

E-CONTRACT DOCTRINE 2.0: STANDARD FORM CONTRACTING IN THE AGE OF ONLINE USER PARTICIPATION

*Shmuel I. Becher**

*Tal Z. Zarsky***

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The growing popularity of e-commerce transactions revives the perennial question of consumer contract law: should non-salient provisions of consumer standard form contracts be enforced? With the focus presently on an ex-ante analysis, scholars debate whether consumers can and should read standardized terms at the time of contracting.

In today's information age, such a focus might be misguided. The online realm furnishes various tools, so-called "Web 2.0" applications, which encourage the flow of information from experienced to prospective consumers. This Article, therefore, reframes the analysis of online consumer contracts while taking into account this new flow of information. In doing so, we draw out several typical ways in which such information flows in the online realm, while addressing the role of search engines, blogs, message boards and social networks. The Article also accounts for the major challenges to the success of such information flow: the motivations of both information providers and receivers, and the accreditation of the data which might be compromised both unintentionally and maliciously.

* Assistant Professor, The College of Management Academic Studies-School of Law, LL.B., Tel Aviv University; LL.M., J.S.D., Yale Law School.

** Assistant Professor, University of Haifa-Faculty of Law. Fellow, Information Society Project, Yale Law School. LL.B/B.A., Hebrew University of Jerusalem; LL.M., J.S.D., Columbia University-School of Law. The authors wish to thank Ben Alarie, Amitai Aviram, Stefan Bechtold, Michael Birnhack, Eric Goldman, James Grimmelmann, Chaim Saiman, Larry Solum, the participants of The George Washington University Law School IP Workshop, the NYLS IILP colloquium, the Behavioral and Experimental Law and Economics Conference at the University of Haifa and The College of Management-Faculty of Law Seminar for their helpful comments. We have also benefited from the research assistance of Yifat Gedanken, Nir Farber and Aner Rabinovitz. We acknowledge the kind support of the Research Foundation of The College of Management Academic Studies-School of Law and the Infrastructure Fund, Israeli Ministry of Science.

After applying the key “law and economics” and “behavioral law and economics” insights pertaining to consumer contracts to the new dynamic created by the online environment, we conclude that this online information flow will strengthen market forces’ ability to generate a fair and balanced contractual equilibrium. We accordingly provide new policy recommendations that are better tailored to deal with online consumer contracts and thus limit the need for legal intervention in the market for consumer contract terms.

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INTRODUCTION

For many decades, numerous consumer transactions between firms and individuals have been accommodated by, and executed through, standard form contracts (“SFCs”).¹ Form contracting will presumably continue to predominate, as modern technology and recent developments bring new and improved standard contracting practices into the market. One prominent example is online contracting, which is constantly growing in breadth and scope.² Almost all online interactions are governed by standard terms incorporated in SFCs. Within this broader feature, online standard contracting dominates retail transactions, sometimes referred to as B2C (Business-to-Consumer).³

1. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

2. In 2004, total online consumer spending in the US rose by 26%, from \$93.2 billion (in 2003) to \$117.4 billion. See eMarketer.com, *Online Consumer Spending Up in 2004*, Jan. 12, 2005, <http://www.emarketer.com/Article.aspx?1003212>. Consumer online spending in 2005 rose constantly, amounting to \$143.2 billion. See Jack Loechner, *Consumer Spending Out of the Gate Fast in 2006*, Feb. 8, 2006, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=39442. Total consumer online spending continued to increase in 2006. See, e.g., Metrics 2.0, http://www.metrics2.com/blog/2006/10/26/online_consumer_spending_to_hit_170_billion_in_200.html (Oct. 26, 2006, 9:12 EST).

3. The following analysis is premised on the assumption that, at least for the time being, online B2C contracts will be governed by SFC. We make this assumption explicit since the digital environment can potentially offer a very different contractual setting, providing

This Article joins a growing body of scholarship that addresses online SFCs. Yet it makes a unique contribution in singling out the importance of the flow of information from the *ex post* stage (after the contract has been formulated) to the *ex ante* stage (before the contract has been formulated by the relevant parties). As we will show, such a flow—which characterizes the online world in general and as a “Web 2.0”⁴ phenomenon in particular—exerts a profound impact on contracting practices, and the role of regulators and courts addressing online SFCs.⁵

The social, economic, and psychological literature on new online trends and behavioral patterns stemming from the emergence of the “Web 2.0” phenomenon has enjoyed abundant attention from legal scholars in recent years. Yet there is a marked gap in the application of these novel insights to legal theory in general and contract law in particular. This Article attempts to fill a substantial part of the gap in respect of consumer contracts.

To meet the Article’s objective, we pursue three themes. First, we explore how e-commerce contracting practices diverge from real-world standard contract formation. Second, we examine where and how the new tools of social interaction and information dissemination that the Internet offers, such as online blogs, virtual communities, and places of virtual congregation, can promote efficient and fair B2C contracting. Third, we suggest policy recommendations for courts and legislatures when they confront the evolving issue of online standard form contracting.

Before proceeding, we hereby briefly define the boundaries of this Article’s analysis. First, we focus on online B2C transactions in competitive markets,⁶ addressing concerns of asymmetric information between

consumers with an “electronic butler” that will automatically signal the consumers’ contractual preferences to the various vendors. For a recent description of this dynamic, see LAWRENCE LESSIG, *CODE: V 2.0* 226–30 (2006). See also Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006). Still, the “electronic butler” is far from becoming reality.

4. “Web 2.0” stands for a variety of online phenomena that involve the creation of content, rankings, and other forms of value through the active participation of users. For a critical view of the term “Web 2.0,” see John C. Dvorak, *Web 2.0 Baloney*, PC MAG., Mar. 1, 2007, available at <http://www.pcmag.com/article2/0,2817,1931858,00.asp>.

5. As we explain *infra*, the results of our analysis should also affect the overall discourse on SFCs policy (i.e., in the offline world as well), especially where offline contracting parties use the relevant information available from the online realm (for the offline transaction). Our analysis in this Article is less ambitious, concentrating only on online markets and transactions.

6. For a general discussion of the e-commerce business realm and the policy issues it raises, see Jay Kesan & Andrea Gallo, *Optimizing Regulation of Electronic Commerce*, 72 U. CIN. L. REV. 1497 (2004). See also NIVA ELKIN-KOREN & ELI M. SALZBERGER, *LAW, ECONOMICS AND CYBERSPACE* (2004).

the contracting parties.⁷ We leave aside an inquiry into whether online B2C contracts require consumer protection regulation due to lack of competition.⁸ Second, we discuss online SFCs, and not the entire scope of e-commerce transactions and related consumer-protection issues.⁹ Third, our analysis posits that the SFC between the online vendor and consumer is indeed a binding contract, resulting from the consumer's informed assent to the terms of the contract offered by the vendor.¹⁰ Our underlying assumption is that in most B2C transactions courts will deem online SFCs to meet the standards of contract formation, yet might exercise great willingness to review their content.¹¹

7. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827 (2006) (stating, as a starting point, that “[t]he usual assumption in economic analysis of law is that in a competitive market without informational asymmetries, the terms of contracts between sellers and buyers will be optimal”).

8. At first blush, online B2C markets should be increasingly competitive in view of the relatively low barriers to entry. On the other hand, entering this market might entail heavy expenses associated with the successful launch of an e-commerce venture, especially in promotion and forwarding of brand recognition.

9. This Article does not deal with contractual terms that are specifically set for every consumer, such as price or quantity. It also does not address issues considered salient in consumer transactions such as time, quantity and form of delivery. Nor does it concern instances in which vendors choose to breach their contractual obligations or simply disappear, leaving consumers without their product or their money.

10. The unique characteristics of SFCs have led some scholars to question the basic assumption that such agreements are indeed contracts. For a recent example, see Omri Ben-Shahar, *Foreword to Boilerplate: Foundation of Market Contracts Symposium*, 104 MICH. L. REV. 821, 826 (2006) (“On a theoretical level, boilerplate is shown to be a legal phenomenon different from contract. Is it a statute? Is it property? Is it a product?”). In the online realm this ongoing debate takes an additional twist, as these contracts are not accepted by the consumer in the customary form of signing a legal document. Instead, consumers allegedly enter the contract by clicking on a designated “box” or link (“clickwrap”), or simply by consenting to browse through subsequent pages on the site (“browsewrap”). With such transactions, courts take into account the way the contractual provisions were displayed, as well as the attributes of the underlying transaction: Was it B2B (Business-to-Business) or B2C? Was it an actual sale or merely terms of service governing access to the relevant website? And the like. For a general judicial analysis of contract formation in clickwrap and browsewrap contracts, see *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 22 (2d Cir. 2002). For a discussion of this issue, see Mark Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006). Most courts seem to find “clickwrap” agreements to constitute a binding agreement. See *id.*; Juliet Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1323–24 & n.82 (2005); see also *Davidson & Assocs. v. Jung*, 422 F.3d 630, 632 (8th Cir. 2005) (accepting clickwrap as assent); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532–33 (N.J. Super. Ct. App. Div. 1999) (finding a clickwrap agreement enforceable).

11. See, e.g., *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 701–02 (Cal. Ct. App. 2001) (holding the America Online forum selection clause invalid); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (holding the arbitration clause substantively unconscionable). *But see*, *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007) (upholding Google’s AdWords contract which included a mandatory venue clause).

The remainder of the Article is arranged as follows: Part I provides the necessary background to B2C SFCs. Here we tackle the substantial scope of the theoretical work addressing this issue, while referring to the contribution of the doctrinal fields of “law and economics” and “behavioral law and economics.” Part II expands on the notion of information flow from the ex post consumers to the ex ante ones. Part III examines the ex post–ex ante information flow in the specific context and dynamics of the Internet. In Part IV we revisit the analysis of the various dynamics of B2C SFCs, concentrating on the online setting and bearing in mind the effects of the online trends discussed in Part III. We then provide policy recommendations in Part V.

I. THE POLICY LANDSCAPE

This Part begins by setting out the suspicion toward SFCs existing in today’s legal doctrine. It then discusses the conventional “law and economics” responses to this position. Thereafter it briefly explores the main advantages of using SFCs. Subsequently it presents the “law and economics” anti-intervention approach and the critiques of this concept.

A. *The Unequal Bargaining Power Argument*

According to the basic paradigm of contract law, a contract is the result of a negotiation process among parties who exercise their freedom to contract. SFCs, however, are offered on a take-it-or-leave-it basis, and are rarely the outcome of any bargaining. SFCs include provisions determined in advance by one party, which is superior in terms of bargaining and market power. Very commonly, merely the seller’s agents negotiate and contract with individual consumers. These agents are not usually authorized to make changes or concessions in the standardized agreements they offer.¹² Seldom can an SFC be negotiated and altered.¹³ Furthermore, consumers are the typical “one-shot players,” whereas businesses have innumerable opportunities to draft and litigate contracts, and are thus sophisticated “repeat players.”¹⁴ Arguably, these elements

12. *But see* Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 877 (2006) (arguing that employees have a great deal of discretion to satisfy consumers).

13. For an anecdote that captures this line of reasoning see, e.g., Bebchuk & Posner, *supra* note 7, at 830–31 (mentioning the failure of one of the authors to alter a standardized term found in an agreement between the author and Harvard University Press).

14. *See* Marc Galanter, *Why the “Haves” Come Out Ahead*, 3 LAW & SOC’Y REV. 95, 98–103 (1974).

increase the disparity in terms of bargaining power between firms and individual consumers.

B. A Law & Economics Perspective

The unique traits of SFCs discussed above have rendered them almost derogatory. Standard form contracting is subject to constant criticism by courts, legislators, academics and society in general. Yet, from a classic law and economics perspective, most of the traditional allegations against SFCs, namely the offer of form contracts by agents not empowered to make contextual changes, execution between unfamiliar parties, and inequality in economic strength, do not necessarily pose serious challenges to contract law. According to the most basic concepts of Law and Economics (hereinafter L&E), both contracting parties are assumed to accept only efficient contracts that maximize their utility.¹⁵

Furthermore, firms' overall usage of SFCs actually carries many advantages. The SFCs substantially reduces transaction costs by eliminating negotiations over contractual terms.¹⁶ SFCs also allow vendors to cut expenses by reducing costs of training their employees and agents. Use of the SFC increases the vendor's efficiency as well: it can serve as a repeated check on selling agents who might be too eager to provide offers that run counter the vendor's interest. Since all consumers are presented with an identical contract, SFCs can signify equality among consumers (assuming that the vendor does not engage in contract terms' discrimination),¹⁷ thereby increasing consumers' confidence.¹⁸ Lastly, open market transactions which apply SFCs are assumed to

15. Therefore, some scholars question the widely accepted notion that SFCs provisions are "pro-seller". See, e.g., Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 Hous. L. Rev. 975, 979 (2005); Johnston, *supra* note 12, at 887.

16. Since SFCs are utilized to minimize negotiation costs, individual exchanges are not a sufficient reason to reopen the bargaining terms, which were drafted in advance. Still, forms typically do leave blank spaces for salient and regularly variable aspects of bargains such as quantity, price, method of payment, and day of delivery. Such salient terms are not central to our analysis.

17. We mean ex ante discrimination, i.e., the sellers' ability to offer different contracts to different consumers. If the seller can identify sophisticated consumers and offer them better contracts, its incentive to draft fair contracts to all consumers diminishes. Vendors might engage in ex post discrimination as well, which implies that sophisticated or assertive consumers will obtain relief after a dispute arises whereas lay consumers will not. Assertive and sophisticated consumers—knowing the likelihood of relief later on—will not be motivated to read (let alone negotiate the alteration of) contract terms at time of contracting. Cf. Bebhuk & Posner, *supra* note 7 (arguing that reputation concerns will lead vendors to insist on one-sided contract terms only in response to opportunistic behavior on the part of buyers); Johnston, *supra* note 12, at 876 (providing anecdotal evidence that almost everything relating to SFCs can be renegotiated when consumers display an assertive approach).

18. Another important aspect is how the contracting parties split the transaction's surplus. This aspect of wealth distribution will not be tackled here.

promote the welfare of both parties. Although consumer SFCs are basically non-negotiable, firms and consumers are assumed to share the benefits gained from such contracts.¹⁹ Therefore, contract law should merely seek to address market failures that undercut the parties' ability to maximize their utility rather than the intricacies of the SFCs.

Commentators go on to question courts' competence in deciding ex post what would have constituted a fair contractual allocation of risks and obligations among the parties ex ante.²⁰ In most cases, courts' lack the necessary expertise to analyze the specific transaction and market that any given SFC addresses. Courts might also have difficulty understanding the relation between concessions made in one contractual provision and benefits rendered in another. Legal intervention in the terms of SFCs also constitute acts of blunt state paternalism, which encroach on the contracting parties' autonomy. Some academics argue that the very fact that firms are repeat players places them in the best position to assess the appropriate content of form contracts.²¹

The views mentioned thus far have led to an ongoing policy debate regarding the enforcement of SFCs. This debate has also resulted in a variety of policy recommendations, some of which argue for intervention both by court and legislatures. Legislatures are asked to regulate contract terms ex ante and set legal rules permitting courts to strike down undesired and inappropriate contract terms. Courts, on the other hand, are called on to provide judicial review of SFCs terms ex post.²² To counter these assertions, prominent L&E scholars articulate another influential argument against extensive intervention in the market for consumer contract terms. We now address this position.

C. *The Law & Economics Non-Intervention Approach*

L&E scholars' Non-Intervention Approach (hereinafter NIA) is premised on competitive market forces. These forces allegedly generate a desired equilibrium at which vendors have adequate incentives to draft

19. See, e.g., R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 638 (1996); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 594 (1990).

20. See Gillette, *supra* note 15, at 982.

21. See Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 751 (2002).

22. In the US, courts frequently apply the doctrine of unconscionability in this context. Other doctrines include, inter alia, unfair surprise, the duty to contract in good faith, the reasonable expectation doctrine, and the like. See, e.g., Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 456 (2002).

efficient standardized terms.²³ The proponents of the NIA acknowledge that SFCs terms are not typically read by consumers prior to finalizing the transaction. Yet in competitive markets, the fact that *some* consumers (hereinafter Marginal Consumers) do read contractual provisions, and are willing to search for better ones, should suffice. By this reasoning, a vendor that applies unfair or unjust provisions in its contract risks losing Marginal Consumers to a competitor that offers preferable contractual terms. As firms respond to consumers in the aggregate, and provide products that will match their preferences, firms in competitive markets will presumably refrain from exploiting consumers through self-serving contract clauses incorporated in SFCs.²⁴ Hence, the NIA relies on the existence of market pressure, generated by a crucial group of Marginal Consumers. Such a dynamic will only emerge in markets in which the cost of losing Marginal Consumers (due to the use of unfair contractual terms) will outweigh the benefits of extorting infra-marginal consumers (who remain subject to the unfair and biased contractual provisions).²⁵

Taking the NIA into account, the policy response to the fear of unfair SFCs should be limited to encouraging the usage of simple, short, and plain language contracts. This will assist Marginal Consumers in signaling their discontent with the given SFC. Also, regulators should promote competition, which will render Marginal Consumers more powerful and will ensure that they have sufficient options to switch to, thereby indicating their dissatisfaction with biased SFCs.²⁶

D. *The NIA Challenged*

Several scholars, holding varying viewpoints, have critiqued the NIA. Such critiques question the NIA's accuracy and assumptions. We mention these critiques briefly here, and discuss them in greater depth below.

1. Law & Economic Critiques²⁷

Critics argue the NIA fails to ensure the fairness of SFCs. First, high transaction costs that typically accompany everyday consumer transactions will prevent even the most sophisticated consumers from reading

23. See, e.g., Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983).

24. See *id.*; Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 CAN. BUS. L.J. 437 (1991).

25. See Alan Schwartz & Louis L. Wilde, *supra* note 23.

26. See *id.*

27. The discussion in this part relies on Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: A Challenge that Is Yet to be Met*, 45 AM. BUS. L.J. (forthcoming 2008).

