Internet Law in Canada, Third Edition

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Online Contracting

With each passing day, e-commerce gains a greater foothold within society. It has become so much a part of mainstream commerce that businesses are now often classified alternatively as "bricks and mortar" businesses or "e-businesses." For businesses to function effectively online, contractual relationships must be established. Online contracting is clearly central to the e-commerce transaction, since without the ability to create enforceable contracts online, e-commerce would grind to a halt.

The formation of a contract in cyberspace raises the fundamental question of enforceability. The new paradigm of establishing contracts through e-mail or by clicking the "I Accept" button on a Web page must fit within the existing body of contract law. In certain respects, the introduction of new technologies has not disrupted the "ebb and flow" of contract law. It has adequately adapted to the Internet predecessors such as post mail, telex machines and fax machines. E-mail and the World Wide Web are simply the newest incarnations along this same evolutionary path.

The Internet does, however, present some novel issues. In many e-commerce situations the parties do not have an underlying relationship, and the contract is consummated "on the fly." Moreover, the favoured approach for contracting online is a controversial one — the clickwrap contract. The clickwrap contract is merely a contract by which terms are assented to through clicking an "I Agree" button. As a result of the implementation of many Web interfaces, it is frequently difficult or even impossible to ascertain the terms of clickwrap contracts. Parallels are often drawn to the software industry and its shrinkwrap contracting practices, in which the terms of the software licence are only available to the purchaser after they open the purchased product.

Can parties be bound to new terms after the exchange of consideration? Are parties bound to the terms of a contract that they have not even read? As a starting point, we first consider the famous Canadian case of *Tilden Rent-A-Car Co. v. Clendenning*, followed by a closer look at the legality of shrinkwrap contracting.

Tilden Rent-A-Car Co. v. Clendenning†

In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum.

Intellectual Property and Shrinkwrap Licenses‡

MARK LEMLEY

Shrinkwrap licenses have been a fixture in computer software transactions for some time. Shrinkwrap licenses take many forms. The prototypical example is a single piece of paper containing license terms which has been wrapped in transparent plastic along with one or more computer disks. In theory, purchasers of a computer program will read the license terms before tearing open the plastic wrap and using the computer disks. Other examples of the genre include licenses printed on the outside of boxes containing software, licenses simply included somewhere within the box, or licenses shrinkwrapped with the owner's manual accompanying the software.

Wherever they are located, shrinkwrap licenses commonly include language along the following lines:

> [Vendor] is providing the enclosed materials to you on the express condition that you assent to this software license. By using any of the enclosed diskette(s), you agree to the following provisions. If you do not agree with these license provisions, return these materials to your dealer, in original packaging within three days from receipt, for a refund.

The point of such language is simple — the software vendor is attempting to create what some have referred to as a "reverse unilateral contract." This language is the sine qua non of shrinkwrap licenses, because without such a provision there is no license at all. Vendors intend that, by opening the plastic wrap and actually using the software, customers will bind themselves to the terms of the shrinkwrap license.

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B. Judicial Treatment of Shrinkwrap Licenses

Because of the nature of the shrinkwrap license, and because of its potential to rewrite the rules of tort and intellectual property law, courts have viewed such

† [1978] 18 O.R. (2d) 601 (C.A.).

‡ (1995) 68 S. Cal. L. Rev. 1239 at 1241–42, 1248–59. Notes omitted. Reproduced [illegible]mission the author.

licenses with a skeptical eye. Courts have considered three different legal issues with respect to shrinkwrap licenses: (1) whether the shrinkwrap license is valid at all as a matter of contract law; (2) whether the particular terms discussed in the last section are enforceable, even if the license is considered valid; and (3) whether, even if state contract law would enforce terms that modify intellectual property law, federal intellectual property law preempts such modifications. I will briefly review the law on each of these issues in turn.

1. The Validity of Shrinkwrap Licenses

Shrinkwrap licenses do not follow the normal model of contracts. Black letter contract law sets out three predicates to the formation of a contract: offer, acceptance, and consideration. Behind these requirements is the overarching notion of a bargain between the parties. In the prototypical contract, where the parties meet face to face and discuss the terms before coming to an agreement, the bargain is obvious. But where is the bargain in a standard form shrinkwrap license that is not even signed by the party against whom it will be enforced?

The few courts that have considered this issue have relied on U.C.C. sections 2-207 and 2-209 in concluding that shrinkwrap license terms are not generally enforceable. The most detailed discussion of this issue to date is the Third Circuit's decision in *Step-Saver Data Systems, Inc.* v. *Wyse Technology*. The case involved a breach of warranty claim brought by Step-Saver Data Systems, Inc., the purchaser of a shrinkwrapped computer program, against the vendor, The Software Link, Inc. ("TSL"). The shrinkwrap license disclaimed all express and implied warranties on the software, including certain prior warranties allegedly given by TSL to Step-Saver. The district court directed a verdict for TSL on the warranty claims, holding that the shrinkwrap license terms constituted the complete and exclusive agreement between the parties.

The Third Circuit reversed. The court applied the provisions of U.C.C. sections 2-207 to the contract at issue. It reasoned that a contract was formed when Step-Saver, responding to magazine advertisements by TSL, placed telephone orders for copies of TSL's software, and TSL shipped the software. At this point, the contract was formed by agreement and performance because both parties had acted as if a contract existed. The court concluded that the issue therefore concerned the nature of the terms of the contract.

Because the contract was formed before Step-Saver ever received the shrinkwrap license, the court treated the license provisions as a written confirmation and as an attempt to modify the terms of the contract (under U.C.C. sections 2-202 and 2-209, respectively). Because those provisions require that both parties intend to adopt the additional terms, the court held that the shrinkwrap license did not bind Step-Saver. This conclusion was confirmed by the court's application of U.C.C. section 2-207:

> UCC s2-207 establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties's [sic] contract is not sufficient to establish the party's consent to the terms of the writing.... In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the UCC. In other words, because the parties agreed to a contract at the point of telephone order and product shipment, only those terms on which the parties agreed at that point became part of the contract. Other terms could
> license was ineffective to modify the contract terms unless Step-Saver expressly agreed to such a modification.

The Step-Saver decision has potentially broad applicability to shrinkwrap license cases. While the decision is premised on the formation of a contract through telephone orders before the shrinkwrap license is ever delivered, many commercial sales of software occur in analogous contexts. Often the software is ordered by letter or by telephone. Even if it is purchased over the counter, the purchase transaction is completed — and an agreement between retailer and customer is reached — at the point of sale. A shrinkwrap license contained inside a box cannot be discovered and read until after the customer has returned home, opened the box, and begun the process of installing the software.

The few other cases considering the issue directly have generally lined up with Step-Saver in refusing to enforce shrinkwrap licenses. Two courts reached this result on the grounds that the licenses are "unenforceable contracts of adhesion." This rationale is broader than Step-Saver, because a court would then not enforce any shrinkwrap license terms, whether or not the customer was aware of the license at the time the agreement was made. Rather, the "contract of adhesion" rationale focuses on the weaker bargaining position of the consumer, and the consumer's lack of meaningful choice as to the terms offered.

Only one court has enforced the terms of a shrinkwrap license, and then only in a very limited way. In *Arizona Retail Systems, Inc.* v. *Software Link, Inc.*, the district court enforced the shrinkwrap terms sent along with an "evaluative" copy of the software. The court's decision was based on Arizona Retail Systems, Inc.'s ("ARS") admission that it did not decide to keep the copy until having opened and read the shrinkwrap license and used the software for several hours. Thus, unlike Step-Saver, ARS was aware of the terms of the shrinkwrap license at the time the agreement was formed. However, the court refused to enforce the same license when it accompanied software subsequently purchased by phone and shipped to ARS. The court's reasoning for refusing to enforce the license against telephone orders follows Step-Saver. In addition, the court relied on a number of policy arguments against enforcing shrinkwrap licenses. Because of its schizophrenic result, Arizona Retail is at best limited authority for enforcing shrinkwrap licenses.

The general refusal of the United States courts to enforce shrinkwrap licenses is echoed outside the United States. A number of countries either refuse to enforce shrinkwrap licenses at all, or place restrictive conditions on the form and contents of such licenses. Comparatively fewer countries freely enforce shrinkwrap licenses.

2. The Validity of Particular Terms

Even if courts were to conclude that shrinkwrap licenses are themselves enforceable, there remains the possibility that particular terms contained in those licenses will not be enforceable. Contract law offers three circumstances in which license provisions in an otherwise valid contract will not be enforced.

First, the contract term may be "unconscionable." Unconscionability is governed by U.C.C. section 2-302. Under this provision, unconscionability has two components: the absence of meaningful choice or bargaining power on the part of one party (procedural unconscionability) and contract terms which are unreasonably favorable to the other party (substantive unconscionability). The procedural element is satisfied if the contract was not negotiated, and the party claiming unconscionability lacked meaningful choice in entering into the contract. The substantive element is satisfied the party lacking bargaining power. While unconscionability generally arises in form contracts that unfairly bind individual consumers, it has sometimes been applied to protect small businesses as well.

Particular shrinkwrap license terms may be vulnerable to unconscionability claims if they place unfair burdens on licensees. The nature of the shrinkwrap license seems to satisfy the requirement of procedural unconscionability. As a result, substantively unreasonable terms may not be enforced even if the shrinkwrap license is otherwise valid. Terms which purport to alter existing law in significant ways are particularly likely to be invalidated under this rule.

A second legal principle that threatens the enforceability of specific provisions of some shrinkwrap licenses is based on section 211(3) of the Restatement (Second) of Contracts. That section limits the enforceability of standardized contract terms that are not negotiated, even if the contract itself is signed by both parties and some of the terms are bargained over. Such standardized contract terms will not be considered part of the agreement if there is "reason to believe that the party manifesting ... assent [to the form contract] would not do so if he knew that the writing contained a particular term...." Courts have applied Restatement section 211(3) to invalidate standardized contract terms modifying existing law in software transactions. However, application of this rule to shrinkwrap licenses is limited in practice by its requirement that the contract term be unknown and beyond the range of reasonable expectation. An unreasonable rule that was well-known and universally used in shrinkwrap licenses would apparently pass muster under the Restatement test.

Finally, a few courts have been willing to rely on public policy to invalidate license terms. In *Angus Medical Co.* v. *Digital Equipment Corp.*, the court cited public policy in favor of access to the courts as one reason for finding unenforceable a contract term which shortened the applicable statute of limitations. It concluded that a term which violates public policy may be "beyond reasonable expectation" even if it is not "unusual or unexpected."

3. *Copyright Preemption and Shrinkwrap Licenses*

Shrinkwrap license terms that purport to alter the rights granted to purchasers and licensees under patent or copyright law may also be vulnerable to the charge that they are preempted by federal intellectual property law. Several courts have held or strongly suggested that federal statutes preempt state contract law rules to the extent that those rules permit the parties to "opt out" of some parts of the federal statutory scheme. Other courts have found a continuing role for contract law, even where it conflicts with federal law.

The most celebrated decision on intellectual property preemption is *Vault Corp.* v. *Quaid Software Ltd.* That case involved Vault's copy protection program called Prolok, which was designed to prevent unlawful duplication of other software by "locking" it. Vault sold Prolok with a shrinkwrap license, which provided in relevant part that the purchaser could not copy or reverse engineer any part of the software. Quaid purchased a copy of Prolok and reverse engineered it in order to find a way to defeat the copy protection program. Quaid incorporated its knowledge in an "unlocking" product it sold, called Ramkey. The final version of Ramkey did not contain any material copied from Prolok.

