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## **Clicking and Cringing**

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NANCY S. KIM\*

## Clicking and Cringing

*Shrinkwrap, clickwrap, and browsewrap licenses have complicated contract law by introducing nontraditional methods of contracting to govern the use of software. The retention of the underlying intellectual property by the licensor, and the malleable qualities of software, give rise to the ability and the need to set parameters of use. The courts have tended to defer to the ownership rights of licensors by claiming that there is valid contract formation, even in "rolling contract" situations. In this Article, I propose that a consumer's assent to a transaction should not be transmuted into blanket assent to each individual term of a nonnegotiated contract. Instead, the concept of "assent" should be bifurcated into two parts, actual assent and presumed assent. Actual assent means manifested, express agreement. Presumed assent means that the licensee, by expressly agreeing to the transaction, may also be presumed to have assented to certain terms of the contract. The licensee should not be presumed to have assented to all "not unreasonable" contract terms, however, as is currently the case under the "blanket assent" approach to contracts. Whether the licensee's assent to a given term may be presumed depends upon the operative effect of the term. The licensee may be presumed to have assented to provisions governing the "scope of license" or the "terms of use" (as further defined) to the software or web site because such terms establish the conditions upon which the licensor has agreed to make the digital information available. Furthermore, the caption heading of "scope of license" or "terms of use" should not be determinative. The licensee should not be presumed to have*

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*assented to provisions that (i) impose affirmative obligations or (ii) purport to take away the licensee's legal rights. The Introduction sets forth the doctrinal problems related to nonnegotiated software licenses. Part I proposes a two-step analysis. The first step is to determine whether the putative licensee has assented and the nature of that assent (i.e. whether the assent is to engage in the transaction or whether the assent is to a particular term). The second step is to determine what terms govern the activity based upon the nature of the assent. Part II summarizes and analyzes the current case law using my proposed approach, and applies the approach to a sample license agreement. The Conclusion explains that a presumption of assent to scope of license terms and a requirement of actual assent to other material terms both respects the integrity of contract doctrine and accommodates business realities.*

## INTRODUCTION

This Article seeks to expand the current discussion governing software licenses and argues that the *sui generis* nature of software often necessitates deviations from the classical contract model of bargaining. A software license enables the licensee to use but not own the software. The intangible and malleable qualities of software, and the retention of the underlying intellectual property rights by the licensor, give rise to the ability and the need to set parameters of use.<sup>1</sup> This does not mean that when it comes to software licenses, the

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<sup>1</sup> See Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 484–86 (1995) (describing the public goods problem as “particularly acute” in the case of software which is easily copied and distributable).

licensor's exercise of ownership should be unchecked or that the licensee's rights should be unduly restricted. It does, however, mean that contract and commercial law doctrines may conflict with and offend notions of fair play in business transactions. This Article proposes an analytical approach that respects the integrity of contract doctrine while taking into consideration the business realities involved in licensing software.

Legal commentary of software licenses tends to be limited to discussion of nonnegotiated agreements, such as shrinkwraps, browserwraps, and clickwraps,<sup>2</sup> and often lumps these three types of licenses together.<sup>3</sup> In fact, software is licensed in a variety of ways. In many cases, the licensee enters into the license "agreement" simply by opening the package containing the software. In many other cases, however, the licensee has spent months negotiating the terms of the license agreement. A software license encompasses both extremes as well as variations in between. The focus of this Article, however, is solely on the problem of assent with respect to nonnegotiated shrinkwrap, browserwrap, and clickwrap licenses.<sup>4</sup>

A shrinkwrap license refers to an agreement that is wrapped in plastic and included with a disc containing a software program.<sup>5</sup> The licensee manifests assent to the terms of the shrinkwrap agreement either by tearing open the plastic wrap containing the software, or by installing the software.<sup>6</sup> A clickwrap agreement is electronically transmitted and requires clicking on a button indicating assent prior to downloading software or accessing a web site.<sup>7</sup> A browserwrap license purports to bind an individual accessing a web site but does not require the user to expressly manifest assent.<sup>8</sup>

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<sup>2</sup> See generally *id.*

<sup>3</sup> While the interplay of contract and property concepts arises in all software licensing transactions, I limit myself in this Article to discussion of *nonnegotiated* licenses only.

<sup>4</sup> I reserve for another day the other relevant contract formation issues of offer/acceptance and consideration.

<sup>5</sup> Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 (1995) [hereinafter Lemley, *Intellectual Property*].

<sup>6</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452–53 (7th Cir. 1996).

<sup>7</sup> Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006) [hereinafter Lemley, *Terms of Use*].

<sup>8</sup> *Id.*; see also Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003)

Cases, scholarship, and professional organization reports evaluating nonnegotiated software licenses have tended to focus on the issue of contract formation, and specifically, on the matter of assent.<sup>9</sup> In many cases, the consumer or putative licensee does not actually read the software license terms but the courts have nonetheless found the requisite “assent” necessary for contract formation. In so doing, the courts are deferring to the licensor’s business interests and the policy of facilitating business transactions rather than reaching an inevitable conclusion of assent mandated by contract law.

In this Article, I argue that resorting to presumed assent is often necessary, and desirable, to address the unique business needs associated with licensing software. Currently, courts purport to find assent where none exists in an attempt to enforce contracts that provide a net benefit to society.<sup>10</sup> Yet, while a finding of constructive assent sometimes may be necessary to enforce socially desirable contracts, certain parameters should be set around such a legal fiction. A failure to do so imposes *in toto* contract law principles that were established with consenting parties as a premise upon a transaction that occurred without

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[hereinafter Kunz, *Browse-Wrap Agreements*]. While browsewrap agreements often do not involve downloading software, they do purport to govern a licensee’s access and use of a licensor’s web site. Because a web site owner has a proprietary interest in its web site, I do not distinguish between browsewraps used to download software and those used merely to govern use of a site.

<sup>9</sup> See *infra* Part II.A. The American Bar Association (“ABA”) Joint Working Group on Electronic Contracting Practices recently completed a two-part project on the validity of the assent process in electronic form agreements. The first part of the project focused on clickwrap agreements. See Christina L. Kunz et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (2001). The second part of the project examined assent in the context of browsewrap agreements. See Kunz, *Browse-Wrap Agreements*, *supra* note 8.

<sup>10</sup> As Richard Craswell states, in some cases, the costs of obtaining a party’s “proper” consent depends heavily on “just what is deemed necessary for [such party’s] consent to be proper.” Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 9–10 (1993). Craswell further states that as a result, in some cases, such as fine print contracts, it may be appropriate to adopt a liability rule to avoid the unnecessary expense of ensuring consent is proper. *Id.* at 10–11; see also Richard A. Epstein, *Contract, Not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’ 205, 208–14 (Jane K. Winn ed., 2006) (observing that different software products require different kinds of solutions which cannot be anticipated by the government and that current licensing practices have “unleashed an unprecedented wave of new firms and products” that have benefited consumers).

one party's actual consent.<sup>11</sup> The judicial transmutation of constructive assent into actual assent undermines one of the fundamental principles underlying contract law—that of individual autonomy.<sup>12</sup> This Article further argues that, given the lack of actual agreement to terms, contract law's deference to industry norms is troubling and misplaced. In order to render a contract unenforceable on the grounds of unconscionability,<sup>13</sup> the terms of the contract are considered “in the light of the general commercial background and the commercial needs of the particular trade or case.”<sup>14</sup> Modern contract law and the Uniform Commercial Code (“U.C.C.”) state that contractual terms that reflect trade usage or industry standards should be

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<sup>11</sup> See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943) (stressing the need to “remain fully aware” that the use of the word “contract” does not “commit us to an indiscriminate extension of the ordinary contract rules to all contracts”). The effect of assuming actual assent where there is none has led to some disheartening results. See, e.g., *Rinaldi v. Iomega Corp.*, No. 98C-09-064 RRC, 1999 Del. Super. LEXIS 563 (Del. Super. Ct. Sept. 3, 1999) (upholding a warranty disclaimer as “conspicuous” even though it was contained within product packaging). In reaching its conclusion, the *Rinaldi* court relied upon the reasoning of *ProCD, Inc. v. Zeidenberg*, which also upheld a rolling contract, although the disputed terms pertained to the license grant. As Stephen Friedman points out, there is dicta in *ProCD* that cautions against applying that case's rationale to disclaimers of the implied warranty of merchantability: “That dicta indicates that even if ‘money now, terms later’ may be fine for certain types of contracts terms (such as the *ProCD* license term which limited the use of the purchase application program and data to non-commercial purposes), it may not be appropriate for warranty disclaimers.” Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677, 693 (2004).

<sup>12</sup> See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 5–6 (1981). Some scholars argue that, because consent to form contracts is not voluntary, they are not expressions of individual autonomy and should not be enforced. See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1238 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 542 (1971). But see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (criticizing as unrealistic objections to form contracts on autonomy grounds).

<sup>13</sup> For a discussion and analysis of unconscionability, see Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). Leff sets forth a framework for analyzing claims of unconscionability that entails both the manner in which the contract was entered into (i.e. whether there was “procedural” unconscionability) and whether the terms were fair (i.e., whether there was “substantive” unconscionability). *Id.* at 486–88.

<sup>14</sup> U.C.C. § 2-302 cmt. (2003); see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

interpreted as part of the contract.<sup>15</sup> Corbin suggests that the test should be whether the terms are “so extreme as to appear unconscionable according to the mores and business practices of the time and place.”<sup>16</sup> But where there is a pronounced unevenness in the bargaining power within the industry, a set of industry standards or “norms” may be established that reflects the interests of only one side.<sup>17</sup> Using industry standards as a guideline where contracts of adhesion<sup>18</sup> are involved merely reinforces the overreaching by the party with greater bargaining power.<sup>19</sup> While the licensing of software is conceptually different from the sale of goods, many of the contractual problems arising from, and associated with, software licensing stem not so much from the *sui generis* nature of software itself but from the

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<sup>15</sup> See U.C.C. 1-303(d) (2006) (“[U]sage of trade . . . is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”); RESTATEMENT (SECOND) OF CONTRACTS § 222 (1979) (“Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.”).

<sup>16</sup> 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 128, at 551 (3d ed. 1963).

<sup>17</sup> See Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041 (2005) (stating that the U.S. standard of unconscionability is too high a bar to provide reasonable consumer protection and proposing minimum contract standards for nonnegotiated contracts).

<sup>18</sup> The introduction of the term “contracts of adhesion” into American jurisprudence is credited to Edwin Patterson when he described an insurance contract that an insured merely “adheres” to because he has little choice as to its terms. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) [hereinafter Patterson, *Life-Insurance Policy*]. In a later work, Patterson attributes the term “contracts of adhesion” to a French jurist, Raymond Saleilles. Saleilles stated:

Eventually the law must . . . yield to the shading and differences that have emerged from social relations. There are pretended contracts that have only the name . . . For these . . . the rules of individual interpretation should undergo important modifications, if only that one might call them, for lack of a better term, contracts of adhesion, those in which a single will is exclusively predominant, acting as a unilateral will which dictates its law, no longer to an individual, but to an indeterminate collectivity . . .

Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964) [hereinafter Patterson, *Contracts*].

<sup>19</sup> *But see* Epstein, *supra* note 10, at 206 (stating that a “convergence in terms across competitors,” should not be treated as collusion but as “evidence only of the imitation that allows successful practices to succeed while others fail”).

concerted effort by licensors to create standard, one-sided terms. These efforts by software licensors to establish and shape licensing norms create industry standards that consumers soon learn to expect, even if consumers are personally opposed to those norms. This type of private legislation by the software industry is similar to norms that have been established in other industries,<sup>20</sup> most notably the insurance industry.<sup>21</sup> It is thus imperative for courts to recognize the norm-setting impact of enforcing license terms under the guise of contract principles where the result is actually driven by business or economic needs.

I propose that the doctrinal concept of “assent” should be bifurcated into two parts, actual assent and presumed assent. Actual assent would mean express manifested agreement, not simply to the transaction, but to each of the individual material terms. Notice and an opportunity to read the agreement would not suffice; the licensee must manifest assent to a particular, disputed term, not just to the transaction and the idea of the contract. Presumed assent would mean actual assent to the transaction and the contract generally but not to any individual or particular contractual term. A contract could thus be formed with a finding of presumed assent, but presumed assent would not be interpreted as blanket consent to all the contractual terms. Whether a given term would be deemed part of the contract, and enforceable, would depend upon its operative effect. If the provision concerned the “scope of license” or the “terms of use” (as further defined) to the software or web site, then those terms would be enforceable (subject to traditional contract law defenses) although the licensee’s obligation to perform would be conditioned upon actual notice.

A licensee’s right to use software exists only as a result of the grant of license by the licensor; the scope of license describes the parameters of that right.<sup>22</sup> The licensor, by structuring the

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<sup>20</sup> See Kessler, *supra* note 11, at 632 (stating that consumers’ ability to shop around for different contracts is constrained by monopoly enjoyed by the drafting party).

<sup>21</sup> See Patterson, *Life-Insurance Policy*, *supra* note 18.

<sup>22</sup> *But cf.* Lemley, *Terms of Use*, *supra* note 7, at 481 (stating that courts should analyze the property claim underlying electronic agreements directly rather than obscuring the issues in contract theory. Lemley states that to claim “that browsewraps are enforceable only where the drafter already had a right to prevent



agreement as one that is nonnegotiable, has made a decision to create a business model based upon those license terms. The “scope of license” terms (and the license fee) are the material terms of the transaction, the terms that the licensor believes are significant enough to warrant “deal breaker” status. The licensee has no rights to the intellectual property being licensed which preexist the license grant or exist independently of it.

On the other hand, the licensor should not be able to lump terms having nothing to do with the use of the product or service under the “scope of license” or “terms of use” provision. The substance of the provision, and not the caption or heading, is determinative. The scope of license or terms of use include only those restrictions on the licensee’s ability to use the product or service. Those restrictions, however, must directly relate to, and arise out of, the license grant. If the operative effect of a term is to impose any obligation upon the licensee unrelated to how the technology is being used, or if the effect is to strip the licensee of any rights or remedies otherwise available to the licensee, then the court should require actual assent to such term.

Often contained in nonnegotiated licenses are “free rider” provisions,<sup>23</sup> included in an agreement because the drafter has no incentive *not* to include them.<sup>24</sup> Furthermore, even if these provisions were deal breakers for the licensor, the licensee has

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a particular use is the functional equivalent of refusing to enforce those browsewraps”).

<sup>23</sup> Webster’s Dictionary defines a “free ride” as “something (as entertainment, acclaim, or a profit) obtained without the usual cost or effort.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 491 (1988). I adopt the Webster’s Dictionary definition of the term to describe “free-rider” contractual provisions that are included in a form agreement and are not consciously bargained for by the licensee or the licensor. I use the term with a wink to its meaning in the law and economics literature. See, e.g., Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991); Theodore Groves & John Ledyard, *Optimal Allocation of Public Goods: A Solution to the “Free Rider” Problem*, 45 ECONOMETRICA 783 (1977) (describing the “Free Rider Problem” where “the achievement of Pareto-optimal allocation of resources via decentralized methods in the presence of public goods is fundamentally incompatible with individual incentives”); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1040 (2005) [hereinafter Lemley, *Free Riding*] (defining free riding as obtaining a benefit from someone else’s investment).

<sup>24</sup> See discussion *infra* Part II; see also Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 842–45 (2006) (discussing whether market pressure can discipline e-businesses’ selection of standard forms).

preexisting rights that arise independently from the license grant that counterbalance the licensor's intellectual property rights. There is no reason for either party's rights to outweigh the other party's. The term should not be enforced simply because it is in the contract. The nonenforcement of the term would result in a gap in the contract. The courts should then refer to the U.C.C. or to other applicable law<sup>25</sup> to fill in any such gaps.<sup>26</sup>

I have divided this Article into two parts. Part I proposes an analytical approach that reconciles the business realities involved in software transactions with contract law principles. The proposed approach requires first analyzing whether the putative licensee has assented and the *nature* of that assent (i.e., whether it is general assent to engage in a transaction or whether it manifests assent to the disputed term). The second step requires determining *what terms govern* the activity based upon the nature of the assent. Part II summarizes and analyzes the current case law using my proposed analytical approach. I suggest that often courts have contorted contract law doctrine to enforce terms that were never actually agreed to, but which nonetheless were commercially reasonable, as explained in Part I.

