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Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts

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Gaming the System: A Critique of Minors’ Privilege to Disaffirm Online Contracts

James Chang* and Farnaz Alemi**

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INTRODUCTION

The introduction of the Internet as a medium of communication has significantly changed the way people interact with each other. Using the Internet, people are able to store, send, and retrieve vast quantities of information much faster than would be possible using other forms of communication. But the effects of the rise of the Internet as a means of communication have not been limited to efficiencies in accessing information. The power of the Internet to act as an information equalizer has had profound effects on society as well.

Because of the Internet, the world has become a much smaller place than it was only a few decades ago. Today, people are not only able to speak with others all around the globe but can see them in videoconferences as well. People now have the ability to send information across the world just as easily as they can send it across the street. Because of the efficacy with which information may be transferred, many practical barriers to productivity have fallen. For instance, research can be conducted twenty-four hours a day by sending the results of a day's work across the globe to where the day is just starting.

While the practical effects of a highly-interconnected world are often made obvious by new technological abilities that people have at their disposal, what is often less obvious is the impact the technology has on society's norms. The widespread ability to communicate with people across the world from virtually any location has significantly changed the way people interact.

One class of people that has been significantly affected by the development of the Internet is that of minors. The ability to communicate with others across the world is a powerful tool, but in the hands of minors the effect is more profound. While in the past adults may have found it comparatively difficult to communicate across long distances, it was not uncommon for such communications to occur. On the other hand, minors' contact with people outside their immediate communities was limited. The advent of the Internet has changed that.

Because of the Internet, minors can now communicate regularly with people outside their immediate communities. Furthermore, the character of their interactions is no longer limited to social or academic pursuits. Increasingly,

minors are engaging in business transactions from very young ages. This newfound ability has additionally been fueled by the Internet's ability to shroud the identity of minors.

The changing landscape in which minors, and adolescents¹ in particular, interact with society demands differing rules regarding their treatment under the law. Unfortunately, the law has been slow to recognize the need for this reform. One area of particular importance concerns the special privileges minors have traditionally been afforded.

Minors have a special privilege under the law, namely, the power to disaffirm their contracts at will. The ability to void a contract, even after it has been fully executed, creates significant uncertainty for any party subject to the effects of this privilege. Any party considering transacting with a minor must consider that their contracts may be voided until, at the very least, the minor reaches the age of majority, and possibly for some time after that. Businesses faced with this reality must confront the fact that minors may potentially void transactions many years after they have been fully executed.²

As online transactions become more and more commonplace, the ramifications of this privilege become increasingly significant. The relative youth of minors has not kept them from playing meaningful roles in the online economy. Minors are increasingly exposed to the online world at earlier and earlier ages, yet the law continues to disregard their experience and preserves a relatively unqualified privilege that creates substantial uncertainty for those who interact with them.

Some recent examples include:

- ❖ In April 2010, a twelve-year-old boy purchased roughly \$1,450 worth of virtual coins to use in Zynga's game, Farmville. According to his mother, the young boy admitted that he knew what he was doing: "When I asked him why he did it he said that they had brought out 'good stuff that I wanted.'"³
- ❖ In December 2010, a four-year-old purchased one bushel and eleven buckets of "Smurfberries" for \$66.88 in The Smurfs' Village game. His mother did not know that her son could use real-world money in a game.⁴
- ❖ In January 2011, a second-grader guessed her parents' iTunes password and accumulated \$150 of charges buying virtual goods of "buckets of

1. This paper defines adolescents as minors who are between the ages of twelve and eighteen.

2. 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:9 (4th ed. 2009).

3. Jill Insley, *A 12-Year-Old Boy Has Run up Bills of over £,900 Playing the Facebook Game Farmville*, GUARDIAN (U.K.), Apr. 10, 2010, at 2.

4. Peter Svensson, *Bushels of "Smurfberries" Cost Parents Buckets of Cash*, MSNBC.COM (Dec. 9, 2010), http://www.msnbc.msn.com/id/40584671/ns/business-consumer_news.

stars and snowflakes to build a safari out of sea turtles and giraffes” on the popular virtual game Tap Zoo.⁵

- ❖ In February 2011, an eleven-year-old boy purchased approximately \$1,600 of extra features and games on his Microsoft Xbox Live account without his mother’s consent. He stated, “It was just me wanting to get all this stuff which other people have which I don’t have and I was getting jealous.”⁶
- ❖ In February 2011, an eight-year-old purchased over \$1,400 of Smurfberries in The Smurfs’ Village.⁷

Certainly it can be argued that in these instances the minors knew what they were doing when they accrued hefty bills for their parents. The twelve-year-old boy on Farmville *knew* he was making the purchases for virtual coins; the eleven-year-old boy playing on his Xbox *knew* he was making the purchases for goods that his friends already owned; and the second-grader *knew* that she needed to get her parents’ password in order to make online purchases on Tap Zoo.

This Paper examines the effect of the Internet on the rationale supporting the privilege of disaffirmance, concludes that minors’ privilege of disaffirmance is overly broad in the context of online transactions, and suggests a reasonable method of reform.

I. THE PRIVILEGE OF DISAFFIRMANCE

Traditionally, society has placed restrictions on minors, or “infants” as they have historically been called.⁸ Although the modern treatment of minors differs from their treatment at English common law, it is helpful to first discuss the status of minors in the past, to give proper context to their modern privilege.

A. Historical Restriction

Although the law has traditionally regarded minors as a class subject to different powers and duties than adults, the exact rules governing minors have been in a constant state of flux. The law regarding minors’ ability to contract during the ninth and tenth centuries is very different from the law today. For example, during the tenth century, minors completely lacked the power to bind themselves to a contract.⁹ The law imposed a restriction on their ability to transact

5. Cecilia Kang, *Parents Areirate over Apple Kids’ Game Fees*, WASH. POST, Feb. 8, 2011, at A1.

6. *Boy from Strood Runs up £1,000 Xbox Bill*, BBC NEWS (Feb. 8, 2011), <http://www.bbc.co.uk/news/uk-england-kent-12393233>.

7. Andy Chalk, *Eight-Year-Old Girl Blows \$1400 on Smurfberries*, ESCAPIST (Feb. 9, 2011), <http://www.escapistmagazine.com/news/view/107662-eight-year-old-girl-blows-1400-on-smurfberries>.

8. Many historical cases refer to people under the age of majority as infants. This Article highlights the historical term for the benefit of the reader, but adopts the modern practice of referring to this class as minors.

9. Robert G. Edge, *Voidability of Minors’ Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA.

with other parties until they reached the age of majority, which at the time was fifteen years of age.¹⁰

At the time, judges did not recite their reasons for imposing such a burden on minors. Rather, the restriction was applied without much debate.¹¹ The absence of any substantiating rationale has left the field open to comment by various scholars.

1. Protectionist View

Some commentators have opined that minors were traditionally restricted from entering into contracts so that they would be protected from their own naïveté, and from adults who would take advantage of them.¹² This rationale parallels modern doctrines. While modern courts do not often delve into the relative merits of a bargain, instead preferring to leave the value judgment up to the parties, they do examine whether the parties were capable of making the bargain in the first place.¹³ For example, courts commonly will void contracts where the information presented by one party misled the other party,¹⁴ or where a party was not able to understand the ramifications of the agreement.¹⁵

As one scholar commented,

While Nomad tribes might abandon . . . infants who appeared to be weak, the solitudes of our law makers for the welfare of the young and otherwise helpless individuals goes far back in our civilization. In fact, the protection of the weak, helpless, and unfortunate has been strongly stressed in the religions of all our people from ancient times.¹⁶

Although not spelled out specifically, the protectionist view seems to argue that because minors do not have the proper maturity level, understanding of the world, or ability to bargain effectively, society should protect them from being irreversibly bound to any set of terms with another party.

2. Exploitive View

On the other hand, the exploitive view takes an alternate approach to the

L. REV. 205, 220 (1966).

10. *Id.*

11. *Id.* at 219.

12. *Id.* at 219–20.

13. 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.1–2 (2002) (discussing how courts also examine whether or not a party was under duress at the time an agreement was made, or in other words, whether a person is under the influence of a wrongful act or threat that overcomes his free will).

14. *Id.* § 28.13 (explaining that, in a number of jurisdictions, the remedy for misrepresentation is the voiding of a contract and restitution to restore the status quo ante).

15. *Id.* § 27.14 (discussing how persons under the influence of alcohol or narcotics may be legally incompetent to understand the nature and consequences of a contract, and in these cases courts may allow the party to avoid the contract).

16. Edge, *supra* note 9, at 219–20.

historic treatment of minors. According to the exploitive view, the protectionist view does not conform to the historic treatment of minors from the ninth to the nineteenth century.