SFCs;²⁸ many provisions in SFCs refer to credence qualities that are difficult to identify and evaluate at the time of contract formation.²⁹ Uniformity of terms in SFCs may hamper the consumer's incentive to read as well.³⁰ This last argument is strengthened by a game-theory observation that rational consumers are expected to be trapped in a free-rider dilemma.³¹

Other NIA challengers argue that even if a sufficient number of Marginal Consumers exists, the contractual preferences of this group plausibly differ from those of the general pool of consumers.³² Firms might also misperceive Marginal Consumers' preferences and behavior. This is because large vending and retail firms assign their salespeople (rather than their policymakers) to interact and contract with consumers. Thus, these employees might not convey the relevant data throughout the corporate structure.³³ In addition, discrimination, both *ex post* and *ex ante*, between Marginal Consumers and non-marginal can undercut the model's effectiveness as it allows the seller to provide informed consumers with better contracts.³⁴

2. Behavioral Law & Economics Critiques

Critics have also questioned the NIA from a newer interdisciplinary perspective: that of behavioral L&E. Critics taking this approach seek to further demonstrate that consumers are unlikely to read an SFC, nor wholly understand its contents. Here we discuss four specific behavioral patterns particularly relevant to standard form contracting practices.³⁵

First is the problem of information overload. Individuals' cognitive limitations on information processing can undermine optimal contract-

28. See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) (discussing transaction costs occurring during the formation of contracts).

29. See Meyerson, *supra* note 19, at 596–97. Examples of credence qualities are arbitration and forum selection clauses, which the average consumer rarely experiences.

30. Merely asserting that SFCs are similar in some fields of commerce does not necessarily mean they are inefficient. To the contrary, uniformity of terms might be a positive indication signaling that an industry is competitive. Hillman & Rachlinski, *supra* note 22, at 439. Therefore, consumer protection proponents seek to prove that terms are similar, but also that they are unfavorable and one-sided. See, e.g., Avery Katz, *The Strategic of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 249–93 (1990); Slawson, *supra* note 1, at 530–31.

31. As Avery Katz explains, every rational consumer is expected to opt to leave the task of reading SFCs to other consumers. See Katz, *supra* note 30, at 530–31.

32. See Cruz & Hinck, *supra* note 19, at 671.

33. Becher, *supra* note 27, at 25.

34. For definitions of *ex post* and *ex ante* discrimination, see *supra* text accompanying note 17.

35. For a detailed discussion, see Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts* 68 LA. L. REV. 117 (2007).

ing. As Russell Korobkin explains, the information overload that consumers experience when confronted with SFCs causes them to focus on only few components.³⁶ These are typically the contractual provisions concerning price and other conspicuous (“salient”) product attributes. Consumers ignore non-salient provisions, such as terms governing choice of law, forum selection, remedies in the event of breach, exchange policies, etc.

Second, in many instances consumers enter SFCs under unfavorable circumstances. The setting and environment in which SFCs are formulated are frequently characterized by noise, time constraints and vendors’ attempts to manipulate consumers.³⁷ These factors prevent consumers from engaging in a reasonable, let alone optimal, deliberation as to whether to enter the SFC.

Third, consumers have limited ability to evaluate prospects of future contingencies and risks, especially where such prospects are of unpleasant situations. Most SFCs terms address unpleasant events, such as legal disputes and payment defaults. The availability cascade³⁸ and the prevalence of self-serving biases, such as over-optimism and over-confidence,³⁹ explain why most SFCs terms are not evaluated correctly ex ante.

The fourth behavioral argument is premised on the fact that buyers are usually introduced to the SFC after a lengthy shopping period. At this stage consumers are unlikely to ascribe the full meaning or importance of the relevant contract. This is explained by psychological phenomena such as the sunk cost effect⁴⁰ and cognitive dissonance.⁴¹ These phenomena lead consumers to suffer from a perception of self-commitment, which is also a product of their pre-contractual investment

36. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1220 (2003).

37. Hillman & Rachlinski, *supra* note 22, at 448.

38. The term “availability cascades” suggests that people perceive risks as more serious when a relevant incident is “readily called to mind or ‘available.’” Cass R. Sunstein, *Introduction to BEHAVIORAL LAW AND ECONOMICS* 1, 5 (Cass R. Sunstein ed., 2000).

39. For instance, most people believe they are less likely than others to suffer from automobile accidents, heart attacks, smoking diseases, and other health risks. Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCI. 1232 (1989).

40. The “sunk cost” effect means that people will tend to continue a previously chosen course of action once they have invested resources in their previous choice. See Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESS 124 (1985).

41. Cognitive dissonance means that to avoid conflicting evidence or ideas, people will tend to devalue evidence that undermines their ex ante choice. See generally Chris Ann Dickerson, Ruth Thibodeau, Elliot Aronson, & Dayna Miller, *Using Cognitive Dissonance to Encourage Water Conservation*, in THE SOCIAL ANIMAL 277, 278–79 (Elliot Aronson ed., 7th ed., 1995).

in time and effort. Consumers' evaluation of SFCs is distorted and their willingness to read the contract and act on what they find is undermined.

Although the proponents and opponents of the NIA sharply differ in their understanding of the dynamics leading to SFCs formation, both focus their attention on an ex ante analysis. Both approaches examine what consumers will do during the time of contract formation. We believe that this focus neglects to acknowledge an important point in time at which consumers are much more likely to negotiate for alteration or read SFCs, namely ex post.⁴²

Consumers might read and examine SFCs after the contract's formation with far more dedicated interest and attention than they did ex ante. As the next Part illustrates, shifting our focus to this ex post dynamic is crucial for properly examining SFCs in the online realm.

II. EX POST–EX ANTE INFORMATION FLOW

As mentioned, in B2C transactions, consumers do not read or cannot correctly evaluate SFCs prior to and at the time of their formation.⁴³ Arguably, this allows vendors to structure biased contractual terms. Information streaming to the market from consumers who read SFCs ex post could mitigate this problem. Consumers advised of biased terms might refrain from contracting with specific vendors, should such contracting lead to inefficient outcomes. This information flow would stop vendors from including biased and unfair provisions in their SFCs to begin with, to avoid the loss of consumers.⁴⁴

In the following paragraphs we explain the meaning, elements of, and challenges to such data flow, at three crucial "chokepoints": (1) The point at which the contract is viewed ex post; (2) the flow of information concerning the contract from the ex post to the ex ante consumer; and (3) the ex ante consumer's use of and reliance on such information.

42. Several scholars do mention this issue, yet without drawing out the various distinctions we address throughout this Article. See, e.g., Gillette, *supra* note 15, at 977; Johnston, *supra* note 12. For a study that examines actual consumers' contracting behavior with respect to reading SFCs ex ante and ex post, see Shmuel I. Becher & Esther Unger-Aviram, *Myth and Reality in Consumer Contracting Behavior* (work in progress, on file with authors), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117422.

43. Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1163 (1976).

44. Again, the previously mentioned calculus applies: should the benefits to the firm from the use of unfair provisions exceed the damages and detriments stemming from the usage of such language, the firm will continue to make use of these provisions.

A. *The First Chokepoint: Reading Ex post*

First, we must establish why and in which instances consumers review SFCs ex post. The key to this interaction involves identifying instances in which the vendors' actions do not meet the consumers' expectations; the product was not what the vendor represented it to be, it arrived late or damaged, it malfunctioned, and the like. In such cases, the consumer might feel aggrieved, and search for proper responses. Some aggrieved consumers (or their lawyers) might examine the SFC they originally formed with the vendor to acquaint themselves with their rights and obligations. Others will contact the relevant vendor, complain, and demand recourse. Thereafter, vendors will frequently advise the consumers of their rights, or lack thereof, referring to the relevant SFC. In response, consumers might examine the SFC, and contemplate their next steps. These and other behavioral patterns indicate that consumers have strong incentives to examine SFCs ex post.⁴⁵

Consumers often learn of the actual content of their contracts accidentally. In these cases, disputes over contractual terms and conditions are viewed and understood by consumers in the abstract, without them realizing that the genuine source of such disputes is a standardized provision. For an example in the context of travel, after tickets are purchased, at times it is difficult or expensive to change trip dates. Consumers are not likely to fully realize that the issue is an SFC provision that allocates risks among the contracting parties. Yet these disappointed consumers complain about the carrier's "lack of flexibility," "unfairness," or "lousy customer service." Customers do not associate the problem with a standardized term they supposedly agreed to when purchasing the ticket. Nevertheless, their criticism pertains directly to specific contractual provisions.

Most of the reasons for the lack of effective reading and comprehension of "non-salient" terms ex ante do not apply to the ex post context. For instance, L&E NIA opponents explain that the costs of regularly reviewing SFCs ex ante will deter almost all consumers from reading them at all, given the heavy burden such reading would impose. *Ex post* reading calls for a different cost/benefit analysis, which would foster such reading as the risks and problems related to the SFC have already materialized.

The different dynamics that lead to ex post reading of SFCs also silence several concerns voiced by the Behavioral L&E school of thought. Ex post, consumers are not prone to many of the cognitive errors and

45. Cf. Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 938 (2006) (noting that "legal terms [of SFCs] matter only when something goes wrong").

biases mentioned, as they can assess accurately and easily the risks and benefits of reading and understanding the SFC at that juncture. Also, since the breach or dispute has already occurred (and the risk has become manifest), consumers should have no difficulty diverting attention to “non-salient” provisions and understanding their importance. The social setting and environment at the ex post point of time will differ substantially from the ex ante setting. By now the pressure from the vendors has subsided, and consumers can thoroughly review the SFC.

Our assertion that consumers will read and understand SFCs ex post is not clear of doubts. Arguably, in some instances, even at the ex post stage, a cost/benefit analysis might lead consumers to conclude that reading the SFC is inefficient. They may reach this conclusion after considering the heavy financial, attention, emotional, and social costs the interactions with the vendor and potential litigation might incur.⁴⁶ This conclusion would be further borne out when the low probability of receiving any subsequent benefits from the vending firms at the end of the process is considered.

We acknowledge that, in many instances, ex post reading is not likely to take place. We submit, however, that the effective reading and reviewing (and as mentioned above, the merely “experiencing”) of B2C SFCs ex post far exceeds the reading of such contracts ex ante.⁴⁷ In addition, following the NIA assertions, and as we will explain below, a limited number of ex post readers might suffice to deter vendors from drafting biased SFCs.

B. *The Second Chokepoint: Ex Post–Ex Ante Flow of Information*

Establishing that some consumers review SFCs with caution and care ex post gets us only a third of the way through. The most basic concepts of contract law and theory identify the moment of contract formation as the crucial juncture at which the parties establish their respective rights and obligations. Consumers’ late recognition of flaws in contracts they previously entered into will not change the terms of the contract between the parties. Most importantly, late recognition of biased terms will not change the vendors’ actions vis-à-vis other consumers—unless the information concerning the transaction⁴⁸ flows from the aggrieved consumer to the ex ante consumers contemplating a transaction

46. These costs might include, for instance, the costs of finding and accessing the SFC at this later stage. We address these points *infra* Part V.

47. See Becher & Unger-Aviram, *supra* note 42 (providing data that supports this assertion).

48. This ex post information might vary. For instance, it could deal with the actual contractual provisions, or the vendor’s actions when relying upon the contract.

with the same vendor. We now identify and address five typical ways of information flow.

1. Repeat Customers⁴⁹

Information will flow from a consumer reviewing the SFC ex post to the one confronted with it ex ante when these two consumers merge into the same person.⁵⁰ However, to minimize this information flow, vendors strive to identify returning customers⁵¹ and provide them with preferable treatment.⁵² This could indeed mean better contractual terms, or a more lenient form of “interpretation” of such terms when conflicts arise.⁵³ Clearly, these strategies can neutralize this form of data flow.

2. Mass Media Reports

This flow occurs when the vendors’ actions toward the aggrieved (or satisfied) consumers, which reflect the contents of the SFC, are transformed into a “story” reported by the mass media.⁵⁴ Once reported, the information regarding the SFC reaches some prospective ex ante consumers, thus assisting them in their ex ante considerations and negotiations with the vendor.

This information flow suffers severe limitations. Stories of imbalanced contractual provisions rarely engage the mass media, which must tailor their content to meet a broad audience with a limited attention span in a very competitive setting. Aggrieved ex post consumers might find their story “hard to sell” to the mass media, given their general interest in sensationalism.

49. For a reference to the claim that repeat players serve as a regulatory force, see Amitai Aviram, *Regulation by Networks*, 2003 B.Y.U. L. REV. 1179, 1193 (2003).

50. This means that such flows occur in markets that feature returning customers. See Elkin-Koren & Salzberger, *supra* note 6, at 67 (mentioning the flow from ex post to ex ante consumers with regard to returning consumers and addressing other somewhat similar instances of information flow).

51. Vendors do this for various reasons, such as providing customers with preferable treatment to ensure that they return.

52. Johnston, *supra* note 12, at 881 (arguing that firms should have discretion at the “forgiveness” stage, i.e., ex post, to seek out “good customers”).

53. See *supra* text accompanying note 17.

54. Watchdog groups, governmental sources, and consumer organizations also produce and distribute valuable information for prospective consumers. However, the most efficient way for such groups and organizations to reach the general public is via mass media (as discussed in the text) or the Internet. See *infra* text accompanying notes 180–182.

3. Vendors' "Brand"

A more subtle means of flow is through the vendors' "brand."⁵⁵ This amorphous notion is a key element in today's world of mass marketing, and will capsule the available information about a specific vendor. As information about the terms of a specific firm's SFC seeps into society ex post, it affects the firm's brand.

To confront this third form of information flow, vendors strive to control the purity of their brand. They do so by avoiding extremely negative exposure and refrain from using conspicuously biased provisions that might be easily discovered. They also expend a great amount of funds and effort into brand promotion through the media and other advertising avenues. These powerful messages will probably dwarf any adverse information stemming from the few aggrieved consumers who found lopsided terms in the fine print.

4. Geographical Locations

Information can flow from ex post consumers to prospective ones at specific and strategic geographical locations. Such geographical locations may be the vendor's place of business or points of public congregation. Aggrieved consumers might congregate to complain there, meeting other potential consumers who may be curious about the information revealed by the experienced (and now dissatisfied) consumers.

To battle this type of information flow, vendors try to limit the geographical interaction between consumers in the ex post and ex ante stages by the use of architecture.⁵⁶ Vendors separate these groups by distancing their respective points of interaction with the firm. Vendors also try to silence the most vocal disgruntled consumers (and data transferred from them) by providing them with a relief.

5. Social Networks

Information can flow through informal and social channels of data distribution such as family, friends, and neighbors. It can even flow among strangers, who happen to share these consumers' interests and experiences.

Nevertheless, these forms of information flows are limited by several constraints.⁵⁷ For them to succeed, the ex ante consumer must interact

55. Some scholars address this flow in terms of the firms' "reputation." *See, e.g., Aviram, supra* note 49, at 1193.

56. *See* LESSIG, *supra* note 3, at 127–28 (providing references to regulation through architecture in both the offline and online realm).

57. Chrysanthos Dellarocas, *The Digitization of Word-of-Mouth: Promise and Challenges of Online Reputation Systems*, 49 *MGMT. SCI.* 1407–22 (2003).

with another individual who is an ex post consumer, knows about the relevant vendor's SFC, and belongs to the consumer's social or professional circle. These limitations substantially decrease the chances that such interactions will transpire. The two ways in which such a flow could be initiated should also be considered. First, it could be initiated by the ex post consumer, who chooses to convey his or her discontent with a specific vendor's SFCs to peers and friends.⁵⁸ For this to happen, the ex ante consumer must remember the relevant information when facing a similar transaction. Second, this flow of information might be initiated by the ex ante consumer, who signals his or her interest in the information to others in order to receive the information sought. This action generates time and attention costs for both the contacting and contacted party, which substantially limits such flows.

Of course, these obstacles do not stop such flows from occasionally occurring. We all consult friends and family before engaging in (usually substantial) purchases. We also make mental notes about not purchasing products from specific vendors our friends complain of, as well as complain about unsuccessful transactions in our social circle. But our pool of contacts is obviously limited. Moreover, the time and attention-demanding costs of seeking out, gathering, and remembering this information further impede the chances of relevant information reaching the ex ante consumer.⁵⁹ This fifth form of information has the potential to pose a serious challenge for vendors, and they have few tools to hamper its effectiveness. However, as this form of flow is usually limited and sporadic, it will usually not create a serious threat from the vendors' perspective.

C. The Third Chokepoint: Internalization of Information by the Ex Ante Consumer

In the last stretch of the information flow, the relevant information on problematic SFCs provisions reaches prospective consumers who meet the vendor and his SFC ex ante. This circumstance raises difficult questions as to whether consumers will pay attention to information streaming from other (ex post) consumers. Arguably, this information will again be neglected as it refers to events unlikely to occur and usually considered non-salient.

58. Below we address the various incentives and motivations for the ex post consumer actually to convey this information in such a context.

59. Thus, the cheaper the product, the weaker the incentive to seek feedback from informal contacts is. Accordingly, such information flows will hardly exist in many retail markets.

However, we believe such information will be acknowledged and considered by ex ante consumers. The costs of considering such data should be substantially lower than directly confronting the SFC terms, which are usually cloaked in heavy legalese. The information will also reflect actual events that have taken place, and will therefore seem salient, and much more relevant, to the prospective consumer. So although this information flow meets many obstacles, the discussion below exemplifies that the online realm holds great promise for its success.⁶⁰

III. EX POST–EX ANTE INFORMATION FLOWS IN THE ONLINE REALM

In this Part we examine whether the ex post-ex ante information flow discussed above will be enhanced, or possibly abated, in the online setting. In doing so, we take into account recent technological tools and social trends the Internet brings into play. Our analysis addresses each of the three “chokepoints” of the ex post–ex ante information flow addressed above.

