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Bargaining Power and Background Law

Nancy S. Kim*

ABSTRACT

Power in contract law typically refers to the bargaining strength of each contracting party in relation to the other. In assessing the relative bargaining power of each party, courts and commentators often consider factors specific to the parties, such as socio-economic status and education level. In this Essay, I suggest another factor that affects the power of the parties in negotiating or modifying their agreement, one that I refer to as the “background law.” The background law is the substantive law that governs the subject matter of the contract. This Essay focuses specifically on the background law of copyrights and the way it alters and affects the allocation of power between contracting parties. In certain circumstances, the background law of copyright has the potential to create or exacerbate two kinds of power imbalance—knowledge power and market power. In this Essay, “knowledge power” refers to the advantage that a superior understanding of the background law confers upon a contracting party, and “market power” refers to the ability of a contracting party to establish and dictate business norms in a particular segment of the economy or within a particular industry. This Essay focuses on three bargaining pairs in order to explore how copyright law as background law can create knowledge and market power imbalances: (1) independent artist and hiring party, (2) employee and employer, and (3) software company and

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consumer. The first two bargaining pairs involve the work-made-for-hire doctrine. The third bargaining pair involves innovative contracting forms and the freedom to contract. Part I examines knowledge power imbalances using as examples the first two bargaining pairs. Part II analyzes market power imbalances using as an example the third bargaining pair.

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Power in contract relations typically refers to the bargaining strength of each contracting party in relation to the other.¹ In assessing the relative bargaining power of each party, courts and commentators often consider factors specific to the parties, such as socio-economic status and education level.² This Essay suggests another factor that affects the power of the parties in negotiating or modifying their agreement, one that it refers to as the "background law." The background law is the substantive law that governs the subject matter of the contract. This Essay focuses specifically on the

1. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (noting that a bargain is "not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party").

2. See, e.g., *Weaver v. Amer. Oil Co.*, 276 N.E. 2d 144, at 145-46 (1971) (noting that the plaintiff was the party with "lesser bargaining power" had "left high school after one and a half years and . . . work[ed] at various skilled and unskilled labor oriented jobs. He was not one who should be expected to know the law or understand the meaning of technical terms.").

background law of copyrights and the way it alters and affects the allocation of power between contracting parties.

Copyright law grants authors a limited monopoly on their creations in an effort to spur innovation for the benefit of the public.³ This monopoly is a bundle of rights that the copyright owner can transfer, in whole or in part, via contract.⁴ The interplay between contract law and copyright law creates power and shifts rights between the parties, sometimes with unintended consequences.

In certain circumstances, the background law of copyright has the potential to create or exacerbate two kinds of power imbalance—knowledge power and market power. In this Essay, “knowledge power” refers to the advantage that a superior understanding of the background law confers upon a contracting party. This knowledge allows a party to protect or expand his or her contractual rights and to limit his or her contractual obligations. For example, many consumers lack knowledge power in that they do not realize that the “limited warranty” they receive from some product manufacturers actually reduces their rights under the Uniform Commercial Code.⁵ In other words, a knowledge power imbalance occurs where one party’s *lack* of knowledge effectively gives the other party an unnegotiated advantage.⁶ While these imbalances occur in many contexts, this Essay limits its discussion of knowledge power imbalance to the context of copyright law. The rights allocated by copyright law do not always accord with the reasonable expectations of a party to a contract who lacks knowledge of copyright law.

For purposes of this Essay, the term “market power” refers to the ability of a contracting party to establish and dictate business norms in a particular segment of the economy or within a particular industry. For example, even if a consumer is aware of the warranties implied by state law, he or she may be unable to preserve applicable rights under these warranties if most manufacturers of that type of product provide only limited warranties.⁷ In that situation, no

3. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting the objective of copyright law to stimulate artistic production for the “general public good”).

4. 17 U.S.C. § 201(d) (2000); see also *Stewart v. Abend*, 495 U.S. 207, 220 (1990) (referring to the copyright holder’s rights as a “bundle” of rights).

5. See U.C.C. § 2-314 (2004) (providing an implied warranty that goods shall be merchantable); *id.* § 2-711 (setting forth Buyer’s remedies in event of breach by Seller).

6. In some cases, such as the example regarding warranties, the other party may have intended the contractual result achieved. In other cases, however, the other party is equally unaware of the background law but nevertheless benefits from its effects.

7. See Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 580 (1969) (noting that consumers effectively have no choice to seek different warranty terms because all competing goods in that category are similarly limited).

amount of knowledge of background law can surmount the market power of the manufacturer.

The alienability of copyright through contract increases the economic value of the exclusive rights granted under copyright, thus providing an incentive to create.⁸ Yet, in some segments of the economy, the market power of one bargaining entity is much greater than the market power of the other, thus enabling the stronger party to diminish or effectively eliminate the economic value of the copyright.⁹ For example, as further discussed in Part II, a large software company has greater market power than any of its individual consumers. This imbalance in market power can create dynamics that undermine the incentive objective of copyright law.¹⁰

This Essay focuses on three bargaining pairs in order to explore how copyright law as background law can create knowledge and market power imbalances: (1) independent artist and hiring party, (2) employee and employer, and (3) software company and consumer. The first two bargaining pairs involve the work-made-for-hire doctrine.¹¹ The third bargaining pair involves innovative contracting forms and the freedom to contract. Part I examines knowledge power imbalances using the first two bargaining pairs as examples. Part II analyzes market power imbalances using the third bargaining pair as the example.