First, we must recall the nature of the legal system between the ninth and the fifteenth centuries. The heart of the common law is based in feudalism, the system of rules in place to determine ownership of land during the Middle Ages.¹⁷ Land was the basis of wealth and social standing, and feudalism was important in determining how estates were divided and passed from person to person. During the thirteenth century, if a tenant died leaving an heir who had not yet reached the age of majority, the lord was appointed steward of the land.¹⁸ As steward, the lord was allowed full use of the land until the ward reached the age of majority.¹⁹ The lord had no duty to make an accounting of the profits generated from the use of the land to the ward.²⁰ Therefore, if a minor had the ability to contract, to create obligations outside the relationship between his steward and himself, he could potentially deprive the lord of the benefits of the use of the land.

Second, we must also consider the treatment of minors by their own parents. Until the eighteenth century, minors played an integral part in supporting their families. In an agrarian society, children contributed by working the family's land, but by the eighteenth century, many children were bringing home salaries from working in factories.²¹ "At common law . . . parents were entitled to the earnings and services of their minor child[ren]."²² Some states continue this practice to this day, even prescribing it by statute.²³ As long as the law withheld from minors the power to contract, parents could seek to regain any wages a minor may have discharged without their permission. Again, it is apparent that holding a minor incapable of entering into contracts significantly benefitted adults.

Third, it seems odd that a policy intended to protect minors from adults, who might choose to take advantage of minors' naïveté, would go so far as to completely exclude minors from entering into any contractual agreements. While prohibiting minors from engaging in any contract would protect minors from those who would attempt to obtain terms unfairly prejudicing them, it seems unduly harsh to craft a method of protection that also excludes them from contractual interactions with the world.²⁴

17. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 24 (3d ed. 2005).

18. Edge, *supra* note 9.

19. *Id.*

20. *Id.*

21. David Stern et al., *How Children Used to Work*, 39 *LAW & CONTEMP. PROBS.* 93, 100–01 (1975).

22. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE LEGAL STATUS OF ADOLESCENTS* 1980, at 12 (1980), available at <http://www.eric.ed.gov/PDFS/ED205265.pdf>.

23. CAL. FAM. CODE § 7500 (West 2000); OR. REV. STAT. ANN. § 109.030 (West 2003).

24. PERILLO, *supra* note 13, § 27.2. Adults often refuse to contract with minors because minors are incapable of giving binding assurance that they will not disaffirm their contracts. By

Fourth, the protectionist view loses credence upon an examination of the differing ages of majority over time. During the ninth and tenth century, the age of majority was fifteen years. Later, the age of majority increased as armies required older soldiers; as the weight of armor increased, stronger men were needed to bear the increased loads. During this time the age of majority reached twenty-one years.²⁵ Twenty-one years remained the age of majority for many centuries. In the United States, it remained so until the 1970's, when the age of majority was finally lowered to coincide with the voting age imposed by the Twenty-Sixth Amendment.²⁶ The fact that the age of majority has both increased and decreased over time suggests that there are other motivations behind the policy besides the maturity level of minors.

Finally, differing treatment between minors of different genders bolsters the criticism of the protectionist view. The age of majority for males reached twenty-one; however, females were generally held to have reached adulthood at eighteen.²⁷ Such differing treatment suggests that the age of majority had little to do with the cognitive abilities or maturity of a minor. This seems to be especially the case when considering that women, at the time, generally had fewer privileges than men.

Taken together, it becomes apparent that while it could be argued that the inability of minors to contract was intended to protect them from their lack of experience, there were other factors that influenced the rule, including factors that provided clear benefits to adults.

B. Modern Privilege

Over time, the common law has shifted its view of minors' ability to enter binding contracts. The harsh rule prohibiting minors from entering into contracts was eventually tempered to allow minors to make certain kinds of agreements. Courts began to determine the validity of minors' contracts based on the fairness of the terms of the contract. Contracts were divided into those that were prejudicial, possibly beneficial, and certainly beneficial. Based on these categories, courts held the contracts to be void, voidable, and binding, respectively.²⁸ Eventually, this stratified rule was discarded and supplanted by the modern view.

Today, most jurisdictions recognize that minors may enter into contractual agreements. The law, however, grants minors a special privilege to disaffirm their

refusing to contract with minors, adults are in essence preventing them from being able to trade and acquire services.

25. Edge, *supra* note 9.

26. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 22, at 25.

27. *Id.* at 12; see also *Stanton v. Stanton*, 421 U.S. 7, 8 (1975) (reciting facts from a lower court, which stated that in Utah males reach the age of majority at twenty-one years, but females reach the age of majority at eighteen years).

28. LORD, *supra* note 2, § 9:2.

contracts.²⁹ After a contract is disaffirmed, the contract is to be treated as if it never existed, and any consideration that changed hands is to be returned.³⁰ The reasoning behind allowing minors to choose when to disaffirm their contracts is that minors, it is assumed, will only choose to disaffirm contracts that are prejudicial.³¹ The privilege to disaffirm, however, is not unqualified. For example, states generally agree that minors may not disaffirm contracts for the necessities of life (e.g., clothing, food, medical care).³² If minors were allowed to disaffirm these types of contracts, then businesses would not deal with minors and minors would be denied access to the necessities of life.³³

Some courts have also reasoned that because disaffirmance is intended to protect minors from unfair contracts, disaffirmance may only be used as a shield to protect a minor and not as a sword against the other contracting party.³⁴ Under this theory, courts have held that minors may not use disaffirmance offensively. Case law on this point is broad and varied. Some courts seem to indicate that the difference between an offensive and defensive use of disaffirmance turns on which party seeks to restore the exchanged consideration. These courts reason that if disaffirmance is used as a defense to a breach of contract claim, the minor is not required to restore the lost value of the consideration obtained, only that which remains.³⁵ They distinguish this from cases where a minor uses disaffirmance to declare a contract void before seeking an action for restitution of the exchanged consideration. In those cases, the courts hold that a minor must restore the value of the benefits obtained before being allowed to disaffirm.³⁶

Other jurisdictions do not make this distinction. In New Hampshire, for example, courts do not distinguish between whether the minor is plaintiff or defendant.³⁷ Minors are liable in an action for restitution for the value of the benefits received. In this way, the New Hampshire approach protects minors from non-beneficial executory contracts while still recognizing the interests of the businesses dealing with them.³⁸

In the most recent modern interpretation of this doctrine, a court applied the New Hampshire doctrine to an online service. *A.V. v. iParadigms* involved a minor submitting his homework online using a service that required assent to a set of

29. *Id.* § 9:5.

30. *Id.* § 9:16.

31. *Id.* § 9:5.

32. *See, e.g.*, CAL. FAM. CODE § 6751 (West 2004 & Supp. 2012); *Norwood Nat'l Bank v. Allston*, 149 S.E. 593 (S.C. 1929); 43 C.J.S. *Infants* § 240 (2004).

33. *Cf. Norwood Nat'l Bank*, 149 S.E. 593. *But see* *Randall v. Sweet*, 1 Denio 460 (N.Y. 1845).

34. *A.V. v. iParadigms, L.L.C.*, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630 (4th Cir. 2009).

35. *See* PERILLO, *supra* note 13, § 27.6 (discussing the requirements of restitution upon disaffirmance of a contract).

36. *Id.*

37. *See id.* § 27.9 (summarizing the approach of courts in New Hampshire).

38. *Id.*

terms. The court held that even a seemingly minor benefit, like the ability of a student to turn in his homework, estops the minor from being able to disaffirm a contract.³⁹ The court stated that when a minor enters into any contract subject to conditions or stipulations, the minor cannot take the benefit of the contract without the burden of the conditions or stipulations. The court did not allow disaffirmance to be asserted because the minor had acquired a benefit. The court did not explicitly premise a requirement to restore consideration on whether the minor was plaintiff or defendant, but instead based disaffirmance on whether the consideration was returned.⁴⁰

Finally, although in some jurisdictions minors are estopped from using disaffirmance offensively, courts have held that, by itself, a misrepresentation by a minor, usually with regard to the minor's age, does not estop the minor from asserting the privilege.⁴¹

Once asserted, the effects of the privilege are significant. Courts generally regard a disaffirmed contract to have never existed. Any exchanged consideration is to be returned. Although minors are obliged to return any consideration they have obtained because of a contract, most courts agree that they are not legally responsible for any use of the consideration. If the exchanged consideration was an executed service, the minor is not responsible for the loss incurred by the other party.⁴² The only exception to this general rule is that when minors misrepresent their age, some jurisdictions will require them to account for the other party's losses.⁴³

The rationale behind the modern privilege to disaffirm has been left largely unexplained. Most courts seem to believe that the privilege is necessary to protect minors from entering into contracts they do not comprehend. Recently, one court followed this rationale while simultaneously rejecting another line of reasoning—that disaffirmance protects the parent's common law right to control their children. In *Gomes v. Hameed*, the Oklahoma Supreme Court interpreted Oklahoma law to mean that a minor's privilege to rescind a contract was not affected by a parent's consent to the contract.⁴⁴ The Court cited an Oklahoma statute requiring

39. *iParadigms*, 544 F. Supp. 2d at 481.

