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SUMMARY:

... While software and online downloads may be timesavers and enhance productivity, the producers of these technologies have had problems with pirating and illegal copying. ... In this paper I will discuss the three different forms of online and software agreements, and the mutual assent problems web-wraps pose. ... By putting notice of a license agreement on the outside of the package, a vendor can bind a user to the terms of the agreement when the purchaser simply opens the box. ... The court found that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. ... The ProCD court also discussed market competition as a safeguard for consumer protection concerning shrink-wrap. ... Pollstar provided current concert information on its website pursuant to the **conditions** of a license agreement. ... Web-wrap license agreements do not satisfy the contract principle of mutual assent. ... None of the case law concerning software licensing agreements has lessened the importance of mutual assent in contract formation. ... Not only was the license a link from the homepage and therefore not immediately apparent to the user upon entering the website, but the license was also indicated by small gray text on a gray background which was not eye-catching or noticeable to a user. ...

TEXT:

[*87]

Introduction

Internet usage may have more implications and restrictions than users previously thought. In fact, clicking on links and navigating through websites may be analogous to signing on the dotted line of a terms of usage contract. Online websites have increasingly begun displaying these agreements on their websites, although their validity is still under review by courts.

While software and online downloads may be timesavers and enhance productivity, the producers of these technologies have **[*88]** had problems with pirating and illegal copying. ⁿ¹ In copyright law, the first sale doctrine states that once the copy of the work is sold, the new owner can do with it as they please, including copying for private use. ⁿ² While this may not have major implications for print media, ⁿ³ online information and software have much greater copying potential. ⁿ⁴ Therefore, a

software producer could conceivably sell only a few copies of his or her work before free copies are available through alternative sources.ⁿ⁵

To combat the problem of massive copying, software providers began including terms and agreements in their packaging, including the classification of the transaction as a use license and [*89] not as a sale.ⁿ⁶ By terming the transaction a license, the producer can not only avoid any first sale problems, but also attach other **conditions** of use onto that license and further restrict how the software can be used.ⁿ⁷ These licenses are called shrink-wrap licensesⁿ⁸ because although the packaging contains notice of the agreement inside, the entire agreement can only be viewed after buying the product and breaking through the plastic shrink-wrap packaging.ⁿ⁹ Similar agreements have also appeared online. These include click-wrap agreements,ⁿ¹⁰ where the user must click "I agree" to the terms of the agreement on their screen before they are able to enter the websites,ⁿ¹¹ and web-wrap [*90] agreements,ⁿ¹² where the terms are usually listed on a link from the producer's homepage.ⁿ¹³

There has not yet been any legislation concerning the validity of wrap agreements or regulating their application.ⁿ¹⁴ Recently, the Copyright Office officially stated that any legislation is premature at this time.ⁿ¹⁵ However, case law has held shrink-wrap licensing agreements valid.ⁿ¹⁶ *ProCD Inc. v. Zeidenberg & Silken Mountain Web Services Inc.*ⁿ¹⁷ has served as a model for litigation involving shrink-wrap licenses,ⁿ¹⁸ and outlines several policy considerations for determining the enforceability of those particular license agreements.

[*91] Additionally, several cases have highlighted the more recent nuance of web-wrap license agreements, also called browse-wrap license agreements, including *Pollstar v. Gigmania*,ⁿ¹⁹ *Specht v. Netscape Communications, Corp.*,ⁿ²⁰ and *Ticketmaster Corp. v. Tickets.com, Inc.*ⁿ²¹ These cases distinguished web-wrap agreements from shrink-wrap agreements, either holding them unenforceable or withholding judgment at that time.ⁿ²² After looking closer at web-wrap agreements and applying the policy considerations for validity laid out in *ProCD*, it is clear that these agreements should be held invalid and unenforceable.

In this paper I will discuss the three different forms of online and software agreements, and the mutual assent problems web-wraps pose. Additionally, I will look at the consumer protections currently in force, including market competition, the policy considerations that some courts have used in determining the enforceability of these agreements, and legislative attempts to address these new online contracts.

The Agreements

Shrink-wrap

Shrink-wrap agreements evolved because of the initial uncertainty that accompanied the application of copyright law to software.ⁿ²³ Shrink-wrap licenses get their name from the usual [*92] plastic or cellophane wrap that retail software is packaged in.ⁿ²⁴ By putting notice of a license agreement on the outside of the package, a vendor can bind a user to the terms of the agreement when the purchaser simply opens the box.ⁿ²⁵ Basically, shrink-wrap licenses create a contract between the software producer and the software user without negotiating with each user, so the producer can have some control over how the product is used and distributed.ⁿ²⁶ The fears and concerns of the software producers were assuaged, however, when Congress officially ruled on the applicability of software programs to copyright law.ⁿ²⁷

However, Congressional approval did not give any guidance as to the enforceability of the license agreements that regulated their sales.ⁿ²⁸ It was not until ProCD that the precarious ground [*93] of shrink-wrap agreements was given any standing.ⁿ²⁹ ProCD involved a compilation of telephone directories offered on a computer database.ⁿ³⁰ For nonretail buyers, ProCD offered this information as a way to avoid calling long-distance information.ⁿ³¹ The general public could get this information at a low price, while retailers, manufacturers and others using the information for business uses had to pay a higher price.ⁿ³² To assure that this price discrimination practice was enforced, ProCD used a shrink-wrap license.ⁿ³³ The defendant, Matthew Zeidenberg, purchased the product and then made the information available over the Internet for a price cheaper than ProCD was charging -- in direct violation of the terms of the shrink-wrap.ⁿ³⁴

[*94] In finding the shrink-wrap license enforceable, the court applied the Uniform Commercial Code (hereinafter "UCC") and basic contract principles.ⁿ³⁵ The court found that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure."ⁿ³⁶ Consistent with contract law, Zeidenberg had the ability to reject the contract by sending back the product after having read the terms.ⁿ³⁷ Zeidenberg's failure to send the product back after reading the terms indicated his acceptance to the court and bound him to the terms of the agreement.ⁿ³⁸

The ProCD court also discussed market competition as a safeguard for consumer protection concerning shrink-wrap. Under this theory, the terms and **conditions** offered by contract reflect private ordering and a decision on behalf of consumers and sellers as to what are the most important and essential [*95] terms.ⁿ³⁹ This prioritizing is essential to the efficient functioning of markets and reflects the court's traditional separation from any business judgment decisions.ⁿ⁴⁰

Click-wrap

Click-wrap or click-through agreements are basically an outgrowth of shrink-wrap that have been formatted primarily for the Internet.ⁿ⁴¹ This method usually involves the display of the license on the screen and prompts the user to accept the terms by clicking "I accept."ⁿ⁴² This method of licensing is advantageous because there are no problematic additional terms and/or UCC 2-207 problems that sometimes arise with shrink-wrap.ⁿ⁴³ [*96] Specifically, because the licensee must unequivocally agree to the terms of the license before he or she is able to download the product or enter the site, there is no possibility that the terms will be seen as a proposal for additional terms that would elicit a 2-207 scenario.ⁿ⁴⁴ However, the terms and **conditions** on the webpage are the terms offered, and it would be very difficult for an individual user to negotiate for different terms without first accepting the terms and entering the website.ⁿ⁴⁵

Case law has upheld click-wrap agreements as enforceable contracts. In *Hotmail Corp. v. Van Money Pie, Inc.*,ⁿ⁴⁶ the court held that the defendants were bound to the Terms of Service posted on the website when they clicked "I accept."ⁿ⁴⁷ Also, in *Caspi v. Microsoft Network, LLC*,ⁿ⁴⁸ a forum selection clause in Microsoft Network's subscriber agreement was upheld as valid and enforceable.ⁿ⁴⁹ Another forum selection clause contained in a [*97] click-wrap agreement was held enforceable in *Groff v. America Online, Inc.*ⁿ⁵⁰

Web-wrap

Web-wrap agreements differ significantly from the previously noted license agreements because of their placement and the way they are communicated to a user.ⁿ⁵¹ These agreements are usually dis-

played on a website's homepage or are accessible through a link.ⁿ⁵² They state what the owner consents to as acceptable uses of the intellectual property contents on the website.ⁿ⁵³

It is this type of agreement that is at issue in *Pollstar v. Gigmania*.ⁿ⁵⁴ Pollstar provided current concert information on its website pursuant to the **conditions** of a license agreement.ⁿ⁵⁵ The [*98] license agreement was characterized as a web-wrap agreement because the terms were only viewable by clicking on a link from the homepage.ⁿ⁵⁶ However, beyond making this distinction and labeling the license, the court refrained from determining the enforceability of web-wrap agreements.ⁿ⁵⁷

Simultaneous to the decision of Pollstar, a United States District Court for the Central District of California also contemplated the enforceability of web-wrap agreements.ⁿ⁵⁸ The defendant in this case, Tickets.com, operated a website which sold tickets to certain events.ⁿ⁵⁹ However, for events that Tickets.com did not sell tickets, it provided direct links to Ticketmaster.com so users could purchase the tickets through the alternative website.ⁿ⁶⁰ Ticketmaster.com's website, however, subjected its users to a web-wrap agreement that was only viewable by scrolling down to the bottom of the homepage.ⁿ⁶¹ [*99] Ticketmaster claimed that by using the information provided for commercial uses, Tickets.com violated the agreement.ⁿ⁶²

Without clarifying or labeling the agreement at issue, the court held that this was not a typical shrink-wrap.ⁿ⁶³ The court stated that shrink-wrap agreements are usually "open and obvious" and hard to miss, which was not the case here because the home page could be, and was, bypassed by Tickets.com users and was not immediately apparent to a user upon entering the website.ⁿ⁶⁴ Additionally, the court discussed the absence of an "accept" button as additional evidence that this was not an enforceable contract,ⁿ⁶⁵ stating that "it cannot be said that merely putting terms and **conditions** in this fashion creates a contract with any one using the website."ⁿ⁶⁶ Notably, the court granted the [*100] plaintiffs leave to amend their complaint should they produce facts showing Tickets.com's knowledge of the facts as well as an implied agreement to the terms.ⁿ⁶⁷

The most recent court to explore the enforceability of a web-wrap agreement was in *Specht v. Netscape Communications Corp.*ⁿ⁶⁸ This case involved Netscape's SmartDownload and the proper forum for disputes concerning the software.ⁿ⁶⁹ Pursuant to the terms of a web-wrap agreement on its homepage, the defendant, Netscape Communications, moved to compel arbitration in its disputes concerning SmartDownload.ⁿ⁷⁰ After evaluating the various types of licensing agreements, the court held that the agreement at issue was a web-wrap agreement because it could only be viewed by scrolling down the homepage of the websiteⁿ⁷¹ and there was no affirmative consent necessary to download the product.ⁿ⁷²

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Web-wrap license agreements do not satisfy the contract principle of mutual assent.

None of the case law concerning software licensing agreements has lessened the importance of mutual assent in contract formation.ⁿ⁷³ In fact, throughout its comprehensive analysis of license agreements, the Specht court was quite firm on this issue.ⁿ⁷⁴ The new online medium of these agreements does not change the fact that they are contracts and therefore must conform to basic contract principles like mutual assent to be enforceable.ⁿ⁷⁵

Generally, mutual assent means that there has been a "meeting of the minds" and that both parties understand what is meant by the terms of a given agreement.ⁿ⁷⁶ If a party's actions manifested an intention to agree, judged by a standard of reasonableness, then the real but unexpressed state of

the party's mind is irrelevant.ⁿ⁷⁷ Therefore, the party must have [*102] shown through some conduct or action that they intended to be bound by the terms of the agreement.ⁿ⁷⁸ Web-wrap agreements, however, do not manifest a meeting of the minds because it is unclear that the user had actual notice of the terms or even the existence of an agreement.ⁿ⁷⁹ Additionally, users did not indicate through any action or conduct their assent of the terms of the agreement or their willingness to be bound by them.ⁿ⁸⁰

It is uncertain whether the user had actual notice of the terms.

In the three web-wrap cases mentioned above, notice of the terms of the license, or even the existence of the license was fairly determinative for the courts' decisions.ⁿ⁸¹

In Pollstar, the court illustrated that many visitors to the site may not be aware of the existence of a license agreement through [*103] its description of the license.ⁿ⁸² Not only was the license a link from the homepage and therefore not immediately apparent to the user upon entering the website, but the license was also indicated by small gray text on a gray background which was not eye-catching or noticeable to a user.ⁿ⁸³ The court also noted that the text was not underlined, and thus was not clear to the user that the text was a link to view the license terms, especially considering that other similar small text on the page were not links.ⁿ⁸⁴ Therefore, notice of the terms was not sufficient.ⁿ⁸⁵

In Ticketmaster, the web-wrap was not a link from the home page, but was displayed on the home page.ⁿ⁸⁶ This resolved one of the visibility problems noted by the Pollstar court, however, this court noted that the terms are only visible if the customer scrolls down to the bottom of the homepage.ⁿ⁸⁷ Additionally, the court [*104] stated that the license was not similar to a shrink-wrap because the shrink-wrap agreement is "open and obvious and in fact hard to miss."ⁿ⁸⁸ The court claimed that the placement of the terms on the bottom of the homepage where they could easily be missed by a user could not necessarily be said to create a contract with anyone who visits the website.ⁿ⁸⁹

Similarly, the web-wrap in Specht was visible on the bottom of the home page along with an "invitation to review."ⁿ⁹⁰ Therefore, along with the placement problems in Ticketmaster.com, the court also noted that an "invitation to review" does not clearly illustrate to a user that they are bound by the following terms.ⁿ⁹¹ While polite, this phrasing fails to convey the true nature of the words as an agreement and a contract.ⁿ⁹² Additionally, one of the plaintiffs did not download the product through the home page but through a website managed by a third party and therefore [*105] never visited the homepage.ⁿ⁹³ Both of these considerations led the court to hold the web-wrap unenforceable and invalid.ⁿ⁹⁴

There was no conduct to suggest acceptance

While in a traditional contract the parties would have a written document and a signature to establish acceptance of the terms, the online medium makes acceptance more difficult to prove.ⁿ⁹⁵ However, there are ways to prove acceptance of terms including the "I accept" buttons utilized by click-wrap agreements.ⁿ⁹⁶ Not one of the web-wrap agreements in the three cases noted above had an "I accept" button or any other way for the user to show his or her assent to the terms of the agreement by his or her conduct. This was fairly determinative in the courts' analysis that the license agreements were not enforceable.ⁿ⁹⁷ In Specht, the court noted that the case law on software licensing has not "eroded the importance of mutual assent in contract formation."ⁿ⁹⁸ The court pointed to mutual

assent as the "bedrock" of any agreement to which the law will give force and noted that holding these particular web-wraps [*106] enforceable would "expand the definition of assent as to render it meaningless." ⁿ⁹⁹

Market protection is no protection

In ProCD, market efficiency was an important factor in declaring shrink-wrap enforceable. ⁿ¹⁰⁰ The market relies on contract terms and **conditions** to prioritize what is important to consumers and producers. ⁿ¹⁰¹ These terms are then self-regulated through competition where the producers compete amongst each other for terms and prices that consumers find desirable. ⁿ¹⁰² It is this competitive aspect that supposedly protects consumers. ⁿ¹⁰³ Proponents of shrink-wrap often point to the consumer boycott of the 1980's as suggestive that the market can regulate itself. ⁿ¹⁰⁴ [*107] However, market competition among vendors is not a sufficient protection for web-wrap agreements because they are adhesion contracts ⁿ¹⁰⁵ and standard form contracts. ⁿ¹⁰⁶

