The Limitations of Information: Rethinking Soft Paternalistic Interventions in Copyright Law[[1]](#footnote-1)♦

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Abstract

*Authors and intermediaries seldom enjoy equal bargaining power. This disparity—as well as information asymmetries—has been claimed to significantly undermine authors’ ability to capture a fair share of the wealth generated from their creative efforts and contributions, thereby possibly reducing their incentive to create expressive works and compromising the myriad other benefits that copyright protection is meant to provide. To address this problem, legislatures have adopted soft paternalistic interventions designed to improve authors’ choices without applying a hard-handed approach. Such interventions* *benevolently push the author away from risk or encourage her to make decisions that the legislator perceives to be in her best interests. Combining insights from neoclassic economics and behavioral economics, as well as anecdotal evidence and data, this paper demonstrates that because authors are overwhelmed by information and susceptible to various cognitive limitations and biases, many are unwilling or unable to expend the time and effort needed to* *comprehend the implications of the information these soft paternalistic interventions provide, much less incorporate it into their decision-making. Hence, these interventions generally fall short of achieving their legislative goal and may, in fact, harm the very group of beneficiaries they were intended to benefit. These findings prompt a re-thinking of this type of legislative intervention into the author-intermediary contractual relationship.*

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Introduction

The author is a symbol of the copyright system. She is also the entity with whom copyrights generally vest initially. As numerous researchers have pointed out, however, often the reality of the creative industries requires that the author transfer her exclusive rights to other entities (i.e., publishers, producers, and others who act as intermediaries between the author and the public). The author benefits from the work of these entities, which are better positioned to exploit those rights. As such, these intermediaries play a significant role in transforming a creative work into an economic asset.[[3]](#footnote-3)

In theory, the transfer of exclusive property rights should enable an author to obtain fair compensation for her creative efforts. In practice, however, this is not always the case, as authors are generally in a weaker bargaining position relative to their counterparties. While this disparity is not specific to copyright contracts, the inherent difficulty in determining the value of a copyrighted work prior to commercialization may increase the effect of this disparity. Thus, unsurprisingly, the bargaining outcome is often heavily tilted towards the stronger party (i.e., the intermediary), and an author’s ability to capture a fair share of the wealth generated from her creative efforts and contributions is severely compromised. In this way, an author’s incentive to create expressive works may be lessened and the myriad of other benefits that copyright protection is meant to provide compromised.

To address this issue, a host of specific protectionist measures has been implemented through the copyright laws of the United States, Israel, and multiple European countries. This article does not attempt to address all such interventions but, instead, is a novel effort to critically analyze the use and efficacy of one specific category of interventions, namely, those I term soft “paternalistic interventions.”

Although the use of legislative intervention in copyright laws is by no means new, the topic of this type of intervention has received surprisingly little consideration in literature. Soft paternalism is generally defined as an alternative to traditional paternalism or what may be termed “hard paternalism.”[[4]](#footnote-4) A soft paternalistic policy is one that attempts to influence an individual’s behavior in such a way as to promote her welfare, without considerably limiting her freedom of choice.

Within the context of copyright law, so-called soft paternalistic interventions aim to improve the author’s decision-making process by incentivizing information exchange.[[5]](#footnote-5) Although such interventions typically do not speak in terms of paternalism, in practice, both writing and specification requirements seek to benevolently push the author away from risk or encourage her to make decisions that the legislator perceives to be in her best interests. The assumption underlying their use is that humans are better situated to make decisions serving their best interests when they are well informed.[[6]](#footnote-6) Indeed, the specification requirements and pro-author rules of interpretation, which such interventions embody, highlight salient information and, therefore, serve as a “selection guide” supposedly enabling an author to make wiser decisions.[[7]](#footnote-7) However, possession of information is not necessarily a panacea. As such, this paper challenges the increasingly popular view among legislatures that merely providing authors, who sometimes fail to make choices that are in their best interests, with additional information will improve the author’s position vis-à-vis her agent, publisher, or manager (i.e., intermediaries).

Insights from neoclassic and behavioral economics, as well as anecdotal evidence and data, contribute to a central finding of this paper, to wit that existing soft interventions empower authors, prod them to make “better” decisions, and provide them with more favorable remuneration. In fact, I demonstrate that while they may value the information exchange soft interventions seek to facilitate, they frequently do not read, understand, or act upon such information, due to an inability to grasp the meaning or practical implications of the information provided, illiteracy, lack of background knowledge, information overload, or some other cognitive limitation. In other words, these information exchange policies fail because authors, like most humans, tend to act irrationally. Therefore, while soft paternalistic interventions were adopted with the best possible intentions, I contend that they ultimately prove ineffective in meeting their own objectives for the majority of authors. The insights provided in this paper are intended to contribute to the development of more effective intervention models.

Structurally, this paper unfolds in four parts. In Part I, I provide a short introduction to the author-intermediary contractual relationship. In Part II, I explore writing and specification requirements, as well as pro-author rules of interpretation, and emphasize their features as forms of soft paternalistic interventions. In Part III, I draw on insights from neoclassical and behavioral economics to describe the benefits and drawbacks of the interventions narrated throughout this paper. The last Part summarizes my key findings and prompts the re-thinking of soft interventions into the author-intermediary contractual relationship.

I. Setting the Scene

The exploitation of a copyrighted work can take on many different forms, and the author may decide to exploit it herself.[[8]](#footnote-8) However, authors seldom possess the knowledge, means, and experience necessary to fully exploit their works on their own, and so must engage the services of a third party, typically an agent. Agents usually require a transfer of rights as a condition for assisting authors in handling the commercialization of a work.[[9]](#footnote-9) The advantage of agents— be they producers, publishers, or some other intermediary—is that they are better situated, relative to the author, to exploit the commercial value of copyrighted works.[[10]](#footnote-10)

Imagine an author who transfers her copyright to her publisher. Once the initial transfer has taken place, the publisher to whom the author has entrusted the rights to her work will produce the book and market it. The publisher will then enter into several subsequent agreements with retailers, bookshops, and/or various digital platforms. Although the author is not party to these subsequent agreements, they are possible only because of the contract between the author and the publisher. No matter how many subsequent agreements are formed, the original transfer remains, without a doubt, essential to protecting the author’s economic interest.[[11]](#footnote-11)

Author and publisher are ordinarily portrayed as allies working together to promote the author’s work and prevent copyright infringements. Thus, the underlying assumption is that the interests of authors and intermediaries coexist in perfect harmony, or that—at the very least—the transactions between the parties embodies a shared purpose and serves their mutual interests. Indeed, although author and intermediary interests may align in certain respects,[[12]](#footnote-12) the idea that authors and intermediaries have identical interests should be carefully inspected, particularly given that many conflicts of interest arise over the terms of contracts between them and exploitation of the rights conveyed in those contracts.[[13]](#footnote-13)

Broadly speaking, when entering into an exploitation contract, the author wishes to retain control over her work, while deriving as great a pecuniary return as possible from the work’s commercialization. Intermediaries do not act based on altruistic motives but similarly wish to exert control over the exploitation of the work and maximize their profits.[[14]](#footnote-14) Thus, an inherent conflict exists between author and intermediary not only during the negotiation process, but also afterwards over the price that is in their respective interests to charge the public for use of the copyrighted work.[[15]](#footnote-15) Scholars describe this issue as the principal-agent problem.[[16]](#footnote-16) This characterization of the relationship between authors and intermediaries is certainly somewhat simplified, as neither of the two groups is comprised of homogenous entities. Nevertheless, understanding that authors’ and intermediaries’ interests occasionally diverge is of great importance to the forthcoming discussion.

A bargain between a sole author and a prosperous corporation is the situation most people envision when considering an author signing away her rights to a work—a popular perception no doubt influenced by the idea of the genius author toiling away in a lonely garret while the world rejects her. Indeed, most literature addressing the issue tends to portray the author as weak and naïve. A common tale is of an author, a poet, or a painter being forced to live a life of poverty while pursuing her dream of creating an original work. The talented and aspiring author is viewed as dreaming of fame and fortune and being forced to negotiate with the intermediary without having any experience or a real understanding of the consequences, only to wind up being cheated by the “big bad” intermediary, eventually losing control over the exploitation of her work. Whether this view is accepted or rejected,[[17]](#footnote-17) there is no doubt that the bargaining and negotiating powers almost always tilt in favor of the intermediary.[[18]](#footnote-18)

Although much has been written about the imbalance in bargaining powers between authors and intermediaries,[[19]](#footnote-19) the reasons for this imbalance remain unclear. Observers offer the following reasons to explain authors’ weaker bargaining position. First, authors face harsher or stricter financial constraints relative to intermediaries. Except for a few “superstars,” authors depend on the revenues stemming from their creative works for their livelihood and cannot simply borrow against their future earnings. They are therefore inclined to accept any offer. In contrast, the intermediaries—usually large firms with a wide portfolio of investments generating a steady stream of revenues—have a larger range of works at their disposal.[[20]](#footnote-20) Second, there is insufficient competition in the publishing industry and other creative industries.[[21]](#footnote-21) In other words, the market structure and differences in financial resources lead authors into unaffordable conditions in their agreements.[[22]](#footnote-22) Finally, authors are less experienced than publishers, producers, and other intermediaries. They are therefore presumed to be the less sophisticated party. Consequently, they are perceived as unable to compete with the expertise of intermediaries in the bargaining process.

This disparity in bargaining power is further complicated in the copyright context. Unlike other tradable assets, the value of copyrighted works is unclear, and they are traded under conditions of uncertainty and asymmetric information.[[23]](#footnote-23) This means that, *ex-ante*, it is very difficult for both the author and the intermediary to predict the value of the work, not to mention consumers’ preferences. Indeed, there are some possible market signals as to the demand for a certain work, such as the demand for previous works created by the same author or similar works in the market. However, these indicators are not perfect or fail-safe. Theoretically, the uncertain future value should not hurt authors, since both parties suffer from the same predicament when attempting to evaluate the future value of a work. Nevertheless, evaluation discrepancies may exist. In fact, in many circumstances, the intermediary has the upper hand, since he or she has superior information and can better assess the future value of the work.[[24]](#footnote-24) The author is not an expert in the field, nor is she familiar with the industry standards and will need to spend a great deal of financial resources to obtain the necessary information.[[25]](#footnote-25) This will affect the terms of transfer the author will expect and aim for at the negotiation stage.

Bargaining power is commonly measured on the basis of a few elements—namely, socio-economic status, education level, meaningful alternatives, organizational size, and gender.[[26]](#footnote-26) However, the “background law”—the law that governs the subject matter of the contract—as argued by Nancy Kim, also affects the bargaining strength of each contracting party.[[27]](#footnote-27) Kim maintains that background laws alter and affect the allocation of powers between the contracting parties, “sometimes with unintended consequences.”[[28]](#footnote-28) She focuses mainly on two kinds of power imbalance: knowledge power and market power. The former refers to a situation where knowledge of the law, or better yet the lack thereof, has the potential to create power imbalance.[[29]](#footnote-29) The latter refers to situations where the contracting parties’ ability to dictate business norms in a certain industry has the potential to create a power imbalance.[[30]](#footnote-30) In other words, the knowledge of copyright law, as well as the ability to dictate business norms, will affect parties’ relative powers.[[31]](#footnote-31)

In sum, while copyright laws allow authors to transfer their rights, authors may find it difficult to derive financial benefits from their creations. Among other reasons, this results largely from an imbalance between the bargaining positions of authors and intermediaries.[[32]](#footnote-32) One may argue that this is a byproduct of the market for copyrighted works. However, considering that copyright is often perceived as a right designed to promote the economic wellbeing of authors, this is a fundamental weakness that may undermine the system as a whole.[[33]](#footnote-33)

This problem has led legislatures from around the world to adopt specific measures favorable towards authors. These legislative interventions in the parties’ contractual dealing aim to tilt the balance of bargaining power in favor of the author *vis-à-vis* the intermediary.[[34]](#footnote-34) While some forms of intervention have been studied extensively, little consideration has been given to measures designed to incentivize information disclosure and exchange (i.e., soft paternalistic-interventions). These measures are commonly discussed under the general framework of restrictions on transferability.[[35]](#footnote-35) This paper, however, emphasizes their paternalistic and distributive aspects, which frames choices so as to steer the individual author away from errors in decision-making and towards what the legislator perceives to be the better choice for her.

II. Soft Interventions

Soft paternalism refers to measures that alter the decision-making environment in a way that either benevolently pushes the individual away from risk or encourages her to make decisions that the legislator perceives to be better options.[[36]](#footnote-36) Legislative attempts to engage in soft paternalism usually include the use of measures such as mandatory disclosure, default rules, and choice architecture.[[37]](#footnote-37) Designed to improve author’s choices without applying a hard-handed approach, soft paternalistic interventions implemented through the copyrights laws of United States, Israel, and multiple European countries require the parties to abide by certain legislative requirements but leave a wide range of choices in implementing said requirements. The focus of such intervention is to improve the author’s position by promoting information exchange and disclosure. This is achieved primarily by means of (1) writing and specification requirements and (2) pro-author rules of interpretation.

A. Form and Specification Requirements

Freedom of contract normally gives the parties the possibility to conclude a contract either orally or in writing. Be that as it may, legislatures presume that authors are better protected when the agreement is in writing, signed by both parties, and includes enough details as to clearly outline the scope and conditions under which the rights have been transferred.[[38]](#footnote-38) Policymakers have therefore introduced various degrees of form and specification requirements into national copyright legislation.