Admittedly, much of this Article and my proposal is generally applicable to form contracts that are contracts of adhesion.<sup>27</sup> I choose to limit my discussion in this Article to software licenses because, while the problem created by licenses to consumers is

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<sup>25</sup> As of the writing of this Article, a draft of the Principles of the Law of Software Contracts is being circulated by the American Law Institute. Presumably, a final adopted version would serve as an appropriate source for gap filler terms. See PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, Discussion Draft (Mar. 30, 2007) (on file with author).

<sup>26</sup> In the absence of express legislative guidance or case law on a particular issue, the courts would resolve issues guided by the standard of reasonableness. Ian Ayres and Robert Gertner refer to this type of default allocation based upon reasonableness as a "majoritarian default rule." See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989). Craswell points out that majoritarian default rules are similar to liability rules, and that both are preferable where transaction costs to negotiate individual contracts are high. See Craswell, *supra* note 10, at 14; see also *id.* at 32–34 (discussing the problems related to preexisting default rules).

<sup>27</sup> For a discussion of the issues raised by form contracts that are contracts of adhesion, see Rakoff, *supra* note 12. I have previously discussed the disconcerting effects of applying interpretation rules to provisions in form contracts. See Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 539–49 (2005).

similar to that created by other types of consumer form agreements, the application of the solution must be industry specific.<sup>28</sup> In other words, the matter of to “what terms” we can presume assent would require consideration of the nature of the transaction and the business needs associated with that particular industry.

The primary advantage of the approach outlined in this Article is that it defaults to the U.C.C.,<sup>29</sup> other applicable law, and to ordinary (as opposed to industry specific) standards of reasonableness. By contrast, the current law governing nonnegotiated licenses defaults to contract terms that are clearly biased in favor of the licensor. Shifting the burden created by the nonnegotiated form of the contract accomplishes two important objectives. First, it eliminates free-rider provisions, which are those terms that do not affect the licensor’s decision to enter into the transaction.<sup>30</sup> Those provisions which are not free

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<sup>28</sup> Electronic contracting may also raise its own unique set of issues. See Michael H. Dessent, *Browse-Wraps, Click-Wraps and Cyberlaw: Our Shrinking (Wrap) World*, 25 T. JEFFERSON L. REV. 1, 14–16 (2002) (noting, among other problems, the difficulties of proving electronic signature fraud and the lack of ceremony associated with electronic contracting); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 477–85 (2002) (discussing the various social and cognitive factors that may make consumers more inclined to treat electronic transactions casually). But Hillman & Rachlinski conclude that while “e-commerce changes some of the dynamics of standard-form contracting in interesting and novel ways . . . these differences do not call for the development of a radically different legal regime.” *Id.* at 432.

<sup>29</sup> Using the U.C.C. as a “gap filler” does not include preamended section 1-205 or revised 1-303 (amended 2001) which incorporates trade usage where industry norms have been established through adhesion contracts. See discussion, *infra* Part I.B.3.

<sup>30</sup> Mueller has noted that “so much contractual language” is retained because of the feeling that it “can do no harm and might do some good.” Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 580 n.22 (1969). This attitude is expressed by Michael Kinsley, the editor of the online magazine *Slate.com*. When asked about the clickwrap agreement on the *Slate.com* web site, Kinsley admitted, “Yes, it’s absurd.” But he then added that it was no more absurd than agreements at other web sites. See James Gleick, *Click OK to Agree*, <http://www.around.com/agree.html> (last visited Mar. 18, 2008). Lemley and McGowan have referred to adoption of standardized terms by industry players as a “‘network effect’ of a sort—those who draft contracts of adhesion with one-sided terms benefit if their competitors adopt the same one-sided terms.” Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 589 (1998); see also Korobkin, *supra* note 12, at 1206 (describing free-rider provisions as “socially inefficient”). Korobkin argues that the reason form agreements require scrutiny is that buyers make decisions only in a “boundedly rational” manner, which provides incentives to sellers to draft nonsalient contract

riders, on the other hand, will require actual assent and will be called to the reader's attention. A requirement of an affirmative manifestation of consent requires the consumer to consider whether the proposed transaction in fact is what he or she had bargained for. Forcing the consumer to click numerous times may be a hassle for the consumer, but if we are to take the notion of contractual assent seriously, it should be.<sup>31</sup> To do otherwise would be to privilege transaction facilitation<sup>32</sup> over the other objectives of contract law, namely enforcing the intent of the parties. Second, the resultant consumer frustration may motivate the customer to select another, less contractually demanding, licensor, or it may encourage licensors to streamline

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terms to their own advantage, whether or not such terms are efficient. *Id.* The notion of bounded rationality was first espoused by Herbert Simon, a Nobel Prize winning economist who suggested that because human beings are limited in their computational abilities, they make choices that are satisfactory rather than optimal. Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 99–100 (1955) (noting that the concept of “economic man” is in need of “fairly drastic revision” and “the task is to replace the global rationality of economic man with a kind of rational behavior that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist”). Simon further stated:

Because of the psychological limits of the organism . . . actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models. While the approximations that organisms employ may not be the best—even at the levels of computational complexity they are able to handle—it is probable that a great deal can be learned about possible mechanisms from an examination of the schemes of approximation that are actually employed by human and other organisms.

*Id.* at 101.

<sup>31</sup> In this Article, I am primarily concerned with which party should bear the burden of a failure to obtain actual assent. I do not address the issue of the type of liability that should attach where “proper” consent is lacking. Richard Craswell argues that property rules are preferable under any autonomy-based theory that attaches importance to a right-holder's actual rather than hypothetical consent. *See* Craswell, *supra* note 10, at 8. In many cases, however, Craswell states that a liability rule is preferable because the transaction costs of obtaining informed consent are too high. *Id.* at 11. Interestingly, in many software licensing cases, the failure to obtain proper consent would result in misuse by the nonconsenting party. In any event, this Article is primarily concerned with the issue of *what* should constitute proper consent and who should bear the burden of the associated transaction costs in its obtainment. To the extent that I do address the consequences of a failure to obtain proper consent, I do so in my discussion of gap fillers in Part IV.

<sup>32</sup> *See* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996). The authors argue that nonnegotiated licenses are an efficient tool for standard, mass market transactions. *Id.* at 342–43.

agreements and provide less onerous terms to avoid losing customers.<sup>33</sup> The consumer is forced to weigh the contractual provisions as part of his or her cost-benefit calculation in entering into the transaction.<sup>34</sup> As it should be under contract law, under my approach, the contractual terms would more closely reflect what the parties have bargained for, thereby enhancing the economic efficiency of the exchange.<sup>35</sup>

My proposal is admittedly contrary<sup>36</sup> to the current assumption under contract law that all provisions in a contract reflect the bargain or that manifested assent is tantamount to blanket assent<sup>37</sup> to terms that are not “unreasonable.”<sup>38</sup> I argue

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<sup>33</sup> Craswell states that if it is feasible for the drafting party to point out all the contractual clauses and explain them orally, her failure to do so should bar her from enforcing any clauses that were not so explained. Craswell, *supra* note 10, at 59. He acknowledges, however, that many contracts contain so many clauses that they could not all be orally explained prior to every sale. *Id.* Craswell thus recommends that in such cases, a liability rule should apply which would prevent the drafting party “from enforcing only those obligations that were both not pointed out *and* deemed unreasonable by the court.” *Id.* (emphasis added). My proposal strives to obtain an alternative result, the streamlining of agreements which would circumvent the need for imposition of liability rules but would, in most cases, achieve the same result by resorting to gap fillers. *See infra* Part II.B.

<sup>34</sup> Hillman & Rachlinski, *supra* note 28, at 472, question whether “e-businesses will compete for customers with more advantageous contract terms” but note that the Internet “might be producing some diversity in the contract terms e-businesses offer,” and that “comparison shopping among standard terms actually might pay off.” The authors speculate, however, that the diversity of terms “could be a product of the novelty of e-business and therefore might not persist as e-commerce develops.” *Id.*

<sup>35</sup> *See* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 585 (1990) (noting a “tendency toward inefficiency in transactions involving consumer form contracts”).

<sup>36</sup> Although my proposal is contrary to current contract law, it is not the first time an argument has been made in favor of actual assent. *See, e.g.,* Clarke B. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441, 443 (1929) (critiquing the “objective” theory of contracts of the First Restatement and proposing that using “actual assent” as the basis for “mutual assent” except where there has been a “careless misleading which induces a reasonable belief in assent” would lead to better results).

<sup>37</sup> Karl Llewellyn famously stated:

Instead of thinking about “assent” to boiler plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms . . . which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to

that a consumer's assent to the transaction should not be transmuted into blanket assent to each individual term of a nonnegotiated contract.<sup>39</sup> A requirement of actual assent reallocates the current balance of burdens away from the consumer to the party in a better position to accommodate them.<sup>40</sup> As Friedrich Kessler wrote, "freedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract."<sup>41</sup> Vendors have been quick to take advantage of new modes of contracting to accommodate new types of products and services;<sup>42</sup> it is time that they shared some of the costs associated with these forms of contracting as well.

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cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of the agreement.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 370 (1960); see also Hillman & Rachlinski, *supra* note 28, at 461 (defining Llewellyn's notion of "blanket assent" as meaning that "although consumers do not read standard terms, so long as their formal presentation and substance are reasonable, consumers comprehend the existence of the terms and agree to be bound to them").

<sup>38</sup> See Hillman & Rachlinski, *supra* note 28, at 455 (noting that the current legal approach to standard form agreements supports Llewellyn's view that the law should create "a presumption of assent (or 'blanket assent') to standard terms . . . . Llewellyn based his framework on the perspective that, so long as the terms are not unfair in presentation or substance, courts should presume consumers' 'blanket assent' to the details they may have ignored.").

<sup>39</sup> See Rakoff, *supra* note 12, at 1205–06 (criticizing Llewellyn for overlooking that boilerplate clauses often reflect the attorney's "expertise" rather than the business person's).

<sup>40</sup> See Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, 104 *COM. L.J.* 197, 228 (1999) (arguing that materials terms of a transaction should be available prior to purchase of software product); Recent Decision, *Limitations on Credit Card Holders' Liability for Unauthorized Purchases*, 13 *STAN. L. REV.* 150, 154 (1960–61) (stating that it may be proper to determine a credit card issuer's liability by "standards which would require it to bear a greater share of the risk of loss").

<sup>41</sup> Kessler, *supra* note 11, at 642.

<sup>42</sup> See Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 *TOURO L. REV.* 1205, 1215–17 (2000) (querying why "the risk of poor management decisions" resulting in defective products should fall on the consumer rather than the management of the company).

## I

THE PROBLEM OF ASSENT AND THE NONNEGOTIATED  
LICENSE

Let's say that you are downloading software from YOUCH,<sup>43</sup> a social networking web site. Before you can start the download process, a clickwrap agreement appears. In large lettering, a statement appears that you must click the "I agree" box in order to proceed. You click the "I agree" box without reading the terms contained in the electronic agreement. Are you bound by the terms of the clickwrap agreement? Assume further that one of the terms of the clickwrap agreement requires you to permit YOUCH to release your personal information to advertisers. Another provision prohibits you from installing software that blocks pop-up ads. Assume that a pop-up ad releases a virus that infects and deletes some of your files. Let's assume further that desktop icons appear as a result of your use of YOUCH's software. You try to delete those icons and remove YOUCH's software, but are unable to do so. You seek assistance from YOUCH's customer support, but are told that, pursuant to the terms of their clickwrap agreement, YOUCH is not responsible for any viruses caused by use of its web site or its software. To make matters worse, you have just been informed by snickering acquaintances that your profile is being distributed by YOUCH to advertise its "Lonely Singles Meet Your Match" marketing campaign. Your grinning digital image along with a statement about your favorite songs, books, and foods are distributed far and wide by YOUCH's marketers in the form of a jiggling pop-up box—a use which you ignorantly agreed to when you clicked the "I agree" box.

Far from being the product of this author's overactive imagination, such contract terms are common on networking web sites,<sup>44</sup> even if their enforceability has not yet been tested in

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<sup>43</sup> YOUCH is a product of the author's imagination.

<sup>44</sup> See, for example, the end user license agreement on [www.kazaa.com](http://www.kazaa.com), which states:

Sharman reserves the right to run advertisements and promotions on Kazaa.

....

... You agree that Sharman is not responsible or liable for any loss or damage of any sort incurred as the result of any such dealings or as the result of the presence of such advertisers on Kazaa and/ or [kazaa.com](http://kazaa.com).

a court of law.<sup>45</sup> Generally, absent a finding of unconscionability, the terms of clickwrap licenses have been held to be enforceable.<sup>46</sup> There are several problems with relying upon the doctrine of unconscionability to prevent enforcement

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. . . You agree, so long as you have not entirely deleted Kazaa from your computer, not to take any action, including downloading other software, to disable or block the display of advertising by the Software.

Kazaa.com, End User License Agreement, §§ 7.1, 7.5, 7.6, <http://www.kazaa.com/us/eula.htm> (last visited Mar. 18, 2008).

See also the terms of use at [www.myspace.com](http://www.myspace.com), which state:

MySpace takes no responsibility for third party advertisements or third party applications that are posted on or through the MySpace Services, nor does it take any responsibility for the goods or services provided by its advertisers. MySpace is not responsible for the conduct, whether online or offline, of any User of the MySpace Services. MySpace assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, any User or Member communication. MySpace is not responsible for any problems or technical malfunction of any telephone network or lines, computer online systems, servers or providers, computer equipment, software, failure of any email or players due to technical problems or traffic congestion on the Internet or on any of the MySpace Services or combination thereof, including any injury or damage to Users or to any person's computer related to or resulting from participation or downloading materials in connection with the MySpace Services. Under no circumstances shall MySpace be responsible for any loss or damage, including personal injury or death, resulting from use of the MySpace Services, attendance at a MySpace event, from any User Content posted on or through the MySpace Services, or from the conduct of any Users of the MySpace Services, whether online or offline.

MySpace.com, Terms of Use Agreement, § 12, Feb. 28, 2008, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

The terms of service on [www.friendster.com](http://www.friendster.com) state:

By publishing, displaying or uploading (collectively, "Posting") any text, links, photos, video, messages or other data or information (collectively, "Content") on or to the Website (including on or to your profile), you automatically grant, and you represent and warrant that you have the right to grant, to Friendster an irrevocable, perpetual, nonexclusive, fully-paid and worldwide license to use, copy, perform, display, and distribute such Content and to prepare derivative works of, or incorporate into other works, such Content and to grant and authorize sublicenses of the foregoing.

Friendster.com, Friendster Terms of Service, § 5(b), <http://www.friendster.com/info/tos.php> (last visited Mar. 18, 2008).

<sup>45</sup> See Nancy S. Kim, *Sacrificing Privacy to the Web Gods*, SAN FRANCISCO CHRONICLE-SFGATE, Mar. 6, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/06/EDENVAIND.DTL>.

<sup>46</sup> See discussion *infra* Part II.A.2.



of nonnegotiated agreements. First, courts have generally been reluctant to strike down agreements on the basis of unconscionability provided that there was notice and an opportunity to read the contract terms.<sup>47</sup> In addition, the doctrine of unconscionability looks to industry norms to determine whether a term is enforceable, which may be problematic where the norms are set by an industry player with greater bargaining power. For example, consumers may not like the fact that their credit card companies charge them hefty late finance charges, but they lack an alternative. Credit card late finance charges are not unconscionable because all credit card companies charge them.<sup>48</sup>

There is another problem<sup>49</sup> with employing the doctrine of unconscionability in the nonnegotiated agreement context, and that is one that strikes at the integrity of contract doctrine. How can a consumer be deemed to have assented to terms that he or she never read?<sup>50</sup> Even if the consumer was given an

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<sup>47</sup> See Blake Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 261–66 (2003); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA L. REV. 73, 91 (2006) (stating that courts have become more formulaic in their application of the doctrine, thereby undermining the doctrine's "safety net" function); see also Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006) (conducting an empirical study of cases tending to show that claims of unconscionability are difficult, although not impossible, to win). Elsewhere, I have discussed the limitations of the unconscionability doctrine, including a high standard of unfairness, review of events limited to events existing at the time of contract formation, doctrinal vagueness, and judicial discretion. See Kim, *supra* note 27, at 550–53.