A. *The First Chokepoint: Reviewing Online SFC Ex post*

Our analysis of the review of B2C SFCs at the ex post stage addresses two categorical differences between the online and the offline realm: the costs of obtaining the SFC for an ex post review and the potential benefits of and motivations for such reading.⁶¹

1. Costs

Assessing the costs of obtaining SFCs by ex post consumers online and offline applies contrasting arguments. Online, ex post SFCs review should increase. When online B2C consumers are aggrieved they face fewer difficulties and costs in locating and reading the relevant SFC. Consumers can presumably locate and access such contracts on the relevant online vendors’ website with ease. This is somewhat contrary to the offline setting, in which consumers might have misplaced or discarded the original SFC since the time of purchase.

On the other hand, the online setting presents opportunities for vendors to render finding the relevant SFC ex post quite tedious, by placing

60. This dynamic does not *substitute* the one described by the NIA above, but *supplements* it by providing additional market dynamics. Their combination is clearly more likely to succeed in deterring SFCs drafters from incorporating one-sided provisions than mere reliance on the offline Marginal Consumers.

61. As this subject is generally poor in empirical data, much of our analysis rests on assumptions; we hope to assemble empirical evidence and studies in the future.

the link to the SFC at a hidden “location” in the vendor’s website. Vendors might even make such contracts inaccessible to non-purchasing consumers or after purchase. We make no attempt to draw a clear conclusion on these competing arguments, but assume that both results are possible. Later in our analysis, we take this matter into account and offer policy recommendations based on vendors’ conduct at this juncture.

2. Benefits and Motivations

On the face of it, examining the online realm leads to the conclusion that consumers will be less inclined to review SFCs ex post. They might assume that receiving recourse is unlikely given the nature of e-commerce, as many e-commerce vendors are physically remote and might be hard to contact.⁶² In addition, the relatively low prices that characterize many online transactions might create an inherent assumption that e-commerce markets and dynamics present greater adherence to the common law “caveat emptor” principle. Therefore, consumers will be willing to accept various shortcomings in this setting, and refrain from consulting their SFCs.

To our mind, the perception of the limited benefits and obstacles that stem from presenting challenges to existing e-commerce transactions will probably diminish over time. As online transactions become more popular and users become more accustomed to online contracting and transactions, consumers will recognize the potential benefits of reading the SFC and using the knowledge it conveys. They will not be intimidated by the remoteness of the vendor, or the remote chances of success in pursuing their rights by the way of online grievances.

In sum, this first chokepoint of the ex post–ex ante information flow shows several differences between online and offline B2C SFCs ex post reading. Considering the strong incentives to read SFCs ex post in general, e-commerce should still provide ample opportunities and motivations to review SFCs ex post.

B. The Second Chokepoint: Information Flow

Here we address the five forms of information flow we introduced above, while concentrating on those that are greatly affected by the shift to the online realm. This shift makes the ex post–ex ante data flow a reality.

62. They might only provide an email address rather than a phone number that allows for a discussion with a “real” person.

1. Repeat Customers

As mentioned,⁶³ the impact of repeat players on the overall flow seems minimal. To establish whether online markets should lead to a different result, we must examine several elements that might affect such flow. These are the percentage and market share of returning customers; the ability to identify (ex ante) consumers most likely to return, and the ability to provide these consumers with preferable treatment (ex post), thus removing them from the general pool of consumers.⁶⁴

It is somewhat early to establish which trends (regarding repeating customers) will dominate the online market, and speculations lead to mixed conclusions. In terms of the market power of returning consumers in the e-commerce market, the great variety of online commercial websites and platforms might point to a smaller market share made up of consumers returning to any firm. However, recent concentration in online markets might indicate otherwise.⁶⁵ In addition, online marketers devote large funds and much attention to customer-retention initiatives, and construct their interfaces so as to make returning consumers feel at home, thus increasing the number and market share of repeat customers.⁶⁶

An analysis of the second (i.e., the ability to identify, ex ante, returning customers) and third (the ability to perform ex post discrimination) elements mentioned provides mixed results as well. The Internet allows effective tracking of online activity through the use of cookies and other devices.⁶⁷ The information thereby accumulated is analyzed, and used to identify returning consumers. The Internet's one-to-one interface facilitates customized interactions with these consumers, allowing e-marketers to neutralize the "protective" role returning consumers might have on the overall market. On the other hand, in the online realm, users can make use of various means⁶⁸ to shield their identity and interact anonymously.⁶⁹ Online data analyses and direct marketing initiatives

63. See *supra* Part II.B.1.

64. We refer to these dynamics as consumer discrimination, and differentiate the discrimination of ex post and ex ante consumers. See *supra* note 17.

65. See *supra* note 8.

66. Applications such as name recognition, one-click payments and customized recommendations are a few techniques provided by Amazon.com.

67. Chris Jay Hoofnagle, *Privacy Self-Regulation: A Decade of Disappointment*, in CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION ECONOMY" 379 (Jane K. Winn ed., 2006).

68. Many of the applications mentioned above can be neutralized quite easily by erasing all cookies, setting a high security level on the user's browser, and setting up bogus email addresses.

69. Yet these means require knowledge or sophistication which not all users have. In the online privacy context this reality is referred to as the "Blinking Twelve" problem. See

might also prove imprecise in comparison with offline practices.⁷⁰ In sum, this aspect of the analysis has yet to demonstrate a clear distinction between the online and the offline business settings.

2. Mass Media

The second strain of information flow consists of information conveyed to ex ante consumers through various forms of the mass media. Earlier we explained that in the offline world the effects of this data flow would be minimal given the structure and interests of the mass media. Online, however, mass media are supplemented by additional data flows. Of the various outlets the Internet medium provides, we demonstrate the potential changes in information flows online in this context in respect of blogs.⁷¹

Blogs, a personal webpage that can be updated frequently and easily, have sprung up throughout the web in great numbers. Millions of these applications address an enormous variety of topics. The great majority of blogs have no intention to appeal to the masses and do not usually rely on commercial advertisers for financial backing (although some do benefit from a lucrative income from online advertisements posted throughout their blog).⁷² They frequently address niche audiences and subtopics. Given these characteristics, blogs create an ideal setting to convey information regarding problematic contractual provisions.⁷³ Since the blogosphere is extremely diverse, it seems unlikely for commercial firms to successfully block or even counter the information that blogs convey. Blogs allow bloggers to deliver information to their readers, but most of these platforms allow user feedback as well, which creates even more opportunities for conveying information regarding SFCs.

Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy-Control, and Fair Information Practices*, 2000 Wis. L. REV. 743, 754 (2000).

70. In the online realm, existing tracking practices tend to group users of the same computer (through the use of cookies, which track every computer as an individual "user" even though the same machine hosts different individuals), while failing to trace one user making use of several machines (although the use of login names to various sites, which are allocated to each specific individual, potentially resolves this concern).

71. Blogs (short for web logs) are considered one of the icons of the Web 2.0 age. However, blogs are merely one example of an online application that permits dissemination of information in the online realm. Other applications, such as RSS feeds and P2P networks, are beyond the scope of this Article.

72. See *infra* note 155.

73. Clearly, this issue calls for an empirical study. A brief pretest conducted by our research assistant, found somewhat limited references to these issues on blogs, especially popular ones. These results are considered in our analysis of this issue below. Nir Farber, *Tracking Online References to Non-Salient Contractual Provisions*, (May 2007) (unpublished research study, on file with authors).

The emergence of the blogosphere has been recently discussed by several scholars in the context of its implications for free speech, autonomy and democracy.⁷⁴ Blogs facilitate the promotion of diversity of both content and ownership in the media. To our mind, in addition to the effects blogging has on the democratic discourse, it may have a significant impact on the world of commerce as well.⁷⁵

The mere existence of blogs is insufficient if these are not read.⁷⁶ Recent studies indicate that although the blogosphere is vast, the number of users reviewing blogs is relatively small.⁷⁷ We believe, and studies indicate,⁷⁸ that this is a transient state. Blogs are becoming more popular and central as time passes. Blog postings and the information they convey are also prominently presented by search engines in their search results. The increased intake of information by such alternative media sources can inform ex ante consumers of unfair and imbalanced contractual provisions, and allow them to act accordingly.

3. Vendors' "Brand"

The third form of data flow concerns contamination and dilution of the e-commerce vendors' brand as a result of biased contractual provisions. We have yet to establish whether these specific brands are more resilient or vulnerable to ex post–ex ante data flows. Commentators addressing these issues state conflicting arguments.⁷⁹ Generally, several

74. Yochai Benkler, for instance, refers to blogs as tools that can reverse the problems of concentration and commercialization that afflicts today's media markets. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 216 (2006).

75. This potential has not been left unnoticed. See Jean Braucher, *New Basics*, in CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION ECONOMY," *supra* note 67, at 185 ("with public online availability of terms, journalist and bloggers can publicize bad terms and get the word out to more customers in a manner that is more readable than the usual standard form.").

76. One might also argue that blogs and other online forms of information distribution are mere conduits, or "pipes," which distribute the content gathered, formulated and edited by the "old" mass media. See, e.g., C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 896 (2002); see also Robert McChesney, *THE PROBLEM OF THE MEDIA* 118, 220 (2004). According to this school of thought, the existence of online media outlets will merely echo the (sparse) information on SFCs conveyed by conventional media. Reality, nonetheless, has constantly proved this assertion wrong. Whereas some bloggers merely post and link to other stories, others have been constructive in bringing forth new ideas and stories authored by a great variety of people, acting on a diversity of motivation. See Benkler, *supra* note 74, at 221.

77. And thus might not meet the NIA model requirements. See *supra* text accompanying notes 23–25. Though the numbers are constantly rising, it is currently estimated that 39% of online users read blogs. See Pew Internet & American Life Project, *Internet Activities Report* (Jan. 11, 2007), http://www.pewinternet.org/trends/Internet_Activities_1.11.07.htm.

78. *Id.*

79. On the one hand, there are stronger incentives to protect one's brand in new and competing markets. On the other hand, firms might forgo their attempts to protect their brand

studies and anecdotal evidence indicate the ease with which public opinion could turn against players in the online arena in the event of misconduct, privacy breaches, or other unpopular steps.⁸⁰ Yet it is unclear whether we can infer from these instances to those which pertain to non-salient terms in the vendor's SFC.

4. Geographic Locations

At first glance this category seems irrelevant to our discussion. The online realm does not feature geographical points of gathering and congregation. E-commerce vendors might frequently refrain from providing an actual address for complaints, and those available to the public might be of remote warehouses and well guarded corporate headquarters. The lack of such geographical locations in the online realm should greatly reduce this ex post–ex ante information flow. However, geographic locations are supplemented by “virtual” ones. These include the vendor's website, as well as other websites where ex post consumers congregate and exchange information.

At first, the prospects for data flows at virtual points of congregation seem bleak as well. As in the “real” world, vendors will strive to silence the information flow at these venues and make use of the website's architecture to minimize criticizing voices. Vendors can construct their websites so as not to provide applications and tools for information sharing, or deny the publication of all negative remarks within its boundaries.⁸¹ Still, some e-commerce websites do provide for such hubs of unfettered exchange of ideas and opinions within the confines of their website.⁸² Evidently, these applications would allow for an efficient and fertile flow of ex post–ex ante information.

Moreover, the geographical points of congregation at which ex post–ex ante information can flow are not limited to those within the confines

in order to generate a profit in a very competitive market. For a discussion of this matter in the broader context of online vendors' “reputation,” see Hillman & Rachlinski, *supra* note 22, at 469–70, 475.

80. See generally, Laura Gurak, PERSUASION AND PRIVACY IN CYBERSPACE: THE ONLINE PROTESTS OVER LOTUS MARKETPLACE AND THE CLIPPER CHIP (1997).

81. These silencing attempts are undoubtedly extremely effective online. The digital realm allows structuring the webpage in specific ways without this architectural framework being apparent to the users, and facilitates the implementing of frequent changes in the website's structure to meet these objectives. See LESSIG, *supra* note 3, at 38–60 (discussing “Architectures of Control”).

82. For instance, Amazon.com and eBay.com allow various forms of information exchange regarding products and services. In some instances (recorded on file with the authors) these exchanges include direct criticism of the hosting websites and their practices. Nir Farber, Analysis of Comments on Large Vending Website (May 2007) (unpublished research survey, on file with authors) (reporting some of these exchanges).

of the vendors' property. "Virtual" space might not have "sidewalks,"⁸³ yet users constantly interact with these ex post consumers online at virtual points of congregation—such as message boards and open forums.⁸⁴ These online applications are frequently devoted to various vendors or the services and products they provide. Recent studies indicate⁸⁵ that ex ante consumers flock to these points of congregation before concluding (or even start negotiating) their online transaction. Within these forums the vendors' ability to silence unwanted statements is limited, and the minimal costs of speech allow ex post consumers to voice their opinion cheaply and freely.

A possible impediment to the success of these data flows is that (in most cases) they rely on the ex ante consumers' knowledge of these existing hubs of information. As opposed to "real space," these points of congregation are not physically apparent. However, users encounter disgruntled consumers or other consumers with information regarding the online transaction en route to the vendors' website through the use of search engines. When using a search engine, online consumers typing in the name of the e-commerce vendor or relevant keywords, will receive search results indicating the existence of other websites, forums, or chat rooms devoted to the discussion (and at times criticism) of these vendors and products. Thus, consumers can quickly acknowledge the existence of relevant "geographical" locations in the online realm.

Before proceeding, we must address several reservations regarding the success of this form of "geographic" data flow. First, not all users will be exposed to this important information source. Some might not know of these points of congregation, and will not be part of the incidental encounters mentioned, as there are other means to reach vendors' websites besides the use of search engines (such as navigating to the site directly from another one or through a hyperlink).⁸⁶ However, according to recent surveys, the vast majority of online surfers use search engines as an information gathering tool.⁸⁷ Second, vendors constantly strive to limit the online interaction between prospective consumers and aggrieved customers. To do so, they apply trademark law and other legal

83. See Beth Simone Noveck, *Democracy of Groups*, 10(11) *FIRST MONDAY* (2005), nn.140–45 and accompanying text. See also Cass Sunstein, *REPUBLIC.COM* 189 (1999) (discussing possible ways to overcome this problem while referring to Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 *HARV. J.L. & TECH.* 149 (1998)).

84. For instance, those provided by epinion.com, cnet.com and many others.

85. See Pew Internet & American Life Project, *supra* note 77.

86. Therefore, they might not be aware of the vibrant discussion addressing the relevant vendor just a click away on message boards or various forums.

87. See Pew Internet & American Life Project, *supra* note 77 (providing that 91% of users turn to search engines to find information).

doctrines⁸⁸ to block the sale of domain names bearing similar names to their own. In addition, they strive to limit the sale of their brand name as a keyword, which would facilitate the selection and presentation of competing and adverse sponsored links near their own, on search engine result pages. At times, they also attempt to silence criticizing voices by threatening to sue the speaker and the forum which hosts her. We address the steps and the legal doctrines they rely upon, in our policy discussion below.

5. Social Networks⁸⁹

This fifth mode of ex post–ex ante flow constitutes the greatest change and challenge of the online realm. It could potentially lead to significant rewriting of the online B2C SFCs doctrines. The Internet provides novel platforms that generate social ties of various strengths. It facilitates the construction of communities in which users can both seek out knowledge and provide responses, while minimizing time and attention constraints. It also allows the quick retrieval of information previously conveyed within these circles. To explain the effects of these platforms, we address the technological and social changes that are bringing about their great success, and the way they affect the ex post–ex ante flow.

This segment of our analysis focuses on a specific set of online tools and interactions, frequently referred to as “social software” or “social networks.”⁹⁰ These applications create communities with ties of varying strengths, which sometimes are limited in size, and most importantly, generate a communal feeling among their users. We do not cover other online tools that facilitate active exchanges among users, such as open message boards, talk-back features and various other tools that allow online social interactions. The reason for this exclusion is twofold. First, we addressed these in our discussion of the second (news and media—with regard to blogs) and fourth (geographical locations) forms of data

88. See *infra* Part V.C.2.

89. In this Article, we suggest one analytical path to overcome the great variety of technologies and social interactions that are emerging in today’s information society and promoting data flows. In our attempt to manage this variety, we utilize a taxonomy premised on existing technologies and business models. Recent scholarship, however, considers several other taxonomies describing these new dynamics. For an interesting and applicable taxonomy addressing these issues while distinguishing close, intermediary, and loose-knit ties, see Lior J. Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003).

90. These terms are quite loosely defined, and might include a broad variety of applications. For a definition of this dynamic, see BENKLER *supra* note 74, at 373 (quoting Clay Shirky). For a discussion of this term, see Michael J. Madison, *Social Software, Groups, and Law*, 2006 MICH. ST. L. REV. 153, 158 (2006); Noveck, *supra* note 83, at nn.20–30.

flow. Second, these applications raise serious questions concerning the accreditation of the speakers in these forums (which we discuss below).⁹¹ In many open message boards, for example, almost any user can voice her opinion anonymously. Yet in this segment our discussion focuses on applications which provide a constant profile for users. They also serve as tools that allow users to vouch for and accredit others, and in that way, promote the creation of a stable community.⁹² Clearly, however, the line between these applications is blurring. Creators of sites, that were mere points of congregation in the past, are now striving to transform them into communities with ties of diverse strengths.

(a) Technology

The technological platforms facilitating online social networks vary.⁹³ Social networks originally emerged through the use of the very first applications the Internet introduced, such as IRC (Internet Relay Chat),⁹⁴ discussion boards, forums, and mailing lists. With time, these tools have been improved to include additional features allowing accreditation of contributors, as well as incentives to motivate contributions to the ongoing discourse. These tools (such as Wikis)⁹⁵ are commonly referred to as “Social Software”⁹⁶ and allow users to form a community and engage in ongoing debates, as well as in various and elaborate group projects.⁹⁷

91. *But see* Lior J. Strahilevitz, “How’s My Driving” For Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1733–34 (2006). Strahilevitz explains that if these forums and sites provide a great deal of feedback, sorting out the false feedback (both deliberate and unintentional) should be possible. We address this issue below, but note that in this specific context, large quantities of feedback might not be available. In addition, the incentives to provide false information are quite substantial.

92. Clearly the nature of the vouching function is important. As Benkler notes, popular social networking sites such as Friendster and MySpace offer vouching in terms of indicating the user is a “friend.” However, this dichotomy of friend/not friend proves too thin to nurture a sustainable accreditation system. *See* BENKLER, *supra* note 74, at 368.

