that few consumers actually read these "take-it-or-leave-it agreements."¹¹⁵

contract . . . if he signs it without reading, where there are no special circumstances excusing his failure to read it. It is the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it."); *Lenox Manor, Inc. v. Gianni*, 465 N.Y.S.2d 809, 811 (Civ. Ct. 1983) (stating that "basic contract law holds that an individual has a duty to read a contract and is responsible for the provisions contained in it," and that there is "no discernible legislative or common-law prohibition" to pre-authorized electronic fund transfers); E. ALLEN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 558–59 (4th ed. 2004) ("[T]raditional contract doctrine imposes on the parties a 'duty to read.' Accordingly, if a party objectively manifests assent to be bound to a contract (for example, by signing a written contract document), a court will almost automatically find assent to all terms contained in the writing. Courts meet parties' excuses such as, 'I didn't read it' or 'I didn't understand it' with little sympathy, except in cases where more important policies are expressed in the traditional contract defenses."); *see also* 1 WILLISTON ON CONTRACTS § 4:19 (4th ed.) ("According to the objective theory of contract formation, what is essential is not assent, but rather what the person to whom a manifestation is made is justified as regarding as assent. Thus, if an offeree, in ignorance of the terms of an offer, so acts or expresses itself as to justify the offeror in inferring assent, and this action or expression was of such a character that a reasonable person in the position of the offeree should have known it was calculated to lead the offeror to believe that the offer had been accepted, a contract will be formed in spite of the offeree's ignorance of the terms of the offer.").

112. *See generally* U.C.C. §§ 2-201 to 2-210; RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. . . . Customers do not in fact ordinarily understand or even read the standard terms."); *see also* *Febbraro v. Hertz Corp.*, 315 N.Y.S.2d 702, 704 (Civ. Ct. 1970) (refusing to enforce supposed violation of terms of car lease agreement, finding that the terms were "so extensive, so compactly printed and in such very small type as almost to defy readability").

113. UNIF. COMPUTER INFO. TRANSACTIONS ACT (2002) § 102(a) & cmt. 12; PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 cmt. d (Proposed Final Draft 2009).

114. A California appellate court notes the presumption that everyone who signs a contract has read it: "First, the law effectively presumes that everyone who signs a contract has read it thoroughly, whether or not that is true. A basic rule of contract law is, 'in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.'" *Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493, 497 (Ct. App. 2013) (quoting *Stewart v. Preston Pipeline Inc.*, 36 Cal. Rptr. 3d 901, 920–21 (Ct. App. 2005)).

115. Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 746–47 (2002) ("Finally, the consumer expects the law to protect her from egregious terms. In short, the seller presents a form largely incomprehensible to the

Some U.S. courts are reluctant to enforce browsewrap because providers find it difficult to prove that the terms of use were actually communicated to the user.¹¹⁶ Nevertheless, U.S. courts have expanded the duty to read from paper-based contracts to the world of electronic boilerplate, so long as there is proper disclosure to the consumer.¹¹⁷ “One who signs a contract has a duty to read it and is obligated according to its terms.”¹¹⁸ Courts have stretched the duty to read that was developed for paper-based contracts to social networking TOUs. In *Fteja v. Facebook, Inc.*,¹¹⁹ a federal district court ruled:

consumer on a take-it-or-leave-it basis, and the consumer has good reason not to read the form.” (footnote omitted).

116. *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012) (holding that the TOU was too inconspicuous to “conclude that Plaintiffs ever viewed, let alone manifested [their] assent to, the Terms of Use”); *Roller v. TV Guide Online Holdings, LLC*, No. CV-12-306, 2013 WL 3322348, at *7 (Ark. June 27, 2013) (“In this case, TV Guide has not demonstrated that the terms of the agreement were communicated to appellants. TV Guide’s assertions that appellants had notice of the agreement stem from appellants’ mention of the agreement in their complaint. However, this is insufficient as the dispositive issue in determining if an enforceable agreement existed is whether appellants had constructive or actual knowledge of the terms of the agreement and therefore agreed by their use of TV Guide’s website to be bound by those terms.”).

117. *See, e.g., Tricome v. Ebay, Inc.*, No. 09-2492, 2009 WL 3365873, at *2 (E.D. Pa. Oct. 19, 2009) (stating that “failure to read the terms of an agreement is not a defense”); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236–38 (E.D. Pa. 2007) (ruling that the Internet advertiser had notice of and assented to Google’s forum selection clause when an initial screen urged advertiser to read the full text of the proposed agreement, which was only made available by scrolling through screens or making a print copy, prior to manifesting assent). *See generally* Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452 (2013) (discussing the evolving interpretation of online agreements among U.S. courts).

118. *White v. Four Seasons Hotels & Resorts*, No. 13-1399, 2013 WL 6171595, at *4 (D.D.C. Nov. 26, 2013) (quoting *Skrynnikov v. Fed. Nat’l Mortg. Ass’n*, 943 F. Supp. 2d 172, 177 (D.D.C. 2013)) (holding that a sixty-page contract was valid even though the Plaintiff had only thirty minutes to read it); *see also* *Hughes v. CACI, Inc.*, 384 F. Supp. 2d 89, 96 (D.D.C. 2005) (“[A] ‘signature on a contract indicates “mutuality of assent” and a party is bound by the contract unless he or she can show special circumstances relieving him or her of such an obligation.” (quoting *Emeronye v. CACI Int’l, Inc.*, 141 F. Supp. 2d 82, 87 (D.D.C. 2001))). The same principle supplies the basic rule relating to questions of duty to read. A party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents. John D. Calamari, *Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341, 341 (1974) (“Every lawyer learned early in the course on contracts that a party may be bound by an instrument which he has not read.”).

119. 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking [is] so prolific that losing . . . access [to a social networking platform] allegedly caused him mental anguish would understand that the hyperlinked phrase “Terms of Use” is really a sign that says, “Click Here for Terms of Use.” So understood, at least for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. “Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.”¹²⁰

Critics argue that the opportunity to read is really a legal fiction since consumers do not read, and often lack the educational background to comprehend, boilerplate.¹²¹ Some U.S. commentators urge courts to abandon the opportunity-to-read requirement as signifying meaningful assent.¹²² The opportunity to read is a legal fiction when social media boilerplate is drafted to be incomprehensible to the typical consumer. The standard is that a contract should not be drafted in words that encourage a consumer’s false perception, but providers have no general duty to draft readable consumer contracts.¹²³ In the United States, as long as users have an opportunity to review, they are assumed to have agreed to the TOU.

European courts question the misplaced assumption that TOUs contain bargained-for terms. In Europe, consumer law contains mandatory minimum terms that are nonwaivable, a policy designed to protect the weaker party from abuse. In January 2014, the Court of Appeal of Berlin invalidated Facebook’s use of Friend Finder and specific provisions of its standard online boilerplate.¹²⁴ The court first ruled that Facebook was subject to Germany’s data-protection laws although the European Facebook was based in Ireland because “the U.S. parent company processes the applicable data and sets cookies on users’ computers located in Germany.”¹²⁵ The court

120. *Id.* at 839 (quoting *Centrifugal Force, Inc. v. Softnet Comm’n Inc.*, No. 08 Civ. 5463, 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011)).

121. Omri Ben-Shahar, *The Myth of the “Opportunity to Read” in Contract Law*, 5 *EUR. REV. CONT. L.* 1, 13–14 (2009).

122. *Id.* at 6.

123. *See id.* at 21.

124. Kammergericht [KG] [Court of Appeal of Berlin] Jan. 24, 2014, (5 U 42/12); *see also Key Statements on the Judgment by the Court of Appeal, VERBRAUCHERZENTRALE BUDESVERBAND* (Jan. 24, 2014), <http://www.vz bv.de/cps/rde/xbcr/vzbv/key-statements-vzbv-facebook-2014-01-24.pdf>.

125. Karin Retzer, *German Court Rules Against Facebook’s “Friend Finder,” SOCIALLY AWARE* (Mar. 3, 2014), <http://www.sociallyawareblog.com/20>

found Facebook's Friend Finder to breach data-protection law as well as the German Unfair Trade Act because this function collected data without informing users or obtaining their consent.¹²⁶ The German court invalidated Facebook's TOU and privacy policy in part because the language was difficult to understand.¹²⁷ In the following section, we lend empirical support to the German court's decision by showing that the opportunity to read TOUs is a hollow right because key rights-foreclosure clauses in social media TOUs are drafted at a reading level so difficult as to be comprehensible only by those with a college-level education and beyond.

B. *Readability as a Predicate to Manifestation of Assent*

Academic commentators and consumer advocates question whether a provider's disclosures in an online TOU are sufficient to rectify the imbalance between provider and user.¹²⁸ Because Internet contracts "are not summarized in easy language,"¹²⁹ many social media users do not have a meaningful opportunity to comprehend what rights and remedies they are waiving. With anti-class action waivers, mandatory arbitration, and caps on damages, the social media provider is asking its users to forego the possibility of a remedy if their privacy is invaded, if their intellectual property

14/03/03/german-court-rules-against-facebooks-friend-finder/ ("[T]he Court found certain clauses in Facebook's terms and conditions (*Allgemeine Geschäftsbedingungen*) and privacy terms (*Datenschutzrichtlinien*) to be invalid, for a variety of reasons. For example, Facebook's terms and conditions granted the company a worldwide license to use works such as photographs and videos uploaded by users, and the wording of the terms would have permitted the marketing and sale of such materials to other companies for commercial use. The Court found such license to be invalid without obtaining users' specific consent based on 'clear' and 'easy to understand' language. Various other provisions, including those that gave Facebook the right to unilaterally modify its privacy terms and other terms and conditions, were also found to be unclear and therefore invalid."); see also Heini Järvinen, *Facebook Subject to German Data Protection Law, Court Rules*, EDRi (Mar. 12, 2014), <http://edri.org/facebook-subject-german-data-protection-law-court-rules/> ("The High Court also confirmed a decision in 2012 that ruled that Facebook's 'Friend Finder' violated German data protection law as users were not made aware that using the service would import their entire address book.").

126. Retzer, *supra* note 125.

127. *Id.*

128. See Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 849–50 (2006) ("Many commentators seem to have lost faith in disclosure as a remedy for market failures in standard-form contracting partly because they have seen the relative failure of laws such as Truth in Lending, and partly because they now better understand the reasons people sometimes fail to respond to information." (footnote omitted)); see also MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 219–20* (2013) (arguing that disclosure regimes in U.S. general contract law do not protect recipients).

129. Ben-Shahar, *supra* note 121, at 13.

rights are misappropriated, or if the TOU is breached. By their very nature, TOUs are drafted asymmetrically in favor of the dominant party in order to strip consumers of their rights while protecting the provider's intellectual property, contract rights, and remedies to the fullest extent of the law.

The typical social media TOU imposes arbitration under asymmetric provisions, such as choice of venue, which are chosen to benefit the provider. Instagram's TOU,¹³⁰ which the social media provider structures as a browsewrap, is typical in divesting consumers of all meaningful rights and remedies.¹³¹ These contracts of adhesion, "[l]ike their paper-based, real world counterparts, . . . contain one-sided provisions, companies offer them on a take-it-or-leave-it basis, and consumers fail to read their terms."¹³² Our empirical study confirms that to say that social media users have an "opportunity to review" rights-foreclosure schemes is illusionary because social media providers are drafting onerous rights-foreclosure clauses at a reading level substantially beyond the comprehension of the average consumer.

C. *Readability of Social Media TOUs*

1. *Prior Research on Whether Consumers Read*

Contract scholars have established that very few consumers actually read or review standard-form boilerplate but have not determined whether these TOUs are, in fact, readable.¹³³ Marotta-Wurgler's research team found only one or two consumers out of 1000 read consumer license agreements and that, of this miniscule number, the average reader spent only twenty-nine seconds with the form.¹³⁴ The NYU Law School researchers observed that, because the average length of the agreement was 2277 words, it was implausible that users could review the complex terms in less than half a minute.¹³⁵ The NYU investigators concluded that the widespread practice of post-transaction marketing is deceptive because vendors exploit the empirical reality that consumers do not

130. *Terms of Use*, *supra* note 3.

131. See generally Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1642 (2011) ("Browsewrap agreements dictate that additional browsing past the homepage constitutes acceptance of the contract.").

132. Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 267 (2014).

133. But see Forrest E. Harding, *The Standard Automobile Insurance Policy: A Study of Its Readability*, 34 J. RISK & INS. 39, 39 (1967) (conducting a study solely on readability and finding "that the reading level of the automobile insurance policy was beyond the reading ability of a significant percentage of the United States adult population").

134. *Hearing on Aggressive Sales Tactics*, *supra* note 18.

135. *Id.*

read online contracts.¹³⁶ Vendors routinely mislead consumers into complacency:

Post-transaction marketers often identify their offers as rewards or bonuses that the consumers in fact should be grateful to receive. Offers may feature a prominently displayed coupon with a title such as "\$10 off your next purchase—Good for your next Fandango Purchase" or "\$10 CASH BACK ON YOUR PURCHASE TODAY!" Fandango is a very popular vendor of movie tickets, among other products. . . . It is natural to imagine that the new offer is part of the original transaction.

The offers also splash relatively larger-font terms around the page such as "Congratulations," "MEMBER REWARDS," and "Thank You . . . Please Complete Your Survey and Claim Your Reward." These phrases are likely to distract attention from the disclosures that explain the new charges associated with the new offer.¹³⁷

The researchers found that online vendors manipulatively positioned terms so that most consumers would overlook them. They recommended that marketers improve their disclosures and implement a means for consumers to cancel the contract and obtain a refund.¹³⁸ The legal fiction of opportunity to review serves a useful purpose for the social media provider, but not for consumers who are stripped of all meaningful remedies and warranties and forced to litigate or arbitrate in a distant forum. Scholars have discussed the merits of requiring a general duty to make online contracts "user-friendly"¹³⁹ or to "draft reasonably."¹⁴⁰ Subpart II.F discusses the indecipherable nature of rights-foreclosure clauses drafted by social media providers.

2. Plain-English Statutes That Mandate Readability

No federal or state plain-English statute covers mass-market licenses such as TOUs,¹⁴¹ but certain state statutes enacted in the

136. *Id.* at 28.

137. *Id.*

138. *Id.* at 28–29.

139. See generally Gomulkiewicz, *supra* note 74, at 710–12 (discussing potential benefits and drawbacks to imposing a general duty to make online contracts "user-friendly").

140. See KIM, *supra* note 30, at 185–92 (proposing a duty of providers to "draft reasonably").

141. Courts have sometimes refused enforcement of provisions in print that are difficult to read or otherwise incomprehensible. See, e.g., *Boro Hall Agency, Inc. v. Citron*, 329 N.Y.S.2d 269, 272 (Civ. Ct. 1972) (refusing to enforce condition on commission on the grounds that endorser would not notice the conditional language).

1970s and 1980s impose plain-language and readability requirements.¹⁴² North Carolina, for example, adopted a minimum comprehensibility score based on a Flesch readability scale for insurance contracts.¹⁴³ Similarly, we use Flesch readability scales to evaluate the educational level needed to understand social media TOUs. Under the Flesch Readability Ease Test, a higher score indicates greater readability for the social media TOU.¹⁴⁴ Flesch Readability Ease scores range from zero (practically impossible to read) to 100 (easy for any literate person).¹⁴⁵ The Flesch score is computed from an assessment of the total word length, total sentence length, and total syllables per word in a submitted text passage that requires a minimum of four to five full sentences of 200–500 words.¹⁴⁶ States incorporating the Flesch test will frequently require statutory provisions to meet a score of sixty or greater to satisfy minimum readability standards.¹⁴⁷

142. In Texas, the Office of Consumer Credit Commissioner requires loan documents to be drafted in straightforward language: “(1) written in plain language designed to be easily understood by the average consumer; and (2) printed in an easily readable font and type size.” STEPHEN G. COCHRAN, TEXAS CONSUMER LAW HANDBOOK § 341.502 (2013) (discussing Form of Loan Contracts in the Texas Consumer Credit statute). For additional examples, see CONN. GEN. STAT. ANN. §§ 38a-295 to 38a-300 (West 2012) and N.J. STAT. ANN. § 56:12-10 (West 2012) (including in the readability guidelines for consumer contracts provisions that discourage the use of “words that differ in their legal meaning from their common ordinary meaning” or sentences with “double negatives and exceptions to exceptions”).

143. N.C. GEN. STAT. § 58-66-30(b) (2013) (requiring disapproval of any insurance certificate covered by the statute that does not include a “certified Flesch scale analysis readability score of 50 or more”).

144. FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 172 app. B (1988) (“The ‘readability’ score is an index designed by Dr. Rudolph [sic] Flesch to test written materials for ease of comprehension. It combines into a single score two measures that are associated with ease of comprehension: the average number of syllables per word and the proportion of words that are concrete as contrasted with abstract. The test does not require much subjective judgment by the person doing the scoring and may therefore be said to be relatively objective. As with any test of this nature, however, it provides an indirect and imperfect measure of comprehensibility. We would generally expect improvement in comprehensibility to be accompanied by improvement in Flesch scores, but it should not be assumed that instructions with higher Flesch scores are invariably more understandable than instructions with lower scores.” (footnote omitted)).

145. GEORGE A. MILLER, LANGUAGE AND COMMUNICATION 136 (1951).

146. *Free Text Readability Consensus Calculator*, READABILITY FORMULAS, <http://www.readabilityformulas.com/free-readability-formula-tests.php> (last visited Sept. 17, 2014).

147. See, e.g., Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147, 148, 148–49 n.7 (2007) (listing examples of two states that require minimum Flesch scores of forty and two other states that require a score of forty-five to ensure consumer documents are readable).

This Subpart presents the readability test results and compares them to extant empirical studies of other boilerplate TOUs and license agreements. For the 329 social media boilerplate forms, the number of words ranged from 249 to 37,239, with a mean of 4418 words and a median of 3910 words. Thirty-one of the providers' TOUs were at least 5000 words in length. Sixty-four percent were greater than 3000 words. The mean social media TOU was more than twice the length of the 264 consumer license agreements studied by NYU Law School researchers.¹⁴⁸ Florencia Marotta-Wurgler and Robert Taylor reported that the length of EULAs has expanded from 1517 words in 2003 to 1938 words in 2010.¹⁴⁹ This empirical finding suggests that social media TOUs are substantially more complex than the software licenses that these researchers examined.

To assess the readability of the 329 TOUs in the SNS sample, we tested the text of the standard forms using all of the most common comprehensibility scales: the Flesch Reading Ease Formula,¹⁵⁰ the Flesch-Kincaid Grade Level Formula,¹⁵¹ the Linsear Write Formula,¹⁵² and the Text Readability Consensus Calculator that averages seven different readability measures.¹⁵³ Prior to our study, no researcher had studied the question of whether consumers have a realistic opportunity to review *readable* TOUs. Our findings, that rights-foreclosure clauses are drafted well beyond the reading level of the average user, do not differ meaningfully no matter which

148. See Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 250–51 (2013) (discussing the authors' study and the sample size of 264).

149. *Id.* at 253.

150. The Flesch Reading Ease Test was developed by Rudolf Flesch sixty-five years ago and is the most widely used test for readability. See generally RUDOLF FLESCH, *THE ART OF READABLE WRITING* 175–86 (rev. ed. 1974) (1949) (describing the Flesch Reading Ease Score methodology).