Adhesion contracts

Web-wrap agreements are pure adhesion contracts. ⁿ¹⁰⁷ There is little ability to negotiate for terms, ⁿ¹⁰⁸ the form is standard, and the contract is either to be accepted or rejected as a whole. ⁿ¹⁰⁹ [*108] Similarly, traditional shrink-wrap holds that an individual who simply continues to use the product and does not send it back after reading the contained license agreement is bound by the terms of it. ⁿ¹¹⁰

The usual consumer protection concerns of adhesion contracts are also apparent when discussing web-wrap agreements. Because of the nature of the relationship between the parties over the Internet, deliberation is usually pointless. ⁿ¹¹¹ It is often hard to even contact a licensor, let alone enter into negotiations. ⁿ¹¹² Therefore, licensees cannot negotiate for better terms, nor do they usually have the resources or interest to do so. ⁿ¹¹³ Web-wrap agreements then pose the additional problem that users may not be aware of the terms of a web-wrap agreement or that they even exist, therefore the negotiations concern is heightened because without knowledge of a contract, there cannot be negotiations. ⁿ¹¹⁴

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Form contracts

Additionally, web-wrap agreements are form contracts because they are drafted for widespread use with preprinted terms. ⁿ¹¹⁵ The repeated use of the contract makes it advantageous for the producers to draft a form that will not only be to their advantage, but preferably not appear so on its face in order to fool consumers. ⁿ¹¹⁶ This unequal bargaining power contravenes any market protections that may be available. ⁿ¹¹⁷

Richard Posner, however, seems to believe that there is still an element of market competition to protect consumers. ⁿ¹¹⁸ Market [*110] competition theory states that if one firm offers an unfavorable term in their standard form contract, consumers will refuse to bargain with that firm. ⁿ¹¹⁹ Posner claims that this selectivity by consumers can help obliterate unreasonable and unconscionable contract terms even if only a minority of consumers actually read the terms and refuse to bargain. ⁿ¹²⁰ Under this theory, market pressures can remove the need for any review and protections against unconscionable terms. ⁿ¹²¹

Along with Posner, other proponents of the market competition approach point to consumer boycotts as an effective safeguard.ⁿ¹²² Clearly, markets are regulated by price and because market price is what the consumer is willing to pay for a particular item in the marketplace, the community of users is at a particular advantage to influence the terms of computer transactions.ⁿ¹²³ Boycotting **[*111]** the products of an egregiously unfair company is an effective mechanism to induce change.ⁿ¹²⁴ In particular, one scholar has noted the successful consumer boycott of the early 1980's and its effect on copy-protected software.ⁿ¹²⁵

This theory is widely criticized.ⁿ¹²⁶ Dealings between merchants may have this protection because both parties have equal bargaining power, however, consumers sitting at their home computers do not have the same bargaining position.ⁿ¹²⁷ This structure is problematic because consumers without sufficient resources or the necessary business sophistication are unable to effectively go after dishonest sellers.ⁿ¹²⁸

Even more problematic is that the seller may be beyond the **[*112]** reach of an effective remedy.ⁿ¹²⁹ Refusal of payment is often a consumer's most effective weapon against unfair bargaining.ⁿ¹³⁰ Without payment, a company has the choice to either institute a breach of contract action in which the substantive terms of the contract may be reviewed by a court and may be found invalid, or even more to the consumer's advantage, the company may simply decide not to pursue payment if the cost exceeds the benefit.ⁿ¹³¹ However, with web-wrap agreements, the user has little ability to negotiate for these rights and payment is usually not involved.ⁿ¹³² Therefore, he has no effective weapon and must comply with the terms of a contract he is unhappy with, or face a lawsuit.ⁿ¹³³

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Web-wrap agreements can restrict more than normal copyright protection

Copyright law is important because of its role in encouraging creativity, the promotion of learning and its protection of the public domain.ⁿ¹³⁴ It is even constitutionally mandated in Article I, 8, clause 8,ⁿ¹³⁵ due somewhat to the precarious balance it maintains with the First Amendment and free speech.ⁿ¹³⁶ To some extent the copyright clause was intended as a vehicle for free speech because it promotes public access to knowledge by providing an economic incentive to authors to publish books and disseminate ideas to the public.ⁿ¹³⁷ This balance is precarious, however, so certain First Amendment principles have been built into copyright law including the doctrine of fair use.ⁿ¹³⁸

[*114] Additionally, copyright law has other safeguards like the first-sale doctrineⁿ¹³⁹ and certain copying exceptions for libraries that also preserve the promotion of learning and ideas drafted into the Constitution.ⁿ¹⁴⁰ However, with license agreements, information providers can contractually subject a user to restrictions that go further than copyright law prescribes and therefore infringe the safeguards and protections that copyright law offers.ⁿ¹⁴¹

These agreements have the potential to limit fair use.

While it is only more recently in the 1976 Act that the fair use doctrine was statutorily recognized,ⁿ¹⁴² even as early as English common law, judges and courts have recognized that sometimes the unconsented to use of one author's work by a subsequent author may be a "fair abridgement" based on the fact that the second author had created a new, original work that would itself **[*115]** promote the progress of science and thereby benefit the public.ⁿ¹⁴³ However, this doctrine of fair use that evolved for the public's benefit may be sidestepped by web-wrap agreements.ⁿ¹⁴⁴ A licensor could prevent a user from copying the work for private purposes, quoting from the work, and making cop-

ies for educational or scientific purposes, all of which would normally have been acceptable fair uses of material.ⁿ¹⁴⁵ Additionally, uploading material that would under normal circumstances, and in any other medium, be excused by the fair use doctrine would continue to be privileged.ⁿ¹⁴⁶

Libraries are adversely affected by these license agreements.

Libraries are facing problems with license agreements.ⁿ¹⁴⁷ As **[*116]** one of the nation's largest volume-purchasers of copyrighted works, any significant changes affecting either price or access can have direct and indirect adverse affects on them and their users.ⁿ¹⁴⁸ Under section 108 of the 1976 Copyright Act, the reproduction or distribution of a copy or a phonorecord by a library is not an infringement of a copyright if it is a fair use or for archiving purposes.ⁿ¹⁴⁹ Therefore, library patrons have always had the right to enter the libraries' facilities, access works lawfully owned by the library, and use those works, often anonymously, as allowed by copyright laws and copy them for private purposes.ⁿ¹⁵⁰ Copyright law has never meant that **[*117]** publishers can control who looks at information and whether a page can be copied for private use.ⁿ¹⁵¹ Now these licenses between parties with unequal bargaining power threaten to curtail access to information that American libraries, both public and private, were founded to facilitate.ⁿ¹⁵² Specifically, these licenses usually curtail interlibrary lending because many digital licenses prohibit copying or sharing of the work.ⁿ¹⁵³ Therefore, people are unable to get information unless it is at their local library.ⁿ¹⁵⁴ This is in direct conflict with the ability of patrons and libraries **[*118]** under 108 to make a single copy for private use.ⁿ¹⁵⁵

Many digital licenses also prohibit libraries from archiving works, and therefore patrons are unable to obtain and use these works.ⁿ¹⁵⁶ It is risky for libraries to rely on content providers because these servers are subject to corruption, sabotage, subsequent alteration and selective preservation.ⁿ¹⁵⁷ It is entirely likely that profit-motivated publishers will not invest in archiving older works that may no longer be marketable on a large commercial scale.ⁿ¹⁵⁸

Legislation

Recently the Copyright Office issued a report on the Digital Millennium Copyright Act and the Office's thoughts on how the legislation was functioning.ⁿ¹⁵⁹ The Report noted that a number **[*119]** of commentators questioned the contract preemption that has increasingly become a part of copyright law.ⁿ¹⁶⁰ Particularly in the area of software licensing and online websites, the Copyright Office noted that shrink-wrap, click-wrap, and web-wrap agreements have become the norm and do provide some consumer protection concerns.ⁿ¹⁶¹

Regulation is necessary

In the past, limitations have been placed on contractual freedoms concerning bad information and public policy.ⁿ¹⁶² Similarly, it is irresponsible for Congress to allow software providers, one of the largest industries in the United States economy, to wait for the development of the law on an ad hoc basis to determine whether the contracts by which they run their businesses are in fact valid, or to continue allowing operations with different results in different jurisdictions.ⁿ¹⁶³ The **[*120]** jurisdictional split is especially problematic concerning the Internet and web-wrap agreements because there is no way to limit access to one jurisdiction while allowing access to another.ⁿ¹⁶⁴ Therefore, producers are required to use catch-all contracts that conform to the nuances of each state's law.ⁿ¹⁶⁵

UCITA

The Uniform Computer Information Transactions Act ("UCITA") may answer several questions that surround software licensing agreements.ⁿ¹⁶⁶ On July 29, 1999, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted UCITA at its annual conference.ⁿ¹⁶⁷ This means that the NCCUSL may now propose the Act to state legislatures, and, in fact, two states have already adopted [*121] UCITA.ⁿ¹⁶⁸ UCITA is an attempt to standardize the software and online area of commercial law similar to the UCC.ⁿ¹⁶⁹

In an attempt to mirror section 2-207, sections 207ⁿ¹⁷⁰ and 208ⁿ¹⁷¹ of UCITA propose that a party must be granted an [*122] opportunity to review the contract's terms and to decline or accept the offer.ⁿ¹⁷² This opportunity to review is defined in 112(a) ("Manifesting Assent; Opportunity to Review") of the UCITA, and states:

[A] person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it: (1) authenticates the record or term with intent to adopt or accept it; or (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.ⁿ¹⁷³

Therefore, under the terms of proposed UCITA, web-wrap agreements would also not be enforceable because the required opportunity to review is arguably not available and the user is not mandated to engage in conduct or statement that the person assents to the term.ⁿ¹⁷⁴

Problems of UCITA

While UCITA would seemingly solve the problems of web-wrap it seems unlikely that UCITA will be enacted on a widespread scale and become as respected and followed as the UCC.ⁿ¹⁷⁵ The [*123] origins of UCITA and the now abandoned Article 2B share few of the qualities that led to the UCC's success.ⁿ¹⁷⁶ The UCC was only proposed after established case law and business practices had emerged, but UCITA functions in a constantly shifting area of computer transactions.ⁿ¹⁷⁷ UCITA has not had the widespread support enjoyed by the UCC.ⁿ¹⁷⁸

Most important, though, are the criticisms that UCITA is unconcerned with the average consumer.ⁿ¹⁷⁹ Consumer protections and possible unconscionability of substantive terms and procedures were at the forefront of concerns when the UCC was developed.ⁿ¹⁸⁰ Conversely, critics say that UCITA is a "sweetheart bill for software publishers" and a compilation whose provisions clearly favor "the companies whose lobbyists have been sitting at the ...table."ⁿ¹⁸¹

[*124] One of the major criticisms of UCITA is its outright approval of click-through methods of assent.ⁿ¹⁸² Simply clicking on "I agree" is enough to manifest assent under UCITA.ⁿ¹⁸³ While this paper does not attempt to explore the criticisms of click-wrap and click-through agreements, it is important to note here that the Restatement Second of Contracts warns against this problem.ⁿ¹⁸⁴ The Restatement states that unchecked drafters of standard form contracts may be tempted to overdraft.ⁿ¹⁸⁵ Simply put, a licensor who uses a standard form contract could include terms that would never be permitted by a user who reviewed the contract or negotiated its terms.ⁿ¹⁸⁶

The American Law Institute ("ALI") expressly objected to click-through assent when reviewing UCITA as Article 2B.ⁿ¹⁸⁷ The ALI [*125] stated "the current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent."ⁿ¹⁸⁸

While standard form contracts are favorable in the online medium because of the contracting abilities they facilitate,ⁿ¹⁸⁹ it is nevertheless imperative to monitor their potential for overreaching scope. UCITA, however, encourages inequitable contract terms.ⁿ¹⁹⁰ At this time, it does not seem that any of the proposed legislation will solve these consumer concerns.ⁿ¹⁹¹

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Conclusion

After looking more closely at web-wrap agreements and applying the policy considerations of ProCD that found shrink-wrap enforceable, it is clear that these agreements should be held invalid and unenforceable. Web-wrap agreements are sufficiently distinct from both shrink-wrap agreements and click-wrap agreements, both in their placement on the websites, and the lack of a requirement of affirmative assent. While market protection was a consideration in holding shrink-wrap licenses valid, this does not afford the consumer any protection against web-wraps because they are adhesion contracts and in a standard form. Not only do these agreements fail to account for mutual assent, but they have the ability to undermine principles of copyright law.

While some legislation has been proposed to govern the growth of online licensing agreements, no proposed Act has gained widespread support. However, it is interesting to note that under all of the proposed legislation and the suggested safeguards for attorneys given by the Practicing Law Institute, web-wraps would be held unenforceable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Forum Selection Clauses Copyright Law Conveyances Licenses Browsewrap & Clickwrap Copyright Law Conveyances Licenses Shrinkwrap

FOOTNOTES:

n1. See Sheldon W. Halpern, The Digital Threat to the Normative Role of Copyright Law, 62 Ohio St. L.J. 569, 569 (2001) (noting that while technology makes access to software easier, it also facilitates illegal copying); see also Michael J. Madison, Legal-Ware: Contract and Copyright in the Digital Age, 67 Fordham L. Rev. 1025, 1038-39 (1998) (affirming concerns that if copyright law applied to software, first sale doctrine does not prevent piracy because of easy copying capabilities); National Research Council, The Digital Dilemma: Intellectual Property in the Information Age, 62 Ohio St. L.J. 951, 953 (2001) (stating that average computer users could easily copy today what would have previously required significant investment to copy).

n2. The first sale doctrine limits the copyright owner's control over copies of the work to their first sale or transfer. Once the work is sold or legally transferred, the copyright owner's interest in the material object is exhausted; and the owner of the copy can dispose of it as he or she sees fit. Marshall A. Leaffer, *Understanding Copyright Law* 310 (3d ed. 1999). Additionally, there is an understanding among consumers that some photocopying of books is permissible as long as there is no personal financial reward, however, this practice may not translate well to software copying. Madison, *supra* note 1, at 1038-39. The first sale doctrine allows purchasers to dispose of copyrighted works as they please. Joshua H. Foley, *Enter the Library: Creating a Digital Lending Right* 16 Conn. J. Int'l L. 369, 372 (2001). Otherwise law abiding citizens have demonstrated no reluctance to copy software illegally. Halpern, *supra* note 1, at 570.

n3. See Madison, *supra* note 1, at 1084 (stating that for books, informal estimates of legal doctrines concerning improper use and access have been "close enough" to maintain appropriate balance between protection and nonconsensual use). See generally Halpern, *supra* note 1, at 569 (suggesting that current legal safeguards for copyrighted physical material are sufficient); Stephen M. Kramarsky, *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DePaul J. Art & Ent. Law 1, 2 (2001) (implying that illegal printing of books is no longer troublesome).

n4. See David A. Kessler, *Illusion of Privacy: The Use and Abuse of Ex Parte Impoundment in Computer Software Copyright Cases*, 7 Alb. L.J. Sci. & Tech. 269, 278 (1997) (explaining availability of inexpensive copying equipment and lack of copy protection measures in software industry); see also Foley, *supra* note 2, at 372 (suggesting that current controls on illegal copying of software may be insufficient); Kramarsky, *supra* note 3, at 3 (highlighting that software copyright holders view advances in technology as threats to their intellectual property).

n5. See Halpern, *supra* note 1, at 570 (noting that "pirates" illegally copy commercial CDs and sell them to "regular" customers); Deborah Tussey, *From Fan Sites to File-sharing: Personal Use in Cyberspace*, 35 Ga. L. Rev. 1129, 1136 (2001) (outlining various ways personal users become illegal copiers and distributors of copyrighted software). See generally Madison, *supra* note 1, at 1084-85 (asserting that many Internet users believe that material posted online is intended to be public and not under any copyright restrictions).