Vault sued Quaid, alleging copyright infringement and violation of the shrinkwrap license provision. The Fifth Circuit found that Quaid had not infringed Vault's copyright by reverse engineering Prolok or producing Ramkey. It then turned to

shrinkwrap license was unenforceable as a contract of adhesion unless it was saved by the Louisiana Software License Enforcement Act. The Louisiana statute, enacted at Vault's urging, specifically authorized contractual terms prohibiting reverse engineering.

The Fifth Circuit found that the Louisiana statute directly conflicted with the rights of purchasers of copyrighted works set out in section 117 of the Copyright Act, and was therefore preempted by copyright law. The court relied on a venerable line of Supreme Court cases for the proposition that "[w]hen state law touches upon the area of [patent or copyright statutes], it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law."

Vault's conclusion that state law could not expand the rights granted to authors under the copyright law has been endorsed by other courts. Further, several courts have applied Vault's preemption analysis to the interpretation of bargained software license agreements. For example, the court in *SQL Solutions, Inc.* v. *Oracle Corp.* limited the effect of a choice of law provision, holding that "federalism principles dictate that state rules of contractual construction cannot interfere with federal law or policy. In particular, state law must be applied in a manner that does not conflict with federal copyright law and policy."

It does not follow from this, however, that all contract law provisions relating to the subject matter of copyright are preempted. In *National Car Rental Sys.* v. *Computer Assocs.*, the court considered whether copyright law preempted a bargained software license that limited the licensee to using the software for internal purposes. The court held that contract law was not preempted because it did not grant rights "equivalent to" those offered by copyright. Contract law was saved from general preemption by the presence of an "extra element" not required by copyright—an agreement between the parties. The court held that the license agreement governed the question of which of the exclusive rights listed in section 106 Computer Associates had granted to National Car Rental Systems. It did not, however, decide whether the license agreement would be preempted if the agreement directly contradicted rights granted to the user under copyright law.

On this point, the Supreme Court's decision in *Goldstein* v. *California* is particularly relevant. In that case, the Court upheld a California criminal statute penalizing the unauthorized commercial duplication of sound recordings, which at that time were not protected by federal copyright law. The Court identified three classes of cases: those instances in which the federal government intended to provide protection; those instances in which the federal government intended to permit copying; and those instances in which it intended neither. Only in the third instance, the Court held, was state copyright protection permissible:

> [A] conflict would develop if a State attempted to protect that which Congress intended to be free from restraint or to free that which Congress had protected. However, where Congress determines that neither federal protection nor freedom from restraint is required by the national interest, it is at liberty to stay its hand entirely. Since state protection would not then conflict with federal action, total relinquishment of the State's power to grant copyright protection cannot be inferred. Where Congress expressed no intention, the Court held that states are free to legislate. However, Goldstein suggests that this freedom does not permit states to give intellectual property owners rights that the federal government intended to withhold.

A similar set of cases (outside the computer software context) exists in patent ally preempt contract law. As a result, it has permitted inventors to charge a royalty for unpatented inventions. On the other hand, it has steadfastly refused to let licensees bargain away the right to challenge the validity of patents, or to extend the patent term by contract.

In short, courts have been skeptical of shrinkwrap licenses for a variety of reasons. Some courts hold that shrinkwrap licenses are entirely unenforceable under contract law. Particular terms of shrinkwrap licenses may also be vulnerable to judicial attack, especially if they are unexpected, unconscionable, or violative of public policy. Finally, some courts have concluded that shrinkwrap licenses are preempted by intellectual property law to the extent that they attempt to change the balance of rights struck by federal policy. But virtually no reported decisions have actually enforced shrinkwrap license provisions as written, especially where those provisions modify federal law.

Professor Lemley's article illustrates the prevailing thought on shrinkwrap contracting for much of the 1980s and 1990s. The tide shifted in 1996, however, with the release of *ProCD* v. *Zeidenberg*.

ProCD v. Zeidenberg†

Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter — and we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc.* v. *Rural Telephone Service Co.* ProCD sells a version of the database, called SelectPhone, on CD-ROM discs. The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer "end user license," but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone cost more than $10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and sic codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately $150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access to the SelectPhone database is available via the America Online service for the price America Online charges to its clients (approximately $3 per hour), but this service has been tailored to be useful only to the general public.

If ProCD had to recover all of its costs and make a profit by charging a single price — that is, if it could not charge more to commercial users than to the general public — it would have to raise the price substantially over $150. The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get consumer surplus of $50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out — and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves — for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price — ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed database. The corporation makes the database available on the Internet to anyone willing to pay its price — which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they might have been different, and a purchaser does not agree to — and cannot be bound by — terms that were secret at the time of purchase.

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good — but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract — except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to

...ating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information — but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations, and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms — so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

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What then does the current version of the UCC have to say? We think that the place to start is §2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the ent way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

Section 2-606, which defines "acceptance of goods", reinforces this understanding. A buyer accepts goods under §2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under §2-602(1). ProCD extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to §2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery; but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be "conspicuous." UCC §2-316(2), incorporating UCC §1-201(10). Promises to make firm offers, or to negate oral modifications, must be "separately signed." UCC §§2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in Carnival Lines. Zeidenberg has not located any Wisconsin case — for that matter, any case in any state — holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for $100 rather than $150 — although any of these changes would be welcomed by the customer, if all other things were held constant — so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.

III

The district court held that, even if Wisconsin treats shrinkwrap licenses as contracts, §301(a) of the Copyright Act, 17 U.S.C. §301(a), prevents their enforcement. The relevant part of §301(a) preempts any "legal or equitable rights [under state law] that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103". ProCD's software and data are "fixed in a tangible medium of expression", and the district judge held that they are "within the subject

...tion program, and the judge thought that the data likewise are "within the subject matter of copyright" even if, after Feist, they are not sufficiently original to be copyrighted. *Baltimore Orioles, Inc.* v. *Major League Baseball Players Ass'n* supports that conclusion, with which commentators agree. One function of §301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if "subject matter of copyright" includes all works of a type covered by sections 102 and 103, even if federal law does not afford protection to them.

But are rights created by contract "equivalent to any of the exclusive rights within the general scope of copyright"? Three courts of appeals have answered "no." The district court disagreed with these decisions but we think them sound. Rights "equivalent to any of the exclusive rights within the general scope of copyright" are rights established by law — rights that restrict the options of persons who are strangers to the author. Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission; silence means a ban on copying. A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights." Someone who found a copy of SelectPhone (trademark) on the street would not be affected by the shrinkwrap license — though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program.

Think for a moment about trade secrets. One common trade secret is a customer list. After Feist, a simple alphabetical list of a firm's customers, with address and telephone numbers, could not be protected by copyright. Yet *Kewanee Oil Co.* v. *Bicron Corp.* holds that contracts about trade secrets may be enforced — precisely because they do not affect strangers' ability to discover and use the information independently. If the amendment of §301(a) in 1976 overruled Kewanee and abolished consensual protection of those trade secrets that cannot be copyrighted, no one has noticed — though abolition is a logical consequence of the district court's approach. Think, too, about everyday transactions in intellectual property. A customer visits a video store and rents a copy of Night of the Lepus. The customer's contract with the store limits use of the tape to home viewing and requires its return in two days. May the customer keep the tape, on the ground that §301(a) makes the promise unenforceable?

A law student uses the LEXIS database, containing public-domain documents, under a contract limiting the results to educational endeavors; may the student resell his access to this database to a law firm from which LEXIS seeks to collect a much higher hourly rate? Suppose ProCD hires a firm to scour the nation for telephone directories, promising to pay $100 for each that ProCD does not already have. The firm locates 100 new directories, which it sends to ProCD with an invoice for $10,000. ProCD incorporates the directories into its database; does it have to pay the bill? Surely yes; *Aronson* v. *Quick Point Pencil Co.* holds that promises to pay for intellectual property may be enforced even though federal law (in Aronson, the patent law) offers no protection against third-party uses of that property. But these illustrations are what our case is about. ProCD offers software and data for two prices: one for personal use, a higher price for commercial use. Zeidenberg wants to use the data without paying the seller's price; if the law student and Quick Point Pencil Co. could not do that, neither can Zeidenberg.

Although Congress possesses power to preempt even the enforcement of con-

Ry. v. Train Dispatchers — courts usually read preemption clauses to leave private contracts unaffected. *American Airlines, Inc.* v. *Wolens* provides a nice illustration. A federal statute preempts any state "law, rule, regulation, standard, or other provision ... relating to rates, routes, or services of any air carrier." Does such a law preempt the law of contracts — so that, for example, an air carrier need not honor a quoted price (or a contract to reduce the price by the value of frequent flyer miles)? The Court allowed that it is possible to read the statute that broadly but thought such an interpretation would make little sense. Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets. Although some principles that carry the name of contract law are designed to defeat rather than implement consensual transactions, the rules that respect private choice are not preempted by a clause such as §1305(a)(1). Section 301(a) plays a role similar to §1301(a)(1): it prevents states from substituting their own regulatory systems for those of the national government. Just as §301(a) does not itself interfere with private transactions in intellectual property, so it does not prevent states from respecting those transactions. Like the Supreme Court in Wolens, we think it prudent to refrain from adopting a rule that anything with the label "contract" is necessarily outside the preemption clause: the variations and possibilities are too numerous to foresee. National Car Rental likewise recognizes the possibility that some applications of the law of contract could interfere with the attainment of national objectives and therefore come within the domain of §301(a). But general enforcement of shrinkwrap licenses of the kind before us does not create such interference.

Aronson emphasized that enforcement of the contract between Aronson and Quick Point Pencil Company would not withdraw any information from the public domain. That is equally true of the contract between ProCD and Zeidenberg. Everyone remains free to copy and disseminate all 3,000 telephone books that have been incorporated into ProCD's database. Anyone can add sic codes and zip codes. ProCD's rivals have done so. Enforcement of the shrinkwrap license may even make information more readily available, by reducing the price ProCD charges to consumer buyers. To the extent licenses facilitate distribution of object code while concealing the source code (the point of a clause forbidding disassembly), they serve the same procompetitive functions as does the law of trade secrets. Licenses may have other benefits for consumers: many licenses permit users to make extra copies, to use the software on multiple computers, even to incorporate the software into the user's products. But whether a particular license is generous or restrictive, a simple two-party contract is not "equivalent to any of the exclusive rights within the general scope of copyright" and therefore may be enforced.

Discussion Questions

Do you agree with the Court's analysis? Does the market-based approach sufficiently protect the rights of all parties? Do software vendors have other means of bringing licence terms to the attention of purchasers? Given the rising popularity of freeware and open source software, are the assumptions made by the Court still valid?

The Alberta Court of the Queen's Bench addressed a similar issue in *North American Systemshops Ltd.* v. *King*. In that case, the issue was whether all copyright restrictions apply at the time of sale or only to those restrictions brought to the attention of the purchaser. Both the indication of copyright and the licensing agreement were not visible on the software packaging or on the disk. Instead, it was hidden inside the software manual.

