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From the Mouths of Babes: Protecting Child Authors from Themselves

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FROM THE MOUTHS OF BABES:

PROTECTING CHILD AUTHORS FROM THEMSELVES

Julie Cromer Young1

Out of the mouth of babes and sucklings hast thou ordained strength, because of thine enemies, that thou mightest still the enemy and the avenger.

--Psalm 8:2-32

Kids say the darndest things.

--Art Linkletter3

I. Introduction

Akiane Kramarik, age fifteen at the time of this writing, is an accomplished artist and poet, earning appearances on programs such as “Oprah Winfrey” because of her prodigious talent. At the age of four, she began to draw, and by the age of six, she was painting.4 She painted some of her earliest commercial works by age seven.5 She works four to five hours each day painting, often rising before five in the morning to begin.6 Born to a professional-chef father and a stay-at-home mother, Akiane now paints eight to

1 Associate Professor and Director, Center for Law, Technology and Communications, Thomas Jefferson School of Law. The author would like to thank Steven Hetcher for the inspiration for this article; the Vanderbilt University Law School 2008 Roundtable User-Generated Content, Social Networking and Virtual Worlds; Doris Long and David Post for their encouragement; Yvette Liebesman for a great review; Steve Semeraro, Claire Wright, Deven Desai and Jeff Slattery for help refining it; and Jeffrey Eaton for his tireless assistance.
2 The Holy Bible, Authorized (King James) Version [1611], Psalms 8:2-3.
4 See http://www.artakiane.com/akiane_life.htm# (last visited June 4, 2008). It is the author’s understanding that the information on the web site has not been updated since February 2008, so any factual information provided here is subject to that limitation.
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twenty paintings a year, which sell for anywhere from $50,000.00 to $1,000,000.00. In addition, she has written and published two books of poetry, and her teenage brothers operate a web site (www.artakiane.com) dedicated to Akiane and her works and on which consumers can purchase her books and artwork. The web site bears the copyright notice, “All Material on this site is © Copyright 2000-2008 Akiane Kramarik.” She only has one federally registered copyright, co-owned with her mother, Foreli, for the book Akiane – Her Life, Her Art, Her Poetry. Her brothers do not have a copyright registration in the web site.

Like Akiane and her brothers, thousands upon thousands of “underage authors” are exposing their copyrighted works online. But what rights, exactly, are they securing for themselves? In theory, the Copyright Act could protect against the misappropriation of the young author’s rights, but only if that author thinks to register his or her work. The minor author is often all too willing to expose the work to infringement by publishing or even creating the copyrightable work online, inviting right-click instantaneous copying of the work. Distribution of copyrighted works can occur before the author has even realized that a work has been created, thanks to social networking sites that target teens and tweens as young as age six. In addition, each of these sites has complex user agreements and terms of use that could confuse someone who is thirty-eight, much less

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7 See http://www.artakiane.com/akiane_life.htm# and http://www.artakiane.com/questions_answers.htm (last visited June 4, 2008). Limited and open edition giclees are available for $450.00 to $10,000.00 apiece. Id.
8 AKIANE – HER LIFE, HER ART, HER POETRY, and MY DREAM IS BIGGER THAN I – MEMORIES OF TOMORROW.
10 U.S. Copyright Reg. No. TX0006466698, registered November 9, 2006.
eight, but which purport to be contractual agreements that bind the user regardless of that user’s age.

Or do they? In theory, the age-old contractual doctrine of infancy\(^\text{12}\) protects the minor from malevolent contractual predators who would take advantage of a naïve child. In this respect, the doctrine may be used as a defensive shield for the child to negate a contract which the minor in an older, wiser stage of life (often by only months) may regret. Conversely, as a longstanding rule, the infancy doctrine may not be used as a sword, allowing minors to pick and choose the contracts he would disaffirm.\(^\text{13}\) As a result, the infancy doctrine is structured in a way that makes it nearly impossible for a plaintiff to succeed in an infancy-related dispute: A plaintiff who had contracted with a minor may be thwarted by the infancy doctrine when used artfully by a contracting infant; an infant plaintiff has no recourse from the doctrine when attempting to avoid a contract that might impinge upon that plaintiff’s rights. It is no surprise, then, that the doctrine of infancy has always had its share of critics, and, like their historic counterparts, recent authors have called for its abolition.

Online contracts, however, may present an instance where the doctrine of infancy should not be abolished or even limited, but perhaps should be expanded so that minor authors who post materials on a web site can protect the rights in those works from unwitting dilution. Online click-through agreements often contain licenses to the authors’ copyrighted works; but authors who could be protected by the doctrine of infancy often are aware neither of the rights they have obtained in the work nor of the

\(^{12}\) For purposes of this article, the terms “infant,” “child,” “minor,” and “underage” signify a person who is under the age of majority in his or her jurisdiction, typically age eighteen years.

\(^{13}\) See, e.g., Lemon v. Beeman, 45 Ohio St. 505, 509 (Ohio 1888) (“the general doctrine of rescission is departed from no further than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield, and not a sword.”).
license granted merely by the child’s navigation through a colorful site. Assuming the child obtains access without the assistance of a parent, he could be bound to pages of legal jargon, even though the web site may target a demographic including those children whose most advanced vocabulary venture little beyond monosyllabic words.\footnote{ReadingKEY, a vocabulary-building program for grades one through five, identifies fewer than three dozen polysyllabic words over a thirty-six week first-grade course (ten words per week), of which only three are more than two syllables: “together,” “tomorrow,” and “beautiful.” See TampaReads, Grade 1 National Reading Vocabulary, located at \url{http://www.tampareads.com/trial/vocabulary/Grade1/VOC1-new.doc} (last visited January 20, 2009). The first sentence of ClubPenguin.com, by comparison, contains as many polysyllabic words as monosyllabic words, including three four-syllable words (“Welcome to Club Penguin (the “Site”). Club Penguin is operated and presented to users by Club Penguin Entertainment Inc. of Kelowna, British Columbia, Canada (“Club Penguin”).”), if one overlooks the section title, “Introduction.” See Disney, Inc., Club Penguin Terms of Use, located at \url{http://www.clubpenguin.com/terms.htm} (last visited January 20, 2009).}

Granted, the hypothetical situation of an exploited six-year-old author held to the terms of an overly legalized adult contract may sound a little extreme. The erosion of the doctrine of infancy and of the rights that infant authors may have in copyrighted works would not begin in such a case, but in a case such as \textit{A.V. v. iParadigms}.\footnote{544 F.Supp.2d 473 (E.D. Va. 2008), affirmed in part on other grounds, reversed in part on other grounds, \textit{A.V. ex rel. Vanderhye v. iParadigms LLC}, 562 F.3d 630 (4th Cir. 2009). See infra pp. ___ - ___ for an in-depth discussion of this case.} In \textit{iParadigms}, the author was older, bound by terms and conditions of a web site to which he was \textit{forced} to publish. In a case involving the popular plagiarism-checking software Turnitin, the court created an opinion that not only had immediate analytical impact for the contractual doctrine of infancy, but also had a more subtle, lasting impact on how courts are to interpret the terms and conditions of sites. And, as a result, the problems that are highlighted by the failure to apply the doctrine to online contracts, as well as the failure to protect infant authors, may eventually change how web site terms and conditions, user agreements, and click-wrap licenses will ultimately be viewed and created.
This article begins by examining the practical ability or inability of the “infant author” to achieve and exploit the full rights of copyright, given that the Copyright Office itself seems to recognize that any rights given to infant authors are tempered by contract laws. Section two reviews the contract doctrine of infancy and its effect upon a child author’s protection under copyright law. Section three examines the specific problem of minors contracting regarding their copyrights, especially online contracts. Section four explores the issue as currently framed, reviewing potential solutions already suggested and noting their inherent problems. Section five examines a recent decision, A.V. v. iParadigms, concerning child authors and noting potential flaws in the district court’s rationale. Section six explores some of these problems, including Constitutional rights that support the creative process but which may be limited in a child’s setting, and suggests a measure that Congress could take to ensure that these rights are born with the child’s work and mature as quickly as rights for one written by an adult.