n6. See Ajay Ayyappan, UCITA: Uniformity at the Price of Fairness?, 69 Fordham L. Rev. 2471, 2475 (2001) (noting that software transactions are structured as licenses, not sales); see also Stephen T. Keohane, Mass Market Licensing, 652 Prac. L. Inst. Pat. 437, 443 (2001) (affirming that accepted business model for software industry is to license product usage in order to easily determine rights and obligations of parties); Kramarsky, supra note 3, at 1 n.1 (stating that software is not sold, but is licensed).

n7. See Brian F. Fitzgerald, Software as Discourse: The Power of Intellectual Property in the Digital Architecture, 18 Cardozo Arts & Ent. L.J. 337, 372 (2001) (noting that software licenses can restrict licensee's use of software); see also Scott J. Spooner, The Validation of Shrink-Wrap and Click-Wrap Licenses by Virginia's UCITA, 7 Rich. J.L. & Tech. 27, 4 (2001) (stating that software licenses define terms of use of software); Stephen P. Tarolli, The Future of Information Commerce Under Contemporary Contract and Copyright Principles, 46 Am. U. L. Rev. 1639, 1648 (1997) (asserting that licenses claim to grant possession but not ownership, which enables producers to place restrictions and **conditions** on use of software or online content).

n8. See Ryan J. Casamiquela, Business Law: Contractual Assent and Enforceability in Cyberspace, 17 Berkeley Tech. L.J. 475, 477 (2002) (defining "shrink-wrap" licenses as those licenses enclosed within software packaging); see also Batya Goodman, Honey, I Shrink-Wrapped The Consumer: The Shrink-Wrap Agreement As An Adhesion Contract, 21 Cardozo L. Rev. 319, 319 n.4 (1999) (explaining plastic covering on outside wrapping of a product called "shrink-wrap" is where these agreements get their names); Spooner, supra note 7, at 4 (noting that "shrink-wrap" licenses generally refer to retail software packages that are covered in plastic or cellophane).

n9. See Casamiquela, supra note 8, at 477 (implying that purchasers must open software packaging to view terms of "shrink-wrap" license); see also Goodman, supra note 8, at 319 n.4 (asserting inability to read entire license until package is opened); Spooner, supra note 7, at 4 (recognizing that purchasers cannot review terms of "shrink-wrap" licenses until package is opened).

n10. See Symposium, Protecting Software and Information on the Internet, 3 B.U. J. Sci. & Tech. L. 2 para. 22 (1997) (comments by Pamela Samuelson) (explaining that with Internet servers, customers can be made to assent to terms of a license by clicking accept button, be-

fore they are able to download programs); see also Casamiquela, *supra* note 8, at 475 (noting that "click-wrap" licenses are online agreements); Susan Y. Chao, District Court for the Central District of California Holds that a Web-Wrap Site License Does Not Equate to an Enforceable Contract, 54 SMU L. Rev. 439, 442 n.36, (2001) (asserting that contracts where website visitors must click "I accept" button are generally "click-wrap" licenses).

n11. See Casamiquela, *supra* note 8, at 475 (stating that consumers must click "I agree" before software license takes effect); Goodman, *supra* note 8, at 319 (illustrating how user must "click through" screen prompts before entering website); Fitzgerald, *supra* note 7, at 372 (confirming that users attempting to access software online must click on button prior to use of program).

n12. See Chao, *supra* note 10, at 440 n.7 (asserting that web-wrap agreements are primarily characterized by their placement, and that these licenses are substantive agreements merely displayed on home pages which clarify what are authorized uses of website information). See generally Ayyappan, *supra* note 6, at 2493 (recognizing that terms of "web-wrap" licenses are generally presented post-sale); Casamiquela, *supra* note 8, at 476 (characterizing "web-wrap" agreement as "browse-wrap" agreement where vendors utilize small links to software license).

n13. See Casamiquela, *supra* note 8, at 476 (noting that vendor may tuck "web-wrap" link into places where consumers are unlikely to notice them); Chao, *supra* note 10, at 439 n.36 (asserting that web-wrap agreements are primarily characterized by their placement). See generally Ayyappan, *supra* note 6, at 2493 (recognizing use of "web-wrap" licenses).

n14. See Chao, *supra* note 10, at 439 (highlighting that website owners only have ProCD and other cursory illustrations to guide them in developing web-wrap agreements). See generally Fitzgerald, *supra* note 7, at 372 (noting that contract law needs to be infused with regulation). But see Spooner, *supra* note 7, at 4 n.9 (highlighting fact that Virginia became first state to enact legislation intended to regulate "wrap" licenses).

n15. Executive Summary: Digital Millennium Copyright Act: Section 104 Report, available at http://www.loc.gov/copyright/reports/studies/dmca/dmca_executive.html (stating that while contract and copyright law has always coexisted, the increasing ability of rights holders to

unilaterally impose contractual provisions increases the probability that these rights holders will determine landscape of consumer privileges in the future rather than Congress).

n16. See *ProCD Inc. v. Zeidenberg & Silken Mountain Web Services Inc.*, 86 F.3d 1447, 1455 (7th Cir. 1996) (stating shrink-wrap agreements are valid); see also *Hill v. Gateway* 2000, 105 F.3d 1147, 1151(7th Cir. 1997) (holding arbitration clause in shrink-wrap agreement enforceable because user didn't object before using computer); Jessica Litman, *The Tales that Article 2B Tells*, 13 *Berkeley Tech. L.J.* 931, 934 n.14 (1997) (explaining that *ProCD* was first case to hold shrink-wrap enforceable, but since *ProCD* case law has been mixed). But see Symposium, *Protecting Software and Information on the Internet*, supra note 10, at para. 21 (comments of Pamela Samuelson) (proposing that before *ProCD*, courts decided not enforce shrink-wrap agreements mainly because there is no agreement by consumer at time of purchase to those terms of license); Keohane, supra note 6, at 444 (affirming that although more recently courts have held shrink-wrap enforceable, there has been no clear approach as to validity of shrink-wrap licenses with some courts holding them invalid and unenforceable).

n17. 86 F.3d 1447 (7th Cir. 1996).

n18. *Id.* at 1455 (enforcing shrink-wrap license for first time). See Litman, supra note 16, at 934 n.14 (naming *ProCD* as leading case to enforce shrink-wrap licenses). But see *Klocek v. Gateway Inc.*, 104 F.Supp.2d 1332, 1339-40 (D.Kan. 2000) (stating that Kansas and Missouri courts probably would not follow *ProCD*).

n19. 170 F.Supp.2d 974, 980-81 (E.D. Cal. 2000) (hesitating to rule on enforceability of browse wrap license agreements).

n20. 150 F.Supp.2d 585, 594-95 (S.D.N.Y. 2001) (determining that this agreement was more similar to browse wrap agreement discussed in *Pollstar* than typical shrink-wrap agreement).

n21. 2000 U.S. Dist. LEXIS 4553, at 8 (C.D. Cal. March 27, 2000) (asserting that agreement involved was not shrink-wrap agreement, although court never identified what kind of agreement it was).

n22. Specht, 150 F.Supp.2d at 595 (holding agreement unenforceable); Pollstar, 170 F.Supp.2d at 980-81 (hesitating to make any decision on validity of web-wrap agreement); Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (holding agreement unenforceable).

n23. Software licenses in general and particularly shrink-wrap developed because people were uncertain about how to apply the first sale doctrine to packaged software. Madison, *supra* note 1, at 1038. The first sale doctrine limits the copyright owner's control over copies of the work to their first sale or transfer. Once the work is lawfully sold or transferred legally, the copyright owner's interest in the material object is exhausted; and the owner of the copy can dispose of it as he or she sees fit. Leaffer, *supra* note 2, at 310. This was problematic with software because of the easy copying capabilities and piracy concerns. Madison, *supra* note 1, at 1039. The acceptable business model for the software industry to solve this dilemma is to make the product available subject to licenses, which state the rights and obligations of both parties. Keohane, *supra* note 6, at 443.

n24. See, e.g., Goodman, *supra* note 8, at 319 n.4 (explaining plastic covering on outside wrapping of product called "shrink-wrap" is where these agreements get their names); James D. Hornbuckle, The Uniform Computer Transaction Act: State Legislatures Should Take a Critical Look Before Clicking Away Consumer Protections, 23 Whittier L.Rev. 839, 840 (2002) (describing how manufacturing practice of shrinking cellophane around packages resulted in term "shrink-wrap"); Spooner, *supra* note 7, at 4 (describing shrink-wrap as plastic covered software packages).

n25. See ProCD, Inc. v. Zeidenberg & Silken Mountain Web Services, Inc., 86 F.3d 1447, 1449 (7th Cir. 1996) (explaining that some vendors have written licenses that become effective as soon as customer tears wrapping from package); see also Protecting Software and Information on the Internet, *supra* note 10, para. 22 (citing to ProCd language); Spooner, *supra* note 7, at 4-5 (analyzing the enforceability of shrink-wrap agreements).

n26. See Madison, *supra* note 1, at 1039 (asserting that shrink-wrap licenses create contractual privity); Page M. Kaufman, Note, The Enforceability of State "Shrink-wrap" License Statutes in Light of *Vault Corp. v. Quaid Software Ltd.*, 74 Cornell L.Rev. 222, 223 (1988) (explaining how opening plastic on package creates acceptance with shrink-wrap agreements). See generally Spooner, *supra* note 7, at 5-6 (analyzing enforceability of shrink-wrap agreements).

n27. See Robert W. Gomulkiewicz, New Intellectual Property, Information Technology, and Security in Borderless Commerce: Legal Protection for Software Still a Work in Progress, 8 Tex. Wesleyan L.Rev. 445, 447 (2002) (discussing Congress's conclusion that software was copyrightable both in source code and object code forms); Madison, *supra* note 1, at 1040 (explaining that Congress clarified that software is protected by copyright law and first sale doctrine did not authorize renting of computer software); Frank J. Pita, Reconciling Reverse Engineering and Conflicting Shrink-wrap License Terms Under U.C.C. Article 2B: A Patent Law Solution, 14 Computer & High Tech. L.J. 465, 468 (1998) (explaining how copyright protection for software resulted from Congressional action in 1980).

n28. See generally, *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F.Supp. 37, 48 (D. Mass. 1990) (stating designation "works of authorship" is not meant to be limited to traditional works of authorship such as novels or plays, rather, Congress used this phrase to extend copyright to new methods of expression as they evolve); David A. Einhorn, Shrink-Wrap Licenses: The Debate Continues, 38 IDEA 383, 383-84 (1998) (analyzing issues relevant to enforceability of shrink-wrap licenses); Gomulkiewicz, *supra* note 27, at 445 (describing debate between conflicting views that software is too strictly regulated with view that stricter regulation is needed).

n29. See Litman, *supra* note 16, at 934 n.14 (noting that ProCD is first case to hold that shrink-wrap licenses are enforceable, and that before ProCD many courts deemed these licenses unenforceable). But see Madison, *supra* note 1, at 1026 n.3 (stating that previous courts called shrink-wrap practice into question, but did not invalidate them entirely). See generally Spooner, *supra* note 7, at 6-7 (chronicling development of case law on this subject).

n30. ProCD, 86 F.3d at 1449 (stating facts of case). See Brett L. Tolman, Note, *ProCD, Inc. v. Zeidenberg*: The End Does Not Justify the Means in Federal Copyright Analysis, 1998 B.Y.U. L. Rev. 303, 314 (1998) (explaining ProCD's database of telephone directories).

n31. ProCD, 86 F.3d at 1449 (noting that service would be potentially cheaper for nonretail users). See David S. Kerpel, Case Summary, ProCD, Inc. v. Matthew Zeidenberg & Silken Mountain Web Services, Inc., 83 F.3d 1447 (7th Cir. 1996), 7 J. Art & Ent. Law 167, 167 (1996) (noting "the general public could use the database as a substitute for calling long distance information"); Michael J. Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, 45 Buffalo L. Rev. 845, 870 (1997) (stating ProCD database could be used as substitute for long distance information, a way to look up old friends, or as substitute for local phone book).

n32. ProCD, 86 F.3d at 1449 (explaining that database cost more than \$ 1 million to compile and was expensive to maintain). See Brian Covotta & Pamela Sergeeff, I. Intellectual Property: A Copyright: 1. Preemption: b) Contract Enforceability: ProCD, Inc. v. Zeidenberg, 13 Berkeley Tech. L.J. 35, 37 (1998) (noting ProCD licensed database at lower price for private users than for commercial users); David J. DePippo, Dear Sir or Madam: You Cannot Contract in a Closet, 35 U. Rich. L. Rev. 423, 431 (2001) (specifying "ProCD sold its product to residential, non-commercial users at a much lower price than to commercial users").

n33. ProCD, 86 F.3d at 1449 (noting that consumer was notified of license's existence on outside of box, with terms contained in written manual, and that license was also encoded on disks and appeared whenever software ran). See Mark Andrew Cerny, A Shield Against Arbitration: U.C.C. 2-207's Role in the Enforceability of Arbitration Agreements Included with Delivery of Products, 51 Ala. L. Rev. 821, 824 (2000) (stating that ProCD's license was printed in manual, encoded on CD-ROM disks, and every time software was run notice appeared that listings are limited to non-commercial use); see also David Nimmer et al., The Metamorphosis of Contract into Expand, 87 Calif. L. Rev. 17, 61 (1999) (suggesting "one concern about undermining the holding of ProCD is that to do so exposes valuable databases of uncopyrightable materials to parasitic copying and undermines efforts to recoup investment costs through price discrimination").

n34. ProCD, 86 F.3d at 1450 (noting that purpose of lawsuit was to seek injunction against Zeidenberg). See Cerny, *supra* note 33, at 824 (stating Zeidenberg violated license agreement when he sold ProCD's database online through his corporation for less than ProCD charged its commercial customers); see also Joseph C. Wang, ProCD, Inc. v. Zeidenberg and Article 2B: Finally, the Validation of Shrink-Wrap Licenses, 16 J. Marshall J. Computer & Info. L. 439, 445 (1997) (opining that Zeidenberg saw ProCD's warnings on his computer screen, but did not believe they were binding on him).

n35. ProCD, 86 F.3d at 1450 (noting that licenses are ordinary contracts accompanying sale of products and are governed by UCC and common law of contracts); Kell Corrigan Mercer, Shrink-Wrap Licenses: Consumer Shrink-Wrap Licenses and Public Domain Materials; Copyright Preemption and Uniform Commercial Code Validity in ProCD v. Zeidenberg, 30 Creighton L. Rev. 1287, 1338 (1997) (explaining that Seventh Circuit judges stated sale of ProCD's database was offer which could only be accepted through assent to hidden terms, and found Zeidenberg assented when he used the software after inspecting the terms). But see Brandon L. Grusd, Contracting Beyond Copyright: ProCD, Inc. v. Zeidenberg, 10 Harv. J.L. & Tech. 353, 361 (1997) (recognizing "the U.C.C. is of little direct help in divining the circumstances under which such contracts are to be enforced...thus to find the answer we must turn to broader considerations of public policy").

n36. ProCD, 86 F.3d at 1452. See Darren C. Baker, ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifest Assent in the Arena of Shrinkwrap Licenses, 92 Nw. U.L. Rev. 379, 386 (1997) (noting "under 2-207(2) the license terms in standard forms such as ProCD's license are proposals for addition to the contracts which are already solidified"); Mercer, *supra* note 35, at 1295 (commenting that although District Court held against ProCD, it acknowledged shrink-wrap licenses could be viewed as proposals to modify existing contract between the parties).

n37. ProCD, 86 F.3d at 1452 (asserting that Zeidenberg had no choice because software would not let him proceed without indicating acceptance). See Hall v. Resolution Trust Corp, 958 F.2d 75, 79 (5th Cir. 1992) (stating "it is quite plain that a party to a contract can simply reject a nonconforming proposal for modification of the contract"); Ala. Chem. Co. v. Int'l Agric. Corp., 110 So. 614, 614-16 (Ala. 1926) (noting party may reject and return product for failure to comply with terms of contract).