151. "The Flesch-Kincaid test is a reformulation of the Flesch Reading Ease Score test that expresses its result in terms of the grade level a hypothetical reader should have achieved before the selected passage would be readable." Ian Gallacher, *"When Numbers Get Serious": A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals*, 46 SUFFOLK U. L. REV. 451, 458 (2013).

152. "The *Linsear Write* readability formula is generally recommended for technical manuals and is primarily used by the U.S. Air Force. This test calculates the U.S. grade level of a text sample based on sentence length and number of complex words (i.e., words that contain three or more syllables)." *Linsear Write Readability Formula*, OLEANDER SOLUTIONS, <http://archive.is/S6b7x> (last visited Sept. 26, 2014).

153. This aggregate measure averages the seven leading readability formulas: (1) the Flesch Reading Ease Formula; (2) the Flesch-Kincaid Grade Level; (3) the Fog Scale; (4) the SMOG Index; (5) the Coleman-Liau Index; (6) Automated Readability Index; and (7) Linsear Write Formula. *Free Text Readability Consensus Calculator*, *supra* note 146.

measures are employed. Table 3 (below) presents leading readability measures for the text of the 329 social media TOUs.

TABLE 3: MEASURES OF READABILITY FOR SOCIAL MEDIA TERMS OF USE (N=329)

Readability Formula for SNS Terms of Service or Use	Interpretation Guide	Scores for Terms of Use or Service, N=329
<p>Flesch Reading Ease Test¹⁵⁴</p>	<p>The Flesch Readability Ease Scale ranges from zero (practically unreadable) to 100 (easy for any literate person). The higher the score the easier the text is to read. "Designations for easily understood material include 71-80 ('fairly easy;' 80% of adults), 81-90 ('easy;' 86% of adults), and 91-100 ('very easy;' 90% of adults)."¹⁵⁵ Higher scores indicate greater readability.¹⁵⁶ A score of 60-69 is the standard score, while a score of 50-59 is difficult. A score of 30-49 is very difficult. Scores of 29 and below are very confusing.¹⁵⁷</p>	<p>Mean: 47.8 Median: 49 Mode: 52 Range: 10-77</p> <p>Only 8% of the TOUs satisfied the Standard Score of 60-69.</p> <p>Greater than 4 in 10 TOUs (44%) were fairly difficult or more incomprehensible.</p> <p>Only 2 out of 329 TOUs were fairly easy to easy to read.</p>

154.

The Flesch Reading Ease Test is calculated by the following method: Average sentence length is multiplied by 1.015, and average number of syllables is multiplied by 84.6. These two products are subtracted, and the difference is subtracted from 206.835, resulting in a score ranging from 0 to 100. . . . A score of 100 represents the easiest to read text and a score of 0 represents the most difficult to read text. Scores from 60 to 70 are plain English, readable by the average literate reader.

Determine Readability Using the Flesch Reading Ease, JOHN GARGER (Oct. 23, 2012, 10:55 AM), <http://johngarger.com/articles/writing/determine-readability-using-the-flesch-reading-ease>.

155. Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 127 (2008).

156. *Determine Readability Using the Flesch Reading Ease*, *supra* note 154.

157. *The Flesch Reading Ease Readability Formula*, READABILITY FORMULAS, <http://www.readabilityformulas.com/flesch-reading-ease-readability-formula.php> (last visited Sept. 17, 2014).

Flesch-Kincaid Grade Level ¹⁵⁸	"The Flesch-Kincaid Grade Level Formula was originally developed for use on technical manuals by the United States Navy." ¹⁵⁹	Mean Grade Level: 11.7 Median Grade Level: 11 Mode Grade Level: 10 Range Grade Level: 6–31
Linsear Write Formula ¹⁶⁰	The Linsear Write Formula calculates the grade level of text and is used by the U.S. Air Force. ¹⁶¹	Mean Grade Level: 13.4 Median Grade Level: 13 Modal Grade Level: 15.0 Range Grade Level: 5–47
Readability Consensus Calculator ¹⁶²	Grade level is based upon seven of the most commonly used readability formulas. ¹⁶³	Mean Grade Level: 11.6 Median Grade Level: 12 Modal Grade Level: 12 Range Grade Level: 6–22

D. Social Networking TOUs Are Fairly Difficult to Read

For the social media TOUs in our sample, the boilerplate online forms are lengthy and beyond the reading comprehension of most consumers. The first row of Table 3 reports that the Flesch Readability Ease Test scores for the 329 social network TOUs

158. The Flesch-Kincaid Grade Level translates the Flesch Reading Ease Test to a grade level.

The formula takes average sentence length and multiplies it by 0.39, and average number of syllables and multiplies it by 11.8. These products are summed, and the result is reduced by 15.59. Therefore, the formula is: $0.39 (\text{total words}/\text{total sentences}) + 11.8 (\text{total syllables}/\text{total words}) - 15.59$.^[.] A score of about 65 correlates with the 8th to 9th grade level, and a score of about 55 indicates a 10th to 12th grade level. Scores between 0 and 30 represent college graduate readability.

Determine Readability Using the Flesch Reading Ease, supra note 154.

159. Carolyn Sutherland, *The Elusive Quest for Simplicity: Measuring and Assessing the Readability of Enterprise Agreements, 1993 to 2011*, 35 SYDNEY L. REV. 349, 351, 358 (2013) (discussing the tests of readability used to assess eight years of industrial enterprise agreements widely employed in Australia).

160. For a definition of the Linsear Write Formula, see *Linsear Write Readability Formula, supra* note 152.

161. *Linsear Write Readability Formula*, READABILITY FORMULAS, <http://www.readabilityformulas.com/linsear-write-readability-formula.php> (last visited Sept. 27, 2014).

162. The Text Readability Consensus Calculator combines seven of the most widely used readability tests. See *supra* note 153 and accompanying text.

163. *Free Text Readability Consensus Calculator, supra* note 146.

ranged from ten to seventy-one.¹⁶⁴ The Flesch Readability scores for the sample as a whole had a mean of forty-eight and a median of forty-nine (mode=52), which is classified as “fairly difficult” to read.¹⁶⁵ None of the 329 TOUs in the sample were classified as “easy,” and only two out of 329 TOUs were classified as “fairly easy” (Flesch Readability Ease score of seventy to seventy-nine).¹⁶⁶ Even the social media sites that were directed at children contained TOUs that were not easy to comprehend.¹⁶⁷ Gaia Online, for example, is a social media site that enables children to create avatars to “discuss anime, games, comics, sci-fi, fantasy,” and other activities.¹⁶⁸ Gaia Online’s TOU had a Flesch Readability score of forty-six and was deemed readable at an eleventh-grade level, which demonstrates that it is unreadable for children—its target audience.¹⁶⁹

The largest number of social media TOUs were drafted at a Flesch Readability Ease level classified as “difficult” (scores of thirty to thirty-nine) (N=148). Thirty-nine percent of the TOUs had readability scores between fifty and fifty-nine, which means they were “fairly difficult” to understand (N=125).¹⁷⁰ Five percent of the TOUs were rated as “very confusing,” with scores between zero and twenty-nine (N=18)¹⁷¹—scores that are particularly problematic.

The Linsear Write Test, developed by the U.S. Air Force, revealed a median grade level of thirteen for comprehending the

164. The Flesch Readability Ease Test is one of the most commonly used tests in plain language analysis. See Sirico, *supra* note 147, at 150 (suggesting that the popularity of the test may be attributed in part to its inclusion in the Microsoft Word program). Flesch scores are calculated by examining total words, total sentences, and total syllables. *The Flesch Reading Ease Readability Formula*, *supra* note 157. Scores range from zero to 100. *Id.* The higher the Flesch-Kincaid Readability Ease score, the greater the readability. *Id.* A score of sixty is considered the baseline for readability. *Id.* (“The score between 60 and 70 is largely considered acceptable.”). Both the CFPB sample of financial services contracts and the social media sample (N=253) do not reach the sixty threshold for readability and are thus classified as “fairly difficult” under this test. See *id.*

165. See *The Flesch Reading Ease Readability Formula*, *supra* note 157 (stating that scores ranging from thirty to forty-nine are “Difficult” and scores between fifty and fifty-nine are “Fairly Difficult”).

166. See *id.*

167. See, e.g., *About Club Penguin*, CLUB PENGUIN, <http://www.clubpenguin.com/company/about> (last visited Sept. 26, 2014); *Neopets Safety Tips*, NEOPETS, <http://www.neopets.com/safetytips.phtml> (last visited Sept. 26, 2014).

168. GAIA ONLINE, <http://www.gaiaonline.com/> (last visited Sept. 26, 2014).

169. A score of forty-six falls into the “Difficult” category; scores between ninety and 100 are considered easily understandable by the average fifth grader, and those between sixty and seventy easily understood by eighth and ninth graders. *The Flesch Reading Ease Readability Formula*, *supra* note 157. Thus, a score of forty-six would seem to fall well outside the target audience if that audience is children.

170. See *id.*

171. See *id.*

TOUs.¹⁷² The Readability Consensus score, which aggregates seven different readability formulas,¹⁷³ reveals a mean difficulty grade level of 11.6 and a median grade level of twelve. In short, the combined measure reveals that the average TOUs drafted by social media sites are “fairly difficult” to understand for the typical American user, not to speak of the poorly educated, children, or non-native English speakers.

Social media TOUs will be difficult to process for the millions of U.S. users who do not have a reading proficiency of grade eleven. The average reading level of Americans is between grade eight and grade nine,¹⁷⁴ with one in five Americans reading at a level of grade five or lower.¹⁷⁵ The Pew Research Internet Project found that 71% of Facebook users had a high school education or less,¹⁷⁶ too low to comprehend the websites’ TOUs. The National Center for Education Statistics estimated that “[21] to 23 percent—or some 40 to 44 million of the 191 million adults in this country—demonstrated skills in the lowest level of prose, document, and quantitative proficiencies.”¹⁷⁷ This investigation raises the question of whether social media providers are less likely to achieve a minimum readability standard in drafting their boilerplate than other mass-market license providers.

E. TOUs’ Readability Compared to Prior Research Findings

To place the SNS Readability Ease scores in context, we compared the social media TOUs’ Readability Ease scores to prior samples such as the sixty-six consumer financial services agreements studied by the United States Consumer Financial Protection Bureau (“CFPB”)¹⁷⁸ and the NYU Law School study of consumer software TOUs.¹⁷⁹ The 329 TOUs in our study were only slightly more challenging to read than the CFPB sample of financial

172. The authors are not aware of any prior empirical study that has used multiple measures of readability such as the Linsear Write Formula and the aggregate tests reported in this Subpart.

173. See *Free Text Readability Consensus Calculator*, *supra* note 146.

174. HARVARD SCH. OF PUB. HEALTH, THE LITERACY PROBLEM 3 (2014), available at <http://www.hsph.harvard.edu/healthliteracy/files/2012/09/doakchap1-4.pdf>.

175. *Id.*

176. Maeve Duggan & Aaron Smith, *Demographics of Key Social Networking Platforms*, PEW RES. INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/demographics-of-key-social-networking-platforms/>.

177. IRWIN S. KIRSCH ET AL., NAT’L CTR. FOR EDUC. STATISTICS, ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY, at xvi (3d ed. 2002).

178. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 28 n.64 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

179. Marotta-Wurgler & Taylor, *supra* note 148.

services contracts as measured by the Flesch Readability Ease Test. Only 10% of the social networking TOUs met the standard Readability Ease score, which is sixty or greater (N=38). Thirty-eight percent of the agreements were “fairly difficult” (N=99), whereas 45% (N=148) were classified as “difficult.” Six percent (N=18) of the SNS were classified as “very confusing.” In contrast, the CFPB researchers found that the median readability of the TOUs they reviewed for the financial services market (excluding the arbitration clause) was fifty-two,¹⁸⁰ which indicates that they are “fairly difficult” to read.¹⁸¹

The social media TOUs and the CFPB samples were far more readable than those mass-market licenses assessed by Florencia Marotta-Wurgler in her study of 264 consumer software license agreements drafted in 2010, which had a mean score of thirty.¹⁸² The NYU Law School researchers found that consumer software agreements failed the readability test that is legally mandated for insurance contracts by a wide margin.¹⁸³ The mean Flesch-Kincaid Readability Ease score of forty-eight for the social media TOUs, the CFPB’s consumer financial instruments (Mean=52), and the consumer software agreements studied by the NYU Law School researchers (Mean=30) would not satisfy the minimum readability threshold required of Texas healthcare provider agreements¹⁸⁴ or the minimum Flesch Readability Ease score required of insurance policies in the states of New Jersey¹⁸⁵ and Delaware.¹⁸⁶ These U.S. jurisdictions require a score of forty or more to be legally understandable by a person of average intelligence and education.¹⁸⁷ By every standard measure of readability, social media TOUs are indecipherable and not drafted to be understood by the average consumer.

180. CONSUMER FIN. PROT. BUREAU, *supra* note 178, at 29.

181. *The Flesch Reading Ease Readability Formula*, *supra* note 157.

182. Marotta-Wurgler & Taylor, *supra* note 148, at 253 (reporting a study of 264 consumer software license agreements from 2003 to 2010 whose Flesch-Kincaid scores “remained at an unchanged average of around thirty-three for all EULAs”).

183. *See id.*

184. Texas requires all “health benefit plan certificate[s], polic[ies], evidence of coverage, endorsement[s], amendment[s], rider[s], or application form[s], or a provision of such health benefit plan form” to achieve a Flesch Reading Ease score of forty or more. COCHRAN, *supra* note 142, § 3.602.

185. N.J. STAT. ANN. § 17B:17-21 (West 2006).

186. *Cintron v. Universal Underwriters Grp.*, 601 A.2d 1051, 1056 n.4 (Del. Super. Ct. 1990).

187. N.J. STAT. ANN. § 17B:17-21; *Cintron*, 601 A.2d at 1056 n.4.

F. Rights-Foreclosure Clauses Are More Unreadable Than the TOUs as a Whole

TABLE 4: READABILITY OF WARRANTY DISCLAIMER AND EXCLUSION-OF-LIABILITY CLAUSES COMPARED TO THE TERMS OF USE

Readability Formulas	Terms of Service or Use (N=329)	Warranty Disclaimers (N=280) ¹⁸⁸	Exclusion-of-Liability Clauses (N=296)
Flesch-Kincaid Grade Level	Mean: 11.7 Median: 11 Mode: 10	Mean: 16.3 Median: 15.5 Mode: 13	Mean: 18.9 Median: 17 Mode: 16

1. Readability of Warranty Disclaimers Compared to the TOUs

The median grade level for the social media TOUs was 11.7 years of formal education. The grade level for the TOUs ranged from grade six to grade thirty-one (N=329). Warranty disclaimers were, on average, drafted at 4.6 grade levels above the grade level of the TOUs as a whole. Exclusion-of-liability clauses were, on average, drafted at 7.2 grade levels above the grade level of the TOUs as a whole.¹⁸⁹ The overall results confirm what we found in Twitter’s TOU: disclaimers are drafted to be significantly more difficult to read than the social networks’ TOUs as a whole.

2. Readability of Limitation-of-Liability Clauses as Compared to the TOUs

Not only are social media providers aggressively eliminating the user’s remedies, but providers are also drafting the rights-foreclosure clauses at a level of complexity that renders them incomprehensible to the great majority of their customers. The mean Flesch-Kincaid Grade Level for the sampled social media TOUs was 11.7 (median=11 grade level), but limitation-of-liability clauses capping damages were written at a mean grade level of 18.9, which means that a reader would require 6.9 years of education

188. The sample size for the warranty disclaimers and limitation-of-liability clauses does not equal 329 because a number of foreign social providers do not include these rights-foreclosure clauses in their boilerplate. In Europe, these provisions are likely to violate the Unfair Contract Terms Directive and other mandatory consumer rules discussed in Part IV of this Article.

189. The sample size for the limitation-of-liability clauses excludes the thirty-three foreign-based TOUs that do not include such clauses. Ten of these SNS are headquartered in China.

beyond high school to comprehend them.¹⁹⁰ Further, the median grade level for limitation-of-liability clauses capping damages was grade seventeen, which is a year above the level of a typical college graduate.¹⁹¹ The mean limitation-of-liability clause was 7.2 grade levels above the TOUs as a whole, and the median was six grade levels higher. In three out of four limitation-of-liability clauses, the grade level for readability was nine or more grade levels above the reading level of the TOUs as a whole.

The public policy underlying plain-English statutes is largely to make rights-foreclosure clauses more comprehensible—certainly not less readable.¹⁹² Congress enacted the Magnuson-Moss Consumer Warranty Act to “improve the adequacy of information available to consumers, prevent deception and improve competition in the marketing of consumer products”¹⁹³ This federal law imposes a duty on all warrantors of consumer products to “fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty.”¹⁹⁴ U.C.C. Article 2 does not require that disclaimers be understandable,¹⁹⁵ although the U.C.C. prescribes specific language to disclaim warranties.¹⁹⁶ We argue in Part IV that the law of social media TOUs should take into account consumer literacy in evaluating readability and impose a duty to make rights-foreclosure clauses readable and understandable.¹⁹⁷ First, we use additional statistical data to show that the TOU pre-dispute arbitration clauses¹⁹⁸ effectively exclude

190. See J. PETER KINCAID ET AL., DERIVATION OF NEW READABILITY FORMULAS (AUTOMATED READABILITY INDEX, FOG COUNT AND FLESCHE READING EASE FORMULA) FOR NAVY ENLISTED PERSONNEL 40 (1975), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a006655.pdf>; *Free Text Readability Consensus Calculator*, *supra* note 146.

191. See KINCAID ET AL., *supra* note 190; *Free Text Readability Consensus Calculator*, *supra* note 146.

192. See STEVEN PLITT ET AL., 2 COUCH ON INSURANCE 3D § 22:11 (2010) (“With the tendency of insurance companies to use ‘plain English’ in their policies, the insured’s expectations should be more easily defined and the courts will not have to resort to the arbitrary rules of construction to define these expectations.”).

193. 15 U.S.C. § 2302(a) (2012).

194. *Id.*

195. U.C.C. § 2-719 (2013) (providing the ground rules for limiting liability under Article 2).

196. *Id.* § 2-316(2) (prescribing language for the seller to disclaim the implied warranty of merchantability).

197. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 242 (2002) (arguing that disclosure alone without readability is not enough for consumer transactions).

198. The Joint Commission of the American Arbitration Association, the American Bar Association, and the American Medical Association identified four different types of health care arbitration: (1) pre-dispute, final and binding arbitration; (2) pre-dispute, nonbinding arbitration; (3) post-dispute, final and binding arbitration; and (4) post-dispute, nonbinding arbitration. AM.

consumer rights by blocking all paths to a meaningful recovery for online injuries by imposing caps, anti-class action waivers, and pre-dispute mandatory arbitration clauses where the cost of filing far exceeds the capped dollar damages that can be recovered.