<sup>48</sup> In response to consumer credit-related concerns, state governments have enacted special legislation that regulates the substantive content of credit contracts, as well as expands the disclosure requirements imposed upon creditors. See Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977).

<sup>49</sup> Many scholars have also criticized the doctrine of unconscionability on the grounds that it undermines efficient business practices. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294–95 (1975); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1387 (1977).

<sup>50</sup> *But see* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 743 (2002). Professor Hillman has stated, "Although courts and commentators focus on the time of contract formation, this analysis actually yields little fruit. . . . [B]ut few parties think about this technical question, so the issue has little real-world relevance." *Id.* at 744. Furthermore, Hillman notes that "even if the time of

opportunity to read the terms, if the consumer never actually read them, there could not be agreement to those terms.<sup>51</sup> Unconscionability is a defense to contract enforcement, meaning that a contract must have already been formed.

Contract law's present insistence upon blanket assent means that if we wish to enforce *any* of the terms, we have to enforce *all* of the terms, provided that an applicable defense does not apply. In other words, if you had actually read the agreement, you might have agreed to the provision prohibiting you from using YOUCH's web site to market to its members; yet you might have been unwilling to agree to the use of your image in YOUCH's advertisements. Yet if we want to enforce YOUCH's right to prohibit your marketing activity on its web site, we must also say that YOUCH has a right to use your image in its advertising. The only way for you to escape this situation would be if you could successfully use the unconscionability doctrine to defend against enforcement. But your use of the doctrine of unconscionability would likely fail if, for example, the practice of using member profiles in banner ads for social networking sites was commonplace; you were simply unaware of it because it was the first time that you had joined a social networking web site.

In this section, I set forth my proposed approach for analyzing nonnegotiated software licenses.<sup>52</sup> Part A provides a brief

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contract formation is accessible, it does not tell us very much" because additional terms could be agreed to by the parties or barred by courts. *Id.* at 744-45.

<sup>51</sup> For a general discussion of consent, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). See also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989). Some contract theorists view manifested assent to the transaction as actual assent. For example, Randy Barnett has stated that clicking an "I agree" icon demonstrates assent whether or not the terms that are being agreed to have been read. See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 635-36 (2002).

<sup>52</sup> Other commentators have suggested other approaches. Clayton Gillette, for example, has suggested that the issue of assent should be disregarded in the rolling contract situation. In its place, the presence (or absence) of representation by a third party should be used to serve roughly the same functions as assent. See generally Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 241 (Jane K. Winn ed., 2006). Michael Meyerson has stated that no new doctrine needs to be created for consumer form contracts. Expressly recognizing that consumers who sign form contracts typically do not read them, he has suggested instead that the courts should focus on how a "reasonable drafter" should understand the assent of a customer rather than assuming objective agreement to all terms simply because the contract has been signed. See Michael I. Meyerson, *The Reunification of*

discussion of assent in contract law, and explains the concepts of actual assent and presumed assent. Part B focuses on the scope of presumed assent, and introduces an analytical method that makes contract enforceability contingent upon the operative impact of a particular contractual term.

### *A. Actual Assent Versus Presumed Assent*

One of the basic requirements for contract formation is mutual assent.<sup>53</sup> Mutual assent has not been interpreted to mean agreement to all the terms of a contract. Provided that the parties demonstrate mutual assent to the transaction, disagreement about the meaning of a particular term will not nullify its existence. The Restatement expressly distinguishes between terms that have been expressly agreed upon and those that are implied in law:

- (1) A term of a promise or agreement is that portion of the intention or assent manifested which relates to a particular matter.
- (2) A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.<sup>54</sup>

The existing contract interpretation rules then govern how to determine the meaning of contract terms. For example, some courts will determine the meaning of a term in accordance with its ordinary usage or “plain meaning,”<sup>55</sup> although many courts will examine such meaning in the light of circumstances existing at the time the contract was made.<sup>56</sup> The relevant circumstances

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*Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1265–66 (1993).

<sup>53</sup> For example, under the Restatement, contract formation requires a bargain in which there is both a “manifestation of mutual assent to the exchange” and consideration. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979).

<sup>54</sup> *Id.* at § 5.

<sup>55</sup> See *Prudential Ins. Co. of Am. v. Superior Court*, 119 Cal. Rptr. 2d 823, 833 (Cal. Ct. App. 2002) (“The plain meaning of a policy provision governs, and an insured’s reasonable expectations are not considered except where the policy provisions are ambiguous.”).

<sup>56</sup> See *Peterson v. Ek*, 93 P.3d 458, 464–65 (Alaska 2004) (“Washington courts reject the ‘plain meaning’ rule of contractual interpretation and interpret the terms of a contract in light of conduct, subsequent acts of the parties, and circumstances surrounding contract formation, as well as the literal meaning of the language itself.”); see also *Pac. Gas & Elect. Co. v. Drayage & Rigging Co.*, 442 P.2d 641, 644

include course of dealing, course of performance, and trade usage.<sup>57</sup> The courts will also look to the “reasonable expectations” of the parties in determining whether to enforce contractual terms.<sup>58</sup>

### 1. *Is Software Really Different?*

Software licenses occupy a unique place in the law because they raise both contract law issues and issues of proprietorship.<sup>59</sup> While the form of the agreement may vary, all software licenses expressly retain ownership of intellectual property rights in the

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(Cal. 1968) (“A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.”).

<sup>57</sup> See generally *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981); *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542 (Iowa 1995).

<sup>58</sup> *Wessells v. Dep’t of Highways*, 562 P.2d 1042, 1048 (Alaska 1977) (“Contracts should be interpreted to comply with the reasonable expectations of the parties.”); see also *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398 (Del. Super. Ct. 1987); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975); Patterson, *Contracts*, *supra* note 18, at 858 (noting the tendency of courts to interpret form contracts to mean “what a reasonable buyer would expect it to mean” thus protecting “the weaker party’s expectation at the expense of the stronger”). The “reasonable expectations” doctrine is most often used in insurance form contract cases, although its underlying rationale is equally applicable to consumer form contracts in general. See Hillman & Rachlinski, *supra* note 28, at 459–60; Meyerson, *supra* note 52, at 1279–82; Patterson, *Contracts*, *supra* note 18, at 858. See also Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970), for a general analysis of insurance form contracts.

<sup>59</sup> The issue of whether web sites should be treated as “property” is the subject of much debate. See, e.g., Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000); Shuhba Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 (2003); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL. F. 217; Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521 (2003) [hereinafter Lemley, *Place and Cyberspace*]; Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (book review) [hereinafter Lemley, *Romantic Authorship*]. Lemley notes that the rise of the “property rights” view of intellectual property coincides with the widespread use of the term “intellectual property” instead of patent, copyright, and/or trademark law, and suggests that the “rhetoric of property” may make it tempting to treat intellectual property as an absolute right to exclude. Lemley, *Free Riding*, *supra* note 23, at 1033–35, 1071. Setting aside the issue of whether intellectual property is the same (or should be treated the same) as tangible property, I would like to focus on the proprietary interest the licensor has in the software as a product of the licensor’s business.

licensor while permitting the licensee to use a product that is keenly susceptible to copyright infringement, misapplication, and abuse.<sup>60</sup> Many commentators dispute that software is—or should be—licensed, not sold, notwithstanding the purported license agreement.<sup>61</sup> Although the issue of whether software is in fact licensed and not sold is an important one, for the purposes of this Article, it is sufficient to acknowledge that the licensor has an interest in how the software and/or web site information is being used because the use of such software and/or web site information affects the licensor's business.<sup>62</sup> In particular, the reproducibility of software has the potential for economic damage to the licensor in a way that many other goods do not.<sup>63</sup> Many courts, understanding the practical aspects and limitations of selling software, contort existing contract doctrine to enforce agreements that in other contexts would be unenforceable for lack of assent.<sup>64</sup> In so doing, however, the

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<sup>60</sup> The Second Circuit in *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002), noted that it is this manipulable quality that differentiates software from other goods: "Downloadable software . . . is scarcely a 'tangible' good, and, in part because software may be obtained, copied, or transferred effortlessly at the stroke of a computer key, licensing of such Internet products has assumed a vast importance in recent years." *Id.* at 29 n.13; see also Raymond T. Nimmer, *Issues in Licensing: An Introduction*, 42 HOUS. L. REV. 941, 942 (2005) (describing conditional transactions as licenses).

<sup>61</sup> See Thomas M.S. Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577, 581 (1994) (stating that "the retention of 'title' in the 'licensor' is . . . a legal fiction" and that "[a]lthough the license purports to create a reversionary interest in the licensor at the termination of the license, few if any copies of licensed software are ever returned to their licensors"); Lloyd L. Rich, *Mass Market Software and the Shrinkwrap License*, 23 COLO. LAW. 1321, 1322 (June 1994) (noting that because licensors typically do not retain title as a security interest, the license does not expire at a specified time, and the licensee does not make periodic payments, the shrinkwrap "license" is probably actually a sale). *Contra* H. Ward Classen, *Fundamentals of Software Licensing*, 37 IDEA 1, 5–6 (1996) ("[T]he sale of software is typically not a 'sale' within the meaning of section 109 [of the Copyright Act of 1976], but rather a license accompanied by a license agreement . . ."); Nimmer, *supra* note 60, at 941–42 (stating that licenses are a form of conditional transaction which is "by far" the most common type of transaction in information). The Seventh Circuit in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996), expressly reserved the license versus sale discussion for "another day."

<sup>62</sup> I address the issue of whether software is, or should be, licensed or sold in a forthcoming article. See Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. (forthcoming, Oct. 2008) [hereafter Kim, *Licensing Dilemma*].

<sup>63</sup> Of course, there are other products that are susceptible to unauthorized reproduction, most notably music CDs, cassettes, movie videos, and DVDs.

<sup>64</sup> See, e.g., *Specht*, 306 F.3d 17; *ProCD*, 86 F.3d 1447.

courts establish a precedent that applies to all types of nonnegotiated contracts, including those having nothing to do with software.

My proposed approach starts with the basic question, does the license meet the technical requirements of contract formation? This seemingly simple and straightforward question has complex implications stemming from contract law's failure to provide a middle ground between assent and no assent. A finding of assent leads to a finding of contract formation; on the other hand, a finding of no assent means that no contract was formed.<sup>65</sup> Not surprisingly, courts that wish to uphold a particular transaction or *type* of transaction have been more willing to find assent even in the absence of bargaining power. "Assent" has thus been construed to mean acquiescence rather than *agreement*. While one of the objectives of contract law is universally acknowledged as being the promotion of individual autonomy, "assent" is thus stripped of any requirement of voluntariness or volition.<sup>66</sup> While such a passive notion of assent seems inconsistent with the very reason why we enforce contracts, in fact, it reflects another of contract law's goals, which is to encourage and facilitate economic transactions.<sup>67</sup>

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<sup>65</sup> In the absence of a finding of mutual assent, the courts might yet find an implied-in-law, or quasi, contract. Quasi contracts, based in equity, are legal fictions imposed in order to prevent unjust enrichment. See *Kammer Asphalt Paving Co. v. E. China Twp. Sch.*, 504 N.W.2d 635, 640 (Mich. 1993); *Cascaden v. Magryta*, 225 N.W. 511, 512 (Mich. 1929); *Luithly v. Cavalier Corp.*, No. 98-5507, 1999 U.S. App. LEXIS 10653, at \*12-14 (E.D. Tenn. May 20, 1999). In a transaction involving presumed assent, the parties intend to enter into the transaction with an awareness that it shall be governed by contractual terms, but do not actually assent to those terms.

<sup>66</sup> See Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 728 n.49 (1931) ("Agreement does not even today carry any . . . connotation of real willingness. Acquiescence in the lesser evil is all that need be understood.").

<sup>67</sup> See Kessler, *supra* note 11, at 630 (noting that "freedom of contract" is both practical and moral). Kessler stated:

The individualism of our rules of contract law, of which freedom of contract is the most powerful symbol, is closely tied up with the ethics of free enterprise capitalism and the ideals of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen. . . .

With the decline of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has changed radically.

*Id.* at 640. For discussions about the socioeconomic benefits of contracts, see generally A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983);

Contracts, while important in clarifying the terms of transactions, also stall their progression. Simplifying the contracting process—by discouraging or even preventing negotiations—thus shortens the time from transaction inception to completion. The transaction is thus streamlined by allowing assent to be found even where the contracting party did not have actual knowledge of a particular term. In actuality, if one did not know of a particular contractual term, one could not have assented to such term. In contract law, however, provided that the contracting party demonstrated assent to entering into the transaction,<sup>68</sup> the courts have not much concerned themselves with whether the party had actual knowledge, and thus actually assented to, the contractual term at issue. Instead, the courts have focused on notice and an opportunity to read the relevant contractual terms.

Notice and an opportunity to read contractual terms are only somewhat helpful in establishing the existence of assent. While a rejection of those terms after notification does in fact establish *nonconsent* to the terms, the opposite is not true. Where the consumer has no power to negotiate the terms, a failure to reject those terms does not establish agreement or consent to the terms. This does not, however, mean that contractual terms

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ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133–344 (1954) (“[I]n a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in good faith, a social interest in the stability of promises as a social and economic institution, becomes of the first importance . . . .”); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986).

Societal changes necessitate a dynamic approach to contract law that takes into account all the primary underlying objectives of contract law. *See generally* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1745 (2000) (describing dynamic contract law as first effectuating the intent of the parties and then applying the rules that a legislator would use, taking into account relevant policy considerations); Kim, *supra* note 27. While wealth redistribution is not considered one of the objectives of contract law, it is often considered to be one of the goals of the law more generally. *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995).

Another generally accepted contract law objective is the protection of reasonable expectations. *See* Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 157, 190–201 (1989); Roscoe Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1, 1–2 (1945).

<sup>68</sup> With shrinkwrap agreements, the courts have not even required an opportunity to read the contract terms prior to entering into the transaction. *See ProCD*, 86 F.3d at 1447.

should *not* be upheld where they are offered on a “take-it-or-leave-it” basis. In some cases, assent may be presumed because the term is one that the putative licensee would have agreed to if he or she had actually read it. In other cases, assent may be presumed because the licensor would not have agreed to the transaction without it. Thus, assent can be presumed either when the term is unobjectionable or when it is a deal-breaker term, so significant to the licensor’s business objectives that a refusal to accept the terms would have terminated the transaction.<sup>69</sup> If the provision is one affecting the scope of the license, or the terms of use, it should be upheld.<sup>70</sup> The licensee does not have an independent or preexisting right to use the intellectual property of the licensor. The licensor, furthermore, is not required to provide a license to the licensee, and certainly not on whatever terms the licensee chooses. A lack of actual assent should not, therefore, prevent contract formation because in many cases, assent can be presumed. Assent, however, cannot be presumed in all cases, or with respect to all terms in a contract. A putative licensee might be presumed to have assented to certain terms, but not to others. In the next Section, I will discuss which terms should be enforced in the absence of actual assent.

### *B. The Operative Effect of Terms: Why It Matters*

As explained above, if a party manifests actual assent to a contract, then that contractual term becomes part of the transaction. This Section addresses what happens where a party manifests intent to enter into a transaction, but does not manifest assent to a particular term in the contract. Where parties dispute the meaning of a particular term, or have omitted

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<sup>69</sup> These terms are discussed in greater detail below, *see infra* Part I.B.