I. KNOWLEDGE POWER IMBALANCES

Under the Copyright Act of 1976, a creator typically owns the rights to his or her work upon creation of that work, except where the work was “made for hire.”¹² A work made for hire is:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.¹³

8. See discussion *infra* Part II.

9. See discussion *infra* Part II.

10. See discussion *infra* Part II.

11. 17 U.S.C. §§ 101, 201 (2000).

12. *Id.* § 201(a).

13. *Id.* § 101 (noting that a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and

Thus, the work-made-for-hire doctrine creates two exceptions to the typical ownership rule under the Copyright Act: (1) when the creator is an employee and makes the creation during the scope of the employment and (2) when the creator is an independent contractor hired to create a specific type of work for another party pursuant to written agreement.¹⁴ The work-made-for-hire doctrine tries to strike a balance between acknowledging creativity and rewarding those who take an economic risk in order to acquire the fruits of that creativity.¹⁵ Problems arise, however, for three reasons: (1) not all creations qualify as works—only those that fall into the statutorily enumerated categories; (2) not all hiring parties know that they must have independent contractors sign a work-made-for-hire agreement if they wish to acquire the copyright; and (3) in cases where a work does not fall under one of the statutorily enumerated categories of a work made for hire, some hiring parties may not know that they must include assignment provisions in their work-made-for-hire agreements if they wish to own the copyright to the work.¹⁶ As a result, parties may believe that they own the copyright to a creation when they do not.

A. Independent Artist and Hiring Party

The bargaining pair of an independent artist and a wealthy—usually corporate—hiring party is what many people envision when considering a creator's ability to contract away some or all of his or her exclusive rights. Examples of this type of bargaining pair include a painter commissioned to paint a wealthy patron's portrait, a musician assigning his or her rights to a recording, or a writer hired to write a screenplay for a production company. Typically, the hiring party and the creator enter into a written agreement setting forth the terms of the engagement, including the price, the specifications for the work, and the ownership of intellectual property rights.

The work-made-for-hire doctrine determines who owns the copyright to a work and permits the parties to reallocate some or all of

an 'instructional text' is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities").

14. *Id.*

15. Julie Katzman, Note, *Joint Authorship of Commissioned Works*, 89 COLUM. L. REV. 867, 871-72 (1989) (noting that the 1976 Copyright Act aimed to balance the interests of authors and artists against the interests of hiring parties).

16. The courts have not yet resolved whether a creator can effectively assign rights to a work that has not yet been created and does not fall into one of the statutorily enumerated categories of works made for hire. The author would argue that such an assignment is enforceable as a conditional promise under contract law provided that present tense assignment language was employed.

their statutory rights with a written contract.¹⁷ Contract law in turn strives to fulfill the parties' reasonable expectations of the agreement's terms.¹⁸ Knowledge imbalances, however, may operate in a given contract to defeat these reasonable expectations. The following two scenarios illustrate the resulting discrepancy between the parties' intentions and the contractual result.

1. Scenario 1: Nonprofit Organization and Sculptor

A nonprofit organization, unaware of the work-made-for-hire doctrine and the background law of copyright, hires a sculptor to make a sculpture of homeless people.¹⁹ The organization intends to make miniature replicas of the sculpture to publicize its mission to assist the homeless.²⁰ The sculptor is not an employee of the non-profit organization and the organization does not have the sculptor sign a written work-made-for-hire agreement.²¹ Even if the parties had signed such an agreement, a sculpture does not fall into one of the statutorily enumerated categories of works made for hire.²² The copyright to the sculpture thus belongs to the sculptor.²³ As a result, the non-profit organization cannot make miniature replicas of the sculpture to publicize its mission because the right to make and distribute copies are exclusive rights held by the copyright owner under the Copyright Act.²⁴

2. Scenario 2: Bank and Software Consultant

A bank hires a software consultant as an independent contractor to install a complicated software system that the bank previously purchased from another company.²⁵ During the

17. 17 U.S.C. §§ 101, 201.

18. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.1 (1952) ("That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise."); Roscoe Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1, 1-2 (1945).

19. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

20. See *id.*

21. See *id.* at 752.

22. See 17 U.S.C. § 101; *Cnty. for Creative Non-Violence*, 490 U.S. at 738.

23. See 17 U.S.C. § 101.

24. *Id.* § 106 (1), (3).

25. This scenario is the topic of discussion on several software developer websites. See, e.g., Posting of Cliff to Slashdot (*Copyright vs Exclusive License?*), http://ask.slashdot.org/story/07/04/26/0433218/Copyright-vs-Exclusive-License?art_pos=3 (Apr. 26, 2007, 14:21 EST); Posting of Ryan Wilson to <http://discuss.joelonsoftware.com/default.asp?biz.5.736364.4> (*Work Made for Hire Agreement*) (Feb. 27, 2009).

engagement, the consultant creates an interface between the bank's existing system and the new software.²⁶ The consultant has signed the bank's standard work-made-for-hire agreement, which includes both a provision stating that the work is a work made for hire and a provision assigning the copyright to the hiring party in the event that the work does not constitute a work made for hire, such as the following:

All Deliverables shall be considered a work made for hire and ownership of all rights, including all copyrights and renewals and extensions thereof, shall vest in the Company. In the event that any such Deliverable is deemed not to be a work made for hire for any reason, Consultant hereby irrevocably grants, transfers and assigns all right, title and interest in such Deliverable to Company. Consultant hereby waives any moral rights that it may have in and to the Deliverable.²⁷

