
Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking

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Adhesion contracts, many of them now in clickwrap or browsewrap form, proliferate and govern nearly every commercial transaction and most of the ways in which the modern consumer interacts with the world. Virtually every one of these contracts contains a limitation on copyright's fair use doctrine. These widespread and non-negotiated restrictions on fair use ("super-copyright" provisions) conflict with and stand as an obstacle to the achievement of federal purposes, but most courts and many commentators have rejected preemption as the appropriate doctrinal tool for addressing challenges to these provisions. This Article argues that enforcement of super-copyright provisions ought to be preempted. Preemption is the doctrine designed to address the interaction between state law and federal policy; other doctrinal approaches, such as state contract defenses and formation doctrines, do not do the work necessary to mediate between federal and state interests. In addition, preemption in this context is a way of acknowledging and emphasizing the proper institutional structure of copyright policymaking. By permitting copyright owners to contract around fair use, courts have improperly abdicated their fair use policymaking role while at the same time arrogating to themselves policymaking regarding contracting around fair use, which is a task that should be placed at Congress's door.

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INTRODUCTION

Reports of the demise of fair use and the public domain have been rampant recently. Many commentators have provided accounts of the increasing scope and strength of the rights granted to and taken by copyright owners, and the corresponding reduction in third-party uses.¹ There is no doubt that copyright has expanded by statute, by judicial decisions, and by creative business methods. Commentators have described this process as a “one-way ratchet”:² ever greater rights for copyright owners and lesser third-party rights.³ This one-way ratchet has been achieved through a variety of methods. One method is to layer protection for a work, employing copyright law *plus* patent law *plus* state law protections *plus* technological protection measures *plus* restrictive contract terms.

This Article focuses on the contract layer of protection, specifically the use of adhesion contracts by business entities to restrict third-party uses, particularly fair use.⁴ Although the efforts to expand copyright entitlements have been frequently noted in the literature, the extent and effects of the effort to restrict fair use through consumer adhesion contracts has not been fully addressed. This Article addresses the issues raised by the ubiquitous inclusion of fair use restrictions in standard form contracts (“super-copyright”

¹ See, e.g., Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 435 (2007) (“In defining the rights of creators by asking about their incentives to create, copyright law is creating and satisfying increasing expectations in a cycle that leads inexorably to the creation of more rights.”); see also Michael Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1093 (2007) (“Concerns about the problem of fair use uncertainty have intensified recently because fair use has been called upon in a variety of new situations.”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 557 (2004) (“Some scholars have persuasively argued that the scope of fair use is shrinking because courts and commentators have adopted the idea that fair use is only relevant for instances of market failure, and copyright proprietors have successfully urged that market failures are generally curable by licensing schemes, which are even easier to apply in digital markets.”).

² See, e.g., Tushnet, *supra* note 1, at 543 (“Legally, then, copyright has been a one-way ratchet, covering more works and granting more rights for a longer time.”).

³ See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1038 (2006) (“The end result is that copyright law creates an irresistible urge for publishers to claim ownership, however spurious, in everything.”).

⁴ Fair use, pursuant to the Copyright Act, 17 U.S.C. § 101 (2000), is use that is deemed “fair” or non-actionable even though it otherwise constitutes infringement. *Id.* § 107 (2000).

provisions) and concludes that the Copyright Act should preempt such provisions.

Super-copyright provisions are nearly universal. If you have surfed the web, bought a computer, done online banking, ordered flowers, purchased a plane ticket, downloaded software, listened to music on iTunes, or watched a video on YouTube, you have entered into a contract and agreed not to make fair use of the material you encountered.⁵

For example, if you bought a ticket from United.com, you agreed to download only one copy of your itinerary;⁶ if you watched a video on YouTube, you agreed not to use any material on the website without YouTube's "prior, express written consent;"⁷ and if you downloaded software, chances are you agreed not to make any unauthorized copies and agreed not to reverse engineer the program.⁸ Virtually every online experience and many face-to-face consumer transactions involve contracts that contain restrictions similar to those described above. In this way, business entities systematically convert fair uses into breaches of contract, thereby fundamentally altering the copyright balance.

Many courts and commentators have addressed the propriety of contracting around fair use, primarily in the context of software licenses and database agreements. These responses fall roughly into two camps, both of which focus generally on contract law and policy. The "freedom of contract" camp asserts that contracting around copyright is not only acceptable but is affirmatively good.⁹ Under this freedom of contract ethos, contracting around copyright law allows for

⁵ According to the copyright owner, at least, you have entered into a contract. See *infra* Part I.B. "Clickwrap" agreements are those that require the user to click an "I agree" button or box in order to begin using the site, product, or service. "Browsewrap" agreements are less obvious to the user, generally appearing under a "Terms of Use" or "Terms and Conditions" link. Browsewrap agreements purport to bind the user by virtue of her use of the website.

⁶ United Airlines, Terms and conditions, <http://www.united.com/page/article/0,6722,1003,00.html?jumpLink=%2Fterms> (last visited Oct. 11, 2007).

⁷ YouTube, Terms of Use, <http://www.youtube.com/t/terms> (last visited Oct. 11, 2007).

⁸ See, e.g., Apple Computer Inc., Apple iPod software license, <http://images.apple.com/legal/sla/docs/ipod.pdf> ("Except as and only to the extent expressly permitted in this License or by applicable law, you may not copy, decompile, reverse engineer, disassemble, attempt to derive the source code of, modify, or create derivative works of the iPod Software . . .").

⁹ I use Professor Maureen O'Rourke's terms here. See Maureen O'Rourke, *Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 77-79 (1997).

price discrimination and the efficient use and dissemination of expressive works.¹⁰ The other, and nearly diametrically opposed, response by the “public domain” camp is that permitting copyright owners to dramatically alter the baseline assumptions of the Copyright Act impermissibly broadens the scope of copyright, permits economic considerations to become forefront, reduces the public domain, and squelches rather than promotes creativity.¹¹ Nonetheless, many of these on the “public domain” side rely on contract law, particularly on the state law formation, unconscionability, and public policy doctrines, to solve the problems presented by super-copyright provisions.

To the extent that online contracts almost universally purport to limit the otherwise fair use of copyrighted works, the issue is not one of contract law but rather one of copyright policy. Those who recite the “freedom of contract” mantra fail to recognize the ways in which consumer adhesion contracts create “rights against the world,” a task within the exclusive domain of Congress.¹² Those who rely on the state contract law doctrines to police adhesion contracts are barking up the wrong tree — state contract law does not and ought not respond to questions of federal policy.¹³

Instead, preemption is the doctrine that operates to police the boundary between federal copyright law and state contract law. Online adhesion contracts have become ubiquitous and consistently contain super-copyright provisions. Given this trend, the provisions become rights against the world and, as such, conflict with or stand as an obstacle to the federal objectives regarding fair use itself, as well as the policies of balance and uniformity in the copyright system. For the most part, however, courts have refused to preempt the enforcement of state contract law in this context.¹⁴

This failure to preempt has resulted in a disruption of the appropriate copyright policymaking structure. By enforcing super-

¹⁰ Raymond T. Nimmer, *Issues in Licensing: An Introduction*, 42 Hous. L. Rev. 941, 944 (2005) (“[A]ll agreed restrictions or conditions on use are presumptively enforceable except as cabined in by antitrust, unconscionability, and other limiting contract law doctrines. This far better supports modern information markets and acknowledges the ability of individuals and markets to more effectively tailor transactions to fit actual needs than can legislative or regulatory groups.”).

¹¹ *See id.* at 944 & n.9 (“Some apparently argue that the range for enforceable conditions should be narrow and limited to the express conditions in the first-sale rules of copyright law, with no other limits permitted.”).

¹² *See infra* Part I.D.4.

¹³ *See infra* Part III.C.

¹⁴ *See infra* Part II.A.

copyright provisions, courts permit private entities to engage in fair use policymaking, which more properly belongs in the hands of the courts. At the same time, by toeing the “freedom of contract” line, courts arrogate to themselves the policy decisions regarding the Copyright Act, policy decisions that Congress, rather than the courts, ought to make.

The Article proceeds as follows: Part I describes the variety of ways in which super-copyright clauses are used to restrict the fair use of copyrighted works. It then explores the likely effects of the ubiquitous inclusion of these provisions in consumer adhesion contracts. Part II describes the preemption doctrines, and argues that most courts have not properly applied those doctrines in the copyright and contract context, neglecting to engage in the interpretive task of discerning congressional intent. In Part III, I apply this interpretive preemption approach to super-copyright provisions, concluding that enforcement of those provisions should be preempted by the Copyright Act because their operation stands as an obstacle to the federal policies of fair use, balance, and uniformity in the copyright scheme. Finally, in Part IV, I suggest some of the reasons why super-copyright provisions have not been preempted and explain why preemption makes sense from a structural perspective.

I. THE PROLIFERATION OF SUPER-COPYRIGHT PROVISIONS

This section summarizes the rough boundaries of the fair use defense, describes the variety and forms of restrictions on fair use in the online world, and notes the effect of super-copyright clauses on fair use. Nearly every online purchase, most web browsing, and the use of most online services result in a putative contract in which the consumer agrees not to engage in certain fair uses.¹⁵ While the precise terms vary, the trend is unmistakable: business entities seek to obtain

¹⁵ These contracts are commonly referred to as “clickwrap” and “browsewrap” contracts. In general, clickwrap contracts have been held enforceable. *See, e.g., Davidson & Assocs. v. Jung*, 422 F.3d 630, 638-39 (8th Cir. 2005) (refusing to preempt enforcement of clickwrap agreement); *see also* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006). Courts have found that users agree to browsewrap agreements by virtue of browsing a website and exist on nearly every website. They have increasingly been held enforceable. *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428-30 (2d Cir. 2004); *see also* Lemley, *supra*, at 460 (“[A]n increasing number of courts have enforced ‘browsewrap’ licenses . . .”). For purposes of this Article, the enforceability of these agreements is not a central issue; many of the problems with these online agreements arise regardless of their enforceability. *See infra* Part I.D.

through contract more than they can achieve through copyright law. This systemic restriction of fair uses of copyrighted material has significant implications for the substance and the structure of the federal copyright system.

A. *Fair Use in the Federal Copyright Scheme*

The Copyright Act provides relatively broad ownership of a bundle of rights in original, expressive works.¹⁶ The owner of a copyright has control over the copying, distribution, performance, and display of copyrighted material, as well as the right to prepare derivative works based on the original.¹⁷ These rights persist for the life of the author, plus an additional seventy years, or ninety-five years in the case of institutional or anonymous authors.¹⁸ Balanced against this broad grant of specific rights, the statute provides a set of limitations on those exclusive rights,¹⁹ the most significant of which is the fair use defense to a copyright infringement claim.²⁰ Section 107 of the Copyright Act contains the fair use provision, which does not set forth specific fair uses but rather lays out four non-exclusive factors courts may use in making fair use determinations.²¹ Under § 107, courts look to the purpose and character of the allegedly infringing use, the nature of the copyrighted work, the amount of the copyrighted work used, and the effect on the market.²²

Fair use performs a variety of socially and economically valuable functions, such as permitting parody and news reporting, allowing broad educational and research uses, and correcting market failures.²³

¹⁶ 17 U.S.C. § 102 (2000).

¹⁷ *Id.* § 106(1)-(6) (2000).

¹⁸ *Id.* § 302(a), (c) (2000).

¹⁹ *Id.* §§ 107-114 (2000).

²⁰ See Carroll, *supra* note 1, at 1089 (“When fashioning modern copyright law, Congress recognized that circumstances would arise in which the broad sweep of copyright would be socially undesirable, and it responded by codifying a series of limitations on copyright’s scope. Fair use is the first and most general of these limitations.” (citations omitted)); see also Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright Law*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 410 (2005) (“From its inception, the fair use doctrine has facilitated the expansion of copyright by providing a flexible limiting principle that defines the outer limits of the copyright owners’ rights.”).

²¹ 17 U.S.C. § 107 (2000).

²² *Id.*

²³ See, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. 1, 5-6 (1997) (“Several scholars have suggested that fair use should only be found where there is market

Under the fair use doctrine, literary critics may quote from the books they review;²⁴ teachers and researchers may use copyrighted materials;²⁵ and writers and comedians may parody well-known songs and TV shows,²⁶ among other things.²⁷ The fair use defense has been

failure. In the context of copyright law the market can fail for several reasons: high transaction costs associated with achieving a bargained-for [exchange], high externalities that cannot be internalized in a bargain exchange . . . or the existence of non-monetizable interest that are not factored into the bargain by the parties.”).

²⁴ The literary critic is perhaps the prototypical “fair user” of a copyrighted work, and is often the example given in explaining the fair use exception. See, e.g., William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1659 (2004) (“[T]he fair use defense is interpreted and applied on a case-by-case basis, though some rules have emerged, as we have seen, such as the right of a book reviewer to quote brief passages from the book under review, or of scholarly critics to quote from the work they are criticizing.”); Tushnet, *supra* note 1, at 544 (“If every unauthorized use of copyrighted works were infringement, many socially valuable activities would be impaired. For example, a book review would be unable to quote the book in question without permission, and permission could be withheld without a favorable review, a large payment, or both. As one way to solve this problem, courts developed the doctrine of fair use, codified in the 1976 Copyright Act.”).

²⁵ 17 U.S.C. § 107 (2000) (listing “teaching” as one example of fair use); see also *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (“[T]he ‘fair use’ defense codified at § 107 allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself for limited purposes. ‘Fair use’ thereby affords considerable latitude for scholarship and comment . . .”).

²⁶ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew’s version of Roy Orbison’s *Pretty Woman* was parody and therefore not copyright infringement under Copyright Act).

²⁷ Programmers may reverse engineer software to make new programs interoperable with existing software. Under some circumstances, reverse engineering “serves the purpose of facilitating interoperability between a platform and a complementary product” and in those cases “the courts have condoned such copying.” Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 548 (2003); see also Mark Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 129 (1999) (“[M]any software contracts purport to prohibit reverse engineering of the licensed software. These terms may conflict with a user’s apparent right under copyright law to reverse engineer copyrighted works for certain purposes.”); Jacqueline Lipton, *IP’s Problem Child: Shifting the Paradigms for Software Protection*, 58 HASTINGS L.J. 205, 207 & n.5 (2006) (“The fair use defense in particular mitigates against overbroad use of software copyrights to stifle competition in relevant markets.”) (citing *Sega Entm’t. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1514 (9th Cir. 1993) (holding that decompilation of computer program, involving copying of program, in order to produce compatible, non-infringing program is fair use)). As one of the enumerated “fair” uses under 17 U.S.C. §107, news reporting may be conducted without fear of copyright litigation, at least theoretically. Consumers may record movies and TV shows for later viewing. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding home videotaping to be fair use).

the subject of much litigation²⁸ and academic commentary,²⁹ perhaps because of its fundamental lack of clarity and predictability. Indeed, “[a]lmost every comment on the subject notes that fair use is ‘one of the most troublesome [doctrines] in the whole law of copyright.’”³⁰ The difficulty arises, at least in part, from the way fair use has been incorporated into the federal copyright scheme.

Generally, fair use operates as a defense to a copyright infringement claim.³¹ This presents the difficulty that consumers, critics, musicians, and users of all sorts cannot be certain in advance that their uses of others’ works will be deemed “fair.”³² Instead, a potential fair user must hope either that the copyright owner does not file an infringement claim or that the user can prevail on the defense, a risky and expensive gamble. In addition, there is no “safe harbor” or other a priori acceptable fair use.³³ Instead, claims of fair use are decided on an ex post, case-by-case basis.³⁴ Although this unpredictability has been widely criticized as not providing sufficient certainty, thereby

²⁸ See, e.g., *Campbell*, 510 U.S. at 578-81 (addressing parody); *Sony*, 464 U.S. at 423-24 (addressing home videotaping and “time-shifting”); *A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1014-18 (9th Cir. 1994) (addressing sampling, space-shifting, and authorized uses).

²⁹ See generally William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975 (2002); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); *Sag*, *supra* note 20; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990).

³⁰ *Sag*, *supra* note 20, at 385 (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939)).

³¹ 17 U.S.C. § 107 (2000) (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”). There is some dispute about whether fair use is a defense or a right, but the distinction is unimportant here.

³² Carroll, *supra* note 1, at 1090 (“While the doctrine’s attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet speakers, and other[s] who require use of another’s copyrighted expression in order to communicate effectively.”).

³³ There have been some proposals for a “fair use arbitration board,” see Carroll, *supra* note 1, at 1090-91, and a safe harbor for fair use similar to the safe harbor of the Securities Act, see Tessa Pope, *A Fair Use Safe Harbor: A Legislative Exercise 2* (Dec. 2006) (unpublished student paper, on file with author).

