FOREWORD

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This symposium celebrates Nancy Kim's book, *Wrap Contracts*,[1] with eight contributions from noted contracts scholars. It also includes Professor Kim's response. I use the word "celebrates" advisedly because Kim's book usefully advances the ball on one of the paramount issues facing contract law in the twenty-first century, namely the enforcement of online standard forms, which govern more and more of our commerce. Of course, much has been written about "boilerplate,"[2] but *Wrap Contracts* zeroes in on how Internet contracts may compound the problem by freeing drafters from the limitations of the hard-copy page, by challenging the paper-world's notion of assent, and by releasing providers from the confines of other regulation.[3]

The contributors to this symposium also advance our thinking about online contracts by analyzing Professor Kim's description of the problem and her proposed solutions. Collectively, they largely agree with how Professor Kim characterizes the problem, but have some qualms about her solutions. I will briefly address each of these observations.

The contributors endorse Kim's claim that wrap contracts present serious new problems for consumers that demand solutions. One of Kim's many contributions in *Wrap Contracts* is her taxonomy of problematic terms as "crook" terms that take away rights unrelated to the present contract's subject matter, "shield" terms such as disclaimers and remedy limitations, and "sword" terms including exclusive jurisdiction and mandatory arbitration terms.[4] The commentators agree that consumers have

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1. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013).

2. *See, e.g.*, BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Omri Ben-Shahar, ed., 2007).

3. See MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013), for another excellent recent book on the subject.

4. KIM, *supra* note 1, at 44-52. Several of the commentators discuss these terms. *See, e.g.*, Juliet M. Moringiello, *Notice, Assent, and Form in a 140 Character World*, 44 SW. L. REV. 275, 276 (2015); Dov Waisman, *Preserving Substantive Unconscionability*, 44 SW. L. REV. 297, 299-300 (2015).

little choice but to participate in online commerce only to be accosted by these unfriendly terms.[5] Professor Waisman, for example, asserts that the "digital format *inherently* poses formidable obstacles to consumers' awareness and comprehension of such terms."[6] Professor Barnhizer laments that consumers will give up almost any right to participate in Internet commerce.[7] Professor Hart summarizes: "Businesses, courts and technology create a coercive contracting environment where one-sided legal terms are imposed upon non-drafting parties who literally have no choice but to accept them if they wish to participate in modern society."[8]

The wrap-contract problem is magnified, as Professor Hart argues, because drafters take advantage of the "coercive contracting environment" to draft terms that legitimize the narrowing of otherwise protective regulation.[9] Professor Tussey sets forth an example: "[W]rap contracts became the preferred means by which private content owners asserted control over access to both copyrighted works and public domain information, particularly in highly concentrated markets where the wraps essentially imposed private legislation on the entire market."[10] More generally, Professor Eigen observes that "[w]ith respect to form contracts, drafters are like de facto quasi-state actors. They promulgate the outer limits of private laws that regulate the vast terrain of economic exchange."[11] Further, Eigen sees a very real danger that the more consumers waive their rights in order to participate in commerce, the more persuasive the argument becomes that the waivers are enforceable.[12] Eigen also laments that by engaging in commerce through wrap contracts consumers therefore lose their trust in the legal system.[13]

Despite this symposium's emphasis on the problems presented by wrap contracts, some of the contributors do not lose sight of the promise of technology in ameliorating the problems. For example, Professor Moringiello notes that online terms "are even less comprehensible than

5. *See, e.g.*, Waisman, *supra* note 4, at 297.

6. *Id.* at 305.

7. Daniel D. Barnhizer, *Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215, 215-16 (2015).

8. Danielle Kie Hart, *Form & Substance in Nancy Kim's* Wrap Contracts, 44 SW. L. REV. 251, 252 (2015).

9. *Id.* at 258 (quoting KIM, *supra* note 1, at 4).

10. Deborah Tussey, *Wraps and Copyrights*, 44 SW. L. REV. 285, 287-88 (2015); *see also* Allyson Haynes Stuart, *Challenging the Law Online*, 44 SW. L. REV. 265 (2015).

11. Zev J. Eigen, *Norm Shifting By Contract*, 44 SW. L. REV. 231, 232-33 (2015).

12. *Id.* at 234. Professor Barnhizer makes a similar point about the manipulation of norms. Barnhizer, *supra* note 7, at 223, 226.

13. Eigen, *supra* note 11, at 236.

those of fifteen years ago,"[14] but she calls for more research on "how readers perceive online terms,"[15] presumably as an early step in improving the law. Further, she recognizes that the online world can ease the wrap-contract problem by facilitating earlier and cheaper disclosure of terms and by providing better access to information about goods and services.[16] In addition, Professor Ghosh observes that drafters' concerns about their reputations should continue to grow because consumers can easily spread the word about unfair terms.[17] Much more on the positive side could be added. For example, consumers can comparison shop much more cheaply, freed from the machinations of pushy agents.[18] Online shopping also releases consumers from time constraints they encounter in the paper world.[19]

As I have mentioned, many of the commentators have reservations about Professor Kim's proposed solutions. The concerns about solutions should be no surprise because, on the one hand, courts in the paper world arguably never reached a satisfactory resolution of the problem of standard-form overreaching. So it is unlikely that viable solutions in a digital environment, which may exacerbate the problem, would be readily available. Conversely, it is also fair to argue that any dramatic overhaul of the governing law would prove unsatisfactory and only upset the apple cart, based on the theory that contract law's approach to paper standard forms already comfortably harmonizes the conflicting goals of freedom of contract and regulation.[20] The lessons from the paper world apply to wrap contracts, according to this latter view, because wrap contracts are not so different from paper contracts.[21] Either way, to the extent there is a problem, solutions are unlikely.