II. Rights for, and Restraints on, Child Authors

Laws do apply to children. Children benefit from the laws as much as their adult counterparts, receiving constitutional protections from birth (and in some instances, from before birth). Additionally, equal protection of the laws has been held to be as

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16 For purposes of this paper, because children lack the access to tangible mediums of expression on which to fix an original work until they are in fact separated from their mothers at birth, I am assuming that children may begin to realize the potential of copyright at childbirth. This paper makes no representation about when rights not related to intellectual property might attach to a child, though it recognizes the possibility that an ultrasound of an unconsenting naked fetus may in fact be interpreted to violate privacy rights. See Carey v. Population Services, International, 431 U.S. 678, 693 (1977) (holding that the right to privacy in connection with decisions affecting procreation extends to minors as well as adults); Aid for Women v. Foulston, 441 F.3d 1101, 1116-1117 (concluding the right of informational privacy extends to minors); Planned Parenthood of S. Az. v. Lawall, 307 F.3d 783, 789 (9th Cir.2002) (recognizing “a young woman’s privacy interest in avoiding disclosure of sensitive personal information.”); Doe v. Irwin, 615 F.2d 1162, 1166 (6th Cir.1980) (“Though the state has somewhat broader authority to regulate the conduct of children than that of adults, minors do possess a constitutionally protected right of privacy.”); Wynn v. Carey, 582 F.2d 1375, 1384 (7th Cir.1978) (“[A] minor possesses the right of privacy, defined as the right
applicable to children as it is to adults. A child’s status as a child does not negate these protections, even though arguably the child does nothing to earn them. A child pays little to no taxes and does not vote. In fact, as a general rule, American society and its laws protect the child more because of the child’s status as a child. Laws provide children with public education, provide police protections and heightened criminal offenses for child victims, and design numerous civil laws to protect and further opportunities for children. As a class, compared with other demographic classes in the United States, children are overprotected, a phenomenon neither unusual nor unexpected.

This overprotection extends even further when the child is considered to be an individual actor in a legal context. When the law appears to involve the inability of the minor to appreciate fully an action that he has taken, laws either prohibit the child from acting or excuse or rescue the child from acting badly or irrationally. For example, the above-mentioned legal prohibition of a child to vote until he has reached the age of eighteen protects society from a vote ostensibly not cast with full understanding of the issues at hand. Additionally, it protects the child from outside influence and pressure to vote in a way that the child would not otherwise believe if the child possessed the

\[\text{See U.S. Const. amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).}\]
maturity to form a fully-informed opinion. The capacity of the child’s mind is taken into account when considering a variety of potential offenses and behaviors. Bad actions are excused, for example, when a child lacks the mental capacity to form sufficient intent to commit an intentional crime, such as murder or battery. Laws also rescue a child’s bad or irrational decisions – for example, in the infancy doctrine for contracting, which allows a child to avoid certain contracts made before the child attained the age of majority.

In cases involving child authorship, two categories of laws must be considered. The first legal consideration involves which rights the child author receives as a benefit for creating a copyrighted work. The second involves the child’s ability to contract concerning that work and the ability to invalidate such a contract under the infancy doctrine.

A. Rights for Child Authors: Copyright

Most intellectual property rights that would benefit children due to the child’s creation of that intellectual property would be protected under copyright. Copyright

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20 Admittedly, a third legal category should be considered in order to examine all rights and liabilities concerning childhood authorship. Infringement of copyright is a tort which requires no specific intent on the part of the infringer, see Zurich Ins. Co. (U.S. Branch) v. Killer Music, Inc., 998 F.2d 674 (finding copyright infringement can be innocent or intentional), but it could require an examination of intent when examining a defense of fair use, see International Stamp Art, Inc. v. U.S. Postal Service, 456 F.3d 1270 (finding a likelihood of confusion standard, including questions of intent, may be appropriate to analyze faire use). A child author could infringe an existing work by creating an unlicensed derivative work of the existing work. This is an interesting topic which merits a longer discussion. Other cases not involving initial child authorship have considered child infringers and as a rule have held them liable.

21 This is not to say that children cannot create other forms of intellectual property. The Patent and Trademark Depository Library Association has posted a list of child inventors, including the inventors of
protects most authors and works of authorship in the United States. It has its roots in the U.S. Constitution, which extends to Congress the ability to protect authors and their writings.\footnote{U.S. CONST. art. I, § 8, cl. 8.} Congress’ current iteration of this directive is the Copyright Act of 1976, which protects original works of authorship fixed in tangible mediums of expression.\footnote{17 U.S.C. § 102(a). Unless otherwise expressly specified, all references to the “Copyright Act” herein refer to the 1976 Copyright Act.} Provided the work is one that can be protected,\footnote{Works that cannot be protected include works that lack originality, such as those listed under 17 U.S.C. § 102(b).} the author receives the rights afforded to authors in the Copyright Act, dependent upon the type of work. The six rights enumerated in section 106 of the Copyright act are rights of reproduction, creation of derivative works, distribution, performance, display, and digital performance.\footnote{17 U.S.C. § 106. Not all rights are available to all works; for example, the right to digital performance is limited to sound recordings.} Depending on the type of work, additional rights and protections may be available.\footnote{For example, for works of visual art, the author may claim rights of attribution and integrity. 17 U.S.C. § 106A.} These protections are not contingent upon registration of the copyrighted work\footnote{17 U.S.C. 201(d) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law…”).} and can be transferred or licensed in whole or in part.\footnote{17 U.S.C. 201(d) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law…”).}  

Section 201 of the Copyright Act governs ownership, declaring that “[c]opyright in a work … vests initially in the author or authors of the work.”\footnote{17 U.S.C. 201(a). In addition to the types of ownership addressed supra, Section 201 addresses joint authorship, works made for hire, and collective works.} The Copyright Act is silent regarding the definition of the term “author.” Secondary sources define it as “one who produces, by his own intellectual labor applied to the materials of his composition,
an arrangement or compilation new in itself’;\textsuperscript{30} “a person who makes or originates something; creator; originator.”\textsuperscript{31} From the Copyright Office’s perspective, “the individual who actually created the work is the author except in the case of a ‘work made for hire.’”\textsuperscript{32}

