

# Intellectual Property and the Law of Contract:

## The Case Against “Efficient Breach”

By

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### ABSTRACT

In general sound general principles of contract law should carry over more or less seamlessly to the licensing of intellectual property. Those basic principles caution against attacks on standard form contracts that often contain liquidated damage provisions. This paper shows why over a broad range of cases involving two or more parties these liquidated provisions, properly calibrated, avoid the many disadvantages of using the theory of “efficient breach” to set damages. Chief among these difficulties are the high administrative costs of finding these damages, and the perverse incentives that they place on the defendant before breach and the plaintiff afterwards. Intellectual property licenses are not exempt from these many principles, which implies that these clear damage rules are typically optimal in first avoiding breach and then in resolve post-breach disputes.