For instance, the United States Copyright Act requires that an assignment of copyright be in writing and signed by the copyright owner to be effective.[[39]](#footnote-39) Israeli copyright legislation requires a written form for assignments, as well as for the execution of exclusive licenses,[[40]](#footnote-40) whereas Hungary requires all assignments and licenses to be in writing.[[41]](#footnote-41) In other jurisdictions, only specific contracts are required to be in writing. For example, the French Intellectual Property Code requires only performance, publishing, and audiovisual production contracts, as well as authorizations for a gratuitous performance, to be in writing. For all other agreements, the rules of the French Civil Code apply. In Germany, however, there is no general rule requiring the contract to be in writing, except for contracts for the transfer of a future right or right in unknown forms of exploitation.[[42]](#footnote-42)

For the most part, where the legislature adopts a writing requirement, parties seeking legal enforcement are required to show a written agreement **either** as a condition for the validity of transfer **or** as a means to prove the existence of such transfer.[[43]](#footnote-43) This can be particularly beneficial to the weaker party (i.e.*,* the author), protecting her from parties falsely or fraudulently claiming oral transfers, should the contract be the basis of a dispute.[[44]](#footnote-44) Moreover, the writing requirement can offer the author and her counterparty some time to reflect on the transaction, thus ensuring decisions are made only after sufficient deliberation.[[45]](#footnote-45)

On top of that, several jurisdictions have adopted rules requiring the parties to specify the terms of the transfer. For instance, the French Intellectual Property Code requires an express reference to the scope, purpose, place, and duration of transfer.[[46]](#footnote-46) Additionally, the parties must specify the amount of remuneration to be paid for the transfer of rights. If the contract does not expressly specify the required information or stipulate the remuneration for each of the exploitation modes, the authors may annul the transfer.[[47]](#footnote-47)

Copyright literature tends to see both form and specification requirements as restrictions on transferability.[[48]](#footnote-48) In this vein, when the scope of the initial transfer is too broad or not explicitly specified in the contract, the transfer is limited to one right, one exploiter, or one geographical territory. Admittedly, these measures do place some limitations on transferability. Nevertheless, this paper suggests an alternative way of understanding the operation of such measures, specifically, to consider them as information disclosing mechanisms. These requirements incentivize the parties to exchange information and encourage the author to familiarize herself with essential terms and conditions.

By requiring the parties to have a written agreement, as a condition of validity (*ad substantiam*) or to prove the transfer of rights (*ad probationem*), an assumption will be created that where the parties did not fulfill the writing requirement there will be no legally enforceable agreement. To overcome this assumption, the parties must contract around it by producing a signed written agreement. Hence, the legislature—while preserving the parties’ substantive freedom of choice—imposes a form requirement on them.

The legislature presumes that the author has insufficient information or is unsophisticated and hence cannot be trusted to protect its interests when dealing with intermediaries. Thus, the writing requirement is adopted to protect the author from her own inability to assess the potential implications of having insufficient evidence to prove the terms of the transfer. While present in all jurisdictions, the writing requirement is particularly salient in countries of the authors’ rights tradition, where only the author can raise the parties’ failure to execute a written agreement.[[49]](#footnote-49) This rule is paternalistically motivated, because it aims to protect first and foremost the author from overbroad transfers.[[50]](#footnote-50)

Moreover, certain jurisdictions instruct the parties to specify and explicitly indicate within the contract some or all of the following terms: the scope of the rights transferred, the purpose and duration of the transfer, its geographical limitations (if any), and amount of remuneration. In doing so, the state forces its own understanding of what the necessary information is upon the parties to the contract. These interventions strive to facilitate a better decision-making process on the part of the author, who will presumably behave in her own real interest later on,[[51]](#footnote-51) while at the same time preserving the set of choices available to the author. Hence, these interventions can be characterized as paternalistically motivated.[[52]](#footnote-52)

B. Pro-author Rules of Interpretation

After a contract is formed, countless scenarios can occur. For the parties to address each scenario within the contract is almost impossible. In view of that, in certain circumstances, one of the clauses to the contract (or more) will necessarily require interpretation, clarification, or supplementation.[[53]](#footnote-53) This can happen either because the parties did not address a set of circumstances or because they attached different meaning to a specific element of the contract.[[54]](#footnote-54) If the parties cannot resolve the issues, the court may be called upon to resolve it for them.

The court’s aim is typically to give effect to the intent of the parties, whether it may be objective or subjective. In the copyright realm, however, numerous jurisdictions—including Belgium, Hungary, Poland, and Spain—have incorporated *in dubio pro autore* into their copyright legislation.[[55]](#footnote-55) Accordingly, courts will construe transfer agreements in favor of the author when faced with any doubt or ambiguity, even where the circumstances surrounding the formation of the contract indicate such interpretation is contrary to the intent of the parties.[[56]](#footnote-56)

German copyright law does not follow the *in dubio pro autore* principle to the letter. Nevertheless, Article 31(5) of the German Copyright Act codifies the “purpose of grant theory,” otherwise known as *Zweckübertragungstheorie*. The purpose of grant theory dictates a restrictive interpretation of any grant of rights.[[57]](#footnote-57) The author is deemed to have granted the minimum right necessary “envisaged in making the grant.”[[58]](#footnote-58) Moreover, when the contract does not specifically enumerate the uses for which the rights are transferred, the author is presumed to transfer only rights that would be required for the purpose pursued in the transfer at issue.[[59]](#footnote-59) In addition to this general principle, Article 37 of the German Copyright Act offers several specific pro-author provisions.[[60]](#footnote-60) In doing so, the legislature incentivizes the stronger party to draft clear and detailed contracts, or else the court will operate in a pro-author fashion.[[61]](#footnote-61)

As in Germany, the French law follows the restrictive interpretation in favor of the author. For instance, Article 122-7 of the Intellectual Property Code states that where the copyright contract is for a total transfer of communication or reproduction rights, the “effect of this transfer shall be limited to the means of exploitation provided in the contract.”[[62]](#footnote-62) In line with this Article, the court ruled in favor of an artist who authorized the use of her painting as part of the décor of a stage play. The court found this does not imply an authorization to use the painting as part of an audiovisual reproduction of the play.[[63]](#footnote-63) Similar—although not identical—purposes of transfer rules can be found in other authors’ rights jurisdictions, including Austria, Denmark, Italy, Luxemburg, Sweden, and Greece.[[64]](#footnote-64)

While Germany, France, and other countries from the authors’ rights tradition have integrated pro-author rules of interpretation into their legislation, quite a few courts in the United States have reached essentially the same practical result from a different doctrinal position.[[65]](#footnote-65) To be exact, courts are likely to sanction the drafting party—who had the stronger bargaining position—for using ambiguous language.[[66]](#footnote-66) In addition, courts are likely to interpret the contract narrowly and in favor of the author, when new modes of exploitation are at the heart of the dispute.[[67]](#footnote-67)

In determining whether new modes of exploitation are covered by the agreements between the parties, U.S. courts have relied on two principal approaches.[[68]](#footnote-68) Under the first approach, the court will attempt to determine the scope of the grant from the language of the contract. The court will enforce the contract if the new use is reasonably within the scope of the media described in the license.[[69]](#footnote-69) Nimmer describes this approach as allowing the licensee to “properly pursue any uses that may be reasonably said to fall within the medium as described in the license.”[[70]](#footnote-70) Under the second approach, a license in any given medium is to include only uses that fall unambiguously within the core meaning of the term.[[71]](#footnote-71) Therefore, for example, if the author granted the transferee rights in book form, this does not include rights in e-books.[[72]](#footnote-72) Clearly, the latter approach is more favorable towards the author and closer to the general “*in dubio pro autore*” principle common in pro-author countries. It is also not intended to realize and enforce the intent of the parties, but to create an apparent pro-author rule of interpretation.[[73]](#footnote-73)

Pro-author rules of interpretation aim to protect authors from submitting to overly broad or unfair contractual arrangements, resulting from the author’s lack of knowledge or bargaining power. Even where adjudication is unnecessary, these measures have a profound impact on the behavior of the parties’ *ex-ante*.[[74]](#footnote-74) Thus, it would be wrong to assume that these are simply special *ex-post* rules pertaining to the interpretation of copyright contracts and used to resolve ambiguities in favor of the author. Instead, we should understand these rules as particular examples of penalty or information-forcing defaults.[[75]](#footnote-75)

Information-forcing rules are designed to induce informed actors to disclose particular information. If an informed party fails to do so, then the law imposes a potential or actual penalty on her. Pro-author rules of interpretation work in a similar fashion[[76]](#footnote-76) by incentivizing the intermediary—who is usually the better informed, stronger party—to use less ambiguous language, draft precise contract terms, and disclose information to the author, or else risk that the contract be interpreted against him.[[77]](#footnote-77) Additionally, soft interventions mechanisms use an unfavorable default or penalty to redress the asymmetric-information problem.[[78]](#footnote-78) At least in theory, this could deprive the more informed party (i.e., the intermediary) of the advantage the information afforded him to the point of actually benefiting the author economically.[[79]](#footnote-79) The more informed the author is, the less likely she is to agree to overly broad transfers of rights. Furthermore, she is more likely to bargain for either higher remuneration or a transfer of a narrower scope. In which case, some authors will materially benefit at the expense of intermediaries.

In sum, both the writing and specification requirements, as well as the pro-author rules of interpretation, are information-driving rules representing one approach to discouraging the author from making what the legislature believes to be decision-making errors.[[80]](#footnote-80) Although neither coercive nor overruling the author’s choices, legislatures introduce these measures for paternalistic motives.[[81]](#footnote-81) In other words, the goal of the aforementioned soft interventions is to bring about a change in the way the parties conduct themselves, without formally imposing a result.

III. Soft Interventions’ Efficacy

Previous sections have highlighted the role of soft interventions in improving authors’ decision-making process by incentivizing information exchange.[[82]](#footnote-82) The whole idea rests on the assumption that humans are better situated to make decisions serving their best interests when they are well-informed.[[83]](#footnote-83) Indeed, in this context, the specification requirements and the pro-author rules of interpretation highlight particularly salient information and therefore serve as a “selection guide” for the author to make wiser decisions.[[84]](#footnote-84) Nevertheless, information is not necessarily a panacea.

Scholars criticize instruments of soft paternalism on a number of counts. For example, critics focus on the concept of soft paternalism, or “libertarian paternalism,” as an oxymoron.[[85]](#footnote-85) Others have pointed out the legislators’ own susceptibility to make mistakes either due to the legislators’ own cognitive limitations or the influence of third parties. Moreover, it is very difficult to monitor and enforce soft paternalistic measures. Therefore, these measures are more susceptible to abuse.[[86]](#footnote-86) Finally, a fundamental risk with paternalistic policies that aim to facilitate information disclosure or exchange is that the expected benefits rest on the assumption that the targeted individual has the necessary resources to obtain, process, understand, and incorporate the information in a meaningful way into her decision-making process.[[87]](#footnote-87)As growing literature suggests, there are grounds for skepticism regarding this assumption.[[88]](#footnote-88) Additionally, cognitive psychology and behavioral economics suggest that, even when the appropriate information is provided, humans often suffer from a variety of practical and behavioral limitations that impair their capacity to benefit from the information in a meaningful way.[[89]](#footnote-89) It is against this background that the strength of soft interventions, as behavior and distribution-altering vehicles, is challenged.

On a separate note, there are reasons to believe that the market will not remain static. Thus, the information exchange could adversely affect the intermediary’s behavior. As a result, it is plausible that the effect of the soft interventions discussed in this paper on the author’s decision-making process is much more modest than legislatures assume. Consequently, an author’s chances of attaining a different wealth distribution are likewise more limited than observers typically appreciate.

In the absence of empirical data, assessing the benefits and drawbacks of these soft interventions presents serious challenges. Nonetheless, evidence and insights from other bodies of law, where soft paternalistic measures in the form of mandatory disclosure and other information duties exist, provide fertile ground for the discussion that follows. These could potentially shed light on the effect of information facilitating legislative instruments that are used to reshape the author’s decision-making process and, consequently, the distribution of wealth proceeds from expressive works between authors and intermediaries.

A. Not Reading

The author’s willingness to read should not be taken for granted. Numerous studies have found that people regularly enter into binding contracts without reading the terms and conditions.[[90]](#footnote-90) For example, Ben-Shahar and Schneider report that in an experiment conducted by PCpitstop, the software developer added a clause to the end-user license agreement, offering a thousand dollars to the users. The only requirement for receiving the money was for the consumer to ask for it. It took four months and over three thousand downloads for the first person to contact the company to ask for the money.[[91]](#footnote-91) Clearly, the vast majority of people do not read standard form contracts and ignore disclosures. The conventional approach to this problem is to impose mandatory or increased disclosure duties. Yet, several studies demonstrate that this does not increase the level of readership to a meaningful degree.[[92]](#footnote-92) The effectiveness of information exchange seems to be questionable, since only a negligible rate of authors ever read the contract.

On the other hand, some scholars argue that, for the most part, not reading is a perfectly rational behavior.[[93]](#footnote-93) Thus, when deciding whether or not to read the contract, an individual will weigh the costs and benefits of reading against those of not reading. Consequently, individuals will not read the document when the expected benefits are lower in comparison to the perceived costs.[[94]](#footnote-94) This argument fits well with the common notion of the author, as a rational actor, making choices to maximize her preferences.[[95]](#footnote-95) However, the insights of behavioral law and economics suggest that this behavior does not necessarily correspond to observations made in everyday scenarios.[[96]](#footnote-96) In terms of copyright, specifically, the claim that it is rational for the author not to read the information is further complicated by the inherent difficulty of estimating the value of the work before commercialization. Simply put, it is almost impossible for the author to calculate the cost-benefit tradeoff. Furthermore, evidence suggests that readership remains low even in situations where the potential risk is high.[[97]](#footnote-97)

Through legal intervention, legislators purport to change the author’s behavior patterns by persuading her to do something or not. It is not denied here that incentivizing information exchange could be beneficial to the author who would otherwise err, or at least remain unaware of relevant terms and conditions in the contract. Moreover, incentivizing the intermediary to disclose information can reduce the author’s information-gathering costs and ensure that the relevant information is readily available to her.[[98]](#footnote-98) However, it must not be forgotten that these measures require that the author be willing to read the contract. After all, if the author is unaware or ignorant of the specific information, it is doubtful that such disclosure could actually diminish the probability of an erroneous decision.

Considering this, it is possible to conjecture that even when all the terms of the contracts are skillfully laid down, some authors will not read them. Naturally, then, such disclosure cannot meaningfully benefit the author’s decision-making process,[[99]](#footnote-99) nor would it lead to any changes in the distribution of wealth between the parties.

B. Not Understanding

The failure to read the terms of the contract is highly problematic, but it is only one factor influencing the author’s ability to benefit from the information. Even if we assume that all authors will in fact go over the terms of the contract and read the information presented, there is still a chance they will be unable to benefit from it on account of not understanding the information or its practical consequences for the following reasons: (1) literacy; (2) lack of background knowledge; and (3) information overload.