40. *Id.*

41. LORD, *supra* note 2, § 9:22. Different jurisdictions have differing views on misrepresentation by a minor. Some jurisdictions view the misrepresentation as a tort, while others view the misrepresentation as contractual thus allowing the party to recover damages based on the contract. Still others view misrepresentation as a sign of infancy and allow the minor to disaffirm despite a misrepresentation. *Id.*

42. *Id.* § 9:16. While the act of disaffirmance vests a right in the other party to recover the consideration, the restoration of the consideration is not a condition precedent to disaffirmance. Although some jurisdictions require, by statute or case law, a minor to restore consideration before avoidance, the prevailing view does not. *See, e.g.*, KAN. STAT. ANN. § 38-102 (West 2011); MONT. CODE ANN. § 41-1-304 (West 2011).

43. LORD, *supra* note 2, § 9:22.

44. *Gomes v. Hameed*, 184 P.3d 479, 489 (Okla. 2008).

court approval of agreements settling cases where a minor's rights are involved. Based on this reasoning, the Court held that parental consent does not remove a minor's right to disaffirm.

While the privilege of disaffirmance is both broad and strong, the issue has not been vigorously adjudicated in an online context. One possible reason for this is that the benefits of litigation, monetary or otherwise, are often of minimal value. But that is not the case where a business may be tied up in prolonged litigation in the form of class actions. In April 2011, a class-action lawsuit was filed against Apple over minors' in-app purchases of online goods discussed in the manner and flavor discussed in the Introduction.⁴⁵ In the case, *In re Apple In-App Purchase Litigation*, the purported class alleged that Apple's contracts to purchase in-app goods were voidable because Apple contracted with minors.⁴⁶ The plaintiffs also asserted that Apple violated the California Consumers Legal Remedies Act by promoting the in-app games as "free" with the intent to induce minors to make purchases.⁴⁷ As of the date of this Article, the case is ongoing, and could potentially cost Apple hundreds of thousands, if not millions, of dollars in legal fees, and potentially more in damages.

Furthermore, businesses often have an incentive to avoid being seen as taking advantage of minors. In early 2011, the Federal Trade Commission along with a United States Senator began investigating businesses that were providing free game downloads and in-app purchases marketed to minors.⁴⁸ Thus, as the value of minors' transactions grow, parties will become increasingly unwilling to forgo the cost or benefit of their transactions (depending on which side of the litigation they fall on), and minors may begin asserting their privilege more frequently.

II. THE EFFECT OF E-COMMERCE

The advent of the Internet and the proliferation of Internet-connected devices among people around the world have not only changed the way people communicate, but also how they do business as well. Year after year, more and more people of all ages turn to the World Wide Web (the web) as a source of

45. Amy Lee, *Apple Hit with Class Action Lawsuit over Minors' Purchase of In-App Goods*, HUFFINGTON POST (Apr. 16, 2011), http://www.huffingtonpost.com/2011/04/15/apple-hit-with-class-acti_n_849936.html.

46. Consolidated Class Action Complaint at 1, *In re Apple In-App Purchase Litigation*, No. 11-cv-1758 JF, 2011 WL 2428921 (N.D. Cal. filed June 16, 2011).

47. *Id.* at 12.

48. James R. Hood, *Apple Sued for Soaking Children with Smurfberry Charges*, CONSUMER AFFAIRS (Apr. 12, 2011), <http://www.consumeraffairs.com/news04/2011/04/apple-sued-for-soaking-children-with-smurfberry-charges.html>; Leanna Lofte, *FTC Investigating Smurfberries, Other In-App Purchases*, IMORE (Feb. 23, 2011), <http://www.imore.com/2011/02/23/ftc-investigating-smurfberries>; Kim Zalewski, *FTC Investigating Smurfberries*, CELL PHONE TREK (Feb. 23, 2011), <http://www.cellphonetrek.com/ftc-investigating-smurfberries.html>.

information. As people increasingly integrate this resource into their lives, and gain comfort and familiarity with its use, many are beginning to take advantage of the different types of interactions that this form of high-speed communications technology allows.

A. Growth of the Web as a Market

By 2015, the world population is expected to be about seven billion people.⁴⁹ Strikingly, at the same time, the number of devices connected to the Internet is estimated to grow to two devices per capita, or fourteen billion devices.⁵⁰ In 2010, the estimated number of devices connected to the Internet was only 6.8 billion, meaning the number of devices is estimated to grow by more than the size of the world's population in only five years.⁵¹ In North America alone, penetration of Internet access among the population is already over seventy-eight percent.⁵² Worldwide, since 2000, the number of Internet users has risen by four hundred percent.⁵³ Over the past five years, global Internet traffic has increased eightfold.⁵⁴ By 2015, an estimated six million households will each generate over one terabyte of Internet traffic a month.⁵⁵ Clearly, Internet-connected devices are becoming more and more ubiquitous and Internet access is becoming available to an increasing number of people.

Increased Internet use has produced increased uncertainty about Internet users' rights. To solve this uncertainty, many websites have turned to contracts to define a relationship between a website and its visitors, even if the contract does not contemplate monetary transactions. Many commercial websites have some form of terms of service (TOS).⁵⁶ If the terms are not explicitly presented to users when users sign up for a service under a "click-wrap" agreement (i.e., an agreement where the user "clicks to accept the terms" and assent to the TOS), the terms are usually made available via a URL link as a "browse-wrap" agreement (i.e., a notice stating that merely by using the site, the user assents to the TOS).

49. *Population Growth Rate*, WORLD BANK GROUP, <http://www.worldbank.org/depweb/english/modules/social/pgr/chart1.html> (last visited Mar. 30, 2012).

50. CISCO SYS., CISCO VISUAL NETWORKING INDEX: FORECASTING AND METHODOLOGY 2010–2015, at 1 (2011), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

51. See *id.* (estimating the number of Internet-connected devices in 2010 as one per capita); see also *Total Midyear Population—World*, U.S. CENSUS BUREAU, <http://www.census.gov/population/international/data/idb/region.php?N=%20Region%20Results%2&T=6&A=aggregate&RT=0&Y=2010&R=1&C=> (last visited Mar. 30, 2012) (estimating the 2010 global population at 6.8 billion).

52. *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Feb. 10, 2012).

53. *Id.*

54. CISCO SYS., *supra* note 50.

55. *Id.*

56. Terms associated with the use of a website, whether contractual or not, have many different names; this paper simply refers to them generally as terms of service.

The ability to clearly define and spell out the rights and obligations between parties is vital to conducting business because that ability is the primary way to bind parties to one set of standards and rules. As more and more people pursue transactions online, it is only natural that TOS agreements will become increasingly important.

B. Minors on the Internet

The web is readily accessible to minors virtually anywhere today. Minors may access the web from home, school, or, with the assistance of smartphones, the mall. Growing up surrounded by the Internet has predisposed minors to being comfortable using the web and always being connected. This is especially true given the recent widespread proliferation of wireless smartphone and tablet devices. Because of the time they have spent using modern communications devices, adolescents in particular have become accustomed to modern technology and modern methods of business.

A survey by an Internet security firm revealed that ten percent of children under the age of ten in the United Kingdom have an iPhone, and one in twenty primary school children have an iPad.⁵⁷ The same study also revealed that twenty-five percent of minors have their own e-mail accounts.⁵⁸ Another study conducted in 2009 by ComScore and AdMob digital marketing agencies found that sixty-nine percent of iPod Touch users were between the ages of thirteen and twenty-four.⁵⁹

One type of web activity popular among adolescents is social networking. One study found that in 2007, over fifty-five percent of minors between the ages of twelve and seventeen were involved in online social networking.⁶⁰ In a 2009 survey by the Pew Research Center's Internet and American Life Project, researchers found that thirty-eight percent of twelve-year-olds living in the United States used social networks.⁶¹ More recently, in June 2011, *Consumer Reports* estimated that approximately 7.5 million Facebook users were under thirteen years of age.⁶² Because Facebook requires its users to be at least thirteen, these minors were all violating the terms of their agreements with Facebook.

57. *Westcoastcloud Survey Reveals 1 in 10 UK Primary School Children Have iPhones*, WESTCOASTCLOUD, http://www.westcoastcloud.com/_blog/?_article=69 (last visited Jan. 28, 2012).

