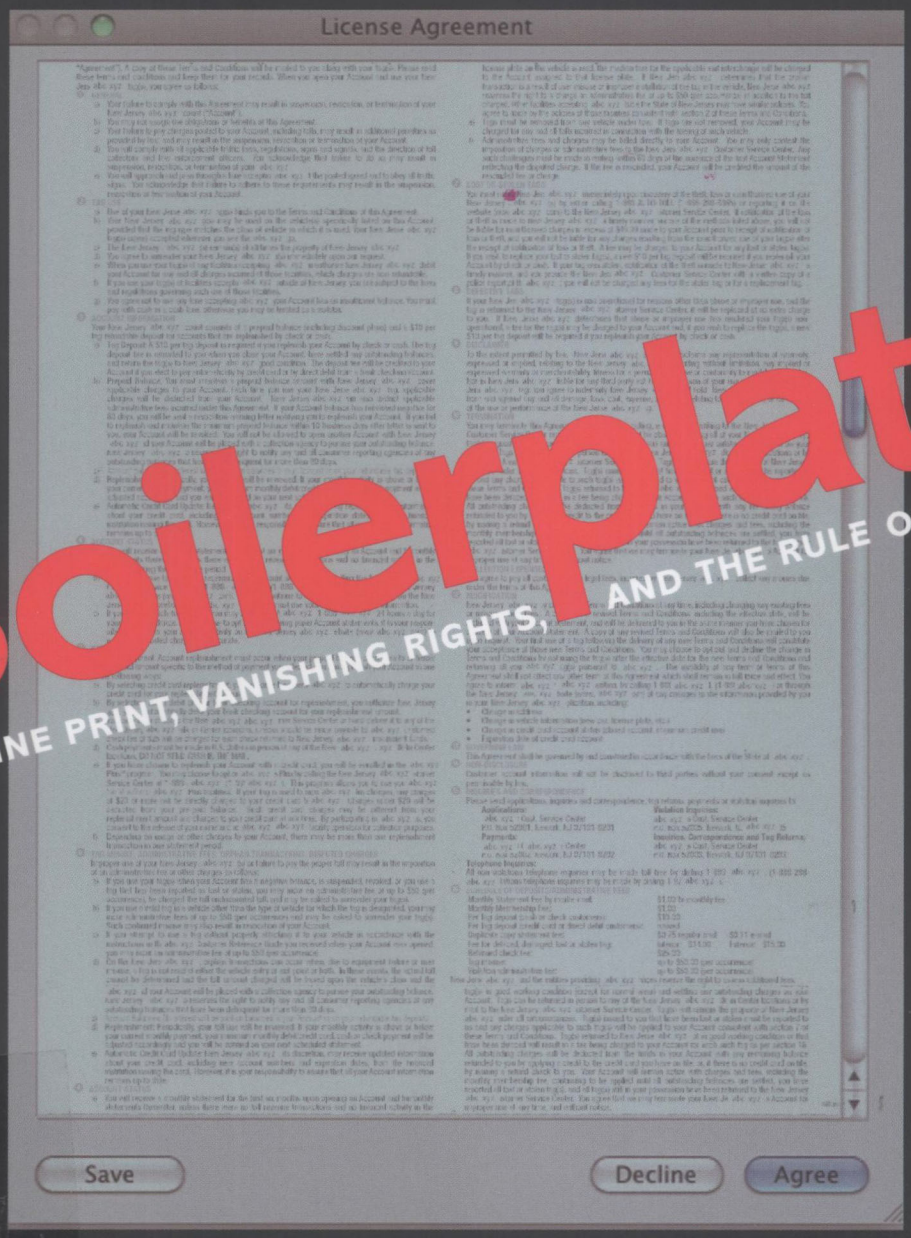

Boilerplate

THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW

Margaret Jane Radin

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The Fine Print, Vanishing Rights,
and the Rule of Law

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Boilerplate

In memory of

C. Edwin Baker

(1947–2009)

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THIS BOOK HAS BEEN a number of years in development. It probably began when I first started teaching contract law at Stanford Law School in the late 1990s, and, of course, noticed that boilerplate fits very uneasily with contract theory. So my first acknowledgment should be to Stanford, and to former Dean Paul Brest, for allowing me to switch from property to contract at that point in my career, and for underwriting the research and writing I did beginning in 2000. Thanks for institutional support of my research is also due to Princeton University, where I was the inaugural Microsoft Fellow in Law and Public Affairs in 2006–2007; at that point I began work on the book that eventually metamorphosed into this one. The institutional support of the University of Michigan from 2007 onward has been indispensable; thanks especially to the Wolfson and Cook funds, and to Dean Evan Caminker and Associate Dean Mark West.

