Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements

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SCOPE OF THE BROWSE-WRAP PROJECT

This project is a product of the Joint Working Group on Electronic Contracting Practices, within the Electronic Commerce Subcommittee of the Cyberspace Law Committee and also within the Uniform Commercial Code Committee of the Business Law Section of the American Bar Association (ABA).

The Working Group began a two-part project on the validity of the assent process in electronic form agreements in 1998, when standard-form agreements were becoming increasingly common on the Internet. The first half of this project focused on click-through agreements (also called click-wrap agreements) to which the user assents to contractual terms by clicking a button that reads "I agree" or "yes" or by manifesting some other means of express assent. An article describing this project, and recommending fifteen strategies to assist transactional lawyers in ensuring that the assent process in their client's click-through agreement would be valid, was published in the November 2001 issue of *The Business Lawyer*.[1] This Article is the result of the second part of the project, in which the Working Group turned its attention to browse-wrap agreements (also known as click-free agreements).

An early use of the term "browse-wrap" appeared in *Pollstar v. Gigmania Ltd.*[2] to describe a Web site agreement to which the user assents by visiting the Web

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1. Christina L. Kunz, Maureen F. Del Duca, Heather Thayer, & Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (2001).

2. 170 F. Supp. 2d 974 (E.D. Cal. 2000).

site.[3] The subsequent use of this term has been imprecise and has conveyed different meanings, including an agreement that covers a user's browsing of a Web site or an agreement for a transaction in which the user can browse the terms but does not have to assent by express means. This Article uses the term "browse-wrap" to mean terms and conditions, posted on a Web site or accessible on the screen to the user of a CD-ROM, that do not require the user to expressly manifest assent, such as by clicking "yes" or "I agree." These terms can cover a particular transaction (license, sale, services, etc.) or merely the use of a Web site or a CD-ROM. They typically claim that the user assents to the terms by taking a specified action, such as using the Web site or installing the software. Often, the terms and conditions begin with such phrases as "use of the site constitutes acceptance of the terms" or "downloading or using the software manifests your assent to these license terms."[4]

Although the proper use of a click-through agreement can provide a more reliable process for establishing assent, online businesses often use browse-wrap agreements, possibly because of Web-page-layout considerations or perhaps because they are perceived as less intrusive to the user's access to the content. During the summer of 2002, a member of the Working Group had students in a seminar class conduct a very informal survey of twenty-five consumer-oriented Web sites. Virtually all of the Web sites contained terms and conditions, but none of the sites required the user to expressly assent to those terms (by clicking "I Agree" or the equivalent) before the user could use the Web site.[5] This result is consistent with the results of a published survey, which notes: "We have yet to visit any Web site aimed at the general public that required a viewer to expressly assent to the terms of use policy before proceeding."[6] The pervasiveness of the browse-wrap format has led the Working Group to surmise that companies believe either that a browse-wrap format results in a binding contract (possibly because they see others using a similar format) or that the benefits of using browse-wrap agreements outweigh the risks of their uncertain validity.[7]

Any term might become the subject of a disagreement between the vendor and the user, but the terms most commonly providing the impetus to challenge the

3. The *Pollstar* court made this statement in comparing a browse-wrap agreement to an agreement which appears on the screen and requires acceptance as a condition to proceed. *Pollstar*, 170 F. Supp. 2d at 981.

4. A published survey confirms this observation. "Of those websites that did have terms of use, the following items were almost universally included: —an introductory paragraph that basically said that using the web site subjected the user to the terms of use. . . ." William A. Hancock, *Web Site Terms of Use*, 19-1 CORP. COUNS. Q. 36, 38–40, 49 (2003).

5. Anita G. Ramasastry, *Survey of Website Contracting Practices* (Aug. 2002) (on file with *The Business Lawyer*).

6. William A. Hancock, *supra* note 4, at 38.

7. This Article is limited to fact situations in which a contract is needed either to bind the user to a particular term (e.g., an exclusive forum provision) or to establish the scope of authorized use of the Web site (e.g., prohibitions against linking to the site, or against using information for commercial purposes). Provisions that perform purely a notice function, such as advising the user as to the copyright protection accorded the text on the Web site or software, do not necessarily depend on the existence of a contract to be binding and are not addressed in this Article.

validity of electronic standard form agreements are dispute resolution clauses,[8] forum selection clauses,[9] disclaimers of warranty,[10] limitations of liability,[11] and prohibitions on the commercial use of the data or software available on the site.[12]

This Article examines the rules of law governing implied assent, arguments for and against valid implied assent in the context of browse-wrap agreements, principles of contract law addressing implied assent in the "paper world," and the application of these principles to the electronic contract setting.[13] Based on the precedents discussed in this Article, as well as policy arguments, the authors posit that a user validly and reliably assents to the terms of a browse-wrap agreement if the following four elements are satisfied:

(i) The user is provided with adequate notice of the existence of the proposed terms.
(ii) The user has a meaningful opportunity to review the terms.
(iii) The user is provided with adequate notice that taking a specified action manifests assent to the terms.
(iv) The user takes the action specified in the latter notice.

As we discuss in the next section, some courts have enforced browse-wrap or other contracts for which assent was implied by conduct, without going through an analysis of each of these factors. In addition, a valid contract is not formed unless all of the elements of contract formation (in addition to mutual assent) are

8. Comb v. PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002); Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. 2002); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); *In re* RealNetworks, Inc., No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000); Licitra v. Gateway, Inc., 734 N.Y.S.2d 389 (Civ. Ct. 2001); Lieschke v. RealNetworks, Inc., Nos. 99 C 7274, 99 C 7380, 2000 WL 198424 (N.D. Ill. Feb. 11, 2000); Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002) [hereinafter "Specht II"]; Westendorf v. Gateway 2000, Inc., No. 16913, 2000 WL 307369, 41 U.C.C. Rep. Serv. 2d (West) 1110 (Del. Ch. Mar. 16, 2000).

9. Am. Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc., 106 F. Supp. 2d 895 (N.D. Texas 2000); Am. Online, Inc. v. Superior Court (*In re* Mendoza), 108 Cal. Rptr. 2d 699 (Ct. App. 2001); Barnett v. Network Solutions, 38 S.W.3d 200 (Tex. Ct. App. 2001); Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. 2002); *In re* RealNetworks, Inc., No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d. 125 (D. Mass 2000); Rudder v. Microsoft Corp., No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt 3195 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999); Net2Phone v. Superior Court of Los Angeles County, 135 Cal. Rptr. 2d 149 (Ct. App. 2003).

10. Scott v. Bell Atlantic Corp., 726 N.Y.S.2d 60 (App. Div. 2001).

11. *See, e.g.*, I. Lan Systems, Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519 (W.D. Pa. 2000) (upholding limitation of remedies).

12. Ticketmaster Corp. v. Tickets.com, Inc., 54 U.S.P.Q. 2d 1344 (C.D. Cal. Mar. 27, 2000); Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000); American Airlines v. Farechase, Inc., No. 067-194022-02, (Tarrant County Ct., Tex., Mar. 8, 2003), *available at* http:// www.eff.org/Cases/AA_v_Farechase/20030310_prelim_inj.pdf.

13. The Working Group presented its findings at the Spring Meeting of the Business Law Section in Los Angeles on April 4, 2003. Anandashankar Mazumdar, *ABA Group Participants Formulating Guidelines for Browsewrap Contract Terms*, Electronic Com. & L. Rep. (BNA) 387 (April 16, 2003), *available at* http://ippubs.bna.com/ip/BNA/EIP.NSF/c7762649479f833085256b57005afd29/ba6066afa. That presentation, together with background research by members of the Working Group and feedback from the presentation, formed the basis for this Article.

established, such as the adequacy of consideration and lack of unconscionability.[14] Of course, some agreements may be unenforceable if they violate laws on unfair and deceptive trade practices.[15]

A proposed modification of an existing agreement by a browse-wrap mechanism can pose similar issues of inadequate notice of the existence of the proposed new terms, lack of opportunity to review the proposed new terms, inadequate notice that taking a specified action manifests assent to the proposed modification, and the user not taking the action specified in the latter notice. The Working Group is currently examining the validity of practices used to modify standard terms that are posted on Web sites or included on CD-ROMs. These modification practices and their validity are not the focus of this Article.

CASE LAW ON BROWSE-WRAP AGREEMENTS

At this point in the evolution of browse-wrap agreements, only four cases—producing seven reported decisions—address the validity of the assent in browse-wrap settings.[16] Because these cases present split outcomes, distinguishable facts,

14. Unconscionability rules vary in subtle but important ways across jurisdictions. In California, for instance, unconscionability must be both procedural and substantive, but "the more significant one is, the less significant the other need be." California's threshold for procedural unconscionability is met if "[a] contract or clause . . . is a contract of adhesion[:] . . . a 'standardized contact, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (quoting Armendariz v. Foundation Health Psychcare Servs., 99 Cal. Rptr. 2d 745, 767 (2000); *see also* Ting v. AT&T, 319 F.3d 1126, 1148–49 (9th Cir. 2003) (using the same California rules).

In New York, an egregious clause could satisfy the unconscionability test on the basis of the substantive element alone. Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (App. Div. 1998). The procedural aspect exists if "one party lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high-pressured tactics' and any disparity in the parties' bargaining power." *Id.* at 573 (quoting Gillman v. Chase Manhattan Bank, 534 N.E.2d 824 (1988)). The substantive aspect exists if the terms unreasonably favor one party. *Id.* at 574. Contrary to the California rule, the *Brower* court refused to declare a clause as procedurally unconscionable just because it was a contract of adhesion between parties of unequal bargaining power; the court reasoned that the consumer could have instead made a contract with one of the seller's competitors. *Id.* at 571–72.

In Washington and Illinois, substantive unconscionability and procedural unconscionability are separate defenses and need not both be proven. *See, e.g.*, M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 314–16 (Wash. 2000); *In re* RealNetworks, Inc., No. 00C1366, 2000 WL 631341, at *5–*7.

15. *See, e.g., CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*, 6 Electronic Com. & L. Rep. (BNA) 562 (May 30, 2001) (discussing settlement with the New York attorney general on a click-through agreement with three to four layers of hyperlinks to the terms); *In re* Juno Online Servs., Inc., 2002 Internet L. Rep. (P&F) 1601 (N.Y. Att'y Gen. May 7, 2002) (assurance of discontinuance) (holding vendor's attempt to make material changes in its subscriber privacy policy in a non-conspicuous and contradictory manner was a deceptive business practice). *But see* Moore v. Microsoft, 741 N.Y.S.2d 91 (App. Div. 2002) (holding click-through agreement not a deceptive trade practice); Scott v. Bell Atlantic Corp., 726 N.Y.S.2d 60 (App. Div. 2001) (holding click-through agreement not false or deceptive conduct, a breach of warranty, or a breach of contract in spite of enthusiastic Web site advertising that was at odds with the disclaimers in the accompanying agreement).