n38. ProCD, 86 F.3d at 1452 (remarking that UCC permits contracts to be made in different ways). See Baker, *supra* note 36, at 386 (stating "a panel of the Seventh Circuit held that shrinkwrap licenses are enforceable, unless their terms are unenforceable under general contract law"); see also Ala. Chem., 110 So. at 614-16 (noting that electing to retain or consuming goods created implied contract).

n39. ProCd, 86 F.3d at 1455, citing *American Airlines v. Wolen*, 513 U.S. 219, 229-30 (1995) (discussing federal preemption of state remedies and federal statutes designed to encourage reliance on competitive market forces). See generally Meurer, *supra* note 31, at 870 (outlining requirements of maintaining effective price **conditions** and competitive market forces); Mark A. Rodwin, *Mechanisms of Consumer Protection - The MarketPlace and Regulation: Managed Care and Consumer Protection: What are the Issues?*, 26 Seton Hall L. Rev. 1007, 1020 (1996) (listing market factors that contribute toward consumer harm, as well as factors needed for markets to work).

n40. See *American Airlines*, 513 U.S. at 230 (noting market efficiency requires enforceability of private agreements, based on needs and perceptions of contracting parties); see also ProCD, 86 F.3d at 1455 (noting licenses serve a procompetitive function; suggesting enforcement of shrink-wrap license may even result in lower prices and more availability of information); Madison, *supra* note 1, at 1031 n.21 (explaining that ProCD court's premise behind "market forces" idea is that market should define boundaries of fair use and public domain).

n41. See *Protecting Software and Information on the Internet*, *supra* note 10, at para. 22 (comments of Pamela Samuelson) (explaining that with Internet servers, customers can be forced to assent to terms of license by clicking an accept button, before they are able to download programs); see also Chao, *supra* note 10, at 442 n.36 (asserting that contracts where website visitor must click on "I accept" button is generally considered click-wrap); Gregory E. Maggs, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section VI Regulating Electronic Commerce*, 50 Am. J. Comp. L. 665, 672 (2002) (describing click-wrap as "the Internet user sees the contract terms on the computer screen, and cannot complete the purchase without clicking a box on the screen to indicate assent").

n42. See Keohane, *supra* note 6, at 445 (explaining popular method of license agreement for software users); Nicolas P. Terry, *Cyber-Malpractice: Legal Exposure for Cybermedicine*, 25 Am. J.L. & Med. 327, 361 n.276 (1999) (describing click-wrap as "consumers on their computers clicking on a box marked 'I Agree'"). See generally Honorable Arthur J. Gajarsa, Evelyn Mary Aswad, & Joseph S. Cianfrani, *How Much Fuel to Add to the Fire of Genius? Some Questions About the Repair/Reconstruction Distinction in Patent Law*, 48 Am. U.L. Rev. 1205, 1227-28 (1999) (discussing issues raised by contractual agreements against infringement).

n43. The structure of online sales transactions sidesteps the 2-207 issues addressed in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991). *Step-Saver* was a pre-ProCD case which held a shrink-wrap license unenforceable after applying 2-207 to determine if the terms of the agreement were incorporated into the parties' agreement. After emphasizing that the contract was formed when *Step-Saver* placed its order over the telephone and TSL agreed to ship the software, the court found that the terms contained inside the box were additional terms after the contract was formed. Therefore, because the terms of the shrink-wrap substantially altered the contract, these provisions were not a part of the contract between the parties. *Keohane*, *supra* note 6, at 447-48. Conversely, ProCD held that 2-207 was not problematic because unlike *Step-Saver*, a "battle of the forms" case, ProCD had only one form and therefore 2-207 was irrelevant to its decision. ProCD, 86 F.3d at 1452.

n44. See *Keohane*, *supra* note 6, at 449 (explaining that click-wrap normally avoids application of U.C.C. 2-207); see also Zachary M. Harrison, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 *Fordham Intell. Prop. Media & Ent. L.J.* 907, 912-13 (1998) (suggesting recent rulings enforcing click-wrap and shrink-wrap licenses illustrate need for U.C.C. provisions dealing with electronic licensing). But see Ayyappan, *supra* note 6, at 2472 (suggesting U.C.C. provisions have been applied inconsistently by courts in software cases).

n45. See Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: "There's a New Sheriff in Town!"*, 35 *U. Rich. L. Rev.* 943, 953 (2002) (noting "enforceability of ... click-wrap licenses is being debated because, among other things, there is no opportunity for the purchaser to negotiate the agreement and the terms are extremely broad and highly restrictive."); see also *Keohane*, *supra* note 6, at 449 (explaining that although click-wrap normally avoids the *Step-Saver* analysis and the application of U.C.C. 2-207, the possibility of previous communications could reintroduce this problem); Spooner, *supra* note 7, at 4 (suggesting laws requiring software publishers to negotiate licenses would result in significant price increases and burdens consumers).

n46. 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. April 16, 1998). See Harrison, *supra* note 44, at 913, 928 (noting importance that outcome of Hotmail decision would have on legal analysis of click-wrap agreements); Thomas C. Inkel, *Comment, Internet-Based Fans: Why the Entertainment Industries Cannot Depend on Traditional Copyright Protections*, 28 *Pepp. L.Rev.* 879, 899 (2001) (clarifying the importance of Hotmail in quickly evolving jurisprudence of Internet agreements).

n47. Hotmail, 1998 U.S. Dist. LEXIS 10729, at 20 (stating that plaintiffs were enjoined from sending "spam" email that falsely stated it came from plaintiff's email service and from using Hotmail accounts as mailboxes for receiving reply spam). See Harrison, *supra* note 44, at 913 (stating that court enjoined individual at least partially to enforce provisions of click-wrap agreement); Inkel, *supra* note 46, at 899 (elucidating that "spamming" was enjoined because it violated click-wrap agreement).

n48. 732 A.2d 528 (N.J. App.Div. 1999).

n49. Caspi, 732 A.2d at 532 (refusing to hear case because forum was improper under forum selection clause within click-wrap agreement). See generally Mark E. Budnitz, Consumers Suffering for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and **Conditions** Bind the Consumer?, 16 Ga. St. U.L. Rev. 741, 765 (2000) (indicating that court determined a mouse click to be sufficient assent); Dessent, *supra* note 45, at 989-90 (noting click-wrap agreement was valid and therefore forum selection clause governed).

n50. Groff v. America Online, Inc., 1998 WL 307001, at 3 (R.I. Sup.Ct. 1998) (holding forum selection clause "prima facie valid"). See generally Casamiquela, *supra* note 8, at 486 n.97 (discussing Groff court's validation of click-wrap agreement); Maggs, *supra* note 41, at 673 n.66 (noting that majority determined that assent was given to click-wrap agreement).

n51. See Chao, *supra* note 10, at 440 n.7 (asserting that web-wrap agreements are primarily characterized by their placement); Madison, *supra* note 1, at 1062 (defining web-wrap and differentiating varieties of web-wrap agreements).

n52. See Chao, *supra* note 10, at 440 n.7 (claiming these licenses are substantive agreements merely displayed on a website's home page); see also Madison, *supra* note 1, at 1062 (describing how web-wrap agreements work); Michael L. Rustad, Uniform Computer Information Transaction Act: Article Making UCITA More Consumer Friendly, 18 J. Marshall J. Computer & Info. L. 547, 548 nn.9-10 (1999) (explaining both types of agreements and differentiating them).

n53. See Chao, *supra* note 10, at 440 n.7 (asserting that web-wrap agreements make clear what are authorized uses of website information); see also Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Websites and the Uniform Commercial Code*, 34 San Diego L. Rev. 1263, 1354 (1997) (explaining that use of content is primary concern of web-wrap agreements); Madison, *supra* note 1, at 1062 (stating that web-wrap agreement is primarily concerned with copyright and trademark rights).

n54. 170 F.Supp.2d 974 (E.D. Cal. 2000). Although Pollstar refers to these as browse wrap license agreements, I will continue to use the terminology of web-wrap for consistency and clarity throughout the paper.

n55. Pollstar, 170 F.Supp.2d at 976 (stating that user could download and use current concert information pursuant to license agreement). See Maggs, *supra* note 41, at 673-74 (explaining that concert information was restricted by user agreement that court deemed enforceable); Jonathan Band, *Cyber Rights, Protection, and Markets: Database Cases Decided During the 106th Congress: Underprotection or Overprotection?*, 32 UWLA L. Rev. 201, 205-06 (2001) (noting that concert information may be protected as "hot news").

n56. Pollstar, 170 F.Supp.2d at 981 (stating that this was not shrink-wrap agreement because shrink-wrap does not allow consumer to continue using product without acceptance of terms, while under web-wrap, consumer assents to terms by navigating through websites). See Samuel J. M. Donnelly & Mary Ann Donnelly, *2000-2001 Survey of New York Law: Commercial Law*, 52 Syracuse L. Rev. 247, 289 n.370 (2002) (indicating that requirement to click on link is court's basis for classifying agreement as web-wrap); Bradley J. Freedman, *Electronic Contracts Under Canadian Law: A Practical Guide*, 28 Man. L.J. 1, 30 n.125 (2000) (classifying agreement as web-wrap because it required clicking onto hyperlink).

n57. Pollstar, 170 F. Supp 2d. at 982 (hesitating to make determination concerning validity and enforceability). See Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test*, 77 Wash. L. Rev. 481, 504 (2002) (noting court's avoidance of enforceability issue); Donnelly & Donnelly, *supra* note 56, at 289 n.370 (indicating court's reticence to hold agreement enforceable).

n58. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 3-4. In fact, the Pollstar court viewed several documents from the Ticketmaster case in connection with the defendant's motion to dismiss. Pollstar, 170 F.Supp.2d at 976. Although these cases are contemporaneous, the court in Ticketmaster ruled on the enforceability of web-wrap agreements and found them to be unenforceable. For further discussion and comparison of these cases, see Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1387-88 (2001).

n59. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 3-4 (detailing business of Tickets.com). See Andrew B. Buxbaum & Louis A. Curcio, *When You Can't Sell to Your Customers, Try Selling Your Customers (But Not Under the Bankruptcy Code)*, 8 Am. Bankr. Inst. L.J. 395, 400-01 (2000) (indicating that Tickets.com sold tickets to limited number of concerts); Chao, *supra* note 10, at 441 (noting that Tickets.com provided tickets for only some concerts).

n60. Ticketmaster, 2000 U.S. Dist LEXIS 4553, at 2-3 (describing operations of website). See Buxbaum & Curcio, *supra* note 59, at 400-01 (indicating that Tickets.com was a clearinghouse of concert information that provided links for purchase of tickets); Chao, *supra* note 10, at 441 (describing process through which Tickets.com linked users to sites where its customers could purchase concert tickets).

n61. Ticketmaster, 2000 U.S. Dist LEXIS 4553, at 2-3 (stating that user must scroll down to bottom of homepage to arrive at terms and agreement of usage). See Christian H. Nadan, *Open Source Licensing: Virus or Virtue?*, 10 Tex. Intell. Prop. L.J. 349, 363 (2002) (stating that Ticketmaster website contained "terms of use" link at bottom of page). See generally Etfross, *supra* note 53, at 1352 (discussing similarities between web-wrap and shrink-wrap agreements).

n62. Ticketmaster, 2000 U.S. Dist LEXIS 4553, at 7-8 (stating that Ticketmaster's user agreement prohibited use of its website for commercial purposes). See Eugene R. Quinn, Jr., *Websurfing 101: The Evolving Law of Hyperlinking*, 2 Barry L.Rev. 37, 64 (2001) (discussing in detail how Tickets.com used Ticketmaster's information for commercial purposes); Nicos L. Tsilas, *Minimizing Potential Liability Associated with Linking and Framing on the World Wide Web*, 8 CommLaw Conspectus 85, 96 (2000) (noting that Ticketmaster claimed that Tickets.com violated user agreement by using information for commercial gain).

n63. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (stating that Ticketmaster's user agreement is not a shrink-wrap license agreement because it was not open and obvious and did not allow users to click on agreement). See generally Carl W. Chamberlin, To the Millenium: Emerging Issues for the Year 2000 and Cyberspace, 18 Notre Dame J.L. Ethics & Pub. Pol'y 131, 170 (1999) (discussing shrink-wraps in detail); Michael J. Schmelzer, Protecting the Sweat of the Spider's Brow: Current Vulnerabilities of Internet Search Engines, 3 B.U. J.Sci. Tech. L. 12, para. 70 (discussing how courts have dealt with shrink-wrap agreements).

n64. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (concluding that Ticketmaster's user agreement was not shrink-wrap license agreement). See generally Chamberlin, *supra* note 63, at 170 (outlining what constitutes shrink-wrap agreement); Wei Wei Jeang & Robin A. Brooks, New Intellectual Property, Information Technology, and Security in Borderless Commerce: Current On-Line Issues, 8 Tex. Wesleyan L.Rev. 615, 623 (2002) (defining elements of shrink-wrap agreements).

n65. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (stating that many other websites make user click to accept button before allowing user to proceed). See generally Trevor Cox, Information and the Internet: Understanding the Emerging Legal Framework for Contract and Copyright Law and Problems with International Enforcement, 11 Transnat'l Law. 23, 23 (1998) (explaining that "clickwrap" agreements typically have accept button that users need to click on); Apik Minassian, The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements, 45 UCLA L.Rev. 569, 571 (1997) (discussing how shrink-wrap licenses are treated as enforceable contracts).

n66. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (stating reason why Ticketmaster's user agreement does not qualify as enforceable contract). See generally David L. Hitchcock & Kathy E. Needleman, New Intellectual Property, Information Technology, and Security in Borderless Commerce: Current Status of Copyright Protection in the Digital Age and Related Topics, 8 Tex. Wesleyan L.Rev. 539, 588 (2002) (noting that courts have been reluctant to enforce agreements when there is no indication that visitor was required to at least look at terms and **conditions**); Simona Kiritsov, Can Millions of Internet Users Be Breaking the Law Every Day? An Intellectual Property Analysis of Linking and Framing and the Need for Licensing, 2000 Stan. Tech. L.Rev. 1, 7 (2000) (stating that courts have given little guidance to practitioners regarding end user agreements).

n67. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (granting leave to amend provided court's **conditions** were met).

n68. 150 F.Supp.2d 585, 587 (S.D.N.Y. 2001) (claiming Specht case is only case to cite to Pollstar and was decided on July 3, 2001).

n69. Specht, 150 F.Supp.2d at 587 (explaining that plaintiffs alleged their use of software transmits to defendants private information about user's file transfer activity on the Internet, thereby affecting electronic surveillance of user's activity in violation of two federal statutes: Electronic Communications Privacy Act, 18 U.S.C. 2510, and Computer Fraud and Abuse Act, 18 U.S.C. 1030). See Casamiquela, *supra* note 8, at 482 (discussing facts of Specht case); Maggs, *supra* note 41, at 673 (discussing issue that was in dispute in Specht).

n70. Specht, 150 F.Supp.2d at 589 (stating that one of terms and **conditions** of agreement was that all disputes arising out of use of SmartDownload would be arbitrated). See Freedman, *supra* note 56, at 31 (discussing fact that Netscape sought to compel arbitration based on software license agreement). See generally Larry E. Ribstein & Bruce H. Kobayashi, State Regulation of Electronic Commerce, 51 Emory L.J. 1, 46 (2002) (discussing treatment of arbitration clauses in electronic commerce).