93. *See* Noveck, *supra* note 83, at n.115 and accompanying text (discussing the emergence of relevant technologies that facilitate the discussed networks).

94. *See* Answers.com, IRC: Definition and Much More from Answers.com, <http://www.answers.com/topic/internet-relay-chat> (last visited Feb. 11, 2008) (defining and describing the application).

95. *See* Answers.com, wiki: Definition and Much More from Answers.com, <http://www.answers.com/topic/wiki> (last visited Feb. 11, 2008).

96. *See* Clay Shirky, *Social Software and the Political Groups*, Shirky.com., March 9, 2003, http://www.shirky.com/writings/group_politics.html.

97. For an in-depth analysis of these projects (such as Wikipedia and Slashdot), see Yochai Benkler, *Coase’s Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

These platforms are provided by a variety of entities. Often they are formed by popular portals,⁹⁸ commercial firms with interests in the relevant field,⁹⁹ search engines that refer users to relevant discussions on the basis of keywords,¹⁰⁰ and other for-profit and not-for-profit entities (such as Facebook.com and MySpace.com). These relatively simple platforms greatly benefit from the Internet's general traits: international accessibility at all times and low costs, as well as the extremely low cost of storing the histories of ongoing conversations. Recent improvements in search technologies provide quick and simple retrieval of these exchanges by users who were not part of these discussions.

(b) Society: From the World Lonely Web to Web 2.0

A successful and substantial information flow requires a social interaction that takes advantage of the tools at hand. The online potential for an active social interaction is apparently now being realized.

Observations and predictions in the early days of the Internet stated that this medium leads to social isolation and solitude.¹⁰¹ This line of social commentary viewed online users as lonely individuals facing their computer screens. As these users are completely immersed in their online activities, they refrain from going out into the "real" world.¹⁰²

Yet, with time, the Internet medium proved to be very different. It allowed users to interact, rather than passively consume content in solitude.¹⁰³ Thus, social commentators began exploring the social side of

98. Yahoo! (Yahoo Groups) and Google (such as Google Groups) include several platforms for the formation of such a discourse.

99. See e.g., Carspace.com, CarSpace Automotive Forums, <http://www.carspace.com/csGroups> (last visited Feb. 11, 2008) (Automotive forums for vehicle information, provided by Edmunds).

100. According to Clive Thompson, this is a practice in China and a service provided by Baidu. Clive Thompson, *Google's China Problem (and China's Google Problem)*, N.Y. TIMES, Apr. 23, 2006, available at http://www.nytimes.com/2006/04/23/magazine/23google.html?_r=1&scp=2&sq=google%27s+china+problem&st=nyt&oref=slogin.

101. See BENKLER, *supra* note 74, at 356, 360; ROBERT PUTNAM, BOWLING ALONE—THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY, 176 (2000) (noting that besides the promise of communications in this realm, they generate many problems as they lack social cues and therefore cannot generate trust). This issue was recently revisited in a report by the Pew Internet & American Life Project. See PEW INTERNET & AMERICAN LIFE PROJECT, THE STRENGTH OF INTERNET TIES 2 (Jan. 25, 2006), http://www.pewinternet.org/pdfs/PIP_Internet_ties.pdf.

102. This line of thought continued (and to a certain degree echoed) previous work regarding the televised medium which seems to isolate its viewers and contribute to the demise of social interaction in today's society. See PUTNAM, *supra* note 101, at 283.

103. Studies have also shown that the rise in Internet use has mostly been at the expense of hours and attention previously devoted to watching television. See, e.g., PEW INTERNET & AMERICAN LIFE PROJECT, *supra* note 101, at 3.

the online interaction.¹⁰⁴ These latter trends of thought grew more popular beginning in the late 1990s, as websites such as Amazon.com and eBay made use of applications that facilitate social networks to promote data flows concerning various vendors and products.¹⁰⁵ In the last few years, these technological applications and social trends have moved to the front line of the celebrated Internet traits and features. Sites that create social networks, such as YouTube, MySpace, Facebook and Friendster, lead the various ratings of popular websites,¹⁰⁶ and in some cases, were purchased for many millions by leading media firms.¹⁰⁷ In response to these trends and developments, technologists have declared the birth of “Web 2.0”: A new online generation dominated by the above applications, and a social dynamic that relies on constant contributions from and interaction with the masses.¹⁰⁸ In keeping with this trend, *Time* Magazine voted “You,” the individual interacting, conversing, and commenting online, as “Person of the Year” for 2006, thus cementing recognition of the Internet as a realm of fruitful and ongoing social interactions.¹⁰⁹

Even in view of these developments, there is still no clear answer as to how these changes impact human relations.¹¹⁰ Many argue that “Web 2.0” is merely a buzz term, promoted for marketing purposes, and does not reflect an actual shift in online user conduct and behavior.¹¹¹ Nonetheless, those pointing to a novel and important social phenomenon arising online make a forceful argument. The Internet allows users to maintain existing strong social ties, as well as create and maintain weaker ties among business associates and individuals with mutual in-

104. Turkle, for instance, pointed out that the Internet promotes social interactions of a different kind. See SHERRY TURKLE, *LIFE ON THE SCREEN* 263 (1997) (explaining that the Internet provides additional freedom).

105. Two instances are Amazon Reviews and eBay’s Feedback system.

106. See e.g., Alexa Traffic Rankings, http://www.alexa.com/site/ds/top_sites?cc=US&ts_mode=country&lang=none (last visited on April 15, 2007) (showing several “Web 2.0” websites in leading positions—excluding the search engines that dominate the list and that might be considered such sites as well—with youtube.com ranked fourth, myspace.com ranked fifth, and wikipedia.org ranked eleventh).

107. See BBC News, *News Corp in \$580m Internet Buy* (July 19, 2005), <http://news.bbc.co.uk/1/hi/business/4695495.stm> (reporting the News Corp. purchase of MySpace.); Jim Hu, *Yahoo Buys Photo-Sharing Site Flickr*, CNET NEWS.COM, Mar. 20, 2005, http://www.news.com/Yahoo-buys-photo-sharing-site-Flickr/2100-1038_3-5627640.html (reporting the Yahoo! Purchase of Flickr); Paul R. La Monica, *Google to Buy YouTube for \$1.65 Billion*, CNNMONEY.COM, Oct. 9, 2006, http://money.cnn.com/2006/10/09/technology/googleyoutube_deal/ (reporting the Google purchase of YouTube).

108. See Dvorak, *supra* note 4.

109. Lev Grossman, *Time’s Person of the Year: You*, TIME, Dec. 13, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

110. Or as Benkler concludes, “the effects of the Internet on social relations are obviously complex.” BENKLER, *supra* note 74, at 357.

111. See Dvorak, *supra* note 4.

terests.¹¹² These social changes profoundly affect our political and social discourse. In addition, and as we argue in this Article, they affect commercial practices as well.¹¹³ The creation and strengthening of these social networks facilitates the transfer of information about contractual terms from ex post to ex ante consumers, thereby potentially limiting the role courts and legislators should play regarding SFCs.

(c) Online Ties and Ex Post–Ex Ante Information Flow

Exchanges within social networks generate a fruitful flow of relevant information and the online realm enhances such flows in various ways and contexts. First, online applications serve to strengthen existing ties among family and friends, even when residing at distant locations. The above flows are reinforced by the lowering of the costs of connecting with members of one's close social circle, regardless of geographical distance. This close social circle will prove a reliable source of information about various vendors and their contracting practices.¹¹⁴

The impact on “strong ties” and the flows across them are but a limited contribution by the Internet to the realm of social networking and its implications to online commerce. “Weak ties”¹¹⁵ formulated online make the major difference to the issues here addressed, clustering around specific topics such as professions, hobbies, issues of interest, personal traits and even geographical locations. These social networks are an ideal setting for ex post–ex ante flows.

An online social networking site devoted to discussions of the intricacies of specific SFCs might not generate a great deal of interest,¹¹⁶ but issues related to SFCs arise casually in a variety of other settings in social networks that address the consumption of products and services.¹¹⁷ In addition, in social networks that are not focused on specific themes related to commerce, but on simple friendship or common interests, users might “float” questions about upcoming purchases among other

112. See PEW INTERNET & AMERICAN LIFE PROJECT, *supra* note 101.

113. We focus on applications that promote interactions taking place online only. Other tools are focused on moving the online discourse offline as well. See, e.g., Meetup, <http://www.meetup.com>. For a discussion of this issue, see BENKLER, *supra* note 74, at 368. For a powerful endorsement of these dynamics, see PUTNAM, *supra* note 101, at 410–11.

114. PEW INTERNET & AMERICAN LIFE PROJECT, *supra* note 101.

115. BENKLER, *supra* note 74, at 368; see also Strahilevitz, *supra* note 89.

116. For instance, a site discussing the “Hilton” hotels’ standardized and allegedly biased terms was viewed only by a very few hundreds of surfers. See *EULA Library*, http://www.gripewiki.com/index.php/EULA_Library (last visited July 15, 2007).

117. For instance, in the process of discussing the purchase of products and services related to the issue at hand (be them musical instruments in one context or car parts in another) ex post consumers could pass on information about a vendor’s conduct, which often reflects its SFC.

community members, and will probably receive meaningful insights from them.¹¹⁸ As noted,¹¹⁹ it is very common for consumers to discuss various aspects of their SFCs, without realizing they are in fact addressing standardized terms.

A possible critique of the effectiveness of this form of information flow is that the limited number of users engaged in information exchanges in these social networks is insufficient¹²⁰ to deter imbalanced contracting.¹²¹ While the number of users who participate in social networks is vast and constantly growing, they still constitute a small percentage of all online users, let alone overall consumers.¹²² Only a very limited number of consumers contemplating an online transaction with a specific vendor are members of the community in which information about the true nature of the vendor's SFC is exchanged. According to this argument, the number of users exposed to this form of data flow might not suffice to meet the stated objective of deterring SFCs drafters to employ biased contract terms.

Several responses to this criticism are possible. First, according to the L&E model discussed above¹²³ a relatively small percentage of educated and informed consumers might deter vendors from providing one-sided terms. More importantly, the circle of ex ante consumers receiving information as a result of this dynamic need not be confined to devoted members of online social networks. Information produced within the network can be quickly and effectively reached by outsiders as well.

118. Recent empirical studies indicate that such practices take place. See PEW INTERNET & AMERICAN LIFE PROJECT, *supra* note 101, at 37.

119. See *supra* text following note 45.

120. Another possible critique might argue that in this context, we are affording a great amount of influence to individuals who dominate social networks. In addition, these individuals might have a different set of preferences than the general public. We plan to address these thorny questions in future work.

121. The problem and the critique run deeper, as even in these social networks only a small proportion of the users actively contribute content to the online discourse. For instance, Wikipedia is the product of a social network, but in the ratio of viewers to actual contributors the percentage of the latter is very small. See, e.g., CASS R. SUNSTEIN, *INFOTOPIA 152* (2006). In other social networks, such as YouTube or Flickr, the percentage of contributing users is smaller still. Only 0.2% of visits to YouTube involve users uploading a video, 0.16% of Flickr visits are people posting photos, and 4.56% of visits to Wikipedia result in content-editing. See Bill Tancer, *Who's Really Participating In Web 2.0?*, TIME, Apr. 25, 2007, available at <http://www.time.com/time/business/article/0,8599,1614751,00.html>. The response to this additional aspect of the critique is similar to the one posted in the text, as even this limited amount of participation is sometimes sufficient to generate content that will deter firms from providing imbalanced contractual provisions.

122. According to recent empirical evidence gathered by the Pew Institute, 78% of online users research a product or service before purchase, yet only 16% report using an online social network site such as MySpace or Friendster. See Pew Internet & American Life Project, *supra* note 77.

123. See *supra* text accompanying notes 23–26.

Many social networks allow non-members to view ongoing discussions and earlier posts.¹²⁴ Several networks allow the content of their discussions to be indexed by specific or general search applications, allowing outsiders easily to find relevant discussion threads. According to recent surveys, many consumers indeed flock to these online social networks (via search engines) when seeking information about relevant online vendors, prior to finalizing transactions.¹²⁵

6. Challenges to Online Information Flows

The expansion of the circle of participants in the online information flow intensifies several difficulties: How will “outsiders” know how much weight to assign to information received from parties they encounter for the first time? Can this information be tampered with or manipulated by interested parties, and thereby rendered incorrect and biased? In addition, one must inquire why ex post consumers contribute and assist other consumers (some of whom visit the relevant network website only that one time) with online advice without receiving any apparent benefit or compensation. These are problems of *Accreditation* and *Motivation*, which we now address.

(a) Accreditation

“Accreditation” refers to information indicating whether the relevant online speakers are knowledgeable, reliable, trustworthy, and unbiased. Without accreditation, many of the noted information flows will falter over time. The need for accreditation, which exists in all walks of life, is magnified online:¹²⁶ online, anonymous communications are widespread;¹²⁷ the Internet presents users with an abundance of sources, opinions, and information, mostly from previously unknown speakers; and in this setting, many online interactions are non-recurring. Therefore, online users need tools to establish the dependability of the relevant data and data source.

Several challenges to the information flows concerning consumer products and services arise. First, there are concerns regarding “*forum accreditation*,” i.e., the risk that the content reviewed might be

124. For various reasons, some social networks strictly guard the content of ongoing discussions within the site against outsiders (such as mailing lists on the one hand and Facebook.com on the other).

125. As mentioned, according to the Pew Report, 78% of consumers research products prior to purchase, and 91% (the highest percentage use of any application) make use of search engines to find information. Pew Internet & American Life Project, *supra* note 77.

126. For a discussion of accreditation in the context of the marketplace of ideas, see BENKLER, *supra* note 74, at 169–74, 183–84.

127. LESSIG, *supra* note 3, at 45–46.

compromised by its online host. The entities controlling the relevant application (blogs, posting boards, or social networks) might censor¹²⁸ or alter messages that they find harmful to specific vendors for various commercial reasons. Below we examine which applications and flows are more susceptible to these concerns, and the steps that might be taken to mitigate them. Although this issue poses a serious challenge, we believe that users are learning to identify and distrust suspicious and unreliable forums.¹²⁹

The online realm also raises the concern that the *actual speaker* is unreliable. First, the speaker might be incompetent, and therefore, provide inaccurate or unsubstantiated advice.¹³⁰ The online society is learning to deal with this challenge in various ways. Users can quickly join in and correct the initial user's mistakes or grade the relevant remark, generating a social dynamic sometimes called "folksonomy."¹³¹ Users logging onto the relevant information source will be able to balance this remark with other, correcting comments and additional consumer feedback.¹³² Various online tools allow users to grade comments made by the same user in the past,¹³³ and post a calculated factor of this grade beside newer comments posted by the same user. As these solutions seem to produce satisfactory results in other online settings,¹³⁴ we assume that this aspect of the accreditation problem could be substantially solved in the context of retail and consumer-related information as well.¹³⁵

Overall, several rules-of-thumb could be formulated to establish the accuracy of content flowing in various online forums. For instance, the

128. While censorship does not yield false or misleading data, it will create a wrong and biased impression for the consumer who is searching for the overall picture of a particular issue.

129. The fear of knowledge of such conduct reaching users will encourage these forums not to intervene in this way.

130. The web, as many point out, is replete with mistakes and nonsense. *See, e.g.,* SUNSTEIN, *supra* note 121, at 186–87.

131. For further discussion on "folksonomies," see Tal Z. Zarsky, *Assessing Alternative Models Compensating for Content Consumption*, 84 *DENV. U. L. REV.* 645, 709 (2006).

132. This, of course, does not help the consumer faced with a limited number of "fresh" comments, who would probably be wise to wait. Wikipedia is an excellent example of a dynamic of self correction of mistakes by other users at a later time. *See* SUNSTEIN, *supra* note 121, at 154.

133. For example, Slashdot provides contributors with Karma points and eBay employs a sophisticated feedback system. For a discussion of Slashdot, see BENKLER, *supra* note 74, at 78.

134. A recent study showed that Wikipedia, an encyclopedia generated by a collaborative effort that is susceptible to the errors of incompetent contributors, is as accurate as *Encyclopedia Britannica*. *See* BENKLER, *supra* note 74, at 70–73; *see also* SUNSTEIN, *supra* note 121, at 151.

135. *See* Zarsky, *supra* note 131.

size and maturity of the community involved would be reliable proxies for the quality of advice and information it provides.¹³⁶ We will return to this issue when we discuss policy recommendations below.

Consumer information online might also be flawed and inaccurate because of actual malice.¹³⁷ Users intentionally give incorrect information because of their commercial interests.¹³⁸ For instance, firms might take advantage of the anonymity of the Internet and instruct employees to roam it and intervene in various online exchanges in order to promote the firm's interests (or they may outsource this task to consultants).¹³⁹ These actions would prove to be an acute problem¹⁴⁰ that presents serious challenges.¹⁴¹

The measures mentioned to protect accreditation can be of some use in battling actual malice as well. Fellow users can assist in flagging malicious sources and content. Yet this might be insufficient, given commercial parties' strong incentives to perpetrate these problematic schemes.¹⁴² We return to this matter when we discuss specific forms of information flows.¹⁴³

136. Shirky argues that the success of some communities such as Slashdot or Wikipedia in delivering high level content should not be indicative of the specific mechanisms they use for content quality control. Such success is the result of the several years these services have been in practice, which have created a process of decision making fine-tuned by the community members. See Clay Shirky, *Group as User: Flaming and the Design of Social Software*, Nov. 5, 2004 www.shirky.com/writings/group_user.html (last visited Feb. 1, 2008).

137. In the context of social networks, these actions are now referred to as "crowd hacking."

138. This occurs in the political realm as well. In the U.S., it has been argued that senators have been praising and bashing each other by manipulating the Wikipedia entries of each other. Matthew Davis, *Congress 'made Wikipedia changes'*, BBC NEWS, Feb. 9, 2006, available at <http://news.bbc.co.uk/1/hi/technology/4695376.stm>.