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This book is dedicated to the memory of C. Edwin Baker, my close friend for more than thirty years and my worst (that is, my best) critic for that long. I have no doubt that if Ed were still here, his gracious and tenacious critique would have made this a better book.

Margaret Jane Radin
Ann Arbor, Michigan
December 2011

PROLOGUE: WORLD A (AGREEMENT) AND WORLD B (BOILERPLATE)

Agreement, the traditional basis of contract (an invented story):

Sally says to John, "I really like your bicycle. Will you sell it to me for $100?" John says, "Well, I couldn't part with it for $100, but how about $125?" Sally says, "OK, I really do like it, so how about $120?" John says, "It's a deal. I'll go get the bike." Then Sally hands over $120.

But John never delivers the bike. After John fails to perform his side of the bargain, Sally can bring John to court in a place convenient for her and ask that John be found in breach of contract. If the court finds that John breached a contract with Sally, John will be ordered to compensate Sally. Probably John will be ordered to pay Sally whatever amount she has lost by not receiving the bicycle, which could include not only the amount it would cost her to buy an equivalent bicycle from someone else, but whatever amounts she has lost as a consequence of the broken contract, such as being unable to deliver her packages of handmade chocolates to her customers, and having her customers go to other chocolate sellers.

Boilerplate, our nonideal "contract" in practice (stories based on real cases):

Arbitration Clause: *Garrit S., age eleven, a boy who cared deeply about animals, went to Africa with his mother on a fantasy safari vacation. Before it booked the trip, the tour company had Garrit's mother sign a form. The form waived (cancelled) the right to sue the company for injury to either the mother or the son. Instead, the form said, if there was any complaint against the company, the mother would be limited to arbitration. Such a waiver of legal*

rights to remedies in court is known as an arbitration clause. (Examples of arbitration clauses appear on pages 111, 116.) A terrible tragedy happened. Hyenas dragged Garrit away from the camp where the tourists were sleeping. The boy was mauled to death. Garrit's father, who did not sign the pre-tour paperwork, brought suit in court charging the tour company with negligence that caused the death of his son. The company asked the court to halt the suit and instead compel arbitration. This case went all the way to the state supreme court. Garrit's father was defeated. The state supreme court upheld the trial court's order to compel arbitration. It held that when the mother signed the paperwork containing the arbitration clause, she signed away her son's right to jury trial in court as well as her own.[1]

Another Arbitration Clause: *Tonya C. was offered a job as manager of a fast-food restaurant at a salary of $7,000 per year. In order to get the job, Tonya was asked to sign some forms. One of the forms contained an arbitration clause that waived Tonya's right to bring a legal action in court against the franchise owners for any reason, including sexual harassment. Unfortunately, later Tonya did feel she had to bring a sexual harassment claim against her employer. She brought suit under the federal civil rights law that prohibits discrimination on the basis of race, sex, religion, or national origin. The employer filed with the court a motion to dismiss her suit on the ground that the arbitration clause contained in the paperwork Tonya had signed eliminated her right to sue in court. The federal district judge who made the initial decision on Tonya's claim ruled in her favor. He thought it obvious, despite the arbitration clause in the employer's form, that a civil rights action based on federal antidiscrimination law belongs in federal court before a jury.*

But on this point the trial judge was overruled by the federal court of appeals. The appellate court was not at all troubled by Tonya's exclusion from federal court and jury trial. The federal appellate court that reviewed Tonya's case, along with other federal appellate courts, holds that once an employee (or anyone) is held to have acceded to an arbitration clause, the right to jury trial "vanishes."[2]