16. *See infra* notes 19–56 and accompanying text. It is not clear whether there is an eighth decision, namely, the temporary injunction order issued in *American Airlines, Inc. v Farechase, Inc.*, No. 067-

and not much in the way of recommendations or safe harbors, they neither resolve the assent issue nor provide much guidance about how to ensure the validity of a browse-wrap agreement. Moreover, the equities of a particular situation may drive the results. To date, the cases favoring enforcement of the browse-wrap agreement have mainly involved methodical "screen scraping" of Web site data by competitors, in violation of posted terms and conditions.[17] By contrast, the two decisions squarely rejecting a browse-wrap agreement involved a situation where individual users downloaded software.[18]

The case that is credited with coining the term "browse-wrap" is *Pollstar v. Gigmania Ltd.*[19] In that case, Pollstar claimed that Gigmania breached Pollstar's posted license agreement by copying concert and ticket information from Pollstar's Web site. Gigmania moved to dismiss based on a lack of mutual assent with regard to Pollstar's browse-wrap agreement.[20] The court cited several factors in how the browse-wrap terms were presented as militating against enforcement of the license agreement, namely, that the agreement was not on Pollstar's home page, but on a different page linked to the home page, Pollstar's notice that "use [of the Web site] is subject to license agreement" appeared "in small gray print on a gray background on the home page," and the notice was not underlined in accordance with common Internet practice to show an active link.[21] The court also noted that the home page contained other small blue text which did not link to another page, which might have led users to mistakenly conclude that colored small text elsewhere on the Web site did not have hyperlink capabilities.[22]

194022-02, slip op. at 1 (Tarrant County Dist. Ct., Tex Mar. 8, 2003), *available at* http://www.eff.org/Cases/AA_v_Farechase/20030310_prelim_inj.pdf. Although the court did find that Farechase's screen-scraping activity violated American Airlines' terms posted on its Web site, it is not clear whether the finding was based upon a contract theory (Farechase's implied assent to American's Web site terms) or upon a 'trespass to chattels" theory (Farechase having exceeded its authority to access the American Airlines Web site). The case subsequently settled. *American Airlines, Farechase Settle Suit*, DALLAS BUS. J., June 13, 2003, *available at* http://dallas.bizjournals.com/dallas/stories/2003/06/09/daily55.html. *See also* Canadian Real Estate Ass'n v. Sutton (Quebec) Real Estate Servs., Inc., [2003] QCCS 500-05-074815-026, *available at* http://www.canlii.org/qc/jug/qccs/2003/2003qccs11838.html (granting interlocutory injunction against real estate association "scraping" real estate listings from plaintiff's website, in part due to Web site terms and conditions prohibiting the practice). As this Article went to press, the First Circuit handed down *Waters v. Earthlink, Inc.*, No. 02-1385 (1st Cir. Oct. 31, 2003) (affirming the district court's refusal to recognize any binding agreement to arbitrate in a browse-wrap setting, because the hyperlinks to the arbitration agreement did not provide plaintiff with notice of the existence of the terms or with an opportunity to review those terms).

17. Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000); Ticketmaster Corp. v. Tickets.com, Inc., 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000) [hereinafter "Ticketmaster I"] (holding motion to dismiss denied in part and granted in part); Ticketmaster Corp. v. Tickets.com, Inc., No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), *aff'd*, 2 Fed Appx. 741 (9th Cir. 2001) [hereinafter "Ticketmaster II"]; Ticketmaster Corp. v. Tickets.com, Inc., No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003) [hereinafter "Ticketmaster III"] (motion for summary judgment denied); *see also* American Airlines, Inc. v. Farechase, Inc., No. 067-194022-02, slip op. at 1 (Tex. Dist. Ct. Mar. 8, 2003).

18. Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002) [hereinafter "Specht I"].

19. 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

20. *Id.* at 976.

21. *Id.* at 977, 981.

22. *Id.* at 981. Pollstar's current Web site appears to be similar to the one described in the *Pollstar*

The court agreed with Gigmania's contention that many users of the site might not have been aware of the license agreement. The *Pollstar* court stopped short of declaring the browse-wrap format unenforceable, however, even in such an obscure presentation, recognizing that there are many situations where people enter into contracts by using a service or product without first seeing the terms. The court cited as examples insurance contracts, in which the buyer pays the premium before the written policy is issued, and the purchase of airline or concert tickets before receipt of the ticket containing the terms.[23] Accordingly, the court refused to grant Gigmania's motion to dismiss the suit on the ground of breach of contract, as well as on other unrelated grounds.[24]

In *Register.com, Inc. v. Verio, Inc.*,[25] Verio, an Internet domain name registrar, sent search robots on a daily basis to comb the database of its competitor, Register.com, to obtain information about Register.com's new customers, so that Verio could solicit those customers to use Verio's Web hosting services. The following terms of use were posted on Register.com's web site, although it is not clear in the opinion whether they appeared on the query screen or only on the next screen containing the search query results:[26]

> By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that, under no circumstances will you use this data to: (1) allow, enable, or otherwise support the transmission of mass unsolicited, commercial advertising or solicitations via direct mail, electronic mail, or by

decision. As of October 8, 2003, the home page of www.pollstar.com began with an initial set of buttons, a one-line advertisement, and a "Concert Search" window. The next item was the following line of text in small gray print: "Use Subject to License Agreement." This line was a hyperlink to the 11-page License Agreement, but it was not a different color, nor was it underlined, nor did it change when under the cursor. Directly underneath was a list of news items about rock bands and their tours. In this list, the hyperlinks were all in dark blue print, while the unlinked text was in gray or black. Some of the hyperlinks changed from dark blue to gray when under the cursor. At the bottom of the screen, after the news items, was the following text in small print: "Use of information on this Web site is subject to License Agreement." The entire sentence was in black, except that the last two words were in dark blue, changing to gray when under the cursor, and were a hyperlink to the License Agreement. These font colors were consistent with the linking capacity of the text in the news items above.

23. *Pollstar*, 170 F. Supp. 2d at 981 (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451–52 (7th Cir. 1996)). The *ProCD* decision discussed these examples as well as the purchase of a radio where the warranty terms are contained in the sealed box, the purchase of drugs where the package insert contains the warnings, and the purchase of software subject to license terms contained in the package. *ProCD*, 86 F.3d at 1451–52.

24. *Pollstar*, 170 F. Supp. 2d at 982.

25. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

26. The authors surmise that Register.com's terms of use were not presented before the search query was submitted but were presented along with the search results because Register.com's current Web site displays the terms at the top of the screen containing the search results, not on the screen where the user submits a query. Moreover, the current wording of the terms of use is identical to the wording of the terms in the case. If the terms of use involved in the case were presented as they currently appear on the Register.com Web site, then the court's ruling that the user was bound by the presented terms might have been based in part on the fact that the particular terms that were violated were hard to miss but also in part on the policy of not letting a competitor engage in screen-scraping. The opinion also states that the terms were "published" on the home page, but it is not clear whether the home page actually contained the terms or just a hyperlink to the terms (and the opinion gives no details about the wording of any hyperlink). *Id.* at 245.

> telephone; or (2) enable high volume, automated, electronic processes that apply to Register.com (or its systems). The compilation, repackaging, dissemination or other use of this data is expressly prohibited without the prior written consent of Register.com. Register.com reserves the right to modify these terms at any time. By submitting this query, you agree to abide by these terms.[27]

The court issued a preliminary injunction against Verio, based on various theories, including breach of contract. As to the contract claim, Verio argued that even if Register.com's terms of use were enforceable, Verio had never manifested assent to those terms. The court, however, disagreed. It noted that Verio had not argued that it was unaware of the terms of use and that the terms of use concluded with this sentence: "By submitting this query, you agree to abide by these terms."[28] The court concluded that, by submitting a WHOIS query, Verio manifested its assent to Register.com's terms of use.[29]

The long-running dispute between Ticketmaster Corp. and Tickets.com, Inc.[30] has yielded three decisions addressing the enforceability of the browse-wrap agreement on Ticketmaster's Web site. To date the court has refused to issue a preliminary injunction *enforcing* the browse-wrap agreement,[31] but has also refused to *dismiss* the breach of contract claim based on alleged violations of the browse-wrap agreement.[32]

Ticketmaster operated a Web site where users may purchase tickets to concerts, sporting events, and other events, often on an exclusive basis.[33] Tickets.com operated a similar Web site.[34] Although Tickets.com sold tickets to certain events on its own, it also provided information as to where and how tickets it did not sell could be purchased. Where the ticket seller for such events was Ticketmaster, the Tickets.com Web site contained a hyperlink that transferred the customer to the interior Web page of the Ticketmaster site (bypassing Ticketmaster's home page) for the particular event in question.[35] This practice, known as "deep-linking," as well as copying Ticketmaster's event information for commercial use, was expressly forbidden by Ticketmaster's terms for its Web site.[36]

The upper portion of Ticketmaster's home page contained many instructions and hyperlinks to various event pages. If the user scrolled to the bottom of the

27. *Id.* at 242–43 (alteration in original).
28. *Id.* at 248.
29. *Id.*
30. *Ticketmaster I*, 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000) (ruling on Ticket.com's motion to dismiss); *Ticketmaster II*, No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug 10, 2000), *aff'd*, 2 Fed. Appx. 741 (ruling on Ticketmaster's motion for preliminary injunction) (9th Cir. Jan. 22, 2001); *Ticketmaster III*, No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003) (ruling on Ticket.com's motion for summary judgment).
31. *Ticketmaster II*, No. 99CV7654, 2000 WL 1887522.
32. *Ticketmaster I*, 54 U.S.P.Q. 2d at 1344–45 (motion to dismiss denied in part and granted in part); *Ticketmaster III*, 2003 WL 21406289, at *1 (motion for summary judgment denied).
33. *Ticketmaster III*, 2003 WL 21406289, at *1.
34. *Id.*
35. *Ticketmaster I*, 54 U.S.P.Q 2d at 1345.
36. *Id.* at 1346.

home page, a hyperlink to the terms of use appeared, accompanied by a legend stating that proceeding beyond the home page accepts the conditions of use.[37] The user was not required to click on an "I agree" button or give any other manifestation of assent, or to view the terms to proceed straight to an interior page.[38]

Ticketmaster alleged several causes of action against Tickets.com, including breach of contract based on the terms and conditions.[39] Tickets.com succeeded in getting the contract claim dismissed on the basis that there was no evidence that Tickets.com was aware of the terms or that there was any implied agreement to them. In so doing, the court distinguished Ticketmaster's Web site from the classic "shrink-wrap" agreement printed on the outside of a software package, because such terms generally are "open and obvious and in fact hard to miss."[40]

Subsequently, Ticketmaster amended its complaint and was unsuccessful in obtaining a preliminary injunction against Tickets.com on its claims, including the contract claim.[41] In *Ticketmaster II*, the court noted that, at that point in the proceedings, the "contract theory lacks sufficient proof of agreement by defendant to be taken seriously as a ground for preliminary injunction,"[42] but granted the injunction on other grounds.

Yet, however skeptical the court has been of the contract claim, it has refused to dismiss it. In *Ticketmaster III*, Tickets.com argued it was entitled to summary judgment because there was no clear evidence that it had assented to the terms and conditions.[43] The court, while declaring its preference for a rule that required "an unmistakable assent to the conditions," recognized that the law has not developed this way.[44] It further observed that no particular form of words is necessary to indicate assent to an offer and that an offeror may specify that taking a certain action is deemed acceptance, which ripens into a contract when the action is taken. The court mentioned, as examples of contract terms accepted by conduct, limitations of liability contained on the back of cruise ship tickets and parking lot tickets, claim checks, and shrink-wrap licenses.[45]

By the time of the *Ticketmaster III* decision, Ticketmaster had revamped its home page.[46] The link and the legend were now posted at the top of the home page.

37. Since the decision in *Ticketmaster I* in 2000, Ticketmaster has moved the notice to a more prominent place on its home page. See *Ticketmaster III*, 2003 WL 21406289, at *2; see *infra* note 46 for a description of Ticketmaster's current website.

38. *Id.* at *1–*2.

39. *Ticketmaster I*, 54 U.S.P.Q. 2d at 1346.

40. *Id.*

41. *Ticketmaster II*, 2000 WL 1887522, at *1, *5.

42. *Id.* at *5.

43. *Ticketmaster III*, 2003 WL 21406289, at *2.

44. *Id.*

45. *Id.*

46. As of October 8, 2003, the Web site at www.ticketmaster.com posted the following line of text at the top of every page, even ahead of the caption at the top of the page: "Use of this site is subject to express terms of use, which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms." Although the underlined words appeared to be the hyperlink in this line of text, in reality, the entire line of text had hyperlink capability, so that clicking anywhere on the line linked the user to the Terms of Use. The third sentence of the Terms of Use said, "By using or

The court, addressing Ticketmaster's new format, found that the Web site now provided adequate notice of the existence of the terms of use. The court distinguished the decision in *Specht v. Netscape Communications Corp.*,[47] discussed below, because in that case, the plaintiff's license terms were not plainly visible or known to the defendants and so were not binding on the user who downloaded software without any notice or knowledge of the terms.[48]

In *Specht v. Netscape Communications Corp.*,[49] Netscape attempted to enforce an arbitration clause contained in a software license that was available on Netscape's Web site. The link to the license could be viewed only if the user scrolled down below the button that activated the program and below the instructions for downloading.[50] In a class action brought on behalf of users who had downloaded software from the Web site, the plaintiffs asserted that the license was not binding because notice of the terms was not adequate, and because users were not required to manifest assent to the terms before downloading the software.