139. These actions will resemble those taken in other online contexts, such as search engine ranking, where firms optimize search results by linking to their website from a variety of locations. See Zarsky, *supra* note 131, at 686; see also James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 10 (2007).

140. For a recent discussion of these concerns, see Annalee Newitz, *Herding the Mob*, WIRED, Mar. 2007 available at <http://www.wired.com/wired/archive/15.03/herding.html>; Annalee Newitz, *I Bought Votes on Digg*, WIRED, Mar. 1, 2007 available at <http://www.wired.com/techbiz/people/news/2007/03/72832> [hereinafter Newitz, *Votes on Digg*].

141. Chyrsanthos Dellarocas, *Reputation Mechanisms*, in HANDBOOK ON INFORMATION SYSTEMS AND ECONOMICS 629, 643-44 (T. Hendershott ed., 2006), available at <http://www.rhsmith.umd.edu/faculty/cdell/papers/elsevierchapter.pdf>.

142. Commercial parties have created such schemes by setting up bogus accounts that promote the specific speaker, who strategically praises or demonizes various products and services, with commercial interests in mind.

143. See *infra* Part III.B.6.c.

(b) Motivation

Empirical findings as well as anecdotal evidence indicate that consumers' motivation to contribute to online social networks exists. Studies show a high percentage of consumer participation in reviewing products and leaving messages in a broad variety of settings.¹⁴⁴ Moreover, these studies show constant growth in online participation.

Yet even after taking these findings into account one must ask why people devote time and attention to providing information about products (and related contractual aspects) for the use of strangers.¹⁴⁵ A possible explanation is a mix of different internal incentives. On the one hand, consumers act out of spite¹⁴⁶ and vengeance against a vendor that has crossed them. On the other hand, users provide feedback out of altruism and while exercising their freedom of expression.¹⁴⁷ In addition, some consumers provide valuable information incidentally, when merely seeking help and assistance from others (regarding the best way to handle problematic SFCs and vendors).¹⁴⁸ These motivations are enhanced online, where the costs of "speaking" and reaching an extremely broad public are particularly low.

New commercial players constantly enter the market for "social networks" and rely on consumer feedback to generate content, value, and eventually profits.¹⁴⁹ These entities seek novel ways to enhance the flow and quality of information that the public provides. To achieve this, they offer prizes and other forms of external compensation to promote

144. See Pew Internet & American Life Project, *supra* note 77 (indicating that 22% of Internet users participate in an online discussion and 19% create content for the Internet).

145. A simple answer might be that the reasons need not matter (or might be an interesting question for sociologists, as opposed to legal and public policy scholars). What should matter for the analysis at hand are the actual trends of user participation. We believe that this response is insufficient. Policy recommendations, which are meant to influence a slowly changing legal system, must be premised on a sound understanding of why these effects transpire, and accordingly determine whether they will prove sustainable in the future. Such information is also required to predict what affects motivation to participate in online exchanges.

146. Spite can go a long way as a motivator online. According to some commentators, spite and hatred of Microsoft are among the key elements that motivated many thousands of computer programmers to collaborate and create the Linux Kernel. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* 98–99 (2005). For more on spite, see Strahilevitz, *supra* note 91, at 1713.

147. Sunstein mentions a mix of these forms of incentives: some are committed to innovation, others enjoy the process, while yet others are pure altruists. Users might also carry out these tasks for approval or glory. SUNSTEIN, *supra* note 121, at 174, 205.

148. A study conducted by our research assistant indeed found several instances in which such information was conveyed. Nir Farber, *supra* note 73.

149. Many new innovative business models are now premised on these sources of labor. Popular websites such as YouTube, Flickr, Digg.com, Del.icio.us rely on information and content generated by consumers in a bottom-up process. See Lior J. Strahilevitz, *Wealth Without Markets*, 116 *YALE L. J.* 1472, 1502–03 (2007).

this form of participation.¹⁵⁰ More time is needed before it can be determined if these new strategies are successful.

(c) Application: Blogs, Message Boards, and Social Networks

The foregoing discussion established the meaning and importance of accreditation and motivation in the general online context. We now apply these elements to three key applications which facilitate online consumer participation.

(i) Blogs

Blogs play an important role in the second form of information flows, as a supplement to the mass media.¹⁵¹ However, the abundance of blogs creates a severe problem of accreditation. Users might rely on a misleading and unreliable source, or lose themselves in the clutter of voices.¹⁵² Yet users find ways around these difficulties. First they learn to rely on specific blogs that have won their trust or that of their acquaintances.¹⁵³ In addition,¹⁵⁴ technological measures (such as Technorati.com and other blog-oriented search engines) point users toward blog entries that have been selected by many other users—a rough proxy for the credibility of the blog's content.¹⁵⁵

In terms of *motivation*, blogs are a classic example of expression primarily motivated by intrinsic incentives.¹⁵⁶ Therefore, bloggers might

150. For instance, MetaCafe.com (social network website) introduced an elaborate “Producer Award” Program. See Metacafe, <http://www.metacafe.com> (last visited Feb. 18, 2008). YouTube has also granted awards to the most-viewed files. See Virginia Heffernan, *Screens: YouTube Awards the Top of its Heap*, NY TIMES, March 27, 2007, available at <http://www.nytimes.com/2007/03/27/arts/27tube.html?fta=y>.

151. See sources cited *supra* note 76.

152. SUNSTEIN, *supra* note 121, at 187, harshly criticizes blogs, stating that in many cases they are inaccurate, error-ridden, and uncorrected when a mistake is revealed. Moreover, he argues, blogs might create “information cocoons” as users will turn to them to strengthen their pre-existing opinions.

153. Recent research indeed indicates that although there are millions of blogs, users tend to only concentrate on a few. See Shirky, *Power Laws, Weblogs, and Inequality*, Feb. 8, 2003, http://www.shirky.com/writings/powerlaw_weblog.html. This trust could indeed be misplaced, as occasional reports surface on a prominent blogger “selling out” and promoting corporate interests. See Jon Fine, *Polluting the Blogosphere*, BUSINESSWEEK, July 10, 2006, available at http://www.businessweek.com/magazine/content/06_28/b3992034.htm. Yet, such concerns pertain to the mass media as well.

154. See LESSIG, *supra* note 3, at 243–44.

155. Another question of accreditation could arise regarding content posted by other users within the blog. However, as these forms of web pages tend to be closely moderated by one or a few individuals, the risk of gaming and manipulation through posting to these sites is substantially reduced.

156. However, bloggers sometimes reap considerable profit from advertising through their pages. See Ben Arnoldy, *Bloggers Can Make Money, but Most Keep Day Jobs*, THE

be motivated to address SFCs they themselves encountered as ex post consumers.¹⁵⁷ Such blogging would not be that common, however, and will be dispersed among the millions of online blogs. Moreover, often the blogger's motivation might not be the same as that required for the task this Article addresses. Most bloggers seem to address political or government-related issues and matters in the news, and therefore shy away from questions of imbalanced non-salient SFCs. In other instances bloggers focus on personal issues, aiming to connect with friends and family.¹⁵⁸ Therefore, blogs might prove a problematic source for ex ante consumers.

(ii) Message Boards and Points of Congregation

The Internet creates many points of congregation, where consumers flock to discuss various aspects of products and services. These sites present a promise for fruitful exchanges and ex post–ex ante information flows. Still, severe problems in terms of accreditation and motivation arise.

First, regarding accreditation; when such sites are operated by commercial entities there is ongoing concern that the operating entities will use the site to promote various commercial interests (problems of “forum accreditation”). Furthermore, many of these sites allow users to leave comments “on the fly” and without registering as a user (and thus creating a stable and identifiable online persona). While existing tools, such as “folksonomies,” help users decide whether the information is accurate and helpful, they are still subject to possible manipulations by interested parties who hide behind a veil of anonymity.¹⁵⁹ This concern is exacerbated given the digital traits of the Internet, which would allow

CHRISTIAN SCIENTIST MONITOR, Feb. 5, 2007, *available at* <http://www.csmonitor.com/2007/0205/p01s03-ussc.html>.

157. According to a recent study, 78% of bloggers are inspired by personal experiences in their posts. PEW INTERNET & AMERICAN LIFE PROJECT, BLOGGERS: A PORTRAIT OF THE INTERNET'S NEW STORYTELLERS 9 (July 19, 2006), *available at* http://www.pewinternet.org/PPF/r/186/report_display.asp.

158. These statements might seem contradictory, but according to a recent study, they address the two faces of blogging. It showed that 60% of bloggers blog to keep in touch with family, and 37% mostly address their personal lives. The second most popular topic is politics and government (11%); business affairs rank much lower in popularity. For a more detailed discussion, see *id.*

159. Many of these forums have recently begun introducing various accreditation systems that indicate returning users in order to maintain their accreditation among the users' eyes. Adopting these applications somewhat constitutes the evolution of this forum into a community or a social network, and therefore it is treated as such in our analysis.

automated “bots” to bombard these forums with self-interested messages.¹⁶⁰

These forms of information flow meet several challenges in terms of *motivation* as well. Although users would be inclined to participate, whether out of spite or altruism, they might hesitate because of the “free riding” problem, which allows many others to benefit from their efforts without reaping any benefit. Genuine comments might be drowned in self-interested ones from vendors and their representatives. Several online vendors strive to overcome these problems by encouraging users to provide feedback, either through compensation¹⁶¹ or simply by endlessly nagging them.¹⁶² It is unclear whether these steps prove fruitful.

Although these online points of congregation might have some shortcomings, many commercial entities are well aware of these difficulties and strive to minimize them. One strategy is to turn these sites into loose-knit (though very large) *communities* of users and consumers. We now consider these social dynamics.¹⁶³

(iii) Social Networks

Information distributed through these networks shows the most promise of overcoming the obstacles of accreditation and motivation. In terms of forum accreditation, these realms are usually maintained by external entities devoted to the neutral operation of this network. When this is not the case, the “repeat players” and active community members closely monitor the actions of the operators and complain if they suspect “foul play.” Several traits of these communities allow other accreditation concerns to be overcome as well. This is achieved by introducing various tools for accreditation of both content and speaker, as well as publication of the histories of the returning players and the grades they received in the past. These tools and applications allow even once-only visitors to quickly establish the merit of comments and recommendations available throughout this network.

160. To battle these bots, websites have devoted resources to develop CAPTCHAs—automated Turing tests set in place to assure that only humans can make use of these applications. For the various difficulties involving the usage of CAPTCHAs, see CAPTCHA: Information and Much More from Answers.com, <http://www.answers.com/captcha> (last visited Feb. 18, 2008).

161. However, as Benkler explains in the context of peer production and the open source movement, providing external incentives in settings dominated by altruistic contributions might prove counterproductive. BENKLER, *supra* note 74, at 94–95.

162. This was the personal experience of one of the authors with both Amazon and eBay.

163. eBay, for instance, strives to brand interactions among users as interactions within the eBay “community.” This is in an attempt to overcome troubles of accreditation and motivation.

Crucial elements of such networks insulate these communications from manipulation and malicious actions of interested parties as well. Since these realms include many returning players, anonymous posts made by interested parties will probably be ignored. Sophisticated and persistent commercial entities might strive slowly to build a credible profile in these realms, and thereafter provide biased content. Yet there is a good chance that other repeat players will identify these bad intentions and “flag” such a user as problematic and unreliable.¹⁶⁴ Finally, as these networks are populated by repeat players who invest a great deal of time and energy in constructing their online reputation, they might be reluctant to risk their integrity by conforming to corporate objectives.¹⁶⁵

In terms of motivation, these realms provide additional dimensions to those mentioned above. Users are motivated to participate in the online discourse given their affiliation and sense of belonging to the online community. Recent studies indicate that consumers’ motivation to contribute is reinforced when information on other community members is available.¹⁶⁶ Also, as they might expect to receive information from other repeat players in the community, users contribute out of reciprocity.¹⁶⁷

The above aspects of social networks have rendered them fertile platforms for peer production and joint projects. They also turn these social realms into an environment that furnishes a sustainable ex post–ex ante information flow. As the popularity of such networks constantly grow, the existence of this dynamic mandates rethinking the legal treatment of online SFCs.

C. *The Third Chokepoint: Internalizing Information Ex Ante*

Even though additional data flows are materializing online, their mere existence might have no impact. For various reasons, ex ante consumers might choose to ignore (or not seek) the important information at

164. For examples of these dynamics, see Newitz, *Votes on Digg*, *supra* note 140.

165. Several troubling instances indicate otherwise. According to news reports, one recent case took place in the folksonomy Digg.com. See Dan Mitchell, *What’s Online—Stuffing the Electronic Ballot Box*, N.Y. TIMES, Dec. 23, 2006, available at <http://www.nytimes.com/2006/12/23/technology/23online.html>. With regard to the proactive role law might be required to take regarding these matters, see Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTEL. PROP. MEDIA & ENT. L.J., 741, 781 (2008) (indicating that such steps are already seriously contemplated in the UK, such as anti-sock puppet legislation).

166. See Chris Forman, Anindya Ghose, & Batia Wiesenfeld, *Examining the Relationship Between Reviews and Sales: The Role of Reviewer Identity Disclosure in Electronic Markets*, *Information Systems Research*, 19 INFO. SYS. RES. (forthcoming 2008) (manuscript at 6), available at <http://ssrn.com/abstract=918978>.

167. See *id.* at 9–11.

their fingertips. We return to these and others issues in Part V below, where we apply our analysis of the ex post–ex ante information flow to a concrete discussion of contractual terms in B2C transactions.

IV. ONLINE B2C CONTRACTS: REASSESSING THE NIA

A. *Ex Ante vs. Ex Post Analysis of Online SFC—Resolving Differences*

In this Part, we examine whether the NIA can be applied in the online context while relying upon our previous insights regarding the ex post–ex ante of information concerning B2C SFCs. After applying the economic and behavioral critiques of the NIA to the online setting, we conclude that this flow strengthens the NIA in specific situations, thus leading to important policy implications.

First, an important caveat is due. Throughout the analysis, we treat as equal the outcome of Marginal Consumers reviewing SFCs ex ante and other instances in which Marginal Consumers act on information flowing from ex post consumers. Nevertheless, these two instances differ substantially. In the former, consumers react to the actual provisions of the SFC; in the latter, consumers (and then the markets) react to the vendors' conduct and other consumers' feedback which are premised on the SFC. The difference between these instances arises when vendors set imbalanced provisions in their SFCs yet fail to act (or act very rarely) on them. In such a case the existence of these provisions will not be reflected in the ex post–ex ante data flow. Therefore, at first blush, implementing policy recommendations on the basis of promoting and relying on the latter data flow will probably not deter vendors from including imbalanced provisions, which they rarely enforce, in their SFCs.

Vendors have several incentives to include imbalanced provisions they do not insist upon in their SFCs. First, such provisions can enhance firms' reputations. When aggrieved consumers turn to vendors for relief, they will first refer them to the relevant (yet imbalanced) contractual provision, and then inform their customers that the vendors' consumer-friendly policy is to forgo their contractual rights. Second, the mere inclusion of such provisions has a "chilling" effect on a significant segment of consumer complainers. These aggrieved consumers will refrain from taking various actions against the vendor on learning of their limited entitlements according to the SFC they previously accepted.¹⁶⁸

168. Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contracts Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 92–93 (1997). This resembles, in a way, the discussion above on ex post discrimination. See also *infra* text accompanying notes 195–200.

Third, in acting this way, vendors prepare themselves for a “doomsday” scenario in which extreme circumstances (such as a massive recall or a colossal malfunction in their product) would require them to exercise their rights according to the imbalanced provisions.¹⁶⁹

Online information flow will minimize two of these three incentives, and thus limit the problematic outcomes of imbalanced yet rarely enforced contractual provisions. Vendors will be less inclined to include imbalanced provisions in their contracts for the first (“enhancing reputation”) and second (“chilling aggrieved consumers”) reasons. This is because the online realm facilitates yet another information flow, that among ex post consumers themselves. This flow allows experienced consumers to learn easily of the ways vendors treat and interact with others. With this additional flow in place, a vendor will be hard pressed to manipulate consumers into believing that it is providing them with preferable treatment. In the online setting, consumers can easily find out that they are not receiving any preferable treatment from the vendor when it “graciously” decides to depart from the strict provisions of its SFC. Similarly, when taking into account the ex post–ex post information flow, the “chilling effect” mentioned might diminish as well. When consumers can easily learn that vendors comply with consumers’ requests even though they are not required to do so according to the relevant SFC, they need not be intimidated by the actual language of the SFC. With such information at hand, consumers will feel more confident to demand more consumer-friendly treatment from the vendor.

The third incentive mentioned (preparation for a “doomsday scenario”) cannot be resolved by the data flows addressed throughout this Article. Still, it could be mitigated by some of the specific regulatory interventions we consider below.¹⁷⁰ In sum, although exclusive reliance on the ex post–ex ante information flow might not provide all the benefits of ex ante review of SFCs, these lost benefits are not substantial in the online realm, and could be restored by specific regulatory steps.

169. In the meantime they risk only minimal reputation damage, as very few consumers actually read and internalize SFCs ex ante. Some academics further argue that vendors might draft one-sided agreements yet enforce them only against opportunistic buyers who exploit market asymmetries that disadvantage firms. *See e.g.*, Bebchuk & Posner, *supra* note 7, at 828 (explaining that “the seller’s right to stand on the contract as written will protect it against opportunistic buyers” where occasional consumers might not have any reputation concerns); Gillette, *supra* note 15, at 977 (opining that sellers are “more likely . . . to enforce ostensibly oppressive terms only in the face of serious buyer misbehavior”). Interestingly, if this is indeed the case, information flows which include references to the consumers’ and firms’ behavior along the lines suggested by Bebchuk & Posner will strengthen the positive outcomes of such behavior patterns. Such a flow will deter consumers from behaving opportunistically and encourage firms to treat good-faith customers fairly, regardless of previously incorporated one-sided terms.

170. *See infra* Part V.