For authors who are not working anonymously or for hire, the duration of the rights afforded by a copyright is contingent upon age.\textsuperscript{33} Section 302 of the Copyright Act provides that “Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”\textsuperscript{34} The very minimum, then, that a copyright may last is seventy years (assuming death immediately upon the work’s creation). For authors of joint works, a copyright may last even longer than seventy years beyond an author’s life; if an author is survived by a joint author, a deceased joint author’s heirs will enjoy a copyright for seventy years from the surviving joint author’s death, even if that event occurs long after the first author has died.\textsuperscript{35}

With the exception of the predeceasing joint author, copyright lasts longest for those who write when they are young and live long lives. The Copyright Act contains no age limit for the author who applies for a copyright. In fact, the sole guidance for an

\textsuperscript{30} Black’s Law Dictionary, 6\textsuperscript{th} ed. At 133.
\textsuperscript{31} Webster’s New World College Dictionary at 92.
\textsuperscript{32} United States Copyright Office, Application for Copyright Registration, Form CO Instructions, located at http://www.copyright.gov/forms/formco2d-ins.pdf (last visited November 19, 2008), at 2. A “(1) work made for hire” is “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.” 17 U.S.C. s101.
\textsuperscript{33} “In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.” 17 U.S.C. § 302(c).
\textsuperscript{34} 17 U.S.C. § 302(a).
\textsuperscript{35} 17 U.S.C. § 302(b).
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author’s age comes not from the statute, but from the Copyright Office in its Circular 1: “Minors may claim copyright, but state laws may regulate the business dealings of copyrights owned by minors.”

B. Additional Rights for, but Also Restraints on, Child Authors: Contract

Implicit in the recognition of state laws when concerning copyrights owned by minors is the suggestion that the ownership of copyright may be tempered by areas of law other than copyright. The consideration of business dealings concerning copyright necessitates reversion to contract law. It has long been a legal tradition for the courts to protect minors when they are parties to contracts. The doctrine of infancy, which allows a minor to avoid or disaffirm contracts, was recognized at common law as early as 1292. The principle that contracts were voidable at the election of the infant, regardless of the fairness of the contract, was well settled by the fifteenth century.

Common-law rules regarding an infant’s lack of contractual capacity have “endured in the United States…with considerable vitality.” Traditionally, the common law viewed minors as naïve and unsophisticated, especially in the marketplace. Contracts are voidable regardless of the minor’s apparent age or maturity and of the other

38 E. Allan Farnsworth, Farnsworth on Contracts, Book I, 3d ed. At 443.
party’s knowledge of the minor’s actual age.42 “In all suits or legal proceedings of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court...may be invoked whenever it becomes necessary to fully protect such rights.”43

While at common law, the standard age of majority was twenty-one,44 in most states presently a person is a minor until the age of eighteen.45 In the absence of a specific statute, contracts by minors are voidable by the infant,46 but the infant must disaffirm the contractual obligations within a reasonable time of attaining the age of majority in order to invalidate the contract.47 When the infant’s age is used as a shield rather than a sword – that is, when the lack of majority is used to rebuff an attempt to enforce a contract – it will be construed as favorably as possible to the infant without regard to the unfairness to the adult.48 In addition, courts have a general tendency to find in favor of the infant and prevent the child from being taken advantage of by those without a disability (adults).49

III. Young Authors and the Contracts They Enter

42 E. Allan Farnsworth, *Farnsworth on Contracts*, Book I, 3d ed. At 443.
44 E. Allan Farnsworth, *Farnsworth on Contracts*, Book I, 3d ed. At 443-444.
45 The age of majority is 18 in all the states except for Alabama (19), Nebraska (19), Wyoming (19) and Mississippi (21). However, in the Mississippi case *Garrett v. Gay*, the age of majority is lowered to eighteen for the purpose of entering into contractual relationships for personal property. In addition, certain statutes addressing the age of majority allow for another statute to take precedence over the general majority age. (Alaska, Connecticut, Florida, Minnesota, Oklahoma and Virginia).
46 A notable exception is a contract for necessities, which is deemed valid.
47 E. Allan Farnsworth, *Farnsworth on Contracts*, Book I, 3d ed.
48 E. Allan Farnsworth, *Farnsworth on Contracts*, Book I, 3d ed.
49 E. Allan Farnsworth, *Farnsworth on Contracts*, Book I, 3d ed.
As noted above, child authors enjoy the same ability to copyright as their adult counterparts. However, this ability is tempered by the authors’ youth, because the very thing that is designed to help young authors may in fact hinder their ability to contract at all. For example, when actor Heath Ledger won an Academy Award posthumously in February 2009, there was little question that the Oscar statuette would go to his daughter and sole surviving heir, Matilda.\(^{50}\) However, the Academy concluded that she was “legally unable to sign the winner’s agreement — a contract required of all nominees that says the recipient will not resell his or her Oscar without first offering it back to the academy for $1.”\(^{51}\) Under California Family Code Section 6701, a minor may not make a contract relating to any personal property not in the immediate possession or control of the minor;\(^{52}\) therefore, while Matilda Ledger is legally entitled to the Oscar, her mother signed the winner’s agreement and retained control of the statuette until Matilda reaches the age of eighteen, when she can legally sign the agreement under California law.\(^{53}\)

This has not prevented minors and minor authors from entering into agreements regarding their copyrights. And, it logically follows that it has not prevented the courts from becoming involved in those agreements.

A. **Offline Copyright Contracts**

Several states anticipate contracts with minors, albeit not in the context of the minor’s creation of a copyrighted work. Few cases have in fact dealt with instances where an infant has created a copyrighted work, but evidence of young authors is


\(^{51}\) Id.

\(^{52}\) California Family Code Section 6701(3). A minor is also prohibited from giving a delegation of power or from making a contract with respect to real property.

\(^{53}\) Associated Press, *supra* at ___.

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abundant. For example, composer Wolfgang Amadeus Mozart was writing musical works by the age of five,\(^{54}\) and by the age of eighteen, had written three operas.\(^{55}\) Diarist Anne Frank was only thirteen when she began to write her diary, although she likely did not think that it would become a commercial success at the time she wrote it.\(^{56}\)

In *Valjo Music Publishing Corporation v. Elvis Presley Music*, the court did not expressly deal with a contract that was entered into by infants.\(^{57}\) At issue was a dispute over the authorship of the song “Hound Dog,” made popular by vocal artist Elvis Presley.\(^{58}\) In *Valjo*, plaintiff Johnny Otis alleged that he was the co-author of the song along with two defendants, Jerry Leiber and Mike Stoller. Otis had previously entered into a settlement agreement with Leiber and Stoller expressly stating that he had not co-authored the song. At court, he rationalized this by saying that he learned that he defendants were infants, and would therefore disaffirm any contract that they had with him. The court noted that this made no sense. “Otis was a man who had many years experience in the music business. He must have realized that even though Leiber and Stoller were infants they could not disaffirm his co-authorship of a song, if in fact he had been a co-author.”\(^{59}\)

**B. Online Copyright Contracts**

When considering the ability of minors to contract online, often scholars pay heed to those contracts which benefit the young contractors to certain detriment of the adult

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\(^{54}\) Otto Erich Deutsch, Mozart: A Documentary Biography (Stanford University Press 1966) at 455.