³⁴ See *supra* note 31.

chilling fair uses,³⁵ the flexibility of the fair use doctrine is also considered one of its strengths.³⁶ The fair use doctrine transfers significant policymaking authority to the courts, permitting more flexibility than a legislative response would allow and establishing a system more responsive to technological change.³⁷

Although the fair use doctrine is both flexible and unpredictable, some generalizations can be made about the types of uses that are often deemed fair. As a general matter, the fair use doctrine provides that certain uses are fair in the absence of authorization by, and even over the objections of, the copyright owner.³⁸ Not all unauthorized uses are fair, of course, but a whole variety of “personal” uses most likely would be deemed fair under the balancing test set forth in § 107. For example, courts have determined that copies made for back-up or home use,³⁹ sharing, or linking,⁴⁰ may be fair uses, particularly if these uses are not considered commercial and do not affect the market for the original.⁴¹ Even a variety of commercial uses may be considered fair, such as excerpts used in the course of news reporting, citations and quotations for the purposes of criticism or review, and copying for parody or other speech-related purposes.⁴² This is an inherently

³⁵ See Carroll, *supra* note 1, at 1095 (“The treatise writers are in accord that the fair use doctrine produces significant *ex ante* uncertainty.”). Carroll describes some of these chilling effects: “The costs of fair use uncertainty are manifest. Potential fair uses routinely are deterred from engaging in a desired use by the uncertain scope of the fair use doctrine coupled with the high costs of litigation and the potentially enormous statutory damages that a court could award if it disagrees with the user’s fair use judgment.” *Id.* at 10. Professor David Nimmer has described this doctrine as no better than a “dartboard” for courts. David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003).

³⁶ See, e.g., *Campbell v. Acuff-Rose*, 510 U.S. 569, 577 (1994) (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” (citations omitted)).

³⁷ *Sag*, *supra* note 20, at 396 (“Fair use is the mechanism by which Congress transferred significant policymaking power to judges in order to allow copyright to adapt to ongoing social and technological change more effectively than a purely legislative response would allow.”).

³⁸ *Campbell*, 510 U.S. at 585 n.18 (“If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use.”).

³⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984).

⁴⁰ See, e.g., Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1273 (2001) (“[M]ost linking is lawful, even where the linked site claims the right to authorize and control links.”).

⁴¹ See *Sony*, 464 U.S. at 417.

⁴² See, e.g., *Campbell*, 510 U.S. at 584 (“The language of the statute makes clear

incomplete list, as the statute provides an open-ended vision of fair use, and the doctrine is clearly meant to evolve as consumer preferences and behavior, technology, and business models change over time.⁴³ In any event, fair use is an integral element of the federal copyright system.⁴⁴

B. *Super-Copyright Provisions in the Digital Age*

The use of consumer adhesion contracts has become an integral part of modern business practice. Today, they come in a variety of forms. “Shrinkwrap” agreements arrive in the box when you order a product over the phone or online. “Clickwrap” agreements require you to click an “I Agree” button on a website before using the website or the product or service you have requested. “Browsewrap” agreements are those that are found under the “terms of use” or “terms and conditions” hyperlinks on websites, conditioning use of the website on agreement to the terms. As described below, all of these types of adhesion contracts regularly purport to restrict the otherwise fair uses that may be made of expressive works.

Much of the literature on adhesion contracts posits that very few people read, much less understand, form contracts; this view certainly is supported by common sense.⁴⁵ If consumers do read the provisions,

that the commercial or non profit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”).

⁴³ See Sag, *supra* note 20, at 397 (“In 1976, Congress decided to alter the structure of copyright law to make it more responsive to technological change. Congress replaced potentially limited and technologically specific rights with rights that were more broadly expressed, in order to allow copyright law to be more flexible in its treatment of new technologies.”).

⁴⁴ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (stating fair use is “a necessary part of the overall design” of copyright law); Sag, *supra* note 20, at 382 (“Fair use plays a vital but misunderstood role in copyright law.”).

⁴⁵ Professor Todd Rakoff pinpointed this issue and described its rationality in his seminal work on form contracts. Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1226 (1983) (“Once form documents are seen in the context of shopping (rather than bargaining) behavior, it is clear that the near-universal failure of adherents to read and understand the documents they sign cannot be dismissed as mere laziness. In the circumstances, the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest.”). Recently, one end user license agreement (“EULA”) drafter apparently went so far to offer \$1000 to the first reader of the EULA who sent an email to a particular address. It took four months before someone claimed the money. See Proof That (Almost) No One Reads End User License Agreements, http://www.techdirt.com/articles/20050223/1745244_F.shtml (Feb. 23, 2005, 17:46

they are likely to comply with the terms to some extent. Some users might assume that their activity would not be detected or pursued by the copyright owner, but it seems safe to assume that the language of the agreements would deter many.

Assuming consumers read the terms of adhesion contracts, it is hard to imagine that most consumers would have the knowledge or incentive to search for, much less negotiate about, the provisions restricting fair use. Consumers may search for price terms, and for type and quality of service or product, but, on an individual basis, it would rarely be rational for them to bargain over super-copyright clauses.⁴⁶

Some commentators have argued that even if consumers do not read or understand adhesion contract terms, consumers have constructive knowledge of, and thus constructively assent to, the terms. Under this view, there are a small number of people, the “readers,” who take the time to read and perhaps police and negotiate the terms. These readers act as proxies for the majority of non-readers.⁴⁷ This argument is used in support of the enforceability of adhesion contracts because it imputes some level of knowledge to consumers engaging in the transactions, and it thus responds to the contention that adhesion contracts are unfair.

In the context of super-copyright clauses, however, the argument might go the other way. The “readers” are unlikely to negotiate or shop for super-copyright provisions because the provisions generally

PST) (“Apparently in an attempt to prove that no one reads end user license agreements (EULAs), anti-spyware firm PC Pitstop buried a note in its own EULA, saying they would give \$1000 to the first person who emailed them at a certain address. It only took four months and over 3000 downloads before someone noticed it and sent an email (and got the \$1000).”).

⁴⁶ There is a great deal of debate about the extent to which consumers read and shop for the terms of standard form contracts. For an overview of the scope of that debate, see Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 975-82 (2005). Business entities might well be more likely to include terms favorable to them and unfavorable to consumers if they believe consumers will not read or bargain over those terms. See *id.* at 978 (“Buyers may ignore terms that are not salient, that pose minimal risks, or about which they have insufficient information, and it is plausible that sellers could systematically capture quasi-rents with respect to those terms. Where potential losses to any given consumer are small, the likelihood of either reputational or legal redress may be so remote that sellers essentially face little downside risk from efforts to exploit.”).

⁴⁷ Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WISC. L. REV. 679, 691 (“Much of the legal literature on [standard form contracts] . . . has dealt with the conditions under which the presence of reading buyers can serve as a proxy for non reading buyers.”).

are too minor on an individual basis — their effects are problematic in the aggregate. In addition, if the “readers” reduce their use of copyrighted materials because of the contract terms, the inclusion of the super-copyright provisions will have the intended effect: less third-party use of copyrighted materials.⁴⁸ To the extent that the behavior of the readers influences the behavior of the non-readers, the effects will only be compounded.

Even if the average consumer neither reads nor understands the contract terms, many consumers likely assume that the terms of the agreements they encounter are favorable to the copyright owner and unfavorable to the consumer. They are likely to restrict their activities accordingly, limiting their engagement in otherwise fair uses. Even if the contracts are unenforceable or unenforced, they are likely to have *in terrorem* effects, frightening readers into complying with the terms and deterring otherwise lawful activities. In any event, the result over time will be an overall reduction in the fair uses engaged in by individuals.

Super-copyright provisions are everywhere. In the course of a typical day or week, the modern consumer regularly encounters numerous standard form contracts that overwhelmingly favor the drafting party in a variety of respects.⁴⁹ Nearly all of these contracts limit the consumer’s right to make fair use of copyrighted works.⁵⁰

If our prototypical consumer merely views the Orbitz website, for example, she is deemed to have entered into a contract. The “Terms

⁴⁸ On the chilling effects of both valid and invalid assertions of copyright rights, see Mazzone, *supra* note 3, at 1058-71. It is not just copyright holders’ rights, but the rights of the public — in the public domain, in fair use, and in the compulsory licensing scheme — that provide incentives and opportunities for the creation and dissemination of creative and expressive works.

⁴⁹ These contracts typically contain a variety of restrictions on the uses of copyrighted works. Many include restrictions on the first sale doctrine. 17 U.S.C. § 109 (2000) (“Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”). Many of the contracts also would constitute “copyfraud” as defined by Professor Jason Mazzone, restricting uses of un-copyrightable and public domain materials. See Mazzone, *supra* note 3, at 1028 (“Copyfraud . . . refers to claiming falsely a copyright in a public domain work. . . . False assertions of copyright are everywhere.”).

⁵⁰ This trend is not limited to online contracts. See Mazzone, *supra* note 3, at 1049 (“By leveraging the vagueness of these doctrines, publishers regularly interfere with de minimis copying and fair uses of copyrighted works. Books published nowadays carry copyright notices that suggest de minimis copying and fair use are nonexistent.”).

and conditions” hyperlink at the bottom of the homepage takes the reader to a form contract that states: “By accessing, using or obtaining any content, products, or services through these websites, you agree to be bound by these terms. If you do not accept all of these terms, then please do not use these websites.”⁵¹ Presented in electronic form, this is now the prototypical adhesion contract. The consumer may be unaware of the contract. If she is aware, she has no ability to change or negotiate the terms. Instead, they are presented on a take-it-or-leave-it basis.

In the new prototypical contract of adhesion, the consumer agrees not to use the content of the website in a variety of ways that might be fair uses under the Copyright Act.⁵² The Orbitz agreement provides that the user of the website may not make more than one copy of the content, may not transmit any of the content, and may not use a “frame or border . . . to enclose any portion of the Site,” among other things.⁵³

I have made two copies of the Orbitz contract for my files, I have transmitted the material via e-mail to a reader and to my research assistant, and I have included content in a footnote, which might be deemed a “frame or border.”⁵⁴ Each of these uses likely would be deemed fair under § 107 of the Copyright Act, primarily because they are personal uses and have no effect on the market.⁵⁵ Orbitz may, however, decide that each of these uses is a breach of its browsewrap contract.

If Orbitz objects to my activities, it is likely to send a cease-and-desist letter, threatening me with claims for breach of contract and copyright infringement.⁵⁶ While the copyright infringement claim might not be particularly strong, I am likely to be dissuaded from pursuing any defenses I may have because of the risk of incurring copyright’s statutory damages, which can be substantial, and the costs of litigation.⁵⁷ Orbitz may prefer the statutory damages, but the

⁵¹ Orbitz, Terms and Conditions, <http://www.orbitz.com> (follow “Terms and conditions” hyperlink) (last visited Oct. 11, 2007).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 17 U.S.C. § 107 (2000).

⁵⁶ See, e.g., Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited Oct. 11, 2007) (collecting cease-and-desist letters sent by copyright owners).

⁵⁷ See 17 U.S.C. § 504(c)(1) (2000) (“[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the

contract claim provides additional leverage, and, presumably like most other consumers, I am unlikely to put up a fight.

Contracts like this proliferate in the modern world. Much of the attention, in the courts and in the literature, has focused on software licenses, but super-copyright provisions appear in connection with nearly every product or service purchased online or over the phone, and on almost every website.⁵⁸ One of the most common limitations is a provision stating that the contents or material may be used only for “personal” or “noncommercial” purposes.⁵⁹ While it is certainly true that many “fair” uses are personal or noncommercial, there are also a whole variety of non-personal or commercial uses that would be considered fair uses, including parody, news reporting, and many educational uses. Thus, the generic and ubiquitous limitation to personal and noncommercial uses constitutes a significant restriction on the scope of fair use as defined under the statute and elaborated on in case law.

C. Representative Super-Copyright Provisions

I reviewed hundreds of online contracts, both clickwrap and browsewrap agreements, and this section includes some representative examples of super-copyright provisions in those agreements. While this is an anecdotal rather than exhaustive sample, significant and interesting trends are obvious. With few exceptions, the contracts consumers encounter on a regular basis restrict fair uses in significant ways. Within industries, the language is strikingly similar and sometimes identical, indicating that, in many areas, there is no market for fair use restrictions; one cannot reject one retailer over another with respect to those terms. There is, however, no absolute uniformity. To determine what uses are acceptable, one would have to look at the language of each contract to be certain.

If you get your daily news from the Internet, you agree to numerous restrictions on the fair use of the content you encounter on those websites, something that is particularly alarming given the fact-based nature of much of the content and the free speech concerns attendant to the reporting and dissemination of news and current events. Facts and news items generally are unprotected by copyright law and, in many cases, constitute core political speech. As non-state actors, private entities generally are not subject to First Amendment

action . . .”).

⁵⁸ All of the agreements cited herein are on file with the author.

⁵⁹ See *infra* Part I.C.

constraints, but copyright policy nonetheless can take account of the effects on speech, culture, and political discourse.⁶⁰ Super-copyright provisions often include restrictions that implicate these concerns.

Many news and information providers, for example, attempt to restrict the use of material including facts, news reports, and other purely factual writings. For example, CNN's Interactive Service Agreement includes the following terms:

- "Subscriber may not modify, publish, transmit, participate in the transfer or sale, create derivative works, or in any way exploit, any of the content, in whole or in part."⁶¹
- "Subscriber may download copyrighted material for Subscriber's personal use only."⁶²

Many other online news providers employ browsewrap agreements.⁶³ Encyclopedia.com, the Associated Press, The New York

⁶⁰ See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (asserting that "copyright law contains built-in First Amendment accommodations"); cf. Tushnet, *supra* note 1, at 538 (discussing some conflicts between First Amendment values and assertions of copyright).

⁶¹ CNN Interactive Service Agreement, http://www.cnn.com/interactive_legal.html (last visited Oct. 12, 2007).

⁶² *Id.* CNN's agreement also states, "Except as otherwise expressly permitted under copyright law, no copying, redistribution, retransmission, publication or commercial exploitation of downloaded material will be permitted without the express permission of CNN and the copyright owner. In the event of any permitted copying, redistribution or publication of copyrighted material, no changes in or deletion of author attribution, trademark legend or copyright notice shall be made. Subscriber acknowledges that it does not acquire any ownership rights by downloading copyrighted material." *Id.* Note that this provision purports to respect uses "expressly permitted by copyright law," but the provision conflicts with the provisions of the agreement that expressly prohibit otherwise lawful uses. It is also far from clear what uses are *expressly permitted* by copyright law. Is fair use a use "expressly permitted" or is news reporting, for example, not one of the uses "expressly permitted"? What if I want to parody, for commercial purposes, CNN's coverage of the Iraq war? Is that "expressly permitted" by copyright law? Certain commercial parodies have been deemed fair use, but it is difficult to conclude that parody as a general matter is "expressly permitted by copyright law." See *Campbell v. Acuff-Rose*, 510 U.S. 569, 1168 (1994).

⁶³ See, e.g., The Associated Press, Terms and Conditions of Use, <http://www.ap.org/pages/about/terms.html> (last visited Oct. 5, 2007) ("By using this Web site you represent that you have read and understand the terms and conditions and that you agree to be bound by these terms and conditions as set forth below . . . (5) Except as provided in this agreement, you may not copy, reproduce, publish, transmit, transfer, sell, rent, modify, create derivative works from, distribute, repost, perform, display, or in any way commercially exploit the Materials carried on this site,

Times, to name just a few representative examples, use language in their contracts restricting uses to “personal” or “noncommercial” uses and requiring permission for any third-party use. These provisions directly implicate the speech values enumerated above. Encyclopedia.com’s terms include the following: “You will not modify, publish, distribute, transmit, participate in the transfer or sale, translate, create derivative works, or in any way exploit other than as set forth herein, any of the content, tools or technology, in whole or in part, found on the Services.”⁶⁴

Wikipedia, the open-source, open access encyclopedia, is one of the few exceptions to this otherwise overwhelming trend.⁶⁵ As an open-source and open access site, Wikipedia encourages copying, sharing, and modification of its content and employs the open-source license, indicating that it permits the modification and use of the material on the site:

The purpose of this License is to make a manual, textbook, or other functional and useful document ‘free’ in the sense of freedom: to assure everyone the effective freedom to copy and redistribute it, with or without modifying it, either commercially or noncommercially. Secondly, this License preserves for the author and publisher a way to get credit for their work, while not being considered responsible for modifications made by others.⁶⁶

The open-source movement, although significant in many ways, remains the minority trend in information licensing.⁶⁷ The openness of Wikipedia and similar sites is far outweighed by the multitude of information providers seeking to restrict the uses of their materials.

nor may you infringe upon any of the copyrights or other intellectual property rights contained in the Materials.”).

⁶⁴ HighBeam Encyclopedia, Terms and Conditions, <http://www.encyclopedia.com/terms.aspx> (last visited Oct. 11, 2007). Other terms include: “You shall make no other use of the content without the express written permission of HighBeam Research,” as well as, “You shall not make any changes to any content that you are permitted to download under this Agreement, and in particular you will not delete or alter any proprietary rights or attribution notices in any content.” *Id.*

⁶⁵ Wikipedia, <http://www.wikipedia.org/> (last visited Oct. 12, 2007).

⁶⁶ Wikipedia, Text of the GNU Free Documentation License, http://en.wikipedia.org/wiki/Wikipedia:Text_of_the_GNU_Free_Documentation_License (last visited Oct. 12, 2007).

⁶⁷ I reviewed hundreds of online agreements, and the overwhelming majority of them contained super-copyright provisions.