North American Systemshops Ltd. v. King[†]

[The court stated:]

On the evidence, I conclude that: the program was sold to the defendants shrink-wrapped; that no copyright symbol was visible to the purchaser, (since the copyright symbol on the booklet is on the inside front cover of the booklet and not on the outside cover and the copyright symbol on the floppy disk is in the same general location on the disk as the registration number and the evidence of the witness Wallace is that the registration number was not visible through the shrink-wrap); and that no licence statement was visible (the licence statement being on the inside back cover of the booklet and not being on the floppy disk). In addition, the evidence establishes that the copyright symbol comes up on the first screen when the program is used, but no licence statement comes up on the screen. Finally, I am satisfied that the user of the program would not have to refer to the booklet for general use of the program as the program was designed to be, and was in fact, "user-useful" [...]

. . . . .

It is true that in every contract, including a contract for the sale of goods, the Court may imply terms. However, it will not imply reasonable terms; it will only imply necessary terms. The law does imply that the purchaser has intended to divest itself of all rights in the article sold, unless restrictions are brought home to the purchaser:

> If a Patentee sells the patented article to a purchaser and the purchaser uses it, he, of course, does not infringe. But why? By reason of the fact that the law presumes from the sale an implied licence given by the Patentee to the purchaser that he shall use that which he has bought, and in the absence of condition, this implied licence is a licence to use or sell or deal with the goods as the purchaser pleases.

The jurisprudence does conclude that patented articles, and I am prepared to find that copyrighted articles belong to a similar category, are different from normal goods in that restrictions not only may be imposed on the sale, but the restrictions will run with the goods:

> [It is] open to the patentee by virtue of his statutory monopoly to make a sale sub modo or accompanied by restrictive conditions, which would not apply in the case of ordinary chattels; secondly, that the imposition, of these conditions in a sale is not presumed, but, on the contrary, a sale having

> occurred the presumption is that the full right of ownership was meant to be vested in the purchaser; while, thirdly, the owner's rights in a patented chattel will be limited, if there is brought home to him the knowledge of conditions imposed ... upon him at the time of sale.

It appears to me that this general thrust of English jurisprudence is all the more applicable to the over-the-counter sale of computer software because of the way in which a computer program must be used, i.e. in order to be used, it must be copied at least once into the computer's memory. In that way, the sale of computer software programs differs markedly from the sale of other types of copyrightable materials such as books.

The Internet equivalent to the shrinkwrap contract is known as a clickwrap contract. Unlike software, which requires removal of the shrinkwrap to manifest acceptance of the terms, the Internet enables parties to be far more explicit in their consent. The most common approach is the "I Accept" button that is frequently found at the bottom of the online contract. The Ontario courts became among the first in North America to address the enforceability of clickwrap contracts in this 1999 decision.

Rudder v. Microsoft Corp.†

This is a motion by the defendant Microsoft for a permanent stay of this intended class proceeding. The motion is based on two alternative grounds, first that the parties have agreed to the exclusive jurisdiction, and venue, of the courts, in King County in the State of Washington in respect of any litigation between them, and secondly, that in any event, Ontario is not the appropriate forum for the conduct of this proceeding and that the service ex juris of the Statement of Claim ought to be set aside.

The Microsoft Network ("MSN"), is an online service, providing, inter alia, information and services including Internet access to its members. The service is provided to members, around the world, from a "gateway" located in the State of Washington through computer connections most often made over standard telephone lines.

The proposed representative plaintiffs in this action were subscriber members of MSN. Both are law school graduates, one of whom is admitted to the Bar in Ontario while the other worked as a legal researcher. They were associated with the law firm which originally represented the intended class. The plaintiffs claim under the Class Proceedings Act, 1992, S.O., C.6 on behalf of a Canada-wide class defined as:

> All persons resident in Canada who subscribed for the provision of Internet access or information or services from or through MSN, The Microsoft Network, since September 1, 1995.

This class is estimated to contain some 89,000 MSN members across Canada.

The plaintiffs claim damages for breach of contract, breach of fiduciary duty, misappropriation and punitive damages in the total amount of $75,000,000.00 together with an accounting and injunctive relief. The plaintiffs allege that Microsoft has charged members of MSN and taken payment from their credit cards in breach of contract and that Microsoft has failed to provide reasonable or accurate information concerning accounts. The Statement of Claim was served on Microsoft at its offices in Redmond, Washington on January 5, 1998.

The contract which the plaintiffs allege to have been breached is identified by MSN as a "Member Agreement". Potential members of MSN are required to electronically execute this agreement prior to receiving the services provided by the company. Each Member Agreement contains the following provision:

> 15.1 This Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership.

The defendant relies on this clause in support of its assertion that the intended class proceeding should be permanently stayed.

Although the plaintiffs rely on the contract as the basis for their causes of action, they submit that the court ought not to give credence to the "forum selection clause" contained within. It is stated in support of this contention that the representative plaintiffs read only portions of the Member Agreement and thus had no notice of the forum selection clause. Alternatively, the plaintiffs contend, in any event, that the Washington courts are not appropriate for the conduct of this lawsuit.

I cannot accede to these submissions. In my view, the forum selection clause is dispositive and there is nothing in the factual record which persuades me that I should exercise my discretion so as to permit the plaintiffs to avoid the effect of the contractual provision. Accordingly, an order will go granting the relief sought by the defendant. My reasons follow.

Analysis and Disposition

Forum selection clauses are generally treated with a measure of deference by Canadian courts. Madam Justice Huddart, writing for the court in *Sarabia v. "Oceanic Mindoro"* adopts the view that forum selection clauses should be treated the same as arbitration agreements. She states:

> Since forum selection clauses are fundamentally similar to arbitration agreements, ... there is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity.

Huddart J.A. further states that "a court is not bound to give effect to an exclusive jurisdiction clause" but that the choice of the parties should be respected unless "there is strong cause to override the agreement." The burden for a showing of a "strong cause" rests with the plaintiff and the threshold to be surpassed is beyond the mere "balance of convenience". The approach taken by Huddart J.A. is consistent with that adopted by courts in Ontario.

The plaintiffs contend, first, that regardless of the deference to be shown to forum selection clauses, no effect should be given to the particular clause at issue in plaintiff's submission that the form in which the Member Agreement is provided to potential members of MSN is such that it obscures the forum selection clause. Therefore, the plaintiffs argue, the clause should be treated as if it were the fine print in a contract which must be brought specifically to the attention of the party accepting the terms. Since there was no specific notice given, in the plaintiffs' view, the forum selection clause should be severed from the Agreement which they otherwise seek to enforce.

The argument advanced by the plaintiffs relies heavily on the alleged deficiencies in the technological aspects of electronic formats for presenting the terms of agreements. In other words, the plaintiffs contend that because only a portion of the Agreement was presented on the screen at one time, the terms of the Agreement which were not on the screen are essentially "fine print".

I disagree. The Member Agreement is provided to potential members of MSN in a computer readable form through either individual computer disks or via the Internet at the MSN website. In this case, the plaintiff Rudder, whose affidavit was filed on the motion, received a computer disk as part of a promotion by MSN. The disk contained the operating software for MSN and included a multi-media sign up procedure for persons who wished to obtain the MSN service. As part of the sign-up routine, potential members of MSN were required to acknowledge their acceptance of the terms of the Member Agreement by clicking on an "I Agree" button presented on the computer screen at the same time as the terms of the Member Agreement were displayed.

Rudder admitted in cross-examination on his affidavit that the entire agreement was readily viewable by using the scrolling function on the portion of the computer screen where the Membership Agreement was presented. Moreover, Rudder acknowledged that he "scanned" through part of the Agreement looking for "costs" that would be charged by MSN. He further admitted that once he had found the provisions relating to costs, he did not read the rest of the Agreement. [...]

. . . . .

It is plain and obvious that there is no factual foundation for the plaintiffs' assertion that any term of the Membership Agreement was analogous to "fine print" in a written contract. What is equally clear is that the plaintiffs seek to avoid the consequences of specific terms of their agreement while at the same time seeking to have others enforced. Neither the form of this contract nor its manner of presentation to potential members are so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument would, rather than advancing the goal of "commercial certainty", to adopt the words of Huddart J.A. in Sarabia, move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium.

On the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing. The position of selectivity advanced by the plaintiffs runs contrary to this stated approach, both in principle and on the evidence, and must be rejected. Moreover, given that both of the representative plaintiffs are graduates of law schools and have a professed familiarity with Internet

Notes

1. The *Rudder* decision garnered widespread praise from the e-commerce bar in Canada as most applauded the greater certainty for e-commerce contracting created by the decision. Consider, however, what the court was actually doing. The *Rudder* case featured Canadian litigants, a dispute originating in Canada, a Canadian Web site and Canadian currency, yet a Canadian court found that the Canadians could not sue in their local court nor apply their local law. Is this good policy? Will this approach increase or decrease consumer confidence in e-commerce?

2. The State of New Jersey similarly upheld the forum selection at issue in *Caspi* v. *The Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. App. 1999). After resolving that the forum selection clause was valid and did not violate consumer fraud concepts, the court considered whether there was adequate notice of the clause.

> The scenario presented here is different because of the medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction. The plaintiffs in Carnival could have perused all the fine-print provisions of their travel contract if they wished before accepting the terms by purchasing their cruise ticket. The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement.
>
> Also, it seems clear that there was nothing extraordinary about the size or placement of the forum selection clause text. By every indication we have, the clause was presented in exactly the same format as most other provisions of the contract. It was the first item in the last paragraph of the electronic document. We note that a few paragraphs in the contract were presented in upper case typeface, presumably for emphasis, but most provisions, including the forum selection clause, were presented in lower case typeface. We discern nothing about the style or mode of presentation, or the placement of the provision, that can be taken as a basis for concluding that the forum selection clause was proffered unfairly, or with a design to conceal or de-emphasize its provisions. To conclude that plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented. Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole.).
>
> The issue of reasonable notice regarding a forum selection clause is a question of law for the court to determine. We agree with the trial court that, in the absence of a better showing than has been made, plaintiffs must be seen to have had adequate notice of the forum selection clause. The resolution of this notice issue, at this stage of the litigation between plaintiffs and defendants must, of course, be seen to be without prejudice to any showing either party may have the opportunity to make in another jurisdiction in a plenary proceeding on the contract regarding issues apart from the validity and enforceability of the forum selection clause.

Discussion Questions

1. What is reasonable notice? Is it easier to give reasonable notice for clickwrap

2. When is an online contract concluded? When the software is purchased? On delivery of software? Once the software is downloaded? Once it is installed?

Building on the *Rudder* case, the Ontario court affirmed the validity of clickwrap contracting in a second case in 2002. *Kanitz* v. *Rogers Cable*, an attempted class action suit launched by disgruntled subscribers to the Rogers high-speed Internet access service, has potentially far-reaching implications given the court's approval not only for clickwrap contracting, but also for Web-based contractual notifications.

Kanitz v. Rogers Cable Inc.†

The defendant provides, among other things, cable television service and high-speed Internet access to subscribers in certain parts of Canada. As of July 18, 2001, the date that this action was commenced, the defendant provided its Internet access services under the brand "Rogers@Home" to approximately 370,000 Rogers@Home customers. At the time of the institution of this action, these services were only provided in Ontario.

. . . .

The defendant has an established protocol for installing Rogers@Home in a customer's home. When prospective subscribers first order the service, they are told that a technician must attend at their home to install the service, at which time they will be required to sign the user agreement. When the technician arrives at the customer's home, he or she is required to explain the installation process, remove the user agreement from the "Welcome Kit" provided to the subscriber, and have the subscriber execute the user agreement. The technicians are instructed not to commence the installation process until the subscriber has executed the user agreement. Subscribers are given a copy of the executed user agreement to retain for their records.