<sup>70</sup> The license grant provision should be upheld as far as the contract analysis goes. There may, however, be other, noncontract law based, policy reasons for nonenforcement. For example, a court may decide not to enforce a license grant provision if the provision is held to be anticompetitive. Margaret Jane Radin has “urge[d] that policy arguments about [information] property . . . take explicit cognizance of other policy considerations . . . [namely] contractual ordering, competition, and freedom of expression.” Margaret J. Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23, 23 (2006); *see also* Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 102–08 (2001) (discussing the impact and effect of price discrimination on copyrighted works, including the consumer use restriction in *ProCD*).



it altogether, courts will often determine meaning by reference to trade usage and industry norms.<sup>71</sup> Where control in a given industry is concentrated, there is often a systemic lack of bargaining power. Contract terms are imposed in a transaction by the party with greater bargaining power; these terms become duplicated and standardized within the industry. These terms thus evolve into standard terms in form contracts, offered on a take-it-or-leave-it basis, and representative of industry norms. This type of private legislation has occurred in many industries, including the insurance industry, the consumer credit industry, and in the subject of this Article, the software industry.<sup>72</sup> Given the systemic lack of bargaining power in the consumer software industry,<sup>73</sup> notice and/or an opportunity to read terms has little or no meaning—and does not mean that the consumer has acted either knowingly or willingly. On the other hand, the party has manifested a desire to participate in the transaction. Does that, however, mean that she or he should be bound to all of its terms?

Assume a consumer logs onto a web site and clicks “I agree” without reading the multipage electronic contract. Has the consumer agreed to those contract terms? Common sense would tell us no. One could not agree to something that one has never read. Barring any unconscionable terms, however, the answer is likely yes under existing law even though our hypothetical consumer could not have actually agreed to those contract terms if she never read them, even if she had the

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<sup>71</sup> For a critical view of the use of business norms, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). Bernstein states that while the drafters of the U.C.C. sought to incorporate business norms in an effort to make commercial law more responsive to business realities, “they failed to recognize that this approach would fundamentally alter the very reality they sought to reflect, and would do so in ways that would have undesirable effects on commercial relationships and would undermine the Code's own stated goals of promoting flexibility in commercial transactions.” *Id.* at 1769.

<sup>72</sup> See Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 316–19 (2003) (discussing how consumers acquiesce to licensing transactions because they effectively have no other way to purchase software given the evolution of the “licensing norm”).

<sup>73</sup> A systemic lack of bargaining power exists in other industries as well, but I focus my discussion in this Article on the software industry and the unique issues that arise with respect to licenses.

opportunity to do so.<sup>74</sup> What the courts actually mean when they say the consumer has demonstrated assent is two things: (1) the consumer expressed a willingness to engage in the transaction; and (2) the consumer can be *presumed* to have agreed to the contract terms. There was no actual agreement to those terms where the consumer has not actually read them. Contract law imputes agreement and does not require actual assent where there was an opportunity to read the contract. The assumption is that the consumer *would have* agreed to the terms because they are reasonable and/or because the consumer had no choice but to agree to them. This begs the question, to what terms can the consumer be presumed to have assented?

In reality, the above-described behavior on the part of the consumer is not so much an expression of intent to contract as it is a ceding to the reality of his or her situation—the consumer clicks without reading because he or she knows that it does not matter what the contract says. If the consumer wants to enter into the transaction, the consumer will accept all of its terms.

Libertarians might ask, so what?<sup>75</sup> The consumer is a free agent, at liberty to visit another site. Nobody is forcing the consumer to purchase goods from this particular e-tailer, or use this web site or software.<sup>76</sup> But in fact, in many cases, due to the systemic bargaining imbalance within a particular market segment, the terms may have become so uniform and standardized that the consumer effectively has no choice.<sup>77</sup> It is not a viable option for the consumer to decline the terms of any

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<sup>74</sup> Many scholars have written at length on the reasons why consumers do not read standard form contracts. See Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986); Hillman & Rachlinski, *supra* note 28, at 445–54; Korobkin, *supra* note 12; Meyerson, *supra* note 52; Slawson, *supra* note 12.

<sup>75</sup> As Thomas Joo keenly observes, however, the use of “normal” human behavior as a standard “may promote libertarianism but it may also serve its nemesis, majoritarianism. . . . Enforcing a contract in accord with the expectations of *most* people rewards conformist expectations and punishes nonconformist expectations.” Thomas W. Joo, *Common Sense and Contract Law: Fear of a Normative Planet?*, 16 *TOURO L. REV.* 1037, 1047 (2000).

<sup>76</sup> For a criticism of the “economic libertarian” view, see Posner, *supra* note 67, at 318. Eric Posner notes that the historical survival of usury laws responds to a basic social problem and that “those who endorse the policy of poverty reduction through the welfare system should support restrictive contract laws.” *Id.*

<sup>77</sup> See Mueller, *supra* note 30, at 580 (noting that consumers effectively have no choice in seeking variances to warranty disclaimers because “all competing goods” are “similarly limited”).

particular agreement since the terms are the same in the agreement offered by a competing web site. So, the consumer clicks away and hopes for the best.<sup>78</sup>

This situation is quite different from the model contract scenario that is assumed by contract doctrine.<sup>79</sup> Not only does one party lack bargaining power with respect to a particular transaction, but one class of parties lacks bargaining power within a given market sector.<sup>80</sup> The party's "assent" in such a case is void of volition and merely reflects a failure on the part of the consumer to resist market forces through self-deprivation. Where the available "good" involves necessities such as credit or insurance, this deprivation has very real social and economic consequences. Similarly, given the ubiquity of software and digital information, it is highly unlikely that even the most ardent supporter of contractual autonomy would forego an ill-advised "click" on the basis of principle and an understanding of contract law alone. Instead, those of us who are aware of the consequences of doing so click and cringe, and pray that whatever we have agreed to is either benign, unlikely to be enforced, or so horrible that it will be deemed unconscionable. A refusal to accept standardized contractual terms is simply unrealistic in many types of transactions. Refusing to purchase software that is subject to the terms of a shrinkwrap agreement, or clicking "I disagree" to electronic contracts containing objectionable terms, is irrational and would force one to reject

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<sup>78</sup> See Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133 (2002) (noting that consumers often click without reading); Hillman, *supra* note 50, at 743 (noting the "widely accepted fact that, for a number of reasons, consumers typically do not read their standard forms").

<sup>79</sup> Professor Arthur Leff discussed the difficulty with classifying consumer transaction contracts as "contracts" in a classic article. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970). Professor Leff proposed treating "the paper-with-words which accompanies the sale of a product" as "part of that product," thereby inviting direct governmental regulation. *Id.* at 155.

<sup>80</sup> Professor Addison Mueller noted two factors that together create the modern consumer's lack of effective legal power:

First, there is an all-pervasive difficulty: our machinery of justice is simply not designed for easy use by the average citizen with a minor claim of any kind. . . .

. . . [Second,] he claims in contract and must use a deck of doctrine that is stacked against him.

Most of his losing cards are colored "freedom of contract."

Mueller, *supra* note 30, at 578-79.

many of the benefits of technological advancements. The claim that such contracts are agreements reflective of free will is just plain fiction.

On the other hand, allowing a consumer or putative licensee to take advantage of the transaction and then reject the offered terms also presents problems. The licensor is not obligated to provide any products or services, and has a right to determine how much risk it will assume in order to engage in business. The calculation of that risk is often reflected in the contractual terms, such as the licensor's limited warranty and limitation of liability. The licensor may wish to offer the product, but only with some restrictions on the licensee's use. The licensor continues to own the intellectual property embodied in the software and likely wishes to restrict how the licensee will use it. The readily manipulable nature of digital information and the ease with which the licensor's business objectives can be subverted makes the licensor's desire for specific license terms or terms of use understandable. Courts, sympathetic to the licensor's plight, have tended to enforce licenses under contract law,<sup>81</sup> finding mutual assent provided there was a reasonable opportunity to review the terms.<sup>82</sup> But, as discussed above, such an opportunity is hollow if it provides no option for the consumer to negotiate other than to decline to enter into the transaction altogether. This does not mean that the licensor should bear the burden of the consumer's refusal to read contractual terms; nor should it mean, as it has in the past, that the consumer should bear the burden of ferreting out onerous terms in a multipage contract *even if given the opportunity to do so*. What it does mean is that if the licensor wishes to impose certain onerous terms upon the licensee, the licensor must receive the licensee's actual assent to those terms. This shifts the burden onto the party in the best position to bear it—the party with greater resources and greater incentive to draft the contract.

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<sup>81</sup> It is perhaps unsurprising that, as Mark Lemley notes, "virtually all the courts that have enforced browsewrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license." Lemley, *Terms of Use*, *supra* note 7, at 462.

<sup>82</sup> In *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit did not even require review of terms prior to purchase but merely an opportunity to return the purchased item after review of the shrinkwrap license. 86 F.3d 1447, 1452–53 (7th Cir. 1996); *see also* discussion *infra* Part II.

Some may wonder, what difference does the requirement of actual assent make if the consumer effectively has no choice given the prevalence of onerous terms in standard form contracts for similar products/services?<sup>83</sup> The additional transactional impediments required to manifest actual assent slow down the contracting process, and that is an inconvenience that affects both parties. The current accepted form of nonnegotiated contracts now burdens only the consumer, and offers no incentive to the licensor to offer streamlined agreements or reasonable terms.<sup>84</sup> On the contrary, judicial deference to licensors' legitimate business concerns<sup>85</sup> has resulted in the licensors taking greedy advantage of consumers' lack of power by imposing multipage terms that are accepted by a simple click.

Robert Hillman has conducted an empirical study that suggests that requiring advance disclosure of web site terms will

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<sup>83</sup> Korobkin, for example, states that notice of a provision does not necessarily render it salient: "'Notice' is a prerequisite of salience, but notice is not a sufficient condition of salience." Korobkin, *supra* note 12, at 1234.

<sup>84</sup> See Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1637 (2006). *But cf.* Hillman & Rachlinski, *supra* note 28, at 472-75 (discussing how market forces may discipline drafters of standard forms but conceding that it is "unclear how long these factors will remain important").

<sup>85</sup> Robert Oakley explains how license agreements evolved with technology:

Standard-form contracts became an issue in the consumer technology context when computers evolved from being essentially a business commodity . . . to being a consumer commodity . . . . In such an environment, it was no longer possible to have a negotiated contract between the seller and each and every customer. There was also considerable uncertainty at the time about the scope of copyright protection for computer software. . . . In an innovative experiment, and with great uncertainty about their validity, these contracts began to take the form of shrinkwrap licenses . . . . Over the years as the technology has evolved, the licenses have evolved along with it to include so-called clickwrap licenses. Browsewrap licenses were added as the Internet developed with its ability to create hyperlinks that would take a customer to a license agreement at another location.

Oakley, *supra* note 17, at 1048-49; *see also* Gomulkiewicz & Williamson, *supra* note 32, at 341-53 (arguing that mass-market end user license agreements provide substantial benefits for distributing information products, are efficient for mass market distribution, informative for end users, and enable software publishers commercial flexibility).

likely fail to increase consumers actually reading such terms.<sup>86</sup> He acknowledges that while requiring methods of attracting attention, “such as requiring bold text or clicking after each term on the screen (or both), might increase reading, . . . analogous strategies in the paper world have had mixed results, probably in part because consumers, worn down by the contracting process, are unlikely to be riveted to attention by such formalities.”<sup>87</sup> Yet Internet transactions are different from real world transactions in significant ways. First, the real world consumer has expended more effort in reaching a retail location. The consumer has spent time and money on gas and parking. Searching for alternative vendors also takes much more effort. In the same way that price comparison shopping is much easier on the Internet than running from shop to shop at the local mall,<sup>88</sup> so is it easier to move from web site to web site, not necessarily in order to review contract *terms* but to discover which web sites offer a more pleasant experience. Web site marketers are very aware of the benefits of making transactions as seamless as possible. In the same way that a consumer is more likely to return to a shopping site that processes transactions with “one click,” so too might that same consumer refuse to return to a site that requires numerous clicks to approve onerous legal terms.<sup>89</sup>

My proposal contemplates a change, not just to the substantive terms of licenses, but to the mechanism by which assent may be demonstrated. Because it affects the consumer experience, it is more likely to have an impact on consumer loyalty. Standard form agreements thus become competitive factors in more than a purely rhetorical sense.<sup>90</sup> To require

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<sup>86</sup> Hillman, *supra* note 24, at 840 (“[E]-consumers may still have ample rational reasons for not reading and cognitive processes that deter reading and processing terms.”).

<sup>87</sup> *Id.* at 844.

<sup>88</sup> See Cheryl Lu-Lien Tan, *Haggling 2.0*, WALL ST. J., June 23–24, 2007, at P1 (reporting that “search engines and fashion sites listing retailer discount codes make it easier than ever” for consumers to comparison shop and even bargain for better prices on the Internet).

<sup>89</sup> See Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687, 695–96 (2004) (setting forth reasons why software publishers should care about better written end user agreements, including building goodwill with customers).

<sup>90</sup> To the claim that standard form contracts are unconscionable, it is often the response that consumers are free to shop elsewhere for better terms. In reality, consumers are unlikely to compare several different multipage agreements for

multiple clicks burdens the consumers, but it also burdens the licensor.<sup>91</sup> The transactional hurdles would likely result in real costs to the licensor in terms of aborted transactions and timed-out web exchanges, thus providing an incentive to the licensor to rethink its contractual offerings.<sup>92</sup>

While limiting presumed assent to license grant or scope of use provisions may be simple in theory, many licensors may simply attempt to cram more terms and conditions in paragraphs captioned “License Grant” or “Scope of Use.” Implementing the proposed approach thus requires that the operative effect of the provision—rather than its caption—determines whether actual or presumed assent is required. Generally, terms that restrict the licensee’s use of the intellectual property would require only presumed assent. The terms of use would then be enforceable provided that traditional contract defenses did not apply. In other words, lack of actual assent to license grant provisions or terms of use would not prevent contract *formation* even though traditional contract law defenses may still bar *enforcement* of those terms. On the other hand, terms unrelated to use of the software or web site that (i) impose an affirmative obligation on the licensee or (ii) require the licensee to relinquish otherwise existent rights would require actual assent. These two categories of terms are discussed below.

### *1. Affirmative Obligation Provisions*

If the relevant contractual term imposes an affirmative obligation that is not directly related to the use of the licensor’s intellectual property, the licensor should be required to show that the licensee actually assented to that particular term. Let us return to the hypothetical presented at the beginning of this Article where you wish to download software from YOUCH’s web site. In order to start the download process, you must

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reasons exhaustively discussed elsewhere. See Eisenberg, *supra* note 74; Hillman & Rachlinski, *supra* note 28, at 445–54; Korobkin, *supra* note 12; Meyerson, *supra* note 52; Slawson, *supra* note 12.

<sup>91</sup> Hillman, *supra* note 24, at 844.

<sup>92</sup> Korobkin claims that “negative reputational consequences of inefficient non-salient form terms are unlikely to discipline sellers to offer efficient terms.” Korobkin, *supra* note 12, at 1240; *see also id.* at 1246–48. While this may be true in certain real-world transactions, this is less likely to be true where the negative reputational consequence is combined with annoying transactional obstacles.

accept the terms of an electronic contract. You have clicked on the “I accept” button but have not read the terms of the contract. Your clicking expressed your assent to enter into the transaction, but not your actual assent to the individual contractual terms. Is the provision prohibiting you from deleting those pesky desktop icons enforceable? Under the blanket assent theory of consent, because you have manifested assent to the transaction, it is likely that the provision would be held enforceable unless it were unconscionable. An unconscionability analysis would examine whether that term was unreasonably favorable to YOUCH, and whether you had a “meaningful choice” regarding whether or not to enter into the transaction. Let us pretend that the software is being provided to users at no charge. Using this test for unconscionability, there is a strong possibility that the provisions would be upheld. You are not required to download the optional software and you are free to join other networking sites that do not have this requirement. The term, while favorable to YOUCH, is not unreasonable especially if the software is being provided at no charge.