Researchers have found that many adults lack the literacy or legal skills necessary to comprehend information presented to them in a complex contract.[[100]](#footnote-100) This problem is even more severe when the information is conveyed in technical jargon or with a high level of complexity.[[101]](#footnote-101) For example, scholars have found that many patients misunderstand clinical terms such as acute, stable, and progressive.[[102]](#footnote-102) Other observers have demonstrated that requiring restauranteurs to display detailed facts concerning food content only creates more confusion and frustration among consumers who are unable to grasp the meaning of such labeling.[[103]](#footnote-103) These findings further confirm that the information is often too complicated and difficult to understand. Even if people attempt to read it, they either misunderstand its implications or fail to fully grasp its meaning entirely. There is no reason to assume that things should be different in the copyright context.

Another impediment to understanding is the lack of background knowledge that gives context to the information.[[104]](#footnote-104) Without this knowledge, the individual is likely to misinterpret the information. For instance, Ben-Shahar and Schneider have examined eBay’s User Agreement. The contract is drafted in laymen’s terms, and some provisions are relatively comprehensible. Nevertheless, other parts are confusing.[[105]](#footnote-105) These provisions require specialized knowledge of terms such as “content,” “non-exclusive,” “perpetual,” “irrevocable, “royalty-free,” “sub-licensable,” “copyright,” “publicity,” “rights” and “media.” Most eBay users lack the background knowledge necessary to understand these terms in this particular context.[[106]](#footnote-106) Likewise, studies of employment contracts found that most employees lack background understanding of the law. Consequently, the employees misinterpret the law on protections against termination as providing them a degree of security, and they are unable to determine the actual bearing of the terms and conditions of the employment contract on their interests.[[107]](#footnote-107) In fact, the literature addressing readability and comprehensibility suggests that one of the most important factors affecting an individual’s comprehension and ability to take in new information is the knowledge the individual already has.[[108]](#footnote-108)

If an individual lacks knowledge in a given domain, her ability to make sense of new information in that specific domain is impaired.[[109]](#footnote-109) Moreover, she will be more prone to make assumptions based on what is already known, which may result in a misunderstanding.[[110]](#footnote-110) This argument adds another dimension to the earlier discussion of the author’s virtual “lack of background knowledge.”[[111]](#footnote-111) It indicates that even when provided with additional information, an author’s lack of background knowledge in legal matters places her at a serious disadvantage in comparison to the intermediary.[[112]](#footnote-112) As Bell and Parchomovsky have noted, “[i]n the realm of copyright law, ignorance of the law runs even deeper than in other fields[,] as rights in chattels are distinct from the rights in the expressive content embedded in them.”[[113]](#footnote-113)

It is to be expected that literacy and lack of background knowledge will be particularly prevalent among young and uneducated individuals. It is obvious that the more complicated and jargon-filled the contract is, the more difficult it will be for the inexperienced and unsophisticated author to fully grasp its denotations.[[114]](#footnote-114)

The typical response to these obstacles is to make the information simpler.[[115]](#footnote-115) That is, to require the drafting party to use plain language and keep technical jargon to a minimum.[[116]](#footnote-116) Presumably, this approach remedies some of the author’s disadvantages. However, sometimes the need for legal precision can make this simply impossible.[[117]](#footnote-117) As noted by Ben-Shahar and Schneider, “complexity cannot be explained simply. Sophisticated vocabularies and professional languages encapsulate complex thoughts.”[[118]](#footnote-118) Furthermore, what is often overlooked by legislatures is the fact that authors are a heterogeneous group.[[119]](#footnote-119) What distinguishes them from one another, among other things, is their literacy level, knowledge, and expertise. In other words, their capacity to handle and apprehend information differs dramatically from non-authors. Some will be versed in the legal language or experienced enough to make sense of it, and others will not.[[120]](#footnote-120)

To round out this picture, it is important to note that the quality of an individual decision correlates positively with the amount of information available, up to a certain point.[[121]](#footnote-121) Unfortunately, excess information can cause confusion and frustration based on the difficulty involved in processing large quantities of information.[[122]](#footnote-122) When too much information competes for one’s attention, one is forced to choose which portion or aspect to focus on.[[123]](#footnote-123) In addition to increasing the information-processing costs, excess information may divert the attention of actors from the information aspects that are most relevant to the choice they wish to make to irrelevant information and thus lead to bad choices.[[124]](#footnote-124) Furthermore, individuals often focus on salient bits of information, while ignoring all others.[[125]](#footnote-125)

To deal with the complexity and the amount of information, legislatures often require contracts to focus on what really matters.[[126]](#footnote-126) In the copyright context, for example, the specification requirement adopted in certain jurisdictions makes some crucial details more salient. This requirement leads to a reduction of “noise” and amount of information the author must evaluate. By imposing it, the legislature is signaling which bits of information the author should focus on. In principle, this could curtail the problem of information overload. However, in practice, it remains unclear whether this measure prompts the author to consider the “right” bits of information. These critical pieces of information could be buried anywhere in a very long and complicated document.[[127]](#footnote-127) As a result, the author can easily miss them. Alternatively, the legislature signaling may lead the author to put too much emphasis on these bits of information, while paying little attention to other stipulations and terms in the contract.[[128]](#footnote-128) As noted earlier, authors are a heterogeneous group, and they differ in what issues concern them the most.

The problem runs deeper than this, because the language of the contract could create a presumption of informed consent that only weakens the effect of pro-author rules of interpretation, even in situations where the author did not read or understand the practical implications of the contract.[[129]](#footnote-129)

C. Cognitive Errors

Even in the unlikely case that the information provided by the contract is tailored to match the author’s knowledge, skills, and expertise, a range of cognitive errors and behavioral biases significantly limits the ability of the author to process it effectively.[[130]](#footnote-130) This is particularly true when the contract is complex. While a complete investigation of the numerous cognitive biases affecting human behavior is well beyond the scope of this paper, several core insights regarding cognitive biases are relevant to the discussion and, therefore, will be addressed.[[131]](#footnote-131)

First, people do not process information in a rational way. On account of partial information and imperfect memory, individuals tend to assess the likelihood of an event by the ease with which they can recall a similar instance. Thus, an individual is likely to overestimate the likelihood of being involved in a car accident after seeing or hearing about such an incident.[[132]](#footnote-132) This phenomenon is known in the literature as the “availability heuristic.”

The availability heuristic is evident in the context of car accidents, but it also relates to the copyright context. For example, since intermediaries heavily promote “superstars,” people continuously hear about success stories. On the other hand, they hear almost nothing about the clear majority of artists who are struggling and never progress beyond small venues, although such artists are substantially more common.[[133]](#footnote-133) Consequently, an author could over-estimate her likelihood of success.

Even if the author does not experience this bias, she might still overestimate her probability of success due to overconfidence and optimism. In fact, Kahneman and Tversky found that people are generally too optimistic, due to overconfidence.[[134]](#footnote-134) Overconfidence can be defined as an individual’s tendency to overestimate the probability of achieving an objective as a result of misunderstanding her own ability.[[135]](#footnote-135) Optimism, on the other hand, refers to the individual’s tendency to overestimate the probability of experiencing positive outcomes compared to others, independent of her actual efforts or skills and irrespective of the objective probability of that outcome actually occurring.[[136]](#footnote-136)If an author overestimates her prospect of success due to overconfidence or optimism, she might make particularly unwise choices about the terms of the contract. For example, she might attribute too much value to uncertain future gains (royalties) over immediate payment.

While facilitating information exchange should theoretically increase the information available to the author and therefore decrease the effect of the availability heuristic, it is doubtful whether soft interventions can accomplish this task. If they cannot, it is likely that the author will continue to overestimate the probability of her work becoming a colossal failure or a wild success based on the ease with which certain events come to her mind. Moreover, if overconfidence and unwarranted optimism influence the author, the lack of information is not the cause of her erroneous choice. Therefore, eliciting information exchange is useless in mitigating the tendency to overemphasize commercial success.[[137]](#footnote-137)

Additionally, it is important to note that soft interventions incentivize information exchange prior to the conclusion of the contract. Ideally, the actual decision-making should take place only following the information exchange, but, in reality, the negotiation process starts long before the signing of the contract. Throughout the process, the parties define the framework of the contract and discuss certain elements. When given the opportunity to read the written contract, the author has already reached a preliminary decision as to whether or not to enter this specific transaction. This preliminary decision could be a determinant factor in the author’s willingness and ability to evaluate objectively the information disclosed in the contract. At that point, the author has incurred substantial costs.[[138]](#footnote-138) She already invested time and effort in the initial negotiation process, and, as a result, she will likely discount the probability of adverse outcomes suggested by new information she receives. She does not want her efforts to appear wasteful.[[139]](#footnote-139) Furthermore, giving the author the information after she has decided to enter into a specific transaction increases the likelihood that she will avoid reading terms and conditions that undermine her decision and seek out information that confirms it.[[140]](#footnote-140) Legislators, for their part, design specification requirements to overcome this tendency by highlighting certain terms and conditions. However, specification requirements will not suffice to overcome the human inclination to interpret information in ways that are consistent with the actor’s preexisting views, preferences, and beliefs, especially when there is uncertainty.[[141]](#footnote-141) Secondly, after deciding to enter the specific transaction, an individual is more likely to abide by it, even when later presented with information detrimental to the deal.[[142]](#footnote-142) The author is therefore likely to stick to her preliminary choice, while ignoring or discounting other information.[[143]](#footnote-143)

Furthermore, even when presented with additional information pertaining to the scope or terms of the contract, the “anchoring effect” hampers the ways in which authors adjust to new information. Anchoring describes an individual’s tendency to rely heavily on the initial value presented when making numeric estimates.[[144]](#footnote-144) Several studies find that the first offer made during negotiation functions as an anchor, affording the party making the offer a distributive advantage. It also functions as a strong predictor of the final terms in a seller-buyer context.[[145]](#footnote-145) Once the price to be paid for the transfer of the author’s rights has been “anchored,” the author will have difficulty adjusting the compensation to account for new information subsequently received.[[146]](#footnote-146)

Finally, people are myopic. They find it hard to consider the long-term benefits of actions that are costly or do not have immediate benefits.[[147]](#footnote-147) In fact, numerous studies show that people choose a small and immediate reward over a larger one that they could attain in the future. Everyday examples of this tendency are easy to find. For instance, homeowners often fail to purchase energy-efficient appliances that carry more upfront costs, even though they save money over time. In other words, they ignore long-term savings. Assuming that the legislative goal is to discourage authors from this type of behavior, it is clear that existing soft interventions are unlikely to achieve this goal. This is because the types of information exchanges soft interventions incentivize are not well suited to overcome the tendency of authors to act myopically.[[148]](#footnote-148)Future gains, after all, are not only less immediate, but also less certain.[[149]](#footnote-149)

In the context of copyright contracts, myopia could lead to the reverse effect of overconfidence and unjustified optimism. The former causes authors to place too little weight on their long-term interests, but the latter causes authors to overemphasize the future. Although it is hard to know how common these biases are, not to mention which one will take the lead in the author-intermediary contractual relationship, the information provided by soft interventions is likely to be ineffective in eliminating these biases.

Furthermore, it is reasonable to assume that the market is dynamic and ever-changing.[[150]](#footnote-150) This means that intermediaries will adjust their behavior in response to legislative interventions—soft or hard. Specifically, to the extent that an intermediary expects the information to diminish his expected returns, he will do his best to counteract the effect of these soft interventions.[[151]](#footnote-151) The intermediary will find ways to tailor the language of the contract to satisfy the legal requirements while at the same time exploiting the cognitive errors of the author. For example, behavioral economics literature teaches us that when choosing between an option with a known outcome (i.e., upfront payment) and an option with an uncertain outcome (i.e., royalties), individuals often consider not only the expected value, but also the framing. That is, they understand the possible outcomes as “gains” or “losses” relative to a reference point. For instance, most people will be risk-averse when choosing between an option that promises a gain and one that might result in a greater gain. On the other hand, they will behave in a way that is consistent with risk-seeking when they need to choose between a situation that is associated with a certain loss and one that has a chance to bring about a greater loss. The intermediary could use this sensitivity to frame the terms of the contract to his advantage.[[152]](#footnote-152) Additionally, the intermediary could attempt to make other provisions more salient than the one governed by the specification requirement.[[153]](#footnote-153) Alternatively, he might display a more adversarial behavior in another context.[[154]](#footnote-154) For example, he might lower the attractiveness of other terms and conditions. Here, too, new and naïve authors may be more susceptible to these tactics.[[155]](#footnote-155)

In sum, the information exchange that soft interventions incentivize cannot rectify the authors’ disposition to misjudge probabilities based on the availability heuristics or other biases. Moreover, it cannot correct inaccurate default assumptions nor prevent authors from ignoring or discounting the future. Consequently, even in the rare occasions where the author has read and understood the information, she may fail to adapt her choices accordingly.[[156]](#footnote-156) In other words, these interventions are undermined by the very same cognitive limitations that motivated their adoption in the first place.[[157]](#footnote-157)

Intuitively, a possible solution to these problems is for the author to find a middleman who can read, analyze, refine, and communicate the information to her in a comprehensive format.[[158]](#footnote-158)The middleman can be a lawyer, an agent, a manager, or even some sort of author alliance. In fact, these entities are well suited for this purpose. Unlike the individual author, they have the necessary knowledge, expertise, and experience in the field. They are also less susceptible to the aforementioned biases. Consequently, they can professionally review the copyright contract and help the author overcome some of the obstacles mentioned earlier, especially the unwillingness to read, inability to understand, and inaccurate assumptions. Moreover, the middlemen could explain the information, evaluate the different attributes and risks of the contract, and even offer the author recommendations. Middlemen could provide an invaluable service to the author.[[159]](#footnote-159)

On the other hand, the introduction of an information middleman between the intermediary and the author creates a new level of complexity and comes with its own challenges. First, it places the burden of attaining counseling on the author. Yet, many authors lack the time, funds, or confidence necessary to seek such a middleman.[[160]](#footnote-160) Second, there is the risk that the middleman himself will hold biases, misrepresent the information, highlight certain elements while ignoring others, or frame the information in such a way that will influence the author’s decision. Finally, it only makes sense to expend resources on a middleman if he can improve the terms of the bargain for the author. However, as will be discussed further below, when there is no meaningful choice, meaning that the contract is offered on a take-it-or-leave-it basis, it makes no sense to pay the middleman.