\(^{56}\) Anne Frank, Diary of a Young Girl, entry dated June 20, 1942 (“[I]t seems to me that later on neither I nor anyone else will be interested in the musings of a thirteen-year-old schoolgirl.”).


\(^{58}\) Valjo, 156 F. Supp. at 569.

\(^{59}\) Valjo, 156 F. Supp. at 570.
contracting party. For example, Juanna Lowder Daniel focuses on the purchasing power of minors through electronic commerce, noting that “merchants are…forced to reckon with the minority incapacity doctrine, despite the level of sophistication demonstrated by minors in their interactions with cyberspace.” She also identifies “sophisticated untoward behavior,” “online criminal activity,” and “electronic misdeeds,” all of which question continued protection of minors for online transactions.

Professor Daniel is entirely justified in identifying the bad-actor children as a lens through which to view and critique the infancy doctrine. On the other hand, however, child authors such as Akiane Kramarik are not necessarily acting with a level of malice that Professor Daniel and others anticipate. The opportunities for minors to engage in authorship and publicize young creative writing have multiplied with the expansion of the Internet and social networking sites, even those directed at children under the age of ten. As demonstrated above, when any of these young authors create their works, they are automatically covered by copyright and given the rights to reproduce, creative derivative works, distribute, perform, and display as befits the particular situation. In the case of young authors, however, these rights are almost immediately compromised because the electronic media where most young authors post their works automatically limit their rights through the terms and conditions of their sites.

Some sites actually first encourage authorship and posting, then proceed to limit the rights the author would otherwise enjoy had she written it with pen and paper instead of posting it online. For example, the Contra Costa Times has for years incorporated a

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61 Daniel, supra n. ___ at 255.
Teen Board. Recently, the Board “went digital,” inspiring the LIP Teen Blog “I Should Be Doing My Homework.” The blog allows teens to write about a variety of topics, from school politics to summer jobs, from social activism online to dismay over the delay of the next *Harry Potter* movie installment. The members of the Teen Board post often and in detail.

By posting on the blog, authors agree to grant:

…a perpetual, irrevocable, royalty-free, non-exclusive, worldwide license, with the right to use, copy, sublicense, modify, adapt, transmit, distribute, publicly perform or display such material. The foregoing grants shall include the right to exploit any proprietary rights in such material, including but not limited to rights under copyright, trademark, service mark or patent laws in any jurisdiction. All rights in this paragraph are granted without compensation of any sort to you.

In another example, Facebook is a “social utility” that “facilitate[s] the sharing of information through the social graph, the digital mapping of people's real-world social connections.” J.C. posts regularly on facebook.com, inviting status updates from his friends and posting his own. While not authorship to the artistic or creative level of Akiane, his writings are in fact protected by copyright, which merely requires originality and fixation in a tangible medium of expression. Yet postings on facebook.com are subject to the following license:

you automatically grant, … to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for

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67 My cousin, who like many teens would be mortified if I actually identified him by name.
any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing. … If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content. 69

More accurately, that was the license at the time of his posting. On February 4, 2009, Facebook posted a new license that removed the last language of that license, removing the expiration of the license and including a provision that the license paragraph survived any termination of the license by the owner. After complaints from tens of thousands of users, Facebook reversed its policy, returning to its previous Terms of Use. 70

Another popular social networking site is Club Penguin, created by Disney and popular with pre-teens. 71 According to the Club Penguin parents’ page:

Players create a penguin and explore the snow-covered island of Club Penguin, engaging in a variety of fun and imaginative activities. Players can chat, send greeting cards, use emotes (emotion icons), or choose from a set of pre-defined actions such as waving or dancing. Users can also attend parties and special events, take on a role in the latest stage play, adopt and care for a cute and cuddly puffle pet, and play games to earn virtual coins which can be used to design the perfect igloo and create hundreds of outfits for their penguin. New content is added every week. 72

69 Facebook Terms and Conditions, located at http://www.facebook.com/ (last visited February 28, 2009).
70 The author recognizes that facebook may not be the most popular mode of online social networking at this time. That honor may have passed to twitter.com, “a service for friends, family, and co–workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: What are you doing?” Twitter home page, located at http://twitter.com (last visited April 4, 2009). The Twitter terms of service actively prohibits users under the age of 13, http://twitter.com/tos (last visited April 4, 2009), so for the most part, it falls outside the scope of this article. However, it is interesting to note that although it prohibits the use of the service by most underage posters, it also has the most liberal copyright ownership provisions, even terming the entire “Copyright” section, “(What’s Yours is Yours).” http://twitter.com/tos.
71 Club Penguin lists the target age as 6-14, but notes that it is open to all ages.
Club Penguin acts much like an adult gaming counterpart, Second Life, in that it is a virtual world where penguins can waddle around and meet one another. In addition, members can write for the Club Penguin Times, the free Club Penguin newspaper delivered every Thursday. Members are encouraged to author articles, jokes, poems, and other works that are copyrightable.

Disney’s license to use the content, ostensibly aimed at a very young age group, is most comprehensive and includes concessions the others do not. Not only does the license include:

a perpetual, non-exclusive, irrevocable, fully-paid, royalty-free, sublicensable and transferable (in whole or part) worldwide license under all copyrights, trademarks, patents, trade secrets, privacy and publicity rights and other intellectual property rights you own or control to use, reproduce, transmit, display, exhibit, distribute, index, comment on, modify (including removing lyrics and music from any Submission or substituting the lyrics and music in any Submission with music and lyrics selected by us), create derivative works based upon, perform and otherwise exploit such Submissions, in whole or in part, in all media formats and channels now known or hereafter devised (including on WDIG Sites, on third party web sites, on our broadcast and cable networks and stations, on our broadband and wireless platforms, products and services, on physical media, and in theatrical release) for any and all purposes including entertainment, news, advertising, promotional, marketing, publicity, trade or commercial purposes, all without further notice to you, with or without attribution, and without the requirement of any permission from or payment to you or to any other person or entity;

73 Club Disney also encourages the participation, displaying in capital letters “WE NEED YOU!” next to the title of the newspaper.

74 Contributed by 01chance: “There was a polar bear that went to a candy store and said, ‘I would like some lemon heads, candy canes, and...Umm...Ahh...Umm...Ahh...Oh yeah! Jelly Beans!’ The shopowner asked, ‘Why the large pause?’ The polar bear answered, ‘I don’t know, I’ve had them my whole life.’”

75 Contributed by Rooney 348: “By day, shut in his workshop, Joe Bright cuts bits of tin./And smoothes them out and flattens them./Until they’re paper thin./At dusk Joe Bright flies skywards./With boxes, bags, and jars./And on the branches of the dark,/He hangs a million stars.”

it also appoints Disney representatives to be agents to execute contracts on behalf of the authors (presumably all children), and it includes a waiver of enforcement of moral rights.\textsuperscript{77} Again, as soon as the creative content is submitted to the site, the rights are curtailed, and rights that may not even exist in the United States are stripped from the users.