Choice of Forum Clause: *Jeffrey K. filed a lawsuit against an Internet service provider on behalf of himself and the class of all other customers of the service provider who were similarly situated. Jeffrey alleged that the service provider had behaved illegally toward its customers by unjustifiably charging an extra fee of $5.00 per month for paying by check instead of by credit card. It would not be worthwhile for one customer to sue for a refund of the $5.00 (multiplied by the number of months he had been a subscriber), and yet the company, if indeed it was behaving in bad faith or unjustly enriching itself at its customers' expense, was illegally raking in millions of dollars because of the number of customers affected. In a different jurisdiction, two other customers filed a class action against the same Internet service provider, alleging that the service provider had behaved illegally by including in its hourly charges the time it took for customers to view pop-up ads.*

The service provider's online equivalent of paperwork was its five-page Terms of Service, which subscribers could access by clicking a link, and to which subscribers had to click "Agree" before proceeding. Jeffrey did not sign anything, but because he became a customer, it could be inferred that he clicked "Agree," though of course it was unknown whether he actually clicked the link to the document and read it. The Terms of Service contained a clause saying that lawsuits had to be brought in the state of Virginia. This term is known as a choice of forum clause. Choice of forum clauses are most often coupled with choice of law clauses, in which the parties choose whose law will govern. The state of Virginia does not allow class actions, and this was probably the main reason that the service provider chose Virginia as the only place in which it would allow itself to be sued. Both of these suits were dismissed and the claimants were told to go and sue in Virginia, even though the courts realized that that would be useless.[3]

Exculpatory Clause: *Michael J., a landscaper, rented a Bobcat truck loader from an equipment company. He paid $185.87 to rent the equipment, and in conjunction with the rental, he was given paperwork to sign. The paperwork included a term stating that the company "is not responsible for injuries or damages sustained in the use of these items whether the damages are due to neglect,*

mechanical failure or any other cause."[4] *This term is known as an "exculpatory clause," because its purpose is to render the firm not culpable; that is, not legally liable for its harm-causing behavior. (An example of an exculpatory clause appears on page 114.) Michael had asked the advice of the employees of the equipment company before he rented the Bobcat. They told him it was the right equipment for what he wanted to do, which was to transport loose materials to the top of a slope, and they instructed him in how to operate it. Unfortunately, while Michael was using the Bobcat it flipped over. Michael suffered permanent injury to his spinal cord.*

Michael brought suit against the equipment rental company, seeking to hold it liable for causing his injury, because, he alleged, its employees were negligent in their recommendation and instructions. The trial court granted summary judgment for the company, which means that even if everything Michael said were true, he would not have any legal right to hold the company liable. The state supreme court affirmed. Michael had no legal right to hold the company liable even if the company was at fault in causing his injury. The company, the court said, was protected against liability for its own fault by the contract it had had the renter sign.[5]

What happened to Garrit's family and the other people in these World B stories was a deletion of legal rights that are otherwise guaranteed by the political order—by the constitution, or by legislation, or by other sources of law. Instead of the set of rights belonging to each of these people under the legal system, they had only the constricted set of legal rights allowed by the firms who delivered paperwork (or its electronic equivalent) to them. Businesses use forms such as those received by the people in these vignettes, and such as most of us receive almost every day, to change the legal infrastructure applicable to us. Businesses use such forms to create their own legal universe. Because we cannot change them, these forms are called "boilerplate."*

* According to Wikipedia: "The term dates back to the early 1900s and refers to the thick, tough steel sheets used to build steam boilers. From the 1890s onward, printing plates of text for widespread reproduction, such as advertisements or syndicated col-

All of the clauses in the stories I have recounted above will figure in this book, as will other common clauses occurring in boilerplate. The main project of this book is to consider the following questions: To what extent should firms be permitted to create their own legal universes in this way? What justifications can be brought forward in favor of firms creating their own legal universes? What limits exist on such universe-creation, and what limits should exist? How can such limits best be implemented?

umns, were cast or stamped in steel (instead of the much softer and less durable lead alloys used otherwise) ready for the printing press and distributed to newspapers around the United States. They came to be known as 'boilerplates.' Until the 1950s, thousands of newspapers received and used this kind of boilerplate from the nation's largest supplier, the Western Newspaper Union. Some companies also sent out press releases as boilerplate so that they had to be printed as written."

CONTENTS

PART I

Boilerplate, Consumers' Rights, and the Rule of Law