To the uninformed, the phrase "work made for hire" sounds like it means only that the consultant will be engaged to do work, and that the bank will pay her for it.²⁸ Still, even though the consultant does not understand that "work made for hire" has a particular legal meaning, she signs the agreement (with the assignment provision) and thereby transfers the copyright to the new interface to the bank. Subsequently, the consultant may create the same software interface for other clients, unaware that she is exposing herself—and them—to infringement claims by the bank. Of course, the bank is unlikely to notice or object to the infringement until the context changes—i.e., the consultant creates a software interface for a competitor of the bank, the bank has a conflict or disagreement with the consultant (or one of the consultant's clients), or the interface suddenly becomes more valuable as a result of a change in the availability of the technology.

3. Knowledge Power and Bargaining Behavior

As these scenarios illustrate, the background law of copyright and the work-made-for-hire doctrine have the potential to create a knowledge power imbalance that defeats the reasonable expectations of the parties. In Scenario 1, if the sculptor does not consent to the non-profit's creation and distribution of replicas of the sculpture, that imbalance defeats the non-profit organization's purpose for

26. *Id.*

27. The interface likely does not fall into one of the statutorily enumerated work-made-for-hire categories, but the assignment provision closes the gap and effectively transfers copyright to the bank.

28. The author was formerly in-house counsel at a software and services company and had many discussions with different software consultants who thought "work made for hire" meant simply that they were getting paid to do the work, not that they were being asked to give up the copyright to the work.

commissioning the work. In Scenario 2, the knowledge imbalance threatens the very existence of the consultant's business.

How would knowledge of the background law change the behavior of the bargaining pairs? In Scenario 1, if the non-profit organization knew the background law of copyright, it would certainly insist upon a written assignment of rights prior to commissioning the sculpture. The sculptor, on the other hand, might (1) insist upon contractual language preserving certain rights to the work, such as requiring consent to any alterations, (2) request more money to compensate for the loss of rights, or (3) refuse to accept the project. In Scenario 2, the consultant could (1) insist upon contractual language that enables her to retain ownership of the interface and gives the bank a perpetual, non-exclusive license to use it, (2) charge development fees much higher than consulting fees, thus factoring the inability to reuse the code into pricing, or (3) decline to accept the project. In both scenarios, the background law creates a potential knowledge power imbalance that may change what the parties thought they were agreeing to into something that neither of them intended.

B. Employee and Employer

The work-made-for-hire doctrine treats employees differently from independent contractors.²⁹ Under the Copyright Act of 1976,

in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights comprised in the copyright.³⁰

Thus, all of the copyrightable work that an employee creates within the scope of his employment is a work made for hire, and the employer therefore owns it. Unlike with independent contractors, this provision affects all work by an employee, not just the type of work that falls into the statutorily enumerated categories.³¹ Usually, the statutory allocation of ownership reflects the expectations of the parties.³² Sometimes, however, it does not.

29. 17 U.S.C. § 201(a) (2000) (defining work for hire as "a work prepared by an employee within the scope of his or her employment").

30. *Id.* § 201(b).

31. *Id.*

32. This is not to say that those expectations are based upon principles of fairness—rather than the imbalance of power between employees and employers—even when the parties intend the work-made-for-hire doctrine to apply. As noted copyright scholar and law professor Jane Ginsburg notes, "[e]mployee authors and others subject to the 'works made for hire rule' are cast out of copyright, as the statute deems their employers and hiring parties the 'author.'" Jane

1. Scenario 3: “Creative Genius” and Eponymous Companies

The legendary choreographer Martha Graham created an eponymous dance company which was incorporated in 1948 after several decades of operation.³³ Although Graham was an employee of the company, the purpose of the company was to handle the business-related aspects of dance education and production (such as hiring dancers and reviewing requests to perform dances) so that she could focus on the creative aspects of her work.³⁴ Upon Graham’s death, the heir to her estate sued the dance company, claiming ownership of seventy dances that Graham had created.³⁵ The dance company countered that because it was Graham’s employer, it—not Graham—owned the dances under the work-made-for-hire doctrine.³⁶ The Second Circuit agreed and held that all of the dances that Graham created while employed by the dance company were works made for hire and therefore owned by the company.³⁷

The *Graham* decision created a stir within the dance community. Merce Cunningham, the late visionary choreographer and contemporary of Graham, said that he was “horrified” to discover that, based on the *Graham* decision, he might not have any say in how his dances were performed.³⁸ His concern regarding the potential loss of creative control over his work was justified.³⁹ If found by a court to be an employee of his company—which is probable given the court’s analysis in *Graham*—it would not matter that Cunningham’s company, like Graham’s, existed solely to promote his artistic vision.⁴⁰ Despite the intentions of Cunningham and his dance company, the work-made-for-hire doctrine dictates that the employee-

C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1645 (2001). Sometimes creators who retain authorship status nonetheless assign all rights for a small royalty, or even a flat one-time payment. *Id.* at 1646.

33. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004). There was actually a school and a dance center, but for the purposes of this discussion and the sake of simplicity, I will refer to only a “dance company.”

34. *Id.* at 639-40 (noting that the “employer” was a not-for-profit corporation formed for the purpose of encouraging an artist in her creative endeavors).