n71. Specht, 150 F.Supp.2d at 588 (noting that users of website were not required to scroll down to bottom of web page). See Geist, *supra* note 58, at 1389 (noting that Specht court distinguished differences between click-wrap and web-wrap agreements). See generally Casamiquela, *supra* note 8, at 475 (discussing various ways software license agreements are displayed on web pages).

n72. Specht, 150 F.Supp.2d at 588 (noting that users of Netscape website were not required to affirmatively click on "I accept" button). See Donnelly & Donnelly, *supra* note 56, at 289 (stating that Specht court focused on whether there were affirmative acts of acceptance of Netscape's terms); Geist, *supra* note 58, at 1389 (stating that Specht court found agreement to be web-wrap agreement because it merely alerted user of terms).

n73. See Specht, 150 F.Supp.2d at 596 (stating that case law on software licensing has not eroded importance of assent in contract formation); Donnelly & Donnelly, *supra* note 56, at 289 (noting that mutual assent was main concern of Specht court); Geist, *supra* note 58, at 1389 (discussing Specht court's focus on mutual assent in web page agreements).

n74. Specht, 150 F.Supp.2d at 596 (stating that mutual assent is bedrock of any agreement to which law will give force). See Donnelly & Donnelly, *supra* note 56, at 289 (discussing Specht court's focus on necessity of having opportunity to review and assent to specific terms); Geist, *supra* note 58, at 1389 (noting that Specht court's decision turned on finding of mutual assent).

n75. See Specht, 150 F.Supp.2d at 596 (highlighting that case law on shrink-wrap has not abolished important contract principles like mutual assent). See generally Steven C. Bennett, *Crafting an Enforceable Click-Wrap Agreement*, NYLJ, June 20, 2000, at 1 (outlining creation of enforceable software licensing agreements using contract principles); Mercer, *supra* note 35, at 1338-39 (noting importance of applying contract principles to online licensing agreements).

n76. E. Allen Farnsworth, *Farnsworth on Contracts* 3.6, 119 (2d ed. 1990) (noting that those who followed subjective theory of intent would talk of necessity of actual assent to agreement and "meeting of the minds," although objective theory is now applied). See generally *Busch v. Dyno Nobel, Inc.*, 2002 U.S. App. LEXIS 14724, at 15 (6th Cir. July 18, 2002) (memorializing that current view on mutual assent is judged by objective view of meeting of the minds); *Novak v. Seiko Corp.*, 2002 U.S. App. LEXIS 9594, at 9 (9th Cir. May 16, 2002) (explaining that court considers overt acts and conduct of parties to determine their objective intentions and understandings).

n77. Farnsworth, *supra* note 76, at 119 (indicating that any mental assent or decision to join in contract has no relevance as far as court is concerned). See *Bourque v. FDIC*, 42 F.3d 704, 708 (1st Cir. 1994) (reiterating modern day established legal principle of requiring manifestation of objective intent in order to show actual mutual assent); *Acme Inv., Inc. v. Southwest Tractor, Inc.*, 911 F. Supp. 1261, 1269 (D. Neb. 1995) (indicating that subjective intent of parties is not factored in determining mutual assent between them).

n78. See *Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at 8 (stating that unless plaintiff could prove facts showing defendant's knowledge of license terms and implied agreement, motion to dismiss would be granted). See generally *DeNeane v. McDonnell & Co.*, 1969 U.S. Dist. LEXIS 12963, at 3 (D.D.C. June 16, 1969) (concluding that plaintiff would eventually have to make a sufficient showing of facts in order to proceed with the claim and survive an early motion to dismiss); *Fishman v. Van Schaack & Co.*, 482 P.2d 990, 991 (Colo. Ct. App. 1971) (ruling that plaintiffs lack of proof of defendant's knowledge that there was problem with property under disputed contract warranted granting defendant's motion to dismiss).

n79. See *Chao*, *supra* note 10, at 439 (stating that web-wrap agreements are displayed on website's homepage or available through links). See generally *Gilfillan v. Union Canal Co.*, 109 U.S. 401, 403 (1883) (commenting that even without signification of assent by party, that party's receipt of actual notice may bind him/her to terms of notice); *Hightower v. GMRI, Inc.*, 272 F.3d 239, 243 (4th Cir. 2001) (concluding that party who continues employment despite change in terms of which she was given actual notice thereby assents to those terms by choosing to continue such employment, regardless if she never manifested any express consent).

n80. See *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 4553, at 8 (C.D. Cal. March 27, 2000) (asserting that plaintiff must prove defendant's implied agreement to terms); see also *Dodge Street, LLC v. Livecchi*, 32 Fed. Appx. 607, 611 (2d Cir. 2002) (finding that defendant accepted money in accordance with agreement was sufficient conduct for court to conclude that there was binding agreement); *Magellan Int'l Corp. v. Handel*, 76 F. Supp 2d 919, 925 (N.D. Ill. 1999) (setting forth that statement or other conduct by offeree can constitute proof of acceptance).

n81. See *Specht v. Netscape Communications, Corp.*, 150 F.Supp. 2d 585, 595 (S.D.N.Y. 2001) (highlighting absence of affirmative assent in SmartDownload web-wrap terms as opposed to ProCD shrink-wrap agreement, which required users perform "an affirmative action unambiguously expressing assent"); *Pollstar v. Gigmania*, 170 F.Supp. 2d 974, 980-81 (E.D. Cal. 2000) (deciding that there was lack of mutual assent due to difficulty for any visitor to pick out license agreement - where license agreement must be found on another web page); *Ticketmaster Corp.*, 2000 U.S. Dist. LEXIS 4553, at 8 (stating that unlike other websites, Ticketmaster.com did not require clicking "I accept" button before continuing navigating through sites).

n82. Pollstar, 170 F.Supp.2d at 980-81 (noting that after viewing website, court determined many site visitors may not have been aware of agreement). Cf. *Bonny v. The Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993) (determining that party is charged with knowledge of language contained in any agreement they execute). But see *Beaver v. Grand Prix Karting Ass'n*, 246 F.3d 905, 910 (7th Cir. 2001) (specifying that where party has been made aware, and party continues his or her normal routine without objection, that party is deemed to have waived any objection and consented to notice).

n83. Pollstar, 170 F.Supp.2d at 980-981 (detailing obscure nature of link to license agreement). See generally Bennett, *supra* note 75, at 1 (proposing that enforceability of click-wrap agreements will ultimately depend on level of notice to, and proof of assent from, users and buyers); Roland L. Trope, *Protecting Readiness Disclosures*, NYLJ, Jan. 19, 1999, at 5 (discussing different types of notice with reference to Internet, including actual notice and website notice).

n84. Pollstar, 170 F.Supp.2d at 981 (explaining how website had chosen to arrange accessibility of license agreement on their homepage). See generally *T. L. James & Co. v. Traylor Bros. Inc.*, 294 F.3d 743, 750 (5th Cir. 2002) (finding that absence of indication that contract terms are ambiguous or vague leads to conclusion that there cannot be contention against sufficient notice). Cf. *Judge Keenan, R Tgerswerke AG v. Abex Corp.*, NYLJ, June 26, 2002, at 26 (showing that binding obligation may arise against party upon clear notice of that obligation - which conversely means that lack of that clear or actual notice may mean that party does not become bound to obligation).

n85. Pollstar, 170 F.Supp.2d at 981 (stating, however, that court was hesitant to declare unenforceability of web-wrap at that time). See generally *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 930 (5th Cir. 1997) (clarifying that notice must be sufficiently plain and conspicuous in order to give sufficient notice that is enforceable); *Gamma-10 Plastics v. Am. President Lines*, 32 F.3d 1244, 1251 (8th Cir. 1994) (arguing that lack of actual notice by non-receipt of physical bill of lading is tantamount to insufficient notice of contract terms, even though bill of lading is generally considered adhesion contract).

n86. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 2-3 (describing arrangement of web-wrap link). Cf. Pollstar 170 F.Supp.2d at 981 (detailing common underlining of website links and describing lack of such underlining in that case), with *GTE New Media Servs. Inc. v.*

Ameritech Corp., 21 F.Supp.2d 27, 33 (D.D.C. 1998) (commenting that websites, such as Netscape, include variety of links that visitors may "click" to select other websites).

n87. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (noting that visitors to this website had to scroll to bottom to notice license agreement link). See generally *Hightower v. GMRI, Inc.*, 272 F.3d 239, 243 (4th Cir. 2001) (charging party with knowledge of contract terms although there was no overt act to indicate assent; court determined her choice to continue to work, after receiving actual notice that her employment contract would be modified, was tantamount to assenting by omission).

n88. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (detailing open and obvious nature of what is generally known as "shrink-wrap"). See generally *Adobe Sys. V. Stargate Software*, 2002 U.S. Dist. LEXIS 15322, at 2 (N.D. Cal. August 20, 2002) (conveying Adobe's claim that all their products are distributed with shrink-wrap End User License Agreements); *Specht v. Netscape Communications, Corp.*, 150 F. Supp 2d. 585, 588 (S.D.N.Y. August 20, 2001) (indicating that shrink-wrap agreements have been focus of "considerable litigation").

n89. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (highlighting fact that visitors are more likely to miss license agreements because they are on same page as more interesting information). See generally *Busch v. Dyno Nobel, Inc.*, *Dyno Nobel, Inc.*, 2002 U.S. App. LEXIS 14724, at 15 (6th Cir. July 18, 2002) (reiterating that objective mutual assent or meeting of the minds must occur to give rise to contract); *Novak v. Seiko Corp.*, 2002 U.S. App. LEXIS 9594, at 9 (9th Cir. May 16, 2002) (clarifying that objective mutual assent or meeting of the minds must occur to give rise to contract).

n90. *Specht*, 150 F.Supp.2d at 588 (explaining how access to license agreement was arranged on website). Cf. Ticketmaster, 2000 U.S. Dist. LEXIS 4553, at 8 (indicating that "many websites make you click on 'agree' to the terms and **conditions**"); *Pollstar*, 170 F.Supp.2d at 981 (informing reader of differences in shrinkwrap and browse wrap licenses).

n91. See *Softman Prod. Co. v. Adobe Sys., Inc.*, 171 F.Supp.2d 1075, 1087 (C.D. Cal. 2001) (stating that installation is required in order for consumer to assent to licensing agreement); *Specht*, 150 F.Supp.2d at 588 (finding "please review" language as "invitation" to review).

See generally Casamiquela, *supra* note 8, at 476 (noting reluctance of courts to find mutual assent regarding online license agreements).

n92. See Specht, 150 F.Supp.2d at 588 (stating that visitors are not required to affirmatively consent). See generally *Audio Visual Assocs., Inc. v. Sharp Elecs. Corp.*, 210 F.3d 254, 258-59 (5th Cir. 2000) (discussing requirement of mutual assent to form binding contract); *Restatement (Second) Contracts* 19.2 (1981) (asserting "The conduct of a party is not effective as a manifestation of assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents").

n93. See Specht, 150 F.Supp.2d at 596-97 (explaining that Michael Fagan had obtained SmartDownload from shareware website which did not contain any reference to license agreement or its terms).

n94. *Id.* at 598 (asserting denial of defendant's motion to compel arbitration).

n95. See Daniela Ivascanu, *Legal Issues in Electronic Commerce in the Western Hemisphere*, 17 *Ariz. J. Int'l & Comp. L.* 219, 229 (2000) (noting need for uniform system of digital signatures to effectuate acceptance of digital contracts); Kalama M. Lui-Kwan, *Digital Signatures: Recent Developments in Digital Signature Legislation and Electronic Commerce*, 14 *Berkeley Tech. L.J.* 463, 468-69 (1999) (noting how digital signatures can serve as affirmative acceptance of online contracts). See generally Specht, 150 F.Supp.2d at 587 (affirming that formality is not required and that any sign or action can create contract).

n96. See Specht, 150 F.Supp.2d at 587 (stating that "assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet"); see also *Hotmail Corp. v. Van Money Pie Inc.*, 1998 U.S. Dist. LEXIS 10729, at 16-17 (N.D. Cal. April 16, 1998) (finding that user of Internet email service accepted terms by agreeing to terms of service online and was therefore liable for breach); Harrison, *supra* note 44, at 944 (suggesting consumers could assent to contract terms by affirmatively typing, "I assent to the license terms").

n97. See Specht, 150 F.Supp.2d at 595-96 (asserting that downloading is not clear indication of assent and without this consent users are not compelled to arbitrate); Pollstar v. Gigimania, 170 F.Supp. 2d 974, 980-82 (E.D. Cal. 2000) (noting that the consumer did not have to click "accept" button before proceeding into website which made agreement different than normally enforceable shrink-wrap agreements); Ticketmaster Corp. v. Tickets.com, Inc., 2000 U.S. Dist. LEXIS 4553, at 8 (C.D. Cal. March 27, 2000) (stating that while many websites necessitate the user to click an "agree" button, the Ticketmaster agreement did not and that merely placing terms and **conditions** on a web page does not create a contract).

n98. Specht, 150 F.Supp.2d at 596.

n99. Id.

n100. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996) (noting that courts usually enforce preemption clauses for intellectual property but leave private contracts unaffected); G.M. Hunsucker, The European Database Directive: Regional Stepping Stone to an International Model?, 7 Fordham Intell. Prop. Media & Ent. L.J. 697, 719 (1997) (discussing how some "commercially minded courts" want to ensure market efficiency). See generally Adam White Scoville, Clear Signatures, Obscure Signs, 17 Cardozo Arts & Ent. L.J. 345, 364 (1999) (opining that increased market efficiency could result from legislation creating more secure system of electronic commerce).

n101. See American Airlines v. Wolens, 513 U.S. 219, 230 (1995) (stating that in order for market to be efficient, private agreements between parties must be enforceable); see also ProCD, 86 F.3d at 1455 (stating that prioritizing of contract terms is important for efficient market); Raymond Nimmer, Breaking Barriers: The Relation Between Contract and Intellectual Property Law, 13 Berkeley Tech. L.J. 827, 847 (1998) (suggesting that by controlling terms of contracts that are enforceable parties can achieve efficiency).

n102. See William Bratton, The "Nexus of Contracts" Corporation: A Critical appraisal, 74 Cornell L.Rev. 407, 417 (1989) (discussing theory that intense competition leads to "optimal contracting strategies"). But see Tamar Frankel, The Managing Lawmaker in Cyberspace: A Powerful Model, 27 Brook. J. Int'l L. 859, 868 (2002) (theorizing that too much competition in marketplace can lead to collapse of "market structure" and there will be no consumers). See

generally Llewellyn Gibbons, No Regulation, Government Regulation, or Self Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace, 6 Cornell J.L. & Pub. Pol'y 475, 529-30 (1997) (applying theory that market competition will keep contract terms competitive for consumers to Internet Service Provider market).

n103. See ProCD, 86 F.3d at 1455 (suggesting enforcement of license actually keeps costs lower for all consumers of product); see also Julian Epstein, The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?, 17 Am. U. Int'l L.Rev. 343, 345 (2002) (noting importance of antitrust laws in protecting competition, which in turn protects consumer interests); Madison, *supra* note 1, at 1031 n.21 (stating that ProCD asserts that limitations upon licensing should be limited only by market forces).

n104. See Julie Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management", 97 Mich. L.Rev. 462, 523 (1998) (discussing power of consumers to boycott, which led software companies to abandon copy protection for their software); see also P. Bernt Hugenholtz, Copyright, Contract & Code: What Will Remain of Public Domain, 26 Brook. J. Int'l L. 77, 87 (2000) (noting consumer boycott that prevented "copy protected software"); Paul Carroll, On Your Honor: Software Firms Remove Copy Protection Devices, Wall St. J., Sept. 25, 1986, at Sec. 1, pg. 33 (explaining boycott and its effects on software industry).