III. SOCIAL MEDIA PROVIDERS' ARBITRATION CLAUSES: AN EMPIRICAL ANALYSIS

A. *The Debate over the Fairness of Rent-a-Judge Arbitration Proceedings*

Social network TOUs often contain pre-dispute mandatory arbitration clauses that funnel disputes away from the traditional, public litigation model to a private tribunal where cases are decided in confidential hearings convened by private judges who are often paid by the provider.¹⁹⁹ Proponents of mandatory pre-dispute arbitration clauses assert that this alternative dispute resolution (“ADR”) system is cost-effective and efficient for consumers, while arbitration opponents argue that this ADR system is unfair, skewed

ARBITRATION ASS'N, AM. BAR ASS'N & AM. MED. ASS'N, COMMISSION ON HEALTH CARE DISPUTE RESOLUTION: FINAL REPORT 9 (1998).

199.

Some commenters take the view that pre-dispute arbitration clauses contained in standard-form contracts are unfair to consumers. Critics generally focus on three areas. First, they attack arbitration as a dispute resolution process. They contend that it reduces or eliminates procedural protections—such as a right of appeal or access to discovery—that are generally available in court. There are also claims that arbitration may be biased against consumers, and that it may not be as fast or cheap as its proponents claim. Second, especially in the wake of the Supreme Court's decision in *Concepcion*, critics argue that arbitration clauses may immunize companies from a range of private civil liabilities, such as by reducing the availability of discovery or by eliminating class proceedings. According to this argument, arbitration clauses may undermine deterrence and leave widespread wrongdoing against consumers unaddressed. Finally, critics assert that arbitration, which is almost always conducted in private, undermines benefits inherent in the public nature of the court system, such as transparency and the development of clear precedents.

CONSUMER FIN. PROT. BUREAU, *supra* note 178, at 7–8 (footnotes omitted); *see also, e.g., Terms of Use, supra* note 3 (“[A]ll disputes between you and Instagram . . . including without limitation disputes related to these Terms of Use [and] your use of the Service . . . will be resolved by binding, individual arbitration under the American Arbitration Association's rules for arbitration of consumer-related disputes . . .”); *Terms of Use, PUREVOLUME*, http://www.purevolume.com/terms_of_use (last visited Sept. 27, 2014) (“Any controversy or claim arising out of or relating to these Terms and Conditions or any user's use of the Products and Services shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association.”).

in favor of repeat player providers.²⁰⁰ Consumer arbitration has a “new age luster,” widely viewed as an alternative to the slow, costly, and congested U.S. court system.²⁰¹ Other commentators “take the view that pre-dispute arbitration clauses contained in standard-form contracts are unfair to consumers” in their disregard for procedural protections found in court proceedings, such as the right to an appeal, rules of evidence, constitutional right to a jury, and liberal discovery.²⁰² Discovery almost always benefits plaintiffs since the social media provider often has evidence in its possession that is necessary to pursue causes of action.²⁰³ To critics, consumer arbitration “combine[s] the ‘despotic’ nature of arbitral decision making with the ‘authoritarian’ nature of adhesion contracts.”²⁰⁴

This Part will marshal empirical evidence to evaluate whether predispute arbitration clauses deployed in social media TOUs favor

200. See Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 293 (1995) (arguing that consumer mandatory arbitration favors repeat players); see also RADIN, *supra* note 128, at 4 (“By using paperwork to shunt them to arbitration, the companies automatically cancelled their right to a trial before a jury of their peers.”); Edward A. Dauer, *Judicial Policing of Consumer Arbitration*, 1 PEPP. DISP. RESOL. L.J. 91, 95–96 (2000) (describing the “repeat player” problem); Zev J. Eigen et al., *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a “Mandatory Arbitration Act,”* 87 IND. L.J. 271, 272–73 (2012) (arguing that those favoring and opposing mandatory arbitration are entrenched and polarized and noting that “[s]upporters of mandatory arbitration continue to believe detractors are making this erroneous presumption about mandatory arbitration”); Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 4–5 (1994) (noting problems with the process of selecting an arbitrator).

201. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 39–40 (1997); Ashley M. Sergeant, *The Corporation’s New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 166–67 (2012) (“Arbitration has traditionally been promoted as being more efficient and timely.”).

202. Arbitral providers will sometimes permit general discovery, but this requires an application to an arbitrator and is subject to his or her discretion. See Marrow, *supra* note 14, at 44–45. For example, JAMS, an organization that provides alternative-dispute-resolution services, permits depositions and discovery at the arbitrator’s discretion, which is similar to the rule for the AAA. *Id.* See generally *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 60 (2011) (statement of F. Paul Bland, Jr., Senior Attorney, Public Justice) (“In many cases, mandatory arbitration clauses have the effect of immunizing corporations from any liability or accountability even when they have blatantly violated consumer protection or civil rights laws.”); AM. ARBITRATION ASS’N, *supra* note 24, at 9 (“Users of ADR are entitled to a process that is fundamentally fair.”).

203. Budnitz, *supra* note 200, at 283–84; see also Dauer, *supra* note 200, at 95.

204. Schwartz, *supra* note 201, at 36.

the dominant party. Twenty-nine percent of social media providers in our sample imposed arbitration clauses (94 of 328). In our social media sample, 91% of the TOUs that included arbitration clauses specified pre-dispute mandatory arbitration (eighty-six of ninety-four). Only nine social media sites (less than 3%) explicitly gave the parties the right to either elect or reject arbitration. In our sample, arbitration clauses were employed two-and-a-half times more frequently than they were revealed to be in a previous study that found that less than 10% of online retailers incorporated arbitration clauses in their TOUs.²⁰⁵ A statistical examination of California consumer transactions reported that 35% of the businesses studied (57 of 161) included mandatory arbitration clauses in their consumer contracts.²⁰⁶ Yet despite these earlier studies, there is little empirical analysis of the basic features of consumer arbitration clauses, let alone data on their fundamental fairness.²⁰⁷

B. *Evaluating Social Media Providers' Arbitration Clauses*

The rapidly growing number of SNS users creates an ocean of potential liability over the loss of privacy, rights of publicity, intellectual property rights, and contract remedies. However, as our analysis shows, almost no consumer arbitrations are ever filed against social media providers. Given the large number of paid-for websites imposing arbitration, such as Match.com,²⁰⁸ it is implausible that only a few social media users would file for arbitration against social media providers. Our hypothesis, which is explored in this Subpart, is that SNS arbitration is almost unknown because social networks employ TOUs strategically to insulate themselves from paying consequential damages or other significant remedies for any cause of action.²⁰⁹ The preeminent measure of a fundamentally fair

205. Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 999 (2008).

206. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004).

207. See Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 58–59 (2013); see also Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 538 (2012); Eigen et al., *supra* note 200, at 273 (arguing that those favoring and opposing mandatory arbitration are entrenched and polarized, and noting that "detractors are making this erroneous presumption about mandatory arbitration"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1658 (2005).

208. See Rustad et al., *supra* note 25, at 647.

209.

A social media company can dodge jury verdicts, punitive damages, class actions, consequential damages, and any other meaningful remedy by requiring their users to submit to arbitration. One-sided terms of use that, in effect, divest consumers of fundamental rights raise serious concerns of procedural and substantive unfairness.

process is the extent to which consumers file arbitration demands to vindicate their rights. By specifying sharply imbalanced predispute mandatory arbitration terms, which include class-action waivers²¹⁰ and waivers of all other meaningful remedies, SNS can preempt any potential legal actions by injured consumers.²¹¹ As we shall demonstrate, social media TOUs are rarely drafted in clear and understandable language.

“Users of ADR are entitled to a process that is fundamentally fair.” Social networking sites have designed arbitration agreements that operate as poison pills that eliminate minimum adequate rights and remedies for consumers, while preserving the full array of remedies for these virtual businesses.

Id. at 645 (quoting AM. ARBITRATION ASS’N, *supra* note 24, at 9).

210.

Absent an agreement to the contrary, if a dispute arises between a consumer and a company as to whether one side or the other is adhering to its contractual or statutory duties, the aggrieved party generally has the right to seek resolution of the dispute in a court of law (although some state and federal laws provide only for public, and not private enforcement). . . . If such an action is certified by the court as meeting the criteria for a class action and plaintiffs prevail or secure a settlement, all members of the class—for example, customers of a company who have been adversely affected by a particular practice—may be eligible to obtain relief without initiating their own lawsuits. Conversely, if the defendant prevails in a certified class action, all members of the class may be bound by the decision and thereby precluded from initiating their own lawsuits with respect to the claims at issue in the class case.

CONSUMER FIN. PROT. BUREAU, *supra* note 178, at 5.

Arbitration clauses did not typically address the distinction between class actions filed in federal and state courts and class action arbitrations. Class actions in court have radically different procedural and substantive rights than so-called class action arbitrations. For a discussion of the differences between court and arbitration class actions, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1757 (2011) (citing empirical research that revealed that class arbitrations did not result in final award on the merits).

Rustad et al., *supra* note 25, at 660 n.57.

211.

[SNS] generally require users to enter into two kinds of contractual relationships, terms of service agreements and privacy policies, as a condition for accessing their websites. Hundreds of millions of consumers enter into mandatory arbitration clauses with [SNS] through browsewrap, clickwrap, or registration forms. After a consumer has registered or accessed a site, [SNS] reserve the right to modify substantive terms, sometimes without notifying users. . . . An SNS, website[s], or other brick-and-mortar compan[ies] can reduce transaction costs by using a predispute mandatory arbitration clause because it need not defend lawsuits in state or federal court but in a forum where it can choose the arbitral provider and rules to govern the dispute.

Rustad et al., *supra* note 25, at 644 (footnotes omitted).

1. *Readability as a Measure of Fundamental Fairness*

One unobtrusive measure of a fundamentally fair process is whether consumers have an opportunity to read a comprehensible agreement. In reality, consumers “rarely read or understand” pre-dispute mandatory arbitration agreements.²¹² However, even if they did, these clauses, which contain a substantial amount of dense legalese, are indecipherable to the typical user.²¹³ Thus, the contract law for TOU boilerplate “is based on unfounded assumptions about the literacy of consumers and the readability of contracts and disclosure forms.”²¹⁴ Table 5 (below) demonstrates that the social media TOUs’ arbitration clauses are written at a much higher grade level than the overall TOU.²¹⁵ If social network providers draft clauses that expunge legal rights in unnecessarily obtuse language that is unreadable, the arbitration proceedings do not give users fair notice of the rights that they are foreclosing.

The average consumer is not on notice that he or she is waiving important rights when acceding to a TOU if key clauses cannot be understood without legal training. Table 5 provides a subsample that compares the readability of the ninety-four arbitration clauses to the overall comprehensibility of the TOUs as a whole. Table 5 demonstrates that arbitration clauses, being significantly more challenging to read than the overall TOUs, fail the readability tests—a finding that is consistent with what was found with disclaimer and limitation-of-liability rights-foreclosure clauses (i.e., arbitration, disclaimer, and limitation-of-liability clauses).²¹⁶

212. Schmitz, *supra* note 69.

213. See White & Mansfield, *supra* note 197 (“The problem of adhesion contracts is therefore not simply a problem of consumers choosing not to read contract documents. Most consumers cannot and do not understand the preprinted forms when they sign a consumer contract.”).

214. *Id.*

215. Margaret Jane Radin argues that

[i]t is reasonable to infer that many claimants simply do not try to challenge the paperwork. Most people do not know what an arbitration clause is. Moreover, given the state of the law, lawyers would be remiss if they did not inform a client who is subject to an arbitration clause that very likely he or she should not bother to [file suit].

RADIN, *supra* note 128, at 5.

216. See *infra* Table 5.

TABLE 5: READABILITY COMPARISONS OF TERMS OF USE VERSUS
ARBITRATION CLAUSES

Readability Tests	Terms of Use N=94	Arbitration Clause N=94	Increased Readability Difficulty Between Terms of Use and SNS Arbitration Clauses
Flesch Readability Ease Test	Mean: 49 Median: 50 Mode: 56	Mean: 34 Median: 33 Mode: 44	Mean: 15 Median: 17 Mode: 12
Flesch-Kincaid Grade Level	Mean: Grade 11.5 Median: Grade 11 Mode: Grade 10	Mean: Grade 15.4 Median Grade 15.5 Mode: Grade 16	Mean: 3.9 Median: 4.5 Mode: 6
Linsear Write Test	Mean: Grade 13 Median: Grade 13 Mode: Grade 11	Mean: Grade 18.4 Median: Grade 18 Mode: Grade 18	Mean: 5.4 Median: 5 Mode: 7
Text Readability Consensus Calculator	Mean: Grade 11.5 Median: Grade 11 Mode: Grade 10 Range: Grades 7-21	Mean: Grade 14.8 Median: Grade 15 Mode: Grade 14 Range: Grades 8-27	Mean: 3.3 Median: 4 Mode: 4

2. Arbitration Clauses Are Far More Challenging to Read Than the TOUs

Ninety-four out of the 329 social media providers incorporated an arbitration clause in their TOUs (29%). A readability analysis comparing the social media TOU to the arbitration clause demonstrates that these clauses are substantially more difficult to comprehend than the TOUs as a whole. To place Flesch Readability Ease scores in perspective, a score between sixty and sixty-nine is considered the acceptable standard for American consumers.²¹⁷ Table 5 demonstrates that both the TOUs as a whole and the

217. See *The Flesch Reading Ease Readability Formula*, *supra* note 157.

arbitration clauses failed the Flesch Readability Ease Test by a wide margin. The mean Flesch Readability Ease score for the TOUs as a whole was forty-nine, eleven points below the standard score.²¹⁸ However, for the mandatory arbitration clauses, the mean score was only thirty-four, twenty-six points below the minimum standard of acceptability.²¹⁹

The Flesch-Kincaid grade-level ranking, which converts the Readability Ease score to a grade level,²²⁰ for the mandatory arbitration clauses was 15.4, which is a mean of 4.4 and a median of 4.5 grade levels above the TOU. All of the readability measures indicate that the drafters have made mandatory arbitration clauses that foreclose rights significantly more difficult to read than the TOUs as a whole. The Text Readability Consensus score, based on the combined scores of all the readability measures, demonstrates that providers draft arbitration clauses at a grade level three years above the general TOU boilerplate.²²¹ The Air Force's Linsear Write Test²²² score for the arbitration clauses was an average of 5.4 grade levels above the TOU (median=5.0). For the ninety-four TOUs with arbitration clauses, the arbitration clause is, on average,²²³ drafted at a mean of 3.3 grade levels above the TOU (median=3.8) for aggregate measures that combine and average readability scores. The aggregate readability scores combining all readability ease tests ranged from six to twenty-seven.

The incomprehensibility of the arbitration clauses cannot be explained by providers being forced to meet complex statutory or contractual requirements mandated by an arbitral provider or regulator. The AAA, JAMS, and other arbitral providers do not require social media providers to adopt particular language for these clauses to be enforceable.²²⁴ The lack of uniformity in the word

218. *See id.*

219. *See id.*

220. *Frequently Asked Questions*, LIT2GO, <http://etc.usf.edu/lit2go/welcome/faq/> (last visited Sept. 27, 2014) (explaining that the Flesch-Kincaid grade level ranking converts the readability score to an approximate grade level).

221. The median for arbitral clauses is four grade levels (mean is 3.3 grade levels) above the TOU and is therefore significantly more difficult to understand.

222. *See Linsear Write Readability Formula*, *supra* note 161 (explaining that Linsear Write is a formula that scores the difficulty of reading English text).

223. The social network TOU were two and a half times more likely to incorporate an arbitration clause than the Internet retailers studied by Ronald Mann and Travis Siebeneicher. *See Mann & Siebeneicher*, *supra* note 205 (finding that less than ten percent of online retailers included arbitration clauses).

224. The AAA is expected to create a registry of consumer arbitration clauses that it approves:

Starting September 1, 2014, the American Arbitration Association (AAA) will implement and maintain a publicly available Consumer Clause Registry (Registry). The Registry was created to provide more

count makes it clear that drafters were not simply employing boilerplate common to the industry. Arbitration clauses employed by social network providers varied widely in the length as well as complexity, ranging from forty-seven words to 2109 words. An obvious hypothesis is that social media providers deliberately drafted these rights-foreclosure clauses to place consumers at a disadvantage.

3. *Comparisons to Prior Studies*

No previous study has tested consumer arbitration clauses against the multiple measures of readability used in our analysis. The CFPB's recent study of arbitration clauses in credit card agreements²²⁵ found that "[c]redit card arbitration clauses almost always were more complex and written at a higher grade level than the rest of the credit card contract."²²⁶ The social network providers' TOUs were slightly more incomprehensible, both as a whole and in their arbitration clauses, than the credit card arbitration clauses. Credit card TOUs had a Flesch Readability Ease average score of 52.2 with a median of 51.6.²²⁷

The mean Flesch Readability Ease scores for social media arbitration clauses closely approximated the reading-level difficulty of arbitration clauses in credit card agreements found in the CFPB's 2013 study, which found that the arbitration clauses had a mean readability of 34.5 and a median readability of 33.7.²²⁸ The social media TOUs' readability in the sample was slightly more difficult than credit card TOUs, with a mean of thirty-four and a median of thirty-three.²²⁹ Only a single arbitration clause in a social networking TOU satisfied the minimum acceptable Flesch Readability Ease score of sixty. The range of scores was four to seventy, which means that nearly all arbitration readability scores would fail most states' plain-language thresholds.²³⁰

Our data replicates and confirms the CFPB's finding that arbitration clauses fail every test of readability by a wide margin.

access to information about the AAA's consumer arbitration services. In particular, the Registry will contain a list of businesses that have submitted their consumer arbitration clauses with the AAA and where upon review the AAA has determined that the clause substantially and materially complies with the due process standards of the Consumer Due Process Protocol.

Consumer Clause Registry, AM. ARB. ASS'N, <https://www.adr.org/aaa/faces/aoe/gc/consumer/registrywelcome> (follow "Consumer Clause Registry" hyperlink) (last visited July 25, 2014).

225. CONSUMER FIN. PROT. BUREAU, *supra* note 178, at 28–31.

226. *Id.* at 28.

227. *Id.* at 29.

228. *Id.* at 28–29.

229. *See id.*

230. *See supra* note 147 and accompanying text.

The CFPB discovered that of the sixty-six credit card boilerplates they examined, only in three cases was the arbitration clause written at a lower grade level than the agreement as a whole.²³¹ In short, both the social media providers and the credit card companies have made the already difficult legalese of TOUs even more challenging when devising rights-foreclosure clauses. One explanation for this linguistic complexity is that providers are overly aggressive because they are interpreting recent signals from the U.S. Supreme Court that plain-English requirements are not applicable to pre-dispute mandatory arbitration clauses.²³²

4. *The Worldwide Wobble: The Drought of Arbitration Filings Against Social Networks*

“Is there any point to which you would wish to draw my attention?”

“To the curious incident of the dog in the night-time.”

“The dog did nothing in the night-time.”

*“That was the curious incident.”*²³³

In the famous Arthur Conan Doyle short story, *Silver Blaze*, Sherlock Holmes realized that because the dog kept in the stables did not bark during a nighttime intrusion, this created an inference that the intruder was a trusted insider.²³⁴ Sherlock Holmes’s famous observation regarding the significance of the dog that did not bark is also a key to understanding the mystery of the missing arbitration filings against social media providers. An unobtrusive measure of fundamental fairness is whether users are actually able to obtain an arbitral remedy against social networks. The best available data on arbitration filings are the publicly available consumer databases maintained by the AAA and JAMS.²³⁵ Noticeably missing from the tens of thousands of consumer arbitration filings we reviewed in the AAA and JAMS databases

231. CONSUMER FIN. PROT. BUREAU, *supra* note 178, at 29.

232. In *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 681, 687 (1996), the U.S. Supreme Court held that the Federal Arbitration Act preempted Montana law requiring placement of prominent notice of an arbitration clause on the first page of the contract. If placement is not an issue in an arbitration clause for the Court, it is unlikely that readability will be either.