. . . .

The user agreement describes the Rogers@Home service and the terms on which that service is provided to subscribers. The user agreement includes on page one the following provision regarding amendments to the user agreement:

> Amendment. We may change, modify, add or remove portions of this Agreement at any time. We will notify you of any changes to this Agreement by posting notice of such changes on the Rogers@Home web site, or sending notice via email or postal mail. Your continued use of the Service following notice of such change means that you agree to and accept the Agreement as amended. If you do not agree to any modification of this Agreement, you must immediately stop using Rogers@Home and notify us that you are terminating this Agreement.

† [2002] O.J. No. 665 (S.C.J.)

The Shaw@Home user agreement contained a similar amending provision. In November 2000, the defendant amended the user agreement to add, among other things, the arbitration clause. The user agreement, as amended in November 2000, is the current user agreement which governs subscribers. The arbitration clause reads as follows:

> Arbitration. Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to: (a) this Agreement; (b) Rogers@Home; (c) oral or written statements, advertisements or promotions relating to this Agreement or to Rogers@Home or (d) the relationships which result from this Agreement (including relationships with third parties who are not signatories to this Agreement) (collectively the "Claim"), will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us.
>
> If you have a Claim you should give written notice to arbitrate to us at the address specified in Section 6. If we have a claim we will give you notice to arbitrate at your address. Arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement will be conducted by one arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to arbitrate.

The defendant posted the current version of the user agreement containing the arbitration clause on the Rogers@Home customer support web site on January 12, 2001. In addition, from mid-January to mid-February 2001, the fact that the user agreement had been amended was noted on the main page of the Customer Support Site in the "News and Highlights" section. The Customer Support Site offers links to the user agreement through both the "Policies/Agreements" and "Rogers Docs" pages. Selecting either option presents a page that (i) offers a link to the user agreement; (ii) explains that the user agreement is the governing contract between the subscriber and the defendant; (iii) reminds the subscriber that the user agreement is periodically updated, and that the customer should check the site regularly to obtain the latest version of the user agreement; and (iv) lists the date on which the user agreement was last updated.

Further, following the swap, the defendant informed former Ontario Shaw customers that their Internet service was now provided by the defendant and that they should consult the Customer Support Site for important information regarding the service. On February 21, 2001, the defendant emailed the Rogers@Home Interaction Bulletin (Volume 2, Issue 1) to all Rogers@Home customers, including former Ontario Shaw@Home customers. Among other things, this Bulletin welcomed the former Shaw customers to Rogers@Home, and included a section titled "Important Information for Former Shaw@Home Customers". This section specifically asked former Shaw customers to visit the Customer Support Site, which contains the user agreement.

. . . .

Is there an arbitration agreement?

I begin by observing that, if it is found that there is an arbitration agreement, it tiffs allege, in paragraph 7 of the statement of claim, that the defendant breached the agreements which it had with the putative members of the class when the defendant's service was not continually available or was intermittently available or was unduly slow throughout the period to which the claim applies but the defendant continued to collect payment of the fees for the service in full without deduction. It is plain that this is exactly the type of claim to which the arbitration provision in the user agreement was intended to apply.

Section 1 of the Arbitration Act, 1991 defines an arbitration agreement as:

> an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them

The plaintiffs say that they did not agree to submit their disputes to arbitration. They assert that the defendant has unilaterally imposed arbitration upon them by purporting to amend the user agreement to include such an arbitration clause without reasonable notice to them of such amendment. The plaintiffs therefore say that the defendant cannot rely on the arbitration clause.

As I have already mentioned, the original user agreements, whether from the defendant or from Shaw, contained a provision which permitted the defendant to amend the agreement from time to time. The clauses were broadly worded in that they provided that Shaw or the defendant could "change, modify, add or remove portions" of the agreements. Those user agreements also provided that continued use of the service by a customer would constitute acceptance of any such amendments. The corollary is, of course, that if the customer did not agree with any amendment, the customer was to cease using the service.

The Shaw agreement provided that reasonable notice would be given of any such amendments but did not specify how such reasonable notice could be given. The Rogers agreement, on the other hand, stated that notice could be given in one of three ways: (i) posting notice on the Rogers@Home web site; (ii) sending notice via email or (iii) sending notice by postal mail.

The plaintiffs contend that notice was not given by the defendant of the amendment to include the arbitration provision in any of these ways. It is not disputed that there was no notice sent by postal mail. While there were email bulletins sent out by the defendant, the plaintiffs say that none of these email bulletins constitute notice because the fact that the user agreement had been amended is not expressly mentioned in any of these emails. Finally, while the amended user agreement was posted on the web site, the plaintiffs say that no notice of the amendments was posted. In other words, while the defendant posted the amended user agreement itself, it did not post a notice to advise customers that the agreement had been amended such that customers would be alerted to go and look for and review the amended agreement. The plaintiffs assert that the defendant has therefore failed to provide the required notice.

In response, the defendant points out that the amendments to the user agreement to include the arbitration clause were made in November 2000 and the amended user agreement was posted on its web site on January 12, 2001. It further points out that after the amended user agreement was posted, the fact that the user agreement had been amended was noted on the main page of the Customer Support Site in the "News and Highlights" section. Finally, the defendant observes that when a customer accesses the user agreement on the web site, there is a note on the

> End-User Agreement
>
> The End User Agreement (EUA) is your contract with us. In most cases, the EUA was signed during the installation of the Rogers@Home service. It outlines the rights and responsibilities of both Rogers@Home and users of the service. Among other things, it tells the customers what services Rogers@Home provides as well as how these services can and cannot be used. To provide you with the best Internet services possible, we update the EUA on a periodic basis. Please keep checking back to obtain the latest End User Agreement. (The EUA Was Last Updated On: January 12th 2001)

I should note that the line regarding the time of the last update appears in bold print.

The plaintiffs contend that none of these steps constitutes the requisite giving of notice under the user agreement. While I accept that one can fairly assert that the defendant could have done more to highlight the fact that the agreement had been amended, that is not the issue. The issue is whether there was notice given of the amendments as contemplated by the terms of the user agreement. I believe that there was.

The user agreement expressly allows the defendant to amend the user agreement and to give notice of that fact through its web site. Each of the representative plaintiffs who was originally a customer of the defendant actually signed the user agreement which contained this amending provision. Each of the representative plaintiffs who was originally a Shaw customer also signed a user agreement which contained an amending provision. The Shaw customers were given reasonable notice, when they became customers of the defendant pursuant to the swap, of the terms of service and other matters relating to the provision of the service by the defendant. It would not be unreasonable to expect that those customers would take the time to visit the appropriate sections of the defendant's web site to familiarize themselves with the defendant's terms of service if they were interested in knowing what those terms of service were and whether they differed in any material respect from those of Shaw. In my view, therefore, the former Shaw customers became bound by the defendant's amending provision once they became customers of the defendant pursuant to the swap and continued to use the defendant's service.

The effect of the terms of the amending provision in the user agreement, in my view, is to place an obligation on the customer, who is interested in any amendments that the defendant may choose to make to the user agreement, to check the web site from time to time to determine if such amendments have been made. Further, in order to check for such changes, I do not accept that the customer can reasonably assert that all he or she should have to do is simply go to the main screen of the defendant's web site and expect to find a notice regarding any such amendments. The defendant is a large company with many different interests, all of which are represented on its web site. Cable Internet access customers, who are the only customers who we are concerned with here, can reasonably be required to visit that portion of the web site dealing with the Internet access aspect of the defendant's business to find such a notice. Such a customer can also be reasonably required, once at the Internet access portion of the web site, to have to go to that portion of that site where the defendant's policies and agreements are maintained to find any such notice. One would not expect to look for such a notice in those portions of the web site dealing with other matters, such as "View and Pay Bills" or "Price Comparison"

The evidence establishes that had any of the plaintiffs taken the time to go to the Customer Support section of the Internet access portion of the defendant's web site, they would have seen a notice that the user agreement had been amended. Further, if they had ever reviewed the user agreement on the web site, they would have also known of the fact that the defendant posts the last change date for the user agreement and they could have easily determined therefrom whether any further changes had been made to the user agreement since the date they last checked for any amendments. In either way, they would receive notice of any changes made. While the plaintiffs make much of the fact that the defendant could have, but did not, send email notifications to customers of the amendments to the user agreement, the fact is that email notification is a separate mode of communication authorized by the amending provision. As long as the defendant uses one authorized method, it cannot be faulted for not having used another. I conclude, therefore, that the defendant did give notice of the amendments as required by the user agreement.

The evidence also establishes that each of the plaintiffs continued to use the defendant's service subsequent to the posting of the notice and the amended user agreement. Under the terms of the user agreement, therefore, they were each deemed to have accepted the amendments.

The plaintiffs also submit that they were given inadequate notice of the amendment to add the arbitration clause because the process of finding the user agreement on the web site is unduly cumbersome and the clause in question is "buried" in the agreement. They contend therefore that the amendment was not sufficiently brought to their attention and they are consequently not bound by it. They rely on decisions such as *Tilden Rent-A-Car* v. *Clendenning (1978)*, *Toronto Blue Jays Baseball Club* v. *John Doe* and *Badie* v. *Bank of America*. For reasons that I will set out below, I do not find that this case is comparable to any of those cases.

The evidence offered by the plaintiffs does not support their assertion that the arbitration clause was hidden from customers. Indeed, in one respect the plaintiffs' evidence could be fairly characterized as disingenuous. Mr. Wallis, in his affidavit, asserted that it requires considerable effort, and the review of numerous different screens, in order to find the user agreement. In fact, and as Mr. Wallis admitted on cross-examination, it takes a review of only five screens on the defendant's web site to get to the user agreement. It admittedly takes more steps if one starts at the Excite@Home web site but not significantly more once one locates the proper links to follow. I note in this latter regard that Mr. Wallis has his Master's degree in computer science. I would expect that he is therefore very familiar with the fact that locating a specific piece of information on any given web site can sometimes require a trial and error approach until one becomes familiar with the web site and where items are located on it. I do not accept, however, that that reality fairly justifies the plaintiffs' characterization as to the magnitude of difficulty involved in finding the user agreement that was suggested by Mr. Wallis in his affidavit.

The user agreement is also contained on the iToolbox CD which the defendant sent to all customers in June 2001. Mr. Wallis, in his affidavit, similarly advanced the contention that it was difficult to find the agreement on the CD. He said that he was only able to do so because of his expertise in computer science. Mr. Wallis went on to state that "any non-technical person" he had given the CD to had not been able to find the agreement. Under cross-examination, however, Mr. Wallis admitted that the only "non-technical" person he had given the CD to was his wife and that

had no knowledge of what his wife had done to try and find the agreement. It is this aspect of the plaintiffs' evidence which I said could fairly be regarded as disingenuous.

Finally, the plaintiffs say that the clause is "buried" in the agreement. This assertion is based largely on the fact that one has to scroll through the agreement once it is up on the screen in order to find the arbitration clause. That contention is amply refuted by the following observation, with which I agree, from *Rudder* v. *Microsoft Corp.* (1999), where Mr. Justice Winkler said:

> All of the terms of the Agreement are displayed in the same format. Although, there are certain terms of the Agreement displayed entirely in upper-case letters, there are no physical differences which make a particular term of the agreement more difficult to read than any other term. In other words, there is no fine print as that term would be defined in a written document. The terms are set out in plain language, absent words that are commonly referred to as 'legalese'. Admittedly, the entire Agreement cannot be displayed at once on the computer screen, but this is not materially different from a multi-page written document which requires a party to turn the pages.