IV. Copyright and Contract: The Dilemma

It is possible that the contracting infant doctrine could save minors from having portions of their copyrights so rudely snatched away by those sites that would encourage the creation of content.

However, proposals that have questioned the viability of the contracting infant doctrine have existed for decades. As early as the nineteenth century, a New York court noted:

\[\text{[A] protracted struggle has been maintained in the courts, on the one hand to protect infants or minors from their own improvidence and folly, and to save them from the deprivations and frauds practiced upon them by the designing and the unprincipled, and on the other to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.}\textsuperscript{78}\]

More recent scholarship has also questioned the viability of the infancy doctrine than defended it. Recently, Professor Juanda Lowder Daniel noted that other areas of the law (torts, crimes, and medical treatment) “operate under rebuttable presumptions of capacity …allowing inquiry into whether the minor truly understood the nature and consequences of his actions.”\textsuperscript{79} Professor Daniel suggests that the burden of establishing

\textsuperscript{77} Id.
\textsuperscript{78} E. Allan Farnsworth, Farnsworth on Contracts, Book I, 3d ed. At 444, citing Henry v. Root, 33 N.Y. 526, 536 (1865).
\textsuperscript{79} Daniel supra n. ___ at 268 (2007-2008).
contractual incapacity rest on the minor adolescent, establishing a sense of responsibility for that contracting person.\textsuperscript{80} She notes that traditional contractual avoidances would remove the need for the contracting infant doctrine; if the law were to treat the infants as adults, then those same defenses would be available to them.\textsuperscript{81} Specifically, she discusses misrepresentation, undue influence, duress, and unconscionability.\textsuperscript{82}

Regardless of the type of contract to which the defenses refer, for the first three, the situations to which they would pertain appear to be limited at best. It is possible that misrepresentation may induce a minor to enter into a contract for goods and be misled as to the type or quality of goods which he is contracting to procure. The defenses of undue influence and duress, however, seem to have little if any sway for contracts where the minor and the seller have little if any contact. In addition, Professor Daniel’s focus appears to be the contracting by minors for goods that can be purchased and sold online. Additional sites, however, might in fact be detrimental to the minor because the minor is not availing himself of a good or making a purchase \textit{per se}, but instead is merely agreeing to the terms of use to which the site mandates every person agree. In those cases, it is difficult to see how misrepresentation, undue influence, or duress would apply.

On the other hand, the defense of unconscionability may have more teeth with the average click-wrap agreement. Daniels notes that “the widely-accepted definition of unconscionability has been stated as the ‘absence of meaningful choice on the part of one

\begin{footnotes}
\footnote{\textit{Id.} Professor Daniel acknowledges that a presumption of incapacity for pre-adolescent minors is appropriate. \textit{Id.}}
\footnote{See Daniel \textit{supra} note \_\_ at 258.}
\footnote{See Daniel \textit{supra} note \_\_ at 258-261.}
\end{footnotes}
of the parties together with contract terms which are unreasonably favorable to the other party.” 83 She continues:

a minor who finds himself in a one-sided contract procured through unfair bargaining can avail himself of the opportunity to avoid the contract. Thus, this modern doctrine seems to address the very concerns behind the ancient doctrine of minority incapacity to contract. 84

Not only would unconscionability appear to apply to click-wrap agreements, but Professor Steven Hetcher has argued that it would extend to textbook terms and conditions as well, which must be affirmatively sought out by the user in order to learn their content. Professor Hetcher examines the social networking site facebook.com in detail and notes that the terms and conditions to which the user must agree are unfair, especially when considering the interests of minors:

[M]inors, like other users who wish to remain on the site, click a button to signify acceptance of the Terms of Use. Given the nature of this procedure, the question naturally arises as to whether the Terms of Service constitute a contract of adhesion, and if so, an unconscionable one. 85

Professor Hetcher’s arguments run counter to those of Professor Daniel. He explains that “while it may be a legal fiction to do so,” because of the relative inexperience of minors, they cannot be held accountable for the terms and conditions as adults - despite the fact that they took the affirmative step to accept the terms by signifying their acceptance of them by checking a box before using the site. 86

84 Daniel supra note ___ at 261 (citing Walter D. Navin, Jr., The Contracts of Minors Viewed From the Perspective of Fair Exchange, 50 N.C. L. REV. 517, 520 (1972)).
85 Steven Hetcher, User-Generated Content and the Future of Copyright: Part Two—Agreements between Users and Mega-Sites, 24 SANTA CLARA COMP. & HIGH TECH. L.J. 829, 858 (May 2008).
86 Hetcher supra note ___ at 858-859.
Professor Hetcher thereafter does not seek to eradicate the contracting infant doctrine, but instead wants to fortify it by extending an implied license with the guardians of the minors to use content posted on facebook.com. By doing so, Professor Hetcher notes, “it would presumably disallow Facebook or its successors in interest from claiming permanent [user-generated content] interests at some later time, on the basis of capacious, largely incomprehensible lawyerly jargon, located in a form contract the person clicked through years earlier when a minor.”

The difficulty that the creation of an implied license imposes on minors is the implicit devaluation or joint authorship of the minors’ copyrighted works. As noted above, the Copyright Act places no age restriction on authorship. At the same time, it reserves the particular economic rights that it affords exclusively to the author of the work. Because it is silent as to a minimum age required when authoring a work, likewise it is silent as to parents’ ability to enjoy the benefits the Copyright Act might bestow upon infant authors just by virtue of their parenthood. While state laws have attempted to provide some protection to child authors with respect to child actors, laws are silent with respect to any additional child authorship rights.

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87 Hetcher supra note ___ at 866.
88 An additional theoretical difficulty may exist in that several minor authors may not want their parents to know that which they have posted on facebook, much less have the ability to impliedly license it.
89 See supra pp. ____ and note ___.
90 17 U.S.C. § 106. Those economic rights are the right to reproduce the copyrighted work, to make derivative works from the work, to distribute the work, to perform the work, to display the work, and to perform the work digitally. Id.
91 Unfortunately, it is not a foregone conclusion that parents have the best interest of their children at heart. The foundation A Minor Consideration, for example, exists to provide guidance to young performers, noting that “Child Stars must pick their parents with care.” See http://www.minorcon.org/index.html (last visited September 7, 2009).
92 California, New York, New Jersey, New Mexico, Louisiana.
93 For a complete list of state employment statutes with respect to child employment, see generally Screen Actors Guild located at http://www.sag.org/content/state-statutes (last visited September 7, 2009).
Moreover, such an extension of a license to parents of minor authors may be the type of law specifically preempted by the Copyright Act. Because inherently contracts are governed by state laws, the law of implied contracts is also governed by state laws. State laws that conflict with the Copyright Act may in certain instances be preempted by the Copyright Act, to the extent that those state statutes conflict. The Copyright Act provides for the statutory preemption of state laws in those situations where two conditions are satisfied. First, the legal or equitable right afforded by the state law must be equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106. Second, the legal or equitable right applies to works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.