233. See ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335, 347 (1930).

234. *Id.* at 349.

235. *Consumer Case Information*, JAMS, <http://jamsadr.com/consumercases/> (follow “Download quarterly Consumer Case Information” hyperlink); *Search ADR Resources*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/educationresources/adresources> (follow “Education & Resources” dropdown; then follow “ADR Resources” hyperlink) (last visited Oct. 15, 2014).

were *any* arbitral filings, settlements, or judgments against social media websites.

5. *Arbitration Filings by Consumers Against Social Media Are Nonexistent*

Table 6 (below) reveals that social media users did not file a single action against any of the largest social media sites with the AAA or JAMS, which social media providers choose most often in their TOUs.²³⁶ This complete absence of arbitration filings against the fifteen most popular social media providers, which have a combined 6.9 billion members, is the ultimate dog that did not bark. Mandatory arbitration appears to have successfully immunized social media providers from having to respond to consumer complaints.

It is implausible that billions of users have no disputes with social media providers.²³⁷ The more likely hypothesis is that social network providers have stacked the deck against consumers by capping damages at a nominal amount, prohibiting class actions,²³⁸ and using other rights-foreclosure clauses to create a one-sided legal environment where the cost of filing exceeds what is at stake. Only 20% of the providers (N=19) imposing arbitration clauses in our sample contained a carve-out provision that allowed consumers to bypass arbitration by filing small claims, so it is implausible that most users are seeking small claims as an alternative forum to arbitration. The CFPB preliminary study also “casts doubt on this hypothesis, for it indicates that, at least when it comes to credit card disputes, consumers do not appear to file many cases in small claims court.”²³⁹ The CFPB uncovered only about 300 arbitration filings by

236. None of the other arbitral providers publish data on consumer arbitrations.

237. Over half of the social media providers preclude class actions, which is the only practical way to pursue small-dollar claims by joining with those users who have substantially similar claims. See, e.g., *In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011) (approving \$6 million settlement in a class action brought by Gmail users arising out of Google’s disclosure of personally identifiable information through the defunct site, Google Buzz, without authorization); *Hubbard v. MySpace, Inc.*, 788 F. Supp. 2d 319, 326 (S.D.N.Y. 2011) (dismissing class action against MySpace for alleged violation of the Stored Communications Act); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 718 (N.D. Cal. 2011) (dismissing class action by Facebook users based upon the Electronic Communications Privacy Act as well as California state law).

238. Class actions “make it possible for plaintiffs with meritorious claims for small amounts of money, to bring th[o]se claims to court without spending more money on attorney’s fees and court expenses than the claims [a]re worth.” *City of S.F. v. Small Claims Div.*, Mun. Court, 190 Cal. Rptr. 340, 342 (Ct. App. 1983).

239. Richard Cordray, *Prepared Remarks of Director Richard Cordray at the Field Hearing on Arbitration*, CONSUMER FIN. PROTECTION BUREAU (Dec. 12,

consumers against financial service providers between 2010 and 2012.²⁴⁰ Consumers were more likely to be sued by financial services providers than to initiate cases against financial services corporations in small claims court.²⁴¹

2013), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-director-richard-cordray-at-the-field-hearing-on-arbitration/>.

240. “The research also shows that while tens of millions of consumers are subject to arbitration clauses in the markets the CFPB studied, on average, consumers filed 300 disputes in these markets each year between 2010 and 2012 with the leading arbitration association.” *CFPB Finds Few Consumers File Arbitration Cases*, CONSUMER FIN. PROTECTION BUREAU (Dec. 12, 2013), <http://www.consumerfinance.gov/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/>.

241. *Id.*

TABLE 6: FIFTEEN PUBLICLY TRADED COMPANIES' ARBITRAL CASES
(JAMS²⁴² AND AAA²⁴³)

Name of Social Network Website	Estimated Number of Unique Monthly Users ²⁴⁴	Total Number of Filings, Settlements, and Decisions Reported by the JAMS and AAA Consumer Arbitration Databases
Facebook	800,000,000	0
Twitter	250,000,000	0
LinkedIn	200,000,000	0
Google+	150,000,000	0
Pinterest	140,500,000	0
Tumblr	125,000,000	0
Flickr	67,000,000	0
VK	65,400,000	0
Instagram	50,000,000	0
DeviantArt	30,500,000	0
MySpace	26,500,000	0
CafeMom	22,500,000	0
Tagged	20,500,000	0
MeetUp	17,500,000	0
LiveJournal	10,900,000	0

On January 1, 2014, only hours before a similar hacker attack on Skype, cybercriminals broke into Snapchat's website and posted 4.6 million names and phone numbers of Snapchat users on the website SnapchatDB.info.²⁴⁵ Snapchat had received prior notice of a security hole but failed to take prompt remedial measures to repair it.²⁴⁶ Victims of this intrusion were particularly upset because Snapchat's marketing materials claim that their product provides a higher level of user security than its competitors do:

242. The JAMS database included all 2595 arbitration records filed between December 8, 2008, and July 25, 2013. *Consumer Case Information*, *supra* note 235.

243. The AAA report included 17,369 records filed between 2010 and the first quarter of 2014. *Consumer Arbitration Statistics*, AM. ARB. ASS'N, <https://www.adr.org/aaa/faces/aoelgc/consumer/consumerarbstat> (follow "Provider Organization Report" hyperlink) (last visited Sept. 27, 2014).

244. See *Top 15 Most Popular Social Networking Sites: December 2013*, EBIZ MBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Mar. 16, 2014). These numbers were obtained for the purposes of this study in early 2014 and have likely increased in the past several months.

245. Gabrielle Karol, *Can Snapchat Recover from Hack Attack?*, FOX BUS. SMALL BUS. CENTER (Jan. 2, 2014), <http://smallbusiness.foxbusiness.com/entrepreneurs/2014/01/02/can-snapchat-recover-from-hack-attack/>.

246. *Id.*

Snapchat has long marketed itself as a private and more secure alternative to services like Facebook and its subsidiary Instagram. The app lets users send photo and video messages that disappear once they are viewed. That self-destruct feature initially gave the app a reputation as a favorite tool for so-called sexters, or those who send sexually suggestive photos of themselves. But the service eventually grew beyond that original niche and went mainstream.²⁴⁷

Consider how the numerous levels of aggressive TOU terms might affect a lawsuit against Snapchat for negligent security in this incident.²⁴⁸ Suppose further that discovery determines Snapchat's security was negligently maintained or not up to date and that Annie, a hypothetical Snapchat user, filed a lawsuit charging the SNS with negligent security that caused the disclosure of credit card information. Snapchat's TOU builds redundancies into its multiple levels of protection to ensure that it will not be accountable to its users under any theory.

Every Snapchat user must agree to the company's one-sided terms when he or she accesses the website.²⁴⁹ Snapchat situates its binding arbitration clause seven pages deep into the TOU. While Snapchat's terms as a whole are written at a grade eleven level, its arbitration clause is drafted at a grade nineteen level.²⁵⁰ Its

247. Nicole Perloth & Jenna Wortham, *Flaws Exposed at Snapchat*, N.Y. TIMES, Jan. 6, 2014, at B5.

248. See Ken Yeung, *Skype's Twitter, Facebook, and Blog Hacked by Syrian Electronic Army Demanding an End to Spying*, TNW (Jan. 1, 2014, 9:36 PM), <http://thenextweb.com/microsoft/2014/01/01/skypes-twitter-account-blog-get-hacked-sea-demanding-end-spying/#!q8E6o>.

249. *Terms of Use*, SNAPCHAT (Dec. 20, 2013), <http://www.Snapchat.com/terms/>.

250. We evaluated the readability of Snapchat's terms of service, which were last revised on December 20, 2013. We evaluated the readability of the text of the 2805 words of the TOU as a whole using standardized readability measures. These measures calculate the number of sentences, words, syllables, and characters in a given sample. *Free Text Readability Consensus Calculator*, *supra* note 146. The Flesch Readability score for the Snapchat TOU as a whole was fifty-nine, fairly difficult to read. The Flesch-Kincaid grade level for the TOU was grade 10.4. The readability consensus based on seven readability formulas was grade eleven, fairly difficult to read. In contrast, the readability of the mandatory-arbitration and class-action waiver clauses was significantly more incomprehensible. The Flesch Readability Ease score for the binding arbitration clause and class-action waiver was twenty-five, which is classified as very difficult to read. The Flesch-Kincaid score for the arbitration clause was nineteen, which is three years beyond the reading level of a college graduate. The arbitration clause (grade nineteen) is drafted eight grade levels above the comprehensibility of the TOU as a whole (grade eleven). The readability consensus score for the arbitration and class-action waiver provisions was grade eighteen (approximately the reading level of a masters degree recipient) as compared to grade eleven for the terms of service as a whole. The Air Force's Linsear Write Formula score for the mandatory-arbitration and class-action waiver provisions was grade twenty-four. The

limitation-of-liability clause is written at a grade fifteen level, whereas the warranty-disclaimer clause is drafted at a grade fourteen level. Each of these rights-foreclosure clauses is three or more grade levels above the TOUs as a whole. Snapchat would counter any lawsuit in either state or federal court by filing a motion to stay the action in favor of mandatory arbitration where the arbitrator would have the power to award only \$1 in monetary damages.²⁵¹ Snapchat's arbitration clause requires all disputes to be decided by a JAMS-appointed arbitrator in Los Angeles.²⁵² Under JAMS's consumer rules, the consumer must pay a \$250 nonrefundable filing fee to pursue his or her claim.²⁵³ Snapchat users are prohibited from joining their \$1 nominal-damages claims together in class actions.²⁵⁴ Snapchat also disclaims all warranties, limits all liabilities, and buries every conceivable category of damages in incomprehensible rights-foreclosure clauses.²⁵⁵

Snapchat's requirement that its users submit to JAMS-initiated arbitration in Los Angeles effectively slams the door on any claims. When the cost of filing a consumer arbitration suit is 250 times the monetary cap on damages (excluding the consumer's cost of traveling to and finding lodging in Los Angeles, retaining an attorney, and other expenses), it is highly improbable that the social network will be held accountable for any security breach. Snapchat, in effect, employs its aggressive TOU to cannibalize its potential torts liability and civil liability for intellectual property, the invasion of privacy, negligent security, and any other civil cause of

readability of Snapchat's limitation-of-liability clause was also drafted at a significantly higher grade level than the TOU. The Flesch Kincaid grade level for the limitation-of-liability clause was grade fifteen as compared to grade eleven for the TOU. The readability consensus score was fourteen for the limitation-of-liability clause as compared to eleven for the TOU. The Flesch-Kincaid grade level score for the warranty disclaimer was grade fourteen, and the consensus readability score was fifteen. Snapchat appears to have drafted its three most expansive rights-foreclosure clauses (arbitration, limitation-of-liability, and warranty-disclaimer clauses) to be incomprehensible, even if read.

251. *Terms of Use*, *supra* note 249.

252. *Id.*

253.

With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services. When the company is the claiming party initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration.

Consumer Arbitration Minimum Standards, JAMS (July 15, 2009), <http://www.jamsadr.com/consumer-arbitration/>.

254. *Terms of Use*, *supra* note 249.

255. *Id.*

action. Mandatory arbitration clauses coupled with other rights-foreclosure clauses are fundamentally unfair to consumers.

6. *Section 230 of the Communications Decency Act Depresses Filings Against Social Media*

It is not just the draconian TOUs that depress filings but also the shield of section 230 of the Communications Decency Act (“CDA”).²⁵⁶ Section 230 immunizes Snapchat and other providers from tort liability that arises out of third-party postings that harm its customers.²⁵⁷ The CDA sought to preserve the “vibrant and competitive free market” of ideas on the Internet.²⁵⁸ Section 230 of the CDA precludes plaintiffs from making interactive computer service providers accountable for the publication of information created by third parties.²⁵⁹ To fall within the protection of section 230, a social network like Snapchat must demonstrate: “(1) [it is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider.”²⁶⁰ A literal reading of section 230 would seemingly restrict Snapchat or another service provider’s shield to a publisher’s liability for defamation. Nevertheless, federal courts have stretched the long arm of section 230 immunity to distributor liability²⁶¹ and almost every other conceivable tort committed by third parties.

Social media providers have no duty to take down tortious content, thus violating a basic principle that a responsible website is an answerable one.²⁶² What was once a narrow statutory immunity

256. 47 U.S.C. § 230 (2012). *See generally* Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335 (2005) (exploring the broadening interpretation of the CDA).

257. The CDA shield has been extended to diverse causes of action. *See, e.g.*, *Shrader v. Beann*, 503 F. App’x 650, 654 (10th Cir. 2012) (affirming the dismissal of claims of defamation, false-light invasion of privacy, intentional infliction of emotional distress, and civil conspiracy on the grounds of section 230 of the CDA).

258. *See* 47 U.S.C. § 230(b)(2).

259. *Id.* § 230(c)(1).

260. *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 388 (Ct. App. 2006) (quoting *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714 (Ct. App. 2002)).

261. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (noting that in enacting section 230, Congress sought “to encourage service providers to self-regulate the dissemination of offensive material over their services” and “to remove the disincentives to self-regulation”).

262. Rustad & Koenig, *supra* note 256, at 371 (“An activist judiciary, however, has radically expanded § 230 by conferring immunity on distributors. Section 230(c)(1) has been interpreted to preclude all tort lawsuits against ISPs, websites, and search engines. Courts have . . . haphazardly lump[ed] together web hosts, websites, search engines, and content creators into this amorphous category.” (footnotes omitted)).

for a publisher's liability for third-party content is now a shield not only for defamation and all other torts—some courts have stretched this immunity to protect against civil actions outside of tort as well.²⁶³ Since the enactment of section 230, no U.S. court has recognized or upheld a judgment against a social media provider arising out of third-party publication torts on a social network.²⁶⁴ Section 230, coupled with forceful TOU rights-foreclosure clauses, has almost entirely precluded the possibility that consumers can obtain a remedy for any civil action against social media providers. Social media users may have rights, but they have no realistic remedies because of the providers' strategic use of TOUs to foreclose rights and their running partner, section 230 of the CDA.

C. Do Arbitration Clauses Inform Consumers of Rights Foreclosed?

The consumer arbitration clauses drafted by social media providers are not just unreadable—they do not sufficiently inform consumers of what rights they are foreclosing by acceding to this ADR procedure.²⁶⁵ CafeMom's arbitration clause, for example, makes no attempt to explain arbitration or its consequences:

You agree that, with the exception of injunctive relief sought by CafeMom for any violation of CafeMom's proprietary or other rights, any and all disputes relating to these TOS, your use of the Site or the Services shall be resolved by arbitration in accordance with the then-current rules of the American Arbitration Association (the "AAA") before an independent

263. *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983 (10th Cir. 2000) (holding that the Internet access provider was immune from suit for providing access to misleading stock information); *OptInRealBig.com, LLC v. IronPort Sys., Inc.*, 323 F. Supp. 2d 1037, 1038 (N.D. Cal. 2004) (denying an injunction in favor of spam e-mailer, ruling that spam website was immunized from liability under the CDA); *Ramey v. Darkside Prods., Inc.*, No. 02-730 (GK), 2004 WL 5550485, at *4 (D.D.C. May 17, 2004) (ruling that online advertising guide for adult entertainment was immunized by the CDA in a claim by a woman that unauthorized photos were used in an advertisement on a website).

264. *See, e.g., Beckman v. Match.com*, No. 2:13-CV-97 JCM NJK, 2013 WL 2355512, at *1, *10 (D. Nev. May 29, 2013) (holding that Section 230 precluded the negligence claims against the operators of Match.com arising out of plaintiff's assault by a serial murderer she met through the website; plaintiff alleged that Match.com's warning and screening system was negligently designed); *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 321 (D.D.C. 2012) (rejecting plaintiff's negligence-based claim that Facebook allowed third parties to assault the plaintiff and violated a duty of care by allowing and furthering death threats by the Palestinian Intifada).

265. We often found it difficult to interpret the meaning of clauses, even after studying them. It was clear that arbitration clauses were not drafted with the goal of educating the social media user.

arbitrator designated by the AAA. The location of arbitration shall be New York, New York, USA.²⁶⁶

CafeMom's cryptic arbitration clause is typical. Christian Mingle was one of the few providers that attempted to define arbitration and advise users of the rights foreclosed:

Arbitration is the referral of a dispute to one or more impartial persons for a final and binding determination. Any Dispute shall be subject only to binding arbitration. The parties expressly agree that there shall be no jury trial or right to a jury trial, or right to any other proceeding to resolve any Dispute in any court.²⁶⁷

Arbitration clauses are neither lucid nor understandable to typical social media users. None of the ninety-four clauses gave consumers an objective explanation of the pros and cons of arbitration. Ten percent of the arbitration clauses were 102 words or less. Half of the arbitration clauses were 275 words or less. No arbitration clause in the sample gave consumers such key information as estimates of the financial costs of pursuing arbitration. Relatively few providers provided a simple link to the arbitration provider's website so that consumers could educate themselves about how arbitration works. Social media users are rarely provided with any significant explanation of arbitration terms, so they cannot weigh the advantages of accessing content against the disadvantages of having no meaningful remedy in the event of negligent security, the invasion of privacy, misappropriation of their intellectual property, or other breaches by the provider.

266. *CafeMom Terms of Service*, CAFEMOM, <http://www.cafemom.com/about/tos.php> (last updated June 29, 2012).

267. *Terms and Conditions of Service*, CHRISTIANMINGLE.COM, http://www.christianmingle.com/terms-of-use.html#service_terms (last visited Sept. 8, 2014); see also *Terms of Use*, FRIENDFINDER, http://friendfinder.com/go/page/terms_of_use.html (last visited Sept. 28, 2014) ("YOU ACKNOWLEDGE THAT YOU ARE GIVING UP YOUR RIGHTS TO LITIGATE CLAIMS IN A COURT OR BEFORE A JURY WITH RESPECT TO ANY SUCH CLAIM. Nothing in this Section 24 shall be deemed to prohibit us from seeking an injunction or other equitable relief in any court of competent jurisdiction to protect or preserve ours or our licensors' rights in and to intellectual property or confidential information.").