B. Taking SFCs Online

Agreements executed online are drafted by one commercial party: the website operator. Most online SFCs terms are rarely (if ever) open to negotiation.¹⁷¹ Furthermore, while offline consumers can complain to the vendor's local agents, online users are arguably confronted with a harsher reality: the e-vendor's automated interface seems to leave no room for any expression of discontent.¹⁷² Online standard form contracting has led to a flurry of reactions. Legislators have set consumer protection rules which regulate the online SFCs.¹⁷³ At the same time, courts have been called to decide whether online consumer contracts are binding and whether their imbalanced provisions might be revoked.¹⁷⁴ Academia too has been grappling with what policy should be implemented regarding online SFCs,¹⁷⁵ a matter we now discuss.

1. The NIA Online

The NIA submits that when market forces are properly aligned, SFCs will prove balanced and will provide an efficient allocation of risks and obligations. This rationale holds for online contracting as well. Fearing the loss of Marginal Consumers in the online competitive B2C setting, sellers are expected to draft balanced SFCs. The NIA also fits quite neatly into broader notions of Internet policy doctrine. Since the advent of the Internet, many have argued for treating this realm as borderless and order-less. Commentators maintain that regulation in this context will slow the net's innovation, as technology will quickly outgrow legal rules.¹⁷⁶ Furthermore, they assert that rules will prove ineffective as online firms defy geographical borders.¹⁷⁷ Regardless of the

171. As stated earlier, several SFCs terms are typically left blank, such as price, quantity, and time and means of delivery. Online, some vendors allow contractual flexibility on more provisions, such as warranties (especially in the retail sale of electronics). *See supra* note 16.

172. *See* Hillman & Rachlinski, *supra* note 22, at 468. Yet some websites do provide means for consumer feedback. *See infra* Part IV.B.2.e.

173. *See, e.g.,* Jane Winn & Brian Bix, *Diverging Perspectives on Electronic Contracting in the US and the EU*, 54 CLEV. ST. L. REV. 175 (2006).

174. *See supra* notes 10–11.

175. For instance, some academics propose that regulators should require online vendors to present clearly SFC terms on their websites prior to contract formation, and include specific captions and details in these documents. *See* Hillman & Rachlinski, *supra* note 22, at 491; Morningiello, *supra* note 10, at 1347.

176. *See* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 8, 1996, <http://homes.eff.org/~barlow/Declaration-Final.html>. For a discussion of this issue, *see* JACK GOLDSMITH & TIMOTHY WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 20–22 (2006).

177. David Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1379–80 (1996). *See also* LESSIG, *supra* note 3, at 300–01 (discussing, and disagreeing with, this notion).

accuracy and validity of these arguments,¹⁷⁸ they represent a powerful notion that matches the NIA's discontent with governmental and judicial intervention. The analytical foundations and prerequisites of the NIA are also a perfect fit with the Internet market realm. Online B2C markets prove extremely competitive given the relatively low barriers to entry.¹⁷⁹ Furthermore, Marginal Consumers can (arguably) easily review the relevant SFC prior to the transaction. Vendors will accordingly tailor their SFCs in a balanced manner, possibly leaving little cause for legal intervention.

The online realm also strengthens the NIA by providing Marginal Consumers with two additional sources of information on the SFCs: (1) ex post consumers, and (2) watchdog groups. The ease of accessing these sources will potentially broaden the Marginal Consumers group, and further deter vendors from providing imbalanced SFCs.

We devote the following sections to the ex post–ex ante flow of information online, after we briefly consider the weight and merit of information streaming from watchdog groups in the online context. Indeed, the Internet might help ex ante consumers by providing them with easy access to information collected by self-appointed or governmental watchdog groups. These groups will closely scrutinize SFCs of popular vendors, and voice their opinions as to the content and fairness of these contracts. The Internet provides a valuable mechanism for checking government branches by dispensing news and commentary on their actions, something hardly possible yesteryear.¹⁸⁰ Arguably, these principles can apply to commerce as well, and consumers can have access to an abundance of consumer reports.¹⁸¹ Blogs, social networks, search engines, and other means of online information distribution could provide users with access to information streaming from these sources about possible flaws and imbalances in SFCs. However, relying on watchdog groups to generate market dynamics that would protect consumers from one-sided contractual terms is a problematic notion. The success of online watchdog groups in the political arena might not easily translate to similar success in the realm of commerce and B2C transactions.¹⁸² Therefore, we leave this issue for future exploration and discussion.

178. See generally Goldsmith & Wu, *supra* note 176.

179. See *supra* text accompanying note 8.

180. For several examples, see BENKLER, *supra* note 74, Ch. 7.

181. See, e.g., Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 852 (2006) (referring to several such successful ventures, some run by the EFF).

182. Skeptic readers might raise several valid questions as to whether watchdog groups will prove a reliable, stable, and substantial source of information online. In the offline world, few relevant reports on the issue of provisions of standard form contracts are produced, and even fewer are actually read by the general public. Even when such reports are produced, they

To summarize, the online realm creates market conditions and information flows that may allow market forces to assure balanced SFCs. Yet, as we mentioned,¹⁸³ the NIA has been criticized from various doctrinal perspectives. We now study these critiques as applied online, focusing on information flowing from ex post consumers.

2. The NIA Online: Law & Economic Challenges and Responses

In the following paragraphs, we discuss critiques of the NIA in the online context from the L&E school of thought. We refer to arguments premised on (a) transaction costs, (b) uniformity of SFCs and free rider effects, (c) credence qualities, (d) the vendors' misperception, and (e) the limited influence of Marginal Consumers and vendors' ability to marginalize market pressures to provide balanced contractual provisions.

(a) Transaction Costs

A powerful challenge to the NIA states that even the Marginal Consumer will find reading and evaluating SFCs inefficient. Consumers in the offline world reach this rational conclusion when considering the high transaction costs of this task, namely evaluating a long and complex SFC. Rational consumers will reach a similar conclusion online. Furthermore, transaction costs online are bound to rise. Online users confront more contracts every day, and at every virtual juncture.¹⁸⁴

The NIA can provide strong responses to this critique in the online context, resorting to the additional data flow we emphasized above. Although ex ante consumers encounter high costs when attempting to decipher SFCs online,¹⁸⁵ they gain access to knowledge about these

tend to focus on outrageous behavior rather than mildly imbalanced contractual provisions. *See id.* There are several possible responses as to why matters will be different online. The Internet proves a fertile platform for content production. For instance, it can facilitate collaborative projects in which thousands of volunteers work their way through extensive SFCs and provide online commentary for their segment, which is later compiled into an overall ranking that is open to the public. *See* BENKLER, *supra* note 74, at 262 (discussing the role of blogs as watchdogs in the political context). On the other hand, the political sphere presumably provides greater motivation for public participation than the commercial realm, so the success of the online discourse about the former should not serve as an indication about the latter. Considering its complexity, we believe this issue raises serious questions that are beyond the scope of this Article.

183. *See supra* Part I.D.

184. On the other hand, it is possible that in the future, technological measures would assist in reviewing SFCs and identifying problematic clauses. For instance, JavaCool software has developed a tool (the "EULAlyzer") which strives to meet this objective. *See* Javacool Software, EULAlyzer, <http://www.javacoolsoftware.com/eulalyzer.html> (last visited Feb. 18, 2008).

185. However, one can argue that technologies can assist consumers in reviewing SFCs quickly and efficiently. Simple applications such as browser search buttons allow users to find quickly the provisions they seek. On the other hand, some commentators argue that reading

contracts through the ex post–ex ante data flow. Prospective consumers can learn of the traits of SFCs by searching and following blogs, message boards and forums, and interacting in various social networks. This information need not be extensive or cloaked in legalese, as it is written by fellow consumers who want to get their point across as clearly as possible. Fellow users are expected to share their experience with contractual terms in simple and informal language (and, as mentioned above, sometimes not even noticing that they are raising matters covered in a standardized term).¹⁸⁶

Obviously, sifting through the various relevant snippets of data available online can be time consuming and even frustrating. However, tech-savvy users will form a new class of Marginal Consumers who master these tasks while avoiding the pitfalls of relying on non-accredited and manipulated sources. Sometimes users will gather this information very cheaply, as they encounter data when interacting within their own online virtual communities. Mostly, however, they will encounter such information when using various search applications. These tools, as we explained above, will quickly and easily direct them to relevant information after typing in relevant keywords or the brand name.¹⁸⁷

(b) Uniformity of SFCs and the Free Rider Problem

NIA critics further argue that Marginal Consumers will refrain from reviewing SFCs as they will be motivated to leave this tedious task to others and try to “free ride” on their efforts. Ultimately this line of thinking will result in almost no consumers reviewing SFCs.¹⁸⁸ Consumers will likewise refrain from examining their particular agreement, assuming that other SFCs (of competing brands) are similar and their dreary task of reading and reviewing will be in vain.

The ex post–ex ante information flows can mitigate these arguments as well. In terms of uniformity, with information streaming smoothly online from various ex post users, ex ante consumers have additional tools to establish whether or not SFCs are similar. With this information flow, consumers need not rely on intuition regarding uniformity, but on actual feedback they receive from consumers who have engaged in transactions premised on the agreements of various online vendors.¹⁸⁹

SFCs off computer screens proves “hard on the eyes” and therefore constitutes an additional cost. Hillman, *supra* note 181.

186. See discussion following *supra* note 45.

187. For a discussion on the ease of searching online, see Gillette, *supra* note 15, at 977.

188. However, this critique is somewhat problematic as it ascribes consumers a great deal of sophistication, which they might not deserve.

189. The NIA provides a strong response, even when these information flows indicate uniformity among SFC. According to the NIA, actual uniformity in SFCs of different vendors

With regard to the “free riding” argument, we assert that as ex ante users are able to access information about SFCs easily from ex post consumers, they are more likely to gather information about vendors themselves, rather than relying on others. As explained above, users might learn of such information incidentally, when searching for information on the product in general,¹⁹⁰ or even interacting with others in online social networks.

(c) Credence Qualities

Another critique of the NIA is that even Marginal Consumers are unable to comprehend, and then signal to vendors, that the SFC at hand is imbalanced and unfair. Many of the imbalanced contractual provisions refer to credence qualities, which are difficult to assess at the time of contract formation, as well as during performance.¹⁹¹ Even the most sophisticated consumers will concede to unbalanced contractual provisions in view of their inability to grasp and predict the future outcome of the agreement at hand.

Consideration of the ex post–ex ante information flows diminishes this line of criticism. Although online ex ante consumers cannot assess credence qualities on the basis of the SFC alone, they are in a better position to do so with ample information streaming in from ex post consumers. These experienced consumers can report on remote risks that manifested later. With this information available, ex ante consumers can better assess terms usually categorized as credence qualities.¹⁹²

(d) Vendors’ Misperception

Critics of the NIA further argue that even if Marginal Consumers review the SFC and signal their disapproval of biased provisions, this signal will be disregarded by vendors. Vendors’ representatives have neither the motivation nor the opportunity to convey consumers’ discontent with the relevant SFC to the vendor’s management and legal departments. On the face of it, online reality strengthens the NIA

need not indicate a problem. Such uniformity can be explained by vendors reaching an acceptable equilibrium, and offering fair and balanced provisions.

190. Recent evidence indicates that large numbers of consumers indeed engage in such searching and examination. *See supra* notes 122, 125.

191. *See* Meyerson, *supra* note 19, at 596–97.

192. We concede that not all credence qualities could be revealed through the ex post-ex ante information flow, as some problematic features may appear many years later. These issues are usually dealt with through consumer protection laws. For a discussion on the EU approach to this matter, see Francesco Parisi, *The Harmonization of Legal Warranties in European Law: An Economic Analysis*, 52 AM. J. COMP. L., 403, 419 (Spring 2004).

critique. This realm leaves hardly any room for actual interaction between vendors and consumers.

However, many e-commerce websites do facilitate consumer feedback, which may make its way directly to management. In the competitive e-commerce environment vendors have many incentives to structure their websites to afford access to this important feedback source. Furthermore, consumer feedback reaches management through the various forms of online content distribution and information flow mentioned. Anecdotal newspaper reports indicate several instances where vendors reacted directly to complaints posted on influential blogs and in social networks.¹⁹³ Recent statements by business leaders indeed indicate¹⁹⁴ an increased interest in information streaming through online forums, chat rooms and other virtual social gatherings. In sum, the online realm will lead to the removal of obstacles in the flow of relevant information to the vendors' management.

(e) Discriminating Among Different Groups of Consumers

NIA critics argue that vendors can undermine the effects Marginal Consumers will have by identifying them and treating them differently. In doing so, vendors can provide sub-optimal SFCs and treatment to the majority of consumers, while not risking the loss of Marginal Consumers. As explained, this form of "customer discrimination" could be carried out at two junctures: *ex ante*, when vendors provide sophisticated consumer with specific contractual terms that will meet their special request; and *ex post*, when vendors can "silence" complaining consumers with preferential treatment.¹⁹⁵

The online context brings interesting twists to this argument. On the surface, it provides a strong foundation for those critiquing the NIA. The Internet's interface provides additional opportunities to narrowcast dif-

193. In recent instances, both negative (Dell) and positive (Toyota Prius) online feedback had a profound effect on brands. See Keith Schneider, *Brands for the Chattering Masses*, N.Y. TIMES, Dec. 17, 2006, available at <http://www.nytimes.com/2006/12/17/business/yourmoney/17buzz.html>. Marketing experts recommend that firms constantly review the blogosphere and discussion boards to seek out both positive and negative information. See Paul Gilber, *Brand Protection in the Age of Customer Engagement*, WIS. TECH. NETWORK, Mar. 2, 2007, available at <http://wistechnology.com/article.php?id=3742>. Various firms, such as BuzzMetrics, engage in monitoring brands in these realms and act as intermediaries by forwarding these data (for a charge) to major vendors. See Schneider, *supra*. Companies also have their own corporate blogs and are interested in promoting various discussions by these means.

194. Comments along these lines were made at the 2007 World Economic Forum in Davos in the panel including the UK Chancellor of the Exchequer and the CEO of Goldman Sachs. Similar comments were made by Scott Anderson, HP's director of Enterprise Brand Communications. See Daniel Terdiman, *Why Companies Monitor Blogs*, CNET, Jan. 3, 2006, http://news.com.com/Why+companies+monitor+blogs/2100-1030_3-6006102.html.

195. See generally *supra* note 17; text accompanying note 34.

ferent content to different consumers. By making use of the Internet's "one-on-one" interface and relying on personal information previously collected, vendors can attempt to identify Marginal Consumers and provide them with preferable terms.¹⁹⁶ They can extend special offers and contractual terms to some purchasers ex ante without the knowledge of others.¹⁹⁷ They can also approach aggrieved consumers ex post and "silence" them without other consumers knowing of such conduct.

However, consideration of the ex post–ex ante information flows substantially weakens this critique. To isolate consumers who might be sensitive to imbalanced contractual provisions, vendors must also identify consumers who are likely to draw information from ex post consumers through the various online applications mentioned and use it when making various retail-related decisions. It seems almost implausible that vendors could construct a model to detect such users ex ante. In addition, the discriminatory practices mentioned above are extremely difficult and risky to implement online. Very few firms have engaged in discrimination of contractual terms in e-commerce, and the technological challenges in attempting to do so are greater than technologists originally predicted.¹⁹⁸ Even when such schemes were implemented,¹⁹⁹ firms suffered serious repercussions on their exposure, as news of these discriminatory practices spread quickly throughout the net.²⁰⁰

3. The NIA Online: Addressing the Behavioral Critique

The existence of the online ex post–ex ante information flow greatly influences the behavioral analysis of offline B2C SFCs. Here we focus on critiques addressing (a) information overload and consumers' tendency to focus on salient attributes; (b) surrounding circumstances that impede consumers' capabilities; (c) risk biases (especially over-confidence and over-optimism); and (d) consumers' perception of self-commitment.

196. See Hillman & Rachlinski, *supra* note 22, at 472; Hillman, *supra* note 181, at 843 (noting that at first glance, "because e-consumers can easily spread the word about the nature of the terms, the Internet should increase this incentive [to provide consumers with fair terms]"; yet realizing that e-technology facilitates ex ante discrimination in contractual terms).

197. For instance, online, e-commerce vendors provide specific forms of consumers with "special sales codes" that allow access to sales and reduced prices (a practice applied, for instance by Bestbuy.com and Amazon.com).

198. Since today's technologies allow users to apply multiple identities and pseudonyms online, firm's risk that these schemes will become evident quickly, and consumers will report them to their peers.

199. In the context of the "special sales codes" example mentioned earlier, *supra* note 197, these dynamics are somewhat undermined by the fact that these codes are later distributed online through various forums (and accessible through search engines). Thus, the effort to discriminate among consumers is further undermined by various information flows.

200. See BENKLER, *supra* note 74, at 157 (noting attempts by Amazon.com to engage in such discriminatory practices, and the severe repercussions it suffered as a result).

(a) Information Overload

A rational decision-maker is assumed to search for information up to the point where the search costs exceed the expected value of the information not yet revealed.²⁰¹ However, empirical studies demonstrate that people act quite differently when they encounter cognitive impediments that undermine their ability to process information. The term “information overload” is usually applied to acknowledge that people are overwhelmed by a deluge of information.²⁰² Applying these findings to our context, some academics argue that consumers fail to carefully (if at all) examine SFCs due to information overload. Human limitations lead consumers to focus on a few salient traits of the underlying transaction: price, time of delivery, quality, and the like. They are likely to neglect many “non-salient” issues²⁰³ or the SFC in its entirety.²⁰⁴

Application of this rationale to the online setting has sparked an interesting debate among scholars. Some argue that although the online realm offers opportunities for users to obtain additional information about the transaction,²⁰⁵ this is offset by the abundance of online contracts and by cognitive pressures on consumers in this environment.²⁰⁶ Therefore, consumers are overwhelmed and overloaded by information online as well, and they disregard the relevant contract in its entirety, settling to only analyze and examine salient provisions.²⁰⁷

The availability of information from ex post consumers and watchdog groups further complicates this question. At first blush, these aspects of the online world fail to improve the position of the confused ex ante consumers. The information flow dynamic addressed throughout this Article provides users with what they seem to need least: more information. Even with such helpful information available, the overwhelmed consumers will ignore it.