D. Lack of Meaningful Choice

The value of new information for an actor depends on her capacity to comprehend the information and improve her position following the attainment of such information.[[161]](#footnote-161) In the copyright context, the efficacy of legislative intervention depends on the author’s ability to transform the information into meaningful choices.[[162]](#footnote-162) For the majority of authors, however, such a choice is often a fiction. As has been discussed in detail in previous sections, authors are regularly confronted with a take-it-or-leave-it scenario.[[163]](#footnote-163) With no real negotiations taking place, the individual author is constrained in her choices no matter how accurate and meaningful the information she has is.[[164]](#footnote-164) This raises again the issue of gross inequality in bargaining powers, which negates the choices that soft interventions aim to promote. Moreover, some authors will be unable or unwilling to take advantage of new information, fearing that doing so would jeopardize their relationship with their intermediaries. Hence, it is doubtful that disclosure of information can profoundly influence the author’s behavior, let alone bring about a real change in the distribution of contractual surplus.[[165]](#footnote-165)

E. Ex-Post Effects

Thus far, the discussion has focused on specification requirements and pro-author interpretation rules designed to improve *ex-ante* information exchanges. These measures serve one additional, but no less important, function *ex-post*. Given that the distributional implications are the center of the discussion, the *ex-post* dimension assumes a particular prominence. For example, the court could declare a method of distribution outside the scope of the contract, thereby opening up an additional revenue source for the author. Nevertheless, there are serious limitations to this effect, and, worse, these *ex-post* interventions might even be harmful for certain authors.[[166]](#footnote-166)

First, private litigation is expensive and time-consuming. Unless a great deal of money is involved, it might not be worth the author’s time and money to hire a lawyer and sue the intermediary for failing to specify the exact scope of transfer or including an ambiguous term in the contract.

A second and related consideration is that the outcome of litigation is unpredictable. Overly broad or unexpected terms might turn out to be reasonable in hindsight.[[167]](#footnote-167) Faced with the prospect of spending several years in litigation over the meaning of the contract, where the outcome of such litigation is uncertain, many authors shy away from turning to the court system.

Perhaps even more importantly, courts apply the pro-author rules inconsistently.[[168]](#footnote-168) In the United States, for example, courts have inconsistently applied a weaker version of the pro-author rules of interpretation.[[169]](#footnote-169) The problem is less prominent in countries of the author’s rights tradition.

Finally, the author could be reluctant to go to court in order to avoid being labeled a “troublemaker.”[[170]](#footnote-170) As a result, soft interventions will not always be successful in inducing information exchange *ex-ante*. Realizing the limited effectiveness of soft interventions, some intermediaries will be reluctant to clarify the terms of the contract or uphold the legislative specification requirements. Alternatively, they can price the cost of these penalties into the contract.

Given these circumstances, even if the parties to the contract and the contract itself are in full compliance with the legal requirements set by the legislature, the legislation will fail to achieve its primary goal of increasing the likelihood of error correction and improving the economic circumstances of authors.[[171]](#footnote-171)

Combining insights from neoclassic and behavioral economics, as well as anecdotal evidence and data, a central finding of this paper is that there are no indications that existing soft interventions could manage to empower authors, prod them to make “better” decisions, or provide them with a more favorable remuneration.

The discussion so far does not suggest that it is necessary to eradicate soft interventions, nor does it imply that it is necessary to demand more disclosure. It is possible that the root problem with soft interventions is the format of the disclosure or the type of information presented to the author, rather than the strategy of soft paternalism. There have been numerous suggestions in the literature about how to improve existing mandatory disclosure regimes. Some of them could apply to the intermediary-author relationship.[[172]](#footnote-172) Then, again, where soft interventions are unhelpful, the alternative will often be to implement much harsher or intrusive interventions.[[173]](#footnote-173)

Conclusion

In this paper, I have sought to fill a gap and shed light on certain aspects of soft-interventions within the context of copyright law. Through a novel perspective, I have demonstrated that interventions aim not only to ameliorate the undesirable effects of disparities in bargaining power, but also to protect the author from her own propensity to err and consequently enable her to attain a larger share of the contractual surplus relative to the intermediary. However, because authors are susceptible to various cognitive limitations, many of them are unable to understand the information soft interventions produce, much less incorporate the information into their decision-making. Hence, interventions that incentivize information exchange generally fall short of achieving their legislative goal. This is not to say that these measures always fail, but rather that they are more likely to help more sophisticated, well-to-do authors than less sophisticated, poorer ones.

To this end, if one assumes the more informed an individual is, the greater the chances are that she will make better decisions, one may be tempted to claim that tweaking the specifics of existing measures would achieve a more desirable outcome. One avenue for reform could be requiring certain key elements of the contract to not only be specified in writing, but also conveyed in a standardized concise form.

I have argued throughout this paper that many authors do not read and have difficulties understanding the terms of the contract, because they are overwhelmed by its magnitude, its complexity, and the use of legal jargon. A standardized concise form would therefore provide a succinct overview of the contract’s key elements in a reader-friendly and comprehensible fashion. Imposing a standardized form cannot guarantee that an author would indeed read the contract in its entirety. However, a simplified document would be less daunting for authors and, therefore, could in theory increase the contract’s readability.

However, since length alone does not affect the readability and comprehensibility of a contract, its language, layout, and even format should all be considered and utilized to promote the understanding and usefulness of a standardized concise form. For instance, by mandating the use of tables, bullet points, or similar graphical representations, policymakers could necessitate that the information is communicated more clearly than with text alone. In fact, research conducted in the context of privacy notices has shown that consumers respond with higher comprehension to such design techniques as bolded text, bulleted lists, and tables.[[174]](#footnote-174) The same concept could be applicable within the copyright realm.

Obliging the parties to supplement the terms of a contract with a standardized concise form would make it much harder for the intermediary to bury the aforementioned key terms in a very long and complex contract or make other terms more salient. Likewise, it could circumvent an attempt by the intermediary to deploy misleading or misdirecting framing techniques that actually deter the author from reading the information or detract her attention from it.

Notwithstanding the above, conveying the full meaning of the information using simpler language is not always possible; thus, to comply with the short-form requirement, the intermediary might need to omit certain elements. Moreover, even in a concise layout, authors may still find it hard to fully comprehend the implications of a contract’s key elements, as they are unable to understand the terms used or are lacking the background knowledge necessary to provide context to such information. Thus, the suggested standardized concise form will be more beneficial to stronger and more experienced authors, much like existing models of soft intervention.

When an author lacks skills, knowledge, or expertise, the role of another type of middleman—a lawyer or an agent, for instance—can be particularly important, and the requirements of a standardized, concise form may offer an additional advantage over existing models of soft interventions. Such requirements facilitate the work of third parties like authors’ associations, expert groups, or even government agencies. In a similar manner to agents or lawyers, such “third party information intermediaries” could read, review, analyze, refine, and subsequently generate supplementary materials, summaries, tutorials, or expert reports for authors. Such supplementary materials and expert reports could offer some valuable insight to authors at a lower cost than retaining the services of a lawyer or an agent.

For instance, third-party information intermediary production of supplementary materials could help educate authors about the meaning, significance, and implications of specific terms, clarify vague or troublesome terminology, and even offer authors some general recommendations pertaining to the different attributes and risks of various contract terms. Thus, they could provide the author with much needed background information and generally enable her to identify the key elements of the contract before she signs it. This would constitute an important contribution, particularly for inexperienced authors, but one that could also be beneficial to more experienced authors. As demonstrated in previous sections, only a small fraction of authors can fully comprehend the implications of key contractual terms.

Another advantage of utilizing third-party information intermediaries is their potential to reduce the biasing effect of success stories’ noticeability. As mentioned previously, the more easily an individual can recall a certain instance or piece of information, the more probable she will be to locate it. Consequently, if third-party information intermediaries could present authors with aggregate frequency statistics about the occurrence of risks and benefits, they could potentially help diminish the biasing effect of the availability heuristic. For example, the information intermediary could generate material pertaining to average income from advance payments (in the relevant industry), average income from royalty payments (in the relevant industry), (average) chances of success, and so on.

This approach would certainly have limitations. The vivid recollection of anecdotal success stories could triumph over the statistical information provided by third-party information intermediaries. Moreover, the variance in earnings among authors is significant, and so focusing on the average might obscure the full picture of the state of the poorest artists. However, it is reasonable to assume that an author who has invested time and efforts in seeking out such supplementary information will be more likely to integrate the newly acquired information into her decision-making.

Given the aforesaid advantages of utilizing third-party information intermediaries, we could abandon endeavors to improve soft-intervention models and instead focus on facilitating third-party information intermediaries’ activity. In fact, Ben-Shahar and Schneider argue that one of the many reasons mandatory disclosure regimes fail is because people do not want to read. “Faced with the unfamiliar and complex decisions that disclosures are intended to inform, people don’t want to be educated, don’t want spreadsheets, and don’t want scrolls. They want advice.” For that reason, they suggest discarding mandatory disclosure regulations and instead allowing market forces to develop such advisory services.

While I agree that expert advice generated by third-party information intermediaries could be of great value to some authors, I doubt these entities will be able to produce very useful advice without policymakers imposing some disclosure and standardized form duties upon the parties. After all, a copyright contract may vary significantly between intermediaries. Moreover, while adopting a mandatory, standardized, concise form could potentially reduce information-gathering costs for authors, the compliance costs such amendments could yield would most likely be significant. On the face of it, imposing a form requirement, in additional to the specification duty, would appear to be a relatively inexpensive task. However, the scale of compliance costs that the intermediary would incur would depend, to a large extent, on (i) the intermediary’s current practices, (ii) how profoundly it would have to amend these practices to comply with the legislative requirements, and (iii) whether or not the costs could be spread out over a large number of contracts, resulting in very low additional compliance costs per transaction.

Overall, adding a mandatory, standardized, concise form requirement to the existing arsenal of soft interventions could be beneficial to authors’ decision-making. It would not, however, eradicate all the maladies previously discussed. First, for the expert advice or information provided by third-party information intermediaries to be effective, authors would need to seek out the information, before they could read and potentially benefit from it. However, just as some authors fail to read the terms of a contract, some authors could fail to seek out the information generated by third parties. They might feel that obtaining this information would have little use, given the disparities in bargaining powers. Second, such standardized, concise forms employed in conjunction with the information generated by third parties could lead authors to place too much emphasis on certain bits of information while neglecting others, a major concern given the heterogeneity of authors. Third, it is questionable whether this new form requirement would preclude intermediaries from behaving strategically. For instance, they might lower the attractiveness of other contract terms and conditions in response to this legislative intervention, and here, too, new and naïve authors may be relatively more susceptible. Deterring the intermediary from practicing such strategic behavior could require other supplements to any *ex-ante* requirements with an *ex-post* pro-author rule. However, such rules are by no means free of problems, as I thoroughly explored in the previous section of this paper.

Another issue worth noting is that of overconfidence and over-optimism. As I have previously maintained, the type of information with which soft interventions are concerned is not likely to account for and eliminate the influence of certain biases. Moreover, I view this as being ostensible, whether that information is conveyed to the author in its concise form or not. Thus, utilizing standardized, concise forms would be unlikely to reduce authors’ susceptibility to either overconfidence or over-optimism. Finally, and perhaps most importantly, the suggested standardized form could not overcome the disparities in bargaining powers that sometimes prevent an author from having a real chance at negotiating the terms of the agreement.

Simply put, although improving models of soft interventions by adopting standardized, concise forms seem promising, they would only minimally benefit most authors and, worse yet, would generate additional costs and the misconception of author empowerment. In other words, even when attempting to amend existing measures, the same old hurdles pertain. I do not claim that this by itself justifies an objection to intervention, nor am I categorically opposed to all government initiatives designed to benefit authors. Further empirical research is needed before drawing any strong conclusions. Nevertheless, the results reported here should make policymakers doubtful as to the efficacy and desirability of soft paternalistic interventions.