The clause whereby you unwittingly consented to advertise YOUCH’s singles matching services, while surprising to you, is not particularly oppressive or shocking, particularly since you are free to go elsewhere and had an opportunity to review the terms of the agreement prior to acceptance. In fact, many YOUCH members might be delighted by the prospect of greater distribution which increases their odds of finding a suitable match. Yet the result is wrong. One could argue that the provision in question is contrary to industry norms and defeats the “reasonable expectations” of the parties.<sup>93</sup> Yet, what *are* the

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<sup>93</sup> The Restatement, for example, states that “where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.” RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979). An accompanying comment adds that “(a)lthough customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectations.” *Id.* cmt. f. Generally, the reasonable expectations doctrine has been limited to contracts for insurance coverage. See Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981) (noting that “a principle authorizing the courts to honor the ‘reasonable expectations’ of the insured is emerging. This ‘expectations principle’ is used to justify a wide range of decisions



reasonable expectations of the parties with respect to a practice that is novel, i.e., the use of software in exchange for permission to use the customer in advertising? The argument regarding reasonable expectations and industry norms carries some weight only as long as the practice is novel. If other companies determine that this method is an effective marketing tool, then it could quickly become an industry norm, as one-sided as this norm may be.<sup>94</sup> An establishment of an industry norm would then defeat any claims of subsequent consumers that the provision was an unfair surprise, or defeated their reasonable expectations.

Under my proposed approach, your assent to the terms of the contract can be presumed with respect to those terms that restrict the way that you use YOUCH's software and/or its web site. Your assent would not be presumed, however, with respect to terms that impose an affirmative obligation not directly related to your use of YOUCH's web site, nor would your assent be presumed with respect to any provisions that deprive you of a legal right (i.e., your right to privacy and your right to control the use of your personal information). Terms that impose affirmative obligations would require express consent. In our hypothetical, your assent to the license grant, but not to the other terms, would be presumed. Your failure to read the provisions of the contract would not prevent contract formation, but it would affect whether a particular provision becomes a binding part of that contract. This does not, however, mean that YOUCH would *never* be able to enforce a contract containing an agreement on the part of the licensee to participate in advertising campaigns. In order for such a provision to be enforceable, YOUCH would need the licensee's express consent. YOUCH could obtain such consent, for example, by requiring the consumer to "initial" the marketing provision—this could take the form of an electronic click immediately following the provision.

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granting policyholders coverage in spite of policy language that seems to deny it.") *Id.* at 1151–52.

<sup>94</sup> Korobkin, *supra* note 12, at 1271 (noting that "if reasonable expectations are defined by prevailing custom . . . the doctrine could entrench and perpetuate inefficient low-quality terms that become commonplace because they are non-salient to most buyers").

It would be more complicated to obtain actual assent to a term in a shrinkwrap agreement that does not pertain to the scope of the license—and it should be. The licensor should not be able to foist obligations not directly related to the scope of the license upon the licensee without the licensee's actual consent. Thus, provisions contained in shrinkwrap agreements that do not pertain to how the licensee may use the software (i.e., provisions that do not derive or flow from the grant of rights by the licensor) would be *per se* unenforceable unless the consumer was asked to initial such terms at the time of purchase—in the same way that consumers currently are asked to initial individual provisions of car rental agreements or other important, but not intuitive, provisions in other types of form agreements. This requirement of actual assent would shift the burden that currently exists on the consumer to sift out the onerous provisions onto the party better situated to do so—the contract drafter. The licensor as the drafting party is in a better position to point out the material terms and draw them to the licensee's attention. This may slow down the transaction, but the result would burden both parties whereas currently, the burden of nonnegotiated contracts is borne only by the consumer.

Shifting the burden of affirmative obligation provisions from the consumer/putative licensee to the contract drafter accomplishes two important objectives. First, it encourages economic efficiency in transactions by eliminating free-rider provisions. Such provisions are included in nonnegotiated contracts even though their presence or absence would not affect either party's decision to enter into the transaction. Often their inclusion in contracts reflects a surfeit of caution, an obsessive desire for no-additional-cost complete legal coverage, or simply reflects boilerplate carried over from a prior form agreement. Those provisions that are not free riders, on the other hand, will be called to the reader's attention and will remain in the contract. Contract drafters faced with the requirement of calling out affirmative obligation provisions will either modify their contracts if the provision is considered important enough (i.e., if it is part of what is being bargained for), or they will drop the provision as unnecessary, thus streamlining and facilitating the contracting process. Consumers, too, will gain from this requirement. Currently, the overwhelming verbiage presented in form agreements makes it difficult to distinguish innocuous

provisions from those requiring more scrutiny and contemplation.<sup>95</sup> A requirement of manifestation of consent to an affirmative obligation term attracts the consumer's attention and requires the consumer to consider whether the proposed transaction in fact is what she or he had bargained for. If the answer is yes, the consumer will proceed to click "I agree." If the answer is no, he or she will click "I do not agree." The consumer faced with such a decision may not be enthusiastic about the available options, but at least he or she is made aware of the consequences of engaging in the transaction. The act of assenting forces the consumer to acknowledge the existence of a particular term. The affirmative obligation provision then becomes part of what is bargained for, and is weighed in the consumer's cost-benefit calculation. The resulting agreement thus more accurately reflects what both parties wanted and encourages the efficiency of the transaction. Currently the assumption under contract law is that all provisions in a contract reflect the bargain. This assumption does not reflect the reality where nonnegotiated contracts are involved. A consumer may want a particular good or service, but not the ancillary provisions that he or she may not have bothered to read. This does not mean that the consumer should be permitted to set the terms of the bargain nor that a consumer should be allowed to pick and choose the provisions at his or her sole discretion. What it does mean is that the contract drafter should not be able to get *more* than what he or she bargained for.

Second, a requirement of actual assent to terms that impose an affirmative obligation upon the consumer provides an incentive to the contract drafter to streamline the contracting process.<sup>96</sup> The licensor risks losing business or harming its

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<sup>95</sup> Richard Epstein, on the other hand, argues that those who are less knowledgeable are able to "rely, often to free-ride, on the wisdom of their betters to achieve the terms that make for successful contracting." Epstein, *supra* note 10, at 206. But as Clayton Gillette points out, in many cases, there are divergent interests among buyers. See Gillette, *supra* note 52, at 250-53; see also Meyerson, *supra* note 52, at 1270-71 (expressing skepticism that there exists a "small cadre of type-A consumers" that ferrets out beneficial terms to the benefit of the nonreading majority of consumers).

<sup>96</sup> There is some evidence that streamlining contractual terms promotes consumer reading and understanding. See Davis, *supra* note 48. Davis conducted an empirical study examining the impact of simplified disclosure terms in consumer credit agreements. He concludes that "[r]equired disclosure undoubtedly can play an important role in protecting consumers. But to be useful, important information

reputation by putting forth onerous terms that will require the putative licensee's acknowledgement and active consent.<sup>97</sup> The Internet itself may facilitate consumer action.<sup>98</sup> Consumers can easily send unhappy e-mails to licensors. Individuals can share and disseminate information by posting comments in blogs and consumer-oriented web sites ridiculing onerous clickwrap terms.<sup>99</sup> Such a requirement forces both parties to consider the importance of such terms in the context of the transaction as a whole; more importantly, it forces each party to acknowledge that the *other* party recognizes and accepts the importance of such term. For the putative licensee, it indicates that the particular term is not just harmless boilerplate that will never be implemented or enforced by the licensor. Minimal, and in the case of browsewraps, nonexistent, transactional obstacles encourage and facilitate consumer ignorance. A requirement of actual assent makes it harder for a consumer to play ostrich. The repeated indignity of forced assent to unreasonable terms may, in turn, result in collective action by consumers. Even if it does not, heightened awareness of a party to a contract is in and of itself socially beneficial.<sup>100</sup> Furthermore, such a requirement

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must be available in documents free of needless clutter." *Id.* at 906. He adds that consumer-credit contracts should contain "only those clauses essential to the buyer-seller relationship." *Id.*

<sup>97</sup> See Hillman & Rachlinski, *supra* note 28, at 470 (noting that the "intense focus on reputation created by the e-business environment diminishes the likelihood that e-businesses will offer inefficient terms in their standard forms"). The authors caution that because of the availability of information on the Internet, "e-businesses must be careful about the content of their boilerplate, or at least might refrain from enforcing some of it." *Id.*

<sup>98</sup> *Id.* at 471 (observing that the availability of "Internet research will have a greater effect on e-businesses than on conventional businesses").

<sup>99</sup> Some web sites have responded to such complaints by modifying their license terms. For example, Fark.com recently revised its terms of use after users complained about the terms on BoingBoing, another web site. See Cory Doctorow, *Fark's Copyright Policy Stinks—UPDATED*, BOINGBOING, Apr. 26, 2007, [http://www.boingboing.net/2007/04/26/farks\\_copyright\\_poli.html](http://www.boingboing.net/2007/04/26/farks_copyright_poli.html). Thanks to Fred von Lohmann for posting about this issue to the cyberprof listserv. MySpace changed its terms and conditions to expressly permit members to retain proprietary rights to their posted materials after member complaints. See Billy Bragg, Op-Ed., *The Royalty Scam*, N.Y. TIMES, Mar. 22, 2008. CD Baby recently overhauled its clickwrap agreement, apparently in response to complaints from potential users about the overwhelming legalese. E-mail from Derek Sivers, CD Baby, Hostbaby, to Seth Burns (Mar. 15, 2006, 07:46 PST) (on file with author).

<sup>100</sup> See Hillman & Rachlinski, *supra* note 28, at 441–42 (stating that "[c]onsumers concerned about the possibility of exploitation can try to avoid terms they consider

reallocates the current balance of burdens away from the consumer to the party in the better position to accommodate it.

## 2. *Provisions That Take Away Legal Rights*

Contractual provisions that diminish the consumer's legal rights should also be subject to the standard of actual assent.<sup>101</sup> Because such rights exist independently from the consumer's right to use the software or other licensed product, the licensee cannot be presumed to have relinquished them.<sup>102</sup> I use the term "rights" loosely here to include privileges otherwise available to the licensee that do not derive from or arise out of the license grant.<sup>103</sup> Examples of provisions restricting or diminishing rights include those compelling arbitration in the event of a dispute and provisions limiting the choice of forum. Currently, such provisions are standard in many nonnegotiated software licenses.<sup>104</sup> There are a number of explanations offered for why and how these provisions originated. Many commentators state that such provisions are essential to the drafting party. For example, some scholars argue that the provision eliminating the licensee's right of first sale under the Copyright Act is necessary

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exploitative and refuse to transact with businesses that have reputations for offering and enforcing manipulative contract terms." Additionally, "the aggregate decisions of many consumers can pressure businesses into providing an efficient set of contract terms in their standard forms.") (emphasis added).

<sup>101</sup> See Lemley, *Intellectual Property*, *supra* note 5, at 1264 (stating that as a matter of policy "unbargained shrinkwrap license provisions that reduce or eliminate the rights granted to licensees by the federal intellectual property law" should not be enforced).

<sup>102</sup> Korobkin provides additional support for why such provisions should require actual assent:

If buyers believe that personal safety or the right to seek redress of legal wrongs in a court of law are entitlements that should be inalienable and not subject to commodification, explicitly trading off these types of entitlements against a product's price and physical features might create elevated stress levels.

Korobkin, *supra* note 12, at 1231. He notes that buyers often cope with the stress of emotion-laden choices by ignoring such terms and rendering them nonsalient. *Id.* at 1231–32.

<sup>103</sup> *But see* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30–32 (1913) (distinguishing "rights" from "privileges").

<sup>104</sup> Judith Resnik has noted that increasingly alternative dispute resolution dominates (and supplants) the adjudicatory process. *See generally* Judith Resnik, *Procedure as Contract*, 80 *NOTRE DAME L. REV.* 593, 619–21 (2005).

to protect the licensor's intellectual property rights.<sup>105</sup> While many critics have questioned the validity of such arguments on substantive grounds,<sup>106</sup> the focus of this Article is on the process by which such provisions are incorporated into agreements.<sup>107</sup> A consumer may be unaware that he or she has abdicated certain rights or privileges by entering into the transaction.<sup>108</sup> Even if such provisions are not contrary to public policy or otherwise

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<sup>105</sup> See Gomulkiewicz & Williamson, *supra* note 32, at 352–61 (stating that software publishers restrict rights associated with first sale, such as decompilation, reverse engineering, and disassembly, because they risk exposing the secrets contained in the software's source code); Mark I. Koffsky, Note, *Patent Preemption of Computer Software Contracts Restricting Reverse Engineering: The Last Stand?*, 95 COLUM. L. REV. 1160, 1160–61 (1999) (claiming that contracts that restrict reverse engineering may become the "primary method" for software creators to deter such activity). The recent enactment of the Digital Millennium Copyright Act of 1998 ("DMCA") is likely to alleviate such concerns. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.). Section 1201 of the DMCA proscribes devices that are primarily designed to circumvent technological devices intended to protect against unauthorized copying. 17 U.S.C. § 1201 (2006); see also Madison, *supra* note 72, at 287–90 (discussing how the anticircumvention provisions of the DMCA operates as a form of licensing to restrict users' rights); Peter Moore, Note, *Steal This Disk: Copy Protection, Consumers' Rights, and the Digital Millennium Copyright Act*, 97 NW. U. L. REV. 1437, 1440–42, 1445–48 (2003) (arguing that the first sale doctrine and archival use are in danger of becoming moot due to the DMCA).

<sup>106</sup> See, e.g., Hemnes, *supra* note 61, at 577–81 (discussing historical reasons why software is licensed). Hemnes concludes that although "[o]riginally justified by the necessity of protecting software as a trade secret, software licensing now appears to be both unnecessary . . . and inconsistent with the general right of alienation that appears in the common law, the Copyright Act, patent law, the Bankruptcy Code and the Uniform Commercial Code." *Id.* at 599; see also Madison, *supra* note 72, at 281–82, 289 (discussing how first sale rights are restricted by software licenses and the DMCA).

<sup>107</sup> See Kim, *Licensing Dilemma*, *supra* note 62 (discussing the legal and policy related problems with characterizing a software transaction as a "license" instead of a "sale").

<sup>108</sup> As Friedrich Kessler noted:

[F]reedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system. . . .

The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract. . . . The individuality of the parties which so frequently gave color to the old type contract has disappeared. The stereotyped contract of today reflects the impersonality of the market.

Kessler, *supra* note 11, at 630–31.

invalid,<sup>109</sup> agreement to their terms should not be presumed but actively sought.<sup>110</sup> Nonnegotiated standard form contracts, by their very nature, assume passive acceptance by the consumer. While there are numerous arguments in favor of such contracts, acceptance of their *form* should not mean wholesale acceptance of their terms. A requirement of actual assent would merely shift the current presumption—a presumption that favors the party in control of the structure of the transaction. Instead of presuming acceptance, as is currently the case, the presumption would be that such terms are *not* part of the transaction. The burden would thus be on the contract drafter to prove acceptance of these particular terms by the consumer. The terms could still be offered on a “take-it-or-leave-it” basis; however, it would require a little more effort on the part of the contract drafter, and a lot more willful blindness on the part of the consumer, to do so.

### 3. Using U.C.C. Article 2 as Default Terms

Much disagreement exists regarding whether software is a good or service and whether it is or should be licensed or sold. Consequently, it is unclear whether the U.C.C. governs software transactions.<sup>111</sup> I advocate looking to the U.C.C. as a source of

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<sup>109</sup> While many critics have questioned the legitimacy and validity of such claims on substantive grounds, the focus of this Article is on the validity of the *process* by which such provisions are incorporated into contracts.

<sup>110</sup> Resnik notes that “[a]spects of privately-based dispute resolution are now melded with public processes as the state itself embraces private dispute resolution for a wide array of conflicts brought to its courts and puts judges in the job of trying to resolve disputes through contracts.” Resnik, *supra* note 104, at 622–23. The enhanced likelihood that a judge will defer to contractual terms in determining procedural matters only highlights the necessity of ensuring that there was actual consent to those contractual terms. Resnik proposes that “[i]n light of the legal ability to use settlement contracts as vehicles to generate court enforcement, courts should refuse to sanction certain kinds of bargains.” *Id.* at 599. Examples of such bargains include “most favored nations’ clauses,” and limitations of parties’ capacity to bargain for sealed records. *Id.* at 650.