In a whole variety of less weighty circumstances, consumers agree to similar contractual restrictions on their fair use of copyrighted materials. For example, if you buy books online, you subject yourself to a variety of restrictions on fair use. If you use Amazon.com, you may only use the site's material in limited ways. By using the site, you agree to the following term, among others: "Amazon.com grants you a limited license to access and make personal use of this site and not to download (other than page caching) or modify it, or any portion of it, except with express written consent of Amazon.com."⁶⁸ Other online booksellers include similar restrictions⁶⁹ on uses that would otherwise be deemed fair: copying, modifying, discussing, criticizing, and parodying.⁷⁰

If you are a sports fan, you also may be quite limited in the fair uses you can make of a variety of copyrighted materials. If you use the National Football League's website or "services" you agree to limit your fair use of the material on the website.⁷¹ Baseball, basketball, and hockey fans are similarly limited.⁷² Moreover, if you buy flowers, gifts,

⁶⁸ Amazon.com, Conditions of Use, <http://amazon.com/gp/help/customer/display.html/002-7873190-1136031?ie=UTF8&nodeId=508088> (last visited Oct. 12, 2007). The Conditions of Use also include: "This site or any portion of this site may not be reproduced, duplicated, copied, sold, resold, visited, or otherwise exploited for any commercial purpose without express written consent of Amazon.com." *Id.*

⁶⁹ See, e.g., Barnes & Noble.com, Terms of Use, http://www.barnesandnoble.com/include/terms_of_use.asp?z=y (last visited Oct. 12, 2007) ("Barnes & Noble.com grants the User a limited, nonexclusive, revocable license to access and make personal, noncommercial use (unless User has a business relationship with Barnes & Noble.com) of the Barnes & Noble.com Site. . . . The foregoing licenses do not include any rights to: modify, download (other than page caching), reproduce, copy . . .").

⁷⁰ See *supra* Part I.A.

⁷¹ NFL, Help, <http://www.nfl.com/help/terms> (last visited Oct. 12, 2007) ("Your use of the Service constitutes your acceptance of the Agreement."). The restrictions include: (1) "Under applicable copyright laws, you are prohibited from copying, reproducing, modifying, distributing, displaying, performing or transmitting any of the contents of the Service for any purposes;" and (2) "Any reproduction, copying, or redistribution for commercial purposes of any materials or design elements of the Service is strictly prohibited, without the prior written consent of the NFL PARTNERS." *Id.* Many of these restrictions also might constitute "copyfraud" — improper assertions of copyrights in the public domain. See Mazzone, *supra* note 3, at 1041.

⁷² Fans who use the Colorado Rockies' website agree to the following: "Except for downloading one copy of the Materials on any single computer for your personal, non-commercial home use, you must not reproduce, prepare derivative works based upon, distribute, perform or display the Materials without first obtaining the written permission of MLBAM. Materials must not be used in any unauthorized manner." Colorado Rockies, Terms of Use Agreement, http://mlb.mlb.com/col/help/col_help_about_terms.jsp (last visited Oct. 12, 2007). Under the NBA.com Terms of

or clothes online you have agreed to refrain from fair uses of copyrighted materials.⁷³ If you buy tickets online, you have limited fair use.⁷⁴ When you watch or post a video on YouTube, you agree⁷⁵ not to “copy or distribute any part of the Website in any medium without YouTube’s prior written authorization.”⁷⁶ That is, the entity

Use agreement, “You may download material displayed on the Site to any single computer only for your personal, noncommercial use, provided you also maintain all copyright and other proprietary notices contained on the materials. You may not, however, distribute, reproduce, republish, display, modify, transmit, reuse, repost, or use any materials of the Site for public or commercial purposes on any other Web site or otherwise without the written permission of the Operator.” NBA.com, Terms of Use, <http://www.nba.com/news/termsfuse.html> (last visited Sept. 27, 2007). The Philadelphia Flyers, a hockey team, contain the following provision in their website’s Terms of Use agreement: “Except for downloading one copy of the Materials on any single computer for your personal, noncommercial home use, you must not reproduce, prepare derivative works based upon, distribute, perform or display the Materials without Wachovia obtaining the written permission of CSLP.” Philadelphia Flyers: The Official Web Site, <http://flyers.nhl.com/team/app/?service=page&page=NHLPage&id=7613> (last visited Oct. 11, 2007).

⁷³ See, e.g., 1800Flowers.com, Terms of Use, <http://ww21.1800flowers.com/template.do?id=template8&page=9003> (last visited Oct. 12, 2007) (“You may not modify, remove, delete, augment, add to, publish, transmit, participate in the transfer or sale of, create derivative works from, or in any way exploit any of the Content, in whole or in part. If no specific restrictions are displayed, you may use the content only for your personal noncommercial use and make copies of select portions of the Content, provided that the copies are made only for your personal use and that you maintain any notices contained in the Content, such as all copyright notices, trademark legends, or other proprietary rights notices.”).

⁷⁴ See, e.g., Tickets.com, Website Terms of Use, http://www.tickets.com/aboutus/user_agreement.html (last visited Oct. 12, 2007) (“You will not download or copy any content displayed on this website for purposes other than preserving information for your personal use, without the written permission of the Company.” And: “You may not modify, publish, transmit, participate in the transfer or sale, create derivative works, or in any way exploit, any of the content, in whole or in part. If you are a consumer, you may download copyrighted material for your personal use only. Except as otherwise expressly permitted under copyright law, no copying, redistribution, retransmission, publication or commercial exploitation of downloaded material will be permitted without the written permission of the Company (and the copyright owner if other than the Company).”).

⁷⁵ YouTube, *supra* note 7 (“BY USING AND/OR VISITING THIS WEBSITE (collectively, including all Content available through the YouTube.com domain name, the ‘YouTube Website’, or ‘Website’), YOU SIGNIFY YOUR ASSENT TO BOTH THESE TERMS AND CONDITIONS (the ‘Terms of Service’) AND THE TERMS AND CONDITIONS OF YOUTUBE’S PRIVACY NOTICE, WHICH ARE PUBLISHED AT <http://www.youtube.com/t/privacy>, AND WHICH ARE INCORPORATED HEREIN BY REFERENCE. If you do not agree to any of these terms, then please do not use the YouTube Website.”).

⁷⁶ See *id.* (“YouTube hereby grants you permission to use the Website as set forth in this Terms of Service, provided that: (i) your use of the Website as permitted is

whose business model relies on the copying and distribution of the copyrighted material of thousands, if not millions, of people, expects you to refrain from copying or distributing *any* part of its content for *any* reason.

In short, super-copyright provisions appear everywhere, in connection with a multitude of daily activities engaged in by millions of people. Other than a few Creative Commons and open-source agreements, I encountered not a single agreement that gave users *more* rights than those that would otherwise accrue under the Copyright Act, and a sparse few that do not seek to alter the baseline fair use principles.

This is neither a quantitative study nor an exhaustive list, but it is anecdotally compelling. Many of these examples are mundane and, individually at least, quite minor. But it is the very minor and mundane character that makes it easier for businesses to insert such terms into agreements without protest. Although these terms may rarely be enforced, at least for now, their consistent inclusion and their consistent, but not uniform, language indicates that the lawyers or website developers who are including these terms seek to reserve their rights to bring breach of contract actions (or to send cease-and-desist letters), possibly coupled with copyright infringement claims seeking copyright's statutory damages.⁷⁷

solely for your personal, noncommercial use; (ii) you will not copy or distribute any part of the Website in any medium without YouTube's prior written authorization" And: "Content on the Website is provided to you AS IS for your information and personal use only and may not be used, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners. YouTube reserves all rights not expressly granted in and to the Website and the Content. You agree to not engage in the use, copying, or distribution of any of the Content other than expressly permitted herein, including any use, copying, or distribution of User Submissions of third parties obtained through the Website for any commercial purposes.").

⁷⁷ 17 U.S.C. § 504 (2000) ("(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000").

D. The Effects of Super-Copyright Provisions

It is perhaps not surprising that all of these agreements trend the same way — toward more protection for rights' owners. It is only logical to try to control the use of one's "property," and digital copying has made it increasingly difficult to exert that control.⁷⁸ Copyright owners are, sometimes justifiably, concerned about digital copying destroying the value of their expressive works. A layering approach, employing copyright *plus* contract *plus* technological protection measures *plus* other legal protections, is a "belt-and-suspenders" method of increasing control. The super-copyright clauses present in nearly all consumer adhesion contracts is part of this approach. Their ubiquitous inclusion may also be the result of risk-averse lawyering and the copying of others' boilerplate language.⁷⁹

In this section, I draw some conclusions about the effects of the proliferation of super-copyright provisions. Freedom of contract is not the only principle implicated by the proliferation of these contracts.⁸⁰ Indeed, there are significant negative externalities

⁷⁸ I do not intend to engage here in the question of whether intellectual property is property, though others have addressed this issue. See Stephen L. Carter, *Does it Matter Whether Intellectual Property is Property?*, 68 CHI-KENT L. REV 715, 715 (1993).

⁷⁹ Discerning these contract drafters' intent is difficult, but it is also difficult to imagine that the provisions are not intended to restrict fair uses. The restrictions on the use of expressive materials are ubiquitous and consistently favor owners over users. Presumably, the goal is to reduce the use of the websites' content and to chill both fair and unfair uses by explicitly or implicitly threatening legal action if consumers fail to comply with the adhesive contract terms. Content owners might claim that the clauses' purpose is to protect against significant commercial exploitation, such as widespread unauthorized use and distribution, but the contracts' language does not reflect this narrower concern. Instead, the language is broad and far-reaching.

In addition, the language reflects risk-averse behavior by the entities drafting and promulgating these contracts. The vast majority of the fair (and unfair) uses in which consumers might engage are unlikely to negatively affect the commercial entities' bottom line. It is hard to imagine, for example, that my copying a story from CNN's website for use in my trademark class, which is likely to be deemed fair use, results in any cognizable loss. Similarly, my parody of Fox News's coverage of the Iraq war might, conceivably, affect Fox's bottom line, but probably not, and that sort of use is clearly within the core protection of the fair use doctrine (not to mention the First Amendment).

Finally, there is little disincentive to the inclusion of super-copyright provisions in a standard form contract because few will challenge the provisions. This is a way for copyright owners to "reserve their rights," in a way, to bring a contract claim along with a copyright claim if the use of the work is deemed harmful, to the bottom line, to the company's image, or to some other interest.

⁸⁰ Along with many others, I am both skeptical of adhesion contracts (and more

associated with the restriction of fair uses in standard form contracts. Some of these include: (1) chilling fair uses of copyrighted works, which means less creation, less speech, and less “Progress;”⁸¹ (2) the potential narrowing of the fair use doctrine itself; (3) a shift in fair use policymaking from Congress and the courts to business entities, resulting in fewer fair use decisions, and thus reduced flexibility in the law; and (4) the de facto creation of rights against the world as the provisions operate nearly universally, control all access to the works, and are consistently one-sided.

1. Chilling Fair Use

For those who read the adhesion contracts that accompany nearly every product and service these days, super-copyright provisions are likely to reduce the number of fair uses by third parties. Even non-readers may be deterred from engaging in fair uses because their actions may be affected by “readers” and because *in terrorem* effects are likely.⁸² For the risk-averse, it is always better to err on the side of caution.

Professor Lawrence Lessig and others have described this chilling effect as part of the “permission” or “clearance culture.”⁸³ Rather than

so as the level of constructive assent decreases) and appreciative of the efficiency effects of such contracts. See, e.g., Randy Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 639 (2002) (“Ever since Friedrich Kessler dubbed them ‘contracts of adhesion,’ form contracts have been under a scholarly cloud . . . [M]ost contracts professors and practitioners also know that form contracts make the world go round.”) (quoting Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629 (1943)). Like Barnett, I contend that contracts of adhesion should generally be enforced but that there is justification for policing their terms more closely. See *id.* at 627 (“[F]orm contracts can be seen as entirely legitimate — though some form terms may properly be subject to judicial scrutiny that would be inappropriate with nonform agreements.”).

⁸¹ U.S. CONST. art. I, § 8, cl. 8.

⁸² See *supra* Part I.D.

⁸³ See LAWRENCE LESSIG, *FREE CULTURE* xiv (2004); see also PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* 29 (2004), available at http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf (describing “[t]he thicket of rights documentary filmmakers confront, and the clearance culture that generally shapes their responses”); Mazzone, *supra* note 3, at 1030 (“[P]ublishers and owners also restrict copying and extract payment from individuals who do not know better or find it preferable not to risk a lawsuit. These circumstances have produced fraud on an untold scale, with millions of works in the public domain deemed copyrighted and countless dollars paid out every year in licensing fees to make copies that could be made for free. Imprecise standards

risking litigation, consumers and users of copyrighted works are much more likely to seek permission and pay for the right to use works. Super-copyright clauses reinforce the notion that nearly all uses of expressive works must be authorized.

In his article addressing false assertions of copyright in public domain works, Professor Jason Mazzone describes some of the effects of “copyfraud.”⁸⁴ Mazzone discusses the ways in which copyfraud “undermines copyright’s purpose” when “publishers leverage copyright law to expand the monopoly beyond that granted to authors in the name of creativity.”⁸⁵ The effects of super-copyright provisions are likely to be similar. For example, professors now often seek permission and pay licensing fees for all the materials included in course reading packets, even if the use would otherwise be fair.⁸⁶ Another example is the clearance required for the inclusion of material in documentary films. Neither the filmmakers nor the producers and insurers feel comfortable relying on the fair use doctrine or the public domain status of the materials; the costs of litigation are simply too high. Filmmakers, therefore, either limit their expression accordingly, or pay to use every piece of third-party material.⁸⁷

The effect of super-copyright provisions will be similar: when in doubt, consumers are likely to restrict their use or seek permission, avoiding the risks of litigation and contributing to the clearance culture.

2. Narrowing the Doctrine

In addition to changing fair use norms, the widespread bargaining away of the right to make fair use of copyrighted materials may ultimately affect the scope and substance of the fair use doctrine itself. As Professor James Gibson has described, there is a direct connection between licensing practices and the types of uses deemed fair under

governing de minimis copying and fair use exacerbate copyfraud by deterring even limited reproduction of works marked as copyrighted.”).

⁸⁴ Mazzone, *supra* note 3, at 1059-63.

⁸⁵ *Id.* at 1059-60.

⁸⁶ *Id.* at 1061 (noting that professors now seek permission to copy “even when copying public domain material or making fair use of copyrighted materials”).

⁸⁷ *Id.* at 1068 (“In addition to finding themselves generally unable to rely upon fair use of copyrighted works, filmmakers can find it hard to use public domain works. . . . A popular guide for independent filmmakers written by three entertainment lawyers advises against using any kind of prior footage because of an inherent ‘clearance nightmare.’”).

§ 107.⁸⁸ “[The] practice of unneeded licensing feeds back into doctrine through one final uncontroversial premise: the fair use defense looks to the existence *vel non* of a licensing market when defining the reach of the copyright entitlement.”⁸⁹ In essence, the more often people pay to engage in certain kinds of uses — that is, the more there is a licensing market for certain uses — the less likely the use will be deemed “fair.” Contractual restrictions on fair use are likely to function in this way. As consumers exchange their fair use rights for a price reduction, the more likely a court is to find a market for those otherwise fair uses.⁹⁰ Thus, over time the proliferation of super-copyright provisions will cause a “doctrinal creep” by which the scope of the fair use defense narrows because of this widespread industry practice.⁹¹

3. Abandoning Fair Use Policymaking

The widespread use of super-copyright clauses also limits the ability of the law, and the fair use doctrine in particular, to adapt to changing technologies, business models, and consumer preferences and behavior. When business entities and consumers automatically and

⁸⁸ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

⁸⁹ *Id.* at 887.

⁹⁰ Professor Sara Stadler has described this phenomenon as well. “Once copyright owners know that they can ‘fence in’ derivative markets simply by exploiting their works in those markets, they can move the fence — and broaden their rights — simply by creating more markets in which to exercise their exclusivity. And by making it easy to take a license in those markets, copyright owners increasingly have redefined an ‘unfair use’ as an unlicensed one.” Stadler, *supra* note 1, at 458.

⁹¹ Gibson, *supra* note 88, at 885. This argument goes further than I take it in this paper. If restrictions on fair use in adhesion contracts produce doctrinal feedback effects that ultimately limit the scope of the fair use defense, the same is likely to be true for negotiated contracts. The more extensive the licensing market for certain uses, the less likely those uses are to be found fair. I acknowledge this, but do not here advocate that *all* fair use restrictions be preempted.

In the context of negotiated contracts, notions of real rather than constructive assent and freedom of contract principles weigh much more heavily in the balance. In addition, adhesion contracts operate differently than negotiated contracts in that they create “rights against the world.” Finally, as a practical matter, courts are much less likely to preempt the enforcement of negotiated contracts. *See, e.g., Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 266 (1979) (refusing to preempt enforcement of contract that was “freely undertaken in arm’s-length negotiation”). In short, the case for policing the terms of adhesion contracts is much stronger than that for policing the terms of all contracts, and the possibility that courts will preempt all contractual fair use restrictions is essentially zero, in my opinion.

always contract around the doctrine, there will be less experimentation with potential fair uses and, therefore, fewer legal decisions concerning fair use. To the extent that fair use is intended to provide flexibility,⁹² super-copyright provisions undermine this goal because with fewer fair uses and fewer challenges to fair use, the doctrine will develop more slowly.

With the fair use provision, Congress delegated substantial policymaking authority over fair use to the courts.⁹³ By routinely enforcing super-copyright provisions, courts abdicate this policymaking responsibility, leaving it in the hands of private entities. When this happens, courts do not participate in the development of the doctrine, except, perhaps, to limit the scope of fair use based on the existence of a licensing market. Thus, the development of the law of fair use will be stunted and will fail to adapt to changing conditions.