58. *Id.*

59. Phillip Elmer-DeWitt, *You iPhone. Me iPod Touch*, CNNMONEY (June 16, 2009), <http://tech.fortune.cnn.com/2009/06/16/you-iphone-me-ipod-touch>. The scope of the study was based on AdMob's user base, and is not necessarily representative of the overall mobile user population.

60. Amanda Lenhart & Mary Madden, *Social Networking Websites and Teens*, PEW INTERNET (Jan. 7, 2007), <http://www.pewinternet.org/reports/2007/social-networking-websites-and-teens.aspx>.

61. Linton Weeks, *Social Networks: Thinking of the Children*, NPR (July 11, 2011), <http://www.npr.org/2011/07/11/137670547/social-networks-thinking-of-the-children>.

62. *Id.*

Minors also engage in online games and activities, including virtual worlds such as Webkinz, Club Penguin, Gaia Online, Virtual MTV, Habbo, World of Warcraft, and Second Life. In December 2009, the Federal Trade Commission submitted a report to Congress on virtual worlds and minors, noting that there were “as many as two hundred youth-oriented live, planned, or beta virtual worlds.”⁶³ This number, of course, does not appear to account for the minors who access virtual worlds and games that are *not* youth-oriented. According to a 2009 report cited by *The Economist*, a market researcher found that nearly ten million children and teenagers visit virtual worlds regularly, a number that is expected to increase to fifteen million by 2013.⁶⁴

Minors are important consumers on the web. Many of the virtual worlds that minors play in, for instance, require a monthly paid subscription. Alternatively, other virtual worlds use a micropayment model, where there is no charge to play the game but the players may purchase content or virtual goods (such as weapons, virtual currency, clothes, or household items) for a premium. This is sometimes referred to as a freemium or free-to-play model. When minors desire to make such purchases, their parents usually provide the means.

With the introduction of ubiquitous platforms such as the iPad, the iPhone, and other smartphones, freemium games have become increasingly popular. As a result, there are more opportunities to engage consumers and drive sales of virtual goods in these games.

Gaming companies like Zynga have led the freemium revolution. Zynga, best known as the creator of the well-known Facebook games Farmville and Mafia Wars, has over 220 million people playing its games and is valued around seven to nine billion dollars.⁶⁵ Since the company was founded in July 2007, it has generated over \$1.5 billion in revenues.⁶⁶ The vast majority of Zynga’s revenues come from its virtual goods.⁶⁷

Zynga’s games, as well as other popular game applications, can be played on the iPhone, the iPad, as well as other connected devices. Based on a 2011 study conducted by Flurry Analytics, which surveyed a sample size of twenty million users across 110 thousand Android and iOS applications, children aged between thirteen and seventeen are responsible for five percent of the money spent on

63. FED. TRADE COMM’N, VIRTUAL WORLDS AND KIDS: MAPPING THE RISKS (2009), <http://www.ftc.gov/os/2009/12/oecd-vwrpt.pdf>

64. *Online Playgrounds*, *ECONOMIST*, July 25, 2009, at 62.

65. Dean Takahashi, *How Zynga Grew from Gaming Outcast to \$9 Billion Social Game Powerhouse*, *VENTUREBEAT* (Dec. 12, 2011), <http://venturebeat.com/2011/12/12/zynga-history>.

66. *Id.*

67. Pascal-Emmanuel Gobry, *How Zynga Makes Money*, *BUS. INSIDER* (Sept. 28, 2011), http://articles.businessinsider.com/2011-09-28/research/30211715_1_video-ads-zynga-banner-ads/2.

freemium games—a seemingly high number for an age group that does not itself have any means to pay.⁶⁸

Minors are able to engage in transactions requiring money if adults, such as their parents, are willing to let them use their credit cards. Alternatively, credit card issuers such as American Express have introduced prepaid cards aimed at minors so that minors are no longer required to use their parents' cards for every purchase.

Minors are also heavily involved in generating intellectual property online. Aspiring young artists have used YouTube to distribute videos of their performances in the hopes that they will develop fans and be discovered by recording companies. The creators of myYearbook originally conceived of their website when they were fifteen and sixteen years old.⁶⁹ A minor created a Twitter account that became immensely popular among users.⁷⁰ He then leveraged the popularity of his account and signed agreements allowing the name to be used in conjunction with another business's activities.

Therefore, online, minors are increasingly acting like adults—they shop, buy virtual goods, play games, and create intellectual property. In fact, as the next Section details, it is virtually impossible to determine an end user's actual age because minors and adults seem to navigate the web similarly.

1. Experience Developed While Transacting Online

If the rationale behind the privilege of disaffirmance is rooted in society's desire to seek a method of protecting minors from their own naïveté, society should consider when such a disability exists.

Authors have argued that empirical data suggests that adolescents possess the ability to make decisions at a level similar to that of adults.⁷¹ It has been suggested that because adolescents' decision-making ability is similar to adults', adolescents' privilege to disaffirm should be mitigated.⁷² Even those that argue against a change in the doctrine of disaffirmance seem to agree that data suggests that minors achieve adult levels of cognitive functioning by age fourteen.⁷³

In the past, there may have been good reason to find that minors lacked

68. Jordan Mallory, *Freemium Isn't Free: 25 to 34 Year Olds Spend the Most on Extra Content*, JOYSTIQ.COM (Sept. 10, 2011), <http://www.joystiq.com/2011/09/10/freemium-isnt-free-25-to-34-year-olds-spend-the-most-on-extra>.

69. Alyson Shontall, *This 21-Year-Old Just Sold Her Startup for \$100 Million*, BUS. INSIDER (July 20, 2011), http://articles.businessinsider.com/2011-07-20/tech/30027081_1_quepasa-early-retirement-users.

70. Complaint at 8, *Deck v. Spartz, Inc.*, No. 2:11CV01123, 2011 WL 2322947 (E.D. Cal. dismissed Nov. 29, 2011).

71. Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 253 (2007).

72. *Id.*

73. Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 628 (2011).

significant experience when engaging in transactions with businesses. The role of minors in antiquity was vastly different from what it is today. In an agrarian society, children worked at home from an early age.⁷⁴ Because children's occupations were not expected to differ from those of their parents, their educations could also be imparted at home.⁷⁵ Combined with the fact that adult men were considered the economic heads of their households,⁷⁶ there was little reason for minors to interact with the world outside their homes.

Later, with the onset of industrialization, some minors transitioned from agricultural work to jobs in factories. This move met significant resistance from reformists, philanthropists, and labor unions.⁷⁷ While many sought to limit the role of minors in the industrialized work force as a means to protect minors, some saw it as a means to preserve the economic authority of fathers.⁷⁸ Labor unions saw the introduction of child laborers as a threat to the wages of adults. If factories could hire minors at lower wages, child labor could dilute the value of adult workers. Furthermore, if factory owners knew that minors were earning salaries to supplement their families' incomes, they might attempt to negotiate lower wages for their adult workers. These threats led to the passage of child-labor and minimum-wage laws, respectively.⁷⁹

Thus, as agricultural work was supplanted by an industrialized society, the role of minors outside the home remained limited. Where minors did obtain work, society curbed their ability to transact by designating their income to be family income.⁸⁰ For the most part, however, instead of going to work in factories, minors devoted more time to their education.

Today, minors' ability to interact with others is vastly different from what it was in the past. Although most minors still attend school, they are no longer isolated from transacting business with companies, even ones across the globe. The introduction of the Internet allows minors to easily communicate with others while remaining in their own homes. As discussed above, the fact that minors have limited access to electronically transferrable monetary funds is not a barrier to their ability to engage in business. Even where monetary payment is required, parents may be willing to allow their children to use their credit cards to engage in some transactions.

Because minors now have the ability to easily interact with others regardless of their physical location, they are developing experience with business

74. Stern, *supra* note 21, at 95–97.

75. *Id.* at 97.

76. *Id.* at 103.

77. *Id.*

78. *Id.*

79. *Id.* at 103–04.

80. OR. REV. STAT. ANN. § 109.030 (West 2003); *see also* Stern, *supra* note 21, at 105 (discussing the role of wages earned by minors as family income).

transactions at earlier ages. The experience minors gain from interacting with businesses at young ages may be shown by their sophistication in navigating certain online restrictions. Minors have demonstrated the ability to circumvent the restrictions that businesses have erected to prevent minors from entering into their sites. For example, Facebook requires its users to enter their birth date during registration. If a user's age is less than thirteen, the user is not allowed to register. To circumvent Facebook's age requirement, a user would have to enter false biographical information. Facebook has admitted that it is forced to remove twenty thousand minors a day for misrepresenting their ages. Because the company only restricts minors under the age of thirteen from registering, one may infer that Facebook then removes twenty thousand minors under the age of thirteen a day. This fact is significant because it shows that a large number of minors who still have at least five years before attaining the age of majority already have the skill to understand the restriction in place and the means to circumvent it.