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3. *See* Severine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 24 (Policy Dep’t C: Citizens’ Rights & Constitutional Affairs eds., 2014). [↑](#footnote-ref-3)
4. In practice, the terms soft paternalism, libertarian paternalism, asymmetric paternalism, or light paternalism are used interchangeably. However, throughout this paper, I employ the term soft paternalism. For further discussion, see, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism*,*”* 151 U. Pa. L. Rev. 1211 (2003). [↑](#footnote-ref-4)
5. This is of course not the exclusive tool advocated by supporters of soft paternalism. However, it does serve as the principal tool for improving the situation of the author by enabling informed decision-making without limiting the choices available to her. *See infra* Part II. [↑](#footnote-ref-5)
6. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 650, 681 (2011). [↑](#footnote-ref-6)
7. Leander D. Loacker, Informed Insurance Choice?: The Insurer’s Pre-Contractual Information Duties in General Consumer Insurance 51 (Alexander Bruns ed., 2015). [↑](#footnote-ref-7)
8. Lior Zemer, *What Copyright Is: Time to Remember the Basics*, 4 Buff. Intell. Prop. L.J. 54, 68 (2006). [↑](#footnote-ref-8)
9. For a discussion of alienability and its role within the copyright system, see Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 Rutgers L.J. 347, 368­–69 (1993) (“Under the utilitarian model, the widespread dissemination of intellectual works is no less an important goal of copyright than is the creation of those works. . . . For the proponents of the natural rights theory of copyright, alienability follows from recognizing the analogy between copyright and the liberal prototype of property. The products of mental labor are property, just as are the fruits of physical labor. Since alienability (i.e., ‘saleability’) is an essential characteristic of property, products of mental labor must also be fully saleable.”) and Jessica D. Litman, *Real Copyright Reform*, 96 Iowa L. Rev. 1, 10–12 (2010) (discussing the relationship between creators and intermediaries and how authors transfer their rights to intermediaries for distribution under copyright laws). [↑](#footnote-ref-9)
10. Not all authors create with the desire or expectation to reap some benefits. However, authors aiming to derive some compensation from their creative works are less likely to commercialize their creative work on their own. For further discussion of authors’ intrinsic and extrinsic motives, seeRoberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 Notre Dame L. Rev. 1945 (2006) and Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 Theoretical Inquiries L. 29 (2011); *cf.* Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 Fla. St. U. L. Rev. 623, 644–46 (2012). [↑](#footnote-ref-10)
11. *See* Giuseppina D’Agostino, Copyright, Contracts, Creators: New Media, New Rules 22 (2010). While copyright contracts may cover a wide area of activities, this discussion is limited to contracts and contractual relationship entered into between the author and the intermediary (e.g., publisher or producer). To be precise, this paper is concerned with contracts in which the author (i.e., the first right holder) transfers her economic rights in a copyrighted work to a producer, publisher, or any other intermediary to warrant his exploitation. Subsequent contracts between the first transferee and any third party (including users) may have an enormous effect on the monetary gains derived by the author; however, these secondary agreements are outside the scope of this research, given that the author is not a party to the contract. Contracts falling under the work-made-for-hire doctrine are likewise outside the scope of this research. [↑](#footnote-ref-11)
12. *See* Michael Brandon Lopez, *Creating the National Wealth: Authorship, Copyright, and Literary Contracts*, 88 N.D. L. Rev. 161, 197–99 (2012) (citing Henry C. Mitchell’s assertion that the interests of authors and publishers generally run parallel); *see also* Lucie Guibault & P. Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, U. Amsterdam: Inst. for Info. L., May 2002, at 32–33. [↑](#footnote-ref-12)
13. *See* Jonathan M. Barnett, *Copyright Without Creators*, 9 Rev. L. & Econ. 389, 390 (2013). [↑](#footnote-ref-13)
14. *See* F. Willem Grosheide, *Copyright Law from a User’s Perspective: Access Rights for Users*, 23 Eur. Intell. Prop. Rev. 321, 322 (2001) (“For authors[,] the importance is appearing in print, making works of good quality[,] or reaching a particular audience. From their side, publishers will have one or more of the following motives: to fulfill certain social, cultural[,] and political needs and simultaneously to optimize financial revenue and economic efficiency.”). [↑](#footnote-ref-14)
15. For instance, where the publisher sets the price for a given copyrighted work at the point of maximum net profit to him, this may not be the best option for the author. In fact, if the parties enter an agreement based on a one-time, buy-out model, the interests of the author may be to have a lower price and wider dissemination of the work. Hence, there is a conflict of interests between the author and the intermediary with regards to the price that will best serve their respective interests. *See* Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 Economica 167, 185–86 (1934). [↑](#footnote-ref-15)
16. For an interesting discussion of the agency relationship between creators and their labels (i.e., authors and intermediaries), see generally Lital Helman, *When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate*, 50 IDEA: J. L. & Tech. 49 (2009) (claiming that “the file-sharing phenomenon shined a spotlight on the divergence of interests” between the creators of music and the recording industry, distinguishing between authors’ economic interests and record companies’ interest to maximize control over the exploitation of works). [↑](#footnote-ref-16)
17. It is important to note that, although the “poor artist” story is very appealing, not everyone subscribes to it. Guy Rub argues that the picture of artists as poor and buyers as rich, as well as the story that the paradigmatic transaction between the two makes the artist poorer and the buyer richer, is based on false assumptions. Rub refers to the view advanced by John Henry Merryman and Monroe Price and claims that it is merely a fable and, therefore, should not be grounds for legal policy. *See* Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 Harv. J. L. & Tech. 49, 81 n.132, 82 (2013) (quoting John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 Am. J. Comp. L. 103, 107–108 (1993); Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the* Droit de Suite, 77 Yale L.J. 1333, 1334–35 (1968). Others argue that the under-compensation of authors does not stem from unequal bargaining powers but is a result of works of low quality. *See, e.g.*, Maureen A. O’Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. Copyright Soc’y U.S. 425, 437 n.66 (2002) (citing J. Alan White, *Public Lending Right*, *in* The Writer in the Market Place 25, 28 (Raymond G. Astbury ed., 1969)); Plant, *supra* note , at 183; *cf.* Paul Katzenberger, *Protection of the Author as the Weaker Party to a Contract under International Copyright Contract Law*, 19 Int’l Rev. Intell. Prop. & Competition L. 731, 731 (1988) (suggesting that even famous authors are nonetheless the weaker party). [↑](#footnote-ref-17)
18. *See* Jacques de Werra, *Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions – A Comparative Analysis between U.S. Law and European Law*, 25 Colum. J.L. & Arts 239, 246 (2003). [↑](#footnote-ref-18)
19. *See, e.g.*, Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Right,* 63 Buff. L. Rev. 147 (2014); Martin Kretschmer, *Does Copyright Law Matter? An Empirical Analysis of Creators’ Earnings* (Univ. of Glasgow, Working Paper, 2012), http://ssrn.com/abstract=2063735; Guy Pessach, *Deconstructing Disintermediation – A Skeptical Copyright Perspective*, 31 Cardozo Arts & Ent. L.J. 833 (2013); John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Audiovisual Works: Contracts and Practice – Report to the ALAI Congress, Paris, September 20, 1995*, 20 Colum. J.L. & Arts 359 (1996); Rub, *supra* note 15; *see also* Günther G. Schulze, *Superstars*, *in* A Handbook of Cultural Economics 431, 431–36 (Ruth Towse ed., 2003); William A. Hamlen, Jr., *Superstardom in Popular Music: Empirical Evidence*, 73 Rev. Econ. & Stat. 729 (1991); Sherwin Rosen, *The Economics of Superstars*, 71 Am. Econ. Rev. 845 (1981). [↑](#footnote-ref-19)
20. Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 Nw. J. Tech. & Intell. Prop. 485, 507–08 (2012). [↑](#footnote-ref-20)
21. Lack of competition in the market is of great importance for the terms of the agreement. *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 616 (1982); *see also* Rub, *supra* note 15, at 101 (discussing non-competitive markets in the context of creative industries); Darling, *supra* note , at 509–11 (discussing insufficient competition in different markets for copyrighted works). [↑](#footnote-ref-21)
22. P. Bernt Hugenholtz, The Great Copyright Robbery: Rights Allocation in a Digital Environment 2, 9–10 (2000). [↑](#footnote-ref-22)
23. Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 Fla. L. Rev. 1329, 1329–30 (2010). [↑](#footnote-ref-23)
24. This has been described as a situation of asymmetric information. *See generally* Darling, *supra* note , at 512. [↑](#footnote-ref-24)
25. *Id.* at 512–13. The author is more inclined to under-estimate or over-estimate the value of her work. In this regards it is also important to note that the literature drawing from behavioral economics suggests that the endowment effect may lead authors to over-evaluate their works. SeeChristopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 Cornell L. Rev. 1 (2010), for a general discussion of the endowment effect in the contexts of copyright. [↑](#footnote-ref-25)
26. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. Colo. L. Rev. 139, 199–223 (2005). [↑](#footnote-ref-26)
27. Nancy S. Kim, *Bargaining Power and Background Law*, 12 Vand. J. Ent. & Tech. L. 93, 94 (2009). [↑](#footnote-ref-27)
28. *Id.* at 95. [↑](#footnote-ref-28)
29. *Id.* at 97–102 (discussing knowledge imbalance in the context of artist-hiring party and employee-employer relationship and arguing that the work-made-for-hire doctrine creates two exceptions to the typical initial rights allocation under copyright law). [↑](#footnote-ref-29)
30. *Id.* at 103–10 (discussing power market imbalance in the context of software companies and the user relationship, as well as creative consumers and corporate website relationship, and arguing that companies’ ability to dictate business norms undermines the traditional contracting process). [↑](#footnote-ref-30)
31. Watt similarly asserts that changes in copyright legislation can and will affect bargaining power at the time of negotiation and eventually the terms of the contract*. See* Richard Watt, *Economic Theory of Copyright Contracts, in* The Relationship Between Copyright and Contract Law 24 (2010); *see also* Abhinay Muthoo, *Bargaining Theory and Royalty Contract Negotiations*, 3 Rev. Econ. Res. on Copyright Issues 19 (2006) (claiming that several factors influence the end result of the negotiation, namely reservation values, impatience, risk of breakdown during the negotiations, the existence and value of other options and asymmetric information). [↑](#footnote-ref-31)
32. *See* Martin Kretschmer et al., Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers 3 (2011); Giuseppina D’Agostino, *Contract lex rex: Towards Copyright Contract’s lex specialis*, *in* Intellectual Property and General Legal Principles: Is IP a lex specialis? 12 (Graeme B. Dinwoodie ed., 2015). [↑](#footnote-ref-32)
33. *See* Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 Am. Econ. Rev. 421, 424–25 (1966); *see also* Sean M. O’Connor, *Creators, Innovators, and Appropriation Mechanisms,* 22 Geo. Mason L. Rev. 973, 980 (2015) (“[A]rtists, entrepreneurs, creators, and innovators . . . all need some means of supporting both themselves *and* the practical instantiation of their ideas.”). [↑](#footnote-ref-33)
34. Adopting an internal point of view, this paper considers only the distributional effect of legislative interventions, which aim to promote the redistribution of wealth and income in favor of the author vis-à-vis the intermediary. It does not address the broader philosophical discussion of distributive justice, or the pursuit of general distributive concerns. *See* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 Berkeley Tech. L.J. 229, 290 (2014) (suggesting that we must differentiate between copyright as a tool to pursue general distributive concerns and copyright’s own distributive impacts). [↑](#footnote-ref-34)
35. *See, e.g.,* Lucie Guibault & P. Bernt Hugenholtz, Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union 32 (2002). [↑](#footnote-ref-35)
36. *See* David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 Conn. L. Rev. 1687, 1690–91 nn.11–12, 1697–99 (2014) (noting that the term soft paternalism has been used to encompass a broad family of concepts, including anti-paternalism, asymmetric paternalism, libertarian paternalism, and light paternalism); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron,* 70 U. Chi. L. Rev. 1159, 1162 (2003) (“Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off. In its most cautious forms, libertarian paternalism imposes trivial costs on those who seek to depart from the planner’s preferred option.”); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 Yale L.J. 1826, 1859–60 (2013). For criticisms of this form of paternalism, see Riccardo Rebonato, Taking Liberties: A Critical Examination Of Libertarian Paternalism (2012). Edward L. Glaeser, *Paternalism and Psychology*, 73 U. Chi. L. Rev. 133 (2006); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033 (2012); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron,* 99 Nw. U. L. Rev. 1245 (2005). [↑](#footnote-ref-36)
37. This, of course, does not include the use of rational arguments to persuade one to do or not to do something, since there is no intervention with that person’s freedom. *See* Eyal Zamir & Barak Medina, Law, Economics and Morality 316 (2010); *see also* Camerer et al., *supra* note ; Sunstein & Thaler, *supra* note 34. [↑](#footnote-ref-37)
38. *See* 2 William F. Patry, Patry On Copyright § 5:106 (2010); *see also* Alice Haemmerli, *Take It, It’s Mine: Illicit Transfers of Copyright by Operation of Law*, 63 Wash. & Lee L. Rev. 1011, 1012 (2006) (discussing the relation between the writing requirement and the copyright indivisibility doctrine as well as the doctrine’s contribution to authors’ loss of copyrights); Severine Dusollier et al., *supra* note , at 31. [↑](#footnote-ref-38)
39. *See* 17 U.S.C.A. § 201 (1976); *see also* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 10.03[A][1][a] [hereinafter Nimmer on Copyright] (The writing requirement was added to the 1976 Copyright Act partly to make transfers of copyright ownership more transparent and intentional. The 1909 Act “applied the writing requirement solely to assignments rather than to exclusive licenses.”). A similar rule exists in the U.K. *See* Copyright, Designs and Patent Act 1988, c. 48, § 90(3) (U.K.). [↑](#footnote-ref-39)
40. The Copyright Act, 5768-2007, §37(c), 2199 (Isr.); *see also* DC (TA) 4857-0908­09­08 Dr. Yoram Hart v. KComerex Ltd., 5772 (2011) (Isr.). [↑](#footnote-ref-40)
41. Hungary requires a written form for all transfer of rights; the exceptions to this rule are works published in daily newspapers or periodicals and works made available by the author through electronic means. In Hungary, the writing requirement is imposed only in circumstances where the work is distributed over the Internet, but this can be satisfied by electronic means. *See* 1999. évi LXXVI. törvény a szerzőijogról (Act LXXVI of 1999 on Copyright) (Hung.). [↑](#footnote-ref-41)