35. *Id.* at 630.

36. *Id.* at 631.

37. *Id.* at 642.

38. Diane Solway, *When the Choreographer Is Out of the Picture*, N.Y. TIMES, Jan. 7, 2007, <http://www.nytimes.com/2007/01/07/arts/dance/07solw.html>.

39. See Arthur Lubow, *Can Modern Dance be Preserved?*, N.Y. TIMES, Nov. 8, 2009, at MM38, available at <http://www.nytimes.com/2009/11/08/magazine/08cunningham-t.html> (“In the aftermath of the [*Graham*] decision, single-choreographer companies realized that if the artist was to own his or her dances with certainty, the rights had to be granted formally by the board.”).

40. *Id.*

choreographer's creations would belong to the company.⁴¹ In the event of a dispute, the employer-company could replace Cunningham with an artistic director who interprets and performs the dances created by the employee-choreographer in a manner that subverts, perverts, and destroys his artistic vision. The work-made-for-hire doctrine, as applied and interpreted in *Graham*, fails to address the reality of many artistic relationships and imposes on them a more traditional and typical type of working arrangement—one with a boss, cubicles, and nine-to-five working hours.

2. Scenario 4: Academics and Universities

Few doubt that full-time professors are employees of their academic institutions.⁴² Yet hardly anyone thinks that professors are mere scribes for hire or that the work they do belongs to the schools that pay them. In fact, some courts have recognized a “teacher exception” to the work-made-for-hire doctrine that enables professors to retain the copyright to their lectures and scholarly works.⁴³ These cases, however, were largely decided prior to the enactment of the 1976 Act which classified work prepared by an employee within the scope of employment as “work made for hire.”⁴⁴ A case rendered in 1987 hinted that academic work *would* constitute a work made for

41. After the *Graham* decision, Merce Cunningham's dance foundation began registering the copyrights to his dances in his name. *Id.*

42. In *Community for Creative Non-Violence v. Reid*, the Supreme Court applied common law principles of agency to determine whether a worker was an independent contractor or an employee. 490 U.S. 730, 751-53 (1989). See also Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C.L. REV. 549, 572-73 (2000) (noting that, using agency principles, professors would almost certainly be considered employees of their university).

43. See, e.g., *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969). For a discussion of the teacher exception and cases, see Jed Scully, *The Virtual Professorship: Intellectual Property Ownership of Academic Work in a Digital Era*, 35 MCGEORGE L. REV. 227 (2004); Elizabeth Townsend, *Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*, 4 MINN. INTELL. PROP. REV. 209 (2003); Chanani Sandler, Comment, *Copyright Ownership: A Fundamental of “Academic Freedom,”* 12 ALB. L.J. SCI. & TECH. 231, 239 (2001).

44. See, e.g., *Weisser*, 78 Cal. Rptr. 542. Professor Rochelle Cooper Dreyfuss writes that [s]cholars have indeed concluded that that 1976 Act abolishes the teacher exception to the work for hire doctrine. They reason that since the 1976 Act suggest that courts should limit their inquiry to the existence of an employment relationship, employees . . . such as academics . . . may no longer argue that the factors surrounding their employment rebut the presumption of employer ownership.

Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 598-99 (1987).

hire under the 1976 Copyright Act.⁴⁵ Several scholars, too, believe that the 1976 Copyright Act—which focuses on whether work is created within the scope of employment—effectively abolished the teacher exception.⁴⁶ Generally, universities did not bother to initiate litigation against their professor-employees or to contest the teacher exception that existed prior to 1976.⁴⁷ Instead, the cases that discussed the issue of ownership of academic work typically arose because of a dispute between a professor and a third party who, for example, tried to sell lecture notes.⁴⁸

A teacher exception, previously justified by the uniquely itinerant nature of academia, is difficult to rationalize in an increasingly mobile marketplace where many types of employees—not just academics—move around from employer to employer. The work-made-for-hire doctrine may thus betray the reasonable expectations of an employee-academic who believes that she owns the rights to her scholarship. As in previous scenarios, this gap in understanding is usually not a problem until changes in the business environment—or technological innovations—change the context and meaning of the agreement. Long-distance learning, for example, has made the question of who owns academic work a more contentious issue—just ask Professor Arthur Miller. A few years ago, Professor Miller agreed to offer online courses for Concord Law School, a distance learning institution.⁴⁹ Harvard University, Miller's then-employer, claimed that he could not offer these courses because it owned his lecture materials.⁵⁰ Eventually, the parties settled the matter, and Miller agreed to give up teaching his Concord courses.⁵¹ Harvard subsequently modified its faculty manual to explicitly forbid faculty

45. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1093-94 (7th Cir. 1987) (stating that the work-for-hire doctrine is “general enough to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than scholars”).

46. *See, e.g., Dreyfuss, supra* note 44; *Scully, supra* note 43. Elizabeth Townsend explains that the “teacher exception was established under the 1909 act by case law, but because the 1976 act did not incorporate it, the ‘teacher exception’ was subsumed by a work-for-hire doctrine that the Supreme Court’s definition of employment in *CCVN v. Reid* places teachers’ materials under the scope of employment.” *Townsend, supra* note 43, at 226.

47. For an analysis of cases discussing the teacher exception in the information age, see *Townsend, supra* note 43.

48. *See, e.g., Weisser*, 78 Cal. Rptr. 542; *see also Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (noting that the 1976 Act likely abolished the teacher exception, even if it did so inadvertently).