In light of these changes, society must consider whether minors still require protection from their own naïveté in an online environment. If minors are gaining experience interacting with businesses online starting from very early ages, the need to protect them from their lack of experience is mitigated. If this need is mitigated, then the privilege must be reevaluated. It would seem irrational to continue to uphold a privilege meant to protect minors from a disability that no longer exists.

2. Disregard of Minors' Experience Online

While there are significant reasons to believe that minors develop an understanding of their agreements at earlier ages, clearly it cannot be said that all minors understand all of their online contracts. Such an attempt to group every minor into one category suffers from the same vulnerabilities as the rule currently in place.

Instead, a better course of action would be to hold minors accountable when it can be demonstrated that they have an understanding of the terms they have agreed to. Minors are not the only class of people given the privilege to disaffirm their contracts. On the contrary, society protects other classes of people who are susceptible to make poor judgments when facts exist that support a finding of a permanent or temporary condition affecting their reasoning abilities. For example, the law provides intoxicated persons and the mentally infirm with the privilege to disaffirm their contracts. However, while minors' privilege may be asserted at anytime until the age of majority,⁸¹ both intoxicated persons⁸² and the mentally infirm⁸³ require a finding of fact establishing the basis of their privileges.

81. A minor has the privilege to disaffirm until he reaches the age of majority, or some reasonable time thereafter. A discussion of the length of a reasonable amount of time is outside the

Therefore, there is a disparity between the ways society treats two groups of people who are fundamentally faced with the same disability. In both cases, society is concerned with protecting against some mental inability to properly make judgments. However, while minors are given the blanket ability to disaffirm almost any contract until they reach a certain age, other classes of parties must show facts that support their assertions that they were incompetent to enter into their agreements.

Such a rule makes little sense and does not address the societal concern supporting it. Instead of examining the actual mental state of a minor, the law creates a broad rule allowing minors to choose to disaffirm their contracts. Because courts make no effort under the current rule to either examine whether the terms of the contract are fair or inquire whether the minor understood the terms before allowing the minor to escape contractual liability, the rule may be subject to abuse. A bright-line rule that continues to ignore the experience of minors in engaging in online transactions and the factors highlighted above is simply unfair to those transacting business, willingly or not, with minors.

C. The Problem of Identity on the Internet

Never before have so many people been able to engage in global transactions so easily. But the same technology that is used to facilitate these transactions also obfuscates the identity of those who seek and provide information about their identity. As the discussion below will reveal, companies are exposed to significant uncertainty and risk when they are unable to definitively ascertain the identities of their customers, especially when those customers turn out to be minors.

Today, Internet users essentially rely on two factors to determine the identity of the person they are interacting with online: the person's access to verifiable personal information, and the person's assertion that such information is truly his own. While a company may be able to verify the validity of some types of information, such as whether a credit card number is authentic, there is no good way to verify that the information actually corresponds to the person who provided it.

This contrasts sharply with transactions completed in person. When transactions are completed in person, businesses can more easily determine whether they are dealing with a minor by using the person's appearance or voice to estimate the person's age. Even if transactions are completed by phone, businesses can still raise a red flag if the person's voice sounds like he or she is a

scope of this Article.

82. PERILLO, *supra* note 13, § 27.10. Unlike the straightforward question of a person's age, the question of whether a person is mentally infirm is subject to a legal test.

83. *Id.* Because the state of intoxication is often considered a form of mental infirmity, an inquiry as to whether the person understood the nature and consequences of his transaction would apply.

minor. Although, surely, there are some minors who are able to transact business in person without raising suspicion, the number pales in comparison to that of children agreeing to contracts on the Internet today. As will be discussed in later sections, the inability of businesses to confirm their customers' identities raises certain concerns regarding the ability of businesses to mitigate risk, while simultaneously providing a measure of assurance that businesses cannot target specific classes of people for exploitation.

1. Balancing Interests Between Minors and Adults

At common law, minors were incapable of entering into binding agreements with any other party. Where a minor was a party to a contract, the contract was automatically void, and the agreement was treated as if it had never taken place. This bright-line rule provided absolute clarity to businesses considering bargaining with minors. If a business chose to engage in a transaction with a minor, the business would be unable to enforce any contractual agreements. Thus, a business could weigh the benefits of bargaining with a minor against the risks of having a void and unenforceable agreement.

Later, when courts began to regard these contracts as being voidable and not simply void, minors gained the ability to bind themselves to contracts, but businesses gained significant uncertainty. Although minors' contracts were no longer considered void, minors had unilateral control of the legal status of their agreements. After a contract was formed, the party bargaining with the minor was bound, but the minor could either choose to complete the minor's portion of the contract or void it altogether. Any consideration furnished by the minor had to be returned, generally without accounting for any losses that would be suffered by the other party.⁸⁴

While some viewed disaffirmance as a privilege afforded to minors, others saw it as a disadvantage. Legal scholars recognized that minors' inability to irreversibly bargain with others effectively excluded them from participating in commerce;⁸⁵ although the new doctrinal framework allowed minors to enter into contracts, a minor's—or any person's—unilateral desire to bargain was not enough to form a binding agreement. The other party had to agree as well. Therefore, a tension existed between the two groups: minors had the privilege to disaffirm, but adults, wary of the privilege, could avoid contracting with minors in the first place.

Certain businesses were more vulnerable to the effects of the privilege to disaffirm than others. Although minors could disaffirm their contracts, they were

84. LORD, *supra* note 2, § 9:16.

85. PERILLO, *supra* note 13, § 27.2. Viewed differently, the power to disaffirm can be seen as a legal and practical disability because parties may not want to enter into a contract that may later be voided.

required to restore any consideration still in their possession. That, however, did not extend to a requirement to restore all of the consideration they had received.⁸⁶ Accordingly, businesses selling durable goods had the greatest amount of protection, and sellers of consumable goods or services carried a greater risk. Service providers were especially vulnerable because their services could not be returned, while sellers of consumable goods stood at least a chance of recovering their products. Only a minority of courts held minors liable for any losses the business would incur, some even limiting liability to cases where a minor had misrepresented himself.⁸⁷

Generally, however, the burden fell on businesses.⁸⁸ The rationale behind this seemed to be that a business could alleviate the risk generated by the possibility of a minor disaffirming by choosing to avoid contracting with minors in the first place.⁸⁹ At the time this rule was developed this was a feasible choice. As more and more transactions occur online, however, the efficacy of this alternative becomes less reasonable, and the rationale loses its strength.

2. *The Loss of Balance for Online Transactions*

When the common law rule changed to allow minors to bind themselves to contractual agreements, transactions were, for the most part, still completed between parties interacting face-to-face. Technologies that allow people to communicate remotely in real time, such as the Internet or even the telephone, had not yet been invented. Because of the direct face-to-face nature of transactions at the time, the approximate ages of minors were readily apparent to those considering contracting with them. Even if age was not apparent, a party considering bargaining with minors was at least in a position to use physical characteristics to establish such a possibility, information that could be used to require a deeper inquiry into their age before proceeding with a transaction.

Thus, although the doctrine of disaffirmance exposed businesses to significant risk, they had the opportunity to mitigate that risk by factoring in the observed age of the minor when deciding whether to agree to a contract. This ability balanced a minor's strong privilege to unilaterally disaffirm his contract.

The recent shift toward completing transactions online has changed this

86. LORD, *supra* note 2, § 9:16.

87. *Id.* § 9:22.

88. *Id.* § 9:16. The prevailing view among jurisdictions has traditionally favored the protection of minors over the possible burden on the adult party. The general rule seems to be that the infant's privilege allows the minor to disaffirm the whole transaction, leaving upon each party the burden of demanding and regaining what each has parted with.

89. By comparison, the Second Restatement of Contracts points out that the contracts of intoxicated persons are only voidable if the other party is aware of the intoxication and still proceeds with the transaction. The burden lies with the non-incapacitated party to avoid the transaction; however, if he is not aware of the intoxication, there is no privilege to disaffirm. PERILLO, *supra* note 13, § 27.14.

dynamic. Computer software is unable to decipher, or confirm, a customer's identity information beyond that which is provided by the person. Businesses cannot actually verify that the information presented corresponds to the identity of a specific customer. Online retailers are unable to use the secondary forms of age verification that are available to brick and mortar stores. For example, if a liquor retailer suspects a customer is not of sufficient age, he can ask to see the customer's identification before completing a sale. In this manner, the retailer has available to him a secondary method of verifying the age of the customer purchasing alcohol. The veil of the web not only prevents online retailers from using visual and aural cues, but prevents them from using secondary methods of age verification as well.⁹⁰

While it seems that a business would be able to avoid this risk by including terms in its contract requiring potential parties to be of, or older than, the age of majority, this solution is not without its problems. Even if a business chose to include such terms in its agreement, most courts have held that misrepresentations by minors regarding their age are no bar to disaffirmance or to the minors recovering their consideration.⁹¹ Therefore, even if the contract required that all parties be over eighteen years of age, a minor who misrepresents himself as being an adult may lose only the consideration obtained from the business, if any still exists. Such a rule effectively eviscerates a business's ability to protect itself from minors who would choose to misrepresent their age.