1. *Social Media Arbitration Clauses Do Not Disclose What Rights Are Foreclosed*

TABLE 7: DISCLOSURES INCLUDED IN ARBITRATION CLAUSES

Type of Disclosure	SNS Provider Addressed Issue in Clause	SNS Provider Did Not Address Issue in Clause
Loss of Right of Jury Trial	34 (36%)	60 (64%)
Restricted Right of Appeal	12 (13%)	82 (87%)
Right of Discovery	9 (10%)	85 (90%)
Notice of Waiver to Courts	24 (26%)	70 (75%)
No Judicial Supervision of Rules of Evidence and Discovery	0%	100%

Consumers who click “I agree” to a clickwrap or those who are subject to browsewrap TOUs waive their right to a jury trial, discovery,²⁶⁸ and appeal without reasonable notice that they are surrendering these important rights. As Table 7 (above) reveals, only thirty-four of the ninety-four providers (36%) provided registrants with notice that by acceding to arbitration they were waiving the right to a jury trial. The social media providers in our sample designed one-sided TOUs that eliminated the possibility of jury verdicts, punitive damages, class actions, consequential damages, and any other meaningful remedy by requiring their users to submit to arbitration without a sufficient explanation of the consequences of agreeing to those terms.²⁶⁹

2. *Arbitration Clauses Do Not Disclose the Rules of the Game*

Only 28% of the ninety-four SNS providers mentioning arbitration placed a warning or notice on the first page of the agreement that gave the user notice of this important clause. Only

268. Arbitral providers will sometimes permit general discovery, but this requires an application to an arbitrator and is subject to the discretion of the arbitrator. See Marrow, *supra* note 14. JAMS, for example, permits depositions and discovery at the arbitrator’s discretion, which is similar to the rule for the AAA. *Id.* at 44–45.

269. Our study was consistent with a study of consumer software license agreements that found these mass-market agreements to be pro-seller. See Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 703 (2007) (finding that end-user license agreements were “almost always more pro-seller than the default rules of the UCC”).

twelve providers (13%) explained how users could exercise the arbitration option. Eighty-five out of these ninety-four TOUs did not even disclose whether arbitration was mandatory or optional. Social media providers that attempted to explain how arbitration works emphasized its advantages, but not any of its disadvantages. Italki's dispute resolution clause, for example, specifies that consumers must arbitrate any disputes that go to court in Hong Kong, but otherwise the ADR provider must be mutually agreed upon:

For any claim arising between you and italki (excluding claims for injunctive or other equitable relief) where the total amount of the award sought is less than HKD 50,000, the party requesting relief may elect to resolve the dispute in a cost-effective manner through binding non-appearance-based arbitration. A party electing arbitration must initiate such arbitration through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties.²⁷⁰

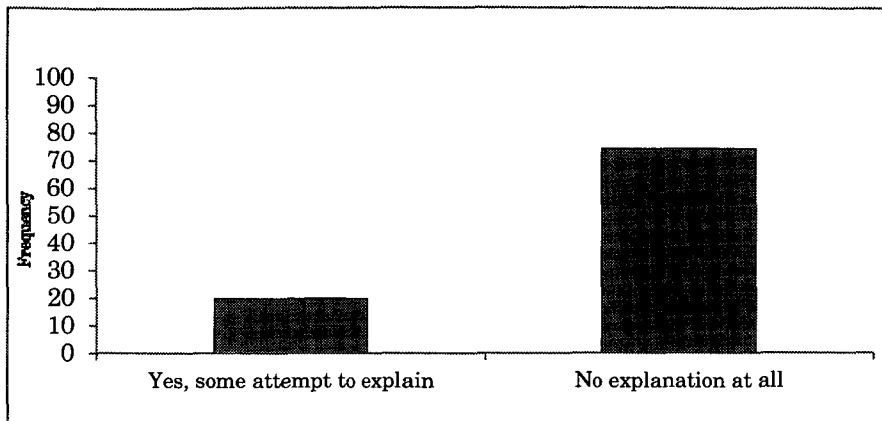
Only forty out of the ninety-four clauses were conspicuously presented (43%).²⁷¹ Life360 was one of the social media providers that gave users a warning that the TOU contained an arbitration clause in the first few paragraphs: "PLEASE READ THIS AGREEMENT CAREFULLY TO ENSURE THAT YOU UNDERSTAND EACH PROVISION. THIS AGREEMENT CONTAINS A MANDATORY ARBITRATION OF DISPUTES PROVISION THAT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS."²⁷²

270. *Terms of Service*, ITALKI.COM, <http://www.italki.com/tos> (last visited Sept. 8, 2014).

271. Under U.C.C. § 1-201(10) (2013), a term is "conspicuous" if it is so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

272. *Terms of Service*, LIFE360, https://www.life360.com/terms_of_use/ (last visited Sept. 8, 2014).

TABLE 8: DID PROVIDERS EXPLAIN HOW ARBITRATION WORKS?



As Table 8 (above) reveals, only twenty out of ninety-four arbitration clauses (21%) made any attempt to explain or even define arbitration. Social networks generally failed to explain the most rudimentary rules for conducting mandatory arbitration proceedings. Seventy-four out of ninety-four arbitration clauses made no attempt to explain arbitration. Eighty-five out of ninety-four networks with arbitration clauses failed to provide a simple link for users to obtain further information about how arbitration works. Eighteen of the arbitration clauses (19%) did not mention where the arbitration proceedings would be held.

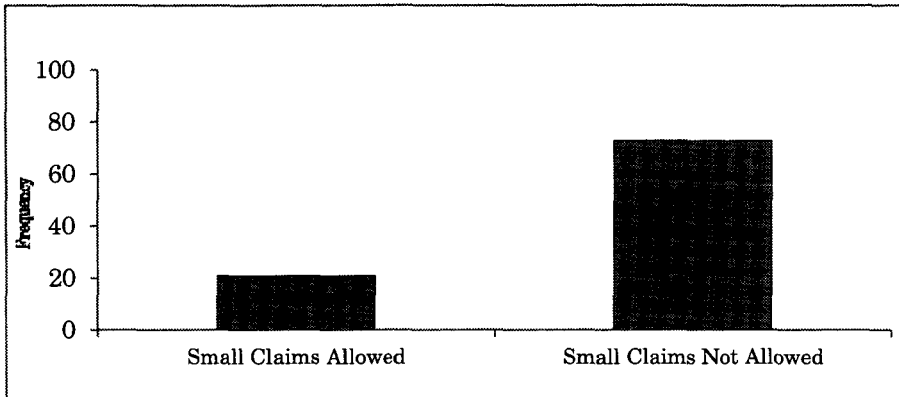
3. SNS Frequently Failed to Specify the Arbitration Provider

SNS provided no elucidation of the most rudimentary rules for conducting mandatory arbitration proceedings in twenty-eight clauses (29%) and relatively few provided a link where the user could read about arbitration procedures. The social media TOUs failed to select the arbitration provider in twenty-six arbitration clauses (28%). The AAA was chosen by forty social media providers (43%), followed closely by JAMS, with nineteen providers (20%). One social media provider specified the AAA but allowed JAMS if AAA refused to decide the case. Twenty-eight percent of the social network providers specified mandatory arbitration but did not give any information to identify the provider or explain the arbitration procedures. Other providers selected by social network providers include: (1) Arbitration and Mediation Institute of Canada (“AMIC”); (2) the ADR Institute of Canada; (3) Beijing Arbitration Commission; (4) Hong Kong International Arbitration Centre; (5) United States Arbitration & Mediation Midwest Inc (“USAM”); (6) South African Arbitration Association; and (7) the China International Economic Arbitration and Trade Commission. The

TOUs did not explain the advantages and disadvantages of arbitrating before these relatively unfamiliar organizations.

4. SNS Foreclosed the Right of Members to Use Small Claims Courts

TABLE 9: THE MAJORITY OF SNS FORECLOSED SMALL CLAIMS RECOVERIES



Social network users in our sample who agree to resolve disputes by arbitration give up the right to pursue relief in small claims courts as well as state and federal courts of general jurisdiction. Only twenty-one of the ninety-four social media providers (22%) with arbitration clauses had an exemption permitting small claims filings. Prohibiting the social media user from taking small-dollar claims to small claims court slams the courtroom door on many consumers. Consumer claims against providers will rarely involve large sums of money, even if a user's personally identifiable information has been misused, intellectual property rights have been infringed, or the TOU has been breached.²⁷³

273. See, e.g., *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 940, 944 (N.D. Cal. 2013) (approving a \$20 million settlement between Facebook and a proposed class of 150 million members whose names and/or likenesses allegedly were misappropriated to promote products and services through Facebook's "Sponsored Stories" program, plus payments of \$15 each to those class members who filed claims); *In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *2 (N.D. Cal. June 2, 2011) (granting final approval of a class-action settlement arising out of Google's disclosure of personally identifiable information without authorization through the defunct site, Google Buzz). The settlement agreement in *In re Google Buzz Privacy Litigation* created an \$8.5 million fund for a plaintiff class that covered an estimated 37 million Gmail users in the United States who were presented with the opportunity to use Google Buzz, meaning that each user would have received approximately twenty-three cents. Notice of Motion and Memorandum in Support of Motion for Order Granting Final Approval of Class Settlement, Certifying Settlement

5. *Cost of Filing Consumer Claims Exceeds Possible Recovery*

a. *Cost of Arbitration Outweighs Possible Recovery*

Another measure of fundamental fairness is whether the cost to a consumer of filing an arbitration claim exceeds the monetary value of a possible award.²⁷⁴ The vast majority of social media sites require arbitrators to cap damages at a nominal amount that is often significantly lower than the consumer's cost of filing, which is \$200 for the AAA²⁷⁵ and \$250 for JAMS.²⁷⁶ Many of the arbitration clauses require the consumer to share the cost of hiring the arbitrator and other expenses in addition to the filing fee. A number of social media sites imposed a "loser-pays" rule, requiring the consumer to pay the attorneys' fees of the SNS if the arbitration claim fails.²⁷⁷ These provisions raise the stakes of pursuing arbitration beyond the resources of many consumers. At a minimum, loser-pay rules have a chilling impact on pursuing arbitration claims. Table 10 (below) reveals that social networks

Class, and Appointing Class Representatives and Class Counsel at 5, 12, *Google Buzz*, 2011 WL 7460099 (No. 5:10-CV-00672-JW), 2010 WL 10838831.

274. This includes "reasonable costs" in a document setting out the essential features necessary for the creation of a "fundamentally fair" arbitration program involving consumers:

In determining what is reasonable, consideration should be given to the nature of the conflict (including the size of monetary claims, if any), and the nature of goods or services provided. . . . The consensus of the Committee was that if participation in mediation is mandated by the ADR agreement, the Provider should pay the costs of the procedure, including mediator's fees and expenses.

AM. ARBITRATION ASS'N, *supra* note 24, at 20.

275. AM. ARBITRATION ASS'N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES 12 (2014), available at https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased.

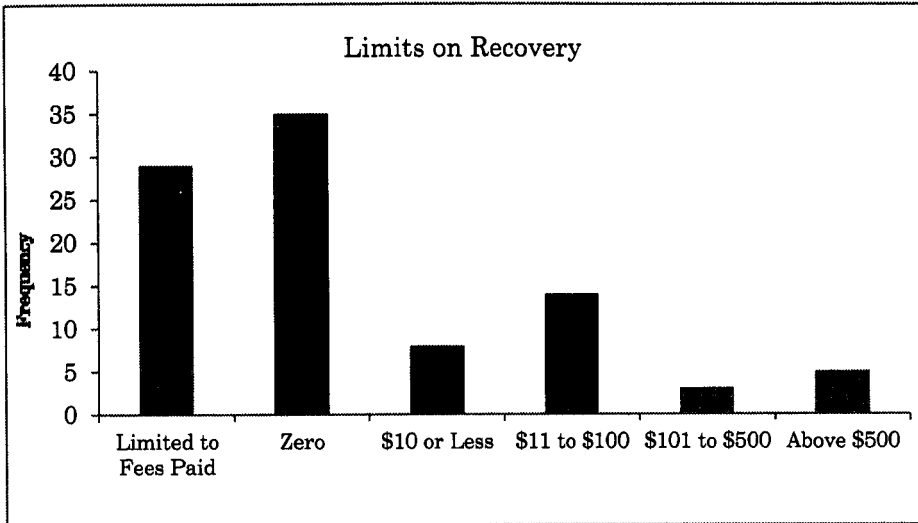
276. *Consumer Arbitration Minimum Standards*, *supra* note 253.

277. Fotki, a photo-sharing site, imposes a loser-pays rule that would require a social media user to pay the costs of a suit if he or she unsuccessfully challenges an arbitration award. *Terms of Service Agreement*, FOTKI, <http://help.fotki.com/terms/> (last visited Sept. 8, 2014) ("In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including a reasonable attorney's fee for having to compel arbitration or defend or enforce the award."); see also *User Agreement*, LINKEDIN, <http://www.linkedin.com/legal/user-agreement> (last updated Mar. 26, 2014) ("You agree to indemnify us and hold us harmless for all damages, losses and costs (including, but not limited to, reasonable attorneys' fees and costs) related to all third party claims, charges, and investigations, caused by (1) your failure to comply with this Agreement, including, without limitation, your submission of content that violates third party rights or applicable laws, (2) any content you submit to the Services, and (3) any activity in which you engage on or through LinkedIn.").

have capped damages so that the cost of arbitration will usually exceed any monetary remedy, which precludes any cost-justified arbitral filings.

b. Providers Limit Damages to Make Arbitration Filings Cost Prohibitive

TABLE 10: CAPS ON DAMAGES IMPOSED IN ARBITRATION CLAUSES



In twenty-nine of the ninety-four clauses (31%), the arbitrator is required to cap damages at an amount equal to the fees paid by the user to the social network for the preceding twelve months, which is frequently below the cost for a consumer to file an arbitration claim. In 37% of the arbitration clauses (N=35), the provider caps overall damages at \$0. In eight other TOUs, the provider capped total damages at a nominal amount of \$10 or less. In three arbitration clauses, the provider capped damages at \$101 to \$500. In five cases, the provider allowed damages capped above \$500; the highest cap was \$5,000. All of the social media providers that limit damages specify in their TOUs that arbitrators cannot award punitive damages, which forecloses the possibility that a substantial award as punishment for particularly egregious conduct might make a small-dollar case attractive to plaintiffs' attorneys.

c. Anti-Class Action Waivers Prevent Aggregation of Small-Dollar Claims

TABLE 11: ANTI-CLASS ACTION WAIVERS ARE COMMON IN TERMS OF USE AGREEMENTS

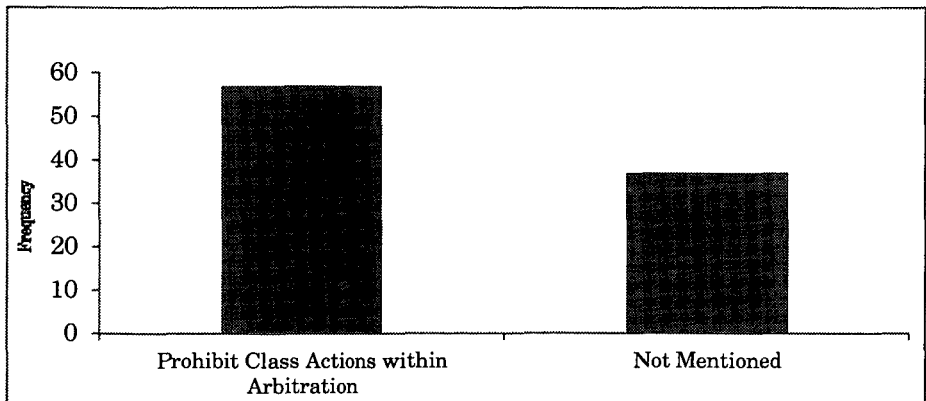


Table 11 (above) confirms that anti-class action waivers are widespread: it shows that fifty-seven out of ninety-four providers (61%) included an anti-class action waiver in their TOUs that prevents users from joining or initiating a class action. Class action is an essential remedy for plaintiffs filing arbitration claims against social networks because aggregation of individual claims is the only way arbitration can be cost justified.²⁷⁸ Anti-class action waivers preclude the possibility that a plaintiff's attorney can aggregate small-dollar claims thus making an action financially viable.²⁷⁹ The history of this collective remedy confirms its effectiveness in vindicating group injuries where the monetary amount at stake per victim is nominal, making individual claims cost prohibitive.²⁸⁰

278. See, e.g., *Lane v. Facebook, Inc.*, 696 F.3d 811, 824–26 (9th Cir. 2012) (affirming trial court's approval of a class-action settlement arising out of Facebook's Beacon program, stating that "[i]t is an inherent feature of the class-action device that individual class members will often claim differing amounts of damages," and that the settlement was fair to all class members although some members may have been entitled to higher recovery).

279. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 373 (2007) (citing arguments that these clauses were included in consumer contracts to sidestep class actions or aggregate dispute resolution).

280.

Modern society seems increasingly [inclined] to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will

Social media users often find it difficult to obtain class certification, even where providers do not prohibit class actions.²⁸¹ The U.S. Supreme Court in *AT&T Mobility, Inc. v. Concepcion*²⁸² held that the Federal Arbitration Act preempted California state court decisions that prohibited anti-class action waivers in consumer contracts.²⁸³ The Court's willingness to legitimize anti-class action waivers and compulsory arbitration clauses explains why TOUs are so one-sided

operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.

Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

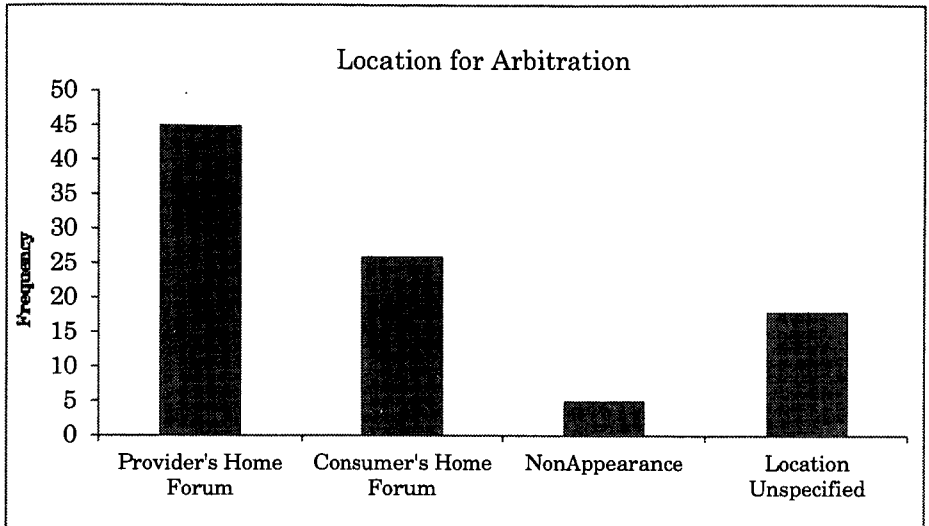
281. *Hulu Users Facebook Class Foiled for Now; Video Privacy Claim Subclasses Suggested*, BLOOMBERG BNA: SOC. MEDIA L. & POL'Y REP. (June 18, 2014) ("Hulu users alleging their personal information was transmitted to Facebook won't move forward as a class for now because the U.S. District Court for the Northern District of California June 17 denied certification, ruling that individual issues predominate about whether class members used software to block the disclosures.").

282. 131 S. Ct. 1740 (2011).

283. *Id.* at 1753 ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA." (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))). In *Discover Bank*, the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740.

6. *Reasonably Convenient Location: Anticonsumer Choice-of-Forum Clauses Predominate*

TABLE 12: ARBITRATION PROCEEDINGS: WHERE ARE THEY HELD?