As was the case with the agreement that was before Mr. Justice Winkler, here the arbitration clause is a separate defined clause with its own heading in bold print. It is displayed just as all of the other clauses of the agreement are displayed. It is not contained within a larger clause dealing with other matters nor is it in fine print or otherwise tucked away in some obscure place designed to make it discoverable only through dogged determination. The clause is upfront and easily located by anyone who wishes to take the time to scroll through the document for even a cursory review of its contents. The arbitration clause is, therefore, not at all equivalent to the fine print on the back of the rent-a-car contract in the Tilden case or on the back of the baseball ticket in the Blue Jays case.

I am also mindful, in reaching my conclusion on this point, of the fact that we are dealing in this case with a different mode of doing business than has heretofore been generally considered by the courts. We are here dealing with people who wish to avail themselves of an electronic environment and the electronic services that are available through it. It does not seem unreasonable for persons, who are seeking electronic access to all manner of goods, services and products along with information, communication, entertainment and other resources, to have the legal attributes of their relationship with the very entity that is providing such electronic access, defined and communicated to them through that electronic format.

I conclude, therefore, that there was adequate notice given to customers of the changes to the user agreement which then bound the plaintiffs when they continued to use the defendant's service. Consequently, I find that there is an arbitration agreement between the parties.

Notwithstanding the apparent support for enforcing clickwrap agreements, the existence of such agreements should still be subject to strict scrutiny as courts consider both how assent to the contract was obtained and judge the policy implications of enforcing the particular agreement. If the agreement is a standard clickwrap agreement in which the user was required to positively indicate their agreement by clicking on an "I agree" or similar icon, the court will likely deem this to be valid

It is not uncommon, however, for Web sites to use terms of use agreements in which no positive assent is obtained. The Web site visitor is unlikely to have read the terms of the agreement and its enforceability therefore stands on shakier ground. A recent U.S. case termed this form of contract a "browsewrap contract" and argued that contracts would not be enforced without a clear indication of assent.

Specht v. Netscape Communications Corp.†

Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even willful inaction, as long as it is unequivocally referable to the promise, may create a contract.

The three related cases before me all involve this timeless issue of assent, but in the context of free software offered on the Internet. If an offeree downloads free software, and the offeror seeks a contractual understanding limiting its uses and applications, under what circumstances does the act of downloading create a contract? On the facts presented here, is there the requisite assent and consideration? My decision focuses on these issues.

In these putative class actions, Plaintiffs allege that usage of the software transmits to Defendants private information about the user's file transfer activity on the Internet, thereby effecting an electronic surveillance of the user's activity in violation of two federal statutes, the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Defendants move to compel arbitration and stay the proceedings, arguing that the disputes reflected in the Complaint, like all others relating to use of the software, are subject to a binding arbitration clause in the End User License Agreement ("License Agreement"), the contract allegedly made by the offeror of the software and the party effecting the download. Thus, I am asked to decide if an offer of a license agreement, made independently of freely offered software and not expressly accepted by a user of that software, nevertheless binds the user to an arbitration clause contained in the license.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Netscape, a provider of computer software programs that enable and facilitate the use of the Internet, offers its "SmartDownload" software free of charge on its web site to all those who visit the site and indicate, by clicking their mouse in a designated box, that they wish to obtain it. SmartDownload is a program that makes it easier for its users to download files from the Internet without losing their interim progress when they pause to engage in some other task, or if their Internet connection is severed. Four of the six named Plaintiffs — John Gibson, Mark Gruber, Sean Kelly and Sherry Weindorf — selected and clicked in the box indicating a deci-

† 00 Civ. 6219 (S.D.N.Y. ...

sion to obtain the software, and proceeded to download the software on to the hard drives of their computers. The fifth named Plaintiff, Michael Fagan, allegedly downloaded the software from a "shareware" web site operated by a third party. The sixth named Plaintiff, Christopher Specht, never obtained or used SmartDownload, but merely maintained a web site from which other individuals could download files.

Visitors wishing to obtain SmartDownload from Netscape's web site arrive at a page pertaining to the download of the software. On this page, there appears a tinted box, or button, labeled "Download." By clicking on the box, a visitor initiates the download. The sole reference on this page to the License Agreement appears in text that is visible only if a visitor scrolls down through the page to the next screen. If a visitor does so, he or she sees the following invitation to review the License Agreement:

> Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software.

Visitors are not required affirmatively to indicate their assent to the License Agreement, or even to view the license agreement, before proceeding with a download of the software. But if a visitor chooses to click on the underlined text in the invitation, a hypertext link takes the visitor to a web page entitled "License & Support Agreements." The first paragraph on this page reads in pertinent part:

> The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product.
>
> Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below the paragraph appears a list of license agreements, the first of which is "License Agreement for Netscape Navigator and Netscape Communicator Product Family (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the visitor then clicks on that text, he or she is brought to another web page, this one containing the full text of the License Agreement.

The License Agreement, which has been unchanged throughout the period that Netscape has made SmartDownload available to the public, grants the user a license to use and reproduce SmartDownload, and otherwise contains few restrictions on the use of the software. The first paragraph of the License Agreement describes, in upper case print, the purported manner in which a user accepts or rejects its terms.

> BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT ("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

The License Agreement also contains a term requiring that virtually all disputes be submitted to arbitration in Santa Clara County, California. Unless otherwise relating to intellectual property rights) shall be subject to final and binding arbitration in Santa Clara County, California, under the auspices of JAMS/EndDispute with the losing party paying all costs of arbitration.

All users of SmartDownload must use it in connection with Netscape's Internet browser, which may be obtained either as an independent product, Netscape Navigator, or as part of a suite of software, Netscape Communicator. Navigator and Communicator are governed by a single license agreement, which is identical to the License Agreement for SmartDownload. By its terms, the Navigator / Communicator license is limited to disputes "relating to this Agreement." ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.... Where such an issue is raised, the party alleged to be in default may ... demand a jury trial of such issue.... If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.").

II. APPLICABLE LAW

The Federal Arbitration Act expresses a policy strongly favoring the enforcement of arbitration clauses in contracts.

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The interpretation of an arbitration agreement is governed by the federal substantive law of arbitration.

On this basis, Defendants argue that this motion properly is analyzed using the federal common law regarding the arbitrability of disputes, and that such federal common law "simply 'comprises generally accepted principles of contract law.'"

However, Defendants' approach elides the distinction between two separate analytical steps. First, I must determine whether the parties entered into a binding contract. Only if I conclude that a contract exists do I proceed to a second stage of analysis: interpretation of the arbitration clause and its applicability to the present case. The first stage of the analysis — whether a contract was formed — is a question of state law. If, under the law, a contract is formed, the interpretation of the scope

In determining which state law to apply, I look first to the choice-of-law doctrine of the forum state, New York. Under New York's choice-of-law rules, when determining which state's law to apply to a contract dispute, "the court evaluates the 'center of gravity' or 'grouping of contacts,' with the purpose of establishing which state has 'the most significant relationship to the transaction and the parties.'" The named Plaintiffs reside in various states, including Florida, Louisiana, and New Jersey. None of these states appears to have any other connection to the litigation. The product at issue — SmartDownload — was created by Netscape, a Delaware corporation with its principal offices in California. Plaintiffs argue in their motion papers that SmartDownload was designed in California and is distributed from Netscape's web site, which is maintained by employees at Netscape's California offices, to Internet users throughout the world. Netscape appears not to dispute these assertions. California necessarily has an interest in the enforceability of an arbitration clause pertaining to a product created in California by a California-based corporation. Likewise, California has an interest in whether a California-based corporation has created a product that violates federal privacy and electronic surveillance statutes. Although the record evidence on this point is sparse at best, no other state appears to have an interest of comparable strength. Therefore, I conclude that California has the most significant connection to the litigation, and I apply California law to the issue of contract formation. By its terms, Article 2 of the Uniform Commercial Code "applies to transactions in goods." The parties' relationship essentially is that of a seller and a purchaser of goods. Although in this case the product was provided free of charge, the roles are essentially the same as when an individual uses the Internet to purchase software from a company: here, the Plaintiff requested Defendant's product by clicking on an icon marked "Download," and Defendant then tendered the product. Therefore, in determining whether the parties entered into a contract, I look to California law as it relates to the sale of goods, including the Uniform Commercial Code in effect in California.

III. DID PLAINTIFFS CONSENT TO ARBITRATION?

Unless the Plaintiffs agreed to the License Agreement, they cannot be bound by the arbitration clause contained therein. My inquiry, therefore, focuses on whether the Plaintiffs, through their acts or failures to act, manifested their assent to the terms of the License Agreement proposed by Defendant Netscape. More specifically, I must consider whether the web site gave Plaintiffs sufficient notice of the existence and terms of the License Agreement, and whether the act of downloading the software sufficiently manifested Plaintiffs' assent to be bound by the License Agreement. I will address separately the factually distinct circumstances of Plaintiffs Michael Fagan and Christopher Specht. In order for a contract to become binding, both parties must assent to be bound. "[C]ourts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective." "To form a contract, a manifestation of mutual assent is necessary. Mutual assent may be manifested by written or spoken words, or by conduct." "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

These principles enjoy continuing vitality in the realm of software licensing. The sale of software, in stores, by mail, and over the Internet, has resulted in several specialized forms of license agreements. For example, software commonly is packaged subject to the terms of a license agreement contained inside the package. The license agreement generally explains that, if the purchaser does not wish to enter into a contract, he or she must return the product for a refund, and that failure to return it within a certain period will constitute assent to the license terms. These so-called "shrink-wrap licenses" have been the subject of considerable litigation.

In ProCD, Inc. v. Zeidenberg, for example, the Seventh Circuit Court of Appeals considered a software license agreement "encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs." The absence of contract terms on the outside of the box containing the software was not ... In a breach-of-warranty suit involving software, the Supreme Court of Washington, en banc, enforced a license agreement that, like the agreement at issue in ProCD, was presented on the user's computer screen each time the software was used, and also was located on the outside of each diskette pouch and on the inside cover of the instruction manuals.

A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did.

He had no choice, because the software splashed the license on the screen and *would not let him proceed without indicating acceptance*. The court concluded that "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)."

The Seventh Circuit expanded this holding in Hill v. Gateway 2000, Inc. In Hill, a customer ordered a computer by telephone; the computer arrived in a box also containing license terms, including an arbitration clause, "to govern unless the customer return[ed] the computer within 30 days." The customer was not required to view or expressly assent to these terms before using the computer. More than 30 days later, the customer brought suit based in part on Gateway's warranty in the license agreement, and Gateway petitioned to compel arbitration. The court held that the manufacturer, Gateway, "may invite acceptance by conduct," and that "[b]y keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause." Although not mentioned in the decision, the customer, by seeking to take advantage of the warranty provisions contained in the license agreement, thus could be fairly charged with the arbitration clause as well. It bears noting that unlike the plaintiffs in Hill and Brower, who grounded their claims on express warranties contained in the contracts, the Plaintiffs in this case base their claims on alleged privacy rights independent of the License Agreement for SmartDownload.