<sup>111</sup> See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir. 2002); Nimmer, *supra* note 60; see also Kim, *Licensing Dilemma*, *supra*, note 62. In most transactions with consumers, there is a sale of the medium (i.e. the CD) upon which the software or other digital information is loaded, but retention of intellectual property ownership by the licensor to the underlying program. See Madison, *supra* note 72, at 297–99; Nimmer, *supra* note 60, at 942 (referring to licenses and leases as conditional transactions where the primary feature is that one “party retains the right in law to control the other party’s use of the information in various ways, while the other party receives only limited privileges or rights in the information”).

guiding principles with respect to consumer transactions, regardless of whether software is licensed or sold, or categorized as goods or services, or something else.<sup>112</sup>

Any gaps in the contract created by the nonenforcement of terms requiring actual assent should be filled using the U.C.C. Article 2 governing the sale of goods with two notable exceptions. My proposal precludes—indeed supplants—U.C.C. section 2-207.<sup>113</sup> In addition, U.C.C. section 1-205 would not be applicable. That section provides as follows:

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) . . . [A]ny usage of trade in the vocation or trade in which (the parties) are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.<sup>114</sup>

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Nimmer contends that software is not a “good” and therefore should not be governed by Article 2 of the U.C.C. at all. See Raymond T. Nimmer, *Licensing in the Contemporary Information Economy*, 8 WASH. U. J.L. & POL’Y 99, 113 (2002) (stating that “[t]he software and digital information industries do not deal in goods any more than the motion picture industry deals in celluloid tapes.”) Nimmer promotes UCITA as “a separate body of contract law applicable to transactions in computer information.” *Id.* at 116. The issue of whether software is a “good,” a “service,” or something else entirely, while an important one, is not to be resolved in this Article.

<sup>112</sup> See LON L. FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* 73 (8th ed. 2006) (“[I]t should be borne in mind that even where a UCC provision is not directly applicable to a transaction—for example, where the provision is in Article 2 and the transaction involves services—the *principle* embodied in the provision may be applicable, so that the provision may serve as a source of law.”); see also Daniel E. Murray, *Under The Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 *FORDHAM L. REV.* 447, 448 (1971) (describing American courts as “almost zealous in extending the reach of Article 2 to non-sales areas”).

<sup>113</sup> As Epstein points out, section 2-207 is “an unfit model to carry over to the licenses of software and computer information technology, whether or not these are covered under the sale of goods provisions of the UCC.” See Epstein, *supra* note 10, at 216.

<sup>114</sup> U.C.C. § 1-205 (2000). The corresponding section in the 2007 version of the U.C.C. states that “usage of trade . . . is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.” U.C.C. § 1-303(d) (2007).



In an industry governed by contracts of adhesion, the creation of industry “standards” does not reflect mutually agreed terms. This does not mean that such terms would never be included as part of a contract; it does, however, mean that in order to so include them, actual—and not presumed—assent would be required.

## II

### MAKING SENSE OF NONNEGOTIATED SOFTWARE LICENSES

This Section applies my proposed approach in two different ways. Part A analyzes the current case law addressing issues raised by nonnegotiated licenses and discusses how the disparate court opinions may be reconciled under the approach set forth in Part I. Part B examines a sample software license agreement and reviews how typical contract provisions might fare using the proposed approach.

#### *A. An Overview of the Law Governing Nonnegotiated Licenses*

Software licenses are usually categorized as negotiated or nonnegotiated. Nonnegotiated agreements typically include shrinkwrap, browsewrap, and clickwrap licenses. The form of these licenses evolved to accommodate the form of the product that was being licensed and the perceived need for protection. As technology enabled different venues or applications, the form of the licenses adapted to these changes.<sup>115</sup> This section examines the current law pertaining to each of these types of licenses.<sup>116</sup>

#### *1. Shrinkwrap Licenses*

Does a customer enter into a contract when he or she unwraps a software package? The first courts to address the issue of shrinkwrap agreements<sup>117</sup> concluded in the negative. In *Step-*

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<sup>115</sup> See Oakley, *supra* note 17, at 1048–54.

<sup>116</sup> This section offers only a cursory overview of the law governing shrinkwraps, clickwraps, and browsewraps because this territory has been well trod by other scholars. See, e.g., Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: “There’s a New Sheriff in Town!”*, 35 U. RICH. L. REV. 943, 949–91 (2002); Joo, *supra* note 75; Lemley, *Intellectual Property*, *supra* note 5.

<sup>117</sup> A shrinkwrap license is an example of a “rolling contract.” In a rolling contract situation, the customer orders and pays for the goods before having an

*Saver Data Systems, Inc. v. Wyse Technology*, the Third Circuit held that a “box-top” license was invalid under the U.C.C.<sup>118</sup> The Court determined that the contract for the sale of the software product was made when the product was purchased; therefore, any terms contained in the shrinkwrap were merely unaccepted “proposals for modification” under U.C.C. Section 2-207 and not a conditional acceptance by the software producer.<sup>119</sup> In other words, the consumer never assented to the terms of the shrinkwrap agreement. The Fifth Circuit in *Vault Corp. v. Quaid Software, Ltd.* stated that a shrinkwrap license was unenforceable because it touched upon federal copyright law and was therefore preempted.<sup>120</sup>

In 1996, however, the Seventh Circuit, in the landmark case of *ProCD, Inc. v. Zeidenberg*, concluded that “[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”<sup>121</sup> The plaintiff, ProCD, compiled information from over 3000 telephone directories into a computer database.<sup>122</sup> It sold a version of the database, called SelectPhone, on compact discs.<sup>123</sup> The plaintiff claimed that the database cost more than ten million dollars to compile and additional resources to maintain.<sup>124</sup> ProCD sold its database to the general public for personal use at a significantly lower price than it did to manufacturers and retailers.<sup>125</sup> The court discussed ProCD’s price discrimination policy and the financial benefits to consumers.<sup>126</sup> It stated that rather than tailoring the product to

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opportunity to review the contract terms, which are included with the product. See Hillman, *supra* note 50, at 744.

<sup>118</sup> *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

<sup>119</sup> *Id.* at 98, 102–03.

<sup>120</sup> *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988).

<sup>121</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

<sup>122</sup> The court assumed that the database could not be copyrighted. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> The court stated:

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over \$150 [the retail price for the general public]. The ensuing reduction in sales

suit a particular user,<sup>127</sup> ProCD decided to contractually bind its customers to its price discrimination policy.<sup>128</sup> The outside of each box stated that the software was subject to enclosed license terms. The license, which limited use of the program to noncommercial purposes, was contained in the user's manual.<sup>129</sup>

The defendant, Matthew Zeidenberg, purchased a consumer package of SelectPhone and formed a company to resell the information contained in the database on the Internet for a price that was less than what ProCD charged its commercial customers.<sup>130</sup> Zeidenberg argued that ProCD made an offer by placing the software in stores.<sup>131</sup> He stated, and the district court agreed, that he "accepted" the offer by purchasing the software.<sup>132</sup> The Seventh Circuit disagreed, stating that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at

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would harm consumers who value the information at, say, \$200. They get consumer surplus of \$50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

*Id.*

<sup>127</sup> The court hinted that modifying the product might be more cumbersome than contractual enforcement:

To make price discrimination work . . . the seller must be able to control arbitrage. . . . Vendors of computer software have a harder task [than airline carriers or movie producers]. Anyone can walk into a retail store and buy a box. . . . [E]ven a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves—for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price—ProCD turned to the institution of contract.

*Id.* at 1450.

<sup>128</sup> *Id.*

<sup>129</sup> It also appeared on the user's screen every time the software was run. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

leisure.”<sup>133</sup> It further noted that while contracts are often formed simply by paying for a product and walking out of the store, the U.C.C. permits contracts to be formed in other ways.<sup>134</sup> Since *ProCD*, courts have generally upheld the enforceability of shrinkwrap licenses.<sup>135</sup>

As many scholars have noted, the *ProCD* court’s analysis of the U.C.C. leaves much to be desired.<sup>136</sup> U.C.C. section 2-204(1) states, “A contract for the sale of goods may be made in any manner sufficient to show agreement, including . . . conduct by both parties which recognizes the existence of [such] . . . a contract.”<sup>137</sup> Judge Easterbrook, writing for the court, turned this provision on its head so that the parties’ conduct no longer established the existence of the agreement. According to Easterbrook, the written contract assigned meaning to the conduct rather than the other way around. Under this analysis, the placement of software on a store shelf would not constitute an offer to sell that a consumer could accept by payment and dominion over the software copy (as the defendant had argued) nor, alternatively, would the consumer’s payment for the software constitute an offer that the store would accept by taking payment (as typically understood under traditional contract

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<sup>133</sup> *Id.* at 1452.

<sup>134</sup> *Id.*

<sup>135</sup> See *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519 (W.D. Pa. 2000). While a minority of courts has refused to enforce shrinkwrap licenses even after *ProCD*, these cases lack a consistent rationale and are distinguishable on their facts. For example, the Supreme Court of Kansas held in a recent opinion that a shrinkwrap agreement submitted after the buyer had accepted the seller’s proposal was a request for modification. See *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006). The *Wachter* court distinguished *ProCD* and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1987), because those cases involved nonnegotiated consumer contracts. See also *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (finding the U.C.C. applicable to the sale of computers).

<sup>136</sup> See Lemley, *Terms of Use*, *supra* note 7, at 468–69 (noting that the *ProCD* court’s legal reasoning is “certainly questionable”); see also Post, *supra* note 42, at 1226 (stating that Judge Easterbrook ignored U.C.C. sections 2-207 and 2-206, the commentary to these sections, the existing precedent interpreting the statute, and the commentary of scholars and experts on Article 2).

<sup>137</sup> U.C.C. § 2-204(1) (2003).

law).<sup>138</sup> Instead, under Easterbrook's view, the *meaning* assigned to the buyer's conduct would be determined by the agreement contained within the software box. Thus, if the terms within the box stated that the buyer agrees to pay a fifty dollar monthly maintenance fee, then the buyer's purchase and dominion of the software would indicate assent to that term even though the buyer did not know about the term until after completing the conduct which purports to establish such assent. Perhaps most notably, the *ProCD* court held that Zeidenberg demonstrated assent to the shrinkwrap license terms by retaining and using the software *even though a consumer could be expected to undertake these actions for reasons other than to demonstrate assent.*<sup>139</sup> But as Corbin stated:

[A]n offeror can not, merely by saying that the offeree's silence will be taken as an acceptance, cause it to be operative as such. . . . It is substantially the same case as where an offeror attempts to give the meaning of an acceptance to some other ordinary act of the offeree that the latter wishes to do without giving it such a meaning. If A offers his land to B for a price, saying that B may signify his acceptance by eating his breakfast or by hanging out his flag on Washington's birthday or by attending church on Sunday, he does not thereby make such action by B operative as an acceptance against B's will.<sup>140</sup>

Under the court's analysis in *ProCD*, assent to the terms of a shrinkwrap license is presumed and the burden is placed upon the consumer to disaffirm assent. In other words, Easterbrook's analysis places an affirmative obligation upon the consumer to establish nonconsent to the terms of the shrinkwrap agreement—something which is anathema to contract law, which has long maintained that silence, or inaction, should not constitute acceptance.<sup>141</sup> Zeidenberg's failure to object to the terms of the shrinkwrap agreement—which can only be

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<sup>138</sup> See Post, *supra* note 42, at 1226 (stating that "as most first year law students can tell you, a display of merchandise in a store window, and one supposes on a shelf, is nothing more than an 'invitation to offer.'").

<sup>139</sup> *ProCD, Inc.*, 86 F.3d at 1453; Lemley, *Terms of Use*, *supra* note 7, at 468 (noting that "the specified conduct that indicates acceptance is the opening of a package and the loading of software the consumer has already paid for—precisely the conduct one would expect the user to engage in if she had been unaware of the shrinkwrap license.").

<sup>140</sup> CORBIN, *supra* note 16, § 73, at 310.

<sup>141</sup> *Id.* §§ 71–72, at 298–309; see also RESTATEMENT (SECOND) OF CONTRACTS § 69 (1979).

expressed by taking affirmative steps to return the software—is thus construed as assent, even where such failure can be attributable to other causes, such as ignorance or logistical constraints.<sup>142</sup>

An alternative, and better, contract law analysis of the transaction in *ProCD* would be that the terms of the shrinkwrap agreement do not govern the sales transaction, which is complete at the time the consumer makes payment and such payment is accepted by the store. The consumer does not and logically cannot assent to these terms prior to the completion of the sales transaction. The terms fail as modifications to the sales transaction because they are not supported by consideration nor is the consumer compelled to accept any such attempted modifications. This does not mean that the terms of the shrinkwrap agreement are without any role or effect. The terms of the scope of license or terms of use provide the consumer with notice of the software producer's business policies and the conditions upon which the software is being provided. *The absence of the consumer's express consent does not mean that those terms do not nonetheless govern the relationship.* The consumer's act of accepting the offer to sell the software (or, more accurately, the consumer's offer to purchase the software which is then accepted by acceptance of payment) does not then give the *consumer* the right to establish the scope of the license grant.<sup>143</sup> While the consumer's purchase of the software does not thereby demonstrate actual assent to all the shrinkwrap terms, assent to the scope of license terms can be presumed because the licensor has the power to establish the terms upon which the software shall be provided. The licensor's intellectual property ownership of the software code entitles it to establish the parameters of the license grant that it wishes to provide to licensees provided that it does not trammel on the licensee's unrelinquished preexisting rights or impose affirmative responsibilities unrelated to how the software is used. In other words, while the licensor does not have the right to force the licensee to undertake affirmative acts or to relinquish legal

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<sup>142</sup> See Rolling, *supra* note 40, at 226 (noting that consumers are subject to retail store policies, and that those who live in rural areas may find it costly and time consuming to drive to retail outlets or to return ship mail-ordered products).

<sup>143</sup> For a discussion of the role of normative assumptions in contract law, see generally Joo, *supra* note 75.

rights, the licensee should not have the right to provide the terms by which the licensor chooses to conduct its business.<sup>144</sup>

## 2. *Clickwrap Licenses*

*ProCD* addressed the enforceability of a shrinkwrap license that accompanies the purchase of software contained in a box. In many cases, however, software is distributed over the Internet pursuant to the terms of a clickwrap agreement. In some ways, clickwrap agreements are less problematic than shrinkwrap agreements for the simple reason that a user expressly manifests assent by clicking.<sup>145</sup> Generally, clickwrap agreements do not permit a user to progress until and unless the user clicks on a box containing the words “I agree” or some similar expression of agreement. Often, the user is asked to acknowledge the terms of a clickwrap agreement by clicking more than once. But not all clickwrap agreements are alike. While some agreements display all their provisions on a single computer page, many clickwrap agreements appear in small textboxes that require constant scrolling in order to review their terms. Sometimes, the “assent” button does not appear within the text box but is readily apparent alongside it on the screen. This cumbersome and aggravating method of providing clickwrap terms, while facilitating the user’s ability to express assent, seems specifically designed to encourage users to simply click on the “I agree” button without reading the terms.<sup>146</sup>

Clickwrap agreements do not raise the same contract formation concerns as shrinkwrap agreements because the user

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<sup>144</sup> See Nimmer, *supra* note 60, at 950 (critiquing opponents of standard form contracts who take a “result-oriented” position that favors buyers and holds that “the transferee should be entitled to receive a transfer including specific terms, regardless of the terms sought by the other party”).

<sup>145</sup> See Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 *HAMLIN L. REV.* 499, 548 (2003).