Both the district court and the U.S. Court of Appeals for the Second Circuit agreed with the plaintiffs, holding that the license agreement was not enforceable because the users could—and actually were encouraged to—download the software before manifesting assent to any license terms, before being given a reasonable opportunity to view any terms, and before even receiving notice of the existence of any terms.[51] Importantly, the Second Circuit also held that, due to the design of Netscape's Web site, a reasonably prudent Web site user "would not have known or learned" of the existence of the SmartDownload license terms.[52]

Both *Specht* courts considered the applicability of the *Register.com* and *Pollstar* decisions. The district court opined, in dictum, that the user in *Register.com* had assented to the terms of use,[53] then distinguished the facts and applicable state law in *Register.com*, and analogized the *Specht* facts to those in the *Pollstar* decision, where no affirmative act was required to indicate assent.[54] The Second Circuit also distinguished the *Register.com* decision on the grounds that Register.com's terms of use were well known to Verio, who took information from Register.com's

visiting the Site, you expressly agree to be bound by these Terms and to follow these Terms and all applicable laws and regulations governing the Site." *At* http://www.ticketmaster.com/h/terms.html.

47. 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

48. *Ticketmaster III*, 2003 WL 21406289, at *2.

49. *Specht I*, 150 F. Supp. 2d at 587.

50. *Id.* at 588. Even then, the district court criticized the language of the link as merely an invitation to view the license terms, as it read: "Please review and agree to the terms of the *Netscape SmartDownload license agreement* before downloading and using the software." *Id.* (alteration in original).

51. *Specht II*, 306 F.3d at 30–31; *Specht I*, 150 F. Supp. 2d at 595–96.

52. *Specht II*, 306 F.3d at 35. The Second Circuit, in affirming the decision, rejected Netscape's contention that a reasonably prudent person would have noticed the link to the terms because the "scroll bar" was not fully down at the point on the page where the "download button" appeared. It stated, "[T]here is no reason to believe the viewers will scroll down to subsequent screens simply because the screens are there." *Id.* at 32.

53. *Specht I*, 150 F. Supp. 2d at 594 n.13 (if the final words, "this case," refer to *Register.com*, not *Specht*).

54. *Specht I*, 150 F. Supp. 2d at 594–95.

Web site daily with full awareness that it was using the information in a manner that violated the plaintiff's terms of use.[55]

Taken together, the decisions specifically addressing browse-wrap agreements do not provide a clear answer to the question of the validity of users' assent to the proposed terms. Four decisions (both *Specht* decisions, *Ticketmaster I* and *Ticketmaster II*) rule in the negative, two decisions (*Ticketmaster III* and *Verio*) rule in the affirmative, and one decision (*Pollstar*) leaves the question open with some qualms about adequacy of notice of the terms. Commentators also disagree as to the validity of assent in a browse-wrap format.[56] The shortfall in the browse-wrap case law and the lack of consensus among scholars has left attorneys in a quandary as to how to advise clients who want to rely upon—or already are relying upon—browse-wrap agreements to contractually bind the users of their Web sites or software, or clients who need to know whether they are bound by the terms of a Web site they may have viewed.

ELECTRONIC AND PAPER CONTRACTING: SIMILARITIES AND DIFFERENCES

Because there are very few cases dealing directly with browse-wrap agreements, this Article also draws on analogies from click-through agreements and the paper

55. *Specht II*, 306 F.3d at 33 n.16. The Web site allowing a user to download the software for Netscape 7.1 has apparently been modified, presumably in response to the *Specht* holdings at the trial court and appellate levels. As of October 8, 2003, at http://channels.netscape.com/ns/browsers/default.jsp, the user can choose between downloading online or ordering a CD. If the user chooses the "Download," the next screen gives the user choices of downloading Netscape alone, downloading Netscape and McAfee VirusScan together, or ordering Netscape on CD. Either of the "download" choices results in pop-up window containing a scrollable version of a License Agreement followed by buttons reading "Back," "Accept," and "Decline." The license agreement begins with the following text in capital letters:

> By clicking the 'Accept' button or installing or using the Netscape 7.1 software, you are consenting to be bound by and become a party to this agreement, as the 'licensee.' If you do not agree to the terms and conditions of this agreement, you must not click the 'Accept' button, you must not install or use the Netscape 7.1 software or any accompanying software included with this product installation, and you do not become a licensee under this agreement.

Netscape Communications Corp., *Netscape 7.1 End-user License Agreement*, *at* http://channels.netscape.com/ns/browsers/download.jsp. Interestingly, the Netscape license agreement cannot be printed out in advance of the user's assent, possibly violating the requirements of the Uniform Electronic Transactions Act (UETA), § 8(c) (1999).

56. *Compare* Drew Block, News, *Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction With Websites*, 14 LOY. CONSUMER L. REV. 227, 228 (2002) ("Browse-wrap agreements are of questionable enforceability . . . because of their lack of one of the traditional elements of a contract, namely mutual assent between the contracting parties"), *and* Jennifer Femminella, Note, *Online Terms and Conditions Agreements: Bound By the Web*, 17 ST. JOHN'S J. LEGAL COMMENT. 87, 91 (2003)("[I]t is clear that [browse-wrap] agreements should be held invalid and unenforceable"), *with* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 493 (2002) ("Courts, therefore, should be willing to consider enforcing browsewrap"), *and* Dan Streeter, Comment, *Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363, 1389 (2002) ("[B]rowse-wrap, when done properly, is no different than any other sort of mass market license, or any contract for that matter. If users are given proper notice that they are entering into a license, and if the terms are available for review, the license should be enforced").

contracting world. Throughout the click-through (express assent) and the browse-wrap (implied assent) phases of this project, the Working Group has assumed that the legal rules applicable to paper and electronic contract formation should be the same, except where the electronic medium presents a unique basis for distinction. This assumption is also the underlying basis of the Uniform Electronic Transactions Act (UETA)[57] and the federal Electronic Signatures in Global and National Commerce Act (E-Sign).[58] These laws seek to provide a level playing field for contracts, so that litigants need not battle over which medium's rules of law govern the transaction.

There is also no dispute that the basic elements of contract formation apply to standard-form electronic contracts as well.[59] Accordingly, cases and statutes addressing non-electronic contracts provide valuable insight for determining when and if a user has given valid assent to a browse-wrap agreement. To support the proposed test, this Article draws on the Uniform Commercial Code (U.C.C.), UETA, E-Sign, the Uniform Computer Information Transactions Act (UCITA),[60] the *Restatement (Second) of Contracts*,[61] Magnuson-Moss Warranty Act,[62] cases on shrink-wrap licenses and other "terms in the box," rules governing acceptance by silence and acceptance by conduct, and the doctrine of incorporation by reference.

Standard-form paper agreements are widely used in society—in renting or buying a car, opening a checking account, accepting a contractor's bid, or checking a bag—because standard-form contracting has advantages, even for consumers. This practice lowers costs by allowing all transactions of the same type to be processed in the same way.[63] Few resources are allocated to the bargaining process, and businesses theoretically save on litigation expenses as well, because many terms in standard form agreements have been tested in the courts. Competition between businesses may result in more favorable terms for consumers (although it is more likely that the major industry players will all offer similar terms). If, however, businesses are unfairly disadvantaging consumers with standard terms,

57. 7A pt. 1 U.L.A. 211 (1999).
58. 15 U.S.C. §§ 7001–7031 (2000 & Supp. 2003).
59. *Specht II*, 306 F.3d at 32 (common law of contracts applies to browse-wrap agreement).
60. 7 pt. 2 U.L.A. 196 (2002).
61. RESTATEMENT (SECOND) OF CONTRACTS (1981).
62. 15 U.S.C. §§ 2301–2312 (2000 & Supp. 2003).
63. As the Seventh Circuit stated in *ProCD, Inc. v. Zeidenberg*, citing *Farnsworth on Contracts*, "Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions." *ProCD*, 86 F.3d at 1451 (citing 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (1990) and quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981)). Likewise, as a commentator noted, "In the mass market/consumer context, the shrink-wrap license provides an efficient way for the software vendor to dictate the terms of each sale. . . . In the mass market setting . . . the negotiation of terms for each sale is clearly impractical." Robert J. Morrill, *Contract Formation and the Shrink Wrap License: A Case Comment on ProCD, Inc. v. Zeidenberg*, 32 NEW ENG. L. REV. 513, 516 (1998) (citation omitted). *See generally* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

the contract may be held to be unconscionable, in violation of consumer protection laws, or in violation of laws regarding unfair or deceptive trade practices.[64]

There are many similarities between standard form electronic and standard form paper contracts. In both, businesses draft terms favorable to business, buyers usually agree without reading the terms, the contracts are full of legalese, and buyers have no bargaining power.[65] To the extent that these are problems common to both electronic and paper agreements, contract law should apply the same rules. In fact, applying a different set of rules to agreements, depending on their medium, would tend to increase the number of contract disputes by decreasing the certainty of the parties' agreed-to rights and obligations.[66]

The most significant difference between Internet and paper contracting is that, in the paper world, there often is a human intermediary, typically a salesperson. Although this intermediary can answer questions about the products and services, however, he or she generally has limited knowledge about the contractual terms, no authority to negotiate them, and may exert pressure on the other party not to read the contract.[67] Another difference is the time pressure that exists in the paper world context, such as that generated by the presence of other customers waiting for service, which may discourage reading of a standard contract. Time pressure can also exist on the Internet, however, when a user purchasing event tickets online has a limited amount of time in which to read the terms and to assent, after which time the tickets become unavailable.

By contrast, in an electronic setting, a Web site can be designed to provide a customer with detailed information about the contractual terms through the use of Frequently Asked Questions (FAQ) pages or by providing a method of contacting the Web site provider with questions.[68] Time pressures are obviated when an Internet user can shop in the privacy of the user's own home, with the benefit of time, thought, and the opportunity to comparison shop, compare standard terms, and even return to a proposed transaction later. Moreover, an on-line shopper need not wait for the conclusion of the transaction to see the contractual terms when they are accessible by way of a link on the home page.[69] As a result, in some respects, the Internet can be a more hospitable environment for contracting from a buyer's standpoint.

64. *See generally* Hillman & Rachlinski, *supra* note 63, at 434–63.

65. Hillman & Rachlinski, *supra* note 63, at 432–34. The law does not require that each party have an opportunity to negotiate the terms of the proposed contract. Consideration for a "bargained-for exchange" exists even if the terms are furnished on a "take it or leave it" basis. *See infra* note 108.

66. *See* Shattuck v. Klotzbach, No. 01-1109A, 2001 Mass. Super. LEXIS 642 (Sup. Ct. Dec. 11, 2001) (applying common law contract analysis and implicitly holding valid a contract for the sale of a house based upon an exchange of e-mails between the parties).

67. In *Licitra v. Gateway, Inc.*, the court pointed out the illusory nature of negotiating standard form contracts by rhetorically asking, "With whom would the customer negotiate, the faceless sales staff or the legal department?" 734 N.Y.S.2d 389, 393 (Civ. Ct. 2001).

68. For example, the amazon.com website has both an elaborate "Help Department" and "Contact Us" instructions accessible from the home page, *available at* http://www.amazon.com/exec/obdos/subst/home/home.html/002-4760396-2913605 (last visited Oct. 15, 2003).

69. In Prof. Ramasastry's 2002 survey, the home page of most Web sites contained a hyperlink to the terms governing the contents of the Web site. Ramasastry, *supra* note 5.

Commercial law should remain flexible, accommodating changing business practices that do not violate basic principles of fairness and good faith.[70] Standard terms assented to by means of a browse-wrap format serve important commercial purposes and are widely used, despite the more certain validity of click-through agreements. Contracts can be formed by a wide range of actions. The important question is under what circumstances do these actions reliably manifest assent to contractual terms?

The Proposed Test

As stated earlier in this Article,[71] the authors posit that a user validly and reliably assents to a browse-wrap agreement if the following four elements are satisfied:

(i) The user is provided with adequate notice of the existence of the proposed terms.
(ii) The user has a meaningful opportunity to review the terms.
(iii) The user is provided with adequate notice that taking a specified action (which may be use of the Web site) manifests assent to the terms.
(iv) The user takes the action specified in the latter notice.

The following discussion addresses each element of this test.