49. Amy Dockser Marcus, *Seeing Crimson: Why Harvard Law Wants to Rein In One of Its Star Professors*, WALL ST. J., Nov. 22, 1999, at A1.

50. *Id.*

51. Jay Lindsay, *Harvard Corrals Its Staff*, AUSTRALIAN, May 3, 2000, at 40.

members from teaching or consulting outside of Harvard, either in person or online, without the appropriate dean's permission.⁵²

Knowledge of the work-made-for-hire doctrine gives the employer power in the form of ownership of the work without having to bargain for it. In the Miller example, technology changed the business environment, and suddenly teaching materials that previously had no independent market value became valuable. Miller, believing he owned the copyright, attempted to exploit the new value of his work product. His employer, however, claimed that it owned the copyright to Miller's lectures and that either Miller should be enjoined from working for Concord or Harvard should receive a portion of the revenues from those lectures.⁵³ The parties may have been able to come to a mutually agreeable resolution if they had contemplated the future business landscape prior to entering into the contract.⁵⁴ The background law, however, acted as a contractual "gap filler"⁵⁵ after the business environment changed, putting Miller at a negotiating disadvantage that he was ultimately unable to overcome.

C. Contract Interpretation and the Knowledge Imbalance

Copyright law permits a copyright holder to contractually alter the exclusive rights granted by statute. Unfortunately, as discussed in Section I, the existing background law—in these scenarios, the work-made-for-hire doctrine of the 1976 Copyright Act—has the potential to create a knowledge gap. The non-intuitive nature of the statutory requirements under the Copyright Act generally, and the work-made-for-hire provisions specifically, affect the allocation of rights between the parties that may defeat the intent of at least one of

52. Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 849-50 (2000). Professor Miller was quoted as saying, "Now I have to justify everything I do. I find it offensive I now have to go through a process I haven't had to go through in 35 years." Lindsay, *supra* note 51. The policy, Miller said, offended the principle of academic freedom: "The question is whether my contract bounds me exclusively to Harvard [L]aw [S]chool or whether I have free choice." *Id.*

53. Sandler, *supra* note 43, at 232. Harvard also claimed that Miller's lectures for Concord would be a conflict of interest with Harvard. *Id.*

54. Professor Miller indicated that an amicable resolution could have been reached if the issue had been broached earlier. "My mistake, Mr. Miller now concedes, 'was I didn't get front-end permission from the dean' before the controversy boiled up. But he says that's because 'I have been doing videotape and audiotape lectures of my courses for 25 years and didn't think this was any different.'" Amy Dockser Marcus, *Seeing Crimson: Why Harvard Law Wants to Rein In One of Its Star Professors*, WALL ST. J., Nov. 22, 1999, at A1.

55. "Gap filler" refers to terms that are supplied by a court regarding issues that the parties to a contract have failed to expressly address. See generally Juliet P. Kostritsky, *What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323 (2004).

the parties to a contract. Because this problem arises from a lack of knowledge of the background law, the best solution is to minimize the need for specialized knowledge of copyright law.⁵⁶

Currently, the work-made-for-hire doctrine is absolutist in nature—either the hiring party owns the work or the creator owns it.⁵⁷ In many cases, however, each party intends to use the work independently of the other but anticipates the other party's intended use of the work, either because such use was discussed or because such use was to be expected given the nature of the work. Unfortunately, the work-made-for-hire doctrine does not recognize or consider context, trade norms, or the intent of the parties in entering into the agreement.

Consequently, Congress should amend the work-made-for-hire doctrine to expressly permit courts to interpret the provisions of an agreement to include context, industry norms, and the intent of the parties. Courts may then determine whether one party had intended to grant the other party an implied license to use the work and, if so, what the scope of that implied license is.⁵⁸ For example, in Scenario 1, where the contracting parties were a non-profit organization and a sculptor, if the sculptor had been aware of the non-profit organization's intent to create replicas of the sculpture, a court might determine that the sculptor had granted an implied license to the non-profit organization to make and distribute copies of the sculpture even though copyright ownership would reside with the sculptor. This would serve the interests and expectations of both parties. The non-profit organization would not be able to alter or modify the sculpture, but it would be permitted to make and distribute miniature replicas, thus fulfilling both parties' contractual expectations.

56. One might suggest that parties remedy knowledge power imbalances through education, but such a suggestion is impractical and ignores the nature of knowledge power imbalances. The problem with suggesting education as a solution is that (unlike with economic or market imbalance situations) in knowledge imbalance cases, the affected party is entirely unaware of the need for education.

57. See Nancy S. Kim, *Martha Graham, Professor Müller and the "Work for Hire" Doctrine: Undoing the Judicial Bind Created by the Legislature*, 13 J. INTEL. PROP. L. 337, 367 (2006) (noting the "pitfalls inherent in an all-or-nothing approach to ownership of created works").

58. See *id.* (stating that the "intent of the parties should be the single most important factor to consider in determining ownership").

II. MARKET POWER IMBALANCES

The third bargaining pair—the software company⁵⁹ and consumer—illustrates how market power imbalance, like knowledge power imbalance, can undermine the incentive objective of copyright law. Software companies have used their market power to introduce novel forms of contracts, such as “shrinkwraps,”⁶⁰ “clickwraps,”⁶¹ and “browsewraps,”⁶² into the marketplace,⁶³ and courts have recognized these contracting forms as legitimate.⁶⁴ Software companies have then reallocated by contract the rights granted to the creator by the background law of copyright,⁶⁵ which may ultimately undermine the incentive objective of the Copyright Act.