<sup>146</sup> See, e.g., Sun Microsystems, Software License Agreement, <http://sunsolve.sun.com/show.do?target=patches/patch-license&nav=pub-patches> (last visited Mar. 18, 2008). Several courts have made this observation as well. See, e.g., *Scarcella v. AOL*, No. 1168/04, 2004 N.Y. Misc. LEXIS 1578, at \*2–3 (N.Y. Civ. Ct. Sept. 8, 2004) (noting that the presentation of the agreement made it easy to skip reading the terms: “Defendant considerably makes it very easy to avoid going to the trouble of slogging through all of that text. The customer can bypass all that bother by simply pressing the ‘OK, I Agree’ button. If the customer nonetheless bites the bullet and presses the ‘Read Now’ button, Defendant affords him or her a *second* opportunity to skip over what will become the contract between the parties . . .”).

typically has notice of the terms and has an opportunity to read them *prior* to engaging in the contractual relationship. A user is also not required to take onerous affirmative steps to disaffirm the contract by, for example, returning the merchandise; a simple click on “I DO NOT ACCEPT” will do.<sup>147</sup> Courts have refused to uphold clickwrap agreements if users do not have sufficient notice of their terms, or do not have to affirmatively accept the terms of use.<sup>148</sup> This does not mean that clickwrap agreements do not raise *any* contractual issues at all. In particular, many commentators find their “take-it-or-leave-it” nature troubling. They are not, however, inherently *more* troubling than other contracts of adhesion simply because their terms are digital rather than inscribed on paper.<sup>149</sup>

One of the first cases to address the issue of clickwrap agreements, *CompuServe, Inc. v. Patterson*, involved a forum selection clause.<sup>150</sup> The defendant, Patterson, was a resident of Houston, Texas, who claimed never to have visited Ohio.<sup>151</sup> The plaintiff was CompuServe, a computer information service headquartered in Columbus, Ohio.<sup>152</sup> Patterson subscribed to CompuServe’s computing and information services via the Internet and placed certain computer software products as “shareware” on the CompuServe system for others to use and purchase.<sup>153</sup> When Patterson became a shareware provider, he entered into a “Shareware Registration Agreement” (“SRA”) with CompuServe.<sup>154</sup> Pursuant to the SRA, CompuServe provided its subscribers access to the shareware that Patterson created as an independent contractor.<sup>155</sup> The SRA incorporated

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<sup>147</sup> See *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

<sup>148</sup> See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (refusing to enforce an arbitration clause contained in a license agreement that was not readily apparent to user downloading software); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (refusing to enforce an online license agreement because the link to it was not sufficiently obvious).

<sup>149</sup> For a comprehensive analysis and comparison of paper-based and electronic-based standard form contracts, see Hillman & Rachlinski, *supra* note 28.

<sup>150</sup> *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

<sup>151</sup> *Id.* at 1260.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*



by reference two other documents, the CompuServe Service Agreement (“Service Agreement”) and the Rules of Operation.<sup>156</sup> Both the SRA and the Service Agreement stated that they were entered into in Ohio.<sup>157</sup> The Service Agreement further provided that its terms were “‘governed by and construed in accordance with’ Ohio law.”<sup>158</sup> The court noted that the SRA required Patterson to type “AGREE” at various points in the document “[i]n recognition of [his] on line [*sic*] agreement to all the above terms and conditions.”<sup>159</sup> Patterson marketed his software for several years on CompuServe’s system.<sup>160</sup> CompuServe later began to market a similar software product, which gave rise to Patterson’s allegations of trademark infringement.<sup>161</sup> CompuServe filed a declaratory judgment in the federal district court for the Southern District of Ohio, relying on the court’s diversity subject matter jurisdiction.<sup>162</sup> Patterson filed a motion to dismiss on several grounds, including lack of personal jurisdiction.<sup>163</sup> The district court granted Patterson’s motion to dismiss for lack of personal jurisdiction.<sup>164</sup>

On appeal, the Sixth Circuit addressed the issue of whether Patterson’s contacts with Ohio were sufficient to support the district court’s exercise of personal jurisdiction.<sup>165</sup> The Sixth Circuit referred to the Internet as representing “perhaps the latest and greatest manifestation of . . . historical globe-shrinking trends.”<sup>166</sup> The court assumed the enforceability of the clickwrap agreement, noting that Patterson “entered into a written contract with CompuServe which provided for the application of Ohio law,” and stated that he “then purposefully perpetuated the relationship with CompuServe via repeated communications

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1260–61.

<sup>160</sup> *Id.* at 1261.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* CompuServe sought a declaration that it had not infringed any common law trademarks of Patterson’s, or of Patterson’s company, FlashPoint Development, and that it was not otherwise guilty of unfair or deceptive trade practice. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1262–68.

<sup>166</sup> *Id.* at 1262.

with its system in Ohio.”<sup>167</sup> The court emphasized that Patterson was “far more than a purchaser of services; he was a third-party provider of software who used CompuServe, which is located in Columbus, to market his wares in Ohio and elsewhere.”<sup>168</sup> The court stated that while “merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio,” that act *in conjunction* with Patterson’s placement of his software product into the stream of commerce and other factors established sufficient contact to establish jurisdiction.<sup>169</sup> Patterson manifested actual assent to the SRA first at his computer in Texas, which was then transmitted to CompuServe in Ohio.<sup>170</sup>

In *Caspi v. Microsoft Network, L.L.C.*, the Superior Court of New Jersey upheld a forum selection clause in a clickwrap agreement.<sup>171</sup> *Caspi* involved a class action complaint against Microsoft<sup>172</sup> arising out of Microsoft’s alleged practice of “unilateral negative option billing.”<sup>173</sup> The named plaintiffs were residents of different states and purported to represent a nationwide class of 1.5 million Microsoft Network (“MSN”) members. Microsoft moved to dismiss the complaint for lack of jurisdiction and improper venue by reason of a forum selection clause, which was in every MSN membership agreement and thus purported to bind all the named plaintiffs and members of the class.<sup>174</sup> The forum selection / choice of law clause provided that the governing law was that of the State of Washington, and that each member consented “to the exclusive jurisdiction and venue of courts in King County, Washington in all disputes

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<sup>167</sup> *Id.* at 1264.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1265.

<sup>170</sup> *Id.* at 1261.

<sup>171</sup> *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999).

<sup>172</sup> The defendants were two related corporate entities, Microsoft Network, L.L.C. and Microsoft Corporation, but this Article will refer to them both simply as “Microsoft,” as did the court in the actual case. *See id.*

<sup>173</sup> Under this practice, Microsoft without notice or permission from MSN members, unilaterally increased membership fees attributing the change to changes in the service plans. *Id.*

<sup>174</sup> *Id.*

arising out of or relating to your use of MSN or your MSN membership.”<sup>175</sup>

Finally, in *Davidson and Associates v. Jung*, the Court of Appeals for the Eighth Circuit upheld a clickwrap agreement that prohibited reverse engineering.<sup>176</sup> In that case, the appellee, Blizzard, created and sold software games, and provided a gaming service available exclusively to purchasers of its games.<sup>177</sup> Because it was concerned about piracy, Blizzard restricted access to its service and required agreement to a clickwrap agreement that prohibited reverse engineering. By reverse engineering, the appellants were able to create an online gaming system as an alternative to Blizzard’s system. The appellants’ system contained operational differences from Blizzard’s system and enabled users to play pirated versions of appellee’s games.<sup>178</sup> The court stated that the appellants had expressly relinquished their right to reverse engineer by agreeing to the terms of the license agreement.<sup>179</sup>

### 3. Browsewrap Agreements

Browsewrap agreements are terms that are posted on a web site which do not require users to affirmatively manifest their consent. In most cases, the web site or the browsewrap includes a statement that the user’s continued use of the web site or the downloaded software manifests assent to those terms. Often, the terms of browsewraps are prominently displayed but the existence of the browsewrap itself is hidden on a page that few users bother to visit—the “Legal” or “Terms” pages.<sup>180</sup> Unless the user is expressly looking for such information, she or he is unlikely to find it.

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<sup>175</sup> *Id.*

<sup>176</sup> *Davidson & Assocs. v. Jung*, 422 F.3d 630, 632 (8th Cir. 2005).

<sup>177</sup> *Id.* at 633.

<sup>178</sup> *Id.* at 636.

<sup>179</sup> *Id.* at 639.

<sup>180</sup> See General Electric, Terms, <http://www.ge.com/terms.html> (last visited Mar. 18, 2008); JSTOR, Terms and Conditions of Use of the JSTOR Archive, <http://www.jstor.org/about/terms.html> (last visited Mar. 18, 2008); Starwood Hotels, Terms and Conditions for Use of This Site, [http://www.starwoodhotels.com/corporate/terms\\_conditions.html](http://www.starwoodhotels.com/corporate/terms_conditions.html) (last visited Mar. 18, 2008).

Generally, courts will enforce browsewrap agreements only if the user had adequate notice of their terms.<sup>181</sup> In other words, the terms must be both conspicuous and accessible. In *Specht v. Netscape Communications Corp.*, for example, the Second Circuit refused to enforce an arbitration clause in a browsewrap agreement because users were able to download the free software without indicating assent or acknowledging the license agreement.<sup>182</sup> Furthermore, in order to view the license terms, the users were required to scroll down *past* the software download button and then access the agreement by clicking on a hyperlink.<sup>183</sup>

Notice was also at issue in *Pollstar v. Gigmania, Ltd.*, where the court refused to enforce the terms of an online license agreement because the link to it was hard to read.<sup>184</sup> Notably, that court did not rule that the license agreement was unenforceable, only that the web site did not give users adequate notice of it.<sup>185</sup> In *Register.com, Inc. v. Verio, Inc.*, the Second Circuit found that Verio's continued use of Register.com's WHOIS database constituted consent to Register.com's terms of use, expressly rejecting Verio's argument that the terms were not enforceable because the user had not clicked an "I agree" icon.<sup>186</sup>

Finally, in *Ticketmaster Corp. v. Tickets.com, Inc.*, Ticketmaster claimed that Tickets.com's use of automated search software violated Ticketmaster's terms of use.<sup>187</sup> Tickets.com used information obtained through its search software to provide "deep links" from its web site to Ticketmaster's event listings, thus enabling Tickets.com users to bypass Ticketmaster's homepage. A prominent notice on Ticketmaster's web site stated that by proceeding beyond the home page, the user had accepted the terms of use. The court

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<sup>181</sup> Mark Lemley has argued that enforcement of browsewraps should be limited to sophisticated commercial entities who are repeat players. *See generally* Lemley, *Terms of Use*, *supra* note 7.

<sup>182</sup> *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

<sup>183</sup> *Id.* at 23.

<sup>184</sup> *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

<sup>185</sup> *Id.* at 981-82.

<sup>186</sup> *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 395 (2d Cir. 2004).

<sup>187</sup> *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH(VBKx), 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 7, 2003).

agreed, ruling that a contract could be formed simply by proceeding to Ticketmaster's interior web pages "after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so."<sup>188</sup>

*B. Balancing Individual Autonomy with Business Interests*

Although courts analyze licenses as contracts, traditional contract doctrine often fails to explain the wide range of judicial decisions. In fact, courts often struggle against the constraints of contract law, and the requirements of notice and assent, in order to enforce the terms of shrinkwrap or browsewrap agreements that pass the test of reasonableness but fail on the issue of formation.

Clickwrap agreements, although often lumped together with browsewrap and shrinkwrap agreements, are less troubling from a doctrinal perspective in that they require a manifestation of consent (albeit blanket consent) by the user. In reality, however, this distinction is one without a difference.<sup>189</sup> While the licensee's click manifests assent to the transaction and to the contractual relationship, often the user does not read—and therefore, cannot actually assent to—the contractual terms themselves.<sup>190</sup> The cases governing nonnegotiated software

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<sup>188</sup> But in a previous decision on the case, the court ruled that merely posting terms and conditions on a web site does not create a contract unless the user had actual knowledge of the contract terms. *Ticketmaster Corp. v. Ticket.com, Inc.*, No. CV99-7654-HLH(BQRx), 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000), *aff'd mem.*, 2001 U.S. App. LEXIS 13598 (9th Cir. 2001).

<sup>189</sup> In fact, Mark Lemley has suggested that judicial decisions enforcing clickwrap and shrinkwrap agreements may have conditioned courts to disregard the concept of assent when it comes to browsewraps. See Lemley, *Terms of Use*, *supra* note 7, at 469.

<sup>190</sup> The Second Circuit in *Register.com*, recognized the difference between notice as a prerequisite to performance and the dubious need for expressions of assent when it stated:

There is a crucial difference between the circumstances of *Specht*, where we declined to enforce Netscape's specified terms against a user of its software because of inadequate evidence that the user had seen the terms when downloading the software, and those of *Ticketmaster*, where the taker of information from Ticketmaster's site knew full well the terms on which the information was offered but was not offered an icon marked "I agree," on which to click. Under the circumstances of *Ticketmaster*, we see no reason why the enforceability of the offeror's terms should depend on whether the taker states (or clicks) "I agree."

licenses frame the issue as one of contract formation. But in order to understand the wide range of judicial opinions, it is necessary to move beyond a discussion of contract doctrine and examine the business environment in which these licenses were created. As the court in *Step-Saver Data Systems, Inc. v. Wyse Technology* noted in discussing shrinkwrap licenses:

When these form licenses were first developed for software, it was, in large part, to avoid the federal copyright law first sale doctrine. . . . Because of the ease of copying software, software producers were justifiably concerned that companies would spring up that would purchase copies of various programs and then lease those to consumers. Typically, the companies, like a videotape rental store, would purchase a number of copies of each program, and then make them available for over-night rental to consumers. Consumers, instead of purchasing their own copy of the program would simply rent a copy of the program, and duplicate it. This copying by the individual consumers would presumably infringe the copyright, but usually it would be far too expensive for the copyright holder to identify and sue each individual copier. Thus, software producers wanted to sue the companies that were renting the copies of the program<sup>191</sup> to individual consumers, rather than the individual consumers.

As many commentators have argued, these types of agreements (and form agreements in other industries) provide a societal benefit by facilitating transactions. In other words, they should be enforced not because they manifest the classic signs of bargaining, but because they are good for society, and are generally not harmful to the licensee. As Easterbrook noted in *ProCD*:

Ours is not a case in which a consumer opens a package to find an insert saying “you owe us an extra \$10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing

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We recognize that contract offers on the Internet often require the offeree to click on an “I agree” icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of a contract. But not in all circumstances.

*Register.com*, 356 F.3d at 403 (emphasis added).

<sup>191</sup> *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 96 n.7 (3d Cir. 1991).

in the UCC requires a seller to maximize the buyer's net gains.<sup>192</sup>

But is Easterbrook actually saying that consent should be foisted upon an unwitting consumer who is then forced to disavow such consent? Is it fair to place an affirmative obligation upon the buyer to "decline" this unreasonable contract term?

A more palatable explanation of the rationale underlying *ProCD* and other cases upholding contracts "formed" without notice is that there is little harm in enforcing the contractual term. While actual assent may be missing, the consumer's assent can be presumed because the consumer *would have agreed to the term if he or she had actually read it* or else the licensor *would not have permitted the transaction at all*. In nearly all the cases upholding the terms of a nonnegotiated software license, the licensor was suing because the licensee was using the software or product in a manner expressly prohibited by the licensor, not because the licensor wished to enforce an affirmative obligation term (such as payment of additional money).<sup>193</sup> The courts, while using the language of contract law, were enforcing fair business practices.<sup>194</sup>

The courts must use the language of contracts because the contract is the vehicle by which the license is made, but it is the transfer of (some) rights that affects the analysis of the contract. If, for example, the shrinkwrap license is not enforceable as a contract due to lack of assent, then the licensor has lost control over how the software is used. If the licensee then decides to use the data stored in the software to undermine the licensor's business, the licensor is helpless to prevent such action.

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<sup>192</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

<sup>193</sup> See Jacques de Werra, *Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions*, 25 COLUM. J.L. & ARTS 239, 263 n.130 (2003) (noting that "commercial use is basically not fair use").

<sup>194</sup> See *id.* at 263. ("The court observed that the defendant in *ProCD* cannot be considered as the best example of an oppressed private user on whom the content owner would have imposed unduly restrictive contractual conditions, appearing instead as a free-riding competitor. Viewed from a transatlantic perspective, Zeidenberg's activities would typically have been prohibited by general unfair competition laws or laws specifically protecting database producers so that the thorny issues regarding both the validity of the contract and the preemption analysis could have been totally avoided."). *Id.* (footnotes omitted).