Furthermore, it is evident that some minors are willing to misrepresent their ages so that they may use the services offered by some websites. For various reasons, such as complying with the Children's Online Privacy Protection Act (COPPA), many websites restrict access to their site if users are below a certain age.⁹² Unfortunately, websites' attempts to limit access have not always worked as intended.

The United States Department of Homeland Security's Computer Emergency Readiness Team notes that some minors may misrepresent their ages to gain access to social networking sites.⁹³ More and more, minors are attempting to gain access to websites to interact with their friends and peers, even when the sites forbid them from using the service. Minors, apparently, are aware of the

90. For various reasons, including privacy concerns, online retailers do not have an electronically accessible database that is equivalent to asking to see a person's driver's license by which to verify a person's age.

91. LORD, *supra* note 2, § 9:22.

92. Statutes such as the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506 (1998), prevent websites from storing personally identifying information of any person aged thirteen or younger. Because certain websites require the storage of personal information to function, e-mail, Facebook, etc., these sites choose to restrict those under thirteen years of age from creating accounts because the special restrictions required by COPPA create too large a burden.

93. *Staying Safe on Social Network Sites*, U.S. DEP'T OF HOMELAND SEC., <http://www.us-cert.gov/cas/tips/ST06-003.html> (last visited Jan. 21, 2012).

restrictions and choose to misrepresent themselves so that they may obtain the benefit of the services they seek.

Because of the web's ability to obfuscate a person's identity, and the ability of minors to disaffirm even after making a misrepresentation, businesses face greater difficulties identifying their customers and an increasing burden from minors' ability to disaffirm.⁹⁴

III. QUESTIONING THE CONTINUED RELEVANCE OF DISAFFIRMANCE

A. General Disaffirmance as a Supplemental Protection

Like all persons engaging in online contracts, minors possess significant traditional legal protections against contracts with terms heavily skewed in favor of another party.

All online transactions have numerous safeguards that protect those entering into them. Although the focus of this paper is the minor's privilege to disaffirm, to support an argument that a general privilege of disaffirmance is overly broad, it is helpful to briefly discuss other protections available to contracting parties.

1. Discouraging Unfair Terms

Courts take a great interest in the use of standardized contracts of adhesion, especially in an online setting. The use of both click-wrap and browse-wrap contracts has become widespread as more and more people enter into contracts on their computers. The ease with which a company can distribute, modify, and store electronically signed agreements has created numerous legal issues.

i. Standardized Contracts

By and large, transactions between companies and customers are completed in the form of standardized contractual agreements. A uniform set of rules provides businesses with a consistent set of practices that may be used when transacting with any customer. A standardized set of terms also prevents an agent of a company from agreeing to a set of terms inconsistent with the desires of the business at large. Therefore, standardized contracts have the effect of streamlining business operations by ensuring that most customers are treated similarly.

Standardized contracts also allow the Internet to play a larger role in completing transactions. When entering into a contract on a website, the terms are offered by the business's web servers. In brick and mortar stores, if a customer attempts to bargain for terms different from those appearing in a standardized contract, an agent of the store may understand the policy behind the store's contract and alter the terms while still upholding the store's policy. In contrast, a

94. See, e.g., Consolidated Class Action Complaint at 1, *In re Apple In-App Purchase Litigation*, No. 11-cv-1758 JF (N.D. Cal. filed June 16, 2011).

web server has no such ability. Technology has not yet developed to the point that a company can rely on a computer to alter or negotiate the terms of an agreement in real time, outside of possibly automating decisions on pricing.⁹⁵ Because of this limitation, the use of computers on the web generally requires the use of standardized terms for a contract. The web server is only able to offer what the business has already allowed it to agree to—the set of standardized terms it has already approved.

Therefore, there is little need to worry that a business will try to implement prejudicial terms when dealing with minors when it would not also do so with adult customers. The desire to maintain standardized terms means that the same terms that apply to adults will likely apply to minors. Thus, there is diminished concern that a company will seek to take advantage of a minor, because doing so would risk alienating its adult customers as well.

Because companies often attempt to have standardized terms, society may rely on a company's own business interests to steer it away from singling out minors with objectively prejudicial terms. If, for example, a business decided to pursue a course of action by which it sought to take advantage of a minor by including prejudicial terms in its contract, adults viewing the prejudicial terms would either seek to avoid transacting with the business or seek to have those terms deemed unconscionable and unenforceable. Businesses' desire to capture maximum market share reduces the risk that minors will be taken advantage of in standardized contracts.

ii. Proving Assent

A crucial step in determining whether a minor, or any user, has agreed to a contract is determining whether there is assent. Without assent, there can be no contract. Therefore, if a party enforcing a contract cannot show assent, that party cannot enforce the terms of the agreement.

Hornbook contract law provides that assent may be express or implied. In many ways, this is the difference between click-wrap and browse-wrap contracts.⁹⁶ Click-wrap agreements require those agreeing to their terms to do so expressly before moving to a different part of the site, usually by clicking on some text stating the person agrees, or even clicking a box saying the terms have been read before clicking the agree button.⁹⁷ Because a click-wrap agreement requires an

95. Various websites allow users to re-price their inventory so that it is the lowest price offered in the marketplace. Similarly, eBay allows bidders to enter a maximum bid, and then it makes automated bids up to that price.

96. See 2 IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 21.03[2] (2011). The act of clicking on a click-wrap contract, especially where the act of clicking is understood to show acceptance of terms, has been held as showing express consent. On the other hand, in a browse-wrap contract, where a click is not required to proceed, the court must usually infer consent from the other actions of the user. *Id.*

97. *Id.*

explicit action, there is more certainty that assent has been provided.⁹⁸ On the other hand, the text of a browse-wrap agreement is usually posted on a site, but does not require users to explicitly agree to the terms of an agreement before being able to access the site.⁹⁹ Websites are more likely to use browse-wrap agreements in situations when ease of use outweighs the normal liability associated with everyday transactions.

Assent is most clearly shown by an affirmative action, such as clicking text stating that a party agrees to the terms of the agreement. From a user interaction perspective, however, a business may not find such a requirement to be ideal. For example, if a news website requires a user to expressly accept its TOS every time a change to the website is made, the user may become frustrated with the delay in accessing the news and go to a different website for the same information.

The news website may point out that the user's assent may be implied by his continued use of the website. In practice, however, implying assent from the conduct of a user in online contracts is much more difficult than if it had been expressly required in the first place.¹⁰⁰ Where express assent may be the basis for summary judgment, enforcing a contract based on implied assent usually requires a trial.¹⁰¹

Contracting parties of any age, including minors, benefit from business's burden to prove assent to implied terms. If a business cannot show that a user took an action implying consent to the terms of a contractual agreement, those terms cannot be enforced against the user; therefore, users are protected against having terms enforced against them that they did not agree to, regardless of their age.

iii. Unconscionable Terms

Even when courts find assent to click-wrap or browse-wrap contracts, they do not enforce the terms without further review. Where a standardized unilateral contract is formed, courts will not enforce unconscionable terms.¹⁰²

The law recognizes two forms of unconscionability—procedural and substantive. While some jurisdictions require a showing of both,¹⁰³ other jurisdictions require only a showing of one.¹⁰⁴

Procedural unconscionability involves the manner in which the terms were

98. *Id.*

99. *Id.*

100. *Id.* § 21.03[1].

101. *Id.*

102. *Id.* § 21.04[1].

103. *See, e.g.,* Davis v. O'Melveny & Myers, 485 F. 3d 1066, 1072 (9th Cir. 2007) (stating that a party must show both procedural and substantive unconscionability to support an assertion that a contract is unconscionable).