Not all courts to confront the issue have enforced shrink-wrap license agreements. In Klocek v. Gateway, Inc., the court considered a standard shrink-wrap license agreement that was included in the box containing the computer ordered by the plaintiff. The court held that Kansas and Missouri courts probably would not follow Hill or ProCD, supra. The court held that the computer purchaser was the offeror, and that the vendor accepted the purchaser's offer by shipping the computer in response to the offer. Under Section 2-207 of the Uniform Commercial Code, the court held, the vendor's enclosure of the license agreement in the ... In this respect,

which appeared on the user's computer screen when the software was used and could not be bypassed until the user indicated acceptance of its terms.

For most of the products it makes available over the Internet (but not SmartDownload), Netscape uses another common type of software license, one usually identified as "click-wrap" licensing. A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three button or icons: one labeled "Back" and used to return to an earlier step of the download preparation; one labeled "No," which if clicked, terminates the download; and one labeled "Yes," which if clicked, allows the download to proceed. Unless the user clicks "Yes," indicating his or her assent to the license agreement, the user cannot obtain the software. The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable.

A third type of software license, "browse-wrap," was considered by a California federal court in Pollstar v. Gigmania Ltd., No. In Pollstar, the plaintiff's web page offered allegedly proprietary information. Notice of a license agreement appears on the plaintiff's web site. Clicking on the notice links the user to a separate web page containing the full text of the license agreement, which allegedly binds any user of the information on the site. However, the user is not required to click on an icon expressing assent to the license, or even view its terms, before proceeding to use the information on the site. The court referred to this arrangement as a "browse-wrap" license. The defendant allegedly copied proprietary information from the site. The plaintiff sued for breach of the license agreement, and the defendant moved to dismiss for lack of mutual assent sufficient to form a contract. The court, although denying the defendant's motion to dismiss, expressed concern about the enforceability of the browse-wrap license:

> Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement is provided by small gray text on a gray background.... No reported cases have ruled on the enforceability of a browse wrap license.... While the court agrees with [the defendant] that the user is not immediately confronted with the notice of the license agreement, this does not dispose of [the plaintiff's] breach of contract claim. The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time.

The SmartDownload License Agreement in the case before me differs fundamentally from both click-wrap and shrink-wrap licensing, and resembles more the browse-wrap license of Pollstar. Where click-wrap license agreements and the shrink-wrap agreement at issue in ProCD require users to perform an affirmative action unambiguously expressing assent before they may use the software, that affirmative action is equivalent to an express declaration stating, "I assent to the terms and conditions of the license agreement" or something similar. For example, Netscape's Navigator will not function without a prior clicking of a box constituting assent. Netscape's SmartDownload, in contrast, allows a user to download and use the softciated license or indicates an understanding that a contract is being formed. California courts carefully limit the circumstances under which a party may be bound to a contract. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.... This principle of knowing consent applies with particular force to provisions for arbitration." Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed. Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the individual obtaining SmartDownload is not made aware that he is entering into a contract. SmartDownload is available from Netscape's web site free of charge. Before downloading the software, the user need not view any license agreement terms or even any reference to a license agreement, and need not do anything to manifest assent to such a license agreement other than actually taking possession of the product. From the user's vantage point, SmartDownload could be analogized to a free neighborhood newspaper, readily obtained from a sidewalk box or supermarket counter without any exchange with a seller or vender. It is there for the taking. The only hint that a contract is being formed is one small box of text referring to the license agreement, text that appears below the screen used for downloading and that a user need not even see before obtaining the product:

> Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software.

Couched in the mild request, "Please review," this language reads as a mere invitation, not as a condition. The language does not indicate that a user must agree to the license terms before downloading and using the software. While clearer language appears in the License Agreement itself, the language of the invitation does not require the reading of those terms or provide adequate notice either that a contract is being created or that the terms of the License Agreement will bind the user. The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants' position, if accepted, would so expand the definition of assent as to render it meaningless. Because the user Plaintiffs did not assent to the license agreement, they are not subject to the arbitration clause contained therein and cannot be compelled to arbitrate their claims against the Defendants. Defendants further contend that even if the arbitration clause in the SmartDownload License Agreement is not binding, the license agreement applicable to Netscape Communicator and Navigator applies to this dispute. As discussed earlier, the Communicator and Navigator agreement is a conventional click-wrap contract; it prevents any use of the software unless and until the user clicks an icon stating his or her assent to the terms of the license. The agreement contains a clause requiring arbitration of "all disputes relating to this Agreement." Assuming arguendo that it is enforceable, the Communicator / Navigator license agreement is a separate contract governing a separate transaction; it makes no mention of SmartDownload. Plaintiffs'

...tion about Plaintiffs' online activities to Defendants. These claims do not implicate Communicator or Navigator any more than they implicate the use of other software on Plaintiffs' computers. Resolution of this dispute does not require interpretation of the parties' rights or obligations under the license agreement for Netscape Communicator and Navigator. Defendants were free to craft broader language for the Communicator / Navigator license, explicitly making later applications such as SmartDownload subject to that click-wrap agreement. They did not do so. Therefore, I reject Defendants' argument that the arbitration clauses in the Communicator and Navigator license agreements mandate arbitration of this dispute.

While the form of assent may call into question the validity of an online contract, the actual terms of the contract itself are of even greater consequence. Courts are required to consider the reasonableness of the terms of a contract as part of their analysis. A court may simply rule that the forum selection clause is unenforceable in light of the overall nature of the contract. This occurred in *Mendoza v. AOL*, a recent California case involving a disputed ISP bill. After Mendoza sued AOL in California state court, AOL responded by seeking to have the case dismissed on the grounds that the AOL service contract contains a forum selection that requires all disputes arising from the contract to be brought in Virginia. The trial court surprised AOL by refusing to enforce the company's terms of service agreement on the grounds that "it would be unfair and unreasonable because the clause in question was not negotiated at arm's length, was contained in a standard form contract, and was not readily identifiable by plaintiff due the small text and location of the clause at the conclusion of the agreement."

The trial court's decision was upheld in June 2001 on appeal in the following decision:

America Online, Inc. v. The Superior Court of Alameda County†

This petition for writ of mandate was filed by petitioner America Online, Inc. (AOL) following the denial of its motion to stay or dismiss a putative consumer class action lawsuit. The motion was based on a claim that California is an inconvenient forum in which to litigate the dispute concerning AOL's proprietary Internet service. In support of its motion, AOL exclusively relied on a forum selection clause in its contracts with real parties in interest, Al Mendoza, Jr. (Mendoza) and the potential class members, which designated Virginia as the jurisdiction in which all disputes arising out of the relationship would be litigated. The agreement also included a choice of law provision requiring that Virginia law be applied to any such dispute. We conclude the court properly denied AOL's motion. First, one of the causes of action seeks class action relief under the California Consumers Legal Remedies Act (CLRA). This act contains a provision that voids any purported waiver of rights under the CLRA as being contrary to California public policy.

† Alameda County Sup. Ct. No. 827047-2 (C.A. Cal., 1st App. Dist., Div. Two,

Enforcement of the contractual forum selection and choice of law clauses would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law. Second, we conclude that Virginia law does not allow consumer lawsuits to be brought as class actions and the available remedies are more limited than those afforded by California law. Accordingly, the rights of Mendoza and the California consumer class members would be substantially diminished if they are required to litigate their dispute in Virginia, thereby violating an important public policy underlying California's consumer protection law. For this independent reason, the forum selection clause is unenforceable.

II. FACTUAL AND PROCEDURAL HISTORY

A class action was filed by Mendoza for himself and others against AOL seeking compensatory and punitive damages, injunctive relief, and restitution. The complaint alleges that real parties are former subscribers to AOL's Internet service who, over the past four years, paid between $5 and $22 each month for the service. Monthly payments were made by allowing AOL to debit automatically the credit cards of class members. The class members terminated their subscriptions to AOL but, without authorization, AOL continued to debit their credit cards for monthly service fees. Mendoza individually alleged that he gave AOL notice of the cancellation of his subscription in October 1999, but AOL continued to charge monthly fees against his credit card at least through February 2000, at which time Mendoza cancelled his credit card in order to stop the debits.

The complaint alleged separate causes of action including violations of California's Unfair Business Practices Act, violations of California's CLRA, common law conversion/trespass, and common law fraud. The complaint also prayed that the action proceed as a class action under Code of Civil Procedure section 382, Civil Code section 1781, and Business and Professions Code section 17204, and that Mendoza and the class be awarded compensatory and punitive damages, restitution, prejudgment interest, attorney fees and costs, and a permanent injunction halting AOL's practice, and requiring it to disseminate corrective notices. Shortly thereafter, AOL filed a motion to stay or dismiss the action on the ground of inconvenient forum. As noted, the motion was based on the forum selection clause contained in the "Terms of Service" (TOS) agreement entered into between Mendoza and AOL at the time he subscribed to AOL's proprietary Internet service. The TOS, attached as Exhibit A in support of AOL's motion, is a 4 1/2-page, single-spaced, unsigned document. Paragraph 8 of the TOS entitled "LAW AND LEGAL NOTICES" states in part the following: "You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or its affiliates, subsidiaries, employees, contractors, officers, directors, telecommunications providers and content providers...." Additionally, paragraph 8 contained a choice of law provision designating Virginia law as being applicable to any dispute between the parties: "The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Agreement and your membership."

In support of its motion, AOL contended the forum selection clause was presumptively valid under California law, was a rational, voluntary, and conscionable rate. Among the legal authorities on which it relied, AOL referred to several unpublished out-of-state cases in which the clause had been previously enforced.

In response, Mendoza objected to Exhibit A, claiming that the document did not accurately reflect what was displayed to him when he commenced service with AOL. Instead, he described seeing displayed on his home computer monitor a "densely worded, small-size text that was hard to read on the computer screen." This objection formed the leitmotif for Mendoza's claim that the TOS was an unconscionable adhesion contract, and that under applicable rules of contract construction, the forum selection clause was unenforceable. In addition, Mendoza contended the TOS was unreasonable and unenforceable because it necessarily required him and the putative class members to relinquish legal rights in derogation of California public policy.

On September 25, 2000, the court entered its order denying AOL's motion. After discussing several of the pertinent cases bearing on the issue, the court denied the motion finding that: 1) the forum selection clause was unfair and unreasonable because it was not negotiated, it was contained in a standard form contract, and was in a format that was not readily identifiable by Mendoza; 2) AOL had failed to carry its burden of proving that the consumer rights afforded under California law would not be diminished by enforcement of the clause; and 3) the remedies available to consumers in Virginia were not comparable to those in California.

AOL filed a petition for writ of mandamus. On November 28, 2000, we issued an order to show cause why a preemptory writ of mandamus should not issue. Thereafter, on January 4, 2001, we discharged the order to show cause as improvidently granted, and denied the petition. AOL then petitioned the Supreme Court for review. On February 28, 2001, the high court granted the petition for review, and transferred the matter back to this court with directions to issue an order to show cause why the relief requested in the petition should not be granted. On March 2, 2001, we issued a new order to show cause as directed by the Supreme Court.

III. LEGAL DISCUSSION

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B. Overview of Forum Selection Clause Enforcement

AOL correctly posits that California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable. This favorable treatment is attributed to our law's devotion to the concept of one's free right to contract, and flows from the important practical effect such contractual rights have on commerce generally. This division has characterized forum selection clauses as "play[ing] an important role in both national and international commerce." The *Wimsatt* court similarly exhorted that "[f]orum selection clauses *are* important in facilitating national and international commerce, and as a general rule should be welcomed." We agree with these sentiments, and view such clauses as likely to become even more ubiquitous as this state and nation become acculturated to electronic commerce.