We believe, however, that the above data flow can prove constructive in this context as well. The ex post–ex ante information flow allows ex

201. See, e.g., GEORGE J. STIGLER, *THE THEORY OF PRICE* (4th ed., 1987).

202. See, e.g., David M. Grether, Alan Schwartz, & Louis Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 278 (1986) (using a similar definition merely as a starting point).

203. See, e.g., Hillman & Rachlinski, *supra* note 22, at 451; Korobkin, *supra* note 36 (explaining that consumers examine only five most salient attributes).

204. See Melvin Aron Eisenberg, Comment, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986).

205. For example, the ability to browse easily through the contract using various search functions.

206. See, e.g., Hillman & Rachlinski, *supra* note 22. Note, however, that according to some recent surveys, users are not overwhelmed when engaging in searches for information regarding commerce online. PEW INTERNET & AMERICAN LIFE PROJECT, *supra* note 101, at 38.

207. See Korobkin, *supra* note 36.

ante consumers to digest a great deal of information effectively, sometimes transforming non-salient, yet relevant, information into salient attributes. To understand how this happens, we must consider the two ways in which ex post consumers convey their opinions. First, consumers provide an aggregated factor. In many cases, message boards and feedback mechanisms allow consumers to rank their interaction with various vendors on a numeric scale. Certain forums aggregate the factors mentioned into one overall number (or grade) that accounts for all the users.²⁰⁸ Second, consumers share their opinions by providing written and detailed accounts of their interaction with specific vendors.

Consumers who resort to aggregated factors describing an online transaction will find them quite helpful in overcoming the information overload phenomenon. These aggregated factors allow users to concentrate on a limited data source that conveys abundant pertinent information. They are also easy to understand and consider when contemplating whether to engage in a specific transaction. In providing their aggregated feedback, ex post consumers will also allocate great weight and attention to the provisions relating to their actual unfortunate experience, including those deemed “non-salient” ex ante. Hence, when ex ante consumers examine a specific grade provided by ex post consumers, they are receiving concise information that encapsulates the entire SFC (including non-salient provisions).

Admittedly, this argument has at least two shortcomings. First, many of the mechanisms that provide aggregated feedback are vulnerable to manipulation by interested parties. Second, a negative (yet true and correct) review of various contractual provisions might be lost among, or offset by, other reviews wrongfully praising the products’ attributes.

The first shortcoming is clearly problematic. Yet, and as explained above, these concerns are greatly mitigated in some forms of information flow by countering social forces on the one hand and technological measures on the other.²⁰⁹ The second shortcoming requires some additional thought, yet could be mitigated as well. Its resolution calls for a complex dynamic in which ex ante consumers rely on the collective wisdom of ex post ones. Recent scholarship explains that the collective wisdom of the masses may lead to true and accurate outcomes. This occurs when the chances that any respondent within the mass (on his own) will answer the relevant question correctly exceed fifty percent (based on

208. For a feedback system composed of four rated factors aggregated into an overall numeric rating of the vendor, see Epinions, <http://www.epinions.com>. These factors then aggregate into one overall rating to account for all consumers. The consumer can also post a written review of the vendor. We thank Eric Goldman for this information.

209. See *supra* Part III.B.6.

a dynamic referred to as “Condorcet’s Jury Theorem”).²¹⁰ Arguably, the question at hand—whether contractual terms are balanced, efficient and fair—is one that responding ex post consumers have a very good chance of answering correctly.²¹¹ Thus, the aggregated response would prove accurate and lead to an efficient outcome.

The shortcomings arising from the use of aggregated factors could be further mitigated by the additional stream of information arriving from ex post consumers: written comments.²¹² In many instances, especially in the context of blogs and social networks, information is conveyed as actual descriptions of the interactions consumers experienced vis-à-vis the vendor. Employing Edward Rubin’s terminology, online information flow in the form of written comments by experienced consumers will provide others with valuable “practical information”, rather than “theoretical information” they cannot use.²¹³

Here, critics of the NIA might point out that ex ante consumers will be overwhelmed when trying to seek out ex post feedback, and therefore will focus on feedback that concerns contractual attributes which are considered salient (such as price or quality). Therefore this dynamic as well will leave the problems of imbalanced non-salient provisions unresolved. This assertion might seem particularly convincing when considering the limited ability of ex ante consumers to approach the vast quantities of actual written comments.

However, this assertion cannot stand. Ex ante consumers are, indeed, likely to seek out specific forms of comments and neglect others. Yet at this point, when ex ante consumers review ex post feedback, their attention is likely be drawn to different factors²¹⁴—factors rendered salient

210. SUNSTEIN, *supra* note 121, at 60. Sunstein addresses the issue of when a specific question should be subjected to mass voting. Sunstein explains that the answer depends on whether the individuals formulating the mass response have a probability of over 50 percent to make the right decision. In these cases, the chances that the final response will prove accurate increase as the pool of responders grows.

211. Clearly, applying Condorcet’s Jury Theorem to this context requires additional empirical testing and theoretical analysis. Here we point out its relevance to this context, as well as state our intuition that the questions at hand could be easily responded to correctly by ex post consumers, especially those whom choose to voice their opinion, and, as mentioned above, act in many cases out of spite. *See supra* text accompanying note 146.

212. Strahilevitz, *supra* note 91, at 1756. *See also* Pei-yu Chen, Samita Dhanasobhon, & Michael D. Smith, *All Reviews Are Not Created Equal: The Disaggregate Impact of Reviews and Reviewers at Amazon.com* 19 (Carnegie Mellon U. Sch. Pub. Pol’y, & Mgmt., Working Paper No. 2007–12, 2006), available at <http://archive.nyu.edu/bitstream/2451/14961/2/USEDBOOK19.pdf>.

213. Edward Rubin, *The Internet, Consumer Protection and Practical Knowledge*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY,” *supra* note 67, at 35.

214. This point requires further empirical analysis that goes beyond the scope of this Article. Interestingly, Korobkin briefly addresses instances in which non-salient information can turn salient as a result of an information flow, which is similar to the ex post-ex ante one.

given the seriousness of the complaint against the vendor, or the severity of the vendor's in compliance with acceptable social norms. Accordingly, a prospective consumer who searches the web and encounters negative information about the SFC she is about to enter will devote ample attention and consideration to it, even should it concern a provision which is usually considered non-salient.²¹⁵

(b) Surrounding Circumstances

Another critique of the NIA argues that even if consumers are interested in adequately reviewing SFCs, often they will not because of various disturbances and disruptions at the time of the SFC formation. Noise, time constraints, and pressure from the vendor and fellow customers alike prevent consumers from making optimal decisions at this juncture.²¹⁶ The vendor also tries to create a "bond" between itself and the buyer, which the latter will be loath to break, so as not to "disappoint" or "insult" the vendor's agents.

Applying this debate to the online setting leads to several outcomes. First, with regard to the consumer-seller online interaction and its impact on the consumer's ability to assess SFC correctly, the existing literature yields mixed results.²¹⁷ The absence of actual "sales talk," personal contact, and interaction in the negotiation process could arguably minimize the "commitment" and the bond that the consumer might forge with the vendor.²¹⁸ On the other hand, the vendor in the online realm is able to tailor its virtual store and interface for every user. To do so, the vendor will take into account personal information about the specific user, and past "experiments" it conducted with other consumers in this setting.²¹⁹ With such abilities, vendors will be able to manipulate consumers, while creating a greater sense of self-commitment.

Scholars also hold mixed opinions about the effects of other surrounding and interfering circumstances online. Proponents of the NIA point out that the online realm relieves consumers of many of the

See supra note 36, at 1240. In Korobkin's view, such instances will be rare. However, as shown throughout our analysis the Internet changes the conditions for such flow, rendering it quite common.

215. This might attest to a difference between "watchdogs" and the ex post-ex ante information flow emphasized in this Article: consumers' reports of instances that actually occurred are likely to attract other consumers' attention (as opposed to the dry analysis of the watchdog group, which addresses theoretical risks that might arise).

216. For a general discussion, see Peter Wright, *The Harassed Decision-Maker: Time Pressure, Distraction, and the Use of Evidence*, 59 J. APPLIED PSYCHOL. 555 (1974).

217. *See* Hillman & Rachlinski, *supra* note 22.

218. Refusing to execute the contract online does not entail letting down any "real person," just a machine.

219. Hillman & Rachlinski, *supra* note 22, at 482.

cognitive pressures associated with the offline commercial setting. Online, users can engage in commerce in the comfort of their homes without being subjected to overpowering salespersons or annoying fellow consumers.²²⁰ Some “behavioral” NIA critics disagree, stating that the online setting creates noise and stress of its own: fear of privacy breaches, identity theft, and uncertainty as to when and how the transaction will be concluded. Online transactions are also typically characterized by overall “jumpiness” (the urge to finalize the deal quickly and move on to something else).²²¹ The online unique setting, likewise, creates an environment in which the consumer is left “to his own devices,” bereft of fellow consumers to discuss the transaction, and may thus be open to manipulation by vendors.²²²

Adding the ex post–ex ante information flow to the debate again strengthens the validity of the NIA in the online realm. At first blush, one might argue that this additional data flow will only add to the consumers’ confusion as it generates a great deal of “interference” that consumers must contend with online. However, the ex post–ex ante flow offers a great advantage: it renders the e-commerce experience far friendlier, while reducing consumer anxiety and stress, hence “noise.” It does so by allowing consumers to understand and feel they are not alone. When consumers are able to exchange information easily about the underlying transaction in forums, message boards, and social networks, they are more likely to acquire the ability to calculate rationally the pros and cons of the transaction at stake.²²³

(c) Self-Serving Biases Regarding Risk Evaluation

“Behaviorist” critics of the NIA state that even when relevant and accurate information is available to consumers, they will often nevertheless err in evaluating their own risk and exposure due to over-confidence and over-optimism.²²⁴ At first sight, this critique seems unchallenged by the shift to the online realm. The NIA critics might also note the online vendors’ ability to tailor their interactions with consumers to their per-

220. *Id.* at 478.

221. *Id.* at 480.

222. *Id.* at 482.

223. The online information flow might also protect users from the manipulative practices vendors adopt. Once observed, knowledge of their existence will be passed on to other consumers. Arguably, once consumers know about the manipulation they face, its effects are mitigated. See Tal Z. Zarsky, *Online Privacy, Tailoring and Persuasion*, in *PRIVACY AND TECHNOLOGIES OF IDENTITY—A CROSS-DISCIPLINARY CONVERSATION* 209, 217 (K. Strandburg & D. Stan Raicu eds., 2006)

224. For an illustration of people’s generally unrealistic-optimistic approach, see 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).

sonal traits, while applying various psychological strategies to further manipulate consumers into an enhanced sense of over-optimism and confidence.²²⁵ Commentators have argued that the online realm leads users into a “click-happy” mode of thought,²²⁶ in which they readily dispense funds without properly considering possible detriments.²²⁷

Yet again, this critique is mitigated in the presence of the information flow that this Article addresses. Reviewing information flowing from the ex post stage, consumers will be exposed to data which goes beyond mere descriptions of events that may or may not occur with low probability in the distant future (as presented in the SFC). Rather, they will face complaints and testimony of fellow shoppers about events that actually happened.²²⁸ These sources of information²²⁹ will counter consumers’ tendencies for over-optimism with harsh facts about online contracting.²³⁰

Furthermore, as consumers receive more information from blogs, message boards, and social networks, the overall (and problematic) optimism and “click-happy” feeling that arguably characterize the online environment will be substantially dampened. This dampening will occur because spite is one of the most “promising” motivators of online consumer feedback,²³¹ and thus negative feedback is likely to characterize the ex post-ex ante flow.²³² The overall negative sentiment of these

225. See Hillman & Rachlinski, *supra* note 22, at 482.

226. *Id.* at 480.

227. One can easily argue for the opposite position, since online consumers encounter additional risks and hazards. See *supra* text accompanying notes 220–221. Therefore, consumers would arguably be more inclined to investigate all aspects of the online transaction, including a review of the relevant SFC.

228. It is significant that fellow shoppers convey this testimony, as it may serve as a debiasing technique. This is especially so, since narratives are more salient than dry facts, and having in mind a real person who suffered increases the psychological vividness.

229. A critical reader might argue that the “click happy” consumers might not even check on their relevant vendors. However, empirical evidence indicates a cultural shift in online behavior. Users are now using the comparison shopping applications at their fingertips. In the broader context, this is reflected in the practice of “Googling” everything and everyone. See, e.g., *Who’s Googling You Right Now?*, CNN.COM, March 13, 2003, <http://www.cnn.com/2003/TECH/internet/03/13/web.searches.reut> (last visited Feb. 10, 2008). Therefore, the acts of double checking on online entities need not reflect pessimism, but conventional caution that most “netizens” exercise in today’s competitive markets and society.

230. While the dynamic described here clearly counters the biases addressed above, we still must examine whether these two effects are calibrated. We leave this for future research.

231. See *supra* note 146.

232. Negative feedback is not always the dominant force online. On eBay, for instance, users generally provide positive feedback. This may be because many of the evaluators are sellers themselves, or because users strive to maintain the “coziness” of the eBay community. These rationales, however, will not apply where consumers provide feedback for large B2C online vendors, so in our opinion they are of limited relevance. For a discussion of the eBay Trust system, see Paul Resnick & Richard Zeckhauser, *Trust Among Strangers in Internet Transactions: Empirical Analysis of eBay’s Reputation System 3* (Feb. 5, 2001) (unpublished

feedback circles might give rise to several concerns, but in this context it can potentially offset the positive sentiment of a “click-happy” environment, affording consumers a more balanced state of mind.

(d) Perception of “Self-Commitment”

An additional critique of the NIA asserts that consumers will fail to properly evaluate SFCs at the time of contract formation due to their commitment to the transactions at hand. Consumers generate this sense of commitment because they have already devoted resources to the transaction at stake while exhausting their limited mental ability and patience.²³³ Vendors are well aware of this dynamic and attempt to inflate such “self-commitment.” They do so by presenting the terms of the SFC at a very late stage of the negotiation process, when most consumers have already made up their minds to execute the transaction. On the face of it, online vendors can try to increase consumers’ commitment by requiring them to go through many “windows” within the interface without first being able to view the relevant SFC.²³⁴

Yet again, the ex post–ex ante information flow provides a strong response to this critique and promotes acceptance of the NIA online. Here, consumers are able to gather information from the other sources noted above. Consumers then do not have to rely upon the vendor to present the SFC. Prospective consumers can learn of possible flaws in the SFC early in the shopping process, even before they become invested in the transaction.²³⁵ These sources will also provide information about the potentially manipulative practices that vendors might attempt (such as presenting the final terms of the transaction at a late stage).

To conclude our discussion of the NIA online, we find that many of its powerful critiques are mitigated by the ex post-ex ante information flow addressed in this Article. Yet the mitigating effects of this flow depend on several variables, and could be promoted by various regulatory steps. We now define these steps and explain how they should be considered by courts and promoted by legislators.

paper), available at <http://www-csag.ucsd.edu/teaching/cse225s04/Reading%20List/E-bay-Empirical-BodegaBay.pdf>.

233. See *supra* text accompanying notes 40–41.

234. This situation differs from the offline realm, where an assertive consumer can demand the SFC from the vendor’s agent at an earlier stage. A limited pretest carried out by our research assistant indicated that many online vendors indeed engage in these practices. For example, vendors allow online users to read the full terms of service only at a relatively late stage of the transaction. Yifat Gedanken, Analyzing SFCs Access and Content Online (Sept. 2006) (unpublished research study) (on file with authors).

235. A possible difficulty might be the existence of “sales talk” and manipulative conduct by vendors within the virtual online communities. As we explained, various means and phenomena exist to counter these forms of manipulation.

V. POLICY RECOMMENDATION

In this part, we examine how the novel insights we presented above should reflect on policy choices regarding online SFCs. Many of our recommendations do not contradict regulatory recommendations made by other scholars but aim to complement them. For instance, various proposed regulatory steps strive to promote *ex ante* reading of SFCs.²³⁶ We favor these steps, but believe their overall impact is quite limited.²³⁷ Nor do we object to regulatory steps which provide a “safe harbor” for pre-approved SFCs (by courts or other administrative agencies). While such policies have been suggested in the online context,²³⁸ and even broadly applied in some jurisdictions in the general context,²³⁹ to date they have evinced limited success.²⁴⁰ Therefore, while we acknowledge this solution as one which might lead to market efficiency and fairness,²⁴¹ we consider an alternative way to achieve contract approval (or disapproval) online: through the collaborative, yet uncoordinated, efforts of *ex post* consumers.

The remainder of this Part sets forth concrete policy recommendations, while striving to meet two objectives. First, to provide regulators and courts with several potential considerations to identify instances in which legal intervention in online SFC is necessary. Second, to point out ways in which online information flows could be strengthened, expanded, and to the extent possible, cleared of unaccredited and false information.

A. *Potential Considerations for Legal Intervention*

In today’s ever-changing environment, it is impossible to broadly define or identify markets which demonstrate (or lack) information flows

236. Scholars propose that SFCs be made available to consumers in an early stage; that they be written in clear language; and that they specifically and plainly address “suspicious” issues which in many cases are imbalanced in B2C SFC. *See generally* Robert Hillman, *Online Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY,”* *supra* note 67, at 283.

237. *See supra* Part I.D (briefly explaining the shortcomings of the NIA model).

238. Gillette, *supra* note 15, at 983.

239. Such as Israel. *See, e.g.*, Shmuel I. Becher, A Fresh Approach to the Long-Lasting Puzzle of Consumer Standard Form Contracts 160–63 (May 2005) (unpublished JSD dissertation, Yale Law School) (on file with authors).