42. *See* Severine Dusollier et al., *supra* note , at 31; *see also* Andreas Rahmatian, Copyright and Creativity: The Making of Property Rights in Creative Works 205 (2011) (“Whether there is a writing requirement, depend[ing] on the type of the contract[,] performance, publishing[,] . . . audiovisual production contracts[,] and free performance [authorizations] must be in writing by virtue of the author’s rights law; in all other cases, possible formality requirements depend on the relevant provisions in the French Civil Code, as do the general rules on assignment (*cession)* and on the formation of contract. The underlying legal concepts of the author’s rights contract in question are always determined in accordance with the general private law, based on the Civil Code.”). [↑](#footnote-ref-42)
43. Severine Dusollier et al., *supra* note , at 32. [↑](#footnote-ref-43)
44. *See* Robert A. Kreiss, *The “In Writing” Requirement for Copyright and Patent Transfers: Are the Circuits in Conflict?*, 26 Dayton L. Rev. 43, 44–45 (2000); *see also* CA 414/84 Brim v. Migdalor, 39(3) PD 109 (1985) (Isr.). [↑](#footnote-ref-44)
45. *See* Darling, *supra* note , at 505. [↑](#footnote-ref-45)
46. Code de la propriété intellectuelle [CPI] [Intellectual Property Code] arts. L.131-3(1) (Fr.), available in English at www.legifrance.gouv.fr [hereinafter French Intellectual Property Code] (“[E]ach of the rights conveyed be specifically mentioned in the instrument of conveyance and that the field of exploitation of the rights conveyed shall be limited as to extent and purpose, as well as to place and duration.”). The application of this rule is limited to contracts entered into by the author herself (unlike those entered into by transferees and third parties). Nicolas Bouch, Intellectual Property Law in France 73 (2011). [↑](#footnote-ref-46)
47. *See* Andre Lucas et al., *France, in* 1-FRA International Copyright Law and Practice FRA §4[3][b] (Paul Edward Geller ed., 2017). Belgium and Spain legislations, likewise, require that the geographical scope and duration of the assignment be stated in the contracts. In Belgium, the author may nullify the contract, if it does not specify the geographical scope, and she may transfer her right for a global exploitation or for the entire term of protection, provided that it is done explicitly. The contract should also specify the mode of exploitation. Belgian law gives only a partial list of relevant factors to the mode of exploitation, including the type of right transferred, technical means of exploitation, and the form in which the work is marketed. *See* Alain Strowel & Jan Corbet, *Belgium, in* 1-BEL International Copyright Law and Practice BEL § 4 (Paul Edward Geller ed., 2017). In Spain, however, if the parties fail to state the specific geographical scope, then the transfer will be limited to the territory in which the contract was concluded. If the parties fail to state the duration, the transfer will be limited to five years. *See* Dusollier et al., *supra* note , at 32. [↑](#footnote-ref-47)
48. Guibault & Hugenholtz, *supra* note 33, at 32; Darling, *supra* note , at 504 (discussing the “restrictions on copyright agreements in the Copyright Law of 1957, such as the specification requirement”); D’Agostino, *supra* note , at 124. [↑](#footnote-ref-48)
49. The law provides a special protection to authors that is not reciprocally accorded to their contracting counterparts. *See* Lucas et al., *supra* note 45, § 4[3][c]. [↑](#footnote-ref-49)
50. This is not merely for evidentiary purposes, but also to protect the authors “even from themselves if need be.” *See* Patry On Copyright, *supra* note 36, § 5:106; *see also* Hickey, *infra* note , at 451–52 (Section 204(a) of the U.S. Copyright Act’s purpose, language, and effect is broader than the statute of frauds. Moreover, traditional exceptions such as estoppel do not apply. Thus, Section 204(a) is not “a neutral evidentiary requirement.”). [↑](#footnote-ref-50)
51. It is interesting to note that in certain jurisdictions, when the contract does not expressly specify the amount of compensation to be paid to the author, the author can ask for the court to declare it null and void. For example, in Belgium, the amount specified can equal zero. The study emphasizes that in France, although the legislation is silent on this issue, courts have ruled that the amount cannot be zero when referring to publishing contracts. In Germany, where the contract does not expressly state the amount of pecuniary benefit, the contract will not be declared null. However, the author will have the right to require adequate remuneration. Guibault & Hugenholtz, *supra* note 33, at 33. This obligation to specify the author’s remuneration does not necessarily mean the author is to be remunerated. However, as will be discussed in detail in the following pages, the assumption is that such clear rules can push the author toward making better decision. [↑](#footnote-ref-51)
52. See, for example, Darling’s discussion of the specification requirements in France: “The explanatory statement accompanying the draft law expresses the paternalistic aim of providing authors some form of protection against themselves: ‘Articles 34, 35, 36, 37, 3 and 39 express to various degrees the same concern, namely the concern for protecting the author from his own incautiousness or diffidence[,] which he sometimes displays in everyday life. The prohibition of granting the rights to future works, the reconsideration of the contract in cases of damage, the requirement of an explicit clause for the grant of a right to an unforeseeable and unforeseen use of a work—be it for the same reason or for a different reason than that of the right to revoke the contract—all protect the author from the dangers vested in uncertainty over the true value, the possible effects, and the deficiencies of his work that can inevitably arise in the moment of publication. Following this reasoning, it is regarded necessary that the author approve every performance, reproduction, translation, adaptation or rearrangement of his work.’” Darling, *supra* note , at 504 (referring to Draft Law on Literary and Artistic Property of June 9, 1954, Decree of the National Convention official parliament document 8618, printed in 20 UFITA 75, 81 (1955)). [↑](#footnote-ref-52)
53. Contract interpretation and supplementation are distinct but closely linked. For a detailed discussion in the context of the *contra proferentem* rule, see Péter Cserne, *Policy Considerations in Contract Interpretation: The Contra Proferentem Rule from A Comparative Law and Economics Perspective* (Working Paper No. 5, 2007),Hungarian Ass’n L. & Econ., https://works.bepress.com/peter\_cserne/28. [↑](#footnote-ref-53)
54. Richard Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581, 1583 (2005). [↑](#footnote-ref-54)
55. *See* F. Willem Grosheide, *Paradigms in Copyright Law*, *in* Of Authors and Origins: Essays on Copyright Law 66 (Brad Sherman & Alain Strowel eds., 1994). [↑](#footnote-ref-55)
56. *See* Dusollier et al., *supra* note , at 41; D’Agostino, *supra* note , at 125–26. [↑](#footnote-ref-56)
57. The legislative language dictates the purpose of grant theory shall apply to question of “whether a right of use has in fact been granted, whether it shall be a non-exclusive or an exclusive right of use, how far the right of use and the right to forbid extend, and to what limitations the right of use shall be subject.” Urheberrechtsgesetz, Act on Copyright and Related Rights, Sept. 9, 1965, Fed. L. Gazzette, 1, 1273, 1965 (Ger.) [hereinafter German Copyright Act]. [↑](#footnote-ref-57)
58. *See* Dusollier et al., *supra* note , at 42; *see also* Paul Goldstein & P. Bernt Hugenholtz, International Copyright: Principles, Law, And Practice 267 (3d ed. 2013). [↑](#footnote-ref-58)
59. Guibault & Hugenholtz, *supra* note 33 at 80–81. [↑](#footnote-ref-59)
60. When the author grants a right of use in a work, she retains—in the case of uncertainties—the “right to consent to the publication or exploitation of an adaptation of the work.” Similarly, when the author grants a right of use in the reproduction of the work, in cases of uncertainty, she retains the right to transfer the work to video and audio recorded media. Alternatively, when the author grants a right of communication of the work to the public, in cases of uncertainty, the transferee is not entitled to make the communication perceivable to the public by screen, loudspeaker, or similar technical devices other than at the event for which it is intended. *See* German Copyright Act § 37(1)-(3). [↑](#footnote-ref-60)
61. To illustrate, in one instance, the German High Court held that a producer of a television film, which acquired the exploitation rights of the film “for all broadcasting and film-related purposes,” did not have the right to transfer the television film into a film or video that would be distributed to the public commercially or non-commercially. *See* Kassettenfilm, Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 26, 1974, GRUR 786, 1974 (Ger.); *see also* Marjut Salokannel, Ownership of Rights in Audiovisual Productions: A Comparative Study 202 (1997). [↑](#footnote-ref-61)
62. French Intellectual Property Code, art. L. 122-7; *see also* Lucas et al., *supra* note , § 4(3)(a). [↑](#footnote-ref-62)
63. *See* Pascal Kamina, Film Copyright in the European Union 205 (William R. Cornish et al. eds., 2002) (referring to Paris Court of Appeal, 23 September 1981, RIDA, July 1982, p. 159). [↑](#footnote-ref-63)
64. *Id.* at 89; *see also* Jane C. Ginsburg & Pierre Sirinelli, *Private International Law Aspects of Authors’ Contracts: The Dutch and French Examples*, 39 Colum. J.L. & Arts 171 (2015).  [↑](#footnote-ref-64)
65. James W. Dabney, *Licenses and New Technology: Apportioning and Benefits*, C674 A.L.I. – A.B.A. 85, 95­–96 (1991) (“If a license grant is determined to be ‘ambiguous’ as to its coverage of a use[,] and if extrinsic evidence of the parties’ intentions is unavailable, ‘maxims’ or ‘rules’ of interpretation may be applicable. One such rule . . . [is] . . . contra proferentem . . . .”). Under the doctrine of *contra proferentem*, ambiguous terms are interpreted against the drafting party. *See generally* Michelle E. Boardman, *Panel Four: Boilerplate Versus Contract: Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 Mich. L. Rev. 1105 (2006); Cserne, *supra* note 51. [↑](#footnote-ref-65)
66. *See, e.g.*, Lee v. Walt Disney Prods., No. B058897 (Cal. Ct. App. Sept. 30, 1992), *cert. denied*, Cal. LEXIS 6172 (Dec. 16, 1992) (Peggy Lee, the plaintiff, granted to Disney “all rights of every kind . . . to recordings or reproductions [of her voice] in any manner whatsoever.” Nevertheless, the court ruled that videocassette reproductions were not covered by the terms of the contract.). [↑](#footnote-ref-66)
67. Examples of new modes of exploitation include, *inter alia*, photocopiers, audio and video recorders, and e-books. *See* Darling, *supra* note 17 (discussing generally the different approaches to the subject); *see also* Darling, *supra* note 18; *see also* Anthony diFrancesca, Note, *New Use in Copyright: A Messy Case*, 14 Media L. & Pol’y 34 (2005); Megan M. Gillespie, Note, *To Whom Does a New Use Belong?: An Analysis of the New Use Doctrine and the Protection it Affords After Random House v. Rosetta Books*, 11 Wm. & Mary Bill Rts. J. 809 (2003); Sidney A. Rosenzweig, Comment, *Don’t Put My Article Online!: Extending Copyright’s New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. Pa. L. Rev. 899 (1995); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1572 (2009). Other jurisdictions, including Spain, Belgium, Poland, Hungary, and the Czech Republic, forbid the transfer of rights in unknown or unforeseeable forms of exploitation. The French Intellectual Property Code, on the other hand, allows for transfer of exploitation rights in new modes where the language of the contracts is explicit and specific and provides the author participation in the profits from this exploitation. In Germany, the prohibition on the transfer of rights in new and unknown modes of exploitation was revoked in 2007 and replaced with a general rule that states that the author may transfer rights in unknown uses. However, the permission is accompanied by a detailed mechanism, under which the contract must first be concluded in writing. Second, it requires the intermediary to notify the author of the new intended mode of exploitation. Third, it provides the author with the right to revoke the grant within three months from after the transferee notifies the author of the intended new use. Fourth, it provides the author with a right to adequate remuneration for each and any mode of exploitation that was new or unknown at the time the parties concluded the contract. *See* German Copyright Act, *supra* note 53, § 31. [↑](#footnote-ref-67)
68. Patry On Copyright, *supra* note 36, § 5:115 (surveying the case law addressing new modes of exploitation). [↑](#footnote-ref-68)
69. *See, e.g.*,Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481, 487 (2d Cir. 1998) (“In our view, new-use analysis should rely on neutral principles of contract interpretation rather than solicitude for either party . . . the party benefitted by that reading should be able to rely on it;  the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract should bear the burden of negotiating for language that would express the limitation or deviation. This principle favors neither licensors nor licensees. It follows simply from the words of the contract.”). [↑](#footnote-ref-69)
70. *See* Nimmer on Copyright, *supra* note 37, § 10.10[B] (preferring this approach over the other the latter one). [↑](#footnote-ref-70)
71. *See id.*; *see also* Rey v. Lafferty, 990 F.2d 1379, 1390–91 (1st Cir. 1993); Cohen v. Paramount Pictures Corp., 845 F.2d 851, 853–54 (9th Cir. 1988); Abkco Music, Inc. v. Westminster Music, Ltd., 838 F. Supp. 153, 155–56 (S.D.N.Y. 1993). [↑](#footnote-ref-71)
72. *See* Random House, Inc. v. Rosetta Books LLC, 150 F. Supp. 2d 613, 614 (S.D.N.Y. 2001); Joseph Perry, *21st Century New Use Technology in the Book Publishing Industry and How Authors Can Better Protect their New Use Technology Rights*, 19 Va. J.L. & Tech. 455, 462 (2015). [↑](#footnote-ref-72)
73. *See, e.g.*, *Cohen*, 845 F.2d at 853–54 (holding that “license must be constructed in accordance with the purpose underlying federal copyright law” and assuming that copyright law is “enacted for the benefit of composer”) (quoting Jondora Music Publ’g Co. v. Melody Recordings,Inc., 506 F.2d 392, 395 (3d Cir. 1974)); *see also* Robert W. Gomulkiewicz, Licensing Intellectual Property: Law and Applications 582 (2014); Kevin J. Hickey, *Copyright Paternalism*, 19 Vand. J. Ent. & Tech. L. 415, 455 (2017). *But see* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum. L. Rev. 1710, 1717 (1997). [↑](#footnote-ref-73)
74. Cserne, *supra* note 51, at 4–5, 15. [↑](#footnote-ref-74)
75. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,* 99 Yale L.J. 87, 91 (1989) (suggesting the use of the term “penalty default” as a way to describe contract default rules that are designed to force contracting parties to bargain over a specific subject); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation,* 69 Va. L. Rev. 967 (1983) (discussing the particulars of information-forcing default rules); *cf.* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 Fla. St. U. L. Rev. 563, 565 (2006) (questioning the existence of penalty default rules and drawing a distinction between default rules and interpretive rules). Posner claims that while interpretive rules govern how we read vague or ambiguous language, default rules fill a gap in the language. In other words, default rules are a concern only when there is a gap and rules of interpretation are a concern only when there is a language to be interpreted. *Id.* [↑](#footnote-ref-75)
76. Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 Fla. St. U. L. Rev. 589, 596 (2006) (“In this regard, it is striking that some interpretative rules of construction take as their starting point not the intent of the drafting parties (which would resemble majoritarian gap-filling), but instead the interpretation which is least favorable to the drafter. Such rules are strong evidence that common law lawmakers have long understood the value of information-forcing rules. The contra in contra proferentem rightly suggests a penalty; the interpretative presumption is not chosen because we think that the most negative interpretation is what the drafter or even the draftee normally wants, but rather because the rule of construction is a stick to force drafters to educate nondrafters.”); Gerard McMeel, *Language and the Law Revisited: An Intellectual History of Contractual Interpretation,* 34 Comm. L. World Rev. 256, 258 (2005) (“It may be that the only significant issue of ideological concern in this corner of the law of contract is the extent of one’s appetite for deploying so-called interpretative devices or other rules for benefiting whichever of the parties is perceived to be in a weaker bargaining position.”); *see also* J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 Wm. & Mary L. Rev. 899, 910–11 (2015); Péter Cserne, Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach 163 (2012); *cf.* David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 Colum. L. Rev. 1849, 1852–54 (1988) (discussing insurance law rules of interpretation). This is in contrast to a majoritarian or market-mimicking default rule. A majoritarian default rule will “mimic the term that the majority of the parties to whom it applies would have agreed on had they considered it as an option when making their contract.” *See* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 Mich. L. Rev. 1417, 1425 (2014). [↑](#footnote-ref-76)
77. It is interesting to note the several rules that fall under the first group. Specification requirement may also be a penalty default rule in the sense that, when not specific in the geographical area or the scope, the term will be null and void. Given that in some countries we find rules that will be void if not specified, this also falls into the category of penalty rules, since, when attempting to transfer too broad a scope, one might end up with nothing. [↑](#footnote-ref-77)
78. Verkerke, *supra* note 74, at 904. [↑](#footnote-ref-78)
79. See, for example, Anthony Kronman’s discussion of property rights in information, contending that in certain circumstances a duty to disclose information is equivalent to requiring the information to be publicly shared. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1, 14 (1978). [↑](#footnote-ref-79)
80. For a critique of disclosure regulation, see generallyOmri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (2014). [↑](#footnote-ref-80)
81. *Ex-post*, legislative intervention makes the court interpret the terms of the contract in favor of the author, even if such an interpretation is inconsistent with the intent of the parties at the time they entered into the agreement. As previously stated, this inconsistency might be either the result of the author not knowing what she really wants and, therefore, making a choice counter to her own interest. Alternatively, it could be that the author knows what she wants but cannot achieve it on account of her weaker bargaining position. Either way, the legislative aim is to benefit the author and make her behave in accordance with her own real interests. *Ex-ante*, the risk of having the contract interpreted against one’s interests purportedly incentivizes the drafter—who is usually the better informed and stronger party—to produce a more precise, detailed contract. Reference to the harm caused to others is a common motive for restrictions on one’s liberty. “Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the [unfavorable] sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited . . . .” *See* John Stuart Mill, On Liberty 52 (Batoche Books ed., 2001). However, this form of intervention is usually considered to lie outside the ambit of paternalism. Arguably, then, pro-author rules of interpretation are not indicative of paternalistic motives *ex-ante*. Alternatively, we can view this as a case of indirect paternalism. According to this approach, the individual (or class of individuals) whose freedom is being interfered with is not identical to the intended beneficiary of such intervention. For instance, requiring manufacturers to post warnings on cigarette packages and other tobacco products concerning their adverse health effects is considered a form of indirect paternalistic intervention. *See* Peter Cserne, *Freedom of Choice and Paternalism in Contract Law: A* Law and Economics *Perspective*, German Working Papers L. & Econ. 1, 7 (2006); Marc Linder, *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. Davis L. Rev. 733, 745 (1990); *see also* Thaddeus Mason Pope, *Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism*, 20 Ga. St. U. L. Rev. 659, 667–79 (2004). Indirect paternalism is sometimes referred to as “impure paternalism.” *See, e.g.*, Yehiel S. Kaplan, *The Right of a Minor in Israel to Participate in the Decision-Making Process Concerning His or Her Medical Treatment*, 25 Fordham Int’l L.J. 1085, 1098 (2002) (“In ‘pure’ paternalism[,] the class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions. In the case of ‘impure’ paternalism[,] in trying to protect the welfare of a class of persons[,] we find that the only way to do so will involve restricting the freedom of other persons besides those who are benefited.”); Willem H. van Boom & Anthony Ogus, *Introducing, Defining and Balancing ‘Autonomy v. Paternalism’*, 3 Erasmus L. Rev. 1 (2010). Similar concepts have been described as “two-party” paternalism*. See* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure,* 99 Cornell L. Rev. 513, 527 n.81 (2014) (citing Joel Feinberg, Harm to Self 12–16 (1986)). Last, but not least, it is important to note that the disclosure has, at the very least, some bearing on the author’s willingness to choose among the set of contractual terms available to her. It can, therefore, potentially induce her to behave in her own real interests rather than in the fashion she would have adopted under the previous legal regime. Out of the two options presented here, I believe this is the more convincing one. When focusing not on the entity being regulated but on the individual whose range of choices is being restricted, it is clear that such intervention is paternalistically motivated. [↑](#footnote-ref-81)
82. This is of course not the exclusive tool advocated by supporters of soft paternalism. However, it does serve as the principal tool for improving the situation of the author by enabling informed decision-making without limiting the choices available to her. *See supra* Part II(A). [↑](#footnote-ref-82)
83. Ben-Shahar & Schneider, *supra* note 4, at 682. [↑](#footnote-ref-83)
84. *See* Loacker, *supra* note , at 51–52 [↑](#footnote-ref-84)
85. The adherence of these measures to libertarian principles is outside the scope of this research. For further discussion, see Douglas G. Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J.L. & Liberty 411, 413 (2007). Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv. L. Rev. 1593, 1594–96 (2014); Mitchell, *supra* note 34, at 1246–48. [↑](#footnote-ref-85)
86. *See generally* Pelle Guldborg Hansen & Andreas Maaløe Jespersen, *Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behavioral Change in Public Policy*, 4 Eur. J. Risk Reg. 3, 12 (2013); Wright & Ginsburg, *supra* note 34, at 1064 (“How costly will government policy errors be if government actors suffer from, say, hyperbolic discounting or status quo bias, or are subject to framing effects?”); Glaeser, *supra* note 34, at 139–56 (2006). [↑](#footnote-ref-86)
87. Cass R. Sunstein, *Switching the Default Rule,* 77 N.Y.U. L. Rev. 106, 110 (2002); Cynthia L. Estlund, *How Wrong Are Employees about Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. Rev. 6, 23–26 (2002); Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection*, 167 J. Institutional & Theoretical Econ. 56, 60 (2011); Verkerke, *supra* note 74, at 939; Ben-Shahar & Schneider, *supra* note 4, at 671–72. [↑](#footnote-ref-87)
88. *See, e.g.*, Timothy F. Malloy, *Disclosure Stories*, 32 Fla. St. U. L. Rev. 617, 628–32 (2005); David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. Pol’y Analysis & Mgmt. 155, 160 (2006); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending,* 14 Cornell J.L. & Pub. Pol’y 199, 248 (2005); Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure,* 58 Ala. L. Rev. 473, 511 (2007); Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 Yale L.J. 574 (2012); Ben-Shahar & Schneider, *supra* note 4, at 652–64 (emphasizing mandated disclosure wide use in the contexts of terms of credit, contract boilerplate, financial transactions, insurance, healthcare, and Miranda warnings by legislatures, courts, and administrative agencies). [↑](#footnote-ref-88)
89. Stefan Grundmann, *Information,* *Party Autonomy and Economic Agents in European Contract Law*, 39 Comm. Mrkt. L. Rev. 269, 270–72 (2002). [↑](#footnote-ref-89)
90. *See, e.g.*, Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*,5 N.Y.U. J.L. & Bus. 617, 628 (2009) (claiming that “a sizeable number of consumers fail to read the contracts that they sign”); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 Mich. L. Rev. 837, 839 (2006); Robert A. Hillman, *Rolling Contracts*, 71 Fordham L. Rev. 743, 747 n.18 (2002) (stating the results of a survey he performed, showing that “[o]nly 24 out of 100 respondents (24%) indicated that they read the terms of rolling contracts”); *see also* Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 Mich. L. Rev. 247, 256 (1970); John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts,* 67 Cornell L. Rev. 735, 778–79 n.207 (1982); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 Va. L. Rev. 1387, 1389 (1983); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met,* 45 Am. Bus. L.J. 723, 724 (2008). [↑](#footnote-ref-90)
91. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 671 (2011). [↑](#footnote-ref-91)
92. Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts*,*”* 78 U. Chi. L. Rev. 165, 172–73 (2011) (finding that mandating disclosure will not by itself change readership or contracting practices in a meaningful way); *accord* Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. Institutional & Theoretical Econ. 94 (2012). [↑](#footnote-ref-92)
93. *See generally* Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 Rand J. Econ. 518, 520 (1990) (“This is individually rational, since the cost of reading and considering each term is high, and many of the terms deal with improbable contingencies. Few consumers attempt to read all the terms of their leases, insurance policies, or automobile loan contracts, for instance, although they may occasionally make a show of doing so in order not to appear unsophisticated.”). [↑](#footnote-ref-93)
94. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 832 (2006). [↑](#footnote-ref-94)
95. Hickey, *supra* note , at 430–34; Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 Iowa L. Rev. 3 n.1 (2002) (“According to the theory of bounded rationality, economic actors seek to maximize their expected utility, but the limitations of human cognition often result in decisions that fail to maximize utility. Decision-makers inherently have limited memories, computational skills, and other mental tools, which in turn limit their ability to gather and process information.”). [↑](#footnote-ref-95)
96. *See* Bainbridge, *supra* note ; Hickey, *supra* note , at 432–33. [↑](#footnote-ref-96)
97. *See, e.g.*, Ben-Shahar & Schneider, *supra* note , at 52; Ben-Shahar & Schneider, *supra* note , at 671–72, 711; W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power,* 84 Harv. L. Rev. 529 (1971). [↑](#footnote-ref-97)
98. In traditional economics, the rule of thumb is that the duty to provide the relevant information should be placed on the cheapest information provider. *See generally* Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970). [↑](#footnote-ref-98)
99. Melvin Aron Eisenberg*, Text Anxiety*, 59 S. Cal. L. Rev. 305, 305 (1986). [↑](#footnote-ref-99)
100. Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 Ga. L. Rev. 583, 598–99 (1990); Edwards, *supra* note , at 232; Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 Wm. & Mary Bus. L. Rev. 35, 59 (2015) (claiming “financial literacy is especially low among young people and among minority population”); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol’y Rev. 233, 266 (2002). Literacy has been defined by Ben-Shahar and Schneider as (1) not knowing what a word combination represents; (2) not knowing what a word means; (3) not knowing what a word combination in a sentence means; and (4) not knowing how to extract information from a combination of sentences. *See* Ben-Shahar & Schneider, *supra note* , at 710–12. [↑](#footnote-ref-100)
101. Ben-Shahar & Schneider, *supra* note , at 712; Claire A. Hill, *Why Contracts Are Written in “Legalese,*” 77 Chi. Kent L. Rev. 59 (2001). [↑](#footnote-ref-101)
102. Ben-Shahar & Schneider, *supra* note , at 711 (referring to Michele Heisler, *Helping Your Patients with Chronic Disease: Effective Physician Approaches to Support Self-Management*, 8 Seminars Med. Prac. 43, 49 (2005)). [↑](#footnote-ref-102)
103. For discussion of literacy and other comprehensive barriers to healthcare information, seeWilliam M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 Colum. L. Rev. 1701, 1728 (1999). Ben-Shahar & Schneider, *supra note* , at 713–14 (pointing out similar results in studies focusing on mandatory disclosures in areas such as Miranda rights, home lending, and privacy of medical information). [↑](#footnote-ref-103)
104. Ben-Shahar & Schneider, *supra note* , at 717; *accord* Charlotte Villiers, *Disclosure Obligations in Company Law: Bringing Communication Theory into the Fold*, 1 J. Corp. L. Stud. 181, 195–96 (2001). [↑](#footnote-ref-104)
105. Ben-Shahar & Schneider, *supra* note4, at 714 (“When you give us content, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise any and all copyright, trademark, publicity, and database rights (but no other rights) you have in the content, in any media known now or in the future.”). [↑](#footnote-ref-105)
106. Ben-Shahar & Schneider, *supra* note 4, at 714; *see also* Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements,* 36 L. & Hum. Behav. 293, 297 (2012). [↑](#footnote-ref-106)
107. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105, 107–110 (1997). [↑](#footnote-ref-107)
108. Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. Tol. L. Rev. 657, 657–58 (1996) (discussing reading comprehension problems affecting beginning students of law); *see also* Bernard Black, Note, *A Model Plain Language Law*, 33 Stan. L. Rev. 255, 258 (1981). [↑](#footnote-ref-108)
109. Ben-Shahar & Schneider, *supra* note , at 710–12. [↑](#footnote-ref-109)
110. Dewitz, *supra* note 106, at 661–62. [↑](#footnote-ref-110)
111. Kim, *supra* note , at 94–96. [↑](#footnote-ref-111)
112. Beverly Horsburgh & Andrew Cappel, *Cognition and Common Sense in Contract Law*, 16 Touro L. Rev. 1091, 1123–24 (2000). [↑](#footnote-ref-112)
113. Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 Cornell L. Rev. 1015, 1061 (2015). [↑](#footnote-ref-113)
114. For criticism of the supposition that even if artists are not poor, they are at least unsophisticated, inexperienced, and in need of protection, see Rub, *supra* note , at 84. Netanel, *supra* note , at 418–19. [↑](#footnote-ref-114)
115. Marotta-Wurgler, *Will Increased Disclosure Help*, *supra* note , at 165; Michael S. Wogalter et al., *On the Adequacy of Legal Documents: Factors That Influence Informed Consent*, 42 Ergonomics 593 (1999) (analyzing studies of healthy subjects’ understanding of consent documents). [↑](#footnote-ref-115)
116. Michael Masson & Mary Ann Waldron, *Comprehension of Legal Contracts by Non-experts: Effectiveness of Plain Language Redrafting,* 8 Applied Cognitive Psychol. 67 (1994) (discussing empirical evidence regarding the effectiveness of three kinds of simplifications of standard legal contracts that were implemented in an attempt to increase comprehension among naïve readers). The authors found that although simplified words and sentences enhance comprehension, non-experts still have difficulty understanding complex legal concepts. This is particularly true when such concepts conflict with their background knowledge. *Id.* [↑](#footnote-ref-116)