n105. See *Neal v. State Farm Ins. Co.*, 10 Cal. Rptr. 781, 784 (Cal. Ct. App. 1961) (defining contract of adhesion as "standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it"); see also Friedrich Kessler, Contracts of Adhesion - Some Thoughts About Freedom of Contract, 43 Colum. L.Rev. 629, 631 (1943) (discussing "standardized mass contract" as adhesion contract); Joseph T. McLaughlin, Arbitrability: Current Trends in the United States, 59 Alb. L. Rev. 905, 922 (1996) (noting that form contracts signed by consumer are usually adhesion contracts).

n106. The market for works on the Internet is mainly governed by standardized form contracts without leaving a consumer the opportunity to negotiate the terms. An interesting example is the e-Book version of Lewis Carroll's *Alice in Wonderland*, published by Volume One for the Adobe Acrobat eBook Reader, with the following use restrictions attached: Copy: No text selections can be copied from this book to the clipboard. Print: No printing is permitted on this book. Lend: This book cannot be lent to someone else. Give: This book cannot be

given to someone else. Read Aloud: This book cannot be read aloud. John R. Therien, Comment, Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age, 16 Berkley Tech L.J. 979, 1031 n.268. Software manufacturers use mainly the same type of licensing agreement. Deborah Kemp, Mass Marketed Software: The Legality of Forum License Agreements, 48 La. L.Rev. 87, 87 (1987). It has been stated that shrink-wrap and web-wrap contracts are standard form contracts for the information age. Rustad, *supra* note 52, at 280.

n107. See Keohane, *supra* note 6, at 443-44. See generally Prof'l. Software Consultants v. Hill, 1994 U.S. Dist. LEXIS 12586, 24 (D. Kan. August 30, 1994) (quoting Black's Law Dictionary definition of adhesion contracts); Garry L. Founds, Shrink-Wrap and Click-Wrap Agreements: 2B Or Not 2B?, 52 Fed. Comm. L.J. 99, 100 (1999) (stating that one problem with software licenses is that public is unable to negotiate terms of agreement).

n108. This is especially apparent when the immediate supplier that the user may have the ability to contact may not have any control over the terms. By lengthening the contact chain, the user's ability to negotiate with the producer who actually wrote the terms of the license is diminished. Noriko Kawawa, Contract Liability for Defects in Information in Electronic Form, 8 U. Balt. Intell. Prop. J. 69, 91 (1999). However, the problem with asserting that software licenses are adhesion contracts is that contracts of adhesion are usually enforced as an implied agreement between the parties. Founds, *supra* note 107, at 107. Nevertheless, courts have generally refused to recognize terms of software licenses that were not reviewable by the purchaser until after the item was paid for, because the terms were not part of the bargained for exchange. Thomas Finkelstein & Douglas C. Wyatt, Shrinkwrap Licenses: Consequences of Breaking the Seal, 71 St. John's L.Rev. 839, 841(1997).

n109. While standard form contracts have been upheld, there are several ways that courts have fashioned to help consumers get out of them: if the writing was not of a type that would reasonably appear to the recipient to contain the terms of a proposed contract, or if the writing had plainly been an offer, if the term was not one that a reader ought reasonably to have understood to be part of that offer, or interpreting the language of the term to favor that party with unequal bargaining power. See generally Farnsworth, *supra* note 76. It is generally accepted that courts may place upon adhesion contracts some limitations, such as construction against the drafter and not enforcing unconscionable terms or terms that are against public policy. Founds, *supra* note 107, at 108. Additionally, UCC Section 2B-208(b)(1) will not enforce mass-market terms so unexpected that "an ordinary reasonable person" would refuse a license with the term. Rustad, *supra* note 52, at 284.

n110. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (noting that consumers could reject shrink-wrap terms by sending software back under UCC 2-606). But see *Madison*, supra note 1, at 1118 n.389 (suggesting that consumers, due to lack of information, time and desire do not fight legal battles); *Finkelstein & Wyatt*, supra note 108, at 840 (noting that complicated legalese of license agreements may leave consumers unsure of what agreements even mean).

n111. The theory of form contracts is that as long as enough consumers search for advantageous terms, all standard forms must offer them. However, this does not play out in practice because many consumers will not deliberate on any given standard form contract. *Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract*, 47 *Stanford L. Rev.* 211, 243-244 (1995).

n112. See *Madison* supra note 1, at 1118 n.389 (highlighting low odds that individuals subject to unconscionable contract terms will have resources or interest in litigating claims); see also *Founds* supra note 107, at 108. But see *Klocek v. Gateway, Inc.*, 104 F. Supp 2d 1332, 1339-42 (suggesting that UCC 2-207 may apply to a scenario similar to this, in which case additional negotiation would not be necessary and any terms found within the license may be deemed merely proposals.).

n113. *Madison*, supra note 1, at 1118 n.389. Often consumers will sign these standard agreements without negotiating or even reading any of the specific terms. These consumers do not have the full information and are therefore operating under unequal bargaining power. Consumer protections have been drafted by state legislatures. *McLaughlin*, supra note 105, 922. See *Deborah Kemp, Mass Marketed Software: The Legality of the Forum License Agreement*, 48 *La. L. Rev.* 87, 126 (1987).

n114. Web-wrap agreements do not provide individuals with the ability to amend terms or individually negotiate with the other party. See *George C.C. Chen, A Cyberspace Perspective on Governance, Overnance, Standards, and Control: Electronic Commerce on the Internet: Legal Developments in Taiwan*, 16 *J. Marshall J. Computer & Info. L.* 77, 96 (1997). *Eisenberg* makes an interesting example of banks competing for checking account users. Consumers are likely to focus on interest rates and activity charges when opening an account. Therefore, banks compete for these terms with each other. However, in order to remain profitable, banks will make other terms that consumers are less likely to search for, i.e. overdrawing

penalties, or failing to detect and promptly report an error in a statement, less favorable to the consumer and weigh them in their favor. Eisenberg, *supra* note 111, at 244. Additionally, it is naive to believe the freedom of contract will prevail and that both parties have equal bargaining power, especially considering the number of non-profit institutions that deal with these standard licenses which are drafted by information providers with more resources and interest in the repercussions of the terms. Rodney J. Petersen, Testimony before The Library of Congress, The United States Copyright Office, and the Department of Commerce, National Telecommunications and Information Administration, Inquiry Regarding Sections 109 and 107 of the Digital Millennium Copyright Act (Aug. 4, 2000) available at

http://www.loc.gov/copyright/reports/studies/dmca/dmca_executive.html.

n115. See Eisenberg, *supra* note 111, at 243 (noting that a form contract is a high volume repeat transaction); see also Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 Ga. L. Rev. 583, 594 (1990) (explaining "take-it-or-leave-it" attitude of these contracts because consumer is presented with preprinted forms outlining obligations of both parties); Edith Resnick Warkentime, Article 2 Revisions: An Opportunity to Protect Consumers and Merchant/Consumers Through Default Provisions, 30 J. Marshall L. Rev. 39, 41 (1996) (asserting consumers often must buy goods on "take-it-or-leave-it" basis).

n116. See Eisenberg, *supra* note 111, at 243 (stating that repeated use of form contracts makes it advantageous to spend time and money on attorneys and deliberate over terms of agreements); see also Kemp, *supra* note 107, at 91-92 (alluding that software companies use these form contracts as one way to solidify their legal rights); Michael L. Rustad, The Uniform Commercial Code Proposed Article 2B Symposium: Commercial Law Infrastructure for the Age of Information, 16 J. Marshall J. Computer & Info L. 255, 281 (noting that primary reason that software manufacturers use form contracts is to limit amount of negotiations and thus reduce transaction costs).

n117. See generally Eisenberg *supra* note 111, at 243 (outlining unequal bargaining power and "asymmetrical incentives" of parties to form contracts); Stephen J. Ware, Comment, A Critique of the Reasonable Expectations Doctrine, 56 U. Chi. L. Rev. 1461, 1476 n.70 (1989) (outlining source that courts use when expounding that form contracts are used primarily by those with strong bargaining power). But see Founds, *supra* note 107, at 107 (arguing that standard form contracts used in software licensing agreements may be advantageous to both the manufacturer and the consumer).

n118. See Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 Am. Bus. L.J. 193, 299 (1998) (explaining Posner's perspective that competition in the markets renders issues of monopoly power moot); Harry Steinberg, Note, *Oligopolistic Interdependence: The FTC Adopts a "No Agreement" Standard to Attack Parallel Non-Collusive Practices*, 50 Brooklyn L. Rev. 255, 257 n.1 (1984) (highlighting Posner's view that competition is "the natural state of affairs" and it "always benefits consumers"). See generally Michael H. Orbison, Note, *Vertical Restraints in the Brewing Industry: Is the Malt Beverage Interbrand Competition Act the Answer*, 50 Brooklyn L. Rev. 143, 164 n.113 (explaining how monopoly theory works with consumer protection).

n119. See Ostas, *supra* note 118, at 214-15 (defining Posner's market competition argument in contracts); see also Meyerson, *supra* note 115, at 595 (arguing consumers in disagreement with form contracts may look elsewhere or not purchase product); Nimmer, *supra* note 101, at 847 (highlighting that outside consumer markets, purchasers' choices influence changes in form contracts).

n120. See Neil Weinstock Netanel, *Cyberspace Self Governance: A Skeptical View from Liberal Economic Theory*, 88 Calif. L.Rev. 395, 438 (2000) (noting efficient markets only require some consumers to be well informed); Ostas, *supra* note 118, at 229 (arguing that market pressures can eradicate unreasonable contract terms). But see Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L.Rev. 349, 361 (1988) (explaining that even if consumers fully understood terms in form contracts, they still could not bargain because employees of companies do not have power to change terms).

n121. See Nimmer, *supra* note 101, at 847 (opining that "if enough potential purchasers decline the product and terms, the provider will change the price or terms, or leave the market"); Ostas, *supra* note 118, at 228-29 (noting that rise of Internet companies that tout intellectual property as their key asset will make competitors feel market pressure to offer more favorable terms in standard contracts). But see Frank P. Darr, *Unconscionability and Price Fairness*, 30 Hous. L. Rev. 1819, 1832 (1994) (arguing that courts have nonetheless resorted to doctrine of unconscionability to enforce "some norms of community justice").

n122. See Hugenholtz, *supra* note 104, at 87 (noting that consumer boycott of copy-protected software in 1980's was effective measure); see also Major R. Ken Pippin, *Consumer Privacy*

on the Internet: It's Surfer Beware, 47 A.F. L.Rev. 125, 138 (1999) (explaining how Intel modified Intel Pentium chip III in response to threatened consumer boycott); Deborah Post, Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook, 16 Touro L.Rev. 1205, 1220 n.45 (2000) (noting existence of body of work on "consumer resistance strategies").

n123. See Jason Green, Is Zippo's Sliding Scale a Slippery Slope of Uncertainty? A Case for Abolishing Website Interactivity as a Conclusive Factor in Assessing Minimum Contacts in Cyberspace, 34 J. Marshall L.Rev. 1051, 1052-53 (2001) (noting that consumers in computer transactions have a broad reach in "global market"); Thomas J. Murphy, It's Just Another Little Bit of History Repeating: UCITA in an Evolving Age of Information, 30 Golden Gate U.L. Rev. 559, 587 (arguing consumers purchasing products on the web may influence market). See generally Darr, *supra* note 121, at 1838 (discussing market price as determinative of consumer behavior).

n124. See, e.g., Paula C. Murray, Inching Toward Environmental Regulatory Reform - ISO 14000: Much Ado About Nothing or a Reinvention Tool, 37 Am. Bus. L. J. 35, 41 n.35 (1999) (arguing consumer boycott of tuna led seafood processors to purchase tuna that was only caught in dolphin safety nets). But see Eisenberg, *supra* note 111, at 243-44 (stating that many consumers will not deliberate on contract terms); Madison, *supra* note 1, at 1118 n.389 (stating that scant resources and ability make it unlikely consumers will litigate against unconscionable contract terms).

n125. See Hugenholtz, *supra* note 104, at 96 (discussing effectiveness of consumer boycott against copy-protected software); see also Richard D. Haroch, Legal Issues Associated with the Creation and Operation of Websites, 537, 584 (2000) (stating threatened consumer boycotts forced Intel to modify its Pentium chip); Pippin, *supra* note 122, at 138 (discussing modification of Intel Pentium chip in response to consumer pressures).

n126. See Gail E. Evans, Opportunity Costs of Globalizing Information Licenses: Embedding Consumer Rights within the Legislative Framework for Information Contracts, 10 Fordham Intell. Prop. Media & Ent. L. J., 267, 291 (1999) (arguing "cyber-market" corporations have greater power over consumers because they possess more information); Nimmer, *supra* note 101, at 847 (characterizing this view as "romantic" theory). See generally Daniel E. Wenner, Renting in Collegetown, 84 Cornell L. Rev. 543, 569.

n127. See Goodman, *supra* note 8, at 324 (arguing daily computer transactions consist of unequal bargaining power and standard form contracts involved in purchasing software are contracts of adhesion). See generally Budnitz, *supra* note 49, at 751 (noting that online shopping takes place under different circumstances than shopping in person); Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 Wayne L. Rev. 1903, 1910 (2000) (discussing how standard form contracts lead to loss in consumer bargaining power because they are not symmetrical).

n128. See Evans, *supra* note 126, at 291 (discussing advantage of online corporations over purchasers because they possess more information); see also Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 Ohio St. L.J. 815, 817 (1998) (stating that many consumers lack information or knowledge about how to use information); Madison, *supra* note 1, at 1118 n.389 (stating that scant resources and ability make it unlikely consumers will litigate against unconscionable contract terms).

n129. See Elwin Griffith, *Searching for the Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 Baylor L.Rev. 265, 313 n.284 (2000) (noting that consumer cannot assert seller's breach of warranty or failure to perform when he has contracted out of these rights); see also Founds, *supra* note 107, at 107 (stating that contracts of adhesion are usually enforced as implied agreements between the parties); Rubin, *supra* note 127, at 1909 (suggesting inherent unfairness in these types of transactions).

n130. Griffith, *supra* note 129, at 313 n.284 (citing nonpayment as most effective tool in fight against seller). See generally Rebecca Korsec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. Int'l & Comp. L.Rev. 227, 239 (1997) (noting consumers will not pay in failure to warn and defective marketing cases if warnings are "overly detailed"); Symposium, *Copyrights in Cyberspace - Rights Without Laws?* 73 Chi.-Kent L. Rev. 1155, 1168 (1998) (noting that consumers may express preferences for products through market transactions).

n131. Griffith, *supra* note 129, at 342-43 (noting that consumers can also be subject to rescission or damages); see also John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285, 295-96 (2000) (explaining judges will "invalidate stand-

ardized terms they do not like"); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Calif. L.Rev. 431, 439 (1993) (suggesting that courts will adopt public policy doctrine in deciding whether or not to enforce terms of contracts). See generally Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U.L. Rev. 749, 755 (2000).

n132. Griffith, *supra* note 129, at 266-67 (describing intent of Truth in Lending Act, to increase rights of consumers). See generally Casamiquela, *supra* note 8, at 475-77 (describing characteristics of click-wrap and browser wrap agreements); Dawn Davidson, *Click and Commit: What Terms are Users Bound to When They Enter Websites*, 26 Wm. Mitchell L. Rev. 1171, 1184 (2000) (explaining how web-wrap agreements are different than shrink-wrap and click-wrap agreements because they do not involve sale of goods but passive user involvement).

n133. See Griffith, *supra* note 129 at 313 n.284 (arguing that without claims for breach of warranty or failure to perform under contract the seller's weapon of non-payment is lost); see also Madison, *supra* note 1, at 1060 (observing that web-wrap agreements require user to comply with all terms including enforcement of payment); Rustad, *supra* note 52, at 548-49 n.10 (noting that many web-wrap agreements do not deal with payment terms because they are licenses for use of material on particular websites).

n134. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 519 (2001) (affirming that primary purpose of copyright is to give to public labors of author); see also *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578 n.10 (1994) (reciting that goal of copyright is to stimulate creation and publication of intellectual material); *Sun Trust Bank v. Houghton Mifflin Corp.*, 268 F.3d 1257, 1260 (11th Cir. 2001) (stating that three main goals of copyright law were codified from English Statute of Anne, and are promotion of learning, protection of public domain, and granting of exclusive right to author).

n135. See U.S. Const. art. I 8, cl. 8 ("Congress shall have the power...to promote the progress of science...by securing for limited time to authors...the exclusive right to their respective writings.").