Adequate Notice of the Existence of the Terms

It is crucial that browse-wrap agreements on Web sites and CD-ROMs be set up so that a typical user in that electronic setting will receive adequate notice of the existence of the proposed browse-wrap terms. What constitutes "adequate notice" of the existence of the terms should be judged both in terms of the physical presentation of the notice and the content of the notice. For example, when the face of a ticket gives no notice to the purchaser that she should read additional terms, a court is likely to rule that the terms were not reasonably communicated to the purchaser and thus not assented to.[72] If a user is unaware that proposed terms of a browse-wrap agreement exist, the user will not have any meaningful opportunity to review the terms, nor will the user know (or have any reason to know) that taking a particular action manifests assent to those terms, so several of the elements of our proposed four-part test will not be met.

Even if the notice is not adequate, however, a user who is actually aware of the existence of the terms by some other means might well be estopped from claiming that the inadequate notice that the terms existed prevented the terms from being binding.

70. U.C.C. § 1-102(2)(b) (2002) (the U.C.C. seeks to promote "the continued expansion of commercial practices through custom, usage, and agreement of the parties"); *see also* I. Lan v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002).

71. See *supra* text accompanying note 13.

72. *See, e.g.*, Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11, 17–18 (2d Cir. 1968) (case set standard for reasonable communication in cruise ship tickets); O'Brien v. Okemo Mountain, Inc., 17 F. Supp. 2d 98, 103 (D. Conn. 1998).

Physical Presentation of the Notice

A faulty physical presentation of terms can result in three possible claims by the user: (i) lack of a contract due to lack of assent to the terms, (ii) deceptive trade practices, and (iii) procedural unconscionability. A handful of cases have addressed procedural unconscionability[73] and deceptive trade practices[74] in the context of electronic contracts, but these grounds of attack are not the focus of this Article. Instead, our focus is on the first ground, i.e., the existence of a contract.

Cases analyzing travel and similar tickets have considered the physical characteristics of the text of the disputed ticket in deciding whether the purchaser assented to the contract terms printed on the ticket. In doing so, courts have considered such characteristics as the size and type of font, the placement of the notice, and the degree of attention paid to terms incorporated by reference.

For example, in *Effron v. Sun Line Cruises, Inc.*,[75] a cruise ship ticket case, the court found that the ticket reasonably communicated the existence of the disputed forum selection clause on the back of the ticket because the warning "IMPORTANT NOTICE—READ BEFORE ACCEPTING" appeared in bold, medium-size lettering on the face of the ticket.[76] On the other hand, a forum selection clause on the back of a ski lift ticket was held not to have been reasonably communicated to the ticket buyer because the front of the lift ticket did not instruct the purchaser to read its back and because the disputed clause appeared on the back of the ticket in "very small typeface with only a single word capitalized."[77] Likewise, in a case involving a baseball ticket, the court refused to give effect to an "express agreement to assume the risk" on the back of the ticket "because the print was so small that it was not legibly reproduced on the photocopy submitted to the trial court."[78]

In *Deiro v. American Airlines*[79] and *Gluckman v. American Airlines*,[80] both involving airline tickets that incorporated other terms by reference, the courts focused on the physical presentation of the notice of incorporated terms to determine whether such terms were enforceable against the purchasers. At issue in each case was whether the notice of the airline's limitation on liability was sufficient to make

73. Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172–73 (C.D. Cal. 2002); *In re* Real Networks, Inc., No. 00 C 1366, 2000 WL 631341, at *5–*6 (N.D. Ill. May 8, 2000); Brower v. Gateway, 676 N.Y.S.2d 569, 573–74 (App. Div. 1998); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 315–16 (Wash. 2000); Kanitz v. Rogers Cable, Inc., No. 01-CV-214404CP, [2002] 21 B.L.R. (3d) 104, 2002 CarlswellOnt 628 (WL) (Ont. Super. Ct. Feb. 22, 2002). *See generally supra* note 14.

74. *See supra* note 15.

75. 67 F.3d 7 (2d Cir. 1995).

76. *Id.* at 9.

77. *O'Brien*, 17 F. Supp. 2d at 103 (ski lift ticket did not reasonably communicate the terms of the purported contract where the front of the ticket contained no instruction at all to read the back of the ticket, and the forum selection clause on the reverse of the ticket appeared in very small typeface with only a single word capitalized).

78. Yates v. Chicago National League Ball Club, Inc., 595 N.E.2d 570, 581 (Ill. App. Ct. 1992) (basing its reasoning on RESTATEMENT (SECOND) OF TORTS § 496B, cmt. c (1965)).

79. 816 F.2d 1360 (9th Cir. 1987).

80. 844 F. Supp. 151 (S.D.N.Y. 1994).

the purchaser aware of the terms. In each case, the court found that the practice of incorporating the terms by reference did provide sufficient notice.[81]

In both cases, the plaintiffs' dogs died as a result of baggage handling that exposed the animals to extreme heat. The plaintiffs brought actions to recover substantial damages from the airlines, claiming they were unaware of the damage limitations imposed by the terms.[82] In addressing the adequacy of the notice, the *Deiro* and *Gluckman* courts found that the notices of incorporated terms and of baggage liability limitations were clear and conspicuous because the limitations were printed on pages attached to the ticket and were set forth in large type.[83]

Decisions involving contracts in situations other than travel tickets also have analyzed the physical characteristics of the presented terms in deciding whether the party who received the terms had agreed to them. In *Boomer v. AT&T Corp.*,[84] the court upheld a customer services agreement, in part because the cover letter transmitting the agreement recited "in bold capital letters" the fact that the agreement contained prices, charges and legal terms and conditions. In *ProCD, Inc. v. Zeidenberg*, the court upheld the shrink wrap license in part because it was referred to on the outside of the box, printed in the manual, and "splashed . . . on the screen," and the user could not proceed without indicating acceptance when the program booted up.[85]

In an electronic setting, the user can be given adequate notice of the existence of the terms by a scroll box revealing a portion of the terms[86] or by a well placed phrase or sentence in a format calculated to be apparent to the typical user of that Web site or CD-ROM. Heeding the warnings in the *Pollstar* decision, we suggest that care be taken to make sure that any linking capability of the phrase or sentence is clear to the reasonable user.[87] Hyperlinks are usually underlined or in different colored text or, as one commentator has recognized, "the nature of the hypertext link itself" indicates that a link exists to another page.[88]

The absence of a well placed phrase was one of the factors that led the *Specht* court to find that the browse-wrap license at issue was unenforceable. In *Specht*, the district court held that the license terms were not binding on the users who downloaded the software, because the users were not required to view any license agreement terms or "even any reference to a license agreement."[89] On appeal, the

81. *Deiro*, 816 F.2d at 1365—66; *Gluckman*, 844 F. Supp. at 162.

82. *Deiro*, 816 F.2d at 1361; *Gluckman*, 844 F. Supp. at 156.

83. *Deiro*, 816 F.2d at 1365; *Gluckman*, 844 F. Supp. at 162.

84. 309 F.3d 404, 414–15 (7th Cir. 2002).

85. 86 F.3d 1447, 1452 (7th Cir. 1996).

86. Forrest v. Verizon Communications, Inc., 805 A.2d 1007, 1010–11 (D.C. 2002) (holding that use of a scroll box that displays only a portion of the whole agreement at any one time is not harmful to the requirement of adequate notice of the forum selection clause).

87. In *Pollstar*, the court was concerned that the notice of the existence of the terms was presented "in small gray print on a gray background" and was not underlined or otherwise set off to show that it was an active link, so that the "user [was] not immediately confronted with the notice of the license agreement." 170 F. Supp. 2d 974, 981–82 (E.D. Cal. 2000).

88. Stephen S. Wu, *Incorporation by Reference and Public Key Infrastructures: Moving the Law Beyond the Paper-Based World*, 38 JURIMETRICS 317, 320 (1998).

89. *Specht I*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001) (emphasis added).

circuit court affirmed, citing the lack of immediately visible license terms as one of the reasons for its holding that the "reasonably prudent offeree" would not necessarily have learned of the existence of Netscape's license terms.[90] The court noted the existence of license terms on "the next scrollable screen," and opined that "there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there."[91] Thus, at least in a consumer contract setting, the terms may not be binding on the user if the user does not receive "immediately visible" notice that terms exist until after the user has availed itself of the software, data, or other items available on a Web site or CD-ROM.[92]

Content of the Notice

The content of the notice of the existence of terms and conditions is as important as the physical presentation factors. In cases involving cruise or other travel tickets, courts are more likely to uphold standard terms printed on the back of a ticket when the face of the ticket contains not only notice that additional terms appear on the reverse side, but also notice that those terms may affect the purchaser's legal rights.[93]

The words used as the hyperlink can furnish the user with adequate notice of the existence of the proposed browse-wrap terms. The district court in *Specht* was critical of the notice provided by Netscape because the notice's content was too ambiguous.[94] Netscape's link to its software license said, "Please review and agree to the terms of the [license agreement] before downloading and using the software."[95] The district court characterized this language as a "mild request" and "a mere invitation, not . . . a condition" and therefore not adequate notice of a binding contract.[96]

Accordingly, clear language in a hyperlink that the terms constitute a proposed agreement is more likely to result in a binding contract. For example, a hyperlink that makes the statement, "Use of this Web site is subject to our terms of use, click here to read" is more informative than a hyperlink that states simply "Terms of Use." Even more informative would be a hyperlink that states the following: "By going beyond this page, you are deemed to have agreed to our terms of use."

Actual Knowledge of the User

Even if the notice of the existence of the terms is not adequate, a user who is actually aware of the existence of the terms might well be found to have given

90. *Specht II*, 306 F.3d 17, 35 (2d Cir. 2002).
91. *Id.* at 30–32.
92. *Id.* at 31.
93. *See* Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9 (2d Cir. 1995); Wallis v. Princess Cruises, Inc., 306 F.3d 827, 836–37 (9th Cir. 2002) (discussing that the purchaser of ticket that simply referred to "Athens Convention" and made reference to limits on liability based on "Special Drawing Rights" could not have determined carrier's liability without reading the Athens Convention and determining value in U.S. Dollars of a "Special Drawing Right" as defined by the International Monetary Fund).
94. *Specht I*, 150 F. Supp. 2d at 595.
95. *Id.*
96. *Id.* at 596. The Second Circuit expressly chose not to address this part of the district court's decision. *Specht II*, 306 F.3d at 32 n.15.

assent to the terms.[97] This exception to the notice requirement could be satisfied by a cease and desist letter that points out the terms to the recipient or by past experience with the Web site, so that subsequent transactions by that user would satisfy the notice requirement.[98] This actual knowledge exception tracks some of the common law cases that bind the purchaser to terms that he or she knew existed. For instance, a purchaser of a new car was bound by a warranty (without any special attention paid to it by the dealer) because he had actual knowledge that it was in the glove compartment of the car.[99] In the electronic context, providing notice to the defendants has been a crucial factor in several cases attempting to apply the doctrine of "trespass to chattels" to behavior such as spamming or screen scraping.[100]

Thus, once one becomes aware of a situation where a Web site user is taking some action in violation of the posted terms and conditions, one can provide actual notice of the terms to the user in the form of a cease and desist letter or similar communication. The user then should not be able to claim that he or she has not received adequate notice of the terms.

Opportunity to Review the Terms

Once the user is provided with reasonable notice of the existence of the proposed contractual terms, the second factor of our test requires that the user of the Web site or CD-ROM has a meaningful opportunity to review the browse-wrap terms before the deal becomes final. Courts consistently hold that, in order to enforce a standard-form contract, the user must have the opportunity to review the terms.[101]

This requirement is echoed in UCITA.[102] The UCITA provisions on opportunity to review contain some careful thinking about the process of mutual assent.

97. *Cf. Ticketmaster III*, 2003 WL 21406289, at *3 ("a contract can be formed by proceeding into the interior web pages after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so.").

98. *Cf.* Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 244 (S.D.N.Y. 2000) (holding vendor sent cease and desist letter to user, pointing out violated terms of use and asking user to sign acknowledgment that it would no longer violate those terms). It should also be noted that, although the terms of use appeared on the results screen, not the search screen, Verio had conducted searches for an extended period of time. Verio thus should have been aware of the notice of the terms after its first use of the Web site.