Moreover, there are strong economic arguments in support of these agreements, favoring both merchants and consumers, including reduction in the costs of goods and services and the stimulation of e-commerce. But this encomium is not boundless. Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the stantial legal rights significantly impaired by their enforcement. Therefore, to be enforceable, the selected jurisdiction must be "suitable," "available," and able to "accomplish substantial justice." The trial court determined that the circumstances of contract formation did not reflect Mendoza exercised free will, and that the effect of enforcing the forum selection clause here would violate California public policy by eviscerating important legal rights afforded to this state's consumers. Our task, then, is to review the record to determine if there was a rational basis for the court's findings and the choice it made not to enforce the forum selection clause in AOL's TOS agreement.

C. Enforcement of the Forum Selection Clause Violates Strong California Public Policy

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Quite apart from the remedial limitations under Virginia law relating to injunctive and class action relief, the cumulative importance of even these less significant differences is substantial. Enforcement of a forum selection clause, which would impair these aggregate rights, would itself violate important California public policy. For this additional reason the trial court was correct in denying AOL's motion to stay or to dismiss.

In so holding we reject Mendoza's contention that the clause should not be enforced simply because it would be patently unreasonable to require him or other AOL customers who form the putative class to travel to Virginia to litigate the relatively nominal individual sums at issue. He points out that in 1998 and 1999, not a single suit by a non-Virginia resident appears to have been filed in AOL's Virginia home county, a development Mendoza suggests is directly related to the fact that the cost of prosecuting a claim in Virginia vastly exceeds the amounts normally at issue in individual claims against AOL.

But the additional cost or inconvenience necessitated by litigation in the selected forum is not part of the calculus when considering whether a forum selection clause should be enforced. Our Supreme Court has put this matter to rest in *Smith Valentino* when it quoted: " 'Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things.' Yet Mendoza contends that *Smith Valentino*'s admonition not to consider convenience and cost in evaluating the validity of forum selection clauses applies only where there remains a "practical option [of travel to the selected forum] in terms of the expense and value of the controversy." As we understand it, Mendoza is arguing that expense in litigating in the selected forum can be considered if it exceeds the amount in controversy or at least renders the choice to litigate "impractical." We disagree that *Smith Valentino* can be read so narrowly. No case of which we are aware has interpreted this language as Mendoza suggests we should. Moreover, it is not at all clear what monetary amount was in dispute in that case, or whether it was "practical" to bring the litigation in the selected forum. Although the current dispute between Mendoza and AOL might make it impractical for Mendoza to pursue an individual claim in Virginia, there may be other potential disputes between Mendoza and AOL arising from their relationship which would have significantly greater value. Are we to parse the enforceability of the forum selection clause, then, based on the economic value of the particular claim in issue, so that the clause can be enforced some of the time (depending on the value of the claim), but

the proclivities of the individual claimant who may not feel litigation in the selected forum is worth it? How should trial judges calculate the costs of litigation? Should they consider the extent to which the selected forum allows for the recovery of costs, including travel-related expenses? Should courts compute the extent to which extraordinary costs in enforcing contractual rights are included in the consideration paid for the goods or services purchased?

As can be seen, in addition to reading a limitation in our Supreme Court's opinion which is not warranted, the practical problems in accepting Mendoza's restricted reading of *Smith Valentino* are formidable, and will ensnare trial courts in endless proceedings during which these factors would be argued and weighed. It was perhaps just such a concern that, in part, moved the Supreme Court to pronounce costs and convenience "[are] not the test of reasonableness [of forum selection clauses]."

Rudder? *Robet v. Versus Brokerage Services Inc. (c.o.b. E*Trade Canada)*†

The defendant is a discount electronic trading brokerage system carrying on business across Canada in association with the brokerage firm of Merrill-Lynch. Securities trading by customers of the defendant takes place either over the Internet through the customer's personal computer, or by telephone. In the case at bar, the communications in question were over the Internet. The chief purpose of electronic trading is to give the customer a process whereby orders for trades in securities may be processed and completed more rapidly than through a "full service" broker. The customer obtains the closest thing to a direct electronic contact with the market as has yet been devised. Speed is a very important function of the service provided by the defendant. As a consequence of communication being by electronic process, the human element is significantly removed, leaving the defendant in the position of offering its service somewhat akin to a bare conduit for the conveyance of orders from the customer to the market.

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Starting in 1997, the plaintiff opened a series of electronic trading accounts with the defendant. In November of 1997, he opened what is known as a cash account. In May of 1998, he opened a United States cash account. In February 1998, he opened an RRSP account and in December of 1998, he opened a "locked-in" RRSP account. Over the time preceding the events giving rise to the issues at bar, the plaintiff engaged in a significant volume of trading. Looking at his history of transactions, one might conclude that he was a relatively sophisticated trader well conversant with the programming and system he employed through the defendant E*Trade. Historically he participated in relatively active trading in all of his accounts and, until the events in issue arose, there appear to have been no difficulties in that respect.

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A review of the information obtainable on the Web site demonstrates that, to some extent, there may be conflicts between the verbiage obtained from the Web site and the precise terminology of the contractual agreement. Certainly, the all-encompassing and draconian limitations and restrictions contained in s. 16 of the agreement are not apparent on the Web site, and the disclaimers with respect to accuracy of the communications are certainly at odds with the description of the account history as being an audit trail for tax purposes. Those inconsistencies or ambiguities, however, are not particularly significant, having regard to the overall nature of the unusual electronic relationship between the parties.

On the facts of the case at bar, it is my view that the chief consideration to be made by me is whether the circumstances which took place are, in fact, ones which are covered by the contractual agreement between the parties, or whether they stand separate and apart from the contract, or any reasonable interpretation of what would constitute the meeting of the minds when the contract was entered into.

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It was the plaintiff's evidence that, on February 15th, he entered his account and checked his locked-in RRSP only to discover that something had gone wrong. His account demonstrated that he had purchased 12,000 shares of Vengold rather than 3,000. As I understood his evidence-in-chief, he did not check his other accounts that day but only looked at the Vengold purchase. The information the plaintiff was looking at was contained in the current account history which had been updated overnight in the process described above.

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The relationship between a customer and the discount electronic trading broker is such that significant emphasis is placed upon the responsibility of the customer to attempt to resolve their own problems. The defendant may offer a "help desk"[;] however, the evidence before me did not disclose such a "help line", or any other service other than a telephone number at its Toronto offices. The defendant's Web site contains information as to how the customer can self-correct certain difficulties or problems which might arise. Beyond placing the onus on the customer to notify the defendant of errors in their account, no process or system is set out in the material that was put before me describing how any such correction, or remedy, might be obtained.

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The relationship between a customer and an electronic trading broker is practically and systemically different from almost any other form of contractual arrangement customarily engaged in by persons buying and selling through an agent. In order for the customer to obtain the discount price of the service, there must, of necessity, be as little human input as reasonably possible in order to keep the defendant's costs down. Since the purpose of the electronic trading system is to get the customer almost instant access to the traders at the stock market, any processes which interrupt the speed of the transaction would make the service less desirable to the customer. It is apparent from a reading of the contractual documentation that the defendant has attempted to set up a process which provides to its customers a

ating real time trading as could be provided under the securities regulations in force at the time. The use of computers and the Internet permits an almost instantaneous transfer of instructions directly from the customer to the market. This, in turn, permits the filling of orders as quickly as the market permits with a close to instantaneous response being sent to the customer to confirm that their order has been traded. There is no question that the defendant is in the position of being a bare conduit and order taker. Given that the transactions [take] place virtually in anonymity with the speed of electronic communications, it is more than apparent that the entire process is dependent upon the integrity of the system provided by the defendant. The necessity for accurate record keeping in respect of personal accounts or for income tax purposes, is not only governed by securities regulations but is also of vital importance to both the customer and the electronic broker in order to be able to keep track of what has transpired. In the circumstances of the customer, it is vital that they have information touching on the status of their trade and their account on a real time basis in order to assist them in making rapid trading decisions. With respect to the defendant, it is vital that they have the information accurately recorded in order that the business can be conducted properly, and their commissions charged accordingly.

The defendant, as an electronic broker, is not just marketing to its customers a direct wire to the stock exchange. There is a significantly more complex set of arrangements which are offered to customers in the overall package of electronic services provided. In effect, the defendant holds itself out to the general public as possessing a system which will do everything to allow a customer to buy and sell securities on the exchange as well as keep a running record of their account with real time information as to the balance or buying power of that account.

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Having regard to the nature of the relationship and the fact that the commercial activity and accounting process is all performed electronically, there is no question that the defendant requires a significant degree of protection and indemnity from liability arising out of systemic difficulties. In a computerized commercial transaction world there are many things that can go wrong which are beyond the control of the parties or, notwithstanding the fact that they may be within the domain of the parties' control, they are the very sorts of things that people who engage in this form of electronic commerce understand can go wrong and, in all probability, will go wrong from time to time. Without testing one's imagination, it would be very easy to understand that electronic error could give rise to mistakes of horrendous consequences for which there ought to be no liability on the defendant. On the other hand, the nature of the relationship between the parties is such that there are certain essential ingredients of their bargain which each must perform in order for the process to work properly. For example, any customer must, of necessity, know any order they might place will be taken at its face presentation and, as such, they must take care to ensure that the order they type out accurately reflects what they wish to take place. Regardless of their intentions, it is the specific electronic instruction which will be followed by the defendant and, all things being equal, it will be followed specifically, accurately and to the letter.

At the time the plaintiff and the defendant entered into the contractual relationship for the opening of the plaintiff's accounts, if the plaintiff had taken the time

The governing principle underlying the UECA is the concept of electronic equivalence. Although the Act does not deem electronic communications valid (just as with paper documents, legal validity depends upon more than just a document's form), it promises that information will not be denied legal effect or enforceability solely because it is in electronic form.

The Act is also careful not to compel parties to use electronic communications. In an important deviation from the U.N. model, the Canadian version provides that nothing in the Act requires a person to use or accept information in electronic form without their consent.

Consent to use electronic communication, however, may be inferred from a person's behaviour. For example, providing a business card with an email address could be construed as consent to receive email. Similarly, placing an order on the Web could be treated as consent to deal with a seller electronically.

The most interesting section of the law focuses on online contracts. Although thousands of contracts are entered into daily through e-commerce, some sellers and consumers remain uncertain of the legal implications of clicking the "I Agree" button on a Web site. The law removes any doubt that this popular form of online consent is indeed valid by stipulating that unless the parties agree otherwise, an offer or acceptance of an offer can be expressed in electronic form by clicking on an appropriate icon.

Contracts between an individual and a computer or between two computers also attracted the attention of the law's drafters. This issue has become particularly important with the growing popularity of online stock trading, as well as with other forms of e-commerce, such when a person deals solely with a computer on the other end of a transaction. The concern in this situation lies with the difficulty of correcting a mistake. For example, if someone inadvertently orders 11 copies of a book rather than just a single copy, can they get out of the contract?

The law creates an appropriate compromise by ensuring that consumers have an opportunity to review the terms of their contract before it becomes binding. Under the UECA, computer-based contracts are not enforceable where an individual alleges that a mistake has occurred and the individual was not provided with the opportunity to prevent or correct the error (as long as the individual notifies the other party of the mistake and does not profit from it).