104. *See* BALLON, *supra* note 96, § 21.04[1].

reached. Many contracts on the web are contracts of adhesion—standardized contracts drafted by a party of superior bargaining strength that require subscribing parties to choose either to accept or reject them.¹⁰⁵ In such cases, there is a strong indication of procedural unconscionability because a customer has no opportunity to bargain on the terms of the agreement. In fact, in *Bragg v. Linden*, a district court applying California law simply stated that all contracts of adhesion are procedurally unconscionable.¹⁰⁶

California law, however, requires a showing of both procedural and substantive unconscionability.¹⁰⁷ Even if an agreement is procedurally unconscionable, “it may nonetheless be enforceable if the substantive terms are reasonable.”¹⁰⁸ A subscriber to a contract may show “overly harsh or one-sided results that ‘shock the conscience’” to satisfy the requirement of substantive unconscionability.¹⁰⁹ For example, courts found substantive unconscionability where terms required arbitration but allowed the stronger party to choose the location.¹¹⁰ California law requires an arbitration remedy to contain a “modicum of bilaterality.”¹¹¹

The Uniform Commercial Code requires a hearing to determine whether unconscionability exists once a party claims that it does.¹¹² The Official Comment states that the purpose of the section is to allow courts to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability, without determining whether it is contrary to public policy or the purpose of the contract.¹¹³ The comment further states that “the basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the term involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”¹¹⁴

Therefore, parties have the benefit of having a court review the terms of a contract for unconscionability. In certain jurisdictions, such as California, contracts of adhesion already satisfy the test for procedural unconscionability. The availability of this protection mitigates the need for a privilege of disaffirmance.

105. *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605–06 (E.D. Pa. 2007).

106. *See id.* at 605. This strong statement derives from the fact that a contract of adhesion, by its definition, excludes the possibility of bargaining.

107. *Davis*, 485 F. 3d at 1072 (applying California law).

108. *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1173 (N.D. Cal. 2002) (applying California law).

109. *Bragg*, 487 F. Supp. 2d at 605.

110. *Id.* at 607.

111. *Id.*

112. U.C.C. § 2-302(2) (2004).

113. *Id.* § 2-302 cmt. 1.

114. *Id.*

2. Parental Supervision

It is important to remember that minors do not engage in online transactions in a vacuum. Although this Paper argues that minors should not be able to escape their contracts by disaffirming them, by no means should it be interpreted to suggest a shift of responsibility away from parents in monitoring the activities of their children online. While parents cannot be expected to monitor all of their minor children's activities online, it is not unreasonable to expect parents to supervise the use of some sites, especially sites that receive a high amount of traffic from minors. Because parents do monitor the activities of their children online, businesses will be disinclined to insert prejudicial terms, even if they expect their audience to be mainly composed of minors.

The privilege to disaffirm has few restrictions. For this reason, some parents may feel disinclined to actively monitor their children's online activities because the parents are aware that their child may later disaffirm any contractual agreements the child may enter into. By tempering minors' privilege to disaffirm their contracts, the change might incentivize parents to take a more active role in monitoring the activities of their children online. The result would provide even greater protection from businesses that are suspected of prejudicing minors because of the increased level of parental scrutiny.

One situation where parental supervision is inherently required is where a contract involves monetary payment. As will be discussed in the next Section, electronic forms of payment contain basic safeguards that can mitigate the need for disaffirmance.

i. Authorized Transactions

If a parent authorizes a minor to make charges on the parent's credit card, the privilege of disaffirmance does not affect the validity of the transaction.¹¹⁵ There are several ways a parent may authorize a purchase: the parent may explicitly allow a minor to use the parent's credit card information, or the parent may cloak the minor with a veil of authority by allowing the minor to use the parent's account where the credit card has already been attached to the account. In either case, a rule that tempers the privilege to disaffirm would not affect the validity of the transaction.

115. The use of a credit card creates an obligation to pay between the cardholder and the issuing bank. When parents authorize minors to use their credit cards, they confer upon the minors the power to create additional obligations to pay between the cardholder—the parent—and the issuing bank. RESTATEMENT (SECOND) OF AGENCY § 21 cmt. on subsection 1 (explaining that a minor or other person who is so incompetent that he cannot bind himself to contract can still bind a principal who appoints him as an agent) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 3.05, illus. 1 (2006). Disaffirmance is not related to credit card liability because credit card liability is established between the cardholder and the credit card issuer; a minor only acts as an authorized agent binding the cardholder to the agreement. The cardholder has no right to disaffirm due to capacity, or lack thereof.

Hornbook law states that agents may bind principals regardless of the actual capacity of the agents to contract for themselves.¹¹⁶ When cardholders allow agents to use their credit cards, they allow themselves to be bound by the agents' decisions. Cardholders would likely only do this if they were in a position to judge the responsibility and judgment of the agent.

When parents authorize their children to make credit card purchases, they are liable for any resulting transactions. Parent-cardholders are not, and should not be, able to escape liability for a transaction by placing it at the feet of a minor whom they empowered to act as their agent by providing the minor with information so that the transaction could take place.

ii. Unauthorized Transactions

Where a minor has evaded parental supervision and engaged in an unauthorized transaction, the law also provides safeguards. Generally, credit card issuers¹¹⁷ will not issue cards to persons less than eighteen years old, or even less than twenty-one years old, without a co-signer.¹¹⁸ Therefore, when minors engage in monetary transactions online, they often require the use of someone else's credit card to complete their transactions.

Minors' ability to engage in financial transactions online is closely tied to their ability to access a credit card. Just as their ability to engage in contracts is closely related to their access to a credit card, so too is a credit card holder's liability closely related to minors' ability to transact. Because credit card holders are liable for all authorized uses of their cards,¹¹⁹ the monetary liability for a minor's transaction is often actually the cardholder's liability. Because of this, an analysis of a cardholder's liability with regard to a minor's online contracts is worth discussing.

All online monetary transactions have various protections that arise before disaffirmance becomes necessary. First, when a transaction takes place for physical goods that can be returned without substantially affecting their value, retailers may be willing to accept returns to preserve good relationships with their customers. Businesses have an interest in maintaining good relations with their customers, and accepting a return may benefit that relationship with both the minor and the parent. The policy of accepting returned items has carried over from brick and mortar stores to some online stores.¹²⁰ Because the policy of allowing returns can

116. See RESTATEMENT (THIRD) OF AGENCY § 3.05, illus. 1 (2006).

117. Minors have various forms of electronic payment available to them, including credit cards, debit cards, and stored value cards. A discussion of the safeguards provided by each of these forms of payment is outside the scope of this Article. The remainder of this Section focuses on credit card transactions.

118. 12 C.F.R. § 226.51(b) (2011).

119. See 15 U.S.C. § 1643 (2006) (providing that credit card holders are not liable for the unauthorized use of their credit cards for charges over fifty dollars).

120. Many online retailers, such as Amazon.com, allow customers to return some items

allow a transaction to be somewhat reversed,¹²¹ the need for disaffirmance can be reduced.

Second, even if a retailer does not permit a return, credit card issuers may be willing to credit the disputed amount to cardholders.¹²² Disputes may arise between the cardholders and the merchants. As cardholders are liable to the card issuers, however, they may attempt to resolve the matter with the card issuers instead of the merchants. Credit card issuers have an interest in maintaining relations with their cardholders. If cardholders become dissatisfied with the services of a card issuer, they may choose to take their business elsewhere. Card issuers may be willing to provide this service in an effort to retain their customers.

Third, for transactions a card issuer is not willing to simply credit, card issuers may issue a chargeback against the merchant. Chargebacks occur between the card issuer and the merchant's bank.¹²³ A chargeback debits funds from an account that the merchant is required to keep with its bank.¹²⁴ Contractual agreements between card issuers and merchant banks generally govern chargebacks. A merchant usually has no say in the matter other than to re-present the charge.¹²⁵ Merchants often strive to reduce the number of chargebacks on their account because they can be penalized for excessive chargebacks issued against them.¹²⁶

Lastly, under federal law, cardholders are not liable for unauthorized charges in excess of fifty dollars that have been reported to the card issuer.¹²⁷ Cardholders are not liable for unauthorized charges in excess of fifty dollars irrespective of whether the person who made the charges was the cardholder's child or a complete stranger. Tempering minors' privilege to disaffirm will not have the effect of making parents liable for minors' unauthorized charges.

For the foregoing reasons, changing the privilege to disaffirm would not be detrimental to minors. Parental involvement and credit card refunds provide the various protections before disaffirmance would be necessary.

purchased on their sites. See Returns Center, AMAZON.COM, http://www.amazon.com/gp/css/returns/homepage.html/ref=hy_f_4 (last visited Jan. 9, 2012).

121. Generally, these transactions cannot be completely reversed, as one party will lose costs associated with shipping and handling.

122. Unfortunately, the exact policies regarding the crediting of an account are often only internally published within issuing companies and likely vary from one issuer to another.

123. See *Chargeback Cycle*, VISA, http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/chargeback_cycle.html (last visited Jan. 9, 2012).

124. *Credit Card Chargeback Rights*, CAL. ATTORNEY GEN., http://ag.ca.gov/consumers/general/credit_card_chargeback_rights.php (last visited Jan. 9, 2012).

125. VISA, VISA INTERNATIONAL OPERATING REGULATIONS 805–06 (2011), available at http://corporate.visa.com/_media/visa-international-operating-regulations.pdf.