99. The evidence demonstrates that, at the time [buyer] purchased the vehicle, the "New Car Warranty" was in the glove compartment of the truck, and that the plaintiff was aware of its presence. . . . Based upon this testimony, the court finds that the warranty was delivered to the [buyer] at the time of the sale and was part of the "basis of the bargain."

Harris v. Ford Motor Co., 845 F. Supp. 1511, 1514 (M.D. Ala. 1994).

100. *See, e.g.*, CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997).

101. *See, e.g.*, Ward v. Cross Sound Ferry, 273 F.3d 520, 525 (2d Cir. 2001) (plaintiff conceded that physical presentation of ticket terms reasonably communicated the existence and importance of contractual terms; only issue was the timing of plaintiff's opportunity to review the terms); Steven v. Fidelity & Casualty Co. of New York, 377 P.2d 284, 286 (Cal. 1962).

102. Uniform Computer Information Transactions Act (UCITA), 7 pt. 2 U.L.A. 196 (2002). In July 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL) decided to no longer push for the adoption of UCITA in state legislatures, after only two state adoptions in four

Under UCITA, a person is deemed to assent to a record or a term if, before taking the action deemed to be assent, he or she acted with knowledge of the record or term or had an opportunity to review the term or record.[103] A UCITA comment states that this requirement "reflects simple fairness and establishes concepts that curtail procedural aspects of unconscionability."[104]

Two important caveats about the opportunity to review browse-wrap terms should be mentioned here. First, so long as the user is provided with adequate notice of the existence of the proposed terms, there is no legal requirement that the user actually review the terms in order for his or her assent to be valid. The obligation is on a person assenting to a standard-form agreement to read and understand its terms, and that person is bound by the terms, even if the terms were never read.[105] This is true in both the paper world[106] and the electronic world.[107] Buyers and users can make a rational decision, based on cost-benefit analysis, not to review agreement terms that are presented to them.

Second, providing a meaningful opportunity to review the terms does not necessarily mean providing an opportunity to negotiate the terms. The law generally does not require that each party be able to negotiate the terms of a proposed agreement, but the disadvantaged party must have a meaningful choice about whether to agree to the one-sided terms (to avoid procedural unconscionability). An agreement is still supported by consideration, in the sense of a "bargained-for

years and considerable opposition and controversy. *See* Press Release, NCCUSL, UCITA Standby Committee is Discharged (Aug. 1, 2003), *available at* http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=56.

103. UCITA § 112(a) (2002).

104. UCITA § 112 cmt. 8 (2000) (unrevised version).

105. *See, e.g., Specht II*, 306 F.3d at 30 ("It is true that a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.") (quoting Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc., 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001); *see generally* E. ALLAN FARNSWORTH, CONTRACTS § 4.26, at 297 (3d ed. 1999).

106. Hale v. State, 838 So. 2d 1185, 1187 (Fla. Dist. Ct. App. 2003) ("in the civil context, a party who signs a document without reading it is bound by its terms in the absence of coercion, duress, fraud in the inducement or some other independent ground justifying rescission"); Robert's Hair Designers, Inc. v. Pearson, 780 N.E.2d 858, 869 (Ind. Ct. App. 2002) ("person is presumed to understand documents which he or she signs and cannot be released from terms of contract due to his or her failure to read the documents"); Brevorka v. Wolfe Const., Inc., 573 S.E.2d 656, 659 (N.C. Ct. App. 2002) ("[t]he duty to read an instrument, or have it read before signing it, is a positive one, and one who signs a written contract without reading it when able to do so is bound by the contract unless the failure to read is justified by some special circumstances"); Cont'l Stock Transfer & Trust Co. v. Sher-Del Transfer & Relocation Servs., Inc., 750 N.Y.S.2d 8, 9 (App. Div. 2002) ("parties are ordinarily bound by agreements they sign because they are presumed to have read them").

107. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 ("A contract need not be read to be effective; people who take the risk that the unread terms may in retrospect prove unwelcome"); Licitra v. Gateway, Inc., 734 N.Y.S.2d 389, 391 (Civ. Ct. 2001) (noting that courts have held that "competent adults are bound by such agreements read or unread"); M.A. Mortenson Co. v. Timberlake Software Corp., 998 P.2d 305, 313 (Wash. 2000) ("Even accepting Mortenson's contention that it never saw the terms of the license . . . it was not necessary for Mortenson to actually read the agreement in order to be bound by it"); Groff v. America Online, Inc., No. PC 97-0331, 1998 WL 307001, at *5 (R.I. Super. Ct. May 27, 1998) ("a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents"); Burnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. Ct. App. 2001) (noting that parties to electronic contract not excused from "consequences attendant upon a failure to read the contract"). *See also supra* note 106; RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

exchange," when each party to the contract is induced into the transaction by what the other party offered, even if one party had no chance to negotiate the terms.[108]

In order to satisfy the requirement that the user have an opportunity to review the proposed terms, such terms must be made available at the right time and under the right circumstances.

Timing of Presentation of the Terms

One important factor considered by courts in enforcing standard-form contracts is when the terms (or notice of the terms) are presented to the user. In a number of cases, if the buyer receives the terms after the moment of contract formation, the terms are not part of the contract because the buyer has not assented[109] (or because an express warranty was not part of the basis of the bargain).[110] The timing of the buyer's assent has been especially problematic in cases involving standard terms included inside the box containing software or hardware. In other situations, however, the courts have side-stepped a buyer's apparent lack of assent (or lack of basis of the bargain) by using doctrines such as promissory estoppel,[111] modification,[112] waiver,[113] and even the commercial expectations of the buyer.[114]

Contract formation situations involving computer software and hardware are instructive in this area. Courts have had to consider whether the timing of presenting the terms makes a difference in the enforcement of standard form licenses where the terms are printed on, or included in, the product's packaging. Decisions applying U.C.C. section 2-204[115] generally uphold the standard terms that are

108. *See, e.g.,* Net2Phone, Inc. v. Superior Court of Los Angeles County, 135 Cal. Rptr. 2d 149, 153 (Ct. App. 2003) (standard terms are enforceable despite being offered on a basis of "take it or leave it"); *see generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 211 (1981).

109. *See, e.g.,* Zoss v. Royal Chevrolet, Inc., 11 U.C.C. Rep. Serv. (Callaghan) 527, 531 (Ind. Super. Ct. 1972).

110. *See, e.g.,* Hrosik v. J. Keim Builders, 345 N.E.2d 514, 516 (Ill. Ct. App. 1976); Global Truck & Equip. Co. v. Palmer Mach. Works, Inc., 628 F. Supp. 641, 651 (N.D. Miss. 1986). *But see* Autzen v. John C. Taylor Lumber Sales, Inc., 572 P.2d 1322, 1325 (Or. 1977) (a post-assent representation was part of the ongoing basis of the bargain and therefore a valid express warranty); Downie v. Abex Corp. v. General Motors Corp., 741 F.2d 1235, 1240–41 (10th Cir. 1984) (post-sale representations were part of the basis of the bargain because of post-sale reliance by buyer).

111. *See, e.g.,* Invin v. Lowe's of Gainesville, Inc., 302 S.E.2d 734, 736 (Ga. Ct. App. 1983).

112. *See, e.g.,* Bigelow v. Agway, Inc., 506 F.2d 551 (2d Cir. 1974).

113. *See, e.g.,* Moldex, Inc. v. Ogden Eng'g Corp., 652 F. Supp. 584 (D. Conn. 1987).

114. *See, e.g.,* Bailey Farms, Inc. v. Nor-Am Chem. Co., 27 F.3d 188 (6th Cir. 1994).

115. Despite the fact that a software license is not a "transaction in goods" under the U.C.C., a number of courts have applied Article 2 of the U.C.C. to contractual issues in such transactions. *See, e.g.,* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1337 (D. Kan. 2000) ("[C]onduct clearly demonstrates a contract for the sale of a computer"); Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 94 n.6 (3d Cir. 1991) (noting that the parties agree that the terminals and programs are goods within the meaning of U.C.C section 2-102 and section 2-105); SoftMan Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1085 (C.D. Cal. 2001) ("[S]hrink-wrap license transaction is a sale of goods rather than a license"); I.Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 332 (D. Mass. 2002) ("[T]he U.C.C. technically does not govern the VAR agreements, but with respect to [the purchase of software], the U.C.C. best fulfills the parties' reasonable expectations"). Other courts have ruled to the contrary. *See, e.g.,* Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425, 432 (S.D.N.Y. 1996); Data Processing Servs., Inc. v. L.H. Smith Oil Corp., 492 N.E.2d 314, 319 (Ind.

included in the box along with the product because the buyer's subsequent action (typically the retention of the product beyond the period set forth in the terms) is the "acceptance" of the standard terms.[116] An example of the U.C.C. section 2-204 approach is found in *ProCD v. Zeidenberg*, in which the outside of the box containing the software stated that use of the software was subject to terms of the license agreement enclosed in the box.[117] The U.S. Court of Appeals for the Seventh Circuit upheld the agreement because the court determined that the contract was not formed until the buyer took the software home, opened the box, and failed to return the product within the time specified in the terms.[118]

In a similar case, *Hill v. Gateway, Inc.*, a personal computer ordered over the phone came with terms in the shipping carton.[119] The Seventh Circuit again upheld the agreement, even without notice of the terms on the outside of the box. The court held that the buyer accepted the proffered terms by keeping the computer past the expiration of the return period set forth in the terms.[120] The court observed that if the vendor had to recite all of the terms of the contract over the phone to the buyer before the product was ordered and shipped, most buyers would have become bored and might even have hung up the phone, terminating the sale.[121]

Where, however, the court views the software or hardware purchase transaction as having taken place in stages, rather than as a single-stage transaction, different contractual doctrines are relevant. Most often applied is U.C.C. section 2-207 (commonly referred to as the "battle of the forms" provision), although the

Ct. App. 1986). The circuit court in *Specht* refused to decide the issue, because the U.C.C. rules were essentially the same as the common law rules on point. *Specht II*, 306 F.3d 17, 29 n.13 (2d Cir. 2002) (discussing extensively cases and commentary). The 2003 amendments to U.C.C. Article 2 state that information is not "goods" but otherwise do not resolve this issue. U.C.C. § 2-103(1)(k) prelim. official cmt. (2003).

116. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1990); Westendorf v. Gateway 2000, Inc., No. 16913, 2000 WL 307369, 41 U.C.C. Rep. Serv. 2d (West) 1110, 1113 (Del. Ch. Mar. 16, 2000); Rinaldi v. Iomega Corp., No. 98C-09-064-RRC, 1999 WL 1442014, at *5 (Del. Super. Ct. Sept. 3, 1999); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (App. Div. 1998). A class action, however, was recently filed in California against Microsoft, Symantec, Best Buy, and 500 other software vendors. The plaintiffs are challenging the practice of providing software licenses inside sealed packaging or on a disk enclosed in the packaging as an unfair consumer practice because there is no sufficient opportunity to review the terms before purchase. Plaintiff's Complaint, Baker v. Microsoft, Inc., No. 030612 (Cal. Super. Ct. Feb. 7, 2003). It is interesting to note that the requested relief is not that consumers need to sign an agreement acknowledging the terms, but simply that the vendor must provide notice of the terms prior to purchase. The complaint suggests three ways to do this: transmitting a copy to the customer at the counter, posting the terms adjacent to the store display, or providing a URL where the terms can be located on a Web site that is accessible nearby. *Id.*

117. 86 F.3d 1447, 1449 (7th Cir. 1996).

118. *Id.* at 1451. The court observed that one would not expect the vendor to put the entire contract on the box because the terms would have been unreadable and other important information might have been omitted from the box.

119. *Hill*, 105 F.3d at 1148.

120. *Id.* at 1150; *accord, Westendorf*, 2000 WL 307369, at *2, 41 U.C.C. Rep. Serv. (West) at 1113; *Brower*, 676 N.Y.S.2d at 573; *But see Klocek*, 104 F. Supp. 2d at 1341; Licitra v. Gateway, Inc., 734 N.Y.S.2d 389 (Civ. Ct. 2001).