During the past four decades, U.S. courts have generally enforced choice-of-forum and choice-of-law clauses drafted in favor of the dominant party.²⁸⁴ U.S.-style choice-of-forum clauses are

284. Compulsory arbitration clauses in mass-market license agreements, computer contracts, or terms of service have been upheld by numerous U.S. courts. *See, e.g.*, *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 706 (S.D. Ill. 2005) (ordering arbitration in a case where a pre-dispute arbitration clause was added to the consumer's contract for wireless services); *Lieschke v. RealNetworks, Inc.*, No. 99 C 7274, 2000 WL 198424 (N.D. Ill. Feb. 11, 2000) (enforcing an arbitration clause in a terms-of-service agreement); *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at *5 (Del. Ch. Mar. 16, 2000), *aff'd*, 763 A.2d 92 (Del. 2000); *cf.* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1334, 1341 (D. Kan. 2000) (declining to enforce an arbitration clause on the grounds that the user did not agree to the standard terms mailed inside the computer box). The U.S. Supreme Court has given lower courts the signal to enforce mandatory consumer arbitration clauses. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (striking down West Virginia's prohibition against mandatory arbitration clauses in nursing home admissions contracts); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding that regardless of whether it is filed in federal or state court, "a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause" contained within it, must go to the arbitrator and not the court); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 91 (2000) (holding that an order compelling arbitration and dismissing a party's underlying claims is a final decision with respect to arbitration in accordance with section 16(a)(3) of the FAA and thus immediately appealable,

broadly enforceable.²⁸⁵ Section 114 of the Principles allows the parties to submit to jurisdiction and agree to an exclusive forum so long as it is not unfair or unreasonable:

The parties may by agreement choose an exclusive forum unless the choice is unfair or unreasonable. A forum choice may be unfair or unreasonable if:

- (a) the forum is unreasonably inconvenient for a party;
- (b) the agreement as to the forum was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means;
- (c) the forum does not have power under its domestic law to entertain the action or to award remedies otherwise available; or
- (d) enforcement of the forum-selection clause would be repugnant to public policy as expressed in the law of the forum in which suit is brought.²⁸⁶

Forty-eight percent of the arbitration clauses specified as a location one that was convenient for the social network, usually its home court. Twenty-eight percent of the clauses specified a location for the proceeding at the consumer's convenience. The remainder of the clauses were either nonappearance or failed to mention where the arbitration proceedings would be held.

IV. DESIGNING TOUS FOR AN INCREASINGLY GLOBALIZED FUTURE

As social networks increasingly go global, corporate counsel and outside attorneys need to tailor their TOUs to comply with radically different legal cultures. U.S. social networking TOUs require

and holding that silence in the agreement on the issue of arbitration fees does not render the agreement per se unenforceable for failing to affirmatively protect a party from potentially high arbitration costs). *See generally* Rustad et al., *supra* note 25, at 675–80 (surveying U.S. Supreme Court decisions over the past four decades).

285. *See, e.g.*, *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271–72 (C.D. Cal. 2008) (upholding a forum-selection clause requiring users to waive their right to joining class action and to submit to pre-dispute mandatory arbitration); *Eslworldwide.com, Inc. v. Interland, Inc.*, No. 06 CV 2503 (LBS), 2006 WL 1716881, at *2 (S.D.N.Y. June 21, 2006) (upholding a forum-selection clause included in a clickwrap agreement); *Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006) (upholding a forum-selection clause for pre-dispute mandatory arbitration); *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1023–24 (Ind. Ct. App. 2007) (upholding Adsit's TOU agreement containing a forum-selection clause and a choice-of-law clause where the user was required to click on a button reading, "I Accept," that was placed strategically at the bottom of the webpage containing the policy, and where the clickwrap agreement also was displayed on an internet webpage).

286. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.14 (2009).

consumers to bear far more risk than is permitted in other parts of the world. Since the mid-1990s, U.S. courts have enforced online contracts so long as there is an opportunity to read and a manifestation of assent.²⁸⁷ Japan, in contrast, does not enforce shrinkwrap license agreements²⁸⁸ “unless the consumer is aware of the license terms and consents to them before purchasing the software.”²⁸⁹ Further, if terms in standard-form contracts are unreasonably unfavorable to the Japanese consumer, the courts or regulatory bodies are likely to strike them down.²⁹⁰

New Zealand, Canada, and the twenty-eight Member States of the European Union have enacted unfair contract terms statutes that provide consumers with the same protections in the virtual realm that they enjoy in the bricks-and-mortar world.²⁹¹ Japanese consumer contract law, as well as the European Directive on unfair contract terms, includes graylists of terms that are presumed to be unfair.²⁹²

In this part of the Article, we propose a hybrid pathway for reforming TOUs that combines features of U.S.-style disclosure and readability reforms with European-style minimum mandatory terms that are non-waivable. The United States and Europe are on a collision course when it comes to social media contracts. The United States follows a free-market approach, whereas the European Union has adopted mandatory consumer protection. The United States/European divide in consumer law parallels the distinction between procedural unconscionability and substantive unconscionability in U.C.C. section 2-302. Procedural unconscionability is the judgement of the court that the bargaining process was severely flawed, whereas substantive unconscionability is a court’s refusal to permit any grossly one-sided terms.²⁹³ U.S. consumer law is largely based upon disclosure—an approach concerned with procedural consumer justice.²⁹⁴ In contrast, the EU

287. Moringiello & Reynolds, *supra* note 117, at 454–55.

288. Rustad & Onufrio, *supra* note 28, at 72 (citing Tsuneo Matsumoto, *Article 2B and Mass Market License Contracts: A Japanese Perspective*, 13 BERKELEY TECH. L.J. 1283, 1284 (1998)).

289. RUSTAD, *supra* note 83, at 373.

290. Matsumoto, *supra* note 288, at 1285.

291. The Unfair Contract Terms Directive, art. 2(b) defines “consumer” as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business of profession.” Council Directive 93/13/EEC, art. 2, 1993 O.J. (L 95) 29, 31, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN>.

292. *Id.* at 33–34; Matsumoto, *supra* note 288, at 1285.

293. MICHAEL L. RUSTAD, *THE CONCEPTS AND METHODS OF SALES, LEASES, AND LICENSES* 199 (1998).

294. See generally Mary J. Culnan & Robert J. Bies, *Consumer Privacy: Balancing Economic and Justice Considerations*, 59 J. SOC. ISSUES 323, 328 (2003) (defining procedural justice as “the perceived fairness of the procedures, and how those procedures are enacted”).

model of consumer law mandates non-waivable consumer rights—a legal culture focused on achieving substantive consumer justice.²⁹⁵ Our argument is that a hybrid reform model that combines greater disclosure and readability with a European-style blacklist of forbidden contracting terms is best suited for a social network targeting the global marketplace.

A. U.S. Procedural Justice Approach: Greater Disclosure and Readability

Most U.S. federal consumer law emphasizes procedural concerns such as disclosure rather than substantive mandatory terms adopted in Europe and many other countries.²⁹⁶ In the predominant U.S. paradigm, if providers adequately present terms, consumers will have the information necessary to make informed choices. U.S. plain-English statutes, for example, are based on the legislative goal of allowing consumers to make decisions that are in their own self-interest.²⁹⁷ Congress enacted the Truth in Lending Act (“TILA”) to improve consumers’ decision making by encouraging “the informed use of credit” through a greater awareness of its cost.²⁹⁸ Similarly, the Magnuson-Moss Consumer Warranty Act (“MMWA”) requires suppliers in the United States to standardize, simplify, and make warranty disclaimers more readable²⁹⁹ in order to “improve the adequacy of information available to consumers,

295. Rustad & Onufrio, *supra* note 32, at 1132.

296. The Truth in Lending Act (“TILA”), currently codified at 15 U.S.C. § 1601 (2012), enacted on May 29, 1968, as Title I of the Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, 82 Stat. 146, is a disclosure statute. Section 1631 of the Consumer Credit Protection Act sets forth disclosure requirements for lending, while section 1632 addresses the form of disclosure. See 15 U.S.C. §§ 1631–1632. Section 1681g, which addresses Consumer Credit Reporting, specifies disclosures to consumers, and section 1681h specifies conditions of disclosure to consumers. See 15 U.S.C. §§ 1681g–1681h. Congress’s purpose in enacting Consumer Credit Cost Disclosure was to encourage the “informed use of credit.” See 15 U.S.C. § 1601.

297. “The premise behind the plain English movement is that legal documents ought to be plainer—and more comprehensible—to the average person.” Peter Tiersma, *The Plain English Movement*, LANGUAGEANDLAW.ORG, <http://www.languageandlaw.org/PLAINENGLISH.HTM> (last visited Sept. 27, 2014).

298. See Truth in Lending Act, § 102, 82 Stat. at 146 (codified as amended at 15 U.S.C. § 1601(a)).

299. See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections of 15 U.S.C.); see also Tiersma, *supra* note 297 (“In 1978 President Carter signed an executive order that required that Federal regulations be ‘as simple an clear as possible.’ Federal law now requires clear, conspicuous, accurate, or understandable language in many types of consumer transactions, including the Truth in Lending Act, the Fair Credit Reporting Act, and the Magnuson-Moss Warranty Act.” (citation omitted)).

prevent deception, and improve competition in the marketing of consumer products.”³⁰⁰

The data presented in Part II supports previous research criticizing online standard-form contracts because of their incomprehensibility.³⁰¹ Our empirical study found that, in social media websites, contract law in the form of TOUs has become an instrumentality for achieving the foreclosure of private rights—an effective form of reassigning risks to the consumer. Electronic boilerplate eliminates meaningful consumer rights and remedies while preserving or expanding rights for the social media provider. In effect, contract law has swallowed almost all rights and remedies into a privatized legal universe where the website has eliminated its liability and accountability.³⁰²

Clear disclosure of what rights the social media user is waiving is a modest, but highly desirable, first step toward creating a more balanced online legal environment. Nevertheless, this improvement is not enough. To assume that consumers knowingly manifest assent to SNS terms when they click “yes” on a radio button is a legal fiction. We propose that Congress enact legislation that imposes mandatory consumer protection that follows the EU model in establishing a blacklist of banned TOU terms or clauses that are deemed unfair under all circumstances and a graylist of TOU terms presumed to be unfair, but which the social media provider can attempt to rebut. What follows is a nonexclusive list of proposed procedural and blacklisted terms that are based on the empirical findings in Parts I, II, and III of this article.

1. *Standardizing Standard Forms to Improve Disclosure*

Social media TOUs varied widely in their terminology, decreasing their comprehensibility even further than their “fairly difficult” readability alone. Boilerplate contracts had inadequate labels, such as “general rules,” “legal information,” “member agreement,” “service terms,” “terms of service,” “terms of use,” “terms and conditions,” and several had no title at all. In addition, the SNS employed many less transparent titles, including “terms and content policy,” “terms of register,” “terms of membership,” “terms of use & EULA,” “license agreement,” “The Essentials,” “User Registration Agreement,” “Welcome to [social network],” and “platform services,” which may confuse the user. As a starting point, social media providers should standardize their “standard-form” agreements so that consumers have minimally adequate

300. 15 U.S.C. § 2302(a) (2012).

301. See Hillman, *supra* note 128, at 837–38.

302. See generally RADIN, *supra* note 128, at 16 (describing the alternative legal universe of rights-deletion boilerplate).

information about what rights they foreclose or gain by joining networks.

The social media TOUs were often composed of dense legalese, without any attempt to aid consumers in locating, much less comprehending, the rights-foreclosure clauses. Standardizing the titles of the agreement and key clauses in a user-friendly fashion would be a valuable first step in aiding consumers in understanding that they are entering into a legally binding contract and possibly alerting the user to the one-sided nature of that agreement.³⁰³ The vast majority of the TOUs (80%) had no index, and only a handful contained hyperlinked to enable readers to find key provisions. A few TOUs did not even contain paragraph breaks to aid the reader, and some were displayed in an almost unreadable font.

2. *More Informative TOUs*

The consumer-law movement has long advocated plain-language statutes that the public can understand, but these TOUs were anything but transparent.³⁰⁴ Social media boilerplate ranged from only 249 words to 37,239 words—that is, eighty-three pages in length. The average social media TOU was 6214 words: almost sixteen single-spaced pages in length.³⁰⁵ Lengthy TOUs, filled with indecipherable legalese, discourage the reader, while a TOU of less than two pages is not likely to contain sufficient information to allow the consumer to make sensible choices.³⁰⁶ FC2's arbitration clause is unintentionally ironic and devoid of any description of fees, rights foreclosed, or how arbitration works: "Any disputes resulting from the use of Our Service(s), will be resolved through arbitrary [sic] proceedings recognized by the State of Nevada. If a resolution cannot be made through arbitration, a Nevada State District Court receives exclusive jurisdiction rights."³⁰⁷

303. "Simplifying and standardizing the presentation format of contracts would likely be helpful. This might change consumers' expectations about the costs of reading contracts and might induce them to read more, although one should be realistic about the actual magnitude of any increase in readership." Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 185 (2011).

304. Black, *supra* note 69, at 261–62 (arguing that state statutes requiring dominant parties to draft contracts in plain language ensures that consumers "can read and understand" them and empowers consumers to "shop more wisely").

305. *Convert Words to Pages*, WORDSTOPAGES.COM, <http://www.wordstopages.com/> (last visited Sept. 28, 2014).

306. These numbers are based on the standard of a 250-word page. See *HarperCollins Publisher, L.L.C. v. Arnell*, No. 600507/08, 2009 WL 1119517, at *4 n.1 (N.Y. Sup. Ct. Apr. 15, 2009) ("It is undisputed that the standard in the book publishing industry is that a full text page contains 250 words.").

307. *FC2 Terms of Use*, FC2 TOTAL WEB SOLUTIONS, <http://help.fc2.com/common/tos/en/> (last visited Oct. 3, 2014).

Few of the ninety-four arbitration clauses provided users with any meaningful explanation of the basic features of arbitration. Forty-five percent of the arbitration clauses were under 250 words, and 75% were comprised of less than 400 words.

3. *Greater Disclosure and Placement of Arbitration Clauses*

As with the TOUs as a whole, there was no uniformity in the titles or presentations of these clauses. Only 43% of the arbitration clauses (N=40) were conspicuously labeled and presented. Our conspicuousness measure required these clauses to either comply with one of the tests required by the U.C.C. or be made highly visible to the user through an introductory warning, a box, or an index.³⁰⁸ Many of the arbitration clauses did not have the word “arbitration” in the heading where the clause was contained.

Social media providers generally situate arbitration clauses deep within the interior of the TOU. WordPress, for example, places its arbitration clause, after 2998 words, in the middle of its “Miscellaneous” clause.³⁰⁹ Arbitration clauses did not employ a standardized terminology. The term “miscellaneous,” for example, does not give a user adequate notice of a mandatory arbitration clause. Arbitration clauses had other diverse labels, such as “arbitration,” “arbitration clauses,” “arbitration and governing law,” “binding arbitration,” “disputes resolution,” “dispute resolution procedures,” “general terms,” “governing law,” and some had no label at all.

On average, a consumer would have to read more than ten single-spaced pages (4615 words) before reaching the first word of the arbitration clause. Ten percent of the clauses required readers to read 7000 or more words before reaching the arbitration clause. Arbitration clauses tended to be short and unhelpful, comprised of a mean word count of 332. Ten percent of the arbitral clauses consisted of less than 100 words. Two-thirds of the arbitration clauses did not provide any notice to users of rights foreclosed when they submit to arbitration. Disclosure reforms could begin by instituting consumer due-process protocol for social media terms and terminology.

308. To meet the U.C.C. standard of conspicuousness found in U.C.C. § 1-201(10) (2013), a clause had to be “so written that a reasonable person against whom it is to operate ought to have noticed it.” The U.C.C. “operationalizes” this standard by requiring language that is “larger or other contrasting type or color.” *Id.* In addition to the U.C.C. tests, we counted the clause as “conspicuous” if it was mentioned at the beginning of the form, indexed, or placed in a clearly marked box.

309. See *Terms of Service*, WORDPRESS.COM, <http://en.wordpress.com/tos/> (last visited July 12, 2014).

4. *Reforming TOU Readability*

The European Union's Consumer Rights Directive requires that all distance contracts be drafted "in plain and intelligible language."³¹⁰ Our study demonstrates that social media providers did not give consumers sufficiently clear and readable information as to what rights they were foreclosing when they register, browse, or click agreement to the TOU, and that the information they conveyed was incomprehensible for many users.³¹¹ Some SNS combine browsewrap and clickwrap in the way they predicate the manifestation of assent upon either browsing a site or clicking agreement to the terms in a registration process.³¹²

As Part II demonstrated, the average American does not have the reading comprehension to understand the crucial portions of the typical TOU. It should not be difficult for social networks to draft their agreements so that high school graduates can understand them, which means that the minimum standard would be set at a Flesch Readability Ease score of sixty and a Flesch-Kincaid Grade Level of eight to nine. Another readability reform would be to make rights-foreclosure clauses less inscrutable than the TOU as a whole, not less readable. Courts should refuse to enforce tricky and unfair rights-foreclosure clauses drafted significantly above the reading level of the TOU as a whole. Consumers have a duty to read, but social network providers should have a corresponding duty to make rights-foreclosure clauses readable for the typical registrant.

5. *Standardizing TOU Format and Terminology*

Requiring social networks to use uniform labels that are not misleading is a modest reform. The label "Welcome," for example, does not put consumers on notice that they are entering into a

310. Council Directive 2011/83/EU, art. 8, 2011 O.J. (L 304) 64, 77 (listing the formal requirements for distance contracts).

311. Bebo, for example, uses the browsewrap and does not require users to manifest assent after an opportunity to read the terms. Blab, a Bebo Project, includes the following language in its browsewrap: "By accessing or using the Site or App, you agree to be bound by these Terms and by our Privacy Policy and Acceptable Use Policy, whether or not you transmit content via the Site or App. These Terms apply to everyone who accesses the Site or App ('Users')." *Privacy Policy*, BLAB, <https://blab.im/privacy> (last visited Sept. 24, 2014); see also *Terms of Use*, *supra* note 25 ("By using this Service, you are bound by these Terms of Use."). LinkedIn advises those who do not agree with the User Agreement not to access the website or to click "Join Now." *User Agreement*, *supra* note 277.

312. See, e.g., *User Agreement*, *supra* note 277 ("You agree that by registering on LinkedIn, SlideShare or Pulse or by using our websites, including our mobile applications, developer platforms, premium services, or any content or information provided as part of the LinkedIn services (collectively, including SlideShare and Pulse, 'LinkedIn' or the 'Services'), you are entering into a legally binding agreement with LinkedIn Corporation, 2029 Stierlin Court, Mountain View, California 94043, USA.").

legally binding agreement. A second procedural reform would be to require providers to include a hyperlinked index that allows the user to locate rights-foreclosure clauses such as mandatory arbitration, caps on damages, shortened statutes of limitations, indemnification provisions, and other private tort reforms. TOUs that are conspicuously labeled and placed toward the beginning of the agreement, not buried deep into the interior, would enable consumers to weigh the costs and benefits before agreeing to the social media TOU.

The most fundamental consumer due-process principle is that social media TOUs present clauses that deplete or delete rights so that consumers can understand them. Fundamentally fair disclosure means that all rights-foreclosure clauses—warranty disclaimers, caps on damages and other limitations of liability, pre-dispute mandatory arbitration clauses, abbreviated statutes of limitations, and indemnification clauses—be made available to the social media user in “plain and intelligible language.”³¹³ U.S. courts should follow their EU counterparts in applying the principle of *interpretatio contra proferentem* to enforce ambiguities in favor of consumers.³¹⁴ European courts may reject insufficiently precise contract terms in consumer contracts even if they are not substantively unfair.³¹⁵ Under our TOU reform proposal, consumers in all countries would have minimally adequate disclosures so they can make rational choices about whether to agree to foreclose their rights.