If an implied license is extended to the parents of minor authors, application of the Copyright Act appears to preempt the state license. First, the legal or equitable right afforded by the license must be equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106. The implied license made available to parents via Facebook and other social networking sites appears to do just that: extend to parents the ability to consent to reproduction, distribution, and display of the child’s work. Second, the requirement that the works of authorship are fixed in a tangible medium of expression and come within the subject matter of copyright would be

95 17 U.S.C. § 301(a)(2).
96 See, e.g., Wilchcombe v. TeeVee Toons, Inc., 555 F.3d 949, 956 (11th Cir. 2009), citing Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 753 (11th Cir. 1996) (“A copyright owner waives his right to sue for copyright infringement while the nonexclusive license is in effect.”).
97 Perhaps the other rights are implicated as well; however, the rights most pertinent to Facebook would be the aforementioned rights.
met just by virtue of their publication on Facebook, as long as the subject matter of such works falls within what is legally acceptable.\(^9\)

Furthermore, even if an implied license is not be specifically preempted by the Copyright Act, such an omission may be the type that falls under the general preemptive power of the Constitution. This power is contained within the Supremacy Clause of the Constitution, which states:

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.\(^9\)

In other words, no law of any state may conflict with the Constitution or the Laws of the United States. Called conflict preemption, under the Supremacy Clause of the Constitution, states cannot enact laws that interfere with the purposes of the federal copyright laws.

Copyright is one of those provinces given exclusively to Congress in the Constitution. Article I, Section 8, Clause 8 states: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”\(^1\) For a state to interfere with the powers of copyright would be for that state to act in direct conflict with the Constitution. Examples of such state laws that are preempted include state unfair competition laws

\(^9\) In order for a work to be copyrightable, the work must be fixed in a tangible medium of expression and must be original. 17 U.S.C. §102(a). In order for a work to be original, it must possess a minimum degree of creativity and a modicum of creativity. Feist Publications Inc. v. Rural Telephone Company, 399 U.S. 1 (1991).

\(^9\) U.S. CONST. art. VI, cl. 2.

\(^1\) U.S. CONST. art. I, § 8, cl. 8.
prohibiting unauthorized copying of product designs that are neither copyrighted nor patented.\(^1\)

Not all state laws are preempted in this manner. For example, the state regulation of trade secrets is not preempted.\(^2\) Where there is a situation where Congress has not established a policy with respect to a particular class of works, states are free to act.\(^3\)

Contracts which create rights that are similar to those discussed here are generally not held to be preempted by the Copyright Act. \textit{ProCD v. Zeidenberg}\(^4\) established that, because rights created by contract are created by individuals and not laws, they are not “equivalent to any of the exclusive rights within the general scope of copyright.” and therefore not preempted by the Copyright Act.\(^5\) In \textit{ProCD}, the Seventh Circuit found that a shrinkwrap license for a software product bound the user to its terms, including the prohibition from copying data from the software database.\(^6\) As such, contracts could protect the contents of a database, even if the Copyright Act specifically excluded those contents from copyright protection, and were not subject to preemption.\(^7\)

In some instances, however, contracts have been found to be preempted. For example, the Ninth Circuit in \textit{Rano v. Sipa Press, Inc} held that “a state law allowing contracts of unspecified duration to be terminated at will was preempted by § 203 of the


\(^{103}\) Goldstein v. California, 412 U.S. 546 (1973) (finding unconstitutional a California criminal law prohibiting the unauthorized copying of uncopyrighted musical recordings).

\(^{104}\) 86 F.3d 1447 (7th Cir. 1996).

\(^{105}\) \textit{See id.}, 86 F.3d at 1454.

\(^{106}\) \textit{See id.}, 86 F.3d at 1455.

1976 Act (which allows grantors to terminate copyright grants after 35 years, even if the grant specifies a longer term)." 108 Other circuits have squarely rejected Rano, finding no conflict preemption, because § 203 does not require copyright grants to last for a minimum 35-year term. 109 The purpose of § 203 is to protect authors from being locked into unfavorable long-term contracts, and state law termination-at-will provisions support rather than conflict with that goal. In contrast, a state law that prohibited early terminations of copyright grants would be preempted by § 203 to the extent it prevented grantors from terminating their contracts at the end of 35 years. The treatment of this decision signals the courts’ overwhelming preference not to preempt contract law with copyright.

Moreover, because the ability to contract is a state-created right, there may also be a problem of equal protection if some sites choose to offer an implied license and others opt to deny this ability. The Fourteenth Amendment provides that the citizens of the several states shall enjoy equal protection of the laws. 110 Laws that treat citizens of different states unequally are held to be contrary to equal protection. 111

An implied parental license may not be the only contract that may compromise the ability of minor authors to copyright their protectable works. The Creative Commons license is another way in which minor authors may subsequently realize what that “legal jargon” was about, well after the piece that they had written had been published and even further after the minor had reached the age of majority. Creative Commons licenses “attach to the work and authorize everyone who comes in contact with the work to use it

109 See e.g., Walthal v. Rusk, 172 F.3d 481 (7th Cir. 1999); Korman v. HBC Florida, Inc., 182 F.3d 1291, 11th Cir. 1999.
110 U.S. CONST. amend. XIV.
111
consistent with the license."^{112} It is foreseeable that, for example, a student uses information published in the Creative Commons in order to may wish to disavow this license once she is of the age of majority, realizing that her work is copyrighted and may have value outside the Creative Commons.

V. Recent Decision: A.V. v. iParadigms

The problem of online infant contracting has not gone unnoticed by the courts, but it has not necessarily been taken seriously, either. In March 2008, in A.V. v. iParadigms, the Eastern District of Virginia almost summarily dismissed the invocation of the infancy defense. The facts may have warranted that the young plaintiff authors should lose the case, but the court’s opinion, in avoiding established legal doctrines, raises new questions that might have broader implications for online licensing.

In iParadigms, the plaintiffs were four high school students in school districts in Virginia and Arizona who were required as part of their course to register and submit works through the popular plagiarism-checking service, Turnitin, available through the web site turnitin.com. Turnitin is a system that compares a student work to content available on the Internet and also works previously submitted to the Turnitin program.\textsuperscript{113} When submitting a work in fulfillment of their course requirements, students must read a user agreement and click “I Agree” before the work is accepted into the Turnitin database.\textsuperscript{114} The click-through license includes a representation that the student licenses Turnitin to retain a copy of the student work in the database for future plagiarism.

\textsuperscript{112} Creative Commons Frequently Asked Questions, located at \url{http://wiki.creativecommons.org/FAQ} (last visited September 8, 2009).
checks. If such a future plagiarism check finds that the new turned-in paper is similar to the prior work, the prior work is referenced in an “Originality Report” and made available for the alleged plagiarist’s teacher to view.

In an attempt to avoid the requirement of an archival copy in the Turnitin database, plaintiffs included bold disclaimers on the face of their submitted papers, claiming that they did not consent to the archival of their works by Turnitin. The service ignored the disclaimers and archived the papers anyway, which prompted the plaintiffs to file a suit for copyright infringement. iParadigms responded with a defense of copyright fair use and with counterclaims, including contractual indemnification, trespass to chattels, and violation of two criminal computer fraud statutes. The plaintiffs raised the infancy doctrine and duress as potential defenses.

The district court roundly rejected all parties’ claims and entered summary judgment against all claims and counterclaims, but also made findings relevant to the minor authors, which in fact raise more questions than answers.