126. *Chargeback Cycle*, *supra* note 123 (merchants will often directly contact a cardholder to resolve an issue and issue a credit to avoid chargeback fees); VISA, *supra* note 125, at 734–35 (exceeding a specified number of chargebacks can result in the assessment of penalty fees).

127. 15 U.S.C. § 1643 (2006).

B. Usefulness Re-Examined

As discussed above, the ability to obfuscate one's identity on the Internet presents a problem for businesses seeking to avoid contracting with minors. However, in some circumstances this does not have to be the case. While the problem of determining whether a person is an adult or minor may apply to businesses that have both adult and minor customers, the argument loses its strength when a business's customers consist primarily of minors. In some cases, based on their products or services, some businesses may be able to anticipate that their customers will primarily be minors. When businesses are able to do so, they may implement specific terms that are designed and appropriate for minors.

For example, Disney produces a game, called Club Penguin, based on children's cartoon characters. Because of Club Penguin's subject matter, Disney can reasonably assume that its customer base will be mainly composed of minors. Due to COPPA's restrictions on collecting information on minors thirteen or younger, Disney takes special care to avoid collecting certain types of personally identifying information.¹²⁸ The website asks for a parent's e-mail address, instead of the minor's e-mail address, when the minor signs up for an account.¹²⁹ Afterwards, the parent receives an e-mail with terms that the adult must agree to before the minor's account is activated.¹³⁰ Disney has chosen to tailor its practices to accommodate the requirements of COPPA. With the same methodology, however, a company could choose to alter its terms of service in ways to take advantage of minors.

The ability to identify minors and tailor contractual terms to accommodate them can serve the beneficial purpose of complying with laws just as easily as it can also be used to target minors for exploitation. Some have argued that companies may seek to target and take advantage of minors now that there are an increasing number of minors engaging in transactions online.¹³¹ There is no question that minors are now interacting with people across the globe from the safety of their homes and without revealing their identities. The new customer base has undoubtedly attracted businesses' attention. Given the rising number of minors engaging in transactions, the relevant question is not whether the protection of minors is warranted, but whether the same form of protection they have been receiving is still needed in the online context. When businesses are able to anticipate an audience of minors, there may be greater cause to hold businesses responsible for the perils of engaging in contracts with minors.

128. For example, Club Penguin does not ask for minors' names and specifically points out that minors should not use their real names when choosing names for their penguin characters. *See Play Club Penguin*, CLUB PENGUIN, <http://play.clubpenguin.com/#/create> (last visited Jan. 9, 2011).

129. *Id.*

130. *Privacy Policy*, CLUB PENGUIN, <http://www.clubpenguin.com/privacy.htm> (last updated Jan. 11, 2012).

131. *See, e.g.,* Slade, *supra* note 73, at 632–33.

C. Proposed Change

In light of the aforementioned concerns, this Paper proposes that a rebuttable presumption be applied to the ability of minors to disaffirm their contracts. Under such a standard, minors would not be able to automatically disaffirm their contracts when engaging in contracts online. Instead, much like other doctrines allowing people to disaffirm, a factual inquiry would be required.

Requiring courts to make factual inquiries is the fairest way to ensure that minors remain protected while continuing to recognize that opposing parties should be able to avoid entering into agreements with minors. The proposed factual inquiry will be based on the two factors highlighted in this Paper: the minor's understanding of the terms of the agreement, and the opposing party's knowledge of whether it was transacting with a minor.

If the law requires a determination of the minor's actual understanding of the terms of the agreement, it continues to recognize the importance of protecting minors from agreements that they do not understand. It can hardly be argued that a three-year-old using a computer would have understood the terms of any agreement, regardless of how long the child may have had access to the Internet. If the law requires a factual inquiry regarding the minor's state of mind, there is no need to draw a distinction between certain ages of minors. Instead, courts can rely on an examination of the actual understanding of the minor in question.

In addition, by accounting for businesses' understanding of their expected audience, the presumption can serve to protect businesses misled into transacting with minors. Businesses should have the choice of whether they choose to expose themselves to the risk of contracting with minors. Whether this comes about by how they choose to market their products, what type of business they choose to engage in, or whether they limit their services to adults by contractual terms, businesses should be able to have some certainty that their contracts will be upheld if made in good faith.

If a party is shown to have known that it was contracting with a minor, the remedy may be determined by the appropriate state's case law. Therefore, in states where parties assume the risk of losing their consideration when bargaining with minors, that risk will remain. In states where minors are estopped from disaffirming if the benefit could not be restored, minors would remain estopped.

This presumption could also alleviate the pressure on government and businesses to institute onerous regulations. Rather, self-regulating bodies within businesses will be better equipped to work with parents and children to come up with mechanisms to educate children about online transactions. This is not a novel concept. The Entertainment Software Ratings Board provides a rating system designed to educate parents and the public about material that is available to

minors.¹³² And the Children's Advertising Review Unit provides industry guidelines for advertising directed at children.¹³³ Such self-regulation will further open the doors for businesses to continue marketing services, such as online games, to minors.

Of course, this proposal is not free of its own drawbacks. First, such a fact-intensive inquiry to rebut the presumption may require additional litigation costs, specifically with respect to discovery. Second, there may be additional costs associated with bringing a child into the courtroom. If a minor testifies, the documents may have to be filed under seal, and extra steps may have to be taken to ensure the privacy of the minor. Third, there is no bright-line rule regarding when the presumption is to be overcome. In other words, judges will have to shoulder much of the rebuttable presumption analysis to make an appropriate assessment. Precedent on this subject may be scant, and it may take years to fine-tune this rebuttable presumption standard.

CONCLUSION

For the reasons discussed above, the doctrine of disaffirmance, specifically in the context of online contracts, is outdated and in need of revision. Minors' privilege to disaffirm contracts at will was awarded before the complexities of the Internet existed. It was created at a time when parties engaging in contracts with minors accepted the risk of disaffirmance ahead of time. Now, however, the general privilege unfairly benefits minors and is unnecessary in light of the protections afforded to minors by other legal doctrines and societal norms.

Society continues to view minors as vulnerable victims subject to detrimental contractual terms. Online, however, many businesses have lost the ability and desire to selectively bargain specific terms with individual customers. Minors possess a powerful privilege to protect themselves from terms that no longer exist in most modern online agreements. Worse yet, businesses have no way of avoiding agreements with minors. Businesses have lost the ability to avoid exposing themselves to voidable contracts. Thus, not only have minors been given a privilege that is largely unnecessary, but businesses' balance against this privilege has been completely removed by the inability to identify and avoid agreements with minors in the first place. Therefore, what was once a balance between the minors' privilege to disaffirm and the businesses' privilege to avoid contracting with minors has now been reduced to a privilege only benefiting minors. In the past, either party could choose to avoid a contract: minors by disaffirming or

132. *Game Ratings and Descriptor Guide*, ESRB.ORG, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Mar. 3, 2012).

133. *Self-Regulatory Program for Children's Advertising*, CARU.ORG, <http://www.caru.org/guidelines/index.aspx> (last visited Mar. 3, 2012).

businesses by refusing to enter a contract. Now, however, the power to walk away rests solely with the minor.

Reforming disaffirmance would not subject minors to unduly prejudicial terms. Businesses have an interest in pursuing terms that are not overly detrimental to their customers. To attract as many customers as possible, it is in a business's interests to have terms that are not offensive to the public at large. Even if a business should choose to implement prejudicial terms, however, such terms may be unenforceable because courts take a marked interest in reviewing contracts for unconscionable terms. The fact that most contracts online are contracts of adhesion will favor minors who seek to show that the terms of a contract are unconscionable.

In the past, adults have been able to rely on their knowledge that they were dealing with minors to avoid entering into binding agreements with them. Because businesses often no longer have this information available when transacting online, the privilege should be mitigated to remediate the loss of the ability of an adult to avoid contracting with minors. However, although the privilege should be modified, it is important to recognize that the policy supporting the privilege is important and beneficial to society. The challenge is balancing the desire to mitigate the right without diluting its purpose.

The solution is to require a factual inquiry before a minor can assert the privilege of disaffirmance. In the past, courts may have been able to rely on the fact that adults were often aware that they were dealing with minors and had accepted that risk when making their agreements. Now that courts can no longer presume that knowledge exists, they must take active roles in determining whether the minors in question understood what they were doing when entering a contract and balancing this finding against whether the adults knew they were dealing with minors before allowing minors to avoid their contracts.

Society cannot continue to disregard minors' contributions and liabilities online. Minors are exposed to the use of the Internet from an early age and are increasingly involved in online financial transactions. A blanket rule treating all minors equally until a minor reaches an arbitrarily set age of majority unfairly burdens businesses. The law requires a court to determine whether members of other classes of people had the capacity to contract. Society cannot, and should not, disregard the role minors play online by continuing to ignore minors' actual capacity to contract when making agreements online.