240. For possible explanations as to why this mechanism has not succeeded in Israel, see, for example, *id.* at 249–56.

241. For a detailed discussion, see Shmuel I. Becher, A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law, 42 U. MICH. J.L. REFORM (forthcoming 2009).

that can guarantee fair and efficient SFCs.²⁴² To overcome this difficulty, we offer two sets of considerations to assist courts at this juncture, which should be developed as time passes and empirical data gathered. The first set refers to instances in which a reliable and robust ex post–ex ante information flow exists. The second set indicates a strong possibility of problems in such flow.²⁴³

1. Elements Which Promote the “Non-Intervention” Approach²⁴⁴

(a) The Vendor Promotes, Without Interference, an Ex Post–Ex Ante Information Flow

Allowing a rich discourse among ex post and ex ante consumers within the confines of the vendor’s website permits even the less sophisticated consumers to obtain important information. Such conduct clearly promotes information flow, which facilitates broad acceptance of the NIA online. At the same time, indications that vendors maintain their discretion to delete messages not to their liking, or that they use this platform for more sales talk, will diminish the positive effects of such mechanisms.²⁴⁵

(b) The Volume of the Ex Post–Ex Ante Information Flow

To respond to this difficult query, courts can make use of several proxies. Intuitively, a heavy flow of ex post–ex ante information will be closely correlated to the vendor’s size, revenue, market share, the length of time it has been operational in the online realm, and the number of unique online communities devoted to the relevant market.²⁴⁶ On a more

242. Accordingly, courts should allow parties to provide evidence and expert testimony to prove the existence or absence of these elements.

243. In examining these elements courts address the transaction and market dynamics *in general*, and need not consider whether the specific consumer has reviewed information accruing from the ex post–ex ante flow. Given that markets respond to consumers in the aggregate, this inquiry is of limited importance. *Cf.* Korobkin, *supra* note 36, at 1283 (making a similar point yet reaching different policy recommendations).

244. An element we do not tackle in the text is the market share of “repeating consumers” that make use of the relevant SFCs. A large market share of such consumers should indicate a robust and very efficient ex post–ex ante flow. However, relying upon this element is problematic, as both offline and online firms succeed in targeting these consumers, thus rendering them somewhat irrelevant to our overall analysis.

245. In our opinion, taking additional steps which would prohibit such censorship, or addressing the actions of the entities controlling various online fora, are problematic, as they might be construed as an unfair limitation on the free speech rights of various parties. For this reason, we touch on these forms of problematic actions tangentially.

246. *See also* Steve J. J. Tedjamulia, et. al., *Motivating Content Contributions to Online Communities: Toward a More Comprehensive Theory*, 38th Annual Hawaii International Conference on Systems Sciences (2005) (mentioning several indicators of an active online community, including the existence of “fresh content”).

concrete level, courts can also examine the ease and probability with which consumers encounter information flows en route to the vendors' website, while navigating through the use of search engines.²⁴⁷ Clearly, ongoing research constantly being carried out in this field will provide additional indicators for the courts to consider.

2. Elements Which Promote the "Intervention" Approach²⁴⁸

(a) Recent or Frequent Changes in the SFC

Such changes render the information flow somewhat moot. When vendors frequently and substantially change their SFC, feedback provided by ex post consumers will be irrelevant for ex ante ones (as the former will be commenting on a legal setting no longer valid). Therefore, the ex post–ex ante flow cannot fulfill its purpose.

(b) Discrimination in Contractual Terms²⁴⁹

Discrimination enables vendors to mitigate the market dynamic, which ensures that all consumers will benefit from the scrutiny of a limited group of consumers. Where contractual discrimination exists, the majority of users will still be at an informational disadvantage vis-à-vis the online vendor.²⁵⁰

(c) Vendor's Attempts to Tamper With Data Flows

As mentioned, a growing number of vendors now promote their brands through various social networks, blogs, and message boards.²⁵¹ While most of these actions are legitimate, some vendors might choose to promote their brand aggressively under the pretext of consumers merely praising the vendors' product or service. Clearly, such actions will contaminate the ex post–ex ante information flow and its various outcomes addressed throughout this Article. The SFCs of vendors applying these practices should be subject to stricter scrutiny.²⁵²

247. For instance, courts can examine whether relevant message boards and other points of virtual congregation are "visible" (as both sponsored and non-sponsored links) on relevant search pages, when keywords related to the vendor are submitted. However, such an inquiry must also take into account the forms of routes used by consumers to the vendors' website (i.e., how many consumers indeed pass through search engines to get to the website, and in that way encounter these alternative sources).

248. We add to the elements mentioned the absence of a rich ex post–ex ante information flow, which mirrors *supra* element 1.b.

249. We refer to discrimination ex ante. *See supra* notes 17; text following note 195.

250. *See* Hillman & Rachlinski, *supra* note 22, at 475 (making a similar point).

251. *See supra* Part III.B.6.

252. *See supra* note 165 (noting that such actions should also be dealt with through other means).

(d) Difficulties in Reviewing the SFC

The ex post–ex ante information flow is partially premised on ex post consumers' ability to review their SFCs at a later time. If a vendor obstructs retrieval of this document, this important segment of the data flow will be stalled. These cases call for additional scrutiny as well.²⁵³

(e) “Buried Provisions” Rarely Applied

When the SFC provision addressed in a specific complaint is only rarely applied by the vendor, an ex post–ex ante flow will not occur.²⁵⁴ In these cases, policy makers cannot rely on Marginal Consumers to deter the vendor from including imbalanced provisions.²⁵⁵

B. *Promoting and Increasing Information Flow*

In this section, we address several strategies for promoting the ex post–ex ante information flow. As many Internet-based businesses are now learning, online user participation is a fickle matter. There are no foolproof, or even simple, ways to increase this flow. Here, we offer preliminary suggestions that will require additional fine tuning as time goes by.

1. Direct Governmental Intervention (Or: “*How’s My Contract?*”)

Providing governmental platforms for ex post consumers to convey their satisfaction with and thoughts about relevant SFC provisions can increase the information flow. By setting up “hotlines,” email addresses, and forums devoted to these issues, regulators can signal the importance of this issue and encourage users to provide information about it. Rather than attending to the complaints and sanctioning the vendors the consumers mention in their complaints (a task that governments are clearly

253. Vendors who systematically provide consumers with a glimpse of their SFCs only at the end of the purchasing process might similarly be treated with suspicion. They might engage in such conduct to increase the consumers' commitment to the transactional process. However, the inability to review the SFC ex ante is mitigated, considering the ability to receive information from ex post consumers. *See also* Hillman, *supra* note 181.

254. We understand that applying this rule in practice would prove difficult, as the party arguing for the existence of rarely applied contractual provisions (the consumer) will have limited or no resources to prove its existence. One way to overcome this difficulty is to adopt a procedural rule, according to which courts encountering a provision they find suspiciously imbalanced will shift the burden regarding this matter to the respondent (the vendor). In other words, the vendor must meet the burden of proving that the provision at stake is enforced in other instances (information it should have no problem obtaining). We leave the details of this proposal for future research projects.

255. For a similar discussion, see *supra* note 17; text following note 195 (explaining and applying ex post discrimination).

unable to do, due to limited budgets and workforce) the government should “open” the data streaming from such platforms to the broader public. This would allow consumers to learn from the ex post complaints of others. Of course, these databases must include search functions, and perhaps tools to generate and store relevant metadata,²⁵⁶ so interested users can easily find the information they need at a later time.

As the title of this section suggests, this model is based on an interesting method of cheap and efficient law enforcement recently discussed by Lior Strahilevitz in the context of safe driving.²⁵⁷ As Strahilevitz points out, this model could be expanded to other contexts as well.²⁵⁸ However, regulators applying this scheme must face the two obstacles we noted throughout our analysis: motivating the public to contribute to this database and accreditation of the contributors to it (and the facts they convey).²⁵⁹

Motivations can vary. Many consumers will act out of spite, some out of altruism, and others in the actual hope that peers within the community might assist them in confronting the relevant vendor. It is very difficult to predict whether these motivations will suffice, given that the time and attention required to present the complaint within these platforms might be non-trivial.²⁶⁰ Therefore, regulators might have to consider other ways—such as compensation²⁶¹—to further motivate

256. For the information to be easily searchable, users should add “tags” as to the topics that the relevant information “bit” addresses.

257. See Strahilevitz, *supra* note 91. The actual enforcement against incautious drivers whose problematic records are revealed through this dynamic is done by the police, insurance firms or employers with large car pools.

258. Strahilevitz states that this dynamic could be implemented in any setting “in which conformity is unproblematic, median voter judgments are informative, a broad social consensus exists regarding appropriate behavior, and the benefits of reputation tracking exceed the costs. We are, in short, looking for environments in which the prevalent social norms are universal and efficient.” *Id.* at 1762. SFCs policy and doctrine would seem to fall within the confines of this description. Strahilevitz notes that efficient citizen enforcement can occur in close-knit groups, where repeat players’ interactions are common and information flows easily. In some instances, technologies transform loose-knit groups into close-knit ones. Given the technology and information flow addressed above, the SFC setting might fit these parameters as well (though the challenges of motivation and accreditation show that changing a loose-knit group into a close-knit one is very difficult).

259. See *supra* Part III.B.6. These problems are likely to arise in almost any context of peer-produced knowledge. In the driving context, based on experiences in virtual communities such as eBay, Strahilevitz concludes that the internal motivations of individuals to participate and even to spite others (in this instance, dangerous drivers) should suffice. He also believes that accreditation concerns could be mitigated by technological tools. Strahilevitz, *supra* note 91, at 1762.

260. This contrasts with the situation described by Strahilevitz, where the citizen has to make a single phone call and leave a brief message about the other driver. *Id.*

261. In other contexts of online user participatory projects, users are sometimes motivated by promises of compensation. For instance, video sharing websites and blog operators

consumers to contribute. For instance, regulators might adopt schemes that offer prizes to consumers whose complaint is found most relevant, or payment to those who contribute to the database on an ongoing basis.²⁶² Alternatively, the government could encourage consumers to contribute to this database and “complaint center” by promising to look into selected queries and requests, and to occasionally fund the legal battles that might ensue.

Accreditation is an additional concern, as vendors might continuously log onto this system anonymously, praise their own products, and vilify their competitors.²⁶³ While some assume these concerns could be settled through the use of sophisticated algorithms and other means,²⁶⁴ we tend to be skeptical as to whether Strahilevitz’s interesting model would suit this consumer-oriented context. Here, “ballot stuffing” might be too easy and appealing, given that the stakes for vendors are high, the incentive to slander competitors is substantial, and the interaction will not be subject to “community” attributes and norms. Therefore, more research is necessary before such a mechanism can be chosen as means to produce a meaningful and reliable information flow.

2. Indirect Promotion and Incentives

(a) Funding

Beyond the governmental database, regulators can promote the ex post–ex ante information flow by funding entities, which enhance the flow by structuring and supporting various online social networks. Such subsidies are especially important to facilitate small virtual communities with strong social ties, which are thought to provide the most accurate and reliable information, yet might be unable to support their own existence.²⁶⁵ However, such funding need not be necessary, as there appears to be an abundance of commercial revenue flows that support these ventures. Accordingly, the government might be required to intervene and provide subsidies only if and when information provided throughout

offer prizes or actual payment for those providing the highest ranked or “most viewed” content. *See supra* note 150 (discussing schemes adopted by MetaCafe and YouTube).

262. However, these strategies might be inappropriate, and even lead to attempts to “game” this system in order to reap compensation. In addition, even though many contracts are imbalanced, promoting litigious behavior demands stringent justification.

263. *See supra* text accompanying notes 138–139.

264. *See, e.g.,* Strahilevitz, *supra* note 91, at 1735 (noting that eBay has proved successful in blocking gaming, and that gaming could be somewhat countered by requiring users to identify themselves when registering a complaint).

265. For a discussion of such subsidies in a somewhat different context (of copyright and the distribution of ideas), see Zarsky, *supra* note 131, at 711.

these realms runs the risk of being tainted by commercial interests (and thus not produce the beneficial outcomes addressed above).

(b) Facilitating Meta-Searches and Meta-Databases

While the Internet is full of “locations” where ex post information can be found, the information is becoming quite dispersed. Often, ex ante consumers must consult many online locations before they can formulate an opinion about the relevant underlying vendor and its SFC. Governments might assist by providing tools to ensure that many of these sources can be accessed and searched simultaneously and easily.²⁶⁶ Again, such steps might not be required should sufficient commercial incentives lead to the creation of similar private ventures.²⁶⁷

(c) “Spillover Effects” From Other Legal Doctrines

Regulators and courts should consider other legal issues that might influence the issue at hand and enhance the crucial data flow among ex post and ex ante consumers. We briefly refer to two such instances below.

i. Trademark Law

The lack of geographical points of congregation where ex post and ex ante consumers might interact is a major obstacle to successful online information flow.²⁶⁸ As explained,²⁶⁹ possible substitutes for geographical sites are virtual ones where consumers meet and exchange information. Even though the online realm lacks “sidewalks,”²⁷⁰ it introduces several strategies to attract consumers to various virtual locations. Some of these strategies involve the use of brand names by entities that do not control the rights to their usage. For instance, a search engine is paid by a third party to present specific information when a brand name is used as a search term, so to lure consumers to their web pages which include content related to a B2C transaction.

266. For instance, governments can fund research for projects that will accomplish such tasks efficiently.

267. Creating such an aggregated commercial database, or even search engine, might raise difficulties in terms of the copyrights, property rights, and contractual rights of those operating the individual websites now “crawled” and aggregated. For instance, creating a database that would index information available on other websites to facilitate future searches could constitute a “trespass to chattel” vis-à-vis the forum or social network whose information is included in the relevant index. Hence, regulatory intervention might be required to meet this important objective and allow for the creation of these indices while preempting the mentioned rights of the website operators.

268. See *supra* Part III.B.4.

269. *Id.*

270. See sources cited *supra* note 83.

Over the last few years, vendors and owners of IP rights of well known brands have attempted to stop users and competitors from applying these strategies through the use of various legal measures.²⁷¹ Courts have delivered contradictory rulings on these issues.²⁷² Legislators have yet to voice their opinion on this matter. We call on both regulators and courts to bear in mind the implications of these rules for the ex post–ex ante information flow.

ii. Privacy and Defamation

Much of the valuable information flow we address throughout this Article is negative. In some instances it might be false. It is almost always presented by a party who shields his or her “real identity” from the broader public (and perhaps from the publishing platform as well). Vendors, who are learning the great importance of this discourse, constantly try to block and deter the spreading of these forms of negative information. One way to achieve this purpose is to sue for defamation. Vendors can do so by applying several strategies. First, they can sue the entity conveying the message—the online content provider—for secondary liability.²⁷³ Second, they can demand that the online content provider turn over information on the actual identity of the alleged defamer, and sue her or him for direct liability.²⁷⁴

The issues of secondary and direct liability in online defamation law, as well as the instances in which content providers must provide information about their users, are constantly in flux.²⁷⁵ Laws and judicial rulings on these matters will directly affect the breadth and quality of the ex post–ex ante information flow.²⁷⁶ Therefore, regulators and courts

271. They did so by applying trademark doctrines prohibiting search engine operators from selling keywords which include their brand, and domain name administrators from allowing the use of addresses which resemble trademarked terms. They also used various legal doctrines to block attempts of others to improve their search rank while making use of their trademarked brands (through invisible metatags and other strategies).

272. For an in-depth discussion of this issue, see Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 561 (2005) (discussing keyword metatags and trademark law); *id.* at 551 n.159 (discussing domain name and trademark protection).

273. Currently, those entities can be held liable only in very rare instances. See DANIEL SOLOVE, MARC ROTENBERG & PAUL SCHWARTZ, *INFORMATION PRIVACY LAW* 163 (2003). This is due to the protection these entities are afforded according to section 230 of the Communications Decency Act. See 47 U.S.C. § 230 (1996). See also *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997).

274. For a discussion and analysis of anonymity in the online context, see SOLOVE ET AL., *supra* note 273, at 480.

275. *Id.*

276. Often consumers will agree to provide critical perspectives and insights only when protected by anonymity. See SUNSTEIN, *supra* note 121, at 210.

should keep these implications in mind when setting the outer borders of defamation, third party liability, and the limits of online anonymity.²⁷⁷

CONCLUSION

This Article strives to provide policy makers with an analytical platform that will assist in the construction of legal rules that should govern the online sphere. The online realm can be a great source of growth and prosperity for both online vendors and ordinary citizens. In spite of this potential, or maybe because of it, consumer protection proponents, as well as courts and legislatures, must be vigilant. To promote the efficiency and fairness of SFCs, we must take into account new means and aspects of information flow among consumers. Having reviewed the economic and behavioral aspects of this flow, we conclude that careful tailoring of legal intervention in, and treatment of, online B2C SFCs is needed.

The ex post-ex ante information flow dynamic analyzed in this Article is already influencing online standard form contracting behavior and practices. Surfers devote blogs, and other online tools, to discuss SFCs.²⁷⁸ In addition, a recently published study indicates that online B2C SFCs are not one-sided as we tend to assume they are²⁷⁹—perhaps a result of the dynamic we address here. We believe that technological developments, combined with clever legislative initiatives and judicial understanding of the new online contracting environment, create an invaluable opportunity to turn standard form contracting governance on its head. This opportunity must not be missed.

The analysis presented in this Article is applicable to an even broader context of commerce and markets, namely several forms of offline commerce as well. The heart of the thesis presented here is, therefore, *not* the act of online contracting, but of online information flow. Nonetheless, throughout this analysis, we chose to focus our attention on online SFCs, as engaging in online commerce indicates a certain level of computer knowledge and ability to partake in and

277. For more on the role of the courts in framing the discourse throughout social networks by applying these torts, see Zarsky, *supra* note 165.

278. See, e.g., Ed Foster's Gripelog, <http://www.gripe2ed.com/scoop> (last visited Feb. 20, 2008); Electronic Frontier Foundation, <http://www.eff.org/wp/eula.php> (last visited Feb. 20, 2008) (collecting examples of unfavorable terms); EULA Library, <http://www.fairterms.org/EULALibrary.htm> (last visited Feb. 20, 2008) (collecting links to sites with one-sided terms).

279. See Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting* 108 COLUM. L. REV. (forthcoming 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988788.

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benefit from the online information flow. With time, this dynamic might become widespread and pertain to many forms of offline transactions as well.