See generally *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135, 151 (1998) (stating that Art. I, 8, cl. 8 was enacted to promote useful arts by rewarding creativity of authors); *Seminole Tribe v. Florida*, 517 U.S. 44, 94 (1996) (remarking

that Congress can legislate to promote progress of science and arts by granting exclusive rights to authors and inventors pursuant to Art. I, 8, cl. 8).

n136. See *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings. Bank*, 527 U.S. 627, 649-50 (1999) (quoting Justice Story's commentary on Federal Constitution as saying that allowing public full enjoyment and possession of authors' works without restraint is power delegated to national government); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977) (noting that District Courts have rejected First Amendment challenges to federal copyright law); *Sun Trust Bank*, 268 F.3d at 1261 (asserting that copyright clause was intended to be engine of free expression).

n137. See *Sun Trust Bank*, 268 F.3d at 1261 (maintaining that economic incentive for authors cultivates distribution of ideas to public); see also *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 816 (5th Cir. 2002) (positing that elimination of economic incentive of copyright would seriously impair many not-for-profit companies that rely on monies from copyright royalties as income); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 682 n.5 (2nd Cir. 1998) (noting that financial incentives are essential to copyrights on compilation works).

n138. See *Sun Trust Bank*, 268 F.3d at 1264 (explaining that First Amendment principles of doctrine of fair use and idea/expression dichotomy are built into copyright so courts do not have to address related First Amendment arguments in copyright cases). Cf. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458 (2nd Cir. 2001) (noting that Supreme Court has never held that fair use was constitutionally required) with *Iowa State Univ. Research Found. v. ABC*, 621 F.2d 57, 60 (2nd Cir. 1980) (suggesting that judicially-created fair use doctrine permits courts to avoid rigid application of copyright law which may stifle creativity).

n139. Under the first sale doctrine, once the work is sold or legally transferred, the copyright owner's interest in the material object is exhausted. Leaffer, *supra* note 2, at 8.14. There is also an understanding among consumers that some photocopying of books is permissible as long as there is no personal financial reward. Schools and students are especially apt to take advantage of this understanding. Madison, *supra* note 1, at 1084. For an explanation of the first sale doctrine as a limitation on the exclusive rights of distribution given to authors, see Donna K. Hintz, *Battling Gray Market Goods with Copyright Law*, 57 Alb. L. Rev. 1187, 1194 (1994).

n140. See 17 U.S.C 108 (1994) (providing libraries and archives can reproduce one copy or phonorecord of work as long as there is no commercial advantage); see also *Universal City Studios, Inc.*, 273 F.3d at 441 (noting that Digital Millennium Copyright Act contains exceptions for libraries and schools to test software); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 265 (5th Cir. 1998) (quoting three exceptions in the Copyright Act for archival copying).

n141. See Comments of the Library Associations, Testimony before The Library of Congress, The United States Copyright Office, and the Department of Commerce, National Telecommunications and Information Administration, Inquiry Regarding Sections 109 and 107 of the Digital Millennium Copyright Act (Aug. 4, 2000) available at http://www.arl.org/info/letters/dmca_80400.html (expressing concerns including restriction of Interlibrary Lending capabilities, less archiving ability and private donations); see also Eric Douma, *The Uniform Computer Information Transactions Act and the Issue of Preemption of Contractual Provisions Prohibiting Reverse Engineering, Disassembly, and Decompilation*, 11 Alb. L.J. Sci. & Tech. 249, 281 (2001) (suggesting that licensing agreements may limit each party's rights under fair use doctrine); Karen E. Georgenson, *Reverse Engineering of Copyrighted Software: Fair Use or Misuse?*, 5 Alb. L.J. Sci. & Tech. 291, 316 (1996) (noting that anti-competition clauses in licensing agreements are contrary to goals of copyright law).

n142. See 17 U.S.C. 107 (1994) (codification of judicially-created fair use doctrine); see also Harry G. Henn, *Henn on Copyright Law: A Practitioner's Guide*, 223 (3d ed. 1991) (discussing fair use doctrine). See generally Jon R. Mostel, Comment, *The Home Videotaping Controversy: Fair Use or Fair Game?* *Universal City Studios, Inc. v. Sony Corp. of America*, 49 Brooklyn L. Rev. 363, 397-98 (1983) (arguing that Legislature intended fair use to mean reasonable use when incorporating it into statute).

n143. See *Harper & Row, Publishers, Inc. v. Nations Enters.*, 471 U.S. 539, 548 (1985) (explaining that verbatim copying by subsequent authors without originality is infringement if not done under fair use); see also William F. Patry, *The Fair Use Privilege in Copyright Law* 3 (Bureau of National Affairs, Washington, D.C. 1995) (1985) (discussing concept of "fair abridgment"). But see *BellSouth Adver. & Publ'g. Corp. v. Donnelly Info. Publ'g.*, 999 F.2d 1436, 1444 n.18 (11th Cir. 1993) (noting different application of fair use with respect to subsequent authors of fictional and non-fictional works).

n144. See Madison, *supra* note 1, at 1109 (asserting "notwithstanding the fact that ProCD concerned shrink-wrap applied to public domain material and technically concerned the elements of an enforceable license, its reasoning has been extended to contexts involving copyrighted material and the assertion of so-called "proprietary rights""); see also Rustad, *supra* note 52, at 561 n.110 (expressing concern that under Uniform Computer Information Transactions Act publishers may try to limit writers' and librarians' rights under fair use doctrine). But see Effross, *supra* note 53, at 77 (arguing that inconspicuousness of or reluctance to implement terms of web-wrap agreements may render them unenforceable).

n145. See Hugenholtz, *supra* note 104, at 79 (reasoning that contract law will govern relationships between information providers and end-users on Internet which may result in consumers giving up contractual freedoms they otherwise would have had); Madison, *supra* note 1, at 1143 (stating that "the lesson" of ProCD is that publishers can not only avoid copyright law, but they can define scope of legitimate debates about what society values in access to and use of information.). But see Douma, *supra* note 141, at 260 (arguing that fair use is already set of implied promises even without contractual provisions contained within license).

n146. See William W. Fisher III, Property and Contract on the Internet, 73 Chi.-Kent L.Rev. 1203, 1225 (1998) (suggesting that uploading short excerpts of material to be subject to criticism would still be privileged under fair use); see also Bruce R. Poquette, Current Public Law and Policy Issues : Information Wants to be Free, 22 Hamline J. Pub. L. & Pol'y 175, 196 (2000) (explaining that uploading of material onto Internet for commercial purpose will not be privileged under fair use). See generally Laura G. Lape, A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine, 61 Alb. L. Rev. 43, 78 (1997) (summarizing recent decisions regarding uploading of information and copyright ramifications).

n147. See generally Comments of the Library Associations, *supra* note 141 (outlining concerns of libraries regarding licensing agreements); Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Colum.-VLA J.L. & Arts 115, 119-20 (2000) (discussing potential for free use of copyrighted works by libraries); Georgia K. Harper, The University Community Pursuit of the Promise of the New Media, 13 Cardozo Arts & Ent. L.J. 447, 463 (1993) (suggesting that specifically tailored license agreements may be more advantageous than subscriptions which are usually more than libraries can afford).

n148. According to surveys published in 1998 by the National Center for Education Statistics, the 8,891 U.S. public library systems alone spent \$ 789 million on library materials, in-

cluding electronic formats in 1995. The 3,303 U.S. academic libraries spent \$ 1.3 billion on information resources in all formats in 1994. These libraries now spend over \$ 2 billion. Comments of Library Associations, *supra* note 141. Academic libraries devote 85% of their budgets to hard copies of materials. Proceedings of the 94th Annual Meeting of the American Association of Law Libraries Held in Minneapolis, Minnesota July 14-19, 93 Law Libr. J. 627, 641 (2001). Libraries, as the largest purchasers of information in the country, are particularly sensitive to changing costs in information because they cannot easily pass these costs on to the patrons. Deborah Reilly, The National Information Infrastructure and Copyright: Intersections and Tensions, 76 J. Pat. & Trademark Off. Soc'y 903, 924 (1994).

n149. See Henn, *supra* note 142, at 249 (outlining rule on reproduction or distribution by libraries); see also Christine L. Wettach, What Constitutes Fair Use of Medical, Scientific and Technical Writings with Respect to Copyright Infringement Actions, 144 A.L.R. Fed. 537, 537 (1998) (stating that doctrine of fair use operates as defense to any claim of copyright infringement). See generally Lape, *supra* note 146, at 678 (stating that fair use doctrine is justified because this type of unauthorized used of copyrighted information outweighs any disincentive to create new works).

n150. 17 U.S.C. 108 (1994) provides:

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the **conditions** specified by this section, if -

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

See also Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 Cal. L. Rev. 1145, 1159 (2000) (noting that library copying falls within ambit of fair use). See generally Niva Elkin-Koren, *Cyberlaw and Social Change A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 266-67 (1996) (stating that because of shift in libraries' holdings to electronic media, libraries no longer own information and are more dependent on suppliers; this shift in way libraries are administrated is inevitable).

n151. See 17 U.S.C. 108(a) (stating that one copy can be made of copyrighted materials by library or archive employees); see also Steven D. Smit, "Make a Copy for the File...": Copyright Infringement by Attorneys, 46 Baylor L. Rev. 1, 5-6 (1994) (noting that Founding Fathers had recognized public utility in limiting copyright protections, included limitation in Constitution, and quickly followed up by enacting first Copyright Act in 1790). See generally Raffi Zerounian, *Bonneville International v. Peters*, 17 Berkeley Tech. L.J. 47, 67 n.131 (2002) (stating that copyright law must handle difficult task of balancing publisher control over information with dissemination of information available for public use).

n152. See Comments by Library Associations, *supra* note 141 (noting that routine library practices that were permitted under copyright law have all been restricted or barred by license agreements); see also Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 Berkeley Tech. L.J. 529, 530-31 (explaining that increase in intellectual property law has put strains on First Amendment). See generally Stephen E. Weil, *Cloning and Copyright*, 19 Cardozo Arts & Ent. L.J. 137, 147-48 (stating that libraries may be forced to lease materials and hold them only as long as they continue payments, as opposed to buying single hard copy and holding it indefinitely).

n153. Libraries deal with so many different licenses that they are forced to treat them all the same and under the strictest standards to simplify their uses. Therefore most libraries simply do not allow Inter-Library Lending of digital works, regardless of what the actual license states, because the stricter licenses do not allow for it. This way they are not forced to reinvestigate the terms and **conditions** of each license each time a Library patron asks to borrow the work. Comments by Library Associations, *supra* note 141. Some commentators have advocated that libraries negotiate agreements with each other to share access to online collections in order to deal with this problem. Georgia H. Harper, 13 Cardozo Arts & Ent. L.J. 447,

463-64 (1995). With the publishers in control of their materials, the public will inevitably lose out in sharing this information without a solution. Weil, *supra* note 152, at 148.

n154. See Comments by Library Associations, *supra* note 141 (noting that this is especially apparent for smaller libraries and public libraries in communities with limited resources); see also Harper, *supra* note 153, at 151-52 (stating that without freedom to use information under fair use doctrine, libraries would fail to fulfill their role as providers of information to community). See generally J.H. Reichman, *The Trips Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 *Fordham Intell. Prop. Media & Ent. L.J.* 171, 228 (1993) (stating that database publishers have also tried to limit inter-library sharing of resources because sharing reduces demand for purchasing of information).

n155. See Comments by Library Associations, *supra* note 141 (noting, however, that libraries are able under sections 107-109 to archive "lawfully purchased works for future use and historical preservation"); see also Gasaway, *supra* note 147, at 121 (stating that first sale doctrine of Copyright Act secures libraries' important function of providing information on all sides of issues to public). See generally Reichman, *supra* note 154, at 227-28 (observing that publishers monopoly on information puts them in position to require librarians to waive copyright privileges that they are guaranteed, which limits patrons' access to information).

n156. See Comments of the Library Associations, *supra* note 141 (noting, however, that they are authorized to convert some works into new formats); see also Harper, *supra* note 153, at 453 (stating that many publishers engage in price inflation in order to compensate for what they believe is revenue lost from library copying permitted under section 108 of the Copyright Act). See generally Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 *Ohio St. L.J.* 783, 812 (observing difficulty of obtaining digital licenses for distance learning use).

n157. See Comments of the Library Associations, *supra* note 141 (noting that "if digital works are not archived in a professional manner the risk of loss to authors and society is enormous"); see generally Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *Yale L.J.* 785, 786 (2001) (stating that content providers have difficulty controlling access to their websites); Julie E. Cohen, *Intellectual Privacy and Censorship of the Internet*, 8 *Seton Hall Const. L.J.* 693, 699-700 (1998) (claiming certain uses of information permitted under fair-use doctrine could be breach of digital licenses).

n158. See Comments of the Library Associations, *supra* note 141 (stating that libraries have also expressed concerns that they will lose access to digital works in event publishers merge, cease operations, or convert existing works into new formats as technology evolves); see generally Harper, *supra* note 153, at 453 (discussing concerns of publishers over lost revenue); Katherine C. Spelman & Rachel Matteo-Boehm, Copyright Current Developments, 691 Prac. L.Inst. Pat. 801, 852 (2002) (noting risk that publishers may be forced to delete up to 200,000 archived articles from electronic archives).

n159. See Executive Summary: Digital Millennium Copyright Act: Section 104 Report, available at

http://www.loc.gov/copyright/reports/studies/dmca/dmca_executive.html (evaluating copyright legislation); see also JeanAne Marie Jiles, Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act to Prevent Constitutional Challenges, 52 Admin. L.Rev. 443, 457 (2000) (stating that under Digital Millennium Copyright Act, content providers will have less copyright protection than librarian's providers). See generally Robyn E. Rebollo, So Many Products... The Explosion in Legal Resources Has Made Sorting Out Vendor Issues More Important, Legal Times, July 15, 2002 (noting Special Library Associations recommendation that content providers should offer alternative licensing agreements to choose from).

n160. See Executive Summary, *supra* note 159 (summarizing views received from public through comments, reply comments, and hearing testimony); see also Keohane, *supra* note 6, at 443 (stating that individually negotiated contracts have become obsolete for mass marketed software and that shrink-wrap, click-wrap and web-wrap agreements are designed to be efficient tools to set terms of standard transaction). See generally Niva Elkin-Koren, Copyright Policy and the Limits of Freedom of Contract, 12 Berkeley Tech. L.J. 93, 94 (1997) (stating that online licensing arrangements, which are easy and cheap to monitor, could replace traditional copyright paradigm of private contracts).

n161. See Executive Summary, *supra* note 159 (evaluating concerns regarding licensing agreements); see also Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) (noting that shrink-wrap agreements are industry norm). See generally Koren, *supra* note 160, at 108-10 (arguing that freedom of contract rationale behind online licensing agreements to contravene copyright protections is bad economic policy).

n162. Fisher, *supra* note 146, at 1243-45 (demonstrating by analogy to other disciplines that arguments in favor of strict limitations on contractual freedoms are strong and diverse and not unprecedented). See generally Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L.Rev. 563 (1982) (explaining paternalist arguments in favor of limitations are based on theories holding that law makers know better than their population how to protect it); Eyal Zamir, *The Efficiency of Paternalism*, 84 Va. L.Rev. 229, 239-40 (1998) (exploring idea that intervention may in fact preserve individual liberty when individuals are inclined to unknowingly act to their own detriment).