4. Creating Rights Against the World

Finally, because super-copyright provisions have become so ubiquitous and because their terms are so consistently one-sided, they look less like private ordering and more like “private legislation.”⁹⁴ Some courts have held that contractual restrictions on fair use do not conflict with the Copyright Act because they do not constitute “exclusive rights.”⁹⁵ However, super-copyright provisions operate much like exclusive rights. There are many situations in which the expressive material is available *only* pursuant to contract terms that limit fair use. Private contract rights that seek to restrict fair uses become exclusive rights when the contract terms apply to anyone who wishes to have access to the copyrighted work. It is extremely difficult

⁹² Sag, *supra* note 20, at 401, 404.

⁹³ *Id.* at 396 (“Fair use is the mechanism by which Congress transferred significant policy making power to judges in order to allow copyright to adapt to ongoing social and technological change more effectively than a purely legislative response would allow.”).

⁹⁴ See Julie Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 485 n.79 (1998) (arguing that market dominated by transactions accomplished through adhesion contracts “may or may not function efficiently as compared with other possible regimes, but it does not function according to the pure neoclassical model, and its constituent transactions cannot plausibly be described as fundamentally private.”); see also Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 106 (1997) (arguing that “a very low standard of assent makes contract provisions essentially equivalent to copyright protection”).

⁹⁵ ProCD v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996).

to locate this kind of agreement in the neoclassical model of private ordering, as there is no one who is a “stranger to the contract.”⁹⁶

When they become rights against the world, fair use restrictions conflict with copyright policy. Federal intellectual property law has developed as a system for creating rights against the world, and federal objectives and policies are implicated when private actors, with the help of state law, act to create exclusive rights different from those provided by Congress.

II. THE PREEMPTION DOCTRINES

As raised in Part I, the ubiquity of super-copyright provisions presents a substantial question about whether state law interferes with the objectives of federal law. The preemption doctrines are designed to address precisely this question. Preemption is hardly a simple doctrine to apply; there are various strains of the preemption doctrines, and the analysis varies based on the subject matter, as will be discussed in this section.⁹⁷

Some conclusions can be drawn, however, about the basic approach to express and implied preemption in general and about intellectual property preemption in particular. Notably, under any version of the preemption doctrines, the fundamental issue with which the courts must grapple is the question of congressional intent.⁹⁸ That is, the court must engage in the *interpretive* task of determining the content of federal law and policy in order to determine whether the operation of state law presents a conflict.

In thinking about the proper relationship between federal copyright law and state contract law, many courts have failed to focus on this interpretive task, substituting pure policymaking for an effort to determine legislative intent. Other courts have merely mechanically applied precedent — “contracts are not preempted by the Copyright Act” — to arrive at the same conclusion.

This section describes the different versions of the preemption doctrines and discusses the ways in which each version has been

⁹⁶ *Id.* at 1454 (“A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’”).

⁹⁷ See *infra* Part II.

⁹⁸ See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (“In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.”).

applied to the enforcement of state contract law. As a general matter, courts rarely hold that federal statutes preempt the operation of state contract law, and, more specifically, contractual restrictions on baseline copyright principles have generally been upheld over preemption challenges. This approach has been misguided and the results skewed, however, because courts have failed to engage in the interpretive preemption task.⁹⁹

A. *Express Preemption: § 301 of the Copyright Act*

The Copyright Act contains an express preemption provision, and any preemption analysis must start there. Section 301 of the Copyright Act provides that state laws purporting to protect the same subject matter as the Copyright Act are preempted.¹⁰⁰ In particular, § 301 states that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.”¹⁰¹ The first step in applying any statute is to read the language and attempt to glean congressional intent from that language.¹⁰² This express preemption provision is hardly a model of clarity, however; the Supreme Court has never addressed it, and the lower federal courts have struggled to understand

⁹⁹ See *infra* Part II.A.

¹⁰⁰ The relevant portion of the express preemption provision reads as follows: “(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to — (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or (2) any cause of action arising from undertakings commenced before January 1, 1978; (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or (4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).” 17 U.S.C. §301 (2000).

¹⁰¹ *Id.*

¹⁰² As Justice Frankfurter famously admonished, the three principles of statutory construction are “(1) read the statute; (2) read the statute; (3) read the statute!” Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 202 (1967).

its language and formulate a test for its application.¹⁰³ At least one commentator has concluded that, “[o]verall, Section 301 is a legislative disaster.”¹⁰⁴

Courts have developed a variety of tests for applying the statute. The Ninth Circuit employs a two-part test that closely tracks the statute’s language.¹⁰⁵ First, the court “determine[s] whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described” in the Copyright Act.¹⁰⁶ Then, if the subject matter of the state law falls within the federal subject matter’s scope, the court will “determine whether the rights asserted under state law are equivalent to the rights contained in [§] 106, which articulates the exclusive rights of copyright holders.”¹⁰⁷ Determining when a state right is “equivalent” to any of the rights in § 106 of the Copyright Act turns out to be quite a difficult task, however.¹⁰⁸

In an effort to better define what it means for a state right to be equivalent to a federal copyright right, many courts have not tracked the statute’s language so precisely.¹⁰⁹ In the most common formulation, the court will ask whether the state law, or enforcement thereof, requires an “extra element” that is not required for proof of copyright infringement under the federal act.¹¹⁰ If the state cause of action requires this extra element, the law is not preempted. Other

¹⁰³ See generally Jennifer Rothman, *Copyright Preemption and the Right of Publicity*, 36 UC DAVIS L. REV. 199, 228-30 (2002) (explaining some difficulties of interpretation and application of § 301).

¹⁰⁴ *Id.* at 236.

¹⁰⁵ *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1138 (citations omitted).

¹⁰⁸ Rothman, *supra* note 103, at 227 (“Section 301, however, does not define what it means for a state action to be ‘equivalent’ to one of these rights.”).

¹⁰⁹ Lemley, *supra* note 27, at 140 (“[C]ourts seemed to have created a nonstatutory safe harbor under section 301 for state laws adding an ‘extra element’ not explicitly present in the copyright laws.”).

¹¹⁰ See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324 (Fed. Cir. 2003) (“The First Circuit does not interpret this language [of Section 301] to require preemption as long as ‘a state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display.’” (quoting *Data Gen. Corp. v. Grunman Sys. Support Group Corp.*, 36 F.3d 1147, 1164 (1st Cir. 1994))); see also *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 847 (10th Cir. 1993); *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc., Mach. Trade Ctr.*, 7 F.3d 1434, 1439-40 (9th Cir. 1993); *Nat’l Car Rental Sys., Inc. v. Computer Assoc. Int’l, Inc.*, 991 F.2d 426, 431 (8th Cir. 1993); *Computer Assoc. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992); Rothman, *supra* note 103, at 228 n.120 (collecting cases and stating that “[m]ost courts have adopted the ‘extra element’ test”).

tests are, essentially, variations on the “extra element” theme. Applying § 301, some courts have asked whether the state law claim at issue is “qualitatively different from copyright infringement.”¹¹¹ Another formulation states that “the [Copyright] Act ‘preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.’”¹¹²

This variety of formulations reflects the ambiguity of the statutory language. Rights might be deemed equivalent only if they are identical, but they might also be equivalent if they have substantially the same effect. In addition, a straightforward application of the provision may be inconsistent with its stated purposes. It would be quite easy for a state to evade preemption under § 301 by adding an element to the kind of claim that Congress clearly intended to preempt. For example, from the legislative history, it is clear that Congress intended to preempt common law copyright claims, but those state claims may require proof of an “extra element” that would preclude preemption under § 301.¹¹³ Thus, the plain text of the statute does not provide sufficient guidance to resolve many expression preemption claims.

Ultimately, the interpretation and application of an express preemption provision ought to rely upon some understanding of congressional intent. But neither the statute nor the legislative history provides guidance as to whether and when the enforcement of state contract law ought to be preempted. “Thus, courts are left with little useful guidance in applying the equivalent rights language of Section 301.”¹¹⁴ Congress certainly did not intend to preempt all contracts concerning copyrighted works, but it left open the possibility that some contracts or contract terms might be preempted.¹¹⁵

¹¹¹ *Bowers*, 320 F.3d at 1325 (citing *ProCD v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996)).

¹¹² *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1311 (11th Cir. 2001) (quoting *Foley v. Luster*, 249 F.3d 1281, 1285 (11th Cir. 2001)).

¹¹³ See *Rothman*, *supra* note 103, at 229 (explaining internal conflicts and inconsistencies of § 301).

¹¹⁴ *Id.* at 231 (“Even though neither of the currently accepted interpretations of equivalent rights are convincing, no legal theorist or court has presented an alternative. Unfortunately, the legislative history of Section 301 does not shed any light on the meaning of the equivalent rights language.”).

¹¹⁵ See *Cohen*, *supra* note 94, at 485 (“Although Congress’s exact intent regarding section 301’s effect on contract rights is uncertain, it seems clear that Congress did not intend the Copyright Act to displace state contract law generally. It seems equally certain, however, that Congress did not intend to allow the states to establish

In general, courts have refused to preempt state contract law under the express preemption provision. In examining state contract law through the lens of § 301, most courts have found that “assent” constitutes the extra element that precludes preemption under the express provision.¹¹⁶ Although courts have not categorically excluded the possibility of preemption of super-copyright provisions,¹¹⁷ few have held such provisions to be preempted under § 301.¹¹⁸

In the most significant decision regarding the application of § 301 to “contracting around” the Copyright Act, the Seventh Circuit in *ProCD v. Zeidenberg*¹¹⁹ held that § 301 did not preempt a contractual restriction on the first sale doctrine.¹²⁰ Virtually all decisions since then addressing contracting around the Copyright Act have cited *ProCD*, often with no analysis or discussion, for the general proposition that § 301 does not preempt state contract law.¹²¹

alternative, universally-applicable regimes of property-like protection for works falling within the subject matter of copyright.”).

¹¹⁶ See, e.g., *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001) (“An extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute the state-created cause of action. The extra element is the promise to pay. This extra element does change the nature of the action so that it is qualitatively different from a copyright infringement claim. The qualitative difference includes the requirement of proof of an enforceable promise and a breach thereof which requires, *inter alia*, proof of mutual assent and consideration, as well as proof of the value of the work and appellee’s use thereof.”); Lemley, *supra* note 27, at 140 (“Contracts have such an ‘extra element’ — the agreement of the parties. Consequently, some courts have held that contracts that limit the user’s rights in the purchased copy of the work (for example, by allowing only certain uses of a copyrighted program) are not preempted by section 301.”); see also 1-1 NIMMER ON COPYRIGHT § 1.01[B][1][a] (2007).

¹¹⁷ See *ProCD v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (“[W]e think it prudent to refrain from adopting a rule that anything with the label ‘contract’ is necessarily outside the preemption clause: the variations and possibilities are too numerous to foresee. *National Car Rental* likewise recognizes the possibility that some applications of the law of contract could interfere with the attainment of national objectives and therefore come within the domain of § 301(a). But general enforcement of shrinkwrap licenses of the kind before us does not create such interference.”).

¹¹⁸ *But see* *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269-70 (5th Cir. 1988) (holding that Louisiana statute permitting contractual restrictions on copying was preempted by Copyright Act).

¹¹⁹ 86 F.3d at 1447.

¹²⁰ 17 U.S.C. § 109(a) (2000) (stating that owner of copy of copyrighted work “is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”).

¹²¹ See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324-25 (Fed. Cir. 2003).

ProCD involved the sale of a CD-ROM telephone directory to Matthew Zeidenberg.¹²² The CD-ROM contained directory information compiled from more than 3,000 telephone books. The software application necessary to search the directory included a shrinkwrap agreement. One provision of the agreement limited “use of the application program and listings to noncommercial purposes.”¹²³ Zeidenberg bought the CD-ROM package, but proceeded to use the listings, which were not protected by copyright law, for commercial purposes. He made the listings available on the Internet for substantially less than *ProCD*’s list price. *ProCD* sued Zeidenberg for breach of contract.

As part of his defense, Zeidenberg argued that the Copyright Act preempted enforcement of the shrinkwrap contract. The Seventh Circuit rejected this argument. The court applied § 301 and concluded that the rights created by the contract in this circumstance were not “equivalent to any of the exclusive rights within the general scope of copyright.”¹²⁴ The court stated that rights equivalent to copyright rights are those established by law, rather than by a party to a contract. According to the court, copyright law creates rights against the world; “[c]ontracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’”¹²⁵ Thus the court held that *ProCD*’s contract was not preempted, stating that “[t]erms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets.”¹²⁶

Much of the opinion is devoted to a discussion of the efficiency and practicality of adhesion contracts. The opinion begins, for example, with the virtues of price discrimination. *ProCD* charged one price for “personal use” and a much higher price for those wishing to make commercial use of its product.¹²⁷

¹²² *ProCD*, 86 F.3d. at 1448-49.

¹²³ *Id.* at 1450. The “noncommercial use” limitation is a restriction on both the fair use doctrine and on the first sale doctrine, which allows the owner of an authorized copy of a copyrighted work to dispose of that particular copy in any way she likes. 17 U.S.C. § 109(a) (2000).

¹²⁴ *ProCD*, 86 F.3d at 1454.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1455.

¹²⁷ *See id.* at 1449-50 (“If *ProCD* had to recover all of its costs and make a profit by charging a single price — that is, if it could not charge more to commercial users than to the general public — it would have to raise the price substantially over \$150. The ensuing reduction in sales would harm consumers who value the information at, say, \$200. They get consumer surplus of \$50 under the current arrangement but would

Ultimately, it is difficult to escape the conclusion that the *ProCD* opinion relies on a policy-driven view of the appropriate relationship between contract and copyright rather than an interpretive approach, an effort to glean congressional intent, to the preemption question.¹²⁸ This is not to dispute the Seventh Circuit's normative view concerning the efficiency of adhesion contracts. As a policy matter, price discrimination has much to recommend it. Rather, I suggest that the Seventh Circuit's preemption analysis is driven by normative policy judgments rather than the legislative history or language of the statute.¹²⁹ Indeed, the opinion reflects no effort by the court to determine or understand congressional intent.

ProCD, although much maligned by many academics,¹³⁰ has been extremely influential. The vast majority of cases concerning § 301 preemption of contract terms cite *ProCD*, many citing it as controlling.¹³¹ In following *ProCD*, many courts, either implicitly or

cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out — and so would the commercial clients, who would have to pay more for the listings because *ProCD* could not obtain any contribution toward costs from the consumer market. To make price discrimination work, however, the seller must be able to control arbitrage.”).

¹²⁸ See Cohen, *supra* note 94, at 487 (stating that *ProCD* court “interpreted [the extra element] test in a way that indicates its support for a regime based primarily on market ordering”).

¹²⁹ Much of the academic debate, more appropriately, focuses on the policy arguments. See Cohen, *supra* note 94, at 488-90 (discussing various approaches to “contracting around” copyright act and concluding that “cybereconomists” “insistence that the market is the better forum for achieving copyright’s goals rests on no firmer basis than the *Lochner* Court’s instinctive distrust of attempts to alter the existing balance of bargaining power”).

¹³⁰ See, e.g., Lemley, *supra* note 15, at 468 (“The court’s legal reasoning is certainly questionable.”); *id.* at 469 n.33 (“*ProCD* can also fairly be criticized for refusing even to discuss the issue of Supremacy Clause preemption, an issue briefed by the parties and necessary for the court to resolve in order to reach the result it did, and for playing fast and loose with the facts by assuming that *ProCD* was in fact engaged in price discrimination despite the absence of any evidence in the case that it was willing to sell to competitors at any price.”).

¹³¹ See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324-25 (Fed. Cir. 2003) (stating that “most courts to examine this issue have found that the Copyright Act does not preempt contractual constraints on copyrighted articles,” and holding that “This court believes that the First Circuit would follow the reasoning of *ProCD* and the majority of other courts to consider this issue. This court, therefore, holds that the Copyright Act does not preempt Mr. Bowers’ contract claims.”); see also *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1108-09 (E.D. Cal. 2006) (citing *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089-90 (9th

explicitly, perpetuate the policy-driven approach taken by Judge Frank H. Easterbrook. Most courts merely cite the proposition that contracts, in general, are not preempted under § 301.¹³²

The way the courts have addressed the question of § 301 preemption of contract terms has been unsatisfying. Application of § 301 should be primarily an exercise in discerning congressional intent. Most courts fail even to acknowledge this, much less attempt it. Because congressional intent in this regard is so unclear, however, the attempt at interpretation is frustrating. It is difficult to conclude that § 301 mandates, prohibits, or permits preemption of contract terms.

In the end, there are two fundamental problems with the application of § 301 to state contract law. First, the courts tend to avoid much analysis and instead mechanically state that § 301 does not preempt the enforcement of state contract law regardless of the contract's terms. Second, as in *ProCD*, most courts do not address the implied preemption doctrines, leaving the analysis of the relationship between state and federal law incomplete.¹³³

Cir. 2005) (finding no preemption, citing Ninth Circuit case that relied on *ProCD*, and stating “In reaching its finding of no preemption in *Altera*, the Ninth Circuit found compelling the Seventh Circuit’s analysis of a similar issue in *ProCD*”); *Huckshold v. HSSL, L.L.C.*, 344 F. Supp. 2d 1203, 1208 (E.D. Mo. 2004) (applying extra element test and citing, among other cases, *ProCD*: “Just as § 301(a) does not itself interfere with private transactions in intellectual property, so it does not prevent states from respecting those transactions.” (quoting *ProCD*, 86 F.3d at 1455; *HotSamba, Inc. v. Caterpillar Inc.*, No. 01 C 5540, 2004 WL 609797, at *5 (N.D. Ill. March 25, 2004) (citing *ProCD* as controlling precedent))).