121. *Hill*, 105 F.3d at 1149.

common law can be applied as well.[122] Under sections 2-207(1) and (2), a contract often is formed by the buyer's offer to purchase and the seller's acceptance by its promise to ship the goods.[123] Any additional terms contained in the box become part of the contract only under the conditions specified in section 2-207 or section 2-209, including express assent.[124]

Courts applying U.C.C. section 2-207 have recognized that the timing of the presentation of terms is critical. Some cases have stated that, had the terms been presented earlier, i.e., as part of the initial offer, the terms would have been part of the initial assent. For example, the court in *Arizona Retail Systems, Inc. v. Software Link, Inc.* upheld the standard terms that accompanied the transmittal of software sent on approval, because they were viewed as part of the initial offer.[125] In *Step-Saver Data Systems, Inc. v. Wyse Technology,*[126] the court declined to enforce the box-top license terms shipped to a buyer in response to the buyer's purchase order, because the seller was deemed to have already accepted the buyer's offer by the seller's conduct in shipping the software.[127] The court distinguished these later-furnished terms from terms that were "conspicuous and available to the purchaser before the contract . . . was formed."[128] In the latter instance, if the offeree proceeds with the contract "with constructive knowledge of the terms of the offer, the offeree is typically bound by those terms."[129] In *Klocek v. Gateway, Inc.*, where a warranty disclaimer contained in the computer box was not enforced, the court suggested that harmonizing practical considerations with the requirements of contract law would simply require that the vendor take the "not unrea-

122. For a common law approach, see *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907, 911 (N.D. Ill. 2002) (enforcing limited liability clause pertaining to loss of UPS cargo, because customer assented to UPS's terms twice by opening shrinkwrap around software and by clicking "yes" during software installation process); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 528 (W.D. Pa. 2000) (enforcing shrinkwrap license where assent was also confirmed via the signing of a registration form, but not directly applying the U.C.C.).

123. *See* U.C.C. § 2-207(1), (2) (2002); *see e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 98–99 (3d Cir. 1991).

124. *See* U.C.C. §§ 2-207(1), 2-209 (2002); *see also, e.g.*, Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 762–66 (D. Ariz. 1993); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (rejecting expressly *ProCD* and *Hill*).

125. *Arizona Retail Sys., Inc.*, 831 F. Supp. at 763–64. The court failed to uphold standard terms that accompanied software sent in response to a telephone order for that particular software.

126. 939 F.2d 91 (3d Cir. 1991).

127. Under section 2-207, the terms of a contract formed by words under section 2-207(1) are determined in section 2-207(2); the terms of a contract formed by conduct under section 2-207(3) are determined in the remainder of section 2-207(3). The *Step-Saver* court seemed to use section 2-207(3) for its conclusion that the parties had formed a contract by conduct, however, but then the court shifted to section 2-207(1) to analyze seller's arguments about its acceptance being conditional on buyer's acceptance of the box-top license terms. Then the court turned to section 2-207(2)(b) to determine whether the box-top terms became part of the parties' existing contract. The court never explained why it did not instead apply the remainder of section 2-207(3) (the knock-out rule) to determine the terms of the agreement. CAROL L. CHOMSKY & CHRISTINA L. KUNZ, SALE OF GOODS: READING AND APPLYING THE CODE 273 n.10 (2002).

128. *Step-Saver Data Sys. Inc.*, 939 F.2d at 102 n.39.

129. *Id*; *accord*, Arizona Retail Sys., Inc v. Software Link, Inc., 831 F. Supp. 759, 765 n.3 ("The case cited by [the defendant] is distinguishable from this case because the warranty disclaimers in that case were made apparent to the buyer at the time of acceptance rather than afterwards as in this case." (citation omitted)).

sonable" step of clearly communicating to the buyer, at the time of sale, either the complete terms of sale or the fact that the vendor will propose additional terms as a condition of sale.[130]

In *Licitra v. Gateway, Inc.*,[131] the court held that the initial contract was formed by the parties' agreement to the basic terms of the contract.[132] The court held that the computer company's additional terms shipped with the computer did not become binding on the consumer merely because the consumer kept the computer for more than thirty days—the "action" that the company said was acceptance, but was instead a form of silence or inaction.[133] The court was concerned about the circularity of how a consumer could keep from assenting to terms contained in a software box when he did not know he was assenting before he opened the box.[134]

Browse-wrap license terms, if presented in a timely manner, do not appear to suffer from the defects that have deterred some courts from enforcing standard terms included "in the box." Browse-wrap agreements can be made available in full text and contemporaneously with the purchasing decision. Furthermore, the typical browse-wrap situation involves only one "form," thereby avoiding the "battle of forms" that U.C.C. section 2-207 seeks to resolve. Moreover, unlike the burden of returning a product as a means of rejecting the contract terms that are in the box, the burden of rejecting the terms contained in browse-wrap agreements is low because the customer need not actually purchase or accept delivery of a product or service in order to review the terms of the browse-wrap agreement.

Alternatively, under UCITA, one of the provisions that generated considerable controversy allows the "opportunity to review" to occur after the user's assent if the user has a right of return upon rejection of the record. No right of return is required at all, however, and the opportunity to review is considered met (i) if the record proposes a modification or specifies terms agreed to be specified later by one of the parties or (ii) if parties in a non-mass-market transaction had reason to know (at the time of contracting) that a record or terms would be presented after assent or access to the information covered by that record or term.[135]

Circumstances of Presentation of the Terms

Courts have often held that if the circumstances surrounding the purchase of goods or services are such that the buyer does not have sufficient time to review the offered contract terms, the terms are not enforceable. For example, in *Ward v. Cross Sound Ferry*,[136] the hurried circumstances of purchase led the court not to enforce the contract terms, after the plaintiff was injured while boarding defen-

130. 104 F. Supp. 2d at 1341 n.14; *see also* Step-Saver Data Sys. Inc., 939 F.2d at 96 ("[N]o reference was made during the telephone calls, or on either the purchase orders or the invoices with regard to disclaimer of any warranties").

131. 734 N.Y.S.2d 389 (Civ. Ct. 2001).

132. *Id.* at 392.

133. *Id.*

134. *Id.* at 392–93. The court rejected the holdings in two other Gateway cases, *Hill* and *Brower*.

135. UCITA § 113(a), (c), 7 pt. 2 U.L.A. 266 (2002).

136. 273 F.3d 520 (2d Cir. 2001).

dant's ferry. The court ruled that the limitations clause printed on the back of the ticket was unenforceable because the purchasing environment did not provide a reasonable opportunity to review the terms.[137] The court noted that the passenger bought the ticket only two or three minutes before boarding, and then handed the entire ticket to the carrier's agent when she boarded the ferry. As a result, there was no way that the passenger could have familiarized herself with the terms of the ticket or consulted the ticket after the injury to review whether there were clauses limiting her ability to sue the carrier.[138]

The circumstances surrounding mechanical delivery of terms sometimes raise special concerns. In *Steven v. Fidelity & Casualty Co. of New York*,[139] a 1962 case involving "man vs. machine," the California Supreme Court held that liability limitations in a travel insurance policy could not be enforced against the estate of the purchaser.[140] In that case, the plaintiff's husband bought a travel insurance policy from a vending machine at an airport. The policy stated that it applied only to travel on "scheduled air carriers." He died in a plane crash soon after purchasing the policy, riding in an air taxi, not a regularly scheduled flight. The air taxi flight was arranged by the scheduled airline from which the insured had bought his ticket because of flight delays in the original flight.

In holding that the insured could recover, the court relied on general principles of contract formation, which, it pointed out, applied with "special force" when the contract is delivered by a machine. The *Steven* court made much of the differences between man and machine. Unlike an insurance salesperson, the vending machine was unable to answer any questions that the insured might have had. Although the evidence was not clear as to whether the limitation of liability was visible through the vending machine's window, certain clauses clarifying the limitation of liability were hidden. The fact that the machine provided no duplicate was also important to the court because the one copy that the machine dispensed was to be sent to the beneficiary before the insured boarded the flight. As a result, the insured did not have an adequate opportunity to read and understand the policy between the time of purchase and the time of boarding the substitute transportation.[141]

Because of the manner in which computers operate and the nature of the Internet, browse-wrap agreements posted on Web sites do not suffer from the same defects that impeded the enforcement of the insurance policy in *Steven* and the ferry boat ticket in *Ward*. The computers of today are far superior to the vending machines of the 1960s in their ability to communicate contract terms. Browse-wrap agreements can be made available to the user before he or she begins to access the data or the site, or download, or use the software. The *ProCD* court was concerned about requiring the vendor to clutter the packaging by printing the terms on the outside of a product box using microscopic print and refused

137. *Id.* at 525.
138. *Id.* at 526.
139. 377 P.2d 284 (Cal. 1962).
140. Id. at 298.
141. *Id.* at 293–94.

to so require.[142] Hyperlinked agreements on computers overcome these concerns. In addition, the user can be provided with unlimited time to read the terms online or on a CD-ROM.

In some electronic settings, the proposed standard-form terms are presented directly to the user; not through hyperlinks. The only case in which browse-wrap terms were directly presented to the user was *Register.com*, in which the terms automatically appeared on the query screen or the query results.[143] Many click-through agreements automatically present the terms directly to the user, however. For instance, software license terms often are directly presented to the user for a click-through assent before the software is downloaded or made accessible to the user.[144] The same is true of a click-through agreement that the user must assent to in order to become an online member, gain access to online data, or buy goods online.[145] Courts in those cases have been concerned that the terms ought to be fully scrollable, and there ought not to be any time limit on the user's opportunity to view the terms.[146] These concerns from the click-through cases (involving express assent) also should be heeded in the browse-wrap context, in which assent is only implied. (In addition, the Federal Trade Commission has issued guidelines for preventing Web sites from being deceptively designed.[147] One of those guidelines states that a Web site or CD-ROM should not present the terms in a "pop-up" window, if the window disappears after a short period of time or cannot be re-accessed.)[148]

In the vast majority of electronic settings, the proposed standard-form terms are not presented directly to the user. Rather, the user must click on a hyperlink to view the terms.[149] Unlike the vending machine criticized in *Steven*, a Web site or CD-ROM can use a hyperlink to present the full text of the terms, providing the user with an opportunity to thoroughly review the terms before entering into the transaction. The advantage for the vendor is that using a hyperlink can

142. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1990).

143. 126 F. Supp. 2d 238, 245 (S.D.N.Y. 2000); *see also supra* text accompanying notes 25–29.

144. *See, e.g.*, I.Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002); Moore v. Microsoft Corp., 741 N.Y.S.2d 91 (App. Div. 2002); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

145. *See, e.g.*, Caspi v. Microsoft Network, L.L.C., 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); Groff v. America Online, Inc., No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998); Rudder v. Microsoft Corp., No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarlswellOnt 3195 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

146. *See, e.g., In re* RealNetworks, Inc., No. 00C1366, 2000 WL 631341, at *6 (N.D. Ill. May 8, 2000) (upholding click-through agreement against procedural unconscionability challenge, partly because the agreement was freely scrollable and viewable without any time restriction).

147. Federal Trade Commission, *FTC Dot-Com Disclosures*, *at* http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html (last visited Oct. 9, 2003).

148. *Id.*

149. In *Net2Phone, Inc. v. Superior Court of Los Angeles County*, 135 Cal. Rptr. 2d 149 (Ct. App. 2003), the vendor's services were available only on software that the customers downloaded from the vendor's Web site. The software download process included highlighted hyperlinks to an end-user license agreement and terms of use. The customer had to assent to both in order to download the software. The appellate court commented, "We perceive no unfairness in Net2Phone's requirement that certain contractual terms must be accessed via hyperlink, a common practice in the internet business." *Id.* at 153.

simplify the presentation of contracts and other documents, while retaining comprehensive coverage of legal issues, thereby making the Web site more accessible to the user.[150] A Web site can even answer questions about the proposed contractual terms in frequently asked questions.

UCITA expressly deals with the circumstance of the electronic presentation of terms of a contract. It limits the circumstances in which presentation is acceptable, as follows: "A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review."[151] A comment to that section states that "a record is not available for review if access to it is so time-consuming or cumbersome, or if its presentation is so obscure or oblique, as to make it difficult to review. . . . In an electronic system, a record promptly accessible through an electronic link ordinarily qualifies."[152]

Thus, a meaningful opportunity to review can be provided by posting terms behind a link from the home page of a Web site, or from another logical location designed to give the user access to the terms.