A. Software Company and Consumer

The objective of copyright is to encourage invention and innovation for the benefit of society.⁶⁶ Copyright law gives ownership

59. In this Essay, the term “software company,” includes owners of websites.

60. A shrinkwrap license is an agreement that is wrapped in plastic and included with a compact disc containing a software program. See Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 799 (2007) [hereinafter Kim, *Clicking and Cringing*]; Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 (1995).

61. A clickwrap agreement is a digital agreement that requires a party to click on an electronic button to indicate assent. See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006) [hereinafter Lemley, *Terms of Use*].

62. Browsewrap agreements are terms posted on a website that do not require an express manifestation of assent but typically are subject to a notice requirement in order to be enforceable. See Kim, *Clicking and Cringing*, *supra* note 60, at 846-47; see also Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1049-50 (noting that software producers first used shrinkwrap licenses, but “as the technology has evolved, the licenses have evolved along with it to include so-called clickwrap licenses” and that “[b]rowsewrap licenses were added as the Internet developed with its ability to create hyperlinks that would take a customer to a license agreement at another location”).

63. See discussion *infra* Part II.A.

64. See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 430-32 (2d Cir. 2004) (recognizing browsewrap agreements with notice); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260-61 (6th Cir. 1996) (recognizing clickwrap agreements); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448 (7th Cir. 1996) (recognizing shrinkwrap agreements); see also *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323-24 (Fed. Cir. 2003); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000). *But see Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 100-03 (3d Cir. 1991) (holding a “box-top” license invalid under the Uniform Commercial Code).

65. See discussion *infra* Part II.A.

66. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting the ultimate aim of copyright law is to “stimulate artistic creativity for the general public good”).

of software to its actual creators (provided, of course, that the software was not work made for hire).⁶⁷ With ownership of software comes exclusive rights, including the right to assign, sell, and transfer these rights, either in whole or in part.⁶⁸ Owners can also license the right to use the software and place limitations on such use.⁶⁹ Copyright law enables authors to exchange some or all of these exclusive rights with a written agreement.⁷⁰

When the public envisions a creator, it tends to think of an individual or an artist, not a corporation or an industry. In reality, creators may be people or entities, such as a software company. The final bargaining pair involves a software company and a consumer. Software companies control their product, including its marketing and use by consumers,⁷¹ and they sell the use of the software through a license conveyed by a contract. Software companies began licensing—rather than selling—their products because the background law gave software creators exclusive ownership of the product and the flexibility to grant use rights.⁷² In other words, copyright gave market power to software producers who were then able to set the terms of software transactions through contracts with end users.⁷³

67. In 1964, the U.S. Copyright Office permitted copyright registration on computer programs. See Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 488-99 (1995) (discussing the availability of copyright protection for software); Note, *Copyright Protection for Computer Programs*, 64 COLUM. L. REV. 1274 (1964).

68. 17 U.S.C. § 201(d) (2000) (permitting ownership of a copyright to be “transferred in whole or in part”); see also *Stewart v. Abend*, 495 U.S. 207, 220 (1990) (referring to the copyright owner’s rights as a “bundle of exclusive rights”).

69. See 17 U.S.C. § 201(d) (2000).

70. See *id.* § 204(a) (noting that a “transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owners of the rights conveyed or such owner’s duly authorized agent”). One commentator has noted that contracts may serve as substitutes for physical barriers. See Jeff C. Dodd, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 HOUS. L. REV. 195, 216-18 (1999).

71. Individual programmers may code software, but corporations often own the software by virtue of the work-made-for-hire doctrine and/or assignment agreements. See discussion *supra* Part I.

72. See Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 341-53 (1996) (explaining the benefits of mass-market end user license agreements for software publishers); Oakley, *supra* note 62, at 1048-49 (discussing how, due to the “considerable uncertainty . . . about the scope of copyright protection for computer software,” software producers began to use shrinkwrap licenses to protect their rights).

73. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448 (7th Cir. 1996) (upholding the validity of a shrinkwrap license of software); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1333-34 (9th Cir. 1995) (finding that software was licensed rather than sold).

Consequently, software producers introduced a new method⁷⁴ of publicly distributing consumer products without selling them.⁷⁵ Unlike in other industries where manufacturers relinquish first sale and associated rights⁷⁶ to an individual item at the time of sale, a software owner instead relinquishes only some of its rights through licensing agreements with software users, and retains those other rights that vendors typically transfer along with physical possession.⁷⁷ For example, one who has purchased a copy of a work may resell or transfer that copy, whereas a licensee of a work is subject to the terms of the license agreement (and software license agreements typically restrict resale or transfer of copies of software).⁷⁸ Furthermore, an owner of a copy of a computer program may make or authorize the creation of another copy for certain limited purposes,⁷⁹ whereas a licensee's right to make copies is dependent upon the scope of the license grant.

Courts have recognized the validity of innovative contracting forms pioneered by the software industry such as shrinkwraps, clickwraps, and browserwraps. With these agreements, assent to the contract occurs after the physical manifestations that typically indicate assent to a transaction. For example, a retail transaction is typically complete (or the terms, such as the warranty and refund terms, are established) when the consumer tenders payment.⁸⁰ By contrast, a consumer may purchase a software product, take the product home, and still not assent to its terms until he unwraps the

74. The licensing model fulfilled legitimate industry needs, as it was not always clear that copyright law protected software, and software is readily reproducible. See O'Rourke, *supra* note 67, at 488-99; Oakley, *supra* note 62, at 1048-49.