¹³² See cases cited *supra* note 131. Some courts have held that certain contracts are preempted, but this is distinctly the minority view. See, e.g., *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (“The provision in Louisiana’s License Act, which permits a software producer to prohibit the adaptation of its licensed computer program by decompilation or disassembly, conflicts with the rights of computer program owners under § 117 and clearly ‘touches upon an area’ of federal copyright law. For this reason, and the reasons set forth by the district court, we hold that at least this provision of Louisiana’s License Act is preempted by federal law, and thus that the restriction in Vault’s license agreement against decompilation or disassembly is unenforceable.”). The issue was presented somewhat differently in *Vault* because of Louisiana’s License Act, but the effect was ultimately the same: the Louisiana Act expressly permitted, but did not require, software vendors to contract around fair use.

¹³³ Although the issue was briefed, the court in *ProCD* did not address the implied preemption doctrines; indeed, it neither mentioned them nor explained why it failed to do so. Lemley, *supra* note 27, at 143 n.138. Some courts have considered the implied preemption doctrines, but, again, they are in the minority. See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (applying conflict preemption doctrine and holding that “[w]hile *Bowers* and *Nat’l Car Rental* were express preemption cases rather than conflict preemption, their reasoning applies here with

B. *The Relationship Between Express and Implied Preemption*

A preemption analysis that fails to consider the implied preemption doctrines is incomplete because it fails to address the variety of ways in which state and federal law may conflict. A claim might not be preempted under an express preemption provision, yet it may still be inconsistent with federal law or policy. A thorough analysis, consistent with federal copyright policy and federalism principles, requires a court to apply the implied preemption doctrines to the question as well.

The Supreme Court has indicated that, even when a federal statute contains an express preemption provision, an implied preemption analysis may also be appropriate.¹³⁴ The relationship between the two

equal force”). The court did not, however, explain why the express preemption reasoning applies to the implied preemption analysis. To be fair, many of the courts that addressed this issue prior to the *ProCD* opinion also failed to consider field or conflict preemption. See, e.g., *Nat'l Car Rental Sys., Inc. v. Computer Assoc. Int'l, Inc.*, 991 F.2d 426 (8th Cir. 1993) (addressing § 301 preemption but not implied preemption doctrines); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990) (same).

¹³⁴ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000) (“We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.”). In *Geier*, the Court examined the saving clause and determined that Congress did not intend “to save state-law tort actions that conflict with federal regulations.” *Id.* at 869. Similarly with § 301, there is no indication that Congress intended to allow state laws or state law causes of action that created a conflict or an obstacle to federal law. See Rothman, *supra* note 103, at 237-38 (“Because neither Section 301 nor its legislative history suggest an abrogation of other preemption principles, conflict preemption analysis still applies. Therefore, state law can be preempted even if the state action does not fall under the parameters of Section 301.”); see also *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (“The fact that an express definition of the pre-emptive reach of a statute ‘implies’ — i.e., supports a reasonable inference — that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption.”); Lemley, *supra* note 27, at 141 (“The fact that section 301 does not seem to preempt most contractual provisions does not, of course, mean that copyright law never preempts state contract rules. Copyright preemption might also occur because of a conflict between copyright law or policy and state enforcement of a contract.”). Lemley provides an example that makes clear that § 301 cannot be the end of the analysis: “For example, suppose California passed a law stating that the copyright laws could not be enforced against any citizen of California. Section 301 would not preempt such a law because it isn’t ‘equivalent’ to copyright. But the Supremacy Clause surely would preempt the law because it conflicts with the federal scheme.” *Id.* at 141 n.130; see also Tom Bell, *Misunderestimating Dastar: How the Supreme Court Unwittingly Revolutionized Copyright Preemption*, 65 MD. L. REV. 206, 232-33 (2006) (“Recognizing that the Constitution’s Copyright and Supremacy Clauses combine to preempt conflicting state laws directly, without the intermediation of the Copyright Act, thus simply brings

types of preemption, one flowing from explicit statutory language, the other from the Supremacy Clause of the Constitution,¹³⁵ is hardly clear,¹³⁶ and I do not intend to explore that tension in this Article.

In any event, the Supreme Court has indicated that there might be situations in which the enforcement of state law conflicts with federal law in a way that Congress neither anticipated nor addressed in an express preemption provision.¹³⁷ With regard to the boundary between contract and copyright, there is some evidence in § 301's legislative history that Congress withheld judgment concerning potential conflicts between federal copyright law and the enforcement of state contract law. In one early version of § 301, the language indicated that the Copyright Act was not intended to affect state contract law, but this language was removed in the final version of the bill.¹³⁸ The import of this action is unclear, however, and thus, "the

copyright law up to speed with patent law.").

¹³⁵ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1155 (1998) ("Congress' capacity to preempt state laws flows from both the powers delegated to Congress through the Constitution and the Supremacy Clause. . . . The supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict.").

¹³⁶ See Jordan, *supra* note 135, at 1151-52 ("If the federal law at issue contains an express preemption provision, the Court has analyzed the language of the preemption clause and has not purported to consider field or conflict preemption theories. Recent preemption cases, however, have suggested a shift away from the categorical approach. . . . [T]he [recent preemption] cases suggest that the Court as a whole agrees that an express preemption provision does not foreclose consideration of the implied preemption doctrines. Beyond that, however, the cases reveal a tension among the Justices regarding the extent to which implied preemption principles should inform the interpretation of an express preemption provision.").

¹³⁷ *Geier*, 529 U.S. at 869 ("We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles."); see Cohen, *supra* note 94, at 485-86 & n.83 (collecting sources and stating that "even if Congress did . . . intend [to permit states to enact copyright-like protection], the intellectual property clause of the Constitution arguably would exert independent preemptive force.").

¹³⁸ Professor Jennifer Rothman describes the varying interpretations of the deletion of the language: "There is a suggestion in the record that it was struck because it would have destroyed the intent of Section 301 by failing to preempt state laws which interfered with copyright law, such as the right of publicity. Other parts of the legislative record, however, suggest another reason the language was struck. Some members of Congress thought the language was unnecessary since it was obvious that certain state rights, such as the right of publicity, would not be preempted."

most logical course of action is to disregard the deleted language.”¹³⁹ Even the *ProCD* court, which refused to preempt the operation of state contract law in that case, declined to make a categorical rule against such preemption.¹⁴⁰

C. Implied Preemption

Unless there is no possibility that the scope of federal law might be broader than that anticipated by Congress in an express preemption provision, a court should conduct an implied preemption analysis to determine the proper accommodation of state law to federal policy.¹⁴¹ Implied preemption has generally been found in two different circumstances. The first is “field preemption,” which occurs when Congress intends to occupy a field exclusively.¹⁴² Implied field

Rothman, *supra* note 103, at 235 & nn.157-58.

¹³⁹ *Id.* at 236.

¹⁴⁰ *ProCD v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (“[W]e think it prudent to refrain from adopting a rule that anything with the label ‘contract’ is necessarily outside the preemption clause”). In addition, the Court’s recent opinion in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), has perhaps only served to muddy the waters regarding the relationship between express and implied preemption in the copyright context. In *Dastar*, the Court interpreted the “origin” of goods language in the Lanham Act to refer to the producer or manufacturer of a good and not to the creator or source of the idea or concept. *Id.* at 32. In so holding, the Court explicitly discussed the policy of preventing “mutant copyrights” — using the Lanham Act to evade the requirements of copyrightability. *Id.* at 34; see Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1522 (2004) (“Based on the Court’s opinion [in *Dastar*], a mutant copyright can be defined as any additional protection for a work within the subject matter of copyright. With this definition, it becomes clear that a mutant copyright emerges whenever overlapping protection is available.”).

For an argument that the Court’s opinion in *Dastar* and the subsequent case law have expanded, perhaps improperly, the implicit preemptive reach of the Copyright Act, see Bell, *supra* note 134, at 212 (“[T]he Court worried that giving the Lanham Act too broad a scope would put it into conflict with the Copyright Act.”). Bell contends that *Dastar* has resurrected implied preemption doctrine in cases involving copyrighted and copyrightable works. See *id.* at 228 (arguing that *Dastar* “herald[s] a shift in the type of copyright preemption that courts favor, away from the express preemption of § 301(a) and toward the more general principles of implied preemption applied in *Dastar*”). If Bell is correct (and I am not sure that implied preemption was buried and, thus, could now be described as resurrected), this shift is problematic, not because it is necessarily the wrong approach but because the Court was unclear about what it was doing and has thus left the lower courts with little guidance.

¹⁴¹ See *supra* Part II.B.

¹⁴² See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

preemption is not particularly relevant here because to the extent that Congress intended to occupy the field of protecting expressive works, it has done so through § 301.¹⁴³ As the states may act to a limited extent in this area, the question then is what forms of state regulation are permissible.¹⁴⁴

To answer this question, a court must turn to the other strain of implied preemption doctrine: “conflict” or “obstacle” preemption. Under these doctrines, the traditional inquiry has been whether it is “impossible for a private party to comply with both state and federal requirements”¹⁴⁵ or whether state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁴⁶

According to obstacle preemption principles, “[e]ven if Congress has not expressly preempted state law, and even if federal law does not occupy the field and there is no conflict between the federal and state laws, preemption still can be found if a court concludes that the state law interferes with a federal goal.”¹⁴⁷ A direct conflict may be found when compliance with both federal law and state law is impossible.¹⁴⁸ Interference occurs when the enforcement of state law “stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.”¹⁴⁹ Because it is possible to comply with both federal and state law in the context of contractual restrictions on fair use, the only remaining question is whether the enforcement of super-copyright provisions “stands as an obstacle to” federal purposes or objectives.

Under this standard formulation, the court’s primary task is interpretive. The interpretive task here is broad because the court

¹⁴³ Rothman, *supra* note 103, at 237 (noting that field preemption “does not seem to apply to copyright preemption analysis because there is no evidence that Congress sought to occupy the entire field of intellectual property”); *see also* Bell, *supra* note 134, at 228-29 (“Because the Copyright Act leaves many openings for state law to play a role, field preemption plays a distinctly minor role in copyright.”).

¹⁴⁴ *Cf.* Goldstein v. California, 412 U.S. 546, 556-57 (1972) (“Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded.”).

¹⁴⁵ *English*, 496 U.S. at 79 (citing *Fl. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

¹⁴⁶ *Id.* at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁴⁷ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 394 (2d ed. 2002).

¹⁴⁸ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

¹⁴⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

must look to “the full purposes and objectives of Congress” in enacting the federal law at issue.¹⁵⁰ The key analytical element of the obstacle preemption analysis is the characterization of the federal objective.¹⁵¹ Determining the federal objective is a matter of gleaning congressional intent from statutory language, legislative history, and other sources. In practice, this can be quite a difficult task, but the theory is clear: the court must ask what Congress intended and attempt to determine what the federal policies or purposes are. The second step involves a determination of whether the state law conflicts with or stands as an obstacle to those policies.

D. Obstacle Preemption in the Intellectual Property Context

The preemption doctrines are sufficiently varied and context-specific that a court ought to look not only to an express preemption provision, if one exists, and to general implied preemption principles, but also to preemption case law as it has developed in the particular substantive area. Unfortunately, the Supreme Court has not issued an opinion regarding implied copyright preemption since Congress enacted the express preemption provision.¹⁵²

In its one significant copyright preemption decision before 1976, the Supreme Court, in *Goldstein v. California*, applied the standard approach, stating that it had to determine whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁵³ The Court then emphasized its interpretive and descriptive role: “We turn, then, to federal copyright law to determine what objectives Congress intended to fulfill.”¹⁵⁴ The Court found those objectives in the Constitution, the 1909 Copyright Act (which applied at the time), legislative history, and Supreme Court precedent.¹⁵⁵ At issue in *Goldstein* was the

¹⁵⁰ *Id.*

¹⁵¹ CHEMERINSKY, *supra* note 147, at 396.

¹⁵² Tom Bell has argued that the Supreme Court’s opinion in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), is a preemption case, but that case involved a horizontal clash between two areas of federal regulation, not a vertical clash between federal and state regulation. See Bell, *supra* note 134, at 244. Bell asserts that the lower courts have read the opinion to address Supremacy Clause preemption, but in the case the Court does not address the preemption doctrines. See *id.* (“[F]ollowing *Dastar*’s lead, courts will ask whether a suspect state law claim threatens to conflict with federal policy.”).

¹⁵³ 412 U.S. 546, 561 (1973).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 566-69.

enforceability of a California state regulation criminalizing “record” or “tape” piracy. The petitioners in the case challenged their conviction, arguing that the state statute was preempted by the Copyright Act. The Court held that the enforcement of the state law did not stand as an obstacle to the achievement of a federal purpose because Congress had not indicated that it wished either to commit the recording to the public domain or provide the exclusive means of regulating recordings. The Court concluded that “[i]n regard to this category of ‘Writings,’ Congress has drawn no balance; rather it has left the area unattended, and no reason exists why the State should not be free to act.”¹⁵⁶

In so concluding, the Court relied on a series of patent preemption cases in which the Court had held that Congress, in enacting the Patent Act, had “indicated not only which articles in this particular category [it] wished to protect, but which configurations it wished to remain free.”¹⁵⁷ The analysis was thus based on an examination of the areas in which Congress had indicated an interest in regulation and had acted either to provide protection for certain classes of inventions or to affirmatively leave material in the public domain. *Goldstein* emphasizes that the scope of permissible state regulation is directly related to the extent and substance of federal regulation in the area, making the evaluation of the federal objectives of crucial importance.

A review of the patent preemption cases also confirms the courts’ role as interpreter or decipherer of federal law and policy in conducting a preemption analysis. Most recently, the Supreme Court found that the Patent Act preempted a Florida statute protecting boat hull designs.¹⁵⁸ In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Supreme Court preempted a Florida statute that provided patent-like protection for boat hull designs in circumstances under which a federal patent was unavailable. The Court found that the “patent statute’s careful balance between public right and private monopoly to promote certain creative activity is a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”¹⁵⁹

As in *Goldstein*, the Court in *Bonito Boats* asked whether Congress had acted in a particular area, not whether providing additional protection was acceptable: “The offer of federal protection from

¹⁵⁶ *Id.* at 570.

¹⁵⁷ *Id.* at 569.

¹⁵⁸ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 144 (1988).

¹⁵⁹ *Id.* at 167 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

competitive exploitation of intellectual property would be rendered meaningless in a world where substantially similar state law protections were readily available. To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use.”¹⁶⁰

In determining that the federal statute preempted the Florida statute, the Court assessed the purposes and goals of federal patent protection.¹⁶¹ In particular, the Court described the “federal policies of encouragement of patentable invention and the prompt disclosure of such innovations.”¹⁶² In attempting to define and articulate the relevant federal policy, the Court in *Bonito Boats* examined a variety of sources: prior Supreme Court cases, the language of various versions of the Patent Act, the writings of Thomas Jefferson, and some scholarly commentary.¹⁶³ Ultimately, the Court summarized federal patent policy as embodying “a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years.”¹⁶⁴

Based on its conclusion that the federal patent system relies upon a backdrop of a relatively free market in *unpatented* designs, the Court held that the Florida statute conflicted with the federal purposes because it restricted exploitation of unpatentable designs.¹⁶⁵ After defining the relevant federal policy, the Court then looked at what effect, if any, the Florida statute had on federal objectives.¹⁶⁶ The Court determined that “the Florida statute at issue in this case so substantially impedes the public use of the otherwise unprotected design and utilitarian ideas embodied in unpatented boat hulls as to run afoul of the teaching of our decisions in *Sears* and *Compco*.”¹⁶⁷

In other cases as well, the Supreme Court has stated that it must ask whether the enforcement of state law “clashes with the objectives of the federal patent laws.”¹⁶⁸ With respect to the preemption of contract

¹⁶⁰ *Id.* at 151.

¹⁶¹ *Id.* at 146-57.

¹⁶² *Id.* at 155.

¹⁶³ *Id.* at 146-57.

¹⁶⁴ *Id.* at 150-51.

¹⁶⁵ *Id.* at 158 (“In contrast to the operation of unfair competition law, the Florida statute is aimed directly at preventing the exploitation of the design and utilitarian conceptions embodied in the product itself.”).

¹⁶⁶ *Id.* at 157-68.

¹⁶⁷ *Id.* at 157.

¹⁶⁸ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964); *see Compco*

terms, the most closely analogous case is *Aronson v. Quick Point Pencil Co.*¹⁶⁹ *Aronson* involved a contract for royalties on a keyholder that was the subject of a patent application. The contract provided that the inventor would receive a five percent royalty in exchange for transferring the exclusive right to make the keyholder to the Quick Point Pencil Company.¹⁷⁰ A contemporaneous contract stated that the royalty would be reduced to 2.5% if the patent application on the invention was not granted within five years.¹⁷¹ The patent application was not granted within five years, and, after paying the reduced royalty for fourteen years, Quick Point sought a declaration that the contract was void because its enforcement was preempted by federal patent law.¹⁷²

In *Aronson*, the Court acknowledged its interpretive task, stating that the first step in the preemption discussion was to “review the purposes of the federal patent system.”¹⁷³ The Court asked “whether [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷⁴ The Court concluded that enforcement of the agreement was not inconsistent with any of the purposes of the federal patent system.¹⁷⁵ The Court found that the encouragement of invention and the preservation of the public domain were two of the primary purposes of the patent system and that the contracts at issue undermined neither.¹⁷⁶ The Court found that the agreements did not withdraw any idea from the public domain¹⁷⁷ and did not improperly leverage the pending patent.¹⁷⁸ Notably, the contract at issue was not an adhesion

Corp. v. Day-Brite Lighting, 376 U.S. 234, 237 (1964) (starting in patent preemption case with question of what relevant federal policy is and holding: “To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain . . .”).