A. Infancy Doctrine.

First, the court found that although the students had attempted to disaffirm their contracts pursuant to the doctrine of infancy, they had received a benefit from the ability to submit their papers to Turnitin. The court defined the benefit as twofold. The first

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115 A.V. v. iParadigms, 544 F.Supp.2d 473, 478 (E.D. Va. 2008). The average daily submission of student works to Turnitin numbers around 100,000. Id.
118 Judge Claude M. Hilton. Interestingly, before being appointed to the bench, Judge Hilton was a member of a board of education. Judiciary Almanac.
119 A.V. v. iParadigms, 544 F. Supp. 2d at 481, citing 5 Williston on Contracts § 9.14 (4th ed. 2007). The court’s use of this language is suspect, however. The quotation begins, “If an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations.” 5 Williston on Contracts § 9:14 (4th ed. 2008). A “condition” or a
benefit was the “grade from their teachers, allowing them the opportunity to maintain
good standing in the classes in which they were enrolled.” Second, the benefit was
“the benefit of standing” to bring the lawsuit, a benefit which would not be returnable if
the infancy defense were in fact to be revoked. Those benefits, reasoned the court,
removed from the students the ability to disaffirm the contracts, because “he cannot take
the benefit of the contract without the burden of the conditions or stipulations.”

Before considering the merit of the identified “benefits” of the contract, it is
necessary to realize exactly what the bargain is. Before the student can get into the site to
upload his paper, the student has to click through the agreement that agrees that
iParadigms can keep an archival copy to be searched through turnitin.com in the future.
As a result, the exchange is the ability to upload a paper for a grade, for the benefit of the
student, for an ongoing license to the student’s copyright in the work, for the benefit of
iParadigms.

The two “benefits” are nothing of the sort, and create serious implications if they
could be construed as such. First, it is nonsensical to state that a benefit of a contract can
be the standing to bring a lawsuit (and indeed, the court cites no authority for this
statement). Had the students attempted to bring a lawsuit based on breach of the contract,
and then attempted to avoid the contract only as a defense to the counterclaim, logically
the students would be estopped from relying on the contract for a right to relief and in the

“stipulation” is a qualification, restriction, or limitation modifying the original act with which it is
connected; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite.” Black’s Law Dictionary (6th ed.) at 293. The court fails to state what the “condition” or the
“stipulation” of the iParadigms contract is, apart from the uploading of the paper – the bargained-for burden.
120 A.V. v. iParadigms, 544 F. Supp. 2d at 481.
121 Id.
122 Id. This conclusion was noted by the Fourth Circuit on appeal, but the Fourth Circuit declined to address it in its opinion, despite being asked to by the appellants. See 562 F.3d at 636 n.5.
same lawsuit claim that the contract is void. However, a case grounded in copyright infringement, as this case is, is completely consistent with the notion that the contract between the students and iParadigms was void *ab initio*, because any reproduction of the material supposedly contracted for would constitute an infringement.

The idea that standing to sue may be a “benefit” of the contract raises questions about whether implementing the doctrine of infancy may simply give way to an infant’s quasicontractual obligations to avoid the unjust enrichment of a party contracting with the infant. This is true of the idea of necessaries. As Williston notes:

An infant may make himself liable for goods that are necessary, considering his position and station in life. This liability, though often treated as arising from the promise of the infant, is in reality a quasicontractual obligation…. Should he minor elect to stand by the contract, he may do so as well where necessaries are the subject of the contract was where they are not. What is really meant then by saying that the minor is liable only quasicontractually for necessaries is that he may avoid his contracts to pay for necessaries just as he may avoid other contracts, but that if he does so, as quasi-contractual liability will be imposed upon him by the law which liability he cannot avoid.123

“Necessaries” do not include “standing to sue,” and it is implausible that the standing to sue can be part of the consideration resulting from the bargain between parties; implicit in the formation of a contract is the ability of the parties to sue for its breach.124 The language of “benefit” and “burden” suggests the doctrine of unjust enrichment, which would require a benefit conferred upon the infant by the plaintiff, an appreciation or knowledge by the infant of the benefit, and the acceptance or retention by the infant of the benefit under such circumstances as to make it inequitable for the infant

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124 “The requirement of ‘standing’ is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation.” Black’s Law Dictionary (6th ed.) at 1405.
to retain the benefit without the payment of its value. However, it is clear that doctrinally, standing has never been included in what is eligible for quasicontractual relief from infant contractors. Extension of the quasicontract beyond necessaries all but nullifies the doctrine of infancy.

First, to address the point most relevant to infants, the Turnitin contract dealt with a service, and not a good. Because they do not meet the category of necessity or other unavoidable contract, courts have allowed minors to disaffirm their contracts for services. The extension of this doctrine in this instance requires one of two further clarifications. Either the court intends to extend the infancy doctrine to services in addition to goods, or, the court is treating the Turnitin service as a good. Treating web services as goods could create interesting questions, such as the implication in trade.

Perhaps more notably, however, the court emphasized and identified the benefit that was conferred upon the students – the grade that the students received from the course. This “benefit” was in itself flawed in two distinct ways. First, the benefit was not derived from Turnitin, the party to the contract which the students were attempting to disaffirm. Instead, this “benefit” was conferred by the school which the students attended and the specific instructor who graded the students. Third party beneficiaries of contracts are not permitted to disaffirm contracts entered into by minors, even though the minors’ infancy could render the contract voidable or invalid. It seems incongruous that the supposed benefit of a contract which the minor is supposed to receive is in fact permitted to be bestowed by a party who has no power over the contract between the parties to it.

126 Even the home page of turnitin.com indicates that Turnitin is in fact a service. See www.turnitin.com.
The second question is how precisely to quantify the benefit conferred by a clickwrap agreement which merely permits the user to post to a certain web site. Monetarily, the user may receive no benefit. The user may find ease of communication with facebook, or substantially cut down on distribution costs by posting to a site. However, the required license or temporary suspension of rights seems like a disproportionate price to pay where the only cost a site has in distributing the material is wholly not dependent upon whether the user has any content posted thereon. Quantification of this benefit, and its practical effect, could influence other tests involving online distribution such as fair use and even infringement.

VI. A Solution

In light of the court’s decision in A.V. v. iParadigms, it is clear that in the wrong context, the infancy doctrine could be little more than a speed bump for the party contracting with the minor to overcome. While the iParadigms court may have reached the right conclusion due to the bad-actor status of the minor authors, it is clear that applied in a different context, the minor author could be left without recourse upon discovering the number and nature of the rights that the author has unknowingly licensed away. As precedent, this opinion is worrisome, but it highlights the error in relying on a doctrine that few are willing to apply.

Part of the underlying problem in relying on the doctrine of infancy to save infant authors from the contracts which they enter into restricting or allowing the dissemination of their copyrighted works is the lack of a clearer directive about its application. Although the doctrine in principle may be exactly what is necessary to help these young authors, in practice, it is housed in the codes of fifty separate governing entities, each of
which must be construed differently when applied to the rights created by Congress. As a result, the only consideration of this issue will come from courts where underage copyright owners are able to use their infancy as a defense, because in itself it has been held not to be a viable cause of action.