6. *More Balance in Stating Advantages and Disadvantages of Consumer Arbitration*

Reforming the design features of social media contracts by imposing plain-English or placement requirements does not address the unfettered power of social media providers to impose one-sided

313. Council Directive 2011/83/EU, *supra* note 310.

314. See Rustad & Onufrio, *supra* note 32, at 1135.

315.

For example, in a judgment of January 7, 1997, in *Assurances GAN v. Impec*, the Belgian Court of Cassation deemed unfair a term waiving a guarantee in respect of “certain damages” on the grounds that an exclusion clause could not be validly relied on against the insured unless the clause in question was “clear, express and limited.” Likewise, in a judgment of May 23, 1996, in *NCR-ANC v. UAP*, a French Court of First Instance ruled that an insurance contract was unfair because it did not subject increases in the premium to any clear contractual condition and gave the insurance company an unfair advantage because it did not have to justify any increase in the premiums.

B2C in Europe and Avoiding Contractual Liability: Why Businesses with European Operations Should Review Their Customer Contracts Now, MORRISON FOERSTER n.8 (Aug. 5, 2004), http://www.mofo.com/resources/publications/2004/08/b2c-in-europe-and-avoiding-contractual-liability__.

provisions that eliminate meaningful rights and remedies. Few social media TOUs attempted to contrast the advantages of arbitration against the potential harms of agreeing to pre-dispute mandatory arbitration, where the consumer is stripped of their Seventh Amendment rights, the right to an appeal, and liberal discovery. The typical social media arbitration clause touted the advantages of arbitration but did not mention the costs, foreclosed rights, and other disadvantages. Zynga's arbitration clause is a prime example:

For any claim (excluding claims for injunctive or other equitable relief) where the total amount of the award sought is less than \$10,000, the party requesting relief may elect to resolve the dispute in a cost effective manner through binding non-appearance-based arbitration. In the event a party elects arbitration, they shall initiate such arbitration through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: (a) the arbitration shall be conducted by telephone, online and/or be solely based on written submissions, and the specific manner shall be chosen by the party initiating the arbitration; (b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and (c) any judgment on the award rendered by the arbitrator shall be final and may be entered in any court of competent jurisdiction.³¹⁶

Ashley Madison, a Canadian dating social network that is designed to facilitate extramarital affairs, is one of the few providers in our sample that discloses that social media users lose the right to file court cases and waive the right to a jury or judge trial by agreeing to arbitration:

Arbitration replaces the right to go to court, and therefore the parties waive any right that you or Ashley Madison might otherwise have had to a jury trial or the opportunity to litigate any claims in court before either a judge or jury. Notwithstanding the foregoing, Ashley Madison reserves the right to pursue the protection of intellectual property rights and confidential information and to stop other illegal activities through injunctive relief or other equitable relief through the courts.³¹⁷

316. *Terms of Service*, ZYNGA, <https://company.zynga.com/legal/terms-of-service/01> (last updated Sept. 30, 2011).

317. *Terms and Conditions*, ASHLEY MADISON, <https://www.ashleymadison.com/app/public/tandc.p?c=1> (last visited Sept. 27, 2014). Lafango uses nearly identical language: "Notwithstanding the foregoing, Lafango.com may seek injunctive or other equitable relief to protect its intellectual property rights in

Greater disclosure of comparative benefits and detriments of mandatory arbitration is a modest step towards alerting the consumer of the risks of accessing the website. Nevertheless, it also reduces the radius of risk of enforcement actions by foreign courts or consumer regulatory agencies for U.S. social networks exporting their services to Europe and other countries that have adopted non-waivable rules to protect consumers.

B. *European-Style Blacklist of Aggressive and Misleading Terms*

1. *European Mandatory Consumer Law*

Over the past two decades, the European Commission has developed mandatory rules that protect consumers throughout the European Union.³¹⁸ The European Union's regulations³¹⁹ and directives go beyond disclosure and readability to address the problem of substantively unfair clauses. Article 8 of the Unfair Contract Terms Directive makes it clear that the Directive is the floor, not the ceiling, for consumer protection by providing that Member States have the discretion to adopt provisions that are more stringent.³²⁰ Individual EU countries could, for example, transform the graylist of suspect terms³²¹ into a blacklist of banned

any court of competent jurisdiction." *Lafango.com Legal Information*, LAFANGO, <http://lafango.com/legal> (follow "Lafango Terms & Conditions" hyperlink) (last visited Sept. 17, 2014).

318. See *The Directive on Consumer Rights*, EUR. COMMISSION, http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm (last visited Oct. 31, 2014) ("The Directive on Consumer Rights (2011/83/EC) replaces, as of 13 June 2014, Directive 97/7/EC[,] on the protection of consumers in respect of distance contracts[,] and Directive 85/577/EEC to protect consumer[s] in respect of contracts negotiated away from business premises."); see also James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 163 (2003) ("Further E.U. action in the consumer area is likely and might result either in changes in the directive itself or in adopting legislation that would prevail over the directive."); Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175, 184 (2006) (examining standard terms in contracts in electronic commerce in American, European Union, and German law). See generally Michael L. Rustad & Thomas H. Koenig, *Harmonizing Cybertort Law for Europe and America*, 5 J. HIGH TECH. L. 13 (2005) (calling "for a globalized regime of Internet torts to protect consumers and other travelers in cyberspace").

319. Regulations are automatically applicable to all EU Member States. Conventions are the equivalent of treaties. When a new Member State joins the European Union, regulations apply automatically, unlike the case with Conventions. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC).

320. Article 8 of the Council Directive provides: "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer." Council Directive 93/13/EEC, *supra* note 291, at 32.

321. A contractual term appearing on a graylist is presumptively unfair and can be overcome by contrary evidence. WADE JACOBY, THE ENLARGEMENT OF THE

clauses.³²² EU mandatory consumer rules have an extraterritorial impact on any social media targeting Europe.³²³

2. *European Enforcement Actions Against U.S.-Style TOUs*

Mandatory arbitration and anti-class action waivers are a distinctively American practice unenforceable in the Eurozone and other regions where U.S. social media providers are doing business. In our sample of arbitration clauses, only one out of ninety-four social media providers was from an EU country. Only eighteen of the ninety-four SNS mandating arbitration originated in foreign countries. Twelve out of fourteen foreign SNS mandating arbitration were headquartered in either China or Canada. Only five Chinese social media providers included arbitration clauses, and no provider prohibited users from joining class actions. These statistics suggest a significant difference between U.S. social media contracting practices and the rest of the world.

U.S. social networking websites that continue to export one-sided TOUs into the European consumer market do so at their peril. Many U.S.-style TOUs have been deemed unenforceable by European authorities in recent years. A French court of appeals recently ruled that a Facebook user is not bound by the SNS's provision that requires disputes to be brought exclusively in a state or federal court located in Santa Clara County.³²⁴ Facebook's TOU, the French court found, violated the French implementation of the Unfair Contract Terms Directive,³²⁵ which requires, among other

EUROPEAN UNION AND NATO: ORDERING FROM THE MENU IN CENTRAL EUROPE 71 n.32 (2004).

322. In contrast with graylist terms, blacklist terms are prohibited outright and are regarded as per se unfair. *Id.*

323.

[T]he European Union has multiple instruments governing certain aspects of extraterritorial jurisdiction, including the Brussels Convention, the Lugano Convention, and the Brussels Regulation. It has also adopted directives in a number of areas, such as insolvency, growing out of its treaties. It is not clear, however, that these regional rules influence the principles applicable under international law more generally.

INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 17 (2009), available at <http://tinyurl.com/taskforce-etj-pdf> (comparing legislative jurisdiction, or the power of legislatures to make laws governing particular peoples and circumstances, to adjudicatory jurisdiction).

324. AOL France v. UFC Que Choisir, R.G. No. 04/05564, Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, JCP 2005 IV 150905 (Fr.).

325. See Brendon Beheshti, *Cross-Jurisdictional Variation in Internet Contract Regulation: Is There a Viable Path to Globally Uniform Internet Contracting Laws?*, 8 J. INT'L COM. L. & TECH. 49, 63 (2013). See generally Council Directive 93/13/EEC, *supra* note 291.

things, that a choice-of-forum clause be highly visible.³²⁶ The court also found that such a restrictive clause is only valid between businesses, not in business-to-consumer transactions.³²⁷

The British Office of Fair Trading (“OFT”) investigated Dell’s consumer license agreements.³²⁸ Ultimately, the OFT required Dell to revise its consumer license agreements by eliminating its prohibited clauses in order to comply with the United Kingdom’s mandatory consumer rules.³²⁹ “Dell agreed to amend terms that . . . ‘limit[ed] liability for negligence to the price of the product’; ‘exclude[d] liability for consequential loss arising out of breach of contract’; [and] ‘exclude[d] liability for oral representations not confirmed in writing.’”³³⁰ The United Kingdom’s National Consumer Council examined twenty-five consumer-software license agreements, concluding that the typical EULA will “mislead consumers and remove legal rights.”³³¹

In 2004, the Norwegian Consumer Agency objected to iTunes’s clause that claimed to allow the provider to impose new or additional rules, policies, terms, or conditions at will³³²:

326. See Stafford Matthews, *Going Global: 10 Rules for Your Company in Its International Transactions*, SLIDESHARE, (June 24, 2014), <http://www.slideshare.net/DentonsGlobal/going-global-10-rules-for-your-company-in-its-international-transactions> (“A French court held that 31 of the 36 sections of the standard Terms of Use for AOL France violated the Directed and related EU rules and were unenforceable or illegal. . . . The invalid provisions included (1) choice of law and forum . . .”).

327. See Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants*, 62 BUS. LAW. 209, 209 (2006) (“When the Court of Appeals for Versailles issued its decision in *AOL France v. UFC Que Choisir* in September 2005, it sent the message to U.S. Internet businesses that even contractual boilerplate localized for European markets may be invalid in European consumer transactions.” (emphasis added) (footnote omitted)).

328. *Dell to Improve Terms and Conditions for Consumers*, OFF. FAIR TRADING (July 6, 2006), <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2006/111-06>.

329. *OFT Forces Dell to Change PC Contracts*, COMPUTERWEEKLY.COM (July 7, 2006, 1:00 PM), <http://www.computerweekly.com/news/2240077803/OFT-forces-Dell-to-change-PC-contracts>.

330. Winn & Webber, *supra* note 327, at 224–25 (citations omitted).

331. John Oates, *Consumer Group Slams “Unfair” Software Licenses*, REGISTER (Feb. 19, 2008, 4:01 PM), http://www.theregister.co.uk/2008/02/19/eulas_unfair_investigation/.

332. *iTunes Violates Norwegian Law*, FORBRUKEROMBUDET (July 6, 2006), <http://www.forbrukerombudet.no/2006/06/11032467.0>; see also, e.g., *CafeMom Terms of Service*, *supra* note 266 (“CafeMom reserves the right to update or change these TOS at any time by posting the most current version of the TOS on the Site. Your continued use of the Site after we post any changes to the TOS signifies your agreement to any such changes.”); *Terms of Service*, HI5, http://www.hi5.com/terms_of_service.html (last updated Apr. 14, 2014) (“Hi5 reserves the right to change or amend this Agreement at any time, for any reason, or for no reason at all, at hi5’s sole discretion. The most recent version of this Agreement will be posted on the hi5 website. Although hi5 will provide

The Norwegian Consumer Ombudsman is highly critical of the contracts Norwegian iTunes-customers have to enter into in order to download music from the internet. To become iTunes customers, Norwegian consumers have to relinquish fundamental consumer rights such as the right to freely use legally purchased products. "Being an international company does not entitle iTunes to disregard the laws of the countries in which it operates. The company's standard customer contract violates Norwegian law."³³³

Norwegian Consumer Ombudsman, Bjørn Erik Thon, contended that some of iTunes's terms of use were unreasonable, violating section 9(A) of the Norwegian Marketing Control Act.³³⁴ The Norwegian consumer protection body ordered iTunes to modify its TOU to comply with Norwegian consumer law.³³⁵

In *Union Fédérale des Consommateurs v. AOL France*,³³⁶ a French court struck down thirty-one out of thirty-six clauses in AOL France's standard-form TOU.³³⁷ The court required the online provider to remove those clauses from its TOU within one month and fined the provider for each day it delayed removing the objectionable clauses.³³⁸ The French court ruled that AOL had a duty to notify its French customers of the resulting changes to its TOU and imposed a fine of €30,000 against AOL, ordering the

notice of material changes to this Agreement on the hi5 website, as a Member it is your sole responsibility to keep yourself informed of any such changes or amendments. Should a Member object to any terms and conditions of the Agreement or any subsequent changes to the Agreement or become dissatisfied with hi5 in any way, Member's only solution is to immediately: (1) discontinue use of hi5; (2) terminate their hi5 registration; and (3) notify hi5 of termination.").

333. *iTunes Violates Norwegian Law*, *supra* note 332 (quoting Norwegian Consumer Ombudsman Bjørn Thon).

334. *Tjenestevilkårene til iTunes Music Store—Markedsføringslovens § 9a*, FORBRUKEROMBUDET (May 30, 2006), http://www.forbrukerombudet.no/asset/2406/1/2406_1.pdf; *see also iTunes Violates Norwegian Law*, *supra* note 332 ("The Scandinavian [sic] Consumer Ombudsmen jointly believe that iTunes violates fundamental Nordic consumer protection principles and laws. The Ombudsmen have joined forces in an effort to change iTunes' illegal contract terms. Initially, the Norwegian Consumer Ombudsman is first in addressing problematic clauses in iTunes' customer contract. The other Scandinavian ombudsmen have also contacted iTunes, hoping to establish a joint and constructive dialogue . . . to rectify the situation.").

335. *iTunes Violates Norwegian Law*, *supra* note 332.

336. R.G. No. 02/03156, Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, 1e ch., June 2, 2004, tgin020604 (Fr.), *aff'd*, AOL France v. UFC Que Choisir, R.G. No. 04/05564, Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, JCP 2005 IV 150905 (Fr.).

337. *Id.* at 35–38.

338. *Id.* at 35. *See generally* Bradley Joslove & Andréi V. Krylov, *Standard American Business to Consumer Terms and Conditions in the EU*, 18 MICH. INT'L LAW. 1, 2–3 (2005).

online provider to publish the substantive parts of the court's judgment on its website and in three national daily newspapers.³³⁹ Some of the unenforceable terms in the AOL contract were those that:

entitle the ISP to unilaterally modify the offered service without the consumer's express consent (except where allowed by law); entitle the ISP to unilaterally modify the amount of the service fees in fixed-term agreements without the consumer's express consent, even if the consumer may terminate the agreement; limit all obligations of the ISP to best effort obligations; exonerate the ISP from its obligation to ensure access to the offered service in the event of a breakdown; allow the ISP to terminate the agreement in the event of the consumer's breach of "imprecise" obligations (e.g., "abnormal use of service") or the consumer's refusal to pay, even if such refusal is justified; make the consumer liable both for liquidated and normal damages in the event of termination of the agreement for breach; and provide that notices sent by e-mail are effective after the expiration of an excessively short period of time (e.g., two weeks), even if the consumer did not consult them.³⁴⁰

The *AOL France* case is not an isolated action but reflects a larger trend of European courts and consumer authorities refusing to enforce U.S.-style TOUs. The Cour d'Appel of Versailles affirmed the decision of the lower court on all counts that found AOL France's TOU to be unfair.³⁴¹ A Berlin court invalidated all twenty-five clauses in Google's standard-form TOU in November 2013.³⁴² What is noteworthy is that the rejected provisions in Google's standard-form TOU are broadly enforceable in the United States and in wide currency among our social media sample, including:

Google's right to unilaterally terminate its services in the case of any breach of its terms of use or policies without prior notice that would allow users to remedy the breach; Google's right to monitor content for compliance with its policies; Google's right to alter its services at its discretion; Google's right to amend its terms of use without further notice or consent; and [t]he (mutual) liability limitation for bodily harm and life, or statutory product liabilities.³⁴³

339. *AOL France*, R.G. No. 02/03156, at 35, 38.

340. Joslove & Krylov, *supra* note 338, at 2.

341. *AOL France*, R.G. No. 02/03156, at 3, 5.

342. Karin Retzer, *German Court Finds 25 Provisions in Google's Online Terms of Use and Privacy Policy To Be Unenforceable*, SOCIALLY AWARE (Dec. 19, 2013), <http://www.sociallyawareblog.com/2013/12/19/german-court-finds-25-provisions-in-googles-online-terms-of-use-and-privacy-policy-to-be-unenforceable/>.

343. *Id.*

The Berlin court also found that Google's standard contract "for the collection, use and sharing of personal data via its consent box ('I agree to the use[,] terms and I have read the privacy policy.')" violated German law.³⁴⁴ The court ruled that Google did not comply with German disclosures as to how personally identifiable data would be used by the search engine giant.³⁴⁵

A Spanish court ruled that a pre-dispute mandatory arbitration clause in a telephone service contract violated the European Union's Unfair Contract Terms Directive.³⁴⁶ Similarly, an Italian court refused to enforce a forum-selection clause in a consumer license agreement.³⁴⁷ "In Germany, consumers associations have challenged successfully the terms of CompuServe, AOL, and Microsoft: the first one was subject to a default judgment; the other two agreed to a binding cease-and-desist declaration."³⁴⁸ The lesson of these cases for social networks is that they must comply with consumer law or face costly injunctions, fines, and unfavorable publicity. As U.S.-based social networks grow globally, the one-sided TOUs they employ will be increasingly under scrutiny in EU

344. *Id.*

345. *Id.*

346. The court in *Asturcom Telecomunicaciones SL v. Nogueira* applied the Unfair Term Directive to a mobile phone subscription contract between a Spanish company, Asturcom Telecomunicaciones, and a Spanish consumer, Cristina Rodriguez Nogueira. *Asturcom Telecomunicaciones SL v. Cristina Rodriguez Nogueira*, Juz. Prim., Oct. 6, 2009 (No. C-40/08, para. 60) (Spain), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62008CJ0040>.

The mobile phone contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad. . . .

. . . .

The *Juzgado de Primera Instancia No 4 de Bilbao* expressed doubts as to whether a pre-dispute mandatory arbitration clause was compatible with EU Community consumer law. The court asked the ECJ for an opinion determining whether it could hold a hearing as to the Unfair Contract Terms Directive and whether it had power to apply *res judicata* to the domestic arbitral award. It also asked the ECJ whether the Directive gave it the power to annul arbitral awards that it deemed to be unfair. The ECJ ruled that the national court had this power, highlighting the system of mandatory rules in Directive 93/13 as predicated upon the assumption that the consumer is in a vulnerable position vis-à-vis the seller or supplier in terms of bargaining power as well as level of knowledge. [A]rticle 6 of the Directive provides national courts with a mechanism for policing unfair contract terms in TOUs. The ECJ highlighted article 6's mandatory provision, which aims to establish equality between the rights and obligations of the parties.