¹⁶⁹ 440 U.S. 257 (1978).

¹⁷⁰ *Id.* at 259.

¹⁷¹ *Id.*

¹⁷² *Id.* at 260.

¹⁷³ The Court did not identify, other than by reference to a prior Supreme Court opinion, the sources for its description of the purposes of the federal patent system. *Id.* at 262.

¹⁷⁴ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 263.

¹⁷⁸ *Id.* at 265.

contract; rather, the contract obligations were “freely undertaken in arm’s-length negotiations.”¹⁷⁹

Here again, the crucial analytic step involves an interpretive endeavor, an effort to determine congressional intent. The vast majority of courts to address the potential conflicts between federal copyright law and state contract law have failed, however, to acknowledge this task, much less engage in it. Instead, courts tend to employ purely policy-driven and normative approaches.¹⁸⁰

Judges and academics have offered a range of suggestions for determining the appropriate balance between copyright rules and private contracting. The prescriptions cover a broad range, from the view that private contracting allows for the most efficient allocation of resources to the view that certain copyright rights should never be contracted away.¹⁸¹ What these perspectives have in common is their normative outlook; each addresses the question of what copyright policy *should be*. The other commonality is their reliance on contract law and theory either to ratify the transaction as consensual or to undermine it as unconscionable.¹⁸²

When confronted with a preemption question, however, courts should not engage in pure policymaking; they should attempt to decipher congressional intent concerning copyright policy. As described above, in the contract and copyright context in particular, courts have avoided looking into congressional intent and have focused instead on policy arguments and the simple conclusion that, as a general matter, copyright law does not preempt state contract law. A closer look at particular contract terms and certain federal policies reveals that there are occasions in which contract law does in fact interfere with and stand as an obstacle to federal purposes.

¹⁷⁹ *Id.* at 266.

¹⁸⁰ *See supra* Part II.A.

¹⁸¹ *See* Cohen, *supra* note 94, at 479 (describing scholars who advocate basic freedom of contract approach as also relying on contract defenses to ameliorate most pernicious consequences of private ordering); *see also* Raymond T. Nimmer, *Issues in Licensing*, 42 HOUS. L. REV. 941, 943-47 (2005) (describing basic contours of debate over information licensing). In fact, many commentators rely on contract theory for both the ceiling and the floor of the permissible role of private ordering.

¹⁸² *See* Cohen, *supra* note 94, at 475 (describing Professors Maureen O’Rourke and Tom Bell as viewing “contract as presumptively more efficient than copyright at promoting the dissemination of creative works”). *But see id.* at 474-80 (criticizing number of scholars for relying so heavily on contract law and theory).

III. COURTS SHOULD PREEMPT SUPER-COPYRIGHT PROVISIONS BECAUSE THEY INTERFERE WITH THE FEDERAL COPYRIGHT SYSTEM

It is easy to criticize courts for failing to engage in the interpretive preemption task. It is quite different, and substantially more difficult, to take on that task in practice, but courts should do it nevertheless.

The primary challenge in conducting a preemption analysis relating to the Copyright Act is a general lack of clarity: the text of the statute provides little guidance; federal copyright law and policy are not well-defined; and the legislative history is not illuminating in many instances. Looking only at fair use restrictions in adhesion contracts, the approach can be simplified. The issue is not whether intellectual property rights *generally* trump state contract law *generally*, but whether *particular* aspects of state contract law conflict with *particular* copyright policies.¹⁸³

The language of the fair use provision itself does not clarify whether and when that section may be waived by contract. Thus, to apply obstacle preemption analysis, a court must look at more general policies embodied in the Copyright Act. Congress has expressed policy preferences in at least three areas that affect the analysis of wide scale restrictions on fair use. Congress has indicated that it intends to (1) preserve and protect fair uses of copyrighted materials; (2) maintain balance in the copyright system; and (3) create uniformity in the copyright system. The proliferation of super-copyright provisions that operate as rights against the world interferes with and stands as an obstacle to these three federal purposes.

A. *Fair Use*

To determine whether the enforcement of super-copyright provisions stands as an obstacle to the achievement of a federal purpose, a court ought to first examine the fair use defense itself.¹⁸⁴

¹⁸³ Cf. Lemley, *supra* note 27, at 137 (“[T]he issue is not the relatively simple one of whether to preempt a particular state statute, but the more complex one of whether and how to preempt certain parts of contract law without bringing down the whole edifice.”).

¹⁸⁴ 17 U.S.C. § 107 (2000) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”). Some of the arguments here may well apply to other provisions of the Copyright Act, including the first sale provision and the affirmative lack of protection for certain kinds of works such as databases. With respect to each of these areas, the Act fails to indicate whether they are default or absolute provisions. The first sale rule is codified at 17 U.S.C. § 109 (2000) (“[T]he owner of a particular copy or phonorecord lawfully

Unfortunately, the Copyright Act does not address the question of the propriety of contracting around fair use. Section 107, which allows for fair use, neither prohibits nor explicitly permits contracting around the provision, so it is not clear from the statute's language whether fair use is merely a default rule.¹⁸⁵

The Act only inconsistently addresses the issue of which provisions are mere default rules and which are non-waivable.¹⁸⁶ Some of the Act's provisions prohibit any kind of waiver. Most notably, § 203 of the Act provides that authors may, under certain circumstances, terminate any transfers of their copyright rights, even when that transfer has been accomplished with a negotiated contract.¹⁸⁷ On the other hand, some provisions of the Copyright Act clearly are default rules that can be contracted around at will. The works made for hire provision, for example, provides that a work prepared by an employee in the scope of her employment is owned by the employer "unless the parties have expressly agreed otherwise in a written instrument signed by them. . . ."¹⁸⁸ Some provisions even set boundaries on both sides, meaning they provide that certain rights are mere baselines rules while others are non-waivable. Moral rights, for example, may be waived in a contract, but they may not be transferred, by contract or otherwise.¹⁸⁹ Overall, however, the majority of the Copyright Act's

made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

¹⁸⁵ This lack of clarity emerges in a variety of areas of the Copyright Act. In the context of public domain or affirmatively not protectable materials, both Congress and the Supreme Court have clearly indicated that certain works, though perhaps expressive and fixed in a tangible medium of expression, are not protectable. Congress has indicated such in § 102(b) of the Copyright Act, for example, which excludes certain material from copyright protection, including ideas, procedures, and processes. 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."). The Supreme Court has indicated such in *Feist*. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (reaffirming that facts may not be copyrighted). But neither Congress nor the Supreme Court has expressly indicated whether it is always or sometimes acceptable to contract around these principles.

¹⁸⁶ See Lemley, *supra* note 27, at 142.

¹⁸⁷ 17 U.S.C. § 203(a) (2000) ("In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions . . .").

¹⁸⁸ 17 U.S.C. § 201(b) (2000).

¹⁸⁹ 17 U.S.C. § 106A(e) (2000) ("(1) The rights conferred by subsection (a) may

provisions do not include any expression of congressional intent concerning the propriety of “contracting around.”

Because there is no consistent pattern in the Act that creates a default rule, we can conclude nothing from the absence of language concerning contracting around the statute’s fair use provision. Thus, to determine whether and under what circumstances super-copyright provisions conflict with federal policy, a court must look beyond the language of the fair use provision.

In enacting § 301, Congress did not indicate when state contract law might conflict with federal copyright policy. Congress did not, however, explicitly exclude contract law from its preemptive reach.¹⁹⁰ Thus, contract provisions are not necessarily free from scrutiny through the lens of the Copyright Act.¹⁹¹

Although neither § 107 nor its legislative history clarifies whether or to what extent contracting around fair use is acceptable, the Copyright Act itself, the legislative history, and the Supreme Court opinions interpreting and applying the fair use defense do shed some light on congressional intent and therefore on the relevant federal policy. Because the Copyright Act does not explicitly prohibit contracting around fair use, it is impossible to conclude that Congress intended to preclude all restrictions on fair use, but the proliferation of super-copyright clauses may nonetheless have implications for federal copyright policy that have not been anticipated or addressed by Congress.¹⁹²

In general, it appears that the fair use defense was the result of a fairly contentious negotiation process among the legislators, that it reflects a significant compromise between many industry representatives,¹⁹³ and that it provides immunity for certain unauthorized uses of copyrighted works. Fair use has been described as one of the few “outlets” in the system providing for third-party use

not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author.”).

¹⁹⁰ See *supra* note 115.

¹⁹¹ See *supra* Part II.B-C.

¹⁹² Lemley, *supra* note 27, at 142 (“Unfortunately, most copyright provisions offer no guidance in either direction. For these provisions, courts must define the parameters of implied conflicts preemption. This involves an attempt to figure out whether each particular provision in the Copyright Act is merely a default rule that the parties are free to ignore, or whether it instead reflects a part of the balance of interests in federal policy that should not be upset.”).

¹⁹³ See generally Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 883-88 (1987) (describing negotiation process).

of copyrighted works,¹⁹⁴ and it is often seen as the mechanism by which copyright law is harmonized with the First Amendment.¹⁹⁵ Little more than these fairly modest conclusions can be drawn from the “muddled statutory provision”¹⁹⁶ and the legislative history concerning Congress’s intent in enacting the provision.¹⁹⁷ Some commentators see fair use as a vehicle for correcting market failures.¹⁹⁸ Others see it as capable of contributing substantially to creativity, expression, and democratic self-governance.¹⁹⁹

The ubiquity of super-copyright clauses threatens the role of fair use in the copyright scheme, even though individually each may limit fair use without creating rights against the world or impinging on the values of the Copyright Act.²⁰⁰ The policies animating the fair use defense include the goal of encouraging creativity and promoting “progress” by permitting some use of copyrighted works, balancing the rights of owners with public benefits, allowing flexibility for the law to adapt to changing technology, and permitting the law to reflect social norms.²⁰¹ Congress has expressed a federal objective of permitting some unauthorized uses of copyrighted works; to permit

¹⁹⁴ *Id.* at 886 (“Fair use was also the sole safe harbor for interests that lacked the bargaining power to negotiate a specific exemption.”).

¹⁹⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 220-21 (2003) (describing fair use as one of copyright’s “built-in” First Amendment accommodations).

¹⁹⁶ Weinreb, *supra* note 29, at 1139.

¹⁹⁷ Litman, *supra* note 193, at 863 (“The legislative history of the 1976 Act contains little evidence of Congress’s specific intent on any substantive issue.”).

¹⁹⁸ See Wendy Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1034-35 (2002) (describing some versions of “market failure” approach to fair use and stating that “I very much regret the way the market failure approach has grown-up, or rather grown-down, since the publication of my original piece. Transaction cost barriers are neither the only kind of economic problem to which fair use responds, nor the only kind of problem to which fair use should respond.”); Sag, *supra* note 20, at 391-92.

¹⁹⁹ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 53 (2004) (“To make intellectual property consistent with the idea of free speech as democratic culture, there must be a robust and ever expanding public domain with generous fair use rights.”); Netanel, *supra* note 29, at 288; see also Sag, *supra* note 20, at 421.

²⁰⁰ Individually negotiated contracts are the epitome of private ordering; and while they may at times present conflicts with the Copyright Act, there is little chance that a court or Congress will agree that fair use is in all cases non-waivable. See *supra* Part II.A.

²⁰¹ See generally Sag, *supra* note 20, at 396 (“Fair use is the mechanism by which Congress transferred significant policy making power to judges in order to allow copyright to adapt to ongoing social and technological change more effectively than a purely legislative response would allow.”).

state law to significantly restrict these otherwise fair uses stands as an obstacle to the federal objective.²⁰²

At the most basic level, widespread contractual restrictions on fair use are likely to result in fewer fair uses of copyrighted works. The provisions are almost certainly intended to reduce the number of fair uses. Eventually, there will be less fair use, fewer fair use determinations by courts, and potentially less creativity, less creation, and less “Progress.”²⁰³ Over time, super-copyright clauses will cause a change in the public’s perception of the public domain and the scope of fair use itself. Even if the average layperson understands the difference between the default fair use standard and the obligations imposed by various contracts, the contractual restrictions will have a chilling effect on the uses of expressive works. Widespread restrictions on fair use, particularly in circumstances where there is no access to the work in the absence of such restrictions, takes from the public something that Congress has declared belongs to the public. In short, super-copyright restrictions will reduce the extent and incidence of fair use of copyrighted materials on a wide scale basis, and, as such, they interfere with the federal policy of encouraging public access to, enjoyment of, and benefit from expressive works.²⁰⁴

Super-copyright provisions conflict with the purposes of the fair use doctrine in another way: fair use can be seen as one of the mechanisms by which copyright law is able to respond to technological change and reflect societal norms.²⁰⁵ This flexibility is achieved through judicial policymaking — policymaking that Congress has delegated to the courts.²⁰⁶ Fair use, as conceived in the Copyright Act, is an extremely flexible and fact-sensitive doctrine, requiring close and careful evaluation by courts based on a rough statutory guideline.²⁰⁷ It is this context-specific nature of fair use that

²⁰² See Lemley, *supra* note 27, at 129 & n.60 (“But fair use is designed precisely to allow nonconsensual uses, and ‘contracting around’ fair use thus presents a conflict with the goals of the doctrine.” (citing Netanel, *supra* note 29, at 362 (“Th[e] imposition of limits [on copyright] must be seen as a vital and integral part of copyright’s structural function.”))).

²⁰³ See *supra* Part I.D.

²⁰⁴ Carroll, *supra* note 20, at 1092 (“Fair use protects a zone of expressive opportunity for criticism, comment, parody, education, and other socially beneficial forms of communication that might not occur if copyright owners were given complete control over how their works were used.”).

²⁰⁵ Sag, *supra* note 20, at 402-03; Weinreb, *supra* note 29, at 1160.

²⁰⁶ Sag, *supra* note 20, at 396 (“Fair use is the mechanism by which Congress transferred significant policy making power to judges . . .”).

²⁰⁷ See *supra* Part I.A.

permits it to change relatively easily and to adapt to new and unforeseen circumstances, such as new business methods and technological advances.

Super-copyright provisions limit the fair use doctrine's ability to respond to such changes because they seek to bypass judicial articulation and refinement of the doctrine altogether. That is, super-copyright clauses take flexibility away from courts, which results in a significant shift in the structural balance of copyright law.²⁰⁸ If there is no experimentation with new uses or new technology, the law cannot respond to those new uses.

Super-copyright provisions conflict with the federal copyright scheme because they are widespread, because they are not negotiated agreements, and because, often, the expressive works are unavailable except under the terms of the adhesion contracts containing such provisions. Thus, such provisions systematically restrict rights provided for under the federal scheme.

Individually negotiated departures from the fair use principle are not as troubling as the pervasive super-copyright provisions present in nearly every consumer adhesion contract and do not implicate federal objectives in the same way. Negotiated agreements are obviously consensual, likely to be more balanced, and unlikely to create rights against the world. Negotiated contracts are the epitome of private ordering, but adhesion contracts operate more like private legislation, altering the fair use defense for whole classes of works. In this way, the enforcement of super-copyright clauses stands as an obstacle to the achievement of the purposes animating the fair use doctrine itself.

B. Balance

The proliferation and enforcement of super-copyright clauses stands as an obstacle to the achievement of federal copyright policy in another way: by consistently arrogating to themselves an increasing arsenal of rights, businesses have succeeded in tipping the balance between owners and users distinctly in the direction of owners. Copyright owners attempt to increase their control over, and reduce the third-party use of, copyrighted works by layering protection. Copyright *plus* patent *plus* trade secrets *plus* the right of publicity *plus* technological protection measures equals a lot of protection. The question is whether this shift effectively and significantly alters the balance of rights, obligations, defenses, and exceptions set forth in the

²⁰⁸ See *supra* Part I.D. and *infra* Part IV.B.

Copyright Act and therefore stands as an obstacle to federal objectives.²⁰⁹

The 1976 Copyright Act has been viewed as a compromise between various interests,²¹⁰ and the Act reflects an implicit bargain between the various business and consumer interests.²¹¹ As Professor Jessica Litman has described, very few legislators even understood, much less participated in, discussions about or the drafting of the provisions of the Copyright Act.²¹² Instead, members of Congress apparently relied upon the various interests to produce a compromise acceptable to all. It is in this manner that the fair use exception was codified.²¹³ Fair use should thus be seen as a counterweight to the rights of copyright owners.²¹⁴ That is, balance in the copyright system depends, in large part, on the fair use doctrine.