75. See Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 316-19 (2003) (noting that consumers effectively have no other way to acquire software than to license it).

76. The first sale doctrine permits the owner of a particular copy of a work to sell or otherwise dispose of that copy. See 17 U.S.C. § 109(a) (LexisNexis 2000).

77. Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103, 1114-15 (2008) ("Since the software code is the licensor's intellectual property, protected by copyright law, the licensor may distribute all, some, or none of the rights attaching to the property.").

78. *Id.* at 1111.

79. 17 U.S.C. § 117(a) (2000) (owners of a copy of a computer program may make copies as an "essential step in the utilization of the computer program" or for "archival purposes").

80. See Kim, *Clicking and Cringing*, *supra* note 60, at 839-40 (noting that, under *ProCD*, the "meaning assigned to the buyer's conduct would be determined by the agreement contained within the box" rather than the conduct determining the existence of an agreement); Lemley, *Terms of Use*, *supra* note 61, at 468-69; Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 Touro L. REV. 1205, 1226 (2000) (criticizing the *ProCD* decision as contrary to existing contract and commercial law).

shrinkwrap, thus completing the transaction.⁸¹ The software industry thus established a different way of doing business⁸² that it termed “contracting,” although it did not accord with the traditional law governing contract formation. In this manner, software producers used the bargaining power given to them by the background law of copyright law to create market power and thereby subvert the traditional contracting process.

There are several problems with this subversion. First, the take-it-or-leave-it nature of licensing agreements shares similarities with other contracts of adhesion⁸³ and raises difficult issues of individual autonomy and consumer choice.⁸⁴ Second, the market power that the background law accords to software producers could also undermine the law’s objective to encourage innovation and reward creators. Copyright law gives creativity an economic currency by enabling creators to transfer, sell, or assign their rights through a written agreement. Software companies have used that currency to force acceptance of wrap agreements⁸⁵ as written contracts, even though most consumers never read them.⁸⁶ These wrap agreements may also require consumers to relinquish their rights to their creations, and many do so unwittingly.

81. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (noting that the buyer accepted the software “after having an opportunity to read the license” after payment for the product).

82. Products to consumers are typically purchased outright and governed by the first sale doctrine and the Uniform Commercial Code. See Kim, *The Software Licensing Dilemma*, *supra* note 77 (explaining how the classification of a transaction as a license or a sale determines which regulatory regime governs, which default rules apply, and what rights and remedies are available to each party).

83. Contracts of adhesion are non-negotiable standard form agreements offered to parties that lack bargaining power. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

84. Edwin Patterson described an insurance policy as one that an insured “adheres” to because he has no ability to negotiate its terms. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

85. This Essay refers to shrinkwrap, clickwrap, and browsewrap agreements together as “wrap agreements.”

86. See Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 743 (2002) (noting that “consumers typically do not read their standard form”); see also Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1265-66 (1993) (discussing reasons why consumers do not read form agreements); Shmuel I. Becher and Esther Unger-Aviram, *Myth and Reality in Consumer Contracting Behavior* (unpublished manuscript) (finding that “the vast majority of consumers do not intend to read the entire [standard form contract] they enter” but that they may “read parts of or skim” them), available at <http://ssrn.com/abstract=1443908>, at 14.

1. Scenario 5: Creative Consumer and Corporate Website

A consumer logs on to a web site to create an electronic greeting card. A clickwrap agreement appears and the consumer clicks "I ACCEPT" without reading the terms. The clickwrap agreement states that the consumer assigns all rights to the materials that the consumer creates to the corporation that owns the web site. Six months later, the consumer finds that his grinning image, the same one that he had included in his electronic greeting card, is now advertising that corporation's services on various web sites. When the consumer calls to complain and to request the removal of his image from the corporation's advertising, the corporation informs him that he expressly permitted such use when he clicked "I ACCEPT" underneath the clickwrap agreement.⁸⁷

Last year, I received an electronic greeting card that contained images of dancing elves with my sister and her family members' faces replacing those of the elves. The image was so humorous that I thought I might want to create one myself so I clicked on the link that said, "Elf yourself," which brought me to the Office Max "ElfYourself" website.⁸⁸ After reading the promotional materials, and just prior to uploading the images, a clickwrap agreement appeared. Unlike my sister—and, most likely, many other consumers—I actually read the terms. One of the provisions stated:

2.5 Grant of License to Registrant Content. By posting Registrant Content to the Website or by otherwise submitting Registrant Content to us, Registrants automatically grant, and represent and warrant that they have the right to grant to Office Max, a non-exclusive, perpetual, irrevocable, sublicensable (through multiple tiers), assignable, fully paid, royalty-free, worldwide license to use, copy, modify, publish, make, sell, create derivative works of or incorporate into other works such Registrant Content, derive revenue or other remuneration from, communicate to the public, distribute (through multiple tiers), perform or display such Registrant Content (in whole or in part) and/or to incorporate such Registrant Content in other works in any form, media, or technology now known or later developed . . . for any purpose, including for purposes of advertising and publicity on the Website and elsewhere. Office Max shall not be limited in any way in its use, commercial or otherwise, of any such Registrant Content. . . . Further, we have the explicit right to incorporate any Registrant Content posted to the Website . . .