Incorporation by Reference in the Paper World. Commentators have asserted that in electronic commerce, "the web technology of hypertext linking permits a reference to another document without using words of incorporation."[153] Hyperlinking thus can be viewed as a sophisticated application of terms incorporated by reference, a practice long in use in the paper world. The common law has long allowed parties to a contract to incorporate terms by reference to an outside document.[154] The contractual reference incorporating an extrinsic document must "be clear and specific."[155]

Statutes and regulations also have tests for when the parties are contractually bound by terms incorporated by reference. For example, under the Magnuson-Moss Warranty Act,[156] a seller can incorporate warranty terms into a consumer product sale either by displaying the warranty "in close proximity to the warranted

150. Wu, *supra* note 88, at 324–25.

151. UCITA § 113(a), 7 pt. 2 U.L.A. 266 (2002).

152. *Id.* § 113 cmt. 2(b), 7 pt. 2 U.L.A. 267. A licensee of computer information made available over the Internet has an "opportunity to review" the terms of a standard form license when (1) the terms are "readily available" to the licensee before the information is delivered or the licensee is obligated to pay, whichever occurs first, and (2) the licensor does not affirmatively prevent the licensee from printing or storing the terms for review or archival purposes. "Readily available" can be "(A) displaying prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or (B) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of the computer information." *Id.* § 114(b), 7 pt. 2 U.L.A. 268.

153. *See, e.g.*, Wu, *supra* note 88, at 321.

154. Incorporation by reference is defined as "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." BLACK'S LAW DICTIONARY 770 (7th ed. 1999).

155. Kokjohn v. Harrington, 531 N.W.2d 99, 100–01 (Iowa 1995).

156. 15 U.S.C. §§ 2301–2312 (2000).

product" or by placing signs "reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request."[157]

The airline industry can incorporate terms by reference in a ticket according to rules established by statute and common law. The Secretary of Transportation is empowered to establish by regulation how an air carrier may incorporate by reference in a ticket the terms of the contract of carriage in a ticket.[158] The terms incorporated by reference may include limitations on liability, claim restrictions (including the time period within which to bring a claim), rights of the carrier to change terms, rules about reservations, and covenants regarding the air carrier's schedule.[159] The full text of the terms must be made available at each airport and city ticket office of the airline, and provided by mail or other delivery service.[160]

Decisions involving airline tickets also enforce assent to terms incorporated into a contract by reference. The courts in *Deiro* and *Gluckman*, discussed earlier in this Article,[161] ruled that the terms incorporated by reference into the airline ticket contract were binding on the purchaser. The plaintiffs in *Gluckman* had claimed that because the limiting terms were incorporated by reference and only available remotely, they were not binding.

In a case involving a domain name registration, a valid contract was formed by a customer's payment by mail because he had received an electronic invoice stating, "In making payment for the invoice below, Registrant agrees to the terms and conditions of the current Domain Registration Agreement."[162]

Not all efforts at incorporation by reference are successful, however. If the incorporated terms referred to in the offer are so complex as to prevent the offeree from understanding those terms, or are difficult to obtain, the offeree may not be bound by the terms. For example, in *Wallis v. Princess Cruises, Inc.*,[163] the ticket referred to "Athens Convention" and made reference to limits on liability based on "Special Drawing Rights." The court held that the purchaser could not have determined the carrier's liability without reading the Athens Convention and determining the value in U.S. Dollars of a "special drawing right" as defined by the International Monetary Fund, and therefore the referred-to terms were not part of the contract.[164] Thus, the incorporated terms themselves should be clear and understandable.

Using Hyperlinks to Incorporate by Reference. Assuming that the terms are reasonably legible and presented on a timely basis, does the practice of disclosing

157. 16 C.F.R. § 702.3 (2002).

158. 49 U.S.C. § 41707 (2000). The associated regulation provides that "[a] ticket or other written instrument that embodies the contract of carriage may incorporate contract terms by reference (i.e., without stating their full text), and if it does so shall contain or be accompanied by notice to the passenger as required by this part." 14 C.F.R. § 253.4 (2002).

159. 14 C.F.R. § 253.5 (2002).

160. *Id.* §§ 253.4, 253.5.

161. *See supra* text accompanying notes 79–83.

162. Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d 125, 127 (D. Mass. 2000).

163. 306 F.3d 827 (9th Cir. 2002).

164. *Id.* at 836–37.

contractual terms behind a hyperlink satisfy the "adequate notice" test? Our conclusion, drawing from precedent addressing click-through and browse-wrap agreements and from analogous practices in the paper world, such as terms incorporated by reference, is that using a hyperlink to disclose electronic standard terms can satisfy the proposed requirement of "opportunity to review."

To adequately alert the users that the hyperlinks will connect the user to the proposed browse-wrap terms, the Web site or CD-ROM should observe certain conventions. Care must be taken to make sure that the link can be identified as such. Hyperlinks are usually underlined or in different colored text, or "the nature of the hypertext link itself" indicates that a link exists to another page.[165] In *Pollstar v. Gigmania, Ltd.*, the court was concerned that the notice of the existence of the terms was presented "in small gray print on a gray background" and was not underlined or otherwise set off to show that it was an active link, so that the "user [was] not immediately confronted with the notice of the license agreement."[166]

The *Ticketmaster* decisions illustrate both unacceptable and acceptable uses of hyperlinking conventions, although other uses may be acceptable. In *Ticketmaster I*, the court did not enforce the terms posted by Ticketmaster on its Web site, in part because the hyperlink to those terms was in small type and "below the fold" of the home page. By the time of *Ticketmaster III*, however, Ticketmaster had moved its notice to the top of its home page, increased the typeface size and restated the wording of the link to state, "Use of this site is subject to express terms of use, which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms." Without addressing the specifics of the changes, the court in *Ticketmaster III* refused to dismiss the claim for breach of contract.[167]

The browse-wrap agreement terms should be placed in an obvious location, as judged by the expectations of the typical user. For instance, both courts in *Specht v. Netscape* concluded that it was not reasonable to expect a Web site user to scroll considerably past the software download button to find the notice of and link to the license terms.[168]

The user should not also have to engage in excessive multiple linking in order to find all of the terms of the agreement. CompUSA entered into a settlement with the New York Attorney General with respect to an allegedly deceptive business practice involving Web site contract terms that were accessible only by using three consecutive hyperlinks. The terms that were harshest to the user were at the two deepest levels of the hyperlinked terms, so that a user reading only the first two levels would not learn of those harsh terms.[169]

165. Wu, *supra* note 88, at 320.

166. 170 F. Supp. 2d 974, 981–82 (E.D. Cal. 2000).

167. *See supra* text accompanying notes 30–48.

168. *Specht II*, 306 F.3d 17 (2d Cir. 2002); *Specht I*, 150 F. Supp. 2d 585, 595–96 (S.D.N.Y. 2001).

169. *See CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*, 6 Electronic Comm. & L. Rep. (BNA) 562 (2001) (demonstrating that excessive linking may be viewed as a deceptive business practice, where disclosure that $400 rebate was conditioned on the buyer subscribing to 3 years of Internet service and agreeing to an early termination penalty of $250 to $450 was viewable only after buyer followed three and four layers of hyperlinks past the homepage), *available at* http://pubs.bna.com/ip/BNA/EIPNSF/23d9e82d7d25950885256743006e3012194cef19b10.

ADEQUATE NOTICE THAT TAKING SPECIFIED ACTION MANIFESTS ASSENT TO TERMS

The third element in our test is that the user must receive adequate notice that taking a certain action manifests assent to the terms. This requirement is consistent with the *Restatement (Second) of Contracts*, which states, "The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."[170] Thus, no acceptance results when an offeree takes the particular action specified as acceptance in the offer without having reason to know the significance of that action.

The offeror's power to specify the action that manifests assent derives from the offeror's role as "master of the offer."[171] Thus, the vendor in a browse-wrap setting (the offeror) can specify the particular kind of express[172] or implied assent[173] required of the user in order to form a contract.

For example, a court held that the customer accepted the terms by continuing to use the services of a telecommunication services company where the company sent the customer a letter stating, in bold capital letters:

> By enrolling in, using, or paying for the services, you agree to the prices, charges, terms and conditions in this agreement. If you do not agree to these prices, charges, terms and conditions, do not use the services, and cancel the services immediately by calling AT & T . . . for further directions.[174]

In *Kilgallen v. Network Solutions, Inc.*,[175] a user argued that he was not bound by the terms of the e-mail renewal notice and the e-mail invoice that he received from the Web site hosting service but did not read.[176] Both e-mails said that the user agreed to be bound by the terms set out in the e-mail by making payment. The user subsequently sent in his acceptance payment by check without enclosing either e-mail record. The court held that the user's payment showed his decision to accept defendant's offer.[177]

In the electronic contracting area, courts have consistently upheld the validity of assent when the vendor gives adequate advance notice that clicking on a clearly

170. RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981), cited in *Specht II*, 306 F.3d at 29.

171. If the offer does not specify the means of acceptance, the first Restatement presumes the offer to invite acceptance only by return promise, RESTATEMENT OF CONTRACTS § 31 (1932), but the second Restatement leaves it up to the offeree to choose between acceptance by promise or performance, RESTATEMENT (SECOND) OF CONTRACTS § 32 (1981). U.C.C. section 2-206(1) (2002) follows the latter approach, with regard to contracts for sales of goods.

172. Assent by express assent, such as clicking a button or icon or giving some other means of express electronic assent was already covered in the Working Group's previous article on click-through agreements. *See* Kunz, et al., *supra* note 1, at 405–06, 410–16.

173. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1990).

174. Boomer v. AT&T Corp., 309 F. 3d 404, 409 (7th Cir. 2002). *See also* Kanitz v. Rogers Cable, Inc., No. 01-CV-214404CP, [2002] 21 B.L.R. (3d) 104, 2002 CarlswellOnt 628 (WL) (Ont. Super. Ct. Feb. 22, 2002).

175. Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d 125 (D. Mass. 2000).

176. *Id.* at 129–30.

177. *Id.* at 129.

labeled button constitutes assent to presented terms, if the other necessary elements of contract formation are satisfied.[178]

A few courts have applied the concept of assent by conduct to browse-wrap agreements. In *Register.com,* the court held that the user had assented to Register.com's terms of use, where the terms posted on the Web site home page[179] included a paragraph stating that by submitting a query, the user would be bound to the terms.[180] Similarly, the Web site at issue in *Ticketmaster III* included the following link at the top of the home page: "Use of this site is subject to express terms of use, which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms."[181] Thus far, the court has rightly refused to dismiss the breach claim based on those terms of use.

In *Specht*, however, the court found that Netscape did not provide adequate notice of the significance of the user's downloading because "the offer did not make clear to the consumer that clicking on the download button would signify assent."[182] The Second Circuit reasoned that the terms presented after the user downloaded software on the Web site were not binding on the user, in part because "[w]hen products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's length bargaining."[183] The *Specht* court emphasized the distinction between the adequacy of notice from a physical standpoint and the adequacy of the wording of the notice, suggesting that in order to be adequate, a notice ought to be conspicuous, presented in a timely fashion, and communicate that the user is about to enter into a contract by this action.[184]

User Takes the Action Specified in the Notice

If the user takes the action specified in the vendor's offer that will manifest the user's assent, then the user thereby assents to the terms, assuming that the vendor's Web site or CD-ROM has complied with the three other requirements of the test proposed in this Article (notice of existence of terms, opportunity to

178. *See, e.g.,* Rudder v. Microsoft Corp., No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarlswellOnt 3195 (WL) (Super. Ct. Justice Oct. 8, 1999). (finding valid assent by user); *Specht II*, 306 F.3d 17, 30–31 (2d Cir. 2002) (finding no assent by user, but useful discussion by court about the need for adequate notice to the user of the consequences of its actions). *See generally* Kunz, et al., *supra* note 1, at 415–16.

179. The opinion is not clear about whether the home page contained the actual terms or a hyperlink to the terms. Nor is it clear whether the user received the terms before or after submitting the query. Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 245 (S.D.N.Y. 2000). For further details about the format and wording of this Web site, then and now, see *supra* note 26.

180. 126 F. Supp. 2d at 248. The district court in *Specht*, however, said that the facts in *Register.com* did not result in a contract, because the user had not assented to those terms. Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 594–95 n.13 (S.D.N.Y. 2000).