Professor Matthew Sag has described fair use as an integral part of the balance of rights created by Congress. He has argued that the presence of the fair use defense permits a stronger set of ownership rights.²¹⁵ This balance helps maintain the integrity of the system: “copyright ownership claims are contingent upon the application of fair use. Reliance on owned works does not necessarily preordain a life of intellectual servitude. The alleged tyranny of copyright is mitigated in part because copyright claims are limited by fair use.”²¹⁶

²⁰⁹ See Lemley, *supra* note 27, at 142 (“Conflicts-based preemption of contracts will occur not only in cases in which there is a direct conflict with the express terms of the statute, but also in cases in which a state law stands as an obstacle to achieving the general goals of federal law because it upsets the balance struck by Congress.”). In at least one other context, the Supreme Court has validated the idea of “balance preemption.” See *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973) (preempting state law in order to preserve Federal Aviation Act’s “delicate balance between safety and efficiency”).

²¹⁰ Litman, *supra* note 193, at 861 (“[T]he language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.”).

²¹¹ *Id.* at 862 (“The Legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus.”).

²¹² *Id.* at 862-63 (quoting Representative Paul C. Jones as saying that “I have talked to members of the Committee on the Judiciary who admit they do not know what is in it.”).

²¹³ *Id.*

²¹⁴ See Mazzone, *supra* note 3, at 1029 (“Copyright law suffers from a basic defect: The law’s strong protections for copyrights are not balanced by explicit protections for the public domain.”).

²¹⁵ Sag, *supra* note 20, at 408, 410.

²¹⁶ *Id.* at 383.

Under this view, the rights granted under the Act might not be so strong in the absence of fair use. If this balance is one of the purposes of the fair use doctrine, super-copyright clauses interfere with the ability of the doctrine to offset ownership rights.

In a much more general way, as well, balance is part of the federal copyright system.²¹⁷ The Supreme Court has repeatedly acknowledged the effort made by Congress to create a balance between providing an incentive for creation and the good that is meant to flow to the public from the creation and dissemination of expressive works. Indeed, the Court has often justified the grant of exclusive rights on the basis of the public interest in having access to a greater number of works. In *Sony v. Universal City Studios*,²¹⁸ for example, the Court stated that:

In enacting the copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.²¹⁹

This statement makes clear that the Supreme Court views the copyright law as a balancing act. The copyright balance, like the patent balance, can be seen as a “bargain” between the owners of expressive works and the public whereby both parties benefit.²²⁰

More recently, in upholding the 1998 Copyright Term Extension Act in *Eldred v. Ashcroft*,²²¹ the Supreme Court described the copyright system as a “bargain,” albeit one different from the patent bargain.²²² Numerous other cases refer to the balance created by Congress and protected by the Supreme Court.²²³ The Court has clarified that it is

²¹⁷ See, e.g., Dennis Karjala, *Copyright Owners' Rights and Users' Privileges on the Internet: Federal Pre-emption of Shrinkwrap and On-line Licenses*, 22 U. DAYTON L. REV. 511, 512 (1997) (“Copyright has always represented a balance between owners’ and users’ rights.”).

²¹⁸ 464 U.S. 417 (1984).

²¹⁹ *Id.* at 429 n.10 (quoting H.R. REP. NO. 60-2222, at 7 (1909)).

²²⁰ *Id.* at 429.

²²¹ 537 U.S. 186, 194 (2003) (holding “Congress acted within its authority and did not transgress constitutional limitations” in enacting Copyright Term Extension Act).

²²² *Id.* at 214-17 (comparing patent law to copyright law and stating that, in patent law, “immediate disclosure is not the objective of, but is *exacted from*, the patentee” whereas in copyright law “disclosure is the desired objective [for the author], not something exacted from the author in exchange for the copyright”).

²²³ See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)

not its “role to alter the delicate balance Congress has labored to achieve” in the copyright realm.²²⁴

I do not propose that courts should step in to alter that balance. Instead, I argue that private entities have taken it upon themselves to alter that balance. They have, with the acquiescence of the courts, consistently altered the balance in favor of rights holders against the users of expressive works and the public domain.

C. Uniformity

The private legislation aspect of super-copyright provisions also stands as an obstacle to the basic federal policy of creating and maintaining uniformity in the federal copyright system. Uniformity is one of the fundamental and over-arching purposes of federal copyright law. The appearance of the patent and copyright clause in the Constitution indicates an intent to create at least some level of national uniformity in the treatment of copyrightable works.²²⁵ Pursuant to this purpose, the Second Congress passed a copyright act, providing for some degree of uniformity. The current Act continues to advance this notion of national uniformity.²²⁶ Indeed, with the express preemption provision, the 1976 Act did away with some of the

(“The limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).

²²⁴ Stewart v. Abend, 495 U.S. 207, 230 (1990).

²²⁵ See, e.g., Goldstein v. California, 412 U.S. 546, 555 (“The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope.”); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 316 n.66 (2004) (“It is generally agreed that the direct legislative history of the Intellectual Property Clause provides little insight into the intent of the drafters, other than to indicate a desire to provide uniformity among the states.”); see U.S. CONST. art. 1, § 8, cl. 8; see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (“One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property.”); *THE FEDERALIST NO. 43* (James Madison) (noting desire for national uniformity).

²²⁶ The express preemption clause of the Copyright Act, § 301, indicates, however incoherently, an effort to create national uniformity at least to some extent. In general, the breadth and scope of the 1976 Act speaks to a general desire to “occupy the field” of expressive works. See Patrick McNamara, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301*, 24 *B.C. L. REV.* 963, 979 (1983) (“[S]ection 301 embodied a major innovation by substituting a single federal system for the prior dual system.”).

last vestiges of dual federal-state protection for creative works.²²⁷ Also in 1976, Congress made federal jurisdiction over copyright cases exclusive, ensuring greater uniformity in the resolution of copyright disputes.²²⁸

The legislative history also supports the notion that national uniformity was one of the main purposes of Congress in enacting the 1976 Act. One member of Congress stated that:

One of the fundamental purposes behind the copyright clause of the Constitution . . . was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws . . . of the various States. Today . . . national uniformity in copyright protection is even more essential . . . to carry out the constitutional intent.²²⁹

As the economy has become increasingly national in scope, the pressure to achieve uniformity in the treatment of expressive works has risen.

In addition, the courts have consistently interpreted the Copyright Act to further the goal of national uniformity. In *Community for Creative Non-Violence v. Reid*,²³⁰ for example, the Supreme Court applied the "general common law of agency" rather than "the law of any particular State" in defining "employee" and "employer" as used in the Copyright Act.²³¹ The Court explained this decision in terms of furthering the Copyright Act's goal of providing for national uniformity:

This practice reflects the fact that 'federal statutes are generally intended to have uniform nationwide application.' Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's *express objective of creating national, uniform copyright law* by broadly pre-empting state statutory and common-law copyright regulation.²³²

²²⁷ 17 U.S.C. § 301 (2000).

²²⁸ 28 U.S.C. § 1338(a) (2000).

²²⁹ H.R. REP. NO. 1476, at 129-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745-46; *see also Goldstein*, 412 U.S. at 555-56 ("The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope.").

²³⁰ 490 U.S. 730 (1989).

²³¹ *Id.* at 740.

²³² *Id.* (citations omitted) (emphasis added).

National uniformity thus must be seen as one of the basic purposes of the patent and copyright clause of the Constitution and one of the animating features of the Copyright Act. Since the passage of the 1976 Act, an underlying assumption of the copyright system has been that the federal law provides a consistent, predictable, and uniform system for addressing copyright issues.

The propagation and enforcement of super-copyright clauses stands as an obstacle to this predictable and uniform system. Although contract enforcement is and should generally be a matter of state law, super-copyright provisions sufficiently threaten the uniformity principle of the Copyright Act and the copyright and patent clause of the Constitution to justify preemption of state enforcement of those provisions.

The proliferation of super-copyright clauses in virtually every consumer adhesion contract violates the uniformity principle in at least three ways. First, if the enforcement of these adhesion contracts is determined solely as a matter of state law, there will necessarily be state-to-state variation in the enforcement of those provisions.²³³ Second, the contracts containing super-copyright provisions vary in terms of the types of restrictions on fair use. Third, online adhesion contracts restricting fair uses of copyrighted works effectively create rights against the world. Together, these three forms of variation stand as an obstacle to the federal policy of uniformity in the copyright system.

Historically, contract law has been a matter of state law, and there are many good reasons for this: basic principles of federalism and the desire to create laboratories of law, for example.²³⁴ When and if challenges to the enforcement of super-copyright clauses arise, the state law doctrines likely to be invoked include unconscionability, public policy, adhesion contract rules, and the formation rules. Each of these is a state law doctrine, and different states have different approaches to these questions.

²³³ This is, obviously, something that we like in many instances, and I certainly do not intend to suggest any wide scale dismantling of the federal system here.

²³⁴ There have also been serious moves away from diversity in the law of contracts. Most notably, some version of the Uniform Commercial Code has been enacted in every state out of a desire to create uniformity in commercial transactions, primarily as a result of the increased mobility of the population and goods and as a result of changes in technology. See U.C.C. § 1-102(2)(c) (2007) (stating that one of policies of U.C.C. is “to make uniform the law among the various jurisdictions”). Notwithstanding the presence of the U.C.C., however, great variation in state contract law remains.

Resolution of the question of enforceability of super-copyright clauses as a matter of state law will result in inconsistent results. That is, the same restriction on fair use may be valid and enforceable in one state and deemed unconscionable or a violation of public policy in another state. For instance, a browsewrap contract may be enforced in one state and deemed unenforceable in another.²³⁵ In short, the state law contract defenses vary in both rule and emphasis.

The same is true of the state contract formation doctrines. For example, in *ProCD v. Zeidenberg*,²³⁶ the Seventh Circuit, applying Wisconsin law, held that the Uniform Commercial Code's battle of the forms provision did not apply because there was only one form.²³⁷ The defendant in *ProCD* argued that the contract formed before he had notice of the "terms in the box," and therefore, those terms were not part of the contract.²³⁸ The Seventh Circuit rejected this argument,²³⁹ but other courts, applying the law of other states, have reached the opposite conclusion. In *Klocek v. Gateway*,²⁴⁰ for example, the United States District Court for the District of Kansas, applying Kansas or Missouri law, without deciding which, held that U.C.C. section 2-207 did, in fact, apply in cases with just one form,²⁴¹ that there was no

²³⁵ See Lemley, *supra* note 15, at 475-76.

²³⁶ 86 F.3d 1447, 1452 (7th Cir. 1996).

²³⁷ *Id.* ("Our case has only one form; UCC § 2-207 is irrelevant."); see also *Hill v. Gateway, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) ("[W]hen there is only one form, § 2-207 is irrelevant."). The position that section 2-207 applies only to situations in which there is more than one form is almost certainly wrong. See Thomas J. McCarthy et al., *Survey: Uniform Commercial Code*, 53 BUS. LAW. 1461, 1465-66 (1998) (explaining that holding declaring U.C.C. section 2-207 inapplicable when there is just one form is inconsistent with official comment). The official comment states that section 2-207 is intended to "deal with two typical situations," one of which is the circumstance "where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed." U.C.C. § 2-207 cmt. 1 (2007).

²³⁸ *ProCD*, 86 F.3d at 1450 ("Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an 'offer,' which the customer 'accepts' by paying the asking price and leaving the store with the goods.").

²³⁹ *Id.* at 1453 ("Zeidenberg has not located any Wisconsin case, or for that matter, any case in any state, holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced.").

²⁴⁰ 104 F. Supp. 2d 1332 (D. Kan. 2000).

²⁴¹ *Id.* at 1339 (rejecting *ProCD* and *Hill* reasoning and stating that "[d]isputes under § 2-207 often arise in the context of a 'battle of forms,' but nothing in its language precludes application in a case which involves only one form." (citation omitted)).

acceptance of the terms by the consumer, and, therefore, no contract formation.²⁴²

Moreover, in addition to violating the uniformity principle, the state contract law formation doctrines are also not an effective lens through which to view the relationship between state and federal law. Because these doctrines focus on the nature of the bargaining process rather than on the substantive terms of the contract, they are not effective at policing terms. Thus, the reliance by some on these doctrines to mediate the conflicts between copyright and contract is misguided. Cases like *ProCD* and *Klocek* present a good example of the ways in which state contract law cannot effectively address matters of substantive federal policy. In those cases, the contract law questions focus on the nature of the offer, the timing of acceptance, and the existence of assent. Both cases also present a good example of the ways in which inconsistent state law can create a lack of uniformity in the federal copyright scheme. Shrinkwrap, browsewrap, and clickwrap contracts are evaluated differently in different states, violating the uniformity principle embodied in the Copyright Act.

In addition, different contracts contain a variety of restrictions, resulting in inconsistency not just between jurisdictions but between various products or services within or among jurisdictions. As described above in Part I, some super-copyright clauses are extremely restrictive, purporting to prohibit virtually all uses. Other provisions are somewhat looser, varying the baseline copyright rules to some extent, but in a limited way. Even though virtually all online contracts alter the boundaries of fair use in favor of copyright owners, a consumer would have to read and understand each contract into which she has entered before knowing what types of otherwise fair uses were prohibited or permitted.

For example, if you use United Airlines's website, you may have entered into a contract in which you agree to make only one copy of your itinerary.²⁴³ On the other hand, if you use American Airlines' website, you may use the "document for informational purposes only,"

²⁴² *Id.* at 1341 ("The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms. Thus, because Gateway has not provided evidence sufficient to support a finding under Kansas or Missouri law that plaintiff agreed to the arbitration provision contained in Gateway's Standard Terms, the Court overrules Gateway's motion to dismiss." (citation omitted)).

²⁴³ United Airlines, *supra* note 6 ("You may download one copy of these materials on any single computer and print a copy of the materials for your use in learning about, evaluating, or acquiring United's services or products.").

and you must include a copy of the copyright notice.²⁴⁴ Delta Airlines claims it owns *all* of the content on its website,²⁴⁵ as does Alaska Airlines;²⁴⁶ and both limit the use of that material.²⁴⁷ Frontier Airlines, on the other hand, is much more circumspect and claims merely to have a copyright for the content on its website.²⁴⁸

This kind of variation occurs in virtually every industry with a national presence.²⁴⁹ Ordinarily, one might conclude that this kind of variation is exactly what federalism and the free market are meant to foster. Ordinarily, that would be the correct conclusion. In this circumstance, however, where consumer adhesion contracts consistently and pervasively restrict fair uses, operation of the market creates a conflict with federal copyright policy. Given the pervasiveness of super-copyright clauses, this variation in terms substantially impedes the uniformity goal established by the Copyright and Patent Clause of the Constitution and the Copyright Act.

Finally, the existence and enforcement of super-copyright provisions conflicts with the uniformity principle by altering the scope of the property right granted by the Copyright Act. With the fair use provision, Congress has said, in essence: The copyright owner has a property right, a right against the world in her expressive work, but that right does not extend to prohibiting fair uses. Super-copyright provisions stand as an obstacle to the achievement of this federal

²⁴⁴ American Airlines, Copyright Information, <http://www.aa.com/aa/i18nForward.do?p=/footer/copyright.jsp> (last visited Oct. 12, 2007) (“The document may be used for informational purposes only. The document may only be used for noncommercial purposes, any copy of this document or portion thereof must include this copyright notice.”).

²⁴⁵ Delta, Terms of Use, http://www.delta.com/legal/terms_of_use/index.jsp (last visited Oct. 12, 2007) (“All content on this Internet site is owned or controlled by Delta Air Lines and is protected by worldwide copyright laws. You may download content only for your personal use for noncommercial purposes, but no further reproduction or modification of the content is permitted.”).

²⁴⁶ Alaska Air, Copyright Information, <http://www.alaskaair.com/www2/company/copyright.asp> (last visited Oct. 12, 2007) (“The information in this Web Site belongs exclusively to Alaska Air Group, Alaska Airlines, and Horizon Air Industries.”).

²⁴⁷ *Id.* (“Permission is hereby granted to download information from this site for viewing or printing. Any other uses of any of the information from this site require additional permission from Alaska Air Group, Alaska Airlines, and Horizon Air Industries.”).

²⁴⁸ Frontier Airlines, Terms of Use, <http://www.frontierairlines.com/frontier/terms-of-use.do> (last visited Oct. 12, 2007) (“This Frontier Airlines website is Copyright© 2006, Frontier Airlines, Inc. All Rights Reserved.”).

²⁴⁹ *See supra* Part I.C.

objective — that of establishing uniformity and exclusivity in the creation and enforcement of property-like rights in intangible works.

Online adhesion contracts are not “private ordering.” Instead, they operate to create rights against the world. With respect to whole classes of expressive materials, copyright owners have created property rights through adhesion contracts. In other words, super-copyright clauses have effectively withdrawn from the public something that Congress has indicated belongs to the public. This effectively results in a private, but state-endorsed, creation of rights against the world.

IV. COURTS SHOULD PREEMPT SUPER-COPYRIGHT PROVISIONS TO PROPERLY ALIGN COPYRIGHT POLICYMAKING

As discussed above in Part III, the enforcement of super-copyright provisions “stands as an obstacle” to the achievement of federal purposes. Although it is impossible to conduct the preemption analysis without making some normative judgments, the preemption doctrines require courts to engage in a primarily interpretive task. That is, the court ought to try to determine the content of federal policies, purposes, and goals, and then decide whether the enforcement of state law “stands as an obstacle” to those purposes or goals. If it does, the state law must be preempted.

As described above in Part II, however, courts generally have not preempted enforcement of super-copyright provisions. In this section, I summarize the factors that have led to the current judicial approach to super-copyright clauses and suggest some additional reasons for preemption.