Rustad & Onufrio, *supra* note 32, at 1168–70 (footnotes omitted).

347. Rustad & Onufrio, *supra* note 32, at 1172–73 (refusing to enforce forum-selection clause in a smart-card license agreement).

348. *Id.* at 1088 n.9.

countries and other nations that provide mandatory consumer protections. The next Subpart examines the specific ways that social media TOUs in our sample violate European Directives, Regulations, and the national law of other countries.

3. *The European Union's Unfair Commercial Practices ("UCP") Directive*

Annex I to the UCP Directive³⁴⁹ contains the European Commission's current blacklist of unfair and overly aggressive commercial practices.³⁵⁰ Many of the blacklisted terms concern sales of goods or services. For example, a term where a trader makes "a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product" is always blacklisted and therefore unenforceable under any circumstance.³⁵¹ As a starting point, Congress should create a parallel blacklist of prohibited clauses that are per se illegal and a graylist of terms that are presumed to be illegal. Ultimately, an international convention or treaty will be required to implement this minimum consumer protection for all consumers using social networks.

4. *The European Union's Unfair Contract Terms Directive ("UCTD")*

The European Legislature enacted the UCTD because "sellers and suppliers possess a considerable advantage" over consumers.³⁵² Social networks that draft TOUs have the sole discretion to define all of the contractual terms in advance.³⁵³ The European Commission notes that the dominant party drafting standard forms has information and transactional advantages over the consumer.³⁵⁴

349. Council Directive, 2005/29/EC, 2005 O.J. (L 149) 22 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:HTML>.

350. *Id.* at Annex I.

351. *Id.*

352. Rustad & Onufrio, *supra* note 32, at 1133.

353. *Id.* at 1086–87.

354. The Commission states that the potential imbalance advantages the dominant party in two ways. First, the drafter has a potential information advantage because they know "exactly what is in the contract, whilst the other party must analyse" the form contract. Rafal Manko, *Unfair Contract Terms in EU Law: Unfair Terms Directive and Common European Sales Law*, LIBR. EUR. PARLIAMENT 1 (Sept. 19, 2013), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130624/LDM_BRI\(2013\)130624_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130624/LDM_BRI(2013)130624_REV1_EN.pdf).

Second, the dominant party also has a transaction-costs advantage because it must only pay an attorney once to draft the form contract, which can be used in countless transactions. *Id.* at 1–2. Standard-form contracts create the risk of unfair terms that will be accepted because of

The European Commission acknowledges that standard-form contracting is efficient, but regulatory oversight is necessary so that “abuses can be prevented.”³⁵⁵ The UCTD, unlike U.S. contract law, imposes a duty of readability—contracts must be drafted in plain and intelligible language.³⁵⁶ Under the plain-language principle of the UCTD, courts are to construe all ambiguities against the dominant party.³⁵⁷

The language of Directive 93/13 compels courts to apply a two-part test to determine whether a given contractual provision is unfair.³⁵⁸ To qualify as an unfair contract, there must be a significant imbalance to the detriment of the consumer and that imbalance must be “contrary to good faith.”³⁵⁹ Nevertheless, the prevailing interpretation of Directive 93/13 is that any contractual term in a consumer contract causing a significant imbalance is, by definition, contrary to the principle of good faith.³⁶⁰ Under this interpretation, a court or consumer administrative agency or authority will deploy the Directive to strike down oppressive terms in consumer contracts such as TOU agreements. The language in article 3 of the Directive addresses newly emergent terms not found in Annex I.³⁶¹ This Annex is a nonexclusive list of terms considered suspect under article 3(3).³⁶²

The UCTD blacklist invalidates many common terms in U.S.-style TOU agreements: disclaimer of warranties, limitations of licensor’s liability, rolling contracts, and the acceptance of the license agreement by performance.³⁶³ If the UCTD Annex does not address a specific contractual clause, courts are to apply a general test of unfairness.³⁶⁴ As mentioned before, the Directive is the floor, not the ceiling, for consumer protection; it gives Member States the

lack of awareness (many consumers do not think of the risk at the time of buying a good or service); lack of time (consumers do not wish to spend time reading the [standard form contract]); lack of knowledge (“small print” terms are too difficult to understand without specialist expertise); lack of bargaining power (even if the consumer wants to negotiate, the trader will refuse); [and] lack of choice (all traders offering a given good or service use similar terms in their contracts.).

Id. at 2.

355. *Unfair Contract Terms*, EUR. COMMISSION, http://ec.europa.eu/consumers/archive/cons_int/safe_shop/unf_cont_terms/index_en.htm (last visited Oct. 16, 2014).

356. Council Directive 93/13/EEC, *supra* note 291.

357. *Id.*

358. Maxeiner, *supra* note 318, at 134–35.

359. *Id.*

360. *See id.*

361. *Id.* at 135.

362. Council Directive 93/13/EEC, *supra* note 291.

363. Rustad & Onufrio, *supra* note 32, at 1136.

364. *Id.*; *see also* Council Directive 93/13/EEC, *supra* note 291 (“The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.”).

discretion to adopt more rigorous provisions.³⁶⁵ For example, a Member State could ban the terms in the Directive's graylist.³⁶⁶ However, article 4(2) provides that this test does not apply to core terms, including "the definition of the main subject matter of the contract [and] . . . the adequacy of the price and remuneration."³⁶⁷

Few U.S. companies have constructed TOUs or license agreements that will satisfy the proconsumer rules of Directive 93/13, particularly because the UCTD instructs courts to interpret ambiguities in favor of consumers. Under article 3 of the UCTD, "[a] . . . term . . . [is] unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."³⁶⁸ Table 13 (below) reveals that the UCTD blacklist would invalidate many common provisions in social media TOUs: disclaimer of warranties, browsewrap, rolling contracts, predispute mandatory arbitration, anti-class action waivers, and limitations of licensor's liability (caps on damages).

Our data demonstrates that U.S. social media providers construct TOUs that are infused with "boilerplate rights deletions schemes."³⁶⁹ Of the U.S. SNS in the sample, for example, 42% of the providers included arbitration clauses. In contrast, only eighteen of the foreign sites (13%) contained arbitration clauses, and three of these were headquartered in Canada. In the 43% of the SNS that are headquartered outside of the United States, rights-foreclosure clauses are either not included or less aggressive.

365. Article 8 of Council Directive 93/13 provides: "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer." Council Directive 93/13/EEC, *supra* note 291, at 32.

366. A contractual term appearing on a graylist is essentially a presumption of unfairness that can be overcome by contrary evidence. In contrast, blacklist terms are prohibited outright and are regarded as per se unfair. JACOBY, *supra* note 321.

367. Council Directive 93/13/EEC, *supra* note 291.

368. *Id.* at art. 3.

369. RADIN, *supra* note 128, at 16 (describing boilerplate provisions as systematic rights-deletion schemes).

TABLE 13: TOU CLAUSES LIKELY TO VIOLATE THE UCTD
BLACKLIST³⁷⁰

Social Media Clause	UCTD Blacklisted Term and Other European Consumer Law Prohibitions
<p>(1) Choice-of-Forum Clause Favoring Social Media Provider: (271 out of 329, 82%)</p>	<p>Article 3 of the UCTD strikes down contractual terms that cause a “significant imbalance in the parties’ rights.”³⁷¹ Choice-of-forum clauses favoring the provider create an imbalance benefitting the dominant party. Choice-of-forum clauses requiring consumers to submit to jurisdiction also violate the Brussels Regulation.³⁷²</p>
<p>(2) Choice-of-Law Clause Favoring Social Media Provider: (280 out of 329, 85%)</p>	<p>Article 6 of the European Union’s Rome I Regulation prohibits providers from divesting consumers of their home forum’s law.³⁷³ Article 6 mandates that the governing law for consumers must be the law of the EU Member State where the consumer is domiciled.³⁷⁴</p>

370. See Council Directive 93/13/EEC, *supra* note 291, at 33.

371. *Id.* at 31.

372. Articles 15 and 16 of the Brussels Regulation provide that if a business “pursues commercial or professional activities in the Member State of the consumer’s domicile,” the consumer may sue in the court where he or she is domiciled.” Council Regulation (EC) 44/2001, arts. 15–16, 2001 O.J. (L 12) 1, 6–7, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN>. Article 15(1)(c) extends the consumer home-forum rule to entities that “direct such activities” to the consumer’s domicile. *Id.* at 6. Article 16(1) notes: “A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.” *Id.* at 7. Similarly, Article 16(2) makes it clear that the U.S. company may only sue “in the courts of the Member State in which the consumer is domiciled.” *Id.*

373. Council Regulation (EC) 593/2008, art. 6, 2008 O.J. (L 177) 6, 11–12, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF> (stating that choice of law may not deprive consumers of consumer protection in their home court or forum).

374. The Rome I Regulation governs choice of law in business-to-consumer transactions. *Id.* Article 1(1) explains that the “Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.” *Id.* at 10. Article 6 defines a consumer as “being outside his trade or profession . . . with another person acting in the exercise of his trade or profession.” *Id.* at 11–12. The Rome I Regulation adopts the consumer’s home-court rule, which means that the governing law for consumers is where she has her “habitual residence.” *Id.* at 12.

<p>(3) Complete Disclaimer of Warranties: (282 out of 329, 86%)</p>	<p>Article 3 of the UCTD provides: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."³⁷⁵</p>
<p>(4) Browsewrap or Clickwrap Contract³⁷⁶ Formation: (216 out of 329, 66%)</p>	<p>Browsewrap violates term (i) to the UCTD annex, which provides that terms are unenforceable if they "irrevocably bind[] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."³⁷⁷ European cases have held that these contractual forms violate the UCTD.³⁷⁸</p>

375. Council Directive 93/13/EEC, *supra* note 291.

376. Christian H. Nandan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTEL. PROP. L.J. 349, 362 n.53 (2002) (describing a clickwrap agreement as one "requiring the user to click an 'accept' button before the installation will conclude").

377. Council Directive 93/13/EEC, *supra* note 291, at 33.

378. See, e.g., Union Fédérale des Consommateurs v. AOL France, R.G. No. 02/03156, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, June 2, 2004, 020604 (Fr.), *aff. d.*, AOL France v. UFC Que Choisir, Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, JCP 2005, IV, 150905 (Fr.), available at <http://www.stepto.com/attachment.html/1694/AOL+France+v.+UFC+Que+Choisir'+R.G.+N+0405564.pdf>; Giud. Pace di Partanna, 12 novembre 2001, No. 206/2001 R.G.A.C. (It.), available at <http://www.avvocatocerutti.it/partanna.htm>.

<p>(5) Rolling Contracts That Give Providers the Discretion to Modify Provisions at Will: (219 out of 329, 67%)</p>	<p>Term (c) in the UCTD annex prohibits the licensor or provider from making agreements “binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone.”³⁷⁹ Rolling contracts also violate term (j), which prohibits sellers or suppliers from altering “the terms of the contract unilaterally without a valid reason which is specified in the contract.”³⁸⁰ Rolling contracts violate term (i) because they bind the consumer without an “opportunity of becoming acquainted before the conclusion of the contract.”³⁸¹</p>
<p>(6) Predispute Mandatory Arbitration: (94 out of 329, 29%)</p>	<p>Predispute mandatory arbitration provisions could violate the Brussels Regulation’s mandatory home-court rules for consumers found in Articles 15–17³⁸² as well as the UCTD. Term (q) of the UCTD annex prohibits the dominant party from excluding or hindering the consumer’s right to take legal action or exercise “any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.”³⁸³ Predispute mandatory arbitration rules that reserve the right for the dominant party to exercise their legal rights but deny that right to the consumer are “significantly imbalanced” and violate term (b) of the UCTD annex.³⁸⁴ Predispute mandatory arbitration clauses also provide consumers with little or no information about the consequences of the clause or the cost of deciding disputes, thus violating term (i) of the UCTD annex.³⁸⁵</p>

379. Council Directive 93/13/EEC, *supra* note 291, at 33. Amelia Boss contends that rolling contracts likely violate the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles prohibit “the enforceability of terms in standard form contracts that are both unreasonable and ‘surprising.’ It is noteworthy that the UNIDROIT Principles are *not* consumer protection principles; by their own terms, the Principles apply only to commercial contracts.” Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned?*, 7 ROGER WILLIAMS U. L. REV. 167, 197 (2001).

380. Council Directive 93/13/EEC, *supra* note 291, at 33.

381. *Id.*

382. Brussels Regulation, *supra* note 372.

383. Council Directive 93/13/EEC, *supra* note 291, at 33.

384. Council Regulation (EC) 44/2001, *supra* note 375 (barring terms which have the effect of “inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him”).

385. Term (i) bars terms which have the effect of “irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.” *Id.*

<p align="center">(7) Anti-Class Action Waivers: (62 out of 329, 19%)</p>	<p>Anti-class action waivers violate term (b) of the UCTD annex.³⁸⁶ This provision is significantly imbalanced in favor of the dominant party. Some anti-class action waivers reserve the right of the dominant party to consolidate actions, which is an imbalanced provision.</p>
<p align="center">(8) Limitation of Remedies or Caps: (286 out of 329, 87%)</p>	<p>Caps on damages violate term (c) of the UCTD annex.³⁸⁷ Limitations of liability that disclaim many categories of damages violate term (b).³⁸⁸</p>
<p align="center">(9) Reduced Statute of Limitations: (39 out of 329, 12%)</p>	<p>Shortening statutes of limitations arguably violates term (b) of the UCTD annex.³⁸⁹</p>

C. Nine Blacklisted Provisions Commonly Used in Social Media TOUs

Terms in consumer contracts classified as unfair under the UCTD are not binding on consumers in any of the twenty-eight EU Member States.³⁹⁰ As mentioned before, Directive 93/13 compels

386. *See Id.*

387. *See supra* note 383 and accompanying text.

388. *See supra* note 384.

389. *See supra* note 384.

390. A growing body of European case law proves our point that clickwrap agreements are suspect under the Unfair Contract Terms Directive as well as under national law. *See, e.g.,* Union Fédérale des Consommateurs v. AOL France, R.G. No. 02/03156, Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, 1e ch., June 2, 2004, tgin020604 (Fr.), *aff'd*, AOL France v. UFC Que Choisir, R.G. No. 04/05564, Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, JCP 2005 IV

courts to apply a two-part test to determine whether a given contractual provision is unfair³⁹¹—a contractual provision that imposes a significant imbalance to the detriment of the consumer and is “contrary to good faith” will be deemed unfair.³⁹² European consumer contracts are not enforceable unless drafted in plain and intelligible language.³⁹³ As social media networks mature, the list of blacklisted terms illustrated by Table 13 will evolve to address new unfair and deceptive practices modeled on Annex I to the UCTD.³⁹⁴ Under our reform proposal, courts would presume that these social media clauses are unenforceable. Many of the most common social media TOU clauses will need to be redrafted to make them fundamentally fair to social media users.

CONCLUSION

Social networks are multi-hemispheric, as the sun never sets on these websites, which enables users to have access twenty-four hours a day, seven days a week on every continent. Prior technological advances—the automobile, the telegraph, and the telephone, for example—have brought dramatic improvements for society, but have also created new legal dilemmas. U.S. contract law lags behind these rapidly evolving social media networks, which are taking advantage of the legal laxity by aggressively foreclosing consumer rights, compromising privacy, and divesting users of their intellectual property rights. The timeworn doctrine of the manifestation of assent needs to be updated for an era in which social networks draft self-serving TOUs that systematically eviscerate consumer rights and remedies. While TOUs dress in the clothing of contracts, they are, in reality, despotic “rules to protect [new] business models.”³⁹⁵

The procedural-justice approach to consumer-law reform, which predominates in the United States, is disclosure-centered, with a reticence to mandate the content of substantive consumer clauses. As a result, social network TOUs too often rest on a procrustean bed of unfavorable disclaimers, unfair arbitration clauses, and nonconspicuous liability limitations. The emphasis of federal and state consumer law is to require greater clarity and readability so that consumers can make informed choices. The procedural justice

150905; Giud. Pace di Partanna, 12 novembre 2001, n. 15/02 (It.), available at <http://www.avvocatocerutti.it/partanna.htm>.

391. Maxeiner, *supra* note 318, at 134–35.

392. *Id.*

393. Council Directive 93/13/EEC, *supra* note 291; see also Maxeiner, *supra* note 318, at 134.

394. The Annex to the UCTD is a nonexclusive list of terms considered suspect under Article 3(3). See Council Directive 93/13/EEC, *supra* note 291.

395. KIM, *supra* note 30, at 112.

prong of our hybrid TOU reform model places a duty on social media providers to draft TOUs that are more readable.

The duty to read is a fundamental principle of U.S. contract law; we propose a concomitant duty of social media providers to make TOUs readable. Social networks should be required to achieve a minimum grade-level score, or their TOUs should be presumed as too incomprehensible to be enforceable. A subsidiary principle is that rights-foreclosure clauses such as pre-dispute mandatory arbitration, the disclaimer of warranties, caps on damages, a shortened statute of limitations, one-sided choice-of-law and choice-of-forum clauses, and class-action waivers be drafted at a reading level that is less than the minimum reading level for the TOU as a whole.

To make rights-foreclosure clauses clearer and more conspicuous, TOUs should employ standardized disclosures that are easy to locate and understand. Providers must create an index, include numbered clauses, and provide hyperlinks to websites where consumers can learn more about what rights are foreclosed³⁹⁶ before they accede to mandatory arbitration, agree to cap damages, or allow warranties to be disclaimed. In short, we propose more standardized social media boilerplate coupled with greater disclosure and readability, particularly as to rights-foreclosure provisions.

These new (to the United States) mandatory duties of disclosure and readability are only a modest first step toward reforming TOUs for the global marketplace. The second prong of our reform package is to create a European-style blacklist of prohibited substantive terms in TOUs. Under this reform, providers would not be permitted to incorporate blacklisted terms such as the elimination of warranties, caps on damages, pre-dispute mandatory arbitration clauses, anti-class action waivers, or one-sided choice-of-law and choice-of-forum clauses. The United States' undue emphasis on disclosure is simply not exportable to countries with legal regimes more focused on social welfare. Our reforms will assure that consumers can maintain their rights to redress while also assuring that social networks have a safe harbor in exporting their services to countries with mandatory consumer protections.

396. Hi5 is an example of a social media provider that gives consumers a link to the ADR provider and attempts to explain how to initiate a claim:

Information regarding the appropriate filing fee to send with the Demand to the AAA (including the possible waiver of all or part of that fee) is available at <http://www.adr.org/sp.asp?id=22039> and <http://www.adr.org/sp.asp?id=22040>, or by calling AAA Customer Service at (800) 778-7879 or AAA Case Filing Services at (877) 495-4185. Note: AAA does not provide hi5 customer support and is only able to provide information regarding initiating an arbitration proceeding against hi5.

Terms of Service, supra note 332.

At present, providers face a chaotic legal environment in which U.S.-centric TOUs are likely to be unenforceable in the European Union, Japan, New Zealand, and other nations. Social network providers have global ambitions and therefore must accommodate their TOUs to diverse legal cultures. The rise of social networks blurs national boundaries, thus creating a variety of clashing legal regimes. A social media presence automatically creates an international channel of communication, triggering the potential for cross-border litigation. Harmonizing or localizing social network consumer protections will ultimately lead to greater certainty for providers as well as fairness for social media users around the world.