117. Ben-Shahar & Schneider, *supra* note, at 713. [↑](#footnote-ref-117)
118. *Id.* [↑](#footnote-ref-118)
119. Members of this group range from first-time to experienced authors, young and old writers, novices and professionals, and so on. [↑](#footnote-ref-119)
120. Ben-Shahar & Schneider, *supra* note , at 725–27 (explaining that in their recent comprehensive critique of mandated disclosures, in many situations, what an individual really needs is to make a better decision and acquire knowledge and experience, not merely acquire more information). Knowledge and experience cannot be thought of or overcome through mandate disclosure. This is not to claim that novices never understand information. It is more difficult for them to interpret information in comparison to the expert author. More than that, it affects the quantity of information an author can handle. While experts or experienced authors can handle large quantities of information, new and unsophisticated authors might have problems with this. *Id.* [↑](#footnote-ref-120)
121. *See* Loacker, *supra* note , at 114 (suggesting at least four reasons why at a certain point the amount of information actually integrated in the decision-making process declines: (a) the extent of the given information, (b) the complexity of the given information, (c) limited available time to proves the given information, and (d) the rare occurrence of the information processing task). [↑](#footnote-ref-121)
122. Human limitations of information processing are often referred to as information overload. Ben-Shahar & Schneider, *supra* note 4, at 686–90 (discussing both the overload effect and accumulation problem). [↑](#footnote-ref-122)
123. This is sometimes referred to as “information overload problem.” *See, e.g.*,Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417 (2003); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age,* 77 N.Y.U. L. Rev. 429, 451–54 (2002); Herbert A. Simon, *Rational Decision-Making in Business Organizations*, 69 Am. Econ. Rev. 493, 507 (1979) (arguing that people often reach decisions based on a “search of only a tiny part” of the total available information). [↑](#footnote-ref-123)
124. Erik F. Gerding, *Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures?*, 90 Tul. L. Rev. 1143, 1149–53 (2016); Ben-Shahar & Schneider, *supra* note , at 721; *see also* Yaniv Hanoch & Thomas Rice, *Can Limiting Choice Increase Social Welfare? The Elderly and Health Insurance*, 84 Milbank Q. 37, 41 (2006). [↑](#footnote-ref-124)
125. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 Md. L. Rev. 707, 780–81 (2006); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. Econ. 505 (2006); Adi Ayal, *Coming Full Circle: Will ‘New Economics’ Require Old Solutions in Cellular Market Regulation?* (Bar Ilan Univ. Pub. Law & Legal Theory Paper No. 17-09, 2009), https://ssrn.com/abstract=1503503. [↑](#footnote-ref-125)
126. *See* Villiers, *supra* note , at 198–99; *see also* Porat & Strahilevitz, *supra* note ; Anne-Lise Sibony & Geneviève Helleringer, *EU Consumer Protection and Behavioral Sciences: Revolution or Reform*?, *in* Nudge And The Law: A European Perspective 209 (2015). [↑](#footnote-ref-126)
127. Ben-Shahar & Schneider, *supra* note , at 47. [↑](#footnote-ref-127)
128. *See, e.g.*, Lauren E. Willis, *Against Financial-Literacy Education*, 94 Iowa L. Rev. 197, 235–36 (2008); Ben-Shahar & Schneider, *supra* note , at 720. [↑](#footnote-ref-128)
129. Compare this with the arguments articulated by Bar Gill and Ben-Shahar. *Cf.* Oren Bar Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 Common Mkt. L. Rev. 109, 124–25 (2013); Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 Eur. Rev. Cont. L. 1, 7–12 (2009). [↑](#footnote-ref-129)
130. This has been demonstrated with regards to other information-regulatory regimes, such as healthcare information, hazard warnings, etc. Ben-Shahar and Schneider mention the following cognitive phenomena as those which can significantly limit the effectiveness of disclosure: “(a) inability to process user-unfriendly features of disclosure regimes; (b) lack of contractual schemas or knowledge structures; (c) inaccurate default assumptions of how contractual provisions are likely to be structured and whether the terms can be negotiated; (d) availability heuristics; (e) reason-based decision making; (f) biases in attribute estimation and evaluation; (g) positive confirmation biases; (h) acceptance of senseless explanations; (i) argument immunization; (j) sunk cost effects; (k) endowment effects; (l) temporal and uncertainty discounting; (m) a strong motivation to trust that is exacerbated when the consumer is of lower socioeconomic status, and misplaced trust in the mortgage broker or lender . . . .” Ben-Shahar & Schneider, *supra* note , at 723 (citing Debra Pogrund Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 Psychol. Pub. Pol’y & L. 85, 89 (2010)); *see also* Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. Rev. 1669, 1678 (2003) (“People may often desire what is bad for them . . . .”); W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 Rutgers L. Rev. 625, 636 (1996); Sage, *supra* note , at 1729–33. Matthew Rabin, *Psychology and Economics*, 36 J. Econ. Literature 11, 12 (1998) (“[P]eople have a short-run propensity to pursue immediate gratification that is inconsistent with their long-run preferences . . . .”). For a detailed discussion of a situation in which soft paternalistic measures are less likely to control a choice, see Mitchell, *supra* note . [↑](#footnote-ref-130)
131. *See, e.g.*,Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* Judgment Under Uncertainty: Heuristics and Biases (1982). [↑](#footnote-ref-131)
132. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998); Cass R. Sunstein, Introduction to Behavioral Law and Economics 1, 3–5 (2000); Richard L. Hasen, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. Rev. 391, 395–96 (1990). [↑](#footnote-ref-132)
133. Rub, *supra* note , at 104–05. [↑](#footnote-ref-133)
134. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 Econometrica 263 (1979). [↑](#footnote-ref-134)
135. Stuart Oskamp, *Overconfidence in Case-Study Judgments*, *in* Judgment Under Uncertainty: Heuristics and Biases 287 (1982). [↑](#footnote-ref-135)
136. Perhaps the best illustration can be found in studies showing that approximately 99% of all couples about to be married underestimate the likelihood that their own marriage could end in a divorce. *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993); *see also* Tali Sharot, *The Optimism Bias*, 21 Current Biology 941, 941 (2011). [↑](#footnote-ref-136)
137. *See generally* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism,* 97 Nw. U. L. Rev. 1165, 1177 (2003) (“The influence of cognitive errors on choice, however, undermines the benefits of information disclosure. If a lack of information is the chief cause of erroneous choice, then the least costly cure is ensuring more informed decisions. If, however, the problem is that individuals make bad choices even when they have good information, then information disclosures and warnings are useless.”); *see also* Rub, *supra* note , at 109–110. [↑](#footnote-ref-137)
138. People do not treat costs they have already incurred as sunk costs that are irrelevant to subsequent decision making. *See* Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 Acad. Mgmt. Rev. 577, 578–80 (1981). [↑](#footnote-ref-138)
139. Stark & Choplin, *supra* note 86, at 89–90. [↑](#footnote-ref-139)
140. *See, e.g.*, Becher, *supra* note 86, at 133 (This is known in the literature as “confirmation bias.”); Willis, *supra* note 120, at 790–92. [↑](#footnote-ref-140)
141. Stark & Choplin, *supra* note 86, at 101. [↑](#footnote-ref-141)
142. This is known as the low-ball technique, under which a salesperson presents a “low-ball” price to a customer. Once the customer has agreed to buy the product, the salesperson discovers some error that increase the price or rescinds some special features that the customer believed were part of the original offer. *See* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 La. L. Rev. 117, 135 (2007); Kenneth K. Ching, *What We Consent to When We Consent to Form Contracts: Market Price*, 84 UMKC L. Rev. 1, 16 (2015). For a detailed discussion of pre-contractual information duties as a regulatory tool in the EU consumer law, see Christoph Busch, *The Future of Pre-Contractual Information Duties: From Behavioral Insights to Big Data*, *in* Res. Handbook on EU Consumer and Cont. L. Law, 221–40 (Christian Twigg-Flesner ed., 2016). [↑](#footnote-ref-142)
143. There might be additional reasons to doubt the usefulness of the information. *See, e.g*., Ching, *supra* note 137, at 16–17. [↑](#footnote-ref-143)
144. For a detailed discussion of anchoring, see the seminal work of Amos Tversky and Daniel Kahneman on heuristics and biases. *See* Amos Tversky & Daniel Kahneman*, Judgment Under Uncertainty: Heuristics and Biases,* 185 Science 1124, 1128–30 (1974). [↑](#footnote-ref-144)
145. *See generally* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath:* *Dealing with Power Differentials in Negotiations*,5 Harv. Negot. L. Rev. 1, 76–77 (2000); Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 Organizational Behav. & Hum. Decision Processes 84, 87–96 (1987); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 Cornell L. Rev. 739, 751 n.60 (2000). [↑](#footnote-ref-145)
146. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,*153 U. Pa. L. Rev. 1251, 1258–59 (2005) (showing that a demand made at a prehearing settlement conference anchored judge’s assessment of the appropriate amount of damages); Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. Personality & Soc. Psychol. 657, 675–58 (2001) (claiming that when the negotiating party took the perspective of her opponent and focused on his minimum desires in the negotiation, as well as any information inconsistent with the implications of the opponent’s first offer, she was able to reduce the negative impact of the initial offer on the outcome of negotiation). However, this sort of information gathering can be problematic. [↑](#footnote-ref-146)
147. *See generally* Ted O’Donoghue & Matthew Rabin, *Present Bias: Lessons Learned and To Be Learned,* 105 Am. Econ. Rev. 273, 274–75 (2015) (discussing present bias). Rabin, *supra* note 125, at 12; *see also* Bubb & Pildes, *supra* note 81, at 1649 (“Mandatory disclosure is simply not well suited to solving self-control problems.”); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1164–66 (1986). [↑](#footnote-ref-147)
148. It is also crucial to consider whether an author’s decision to prefer immediate benefits to the chance of much larger long-term benefits is the wrong decision. In that sense, some economists have argued that when the future is uncertain hyperbolic discounting could be sensible. *See* J. Doyne Farmer & John Geanakoplos, *Hyperbolic Discounting Is Rational: Valuing the Far Future with Uncertain Discount Rates* (Cowles Found. Discussion Paper No. 1719, 2009), http://cowles.econ.yale.edu/P/cd/d17a/d1719.pdf. [↑](#footnote-ref-148)
149. *See* Gideon Keren & Peter Roelofsma, *Immediacy and Certainty in Intertemporal Choice*, 63 Org. Behav. & Hum. Decision making Process 287, 292 (1995); *see also* Russell Korobkin & Chris Guthrie, *Heuristics: Heuristics and Biases at the Bargaining Table*, 87 Marq. L. Rev. 795, 799–800 (2004). [↑](#footnote-ref-149)
150. Bubb & Pildes, *supra* note 81, at 1648. [↑](#footnote-ref-150)
151. Daylian Cain, George Loewenstein & Don Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. Legal Stud. 1, 6–8 (2005). [↑](#footnote-ref-151)
152. *See* Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, And Happiness 98–99 (2008); Korobkin and Guthrie, *supra* note 144, at 800–02; Jolls et al., *supra* note 127, at 1534. [↑](#footnote-ref-152)
153. *See* Bubb & Pildes, *supra* note 81, at 1649 n.223 (stating that banks’ rules on overdraft fees are a nice illustration of such means to undermine mandate disclosure). [↑](#footnote-ref-153)
154. *See* Cain, Loewenstein & Moore, *supra* note 146, at 7 (discussing moral licensing). [↑](#footnote-ref-154)
155. Jacob Hale Russell makes a parallel argument with respect to unintended consequences of nudges in the context of retirement savings. Russell, *supra* note 96, at 66. [↑](#footnote-ref-155)
156. Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 Nw. U. L. Rev. 1165 (2003) (noting that if individuals make bad choices even when they have good information, then information disclosures and warnings are useless). [↑](#footnote-ref-156)
157. Hickey, *supra* note 69, at 465. [↑](#footnote-ref-157)
158. These entities are sometimes referred to in the literature as information intermediaries. However, to avoid confusion with “intermediaries,” I use the term “middleman.” *See* Loacker, *supra* note , at 121–22. [↑](#footnote-ref-158)
159. *Id.* at 127 (discussing borrowers’ behavior after meeting with counseling agencies); *see also* Ben-Shahar & Schneider, *supra* note , at 671–72, 725–27 (arguing that while disclosure rarely improves the decision-making process of the common individual (layman), using experts might yield better results). [↑](#footnote-ref-159)
160. *See, e.g.*, Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1309–1311 (2002) (objecting to mortgage counseling). [↑](#footnote-ref-160)
161. Sage, *supra* note 99, at 1731 (discussing limited choice in the healthcare context). [↑](#footnote-ref-161)
162. Issacharoff, *supra* note 83, at 60. [↑](#footnote-ref-162)
163. Phillip Johnson, et al., *The Business of Being an Author: A* S*urvey of Author’s Earnings and Contracts,* (Queen Mary University of London, Project Report, 2015), http://orca.cf.ac.uk/72431/1/Final%20Report%20-%20For%20Web%20Publication.pdf. [↑](#footnote-ref-163)
164. For similar arguments discussed in the context of consumer insurance contracts, see, for example, Julie-Ann Tarr, Disclosure and Concealment in Consumer Insurance Contracts 12–13 (2001). [↑](#footnote-ref-164)
165. Martin Kretchmer, *Creator Contracts (‘Supply Side’)*,Relationship Between Copyright & Cont. Law 41 (2010). [↑](#footnote-ref-165)
166. *See* Severine Dusollier et al., *supra* note , at 83 (Pro-consumer interpretation approach has been criticized for the inability to generate any meaningful benefit to the consumer.); *see* Bar Gill & Ben-Shahar, *supra* note , at 133 (discussing consumer protection techniques employed by European contract law, in particular the proposed Common European Sales Law). [↑](#footnote-ref-166)
167. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight,* 65 U. Chi. L. Rev. 571, 580–86 (1998) (discussing how the hindsight bias affects judges). [↑](#footnote-ref-167)
168. For a similar discussion in the context of consumer contracts, seeBecher, *supra* note 86. [↑](#footnote-ref-168)
169. *See supra* notes 77–82 and accompanying text. [↑](#footnote-ref-169)
170. *See* D’Agostino, *supra* note , at 124–125, 167–68; s*ee* *also* European Comm’n, Impact Assessment on the Modernization of EU Copyright Rules, Pt. 1/3*,* 176 (2016), https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules. [↑](#footnote-ref-170)
171. Severine Dusollier et al., *supra* note , at 83. [↑](#footnote-ref-171)
172. *See, e.g.,* Eisenberg, *supra* note , at 310–12 (discussing the idea of a “duty to read”); Severine Dusollier et al., *supra* note , at 28 (suggesting backlisting specific contract terms); *see also* Ben-Shahar & Schneider, *supra* note 4. [↑](#footnote-ref-172)
173. *See generally* Sarah Conly, Against Autonomy: Justifying Coercive Paternalism (2012); Issacharoff, *supra* note , at 56–70; Bubb & Pildes, *supra* note , at 1646–48 (criticizing behavioral law and economics emphasis on soft paternalism). [↑](#footnote-ref-173)
174. *See, e.g.*, Sec. & Exch. Comm’n, A Plain English Handbook: How To Create Clear SEC Disclosure Documents 49 (1998), https://www.sec.gov/pdf/handbook.pdf (referring to the seminal work of Edward Tufte, titled “The Visual Display of Quantitative Information”); *see also* Edward R. Tufte, The Visual Display of Quantitative Information (2d ed. 2001). [↑](#footnote-ref-174)