One of the most contentious issues faced by the drafters concerned the point at which an electronic communication is deemed sent and received. In the early days of contract law, a postal acceptance rule was established which deemed a contract accepted from the moment the acceptance was mailed. The UECA seeks to develop an Internet equivalent. An electronic document is deemed sent once it enters an information system outside the control of the originator. For most Internet users, this occurs once their email program actually sends the email (not necessarily when the user clicks the send button).

An electronic document is presumed received by an addressee when it enters their information system, provided the recipient has designated the system for receipt of electronic documents. In other words, the recipient does not actually have to retrieve the message, but merely have the capability of doing so.

Although legislative proposals passed by the ULCC are not binding, they are forwarded to all provincial and territorial governments with a recommendation that they be enacted in order to provide Canada with a harmonized approach to

Uniform Electronic Commerce Act†

1 The definitions in this section apply in this Act.

(a) "electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and electronically has a corresponding meaning.

(b) "electronic signature" means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document.

(c) "Government" means

(i) the Government of [enacting jurisdiction];

(ii) any department, agency or body of the Government of [enacting jurisdiction], [other than Crown Corporations incorporated by or under a law of [enacting jurisdiction]]; and

(iii) [any city, metropolitan authority, town, village, township, district or [rural municipality or other municipal body, however designated, incorporated or established by or under a law of [enacting jurisdiction].]

2.(1) Subject to this section, this Act applies in respect of [enacting jurisdiction] law.

(2) The [appropriate authority] may, by [statutory instrument], specify provisions of or requirements under [enacting jurisdiction] law in respect of which this Act does not apply.

(3) This Act does not apply in respect of

(a) wills and their codicils;

(b) trusts created by wills or by codicils to wills;

(c) powers of attorney, to the extent that they are in respect of the financial affairs or personal care of an individual;

(d) documents that create or transfer interests in land and that require registration to be effective against third parties.

(4) Except for Part 3, this Act does not apply in respect of negotiable instruments, including negotiable documents of title.

(5) Nothing in this Act limits the operation of any provision of [enacting jurisdiction] law that expressly authorizes, prohibits or regulates the use of electronic documents.

(6) The [appropriate authority] may, by [statutory instrument], amend subsection (3) to add any document or class of documents, or to remove any document or class of documents previously added under this subsection.

† Online: <http://www.ulcc.ca/en/us/euecafin.wpd>. Reproduced with permission of

(7) For the purpose of subsection (5), the use of words and expressions like "in writing" and "signature" and other similar words and expressions does not by itself prohibit the use of electronic documents.

. . . . .

4. The provisions of this Act relating to the satisfaction of a requirement of law apply whether the law creates an obligation or provides consequences for doing something or for not doing something.

5. Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form.

6.(1) Nothing in this Act requires a person to use or accept information in electronic form, but a person's consent to do so may be inferred from the person's conduct.

(2) Despite subsection (1), the consent of the Government to accept information in electronic form may not be inferred by its conduct but must be expressed by communication accessible to the public or to those likely to communicate with it for particular purposes.

7. A requirement under [enacting jurisdiction] law that information be in writing is satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference.

8.(1) A requirement under [enacting jurisdiction] law for a person to provide information in writing to another person is satisfied by the provision of the information in an electronic document,

(a) if the electronic document that is provided to the other person is accessible by the other person and capable of being retained by the other person so as to be usable for subsequent reference, and
(b) where the information is to be provided to the Government, if
  (i) the Government or the part of Government to which the information is to be provided has consented to accept electronic documents in satisfaction of the requirement; and
  (ii) the electronic document meets the information technology standards and acknowledgement rules, if any, established by the Government or part of Government, as the case may be.

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Part 2 Communication of Electronic Documents

19. In this Part, "electronic agent" means a computer program or any electronic means used to initiate an action or to respond to electronic documents or actions in whole or in part without review by a natural person at the time of the response or action.

20.(1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed

(b) by an action in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

(2) A contract shall not be denied legal effect or enforceability solely by reason that an electronic document was used in its formation.

21. A contract may be formed by the interaction of an electronic agent and a natural person or by the interaction of electronic agents.

22. An electronic document made by a natural person with the electronic agent of another person has no legal effect and is not enforceable if the natural person made a material error in the document and

(a) the electronic agent did not provide the natural person with an opportunity to prevent or correct the error;
(b) the natural person notifies the other person of the error as soon as practicable after the natural person learns of the error and indicates that he or she made an error in the electronic document;
(c) the natural person takes reasonable steps, including steps that conform to the other person's instructions to return the consideration received, if any, as a result of the error or, if instructed to do so, to destroy the consideration; and
(d) the natural person has not used or received any material benefit or value from the consideration, if any, received from the other person.

23.(1) Unless the originator and the addressee agree otherwise, an electronic document is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, when it becomes capable of being retrieved and processed by the addressee.

(2) An electronic document is presumed to be received by the addressee,

(a) when it enters an information system designated or used by the addressee for the purpose of receiving documents of the type sent and it is capable of being retrieved and processed by the addressee; or
(b) if the addressee has not designated or does not use an information system for the purpose of receiving documents of the type sent, when the addressee becomes aware of the electronic document in the addressee's information system and the electronic document is capable of being retrieved and processed by the addressee.

(3) Unless the originator and the addressee agree otherwise, an electronic document is deemed to be sent from the originator's place of business and is deemed to be received at the addressee's place of business.

(4) For the purposes of subsection (3)

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction to which the electronic document relates or, if there is no underlying transaction, the principal place of business of the originator or the

(b) if the originator or the addressee does not have a place of business, the references to "place of business" in subsection (3) are to be read as references to "habitual residence".

Discussion Questions

1. Consider the definition for "electronic", which is designed to be "technology neutral." Do you think the law will outlive current technologies such as the digital signature?
2. What potential problems are encountered when using electronic agents to form contracts?

Notes

Countries around the world are adopting legislation modeled after the UN standard and thus similar in form to the UECA. As of July 2002, over 30 U.S. states, including Pennsylvania and California, had adopted the U.S. equivalent called the *Uniform Electronic Transactions Act*. Moreover, Congress enacted the *Electronic Signatures in Global and National Commerce Act*, better known as E-SIGN, in the fall of 2000. The legislation effectively renders the U.N. standard national law in the United States. In Australia, the *Electronic Transactions Bill* had been adopted in two states. Similar initiatives were under way around the world, including proposals in Singapore, India, Ireland, the U.K. and Ecuador.

E-commerce legislation gained increasing momentum across Canada in the years 2000 and 2001, with virtually every province and territory enacting or proposing enacting e-commerce legislation by July 2002.

Saskatchewan, which became the first province to propose e-commerce legislation in December 1999, also led the way as the first Canadian province to enact e-commerce legislation when the *Information and Documents Act 2000* (Bill 38) received Royal Assent on June 21, 2000. An excerpt is found below.

The Electronic Information and Documents Act, 2000†

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

3. In this Part:

(a) "electronic" means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

(b) "electronic signature" means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document.

4.(1) This Part does not apply to:

(a) wills;
(b) directives within the meaning of *The Health Care Directives and Substitute Health Care Decision Makers Act*;
(c) trusts created by wills;
(d) powers of attorney, to the extent that they concern the financial affairs or personal care of an individual;
(e) documents that create or transfer interests in land and that require registration to be effective against third parties; or
(f) any other provisions, requirements, information or documents prescribed in the regulations.

(2) Divisions 2 and 3 do not apply to negotiable instruments, including negotiable documents of title.

(3) This Act does not apply to any matter to which Part III applies or may apply.

. . . . .

5(1) Nothing in this Part limits the operation of any law that expressly authorizes, prohibits or regulates the use of information or documents in an electronic form.

(2) For the purpose of subsection (1), the use of "in writing" and "signature" and other similar words and expressions does not by itself prohibit the use of information or documents in an electronic form.

(3) The provisions of this Part relating to the satisfaction of a requirement of any law apply whether or not the law creates an obligation or provides consequences for doing something or for not doing something.

18.(1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed:

(a) by means of information or a document in an electronic form; or
(b) by an action in an electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

(2) A contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation.

19.(1) In this section and in section 20, "electronic agent" means a computer program, or any electronic means, used to initiate an action or to respond to electronic information, documents or actions in whole or in part without review by an individual at the time of the response or action.

(2) A contract may be formed by the interaction of an electronic agent and an

20. An electronic document made by an individual with the electronic agent of another person has no legal effect and is not enforceable if the individual made a material error in the document and:

(a) the electronic agent did not provide the individual with an opportunity to prevent or correct the error;
(b) the individual notifies the other person of the error as soon as is practicable after the individual learns of the error and indicates that he or she made an error respecting the electronic document;
(c) the individual takes reasonable steps, including steps that conform to the other person's instructions, to return the consideration received, if any, as a result of the error or, if instructed to do so, to destroy the consideration; and
(d) the individual has not used or received any material benefit or value from the consideration, if any, received from the other person.

21.(1) In this section:

(a) "addressee" means the person to whom any information or document in an electronic form is to be sent;
(b) "originator" means the person sending the information or document in an electronic form.

(2) Unless the originator and addressee agree otherwise, information or a document in an electronic form is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, when it becomes capable of being retrieved and processed by the addressee.

(3) Information or a document in an electronic form is presumed to be received by the addressee:

(a) when it enters an information system designated or used by the addressee for the purpose of receiving information or documents in an electronic form of the type sent and it is capable of being retrieved and processed by the addressee; or
(b) if the addressee has not designated or does not use an information system for the purpose of receiving information or documents in an electronic form of the type sent, when the addressee becomes aware of the information or document in the addressee's information system and it is capable of being retrieved and processed by the addressee.

(4) Unless the originator and the addressee agree otherwise, information or a document in an electronic form is deemed to be sent from the originator's place of business and is deemed to be received at the addressee's place of business.

(5) For the purposes of subsection (4):

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction to which the information or document in an electronic form relates or, if there is no underlying transaction, the principal place of business of the originator or the addressee; and
(b) if the originator or the addressee does not have a place of business, the references to "place of business" in subsection (4) are to be read as references to "habitual residence".

20

Electronic Signatures

The signature, which for hundreds of years has symbolized acceptance of a binding contractual obligation (and before the signature, the seal accomplished the same thing), has proven to be one of the most difficult aspects of traditional commercial relations to replicate in cyberspace. In real space, contracting parties can meet face-to-face to sign a contract. A person's signature is distinctive and can be used to hold them to their bargain. In cyberspace, however, there are no face-to-face meetings, and electronic communication is susceptible to interception and alteration. This presents a significant concern for lawyers, who fear that contractual reliability and enforceability may be compromised.

The commonly accepted solution to this problem is the electronic signature. For example, with the establishment of a full-scale digital signature programme, each person would create their own distinctive digital signature (comprised of a cryptographic key) which would be legally binding and provide contracting parties with the assurance that each person is who they claim to be.

The use of digital signatures extends beyond just signing documents, since they can be designed to verify other information, such as age, residence or credentials, as well as to provide assurances that electronic communications have not been altered while in transit. With a fully developed certificate programme, known as a public key infrastructure, digital certificates could even serve a critical role in limiting pornographic material to adults, providing greater certainty to jurisdictional questions, and enabling the public Internet to match the security of private communications systems.

Notwithstanding the great potential of certificates and signatures, several important legal questions remain. Should certificate issuers be subject to government regulation? Who is liable if a certificate is relied upon that proves to be false? Will users need multiple certificates (one for their health information, another for a professional association, another for their tax returns, etc.), or will a single certificate