n163. Murphy, *supra* note 123, at 563 n.28 quoting Mary Jo Howard Dively, *Overview of Proposed UCC Article 2B*, 557 Prac. L.Inst. Pat. 7, 9-10 (1999). See generally Das, *supra* note 57, at 502 (stating that courts have examined different factors to determine liability in click-wrap and browse-wrap agreements). But see Lawrence Lessig, *Sign It and Weep*, available at <http://www.thestandard.com/article/0,1902,2583,00.html> (issue date Nov. 20, 1998) (arguing that common law process of making law over time will produce set of standardization rules supported by reason rather than industry-controlled legislation).

n164. See Wayde Brooks, *Wrestling Over the World Wide Web: ICANN's Uniform Dispute Resolution Policy for Domain Name Disputes*, 22 Hamline J. Pub. L. & Pol'y 297, 298 (2001) (explaining that Internet has caused "multi-jurisdictional mess" that alternate dispute resolution methods could solve); see also Darren L. McCarty, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 Wm. & Mary L. Rev. 557, 577-80, 590 (1998) (discussing general and specific personal jurisdiction with respect to Internet cases to conclude that specific jurisdiction is better suited to deal with geographic Internet jurisdictional concerns); Henry H. Perrit, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Disp. Resol. 675, 676 (2000) (describing how Internet globalization frustrates traditional judicial resolution that depends on localization to determine jurisdictional laws, since Internet transactions reach many national and international jurisdictions).

n165. See generally Keohane, *supra* note 6, at 455 (noting that UCITA aims to provide uniform framework for laws from state to state); McCarty, *supra* note 164, at 559 (proposing that diverse geographic Internet transactions threaten traditional limits on state judicial powers); Katy Hull, Note, *The Overlooked Concern With the Uniform Computer Information Transactions Act*, 51 Hastings L. J. 1391, 1400 (2000) (cautioning that without stable law of contract

and with inconsistency from state to state software industries will be hindered in reaching fullest potential).

n166. Keohane, *supra* note 6, at 454 (discussing UCITA's application to software licensing agreements). See generally Hull, *supra* note 165, at 1401 (noting three basic arguments for standardization of software licensing agreement laws); Matthew J. Smith, An Overview of the Uniform Computer Information Transactions Act: Warranties, Self-Help, and Contract Formation Why UCITA Should Be Renamed "The Licensors' Protection Act", 25 S. Ill. U. L.J. 389, 390 (2001) (describing process by which UCITA originated).

n167. Murphy, *supra* note 123, at 559 (stating that the NCCUSL adopted UCITA at its conference in Denver, Colorado). See Smith, *supra* note 166, at 393 (stating that NCCUSL presented its first UCITA draft on July 29, 1999 and made final drafts available in October, 1999). See generally Computer Professionals for Social Responsibility, UCITA in the United States, available at

<http://www.cpsr.org/program/UCITA/ucitastates.html> (last visited Sept. 20, 2002) (explaining in order for UCITA to become law it must be passed in each state, and provides updated information regarding UCITA status in each state).

n168. Although two states have adopted the UCITA, others have specific statutes for addressing issues such as forum selection clauses in Internet transactions. Das, *supra* note 57, at 487 n.43. Currently, only Maryland and Virginia have passed legislation on UCITA, but Hawaii, Iowa, Illinois, and Oklahoma have introduced its legislation to one or both houses of the state Congress. Keohane, *supra* note 6. See Society for Information Management, at www.simnet.org/search/ucita, for an up to date list of UCITA's status in each state legislature.

n169. Initially, UCITA was intended as an addition to the UCC as Article 2B as a standardization of commercial law for transactions involving intangible property. However, the proposed Article 2B met with dissatisfaction and was abandoned. The NCCUSL then proposed a new form of this idea in UCITA. Murphy, *supra* note 123, at 560. Neither the UCC nor the proposed UCITA are federal law. The UCC is not a federal statute but rather was drafted with representatives from all the states and other important people and then proposed to state legislatures and independently enacted by each state legislature. Consequently there are slight differences among the actual state laws and the UCC, but nothing dramatic. UCITA is intended to work in a similar fashion. The goal of UCITA is to set down a uniform law for all the states. It is drafted by representatives of the states and then proposed to the state legislatures

for ratification. Therefore, it is not federal law, but state law, but it is increasingly uniform from state to state. Keohane, *supra* note 6. There was a call for a new UCC because the UCC was already an established vehicle for commercial transaction and more readily intellectually accessible than complex licensing agreements; the courts seemed more at ease in implementing a UCC approach to a controversy; and the simultaneous goals of gap-filling and encouraging technology transfer would be met; and basic uniformity where areas of intellectual property law had started to significantly overlap. *Id.*

n170. UCITA 207 (Formation: Releases of Informational Rights) states:

(a) A release is effective without consideration if it is:

(1) in a record to which the releasing party agrees, such as by manifesting assent, and which identifies the informational rights released; or

(2) enforceable under estoppel, implied license, or other law.

(b) A release continues for the duration of the informational rights released if the release does not specify its duration and does not require affirmative performance after the grant of the release by:

(1) the party granting the release; or

(2) the party receiving the release, except for relatively insignificant acts.

(c) In cases not governed by subsection (b), the duration of a release is governed by Section 308.

n171. UCITA 208 (Adopting Terms of Record) states

Except as otherwise provided in Section 209, the following rules apply:

(1) A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.

(2) The terms of a record may be adopted pursuant to paragraph (1) after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins. If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, Section 202(e) applies.

(3) If a party adopts the terms of a record, the terms become part of the contract without regard to the party's knowledge or understanding of individual terms in the record, except for a term that is unenforceable because it fails to satisfy another requirement of this [Act].

n172. See UCTIA 208(2). See generally Das, *supra* note 57, at 483 (proposing that courts use two-prong "reasonably communicated" test to examine both physical characteristics of forum selection clauses and consumer's ability to become meaningfully informed of existence of such clause before enforcing forum selection clauses in favor of e-vendors); Smith, *supra* note 166, at 390 (noting that there are UCITA provisions that mirror UCC provisions).

n173. Duoma, *supra* note 141, at 276 (challenging that assent requirements in 112(a) are fundamentally flawed and create procedural unconscionability). See generally Hull, *supra* note 165, at 1391 (cautioning that while standardization is needed, overly restrictive laws will only hinder software industries); Smith, *supra* note 166, at 397-401 (detailing background and implication of "manifestation of assent" and "opportunity of review" terms).

n174. See generally *Specht v. Netscape Communications, Corp.*, 150 F.Supp.2d 585, 596 (S.D.N.Y. 2001) (noting that in web-wrap agreements there is no affirmative assent to agreement); Das, *supra* note 57, at 501 (explaining that Specht court found liability in defendant's failure to insure that users manifest assent to terms and failure to notify users of contract formation); Smith, *supra* note 166, at 399 (noting that although UCITA provisions require manifestation of assent and opportunity to review, licensees are often presented with additional terms post transaction without remedy).

n175. See generally Hull, *supra* note 165, at 1391 (echoing commentator concern that UCITA may remove consumer protections currently granted under UCC Article 2); Murphy, *supra* note 123, at 574 (claiming that UCITA principles have not evolved through case law like UCC principles); Smith, *supra* note 166, at 391 (submitting that UCITA provisions provide software licensing industries opportunities for total control over drafting and enforcing computer software transaction contracts).

n176. See Murphy, *supra* note 123, at 573 (determining that the development process used to codify UCC provisions was not adhered to in UCITA development); see also Hull, *supra* note 165, at 1403 (identifying four distinct problems that UCITA does not address); Smith, *supra* note 166, at 397 (commenting that UCITA replaces UCC traditional contract formation and modification with layered contract terms requiring manifestation of assent).

n177. See Murphy, *supra* note 123, at 573-74 (stating that UCITA tried to codify quickly changing area); see also Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned?*, 7 Roger Williams U. L.Rev. 167, 203 (2001) (showing that UCITA areas of concern are rapidly changing). See generally Carlyle C. Ring, Jr., *An Overview of the Virginia UCITA*, 8 Rich. J.L. & Tech. 1, 21 (2001) (explaining that UCITA establishes rules that do not yet exist in law).

n178. See Murphy, *supra* note 123, at 574 ("It has become apparent that this area does not presently allow the sort of codification that is represented by the Uniform Commercial Code."); see also Hornbuckle, *supra* note 24, at 847, (stating that ALI withdrew its support of UCITA). See generally Rustad, *supra* note 52, at 552 (stating that UCITA is unlikely to be adopted nationwide).

n179. See Murphy, *supra* note 123, at 575 (stating that critics characterize UCITA as "sweet-heart bill for software publishers" and compilation whose provisions clearly favor "the companies whose lobbyists have been sitting at the ... table."). See generally Boss, *supra* note 177, at 203 (noting that intrusion into intellectual property is obstacle to adoption of UCITA). But see Kalinda Basho, Note, The Licensing of Our Personal Information: Is it a Solution to Internet Privacy?, 88 Cal. L. Rev. 1507, 1535 (2000) (showing that UCITA may give average consumer rights that they would not be able to attain themselves).

n180. See Murphy, *supra* note 123, at 575 (stating that needs of consumers were in mind when drafting UCC). See generally Casamiquela, *supra* note 8, at 489 (explaining that federal and state governments have created acts to protect consumers). But see David A. Kessler, Note, Investor Casualties in the War for Market Efficiency 9 Am. U. Admin. L.J. 1307, 1334 (1996) (stating that consumer advocates think UCC never protected consumers).

n181. See Murphy, *supra* note 123, at 575 (showing that limited warranties serve to protect customers against malfunctions only so long as software warranty lasts, and warranties remove incentives for commercial software publishers to ensure safely running programs that leaves consumer unprotected); see also Pratik A. Shah, Berkeley Technology Law Journal Annual Review of Law and Technology I. Intellectual Property; A. Copyright The Uniform Computer Information Transaction Act, 15 Berkeley Tech. L.J. 85, 92 (2000) (explaining that there are potential consumer protection problems). See generally Cheon-Seok Seo, Licenses and the Uniform Computer Information Transactions Act, 1 Buff. Intell. Prop. L.J. 146, 160 (2001) (describing consumer protection problems arising from UCITA dealing with warranties).

n182. See UCITA 112 (approving click through methods of assent); see also Ayyappan, *supra* note 6, at 2472 (noting that criticism focuses on idea that UCITA is "anti-consumer"); Brian D. McDonald, Contract Enforceability: The Uniform Computer Information Transactions Act, 16 Berkeley Tech. L.J. 461, 463 (2001) (explaining wide-spread criticism of the UCITA).

n183. See Murphy, *supra* note 123, at 583 (showing assent is allowed through a "click-through" method); see also Jean Braucher, Why UCITA Like Article 2B is Premature and

Unsound , available at <http://www.2bguide.com/docs/0499jb.html>. (last visited Feb. 20, 2000) ("There is reason to question whether these are adequate formalities to carry with them the idea of assent, particularly blanket assent to a long license when not in the context of a bargain, but rather in the context of supposed post-purchase validation of terms."). See generally Douma, *supra* note 141, at 276 (explaining how assent is manifested under UCITA).

n184. See Murphy, *supra* note 123, at 583 (explaining problem with agreement methods). See generally Jason Sheets, Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair and Innovative Markets, 23 *Hastings Comm. & Ent. L.J.* 1, 6 (2000) (explaining that click-through agreements are troublesome). But see Scott R. Zemnick, Note, The E-Sign Act: The Means to Effectively Facilitate the Growth and Development of E-Commerce, 76 *Chi.-Kent L. Rev.* 1965, 1990 (2001) (explaining that handwritten agreement is no more burdensome than a click-wrap agreement).

n185. See Murphy, *supra* note 123, at 583 (noting implications of overdrafting). See generally John J. A. Burke, Contract as Commodity: A Nonfiction Approach, 24 *Seton Hall Legis. J.* 285, 288-89 (2000) (explaining what is involved in standard form contract); Donald B. King, Standard Form Contracts: A Call For Reality, 44 *St. Louis U. L.J.* 909 (2000) (showing that these agreements are dictated by only one party).

n186. See Burke, *supra* note 185, at 289 (explaining that some parties cannot negotiate in standard form contracts); see also Jeff C. Dodd, Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts, 36 *Hous. L. Rev.* 195, 210 (1999) (noting that license terms cannot be negotiated). See generally Ring, *supra* note 177, at 20-21 (discussing UCITA's application to standard form contracts).

n187. Murphy, *supra* note 123, at 584 (describing ALI's objection to click through assent). See Cem Kaner, Uniform Computer Information Transactions Act: Software Engineering and UCITA, 18 *J. Marshall J. Computer & Info. L.* 435, 436-37 (1999) (stating that UCITA approach was unlike traditional contracting); see also Boss, *supra* note 177, at 177-78 (explaining that Article 2B received criticism by ALI).

n188. Murphy, *supra* note 123, at 584. See Letter from Bureaus of Consumer Protection and Competition and the Policy Planning office of the Federal Trade Commission to John

McClaugherty, NCCUSL Chair for Federal Trade Commission (last modified July 9, 1999), at <http://www.ftc.gov/be/v990010.htm>. ("UCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction...UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction."); see also Dodd, *supra* note 186, at 238 (stating Article 2B does not adequately address assent).

n189. See Keohane, *supra* note 6, at 443 (proporting that mass-market software licenses cannot be individually negotiated and need to be standardized); see also Seo, *supra* note 181, at 159 (noting that standard form contract is not invalid if mass marketing license is shown before the price is paid). See generally Goodman, *supra* note 8, at 334 (explaining that mass marketing of computer software precludes negotiations).

n190. See Leo L. Clarke, Performance Risk, Form Contracts and UCITA, 7 Mich. Telecomm. & Tech. L. Rev. 1, 4-5 (2000) (showing that unfair resolution of disputes will arise); McDonald, *supra* note 182, at 484 (opining that concerns will stop UCITA legislation). See generally Rustad, *supra* note 52, at 581 (stating that UCITA needs to further consumer protection).

n191. While scholars and legislators argue over legislative and market concerns with standard form contracts on the Internet, The Practicing Law Institute has put out several interesting articles to guide lawyers and help them counsel their software clients.

First, the PLI suggests that it must be made clear to the user that a license and not a sale is involved. This characterization should avoid any first-sale concerns by making the doctrine inapplicable. A license, conversely, is only a right or privilege to use the software or information for a sometimes specified period of time and conditioned upon specified terms.

Additionally, the PLI suggests that agreement should require that the user take an affirmative step to indicate their acceptance of the terms. If the user does not click "I accept" they should not be allowed access to the information or software. As an additional safeguard, some lawyers have also advised their software and Internet clients to program the license so that the "I accept" button is not visible or accessible until after the terms have at least been scrolled through. This in no way assures a licensor that the terms have been read or understood, but does provide additional evidence of mutual assent.

The PLI also notes the UCC's position on warranty disclaimers. Many license agreements expressly disclaim all implied warranties including the implied warranty of merchantability 2-314 and the implied warranty of fitness 2-315. Noting that the UCC requires that disclaimers

of implied warranties must be conspicuous to be effective, the PLI suggests that any online license agreements abide by that rule as well. Keohane, *supra* note 6.

None of these safeguards, however, would sufficiently validate web-wrap licenses. All of the PLI's suggestions are directed at satisfying the second prong of mutual assent: showing assent through conduct, while not one of the PLI's suggestions are directed at the first prong of mutual assent and awareness of the terms where these web-wraps inevitably fail.

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