87. The hypothetical, while fictitious, is similar to a situation where a teenaged girl's picture was used by a mobile phone company without her or the photographer's permission. *Virgin Mobile sued over Flickr image used in ad*, September 20, 2007, <http://www.msnbc.msn.com/id/20896643/> (last visited Nov. 14, 2009). The photographer had uploaded a picture of the teenager to Flickr, a photosharing website, pursuant to a Creative Commons license. *Id.* Unknown to the photographer, the Creative Commons license permitted the photograph to be used for commercial purposes. *Id.* The phone company used the photograph of the smiling teenager in an advertisement with the words "Dump your pen friend" over her picture. *Id.* Also included at the bottom of the ad were the words, "Free text virgin to virgin." *Id.*

88. ElfYourself by OfficeMax, www.elfyourself.com (last visited Nov. 14, 2009).

into any further work, in any medium, without prior consent or review, and without payment of any royalty or fee whatsoever.⁸⁹

In other words, by simply taking advantage of their dancing elf offer, the consumer offers the digital images of himself and his family for Office Max to use in advertising and in any other way it wants—forever. The consumer has, true to the company's word, "elfed" himself.

B. Two Strategies to Contain Market Power

One solution to market power imbalances (and the resultant contractual surprises) addresses the role of the judiciary in enforcing "wrap agreements." Courts have recognized the validity of novel contracting forms in order to support the needs of the fledgling software industry.⁹⁰ Software producers (including, for the purposes of this Essay, websites) have responded to this judicial accommodation of wrap agreements by overreaching and inserting terms that do more than establish the scope of the license grant. Not only do these terms draw boundaries around the rights and responsibilities of the parties with respect to the use of the licensed product, but they also wrest from the licensee rights that are unrelated to the use of the subject matter of the license agreement. For example, a license to use Friendster.com's social networking website purportedly gives the company "an irrevocable, perpetual, nonexclusive, fully-paid and worldwide license to use, copy, perform, display and distribute"⁹¹ any content posted by the user and "to prepare derivative works of, or incorporate into other works, such Content and to grant and authorize sublicenses of the foregoing."⁹² Thus, Friendster's browsewrap agreement does more than merely govern the user's ability to use the website. It also allows the website to use the content that the user posted for purposes unrelated to the user's social networking profile. A website such as Friendster typically does not do so, but as the web environment changes and user generated content becomes more sophisticated and valuable, this may change. Unfortunately for the user, he has already granted broad use rights to the website through the site's wrap agreement, something he may not be aware of until the environment shifts and the website starts exploiting user content.

89. ElfYourself Terms of Service, <http://www.elfyourself.com/termsfuse.php> (last visited Nov. 14, 2009) (on file with author).

90. See discussion *supra* Part II.A.

91. Friendster Terms of Service, <http://www.friendster.com/info/tos.php> (last visited Oct. 9, 2009).

92. *Id.*

Because social networking sites would have already established industry norms (through wrap agreements) granting them broad use rights, the user would discover that it is futile to move to a site with more favorable terms because all sites would offer the same terms.⁹³ Furthermore, even if the user did manage to find a site with more favorable terms, he may find it too burdensome to move his contacts and content over to that new location since he has already established a presence and a following on the original site. The user then may simply refrain from creating and posting additional works, which undermines the incentive objective of copyright law.

Courts have accommodated the business needs of software producers and encouraged industry growth by enforcing novel contracting forms that did not strictly conform to rules of contract formation. This accommodation reflects an admirable awareness of business realities; however, courts should also acknowledge the realities of market power imbalance. Market power gives licensors of software (and websites) the ability to dictate contractual terms. In evaluating the validity of wrap agreements, courts should consider not just their form, but also their substance. To consider the substantive terms of wrap agreements in this context means more than invalidating only those agreements and/or provisions with harsh, one-sided terms. Courts should balance the needs of the software industry with the disadvantages of these novel contracting forms (which often do not require actual assent by the licensee) by enforcing only those terms that govern the use of the software or website and not those terms that deprive licensees of rights that are unrelated to their use of licensed subject matter.⁹⁴

The second strategy to alleviate the contracting inequities that result from market power imbalance requires that efforts be made by licensees themselves. While an individual licensee or user may have little or no bargaining power, the aggregated influence of all licensees of a particular product or website may level the market power imbalance. One way licensees can mobilize and address market power imbalances is by harnessing the power of the Internet to raise awareness of unfair contract terms. For example, when Facebook recently changed its terms of use, purportedly to give the company perpetual ownership of user content, a coalition of consumer advocacy

93. See Mueller, *supra* note 7, at 580.

94. See Kim, *Clicking and Cringing*, *supra* note 60, at 810-36 (discussing different levels of assent and advocating for selective enforcement of terms).

groups and users organized an angry online campaign that succeeded in preventing the implementation of the changes.⁹⁵

III. CONCLUSION

In considering the enforceability of contracts, courts and other dispute resolution entities should consider not only the relative socio-economic status of the parties but also the effect of the background law as a “gap filler” when the bargaining context changes. These entities should focus on the intent that the parties had when they entered into the agreement, being ever mindful that the background law may result in unintended consequences that not only defeat the reasonable expectations of the parties but also may undermine the objectives of copyright law itself.

95. Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 18, 2009, <http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html>.