The failsafe solution, then, is for Congress to address the question of contracts involving minors, incorporating portions into the Copyright Act. The traditional governance of the laws of contract by the states has not prevented Congress from addressing certain contractual problems within the Copyright Act. In fact, Congress may already have the framework for some relief in the Act in the form of Section 203. Section 203 of the Copyright Act provides for the outright termination of transfers of copyright by the author, effecting the rights’ return back to the author.\textsuperscript{127} However, the section provides that the transfer must be terminated within a five-year window thirty-five years after the execution of the transfer.\textsuperscript{128} As a result, transfers and licenses involving an author who would invoke the doctrine of infancy to invalidate them are necessarily excluded; the contracting infant must seek to invalidate the contract during their infancy or soon thereafter,\textsuperscript{129} making the realistic time lapse considerably less than twenty years.

One straightforward way to incorporate the doctrine of infancy into the Copyright Act is merely to add the possibility of infant invalidation directly into Section 203. In addition to the possibility of termination of transfer or license thirty-five years after the

\textsuperscript{127} 17 U.S.C. §203(b). The termination of transfers also applies to other rights-holders, though it seems likely that most minors discussed in this article would not have engineered multiple licenses or transfers at this point in their careers.

\textsuperscript{128} 17 U.S.C. §203(a)(3). Or, if the grant covers the publication of the work, any time during a five-year window beginning at the earlier of thirty-five years from the date of publication or forty years from the date of execution of the grant.

\textsuperscript{129}
execution of a contract, Congress could provide for the termination of transfer or license within a five-year window after the execution of the transfer, if the author has not yet reached the age of majority, or within five years of the author’s attaining the age of majority if the author would not in fact attain that age within the five-year period. To avoid the bad-faith situation presented in A.V. v. iParadigms, the author would have to sign a statement to the effect that the termination was not being made for any improper purpose – a statement that, if successfully challenged, would amount to fraud on the Copyright Office with the possibility of penalty.

Of the remaining provisions of Section 203, only one would have to be amended because it does not go far enough to protect minors in a similar transfer termination. Under Section 203(b)(1), authors of derivative works prepared pursuant to the grant prior to its termination may continue to use those derivative works. In order to reflect the infancy doctrine, an amendment to Section 203 could not permit this to continue. The distinction is warranted for two reasons. First, if derivative works are not permitted, then Section 203 would act more as an invalidation of the contract – similar to what the infant would be able to achieve under the traditional doctrine of infancy. Second, the difference in the timing of invalidating an infant’s transfer (which could occur in as little as one year within the execution of the grant) renders it less likely that derivative works would have been created in that time span.

Such a solution is not contrary to the purpose of Section 203. According to the Notes of Committee on Judiciary, the law was intended to safeguard authors “against

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130 See Appendix A infra.
unremunerative transfers.”

The Committee noted that the law was necessary “because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited,” and found that Section 203 “reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.”

The extension of Section 203 to infant contracts is natural. Largely, contracts that infant authors would enter into have the possibility of being unremunerative or underremunerative, and the authors definitely suffer from an unequal bargaining power when faced with the contracts of large corporations. And, the compromise that can be achieved with the addition of a half a paragraph to Section 203(a)(3) has the potential to further the objectives not only of copyright law but also of the doctrine of infancy, without tampering with the defensive mechanism as it exists in most states.

Insofar as state laws are concerned, incorporating the doctrine of infancy into the Copyright Act would solve two problems. First, as discussed above, typically, while the Copyright Act preempts coexisting state law rights, it has been held not to preempt most rights based in contract. This is because most rights conferrable by contract are not squarely addressed within the Copyright Act. Section 203, however, has been held to preempt a terminable-at-will contract that deals with the mode of contracting regarding a grant of copyright. This precedent would have *stare decisis* value to apply to all questions arising from Section 203, such as whether contracts with infants would be preempted as well.

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132 *Id.*
133 *See* Rano v. Sipa Press, Inc., 987 F.2d 580, 585 (9th Cir. 1993) (finding terminable-at-will licensing agreements for copyrights under California law to be in direct conflict with section 203 and therefore preempted).
Second, including the termination of infant contracts within Section 203 would eliminate the need to harmonize conflicting state applications of the doctrine of infancy, at least as far as copyright is concerned.

As it is currently written, Section 203 only covers works created on or after January 1, 1978. Because of the mandatory thirty-five-year period, therefore, the earliest that a grant can be terminated under this Section is January 1, 2013, so at this point not much discussion has been had about Section 203 and its implementation. The first terminations of transfer were eligible to be filed on January 1, 2003.

The second concern one might have about Section 203 is that it treats minors even more favorably than their adult counterparts who are subject to the same contracts. In one respect, this is the purpose behind the infancy doctrine; adults who would be subject to the identical contractual terms and conditions would be forced to comply with their requirements, whereas their contracting underage counterparts would be able to avoid them.

VII. Conclusion

Currently, there are very few opportunities to join the discourse about the infancy doctrine, and even fewer to join in its favor. The trend among scholars for years has been to criticize the doctrine and call for its abolition. Even in the area of minors online, it is easy to believe that the infancy doctrine has zero applicability due to the relationship the contracting minor most often has to the copyrighted work. In other words, most cases

134 However, there has been discussion concerning and cases interpreting 17 U.S.C. § 304, which covers transfers of works under the 1909 Copyright Act. This article does not suggest amending that section of the Act, as all works created by minor authors (even assuming creation at infancy) would not have been created prior to 1991.

135 See 17 U.S.C. §203(a)(4)(A), providing that notice shall not be served upon a transferee, or recorded with the Copyright Office, more than ten years prior to the termination.
involve students illegally downloading music or other content, creating unsympathetic bad actors whom we want to hold accountable for their contracting activities online. This is an aspect shared by the iParadigms case. Practically speaking, the only rational motivation for teen authors to care whether Turitin retains a copyright is for the hopes to keep it from searching in the future – perhaps after selling a successful paper to a future student of the same instructor.

But when we consider the case of Akiane Kramarik and other child artists and authors who merely want to distribute or display online works, it becomes easier to see why we should preserve this doctrine or at least implement some workings of it into the Copyright Act. The flaws apparent in the licenses running to the Web sites from the child authors are indicative of flaws apparent in all terms and conditions automatically licensing copyrighted content of work.

The wolf also shall dwell with the lamb, and the leopard shall lie down with the kid; and the calf and the young lion and the fatling together; and a little child shall lead them.

--The Holy Bible, Isaiah 11:6

§ 203 Termination of transfers and licenses granted by the author [suggested revision]

(a) Conditions for Termination.—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:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author’s termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a

136 THE HOLY BIBLE, Authorized (King James) Version [1611], Isaiah 11:6.
total of more than one-half of that author’s interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected as follows:

(A) At any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier;

(B) If the author has not yet attained eighteen years of age, at any time during a period of five years from the date of the execution of the grant; or, if the author will not attain eighteen years of age within five years from the date of the execution of the grant, within five years of the author's eighteenth birthday.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.
(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of Termination.--Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) If termination is effected pursuant to section (a)(3)(A) above, a derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the
original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.