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14. Moringiello, *supra* note 4, at 276.

15. *Id.* at 284.

16. *Id.* at 275.

17. *See* Shubha Ghosh, *Against Contractual Authoritarianism*, 44 SW. L. REV. 239, 243 (2015).

18. *See, e.g.*, Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 468-69 (2002).

19. *See, e.g., id.* at 460. But we make the point that users may be impatient, thereby diminishing the value of extra time. *Id.* at 479-80. Some analysts seem less concerned about possible bargaining power disparities. *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, *in* BOILERPLATE, *supra* note 2, at 3; Forencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado about Nothing?*, *in* BOILERPLATE, *supra* note 2, at 45.

20. *See* Hillman & Rachlinski, *supra* note 18, at 468-69.

21. *See* Ghosh, *supra* note 17, at 242. Ghosh points out that contracts formed over the telephone and employment contracts that incorporate the terms in employee handbooks are precursors of wrap contracts and suggests Kim's real concern is with the judicial treatment of

Assuming the nature of wrap contracts requires a new solution, Kim proposes in part a legal presumption of the unconscionability of online wrap contracts.[22] The presumption can be rebutted by showing that the legislature or a regulatory agency approved the suspect term or that alternative terms were available.[23] But some of the commentators worry about legislative involvement. For example, Professor Tussey points out that positive Federal legislation to "amend the Copyright Act to allow transfer of lawful digital copies if the transferor destroys his original copy has gone nowhere."[24] Professor Waisman points out that legislative bodies may be captured by industry so that legislation will only reinforce the enforcement of unfair terms.[25] In addition, Waisman points out that alternative terms may not be accessible to consumers and suggests that Kim's only rebuttal test should be whether the contract at issue offered alternative terms.[26] Notwithstanding Kim's unconscionability suggestion, Professor Hart worries that Kim's solutions "elevate form over substance" and do not address the reasons for the bargaining disadvantages of consumers.[27] Hart calls for an even "more robust version of unconscionability," but does not elaborate.[28]

Professor Kim also believes that courts should enforce crook, shield, and sword terms only if the consumer clicks I agree next to each such term.[29] But Professor Tussey believes that such multiple clicking "may fail to put a dent in consumers' inattentional blindness."[30] Tussey also questions whether judicial reform is even possible. Tussey remarks that Kim's "proposals must somehow overcome the path dependence established through a now lengthy series of case precedents. The courts created wrap doctrine but how likely are they to 'unring' that bell?"[31]

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wrap contracts. *Id.* at 242. Ghosh adds that the wrap contract problem is a "matter of scale, rather than a new kind of transaction." *Id.*

22. KIM, *supra* note 1, at 208. She considers wrap contracts a "coercive contracting form" if the consumer is required to accept the form. *Id.* Kim also sets forth a "duty to draft reasonably." *Id.* at 186-92.

23. *Id.* at 208. Among others, Waisman, *supra* note 4, at 298, comments on this solution.

24. Tussey, *supra* note 10, at 292. Further, Tussey writes: "Unfortunately, legislative avenues look forbidding given the influence on legislatures of lobbyists for the very same corporate drafters who profit most from wrap contracts." *Id.* at 294-95.

25. Waisman, *supra* note 4, at 305-06.

26. *Id.* at 300-01.

27. Hart, *supra* note 8, at 251, 257, 261, 263.

28. *Id.* at 114.

29. KIM, *supra* note 1, at 196-97.

30. Tussey, *supra* note 10, at 291.

31. *Id.* at 293.

Some of the contributors present solutions of their own. Professor Ghosh's answer to what he calls "market authoritarianism" is consumer activism to assess reputational costs on overreaching businesses.[32] He points to the furor caused by Facebook's attempt to confiscate personal information of its users through the use of contract authorizations. Ghosh posits that consumers can "[u]tilize the full power of the Internet to counter what courts have entrenched through legal doctrine."[33] This approach echoes one of the strategies of the American Law Institute's Principles of the Law of Software Contracts, drafted by Maureen O'Rourke and me, which incentivizes vendors to make their terms easily accessible on the Internet.[34] Watchdog groups could then access the terms and publicize "dangerous terms" on the Internet.[35] Professor Stuart also sees the value of public opinion to defeat oppressive terms.[36]

Professor Barnhizer focuses on "*a priori"* solutions suggested by other commentators, such as the use of Internet "consumer aggregators" that would match the consumer's prior set of acceptable and unacceptable terms with the vendor's.[37] But such approaches obviously raise significant issues of their own, including the method and costs of implementing the proposals and whether they would succeed.

In conclusion, the various perspectives and proposals in this symposium are well-worth the attention of anyone who has ever clicked "I agree" on the Internet. I guess that means just about everybody should be interested.

32. Ghosh, *supra* note 17, at 250.

33. *Id.*

34. *See* PRINCIPLES OF THE LAW: SOFTWARE CONTRACTS § 2.02 (2009).

35. *Id.*; *see* Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELEC. FRONTIER FOUND. (Feb. 2005), http://www.eff.org/wp/dangerous-terms-users-guide-eulas.

36. Stuart, *supra* note 10, at 265.

37. Barnhizer, *supra* note 7, at 227 (discussing Ian Ayres).