181. Ticketmaster, *at* http://www.ticketmaster.com (last visited Oct. 10, 2003).

182. 306 F.3d at 29–30.

183. *Id.* at 32.

184. *Id.* at 31–32; *Specht I*, 150 F. Supp. 2d at 595–96.

review those terms, and notice that taking a particular action will manifest assent to those terms).

The following actions have been held to constitute acceptance of contractual terms, when the vendor's offer specifies that conduct to be the means of acceptance: continuing to use satellite services,[185] continuing to use a telephone service,[186] incurring new charges on a credit card (in some situations),[187] paying an invoice,[188] opening a package and installing software,[189] just opening a package,[190] using software,[191] and submitting a search query.[192] Some courts have intimated that assent can be given by downloading software[193] or by proceeding past the home page of a Web site.[194]

If the user's assenting action is not a paper-based action, like paying an invoice with a check or signing a credit card slip or breaking a seal on software, but is instead an electronic action, like passing the home page, then the vendor must decide how to preserve the electronic evidence of the user's assent. The vendor might choose to preserve various forms of evidence, including (i) the actual "clickstream data" tracking the user's path through the Web site or CD-ROM (which may raise privacy issues about recording the user's identifying information); (ii) programming records establishing that the user could not have gained access to the Web site, data, or software governed by the agreement without first having engaged in the conduct that manifested assent to the agreement;[195] and (iii) the

185. Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1101–06 (C.D. Cal. 2002).

186. Boomer v. AT&T Corp., 309 F.3d 404, 414–17 (7th Cir. 2002).

187. *Cf.* Mandel v. Household Bank (Nevada) Nat'l Ass'n, 129 Cal. Rptr. 2d 380, 385 (Ct. App. 2003) (allowing modification of contract, after adequate notice). *But see* Shea v. Household Bank (Nevada) Nat'l Ass'n, 129 Cal. Rptr. 2d 387, 389 (Ct. App. 2003) (finding no modification of contract by mere failure to pay off balance, after notice of changed terms and customer's objection to them); Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 287 (Ct. App.1998) (holding that even with previous agreement that bank could make unilateral changes and adequate notice of those changes, modification was ineffective because it was outside the scope of anticipated changes). As mentioned earlier, the Working Group is currently examining the validity of modification practices. These modification practices and their validity are not the focus of this Article.

188. Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d 125, 128–29 (D. Mass. 2000).

189. CEGC, Inc. v. Magic Software Enters., Inc., 51 Fed. Appx. 359, 363 (3d Cir. 2002).

190. Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 763–64 (D. Ariz. 1993) (as to the live copy, of the two contracts).

191. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (software offer's terms stated that customer's use of software was acceptance, and customer used the software); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 308 (Wash. 2000) (notice stated that use of software was acceptance, and customer used the software).

192. Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000).

193. *Specht II*, 306 F.3d 17, 22–35 (2d Cir. 2002).

194. *Ticketmaster III*, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003).

195. UCITA includes a provision that "[c]onduct or operations manifesting assent may be proved in any manner, including a showing that a person . . . obtained or used the information . . . and that a procedure existed by which a person . . . must have engaged in the conduct or operations in order to do so. Proof of [assent by electronic conduct] is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means." UCITA § 112(d), 7 pt.2 U.L.A. 259 (2002). *See* Groff v. America Online, Inc., No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998). Other evidence that the user actually used the Web site and obtained information from it also could be used.

content and appearance of the Web site, to show that a user "scraped" and used the site's information, in violation of the agreement terms..

User's Defense of Mistake

Because of the inherent ambiguity in acceptance by conduct, acceptance sometimes will not be valid because the user performed the conduct without intending to accept contract terms or without realizing he or she was accepting contractual terms. If the user's assent was truly by mistake, the common law defense of unilateral mistake or mistake in transmission may be available, depending on the facts and on the rules of the jurisdiction.[196]

In addition, the Uniform Electronic Transactions Act (UETA)[197] gives a party to an electronic transaction the right to rescind any resulting agreement ("avoid the effect of an electronic record") if an error in an electronic record occurs in a transmission between the parties; the party seeking to rescind the transaction was an individual, not an electronic agent; and the vendor's electronic agent did not provide an opportunity for the prevention or correction of the user's error.[198]

The rescinding individual must

> (A) promptly notify[y] the [vendor] of the error and that the [user] did not intend to be bound by the electronic record received by the [vendor];
> (B) [take] reasonable steps . . . to return to the [vendor] or, if instructed by the [vendor], to destroy the consideration received, if any, as a result of the erroneous electronic record; and
> (C) [have not] used or received any benefit or value from the consideration, if any, received from the [vendor].[199]

In a browse-wrap setting, this section of UETA is potentially applicable if the individual did not mean to go to the next screen or click a particular hyperlink or press a "download" button, if the individual's mistaken keystrokes are then transmitted to the vendor in a "record," and if the Web site or CD-ROM has no error-correction mechanism. However, most browse-wrap users who are not aware of the effect of their conduct and therefore would not know to promptly

196. Both types of mistake are available when the other party had reason to know of the mistake, perhaps because of faulty Web site design causing the user to mistakenly take the action manifesting assent. *See e.g.*, Ayer v. Western Union Telegraph Co., 10 A. 495 (1887) (mistake in transmission); RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) (unilateral mistake).

197. 7A pt. 1 U.L.A. 211 (1999). As of July 21, 2003, UETA was enacted in 42 states and the District of Columbia, and pending in two state legislatures.

198. *Id.* § 10(2), 7A pt. 1 U.L.A. 264. Comment 5 of UETA section 10 says that this opportunity to prevent or correct an error could be a

> 'confirmation screen' . . . setting forth all the information the individual initially approved. This would provide the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the electronic agent might receive the record sent by the individual and then send back a confirmation which the individual must again accept before the transaction is completed. This would allow for correction of an erroneous record.

199. *Id.* § 10(2), 7A pt. 1 U.L.A. 263.

notify the vendor of the error. In addition, comment 6 to UETA section 10 notes that the third requirement above cannot be met when the user has received information or the ability to redistribute information because the transaction cannot be unwound.[200] A party who does not give prompt notice or cannot unwind the transaction will not be able to use UETA to avoid the effect of the mistaken electronic record.

Acceptance by Inaction or Silence

If the vendor's offer (the proposed terms of the browse-wrap agreement) states that the user's inaction or silence will be acceptance of the vendor's terms, then the user will have some good arguments that no contract is formed by the user's inaction in response to the offer. A party's silence or inaction usually does not manifest assent because of its inherent ambiguity (the offeree might have meant to assent or might merely have meant not to perform the action). Case law has focused on facts about the parties' existing relationship or course of dealing or facts establishing the offeree's subjective intent not to assent.[201]

Section 69 of the *Restatement (Second) of Contracts* is generally consistent with the common law rule that the offeree's silence or inaction is not acceptance of an offer. The Restatement has made three exceptions to this rule, however:

> (a) [w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation[; or] (b) [w]here the offeror has . . . given the offeree reason to understand that assent may be manifested by silence or inaction *and* the offeree in remaining silent and inactive intends to accept the offer[; or] (c) [w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept [the terms].[202]

Most browse-wrap agreements do not fall within the first two exceptions to the Restatement rule that silence or inaction is not acceptance, because subsection 69(a) is limited to compensation for services and subsection 69(b) requires the offeree's intent to accept (which usually will be missing or difficult to prove). However, subsection 69(c), which requires previous dealings or the like between

200. *Id.* § 10, cmt. 2, 7A pt. 1 U.L.A. 263.

201. *See, e.g.*, Florence City-County Airport Comm'n v. Air Terminal Parking Co., 322 S.E.2d 471, 473 (S.C. Ct. App. 1984) (addressing reduced-rent negotiations); Boehnlein v. Ansco, Inc., 657 P.2d 702, 703–05 (Or. Ct. App. 1983) (addressing real estate); Saluteen-Maschersky v. Countrywide Funding Corp., 22 P.3d 804, 805–08 (Wash. Ct. App. 2001) (addressing a promissory note); Terminal Grain Corp. v. Rozell, 272 N.W.2d 800, 802 (S.D. 1978) (addressing a grain sale); Ill. Central Gulf R.R. v. Int'l Harvester Co., 368 So. 2d 1009, 1010–12 (La. 1979) (addressing a sublease). The court in *SoftMan Products Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1087–88 (C.D. Cal. 2001), ruled that notice of the terms on the software box was not enough to make those terms binding on the distributor buyer because "[r]eading a notice on a box is not equivalent to the degree of assent that occurs when the software is loaded onto the computer and the consumer is asked to agree to the terms of the license." The distributor never installed the software and thus never expressly or impliedly assented to the end-user license agreement.

202. RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981) (emphasis added).

the parties, might be met in situations like *Register.com, Inc. v. Verio, Inc.*, in which the defendant's repeated uses of plaintiff's Web site helped to persuade the court that the defendant had assented to the terms of use, regardless of their location.[203]

In light of these cases, the preferred strategy is to phrase the terms on a Web site or a CD-ROM so that the user must take an affirmative action in order to assent to the proposed terms, rather than having to argue that the user's inaction (failure to reject, failure to return, failure to leave the Web site, etc.) unambiguously manifested the user's assent. The terms might say, "By going past this page, you agree . . . " or "By submitting a search query, you agree . . . " or "By downloading this software, you agree. . . ." This is not silence or inaction, but an affirmative action, which, when taken after the requisite notices and opportunity to review proposed in this Article, manifests the user's assent to the terms presented for review.

A handful of cases have grappled with whether the terms in the box with the product become binding on the customer because of the customer's failure to return the product (a form of inaction) within the number of days after receipt specified in the terms enclosed with the product. The courts have split as to whether the customer is bound by those terms.[204]

One criticism of treating the failure to return the product as a method of assent is that it is unduly burdensome for the user to make the return, in terms of time and cost.[205] Such a concern is not necessarily applicable to browse-wrap agreements. Because browse-wrap agreements complying with the recommendations of this Article make the terms available for review before products are ordered, downloaded or shipped, they do not impose the same burdens on the user as enclosing the terms in the product packaging. Should the user wish to reject the browse-wrap terms because of the perceived unfavorable terms, he or she presumably can do so before costs are incurred.

CONCLUSION

As stated earlier,[206] the authors posit that a user validly and reliably assents to a browse-wrap agreement if the following four elements are satisfied:

(i) The user is provided with adequate notice of the existence of the proposed terms.
(ii) The user has a meaningful opportunity to review the terms.

203. *See supra* text accompanying notes 25–29.

204. *See generally supra* cases discussed in text accompanying notes 115–134.

205. *See, e.g.*, Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 528 (W.D. Pa. 2000) (finding that the delay or cost occasioned by returning software and obtaining an alternative product could create unreasonable "switching costs"); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) (querying, in dictum, what the buyers' remedy would be "if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping"; the court, however, found that buyers had enough advance notice of terms being included in the box that buyers could not make that argument).

206. *See supra* text accompanying note 13.

(iii) The user is provided with adequate notice that taking a specified action manifests assent to the terms.
(iv) The user takes the action specified in the latter notice.

Throughout this Article, we have provided suggestions about how to increase (or decrease) the likelihood of meeting these four criteria.

To prevail in a dispute about the user's assent, the vendor may well have to produce evidence of each of the above elements, showing the circumstances surrounding the presentation and timing of the notices, the observance of Internet and CD-ROM conventions, the ease of accessing the terms, and the nature of the conduct required for assent and undertaken by the user. Elements (i) and (iii) involve uncertainty as to how much notice is "adequate," and element (ii) involves uncertainty as to how much opportunity to review is "meaningful." Furthermore, the case law on browse-wrap agreements is less cohesive and less consistent than the case law on click-through agreements, so the validity of browse-wrap agreements is less predictable.

These variables make it more difficult to show the users' assent to browse-wrap agreements than to show assent to click-through agreements, so browse-wrap agreements are less reliably enforceable, at least at this stage in the development of electronic commerce law.[207] If the vendor chooses to use a browse-wrap format for obtaining the user's assent to the vendor's terms, the browse-wrap agreement should be formatted and worded to satisfy the four elements proposed in this Article, so that the user's assent is demonstrably obtained.

207. *See generally* Kunz, et al., *supra* note 1, at 401–02, 419–20.