A. *Why Courts Have Not Preempted Super-Copyright Provisions*

Upon reviewing hundreds of online contracts, what becomes starkly clear is that the effort to stifle fair uses is widespread, affecting nearly every person who engages in nearly any quotidian task. While many of these fair use restrictions may not currently be worth litigating, they create a variety of negative externalities that courts ought to address.²⁵⁰ In general, however, courts have not taken any of these externalities into account.

First, restrictions on fair use (and other baseline copyright rules) have been seen as something of an isolated issue. Most of the cases and the bulk of the academic commentary have focused on software

²⁵⁰ See *supra* Part I.C.

licenses and database agreements,²⁵¹ probably because those raise the biggest financial issues and are therefore worth litigating. This focus on software makes fair use restrictions appear to be a sui generis problem. As Part I of this Article makes clear, however, this is far from a niche problem. The ubiquity of super-copyright provisions transforms them from instances of private ordering into exclusive rights against the world.²⁵² When seen as more than an industry-specific problem and understood as creating rights against the world, the systematic limitation on fair uses implicates substantial federal policies.

Second, as described above, many courts substitute a purely policy-driven approach, or a rote reference to precedent, for an attempt at interpreting congressional intent.²⁵³ This reference to policy concerns is understandable to some extent because the language of the Copyright Act and its legislative history are maddeningly unclear. In addition, most courts have not examined the implied preemption doctrines, relying instead on the “legislative disaster” that is § 301.²⁵⁴ Even if understandable, however, this focus on pure policymaking and the failure to examine the implied preemption doctrines results in a distortion of federal policy.

Third, the policy-driven debates have focused on issues surrounding contract law and theory. This is true of both courts, as exemplified by the *ProCD* case, and commentators.²⁵⁵ On all sides of the debate, in fact, the focus has been on contract law. The “freedom of contract” camp, on the one hand, exalts private ordering as efficient and necessary in the digital age.²⁵⁶ Those skeptical of “freedom of contract

²⁵¹ See, e.g., Maureen O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995) (discussing copyright preemption of software licenses); see *supra* Part II.

²⁵² See *supra* Part I.C.

²⁵³ See *supra* Part II.

²⁵⁴ See *supra* Part II.

²⁵⁵ Much of the academic literature focuses on the proscriptive questions, but this focus is much more justified than the courts' policymaking in this context. Many commentators have addressed the policy issues relating to contracting around the Copyright Act. See, e.g., Niva Elkin-Koren, *Copyrights in Cyberspace — Rights Without Laws*, 73 CHI.-KENT L. REV. 1155, 1159 (1998) (examining “arguments supporting the supremacy of private ordering over a copyright regime”); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 58 (2001) (discussing social welfare trade-offs associated with price discrimination).

²⁵⁶ See *supra* INTRODUCTION.

above all” also focus on contract law, relying primarily on state law doctrines to police the terms.²⁵⁷

Because super-copyright provisions implicate federal copyright policy, however, contract law and theory are destined to fall short. The result is a situation in which the effect of certain contract provisions on federal copyright law and policy is treated as a matter of state law and, particularly, as an issue of contract law and theory. As I have suggested, the focus should be on the interpretive question of discerning federal law and policy.

²⁵⁷ The state law doctrines of unconscionability, public policy, and contracts of adhesion, along with the formation doctrines, have been put forward as capable of addressing the issues raised by super-copyright provisions. Because these state law doctrines necessarily focus on state law issues, however, they are poorly positioned to address questions of federal policy. The doctrines of unconscionability and public policy generally require the court to ask whether the enforcement of the contract conflicts with *state* public policy. Many of the doctrines also focus primarily on procedural issues: whether there was “assent,” whether the contract was presented fairly or unfairly, etc. Neither of these lines of inquiry is fruitful regarding the effect of contract enforcement on federal copyright policy. In addition, as described in Part III.C., *supra*, the state law contract doctrines raise a problematic lack of uniformity in addressing the issue. Finally, many commentators and courts have suggested that the copyright misuse defense can play a vital role in managing the relationship between federal copyright policy and state contract law. See, e.g., Neal Hartzog, *Gaining Momentum: A Review of Recent Developments Surrounding the Expansion of the Copyright Misuse Doctrine and Analysis of the Doctrine in its Current Form*, 10 MICH. TELECOMM. & TECH. L. REV. 373, 376 (2004) (arguing that copyright misuse doctrine “has become necessary in order to preserve the balance between intellectual property and effective competition.”); Lemley, *supra* note 27, at 157-58 (“Furthermore, because copyright misuse is a fact-specific doctrine tailored to the circumstances of individual cases, it may prove a better tool both for tailoring copyright incentives and for avoiding the reticence that surrounds coarser tools such as preemption.”). I am, however, extremely doubtful that the copyright misuse doctrine is robust enough. Copyright misuse doctrine is in its infancy and has so far been applied only sparingly. In addition, it is primarily directed at combating particularly egregious contracts. Given the widespread but diffuse and individually rather mundane problems presented by super-copyright provisions, copyright misuse is unlikely to play a role in policing the federal/state boundary in this regard. That is, the vast majority of online contracts are unlikely to be deemed examples of copyright misuse. Finally, courts are likely to be hesitant to employ the copyright misuse remedy of holding the copyright itself unenforceable during the period of misuse. See, e.g., *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 204 (3d Cir. 2003) (“Misuse is not cause to invalidate the copyright or patent but instead ‘precludes its enforcement during the period of misuse.’” (quoting *Practice Mgmt Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 520 n.9 (9th Cir. 1997))); *Lasercomb Am. v. Reynolds*, 911 F.2d 970, 979 n.22 (4th Cir. 1990) (“This holding . . . is not an invalidation of Lasercomb’s copyright. Lasercomb is free to bring a suit for infringement once it has purged itself of the misuse.”).

Finally, preemption has perhaps been rejected as too blunt or too activist a tool.²⁵⁸ In this context, however, it is neither. Unlike many of the “rights restrictors,”²⁵⁹ I have no quarrel with consumer adhesion contracts; nor do I here suggest any expansion of fair use or limitation of federal copyright rights. Instead, I emphasize the extent to which fair use has been restricted through contractual means and the effect that the enforcement of state law has on the values embodied in the Copyright Act. Preemption in this context neither expands nor contracts rights but instead is a mechanism that would preserve the balance between rights and defenses, between private ownership and the public domain set forth in the Copyright Act. Just as Professor Jason Mazzone stated with respect to copyfraud, my claim here is fairly modest: I argue not for changes in copyright law but for mechanisms to keep the current balance of rights within its designated limits.²⁶⁰

B. *Why Preemption Would Correct Structural Problems in Copyright Policymaking*

Above I have discussed what has become the legal status quo: the proliferation and enforcement of super-copyright provisions. This status quo has resulted in a misallocation of copyright policymaking roles.²⁶¹ It has also allowed the burden of overcoming legislative inertia to rest with those least likely to be able to change the status

²⁵⁸ See, e.g., Lemley, *supra* note 27, at 145 (explaining that courts may “shy away” from applying conflicts preemption because of its “lack of nuance”).

²⁵⁹ Cf. Nimmer, *supra* note 181, at 945 (referring to “rights restrictors”).

²⁶⁰ I am paraphrasing Mazzone here. See Mazzone, *supra* note 3, at 1031 (“Instead of changing copyright law by reducing the rights of creators, this Article urges the development of mechanisms to keep those rights within their designated limits. A robust public domain can emerge by respecting and enforcing the copyright limits Congress has already set.”).

²⁶¹ There is not a substantial amount of literature on the structure of copyright policymaking. But see Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 87 (arguing that Congress has recently acted to remove some policymaking authority from courts, engaging in more “complex and industry-specific” regulations that “allocate rights and responsibilities in a far more detailed manner”). In his article, Liu focuses “on the increasingly regulatory nature of U.S. copyright law and the implications of this change for existing legal institutions.” *Id.* at 90; see also Sag, *supra* note 20, at 384 (exploring structural role of fair use in copyright system); Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 279 (2004) (focusing on some regulatory aspects of copyright law). Notwithstanding these significant contributions, this appears to be an area that is undertheorized. I do not attempt that work here, but I do draw some preliminary conclusions.

quo. Diffuse consumers and others who might seek to make incidental or minor fair use of a variety of materials are unlikely to combine in an effort to influence either the courts or members of Congress. Preemption here is a way to change this dynamic, reallocating the responsibility for copyright policymaking and providing for the possibility of dialogue on this issue between the courts and Congress.

1. Fair Use Policymaking

Commentators are generally in agreement that, with the fair use provision, Congress delegated a substantial amount of fair use policymaking to the courts. The fair use provision sets forth a standard to be applied on a case-by-case basis rather than a bright-line rule that would allow for less interpretation. This puts a great deal of responsibility for fair use adjudication in the hands of the courts. “Fair use is the mechanism by which Congress transferred significant policymaking power to judges in order to allow copyright to adapt to ongoing social and technological change more effectively than a purely legislative response would allow.”²⁶² Thus, the courts are granted broad discretion with respect to fair use determinations, and fair use remains the province of federal law and policy.

By acceding to nearly all contractual restrictions on fair use, however, courts have abdicated their role as fair use policymakers. Along with the “clearance culture” in which individuals license various uses that might otherwise be deemed fair uses, the proliferation of super-copyright clauses will reduce the numbers and types of fair uses engaged in and, accordingly, the number of occasions on which courts will apply the fair use doctrine and engage in fair use analysis.²⁶³ To the extent that courts permit copyright owners to short circuit the process of fair use policymaking, the fair use doctrine will fail to develop and adapt to new technologies, changing market conditions, and consumer behavior.²⁶⁴

Contractual restrictions on fair use are, I suggest, part of a trend toward limiting or eliminating fair use altogether. This trend has been initiated by private entities, but the courts and Congress are complicit, at least in part, by permitting private entities to decide what uses may be made of copyrighted works. The Copyright Act outlines the kinds

²⁶² See Sag, *supra* note 20, at 396.

²⁶³ See *supra* Part I.D.1-3.

²⁶⁴ See *supra* Part I.D.3.

of uses that might be deemed fair and provides a structure for courts to engage in fair use policymaking.²⁶⁵ By routinely enforcing super-copyright provisions, courts abdicate their fair use policymaking role. Permitting copyright owners to dictate fair use policy is consistent neither with the structure and intent of the Copyright Act, nor with principles of institutional competence and allocation. That is, courts have been charged with making fair use determinations. As an institutional matter, the fair use doctrine is best elaborated on and developed by courts. Its open-ended and adaptive nature makes it appropriate for nuanced, fact-specific judicial interpretation. That nature — flexible and open-ended rather than rigid and clear cut — is not so amenable to private decisionmaking, and Congress has indicated that it does not intend to engage in those nuanced determinations. Thus it is the courts that are left with the responsibility of fair use policymaking. Moreover, the doctrine will not evolve if courts do not continue to make fair use determinations. In short, courts are better suited than either copyright owners or Congress to draw the line between fair and unfair uses, but enforcement of super-copyright provisions effectively transfers this power to private entities.

2. Policymaking and Contracting Around the Copyright Act

Unlike the structure of fair use policymaking, which points to courts as the primary institutional actor, policymaking authority for contracting around the Copyright Act appears to rest primarily with Congress. As described above, Congress has in many cases indicated whether certain provisions of the Act are default rules or are non-waivable.²⁶⁶ Congress has thus already asserted its policymaking authority in this regard, but it has not completed the task. That is, for some sections of the Copyright Act, it is clear whether contracting around is acceptable. Conversely, for a number of other provisions, Congress has not indicated whether contracting around is never, sometimes, or always acceptable. The courts, by answering the question of the propriety of contracting around fair use, have usurped some congressional authority and at the same time have let Congress off the hook. Congress ought to decide whether and when fair use may be waived by contract.

²⁶⁵ See *supra* Part I.A.

²⁶⁶ See *supra* Part III.A.

This allocation of policymaking roles has been accomplished, in part, by the courts' tendency, as described above, to ignore or give short shrift to the interpretive task demanded by the express and implied preemption doctrines.²⁶⁷ *ProCD* embodies this primarily policy-driven approach. Virtually all courts to examine the issue since have cited *ProCD* and similarly failed to engage in the interpretive task. Also following the *ProCD* path, most courts have sidelined the implied preemption doctrines. While understandable given the opacity of federal copyright policy regarding contracting around fair use, the substitution of a purely policy-driven approach or a minimal citation to precedent for the more difficult task of interpretation is consistent neither with the doctrine nor with the court's role in the copyright policymaking structure. When courts merely uphold super-copyright provisions, without discussion, or with only a policy-driven discussion, they engage in policymaking. A refusal to engage in this policymaking would have the effect of putting the ball in Congress's court, where it belongs.

3. Allocating the Burden of Overcoming Legislative Inertia

One could argue that preemption is an activist or radical move, and courts and commentators have been hesitant to employ preemption because of its potentially overbroad effect. But in this context, preemption would be a deferential step that acknowledges the appropriate structure of copyright policymaking and emphasizes the respective institutional roles of the federal courts and Congress in that structure. One also could argue that Congress is so subject to capture by industry that it would be unable to resolve this question in an appropriate way,²⁶⁸ but I am not sure we should let Congress off the hook.

With respect to "determining the boundaries of copyright law," Professor Sara Stadler has argued that some decisions simply have to be made by Congress. She argues: "In defining legal rights by reference to incentives, which are satisfied (or not) depending on what creators expect, Congress has ceded to creators the power to locate the boundaries of copyright law. Courts cannot relocate those boundaries without deciding which incentives are legitimate and which ones are

²⁶⁷ See *supra* Part II.

²⁶⁸ See, e.g., Tom W. Bell, *Escape From Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 746 (2001) ("[L]egislators could not strike such a balance if they wanted to; thanks to the influence of [the] copyright lobby, they may not even care to try.").

not, and . . . courts do not have the tools to make that decision. Only Congress can make it.”²⁶⁹ Courts can try to prompt action by Congress, however, and preemption is one way to do that.

I have suggested that courts should preempt enforcement of super-copyright provisions. This would involve examining the context in which the provisions arise to determine whether they constitute “rights against the world” that conflict with some of the policies of the Copyright Act. If courts acknowledged that Congress has not made clear the extent to which contracting around the fair use provision is acceptable, and then preempted enforcement of that provision, that decision would signal to Congress that Congress is the institutional actor responsible for exercising this policy choice. Thus, preemption here defers to, rather than usurps, Congress’s authority on this matter.

I have described the legal status quo above, and it has become just that — an entrenched pattern. One could argue that Congress’s failure to respond to the status quo indicates its acquiescence,²⁷⁰ but in this circumstance congressional silence should not be interpreted as particularly meaningful. The “losers” under the current status quo, mostly a diffuse group of users and consumers, individually are affected in only a minor way and, thus, are unlikely to have either the incentives or the resources to bring the issue to the attention of Congress. Conversely, however, if the courts preempted enforcement of super-copyright provisions, the new “losers” would be much better situated to overcome the legislative inertia.

That is why preemption here need not be the final word on the subject. If copyright owners object to the preemption ruling, they may go to Congress and seek legislation reversing the decision. From a public choice perspective, those actors with greater political power ought to bear the burden of convincing Congress that contracting around fair use is consistent with copyright policy. The “losers” under the status quo simply do not have the cohesiveness or political power that the copyright owners do.

CONCLUSION

I have argued that preemption is the appropriate tool to address the conflict between state law and federal law that has arisen with the widespread adoption of super-copyright clauses in nearly every online

²⁶⁹ Stadler, *supra* note 1, at 478.

²⁷⁰ On the difficulties of drawing conclusions from congressional silence, see generally Lawrence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 *IND. L.J.* 515 (1982).

contract. Preemption has been rejected by many judges and commentators as too blunt and too extreme a solution. In the context of online adhesion contract terms limiting fair use, however, preemption is neither radical nor overbroad.

In fact, arguing for preemption here is quite a modest proposal. First, preempting fair use restrictions in adhesion contracts does nothing more than leave fair use as it is and as described in the Copyright Act. Preemption in this context would not broaden fair use, nor would it restrict any rights of copyright owners as defined in the Act. Second, preemption of super-copyright clauses would be an explicit acknowledgement of the appropriate institutional and structural roles of the courts and Congress with respect to copyright policy generally and fair use in particular. If super-copyright clauses were preempted (and particularly if done with the recognition of the appropriate policymaking roles of the courts and Congress) the preemption decision is hardly the end of the story. Congress may well respond, and preemption would merely be part of the dialogue between Congress and the courts.²⁷¹ In this way, preemption is a deferential move and certainly more deferential than the normative gloss applied by many courts in approaching the question of the appropriate relationship between state contract law and federal copyright law.

In this Article, I have suggested that courts ought not elevate their policy perspectives above the effort to determine the content of federal policy and congressional intent. But what the arguments above indicate quite clearly is that congressional policy regarding the status of the fair use exception within the copyright system is in flux and unclear. The discussion above also indicates that it is Congress, rather than the courts, or the states, or private parties, that ought to make the complicated policy calculation, balancing numerous factors, about whether fair use is a default provision or is, instead, a more fundamental aspect of the Copyright Act and of the federal intellectual property system in general. Preemption just might be part of the solution.

²⁷¹ Cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 651 (1993) (“Congress is free to disagree with the Court. The members of Congress are free to, and usually do, disagree with one another. As disagreement occurs, the document will take on new meaning.”).