Although the licensor does not have an obligation to provide the data in the first place, if the licensor does, the licensee may use it in a manner that hurts the licensor's business unless the licensor can protect itself with the only means available—a contract. Without a legal right to stop the licensee from using the software to the licensor's detriment, there is then no economic incentive for the licensor to develop and distribute the data in the first place.<sup>195</sup> The intangible nature of the product (that is, not the disc itself but the information contained therein), makes the need for contract enforcement more compelling.<sup>196</sup>

If I decide to sell my car to you, I no longer have the right to tell you what to do with it. If I lease my car to you, however, it remains mine, and I should therefore have the ability to set parameters on your use. If I own a store, your presence is permitted unless I decide to kick you out. If you purchase an item of clothing from my store, your ability to return it is subject to my policy on exchanges and refunds. If, however, you use my web site and accompanying services to solicit my unwitting customers to your competing web site, thereby undermining my business, I cannot stop you unless I have a contractual right to do so. Unlike in the real world, I cannot kick you out of my store or repossess the car. The only method of enforcement available to me is afforded by contract.

Generally, the court decisions in this area recognize the technology provider's dilemma and, in the interests of facilitating business transactions,<sup>197</sup> have enforced these agreements—at least where there has been notice.<sup>198</sup> Often,

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<sup>195</sup> See generally Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953 (2005); O'Rourke, *supra* note 1, at 496–99 (discussing why licensors may feel the need to include particular provisions that track the Copyright Act).

<sup>196</sup> See Madison, *supra* note 72, at 290 (discussing how the “former implicit and limited governance defined by control of access to chattel and licensing of copyright evaporates” with digital technology and how the software license tries to “replicate” it).

<sup>197</sup> For a discussion of form agreements generally, see Kessler, *supra* note 11; Rakoff, *supra* note 12.

<sup>198</sup> In *ProCD*, for example, the court addressed the realities of the way business is conducted in the software industry:

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is



notice has been interpreted as an “opportunity to read,” even where such opportunity was, in practicality, fictitious. The decisions reveal that the absence of an opportunity to read prior to the transaction does not necessarily render an agreement invalid.<sup>199</sup> A particular provision, however, should not be

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no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations (“MegaPixel 3.14159 cannot be used with Byte-Pusher 2.718”), and the terms of sale. The user purchases a serial number, which activates the software’s features. On Zeidenberg’s arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two “promises” that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

*ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451–52 (7th Cir. 1996).

<sup>199</sup> The court in *ProCD*, for example, noted that in certain industries, transactions in which the exchange of money precedes detailed terms is common and requiring consumers to actually sign contractual terms would result in higher prices and greater inconvenience:

Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge’s understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a “binder” (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers’ interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. . . . Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg’s lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital

enforced until the licensee has received actual notice of the provision. In other words, the licensee's obligation to perform in accordance with the terms of use arises when the licensee becomes aware of such terms, not when the transaction is entered into.

In *Register.com, Inc. v. Verio, Inc.*,<sup>200</sup> the defendant Verio sold a variety of web site design, development, and operation services which competed with the plaintiff Register.com's web site development business. Verio obtained daily updates of information from Register.com's computers relating to newly registered domain names via an automated software program. Verio's practice of e-mail solicitations to those registered names was inconsistent with the terms of the restrictive legend Register.com attached to its responses to queries by Verio's. Some of the recipients of Verio's solicitations believed they were coming from Register.com (or an affiliate), and were sent in violation of the registrant's election not to receive solicitations from Register.com.<sup>201</sup> When Register.com sent Verio a cease and desist letter, it refused. Verio claimed that it "never became contractually bound to the conditions imposed by Register's restrictive legend because, in the case of each query Verio made, the legend did not appear until after Verio had submitted the query and received the WHOIS data."<sup>202</sup> Verio contended that it did not receive legally enforceable notice of the conditions Register intended to impose, and therefore should not be deemed to have taken WHOIS data from Register's systems

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information—but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

*Id.* at 1451. The court in *Pollstar v. Gigmania, Ltd.* cited to the *ProCD* court's rationale, concluding:

While the court agrees with *Gigmania* that the user is not immediately confronted with the notice of the license agreement, this does not dispose of *Pollstar*'s breach of contract claim. Taking into consideration the examples provided by the Seventh Circuit—showing that people sometimes enter into a contract by using a service without first seeing the terms—the browser wrap license agreement may be arguably valid and enforceable.

*Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000); *see also* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

<sup>200</sup> 356 F.3d 393 (2d Cir. 2004).

<sup>201</sup> *Id.* at 396–97.

<sup>202</sup> *Id.* at 401.

subject to Register's conditions.<sup>203</sup> The court rejected Verio's argument:

Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and infrequent. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument fails.<sup>204</sup>

In other words, even if Verio was not aware of Register.com's terms of use at the time it entered into the transaction, it subsequently became aware of the terms. While Verio did not have an opportunity to read the terms prior to each transaction, because it engaged in multiple transactions, it had actual notice of such terms at the time Register.com issued its cease and desist demand. If, however, Register.com had sued Verio for breach of contract after the first transaction (and assuming that it had not sent Verio a cease and desist letter), the results would be otherwise. As the court noted:

The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples—50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.

P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering them only in exchange for 50 cents in compensation, merely because

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.<sup>205</sup>

Verio's claim of "lack of notice" was disingenuous, not because it had such notice at the time the transaction was entered into, but because it subsequently had notice and chose not to comply with such terms.

Similarly, in *ProCD v. Zeidenberg*, the defendant was being sued for using the ProCD data in a manner that the defendant knew was contrary to the licensor's business model given the pricing differential of the commercial and noncommercial versions of the product. As the owner of the software code, the licensor has the right to establish the way in which it may be used. Zeidenberg had no independent right to use that software, and was only permitted to do so pursuant to a license granted by ProCD. The issue of whether Zeidenberg actually assented to the scope of license terms was irrelevant; what was relevant was that he knew what they were when he engaged in the prohibited behavior. While Zeidenberg was not obligated to act in accordance with such terms until he became aware of them, once he became aware of the terms of use he was bound by them. The same is not true if the provisions impose an affirmative obligation or deprive the licensee of a legal right. ProCD, as licensor, could not force Zeidenberg to perform affirmative acts (such as start a business promoting ProCD's products) via a shrinkwrap license; it could, however, determine the scope of the license granted to Zeidenberg. Zeidenberg, in purchasing the software, was buying only a limited right to use the software without being sued by the actual owner—ProCD—and that permission was granted contingent upon the terms of use contained in the license. The grant of that permission, however, could not diminish Zeidenberg's preexisting legal rights.

Returning to the car leasing analogy, if I let you lease my car, I can set the parameters of your use. If you do not abide by my wishes, I can take away your right to use my car. If you are not aware of my conditions—for example, that I do not want you to smoke in my car—you can smoke until I find out about it and tell you to stop. You cannot continue to smoke in my car knowing that I don't want you to because it is, after all, my car. Nor can I make you pay for cleaning the car to rid it of the odor

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<sup>205</sup> *Id.*

of smoke unless you knew beforehand that smoking was prohibited.

### *C. Sample License Analysis*

This Article argues that those terms that are part of a nonnegotiated license agreement include those to which the licensee has *actually* assented, and those pertaining to the scope of license or terms of use if they do not impose affirmative obligations or deprive the licensee of legal rights. What happens then where a nonnegotiated license agreement contains affirmative obligation terms unrelated to the scope of the license or terms that deprive the licensee of a legal right?

In this section, I apply my proposed approach to a sample shrinkwrap license agreement containing many of the provisions found to be standard in such agreements.<sup>206</sup>

#### **SAMPLE LICENSE AGREEMENT**

By opening this package and installing the product, you are consenting to be bound by this License. If you do not agree to all of the terms of this License, return the product to the place of purchase for a full refund within thirty (30) days.

*This provision imposes an affirmative obligation upon the licensee and would not be enforceable because there is no actual assent.*

#### **LICENSE**

Company ABCXYZ (“the Licensor”) retains all title, copyright, and other intellectual property rights in VRS-Home (“the Software”) and hereby grants you (“the Licensee”) a nonexclusive License to use the Software enclosed. Licensor retains all rights not expressly granted herein.

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<sup>206</sup> For a discussion of terms commonly found in shrinkwrap agreements, see Lemley, *Intellectual Property*, *supra* note 5, at 1242–48 (examining the purpose underlying proprietary rights, limitation on warranties, and limitation on user rights provisions).

*This sentence clarifies the nature of the transaction as being a license, and not a sale or transfer of intellectual property rights to the software code. Because it does not impose affirmative obligations upon the licensee or deprive the licensee of legal rights, it should be enforceable.*

Licensee shall not disclose, provide, or otherwise make available any trade secrets, copyrighted or patented material, in any form to any third party. All terms of this License are in effect to the fullest extent permissible under applicable law.

*It is unclear what “make available” means. If it means that the licensee is prohibited from permitting third parties to infringe upon the trade secret, copyright, or patent rights of the licensor, it merely informs the licensee of its existing legal obligations. If it means that the licensee cannot permit third parties to use the software, that restriction is covered in the section on Scope of License. If the intent of this provision is to impose an obligation on the licensee to hide the software from third parties, it is not enforceable. The prohibition against disclosure of trade secrets seems particularly nonsensical. The typical consumer licensee is not privy to confidential information and the software is being sold to the public at large.<sup>207</sup> Because this sentence imposes a blanket obligation of nondisclosure upon the licensee, it should not be enforceable.*

#### SCOPE OF LICENSE

This is a License and not a sale. Licensee may use the Software on a single computer under Licensee’s personal control, but may not run the Software on any computer, system, or network which permits use by more than one person at a

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<sup>207</sup> See Hemnes, *supra* note 61, at 577–81 (explaining that lawyers for software developers used to think that the only protection for their client’s programs was under trade secret law, but in order to do so, the right of possession had to be separate from the right of alienation); Lemley, *Intellectual Property*, *supra* note 5, at 1281–82 (noting that shrinkwrap licenses permit software vendors “to obtain both patent and trade secret protection concurrently in different aspects of the same program, as well as copyright protection in the whole program” with the result being that “vendors can obtain the powerful rights of patent law without having to ‘pay the price’ of a shorter term and the loss of trade secret protection”).

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Licensee may *not* modify, adapt, alter, change, reverse engineer, or transform the Software, except to the extent permitted by law.

*This provision provides the terms of use or the conditions under which the licensor licenses its software. The licensee should not have the right to use the software in a manner prohibited by the licensor. Furthermore, the licensee does not have the legal right to use the software at all without the licensor's permission, which the licensor is granting only with these restrictions. Generally, prohibitions against modifying and reverse engineering deprive the licensee of a right expressly granted under the Copyright Act; however this particular reference expressly permits such activities "to the extent permitted by law." Consequently, this provision would be enforceable.<sup>208</sup>*

#### **TERM**

This License shall remain in effect only for so long as Licensee is in compliance with the terms and conditions set forth herein. License terminates automatically if Licensee fails to comply with any of its terms and conditions. Licensee agrees, upon termination, to destroy all copies of the Software.

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<sup>208</sup> In *Davidson and Associates v. Jung*, the appellants were able to create an alternative online gaming system by reverse engineering. While the court in that case upheld the prohibition against reverse engineering contained in the contract, under the approach proposed in this Article, such a prohibition would require actual assent. The appellants in *Davidson and Associates*, however, would still be prohibited from the infringing activity under the Digital Millennium Copyright Act, which prohibits a person from circumventing a technological measure that controls copyright-protected works. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639–42 (8th Cir. 2005); see also *supra* Part II.A.2 (discussing *Davidson and Associates*).

*This provision sets forth terms of use, and termination of the right to use, the software. As it does not impose an affirmative obligation or deprive the licensee of a legal right, it should be enforceable.*

The intellectual property rights, limited warranty, and limitation of liability provisions set out in this License shall continue in force after termination.

*This provision requires actual assent.*

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IN NO EVENT SHALL LICENSOR BE LIABLE FOR ANY LOSS OR DAMAGE OF ANY KIND, INCLUDING, BUT NOT LIMITED TO INTERRUPTION OF BUSINESS, LOSS OF USE, AND INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, REGARDLESS OF FORM OF ACTION, WHETHER CONTRACT OR TORT (INCLUDING NEGLIGENCE). THIS EXCLUSION COVERS ANY LIABILITY THAT MAY ARISE OUT OF



**FORESEEABLE THIRD-PARTY CLAIMS AGAINST LICENSEE.**

**IN NO EVENT SHALL LICENSOR'S LIABILITY EXCEED THE PRICE PAID BY LICENSEE.**

*Under the U.C.C., the licensee has the right to certain implied warranties;<sup>209</sup> however, the U.C.C. recognizes and permits warranty disclaimers provided that they are conspicuous, mention merchantability, and are in writing.<sup>210</sup> The enforceability of this disclaimer would depend upon how the relevant state implements and interprets the U.C.C. provisions governing warranties and warranty disclaimers. The U.C.C. does not expressly require the consumer's assent to warranty disclaimers, although the requirements of conspicuousness indicate that the drafters viewed such disclaimers as being contractual in nature. In addition, the provisions must comply with the federal law governing written warranties, the Magnuson-Moss Warranty Act. If these provisions do comply, then they should be enforceable.<sup>211</sup>*

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<sup>209</sup> Section 2-314 states that “[a] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” Section 2-312(3) states that “a seller that is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement.”

<sup>210</sup> Under section 2-316(2):

[T]o exclude or modify the implied warranty of merchantability or any part of it in a consumer contract the language must be in a record, be conspicuous, and state “the seller undertakes no responsibility for the quality of goods except as otherwise provided in this contract,” and in any other contract the language must mention merchantability and in case of a record must be conspicuous . . . . [T]o exclude or modify the implied warranty of fitness, the exclusion must be in a record and be conspicuous.

U.C.C. § 2-316(2) (2003).

<sup>211</sup> The issue of whether the provisions comply with the U.C.C. requirements may nevertheless pose some difficulties. For example, in *Rinaldi v. Iomega Corp.*, the Delaware Superior Court found that a warranty disclaimer in a rolling contract was conspicuous even though it was located within the product packaging. *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 Del. Super. LEXIS 563, at \*19 (Del. Super. Ct. Sept. 3, 1999) (mem.). For a critique of that case, see Friedman, *supra* note 11, at 692 (“The *Rinaldi* court’s reasoning on conspicuousness was far from unassailable and demonstrates some of the weaknesses of using conspicuousness to assess the timing of disclaimers.”) The *Rinaldi* court relied too literally on *ProCD*, thus illustrating the danger of claiming actual assent where there is in fact none. If the court in *ProCD* had expressly stated that it was presuming assent to the scope of license terms—and no other—the *Rinaldi* court would have had no precedent for claiming that there was actual assent to all packaged terms. Implied warranty

*Limitations of liability are also permitted under the U.C.C. provided that they do not fail of their “essential purpose.”<sup>212</sup> Again, their enforceability depends on how a particular jurisdiction has interpreted the U.C.C. provision governing limitations of liability.*

#### **INDEMNITY**

Licensee agrees to indemnify Licensor for any third-party claims arising out of misuse, infringing use, or other illegal use of Software.

*This provision uses language that appears to impose an affirmative obligation upon the licensee.<sup>213</sup> Ordinarily, the licensee would be liable for any infringement caused by her misuse; however, she would not be obligated to indemnify the licensor against all claims filed against the licensor. Because the provision imposes an affirmative obligation upon the licensee, it would not be part of the agreement between the parties without actual assent. As a practical matter, a third party suing the licensor on the basis of misuse by licensee would have to prove the licensor’s involvement, whether by passive knowledge or active assistance.*

#### **GOVERNING LAW**

This License shall be governed by and construed in accordance with the substantive laws in force in the State of

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disclaimers are clearly not conspicuous if they are contained within the package and unavailable for inspection until after purchase.

<sup>212</sup> U.C.C. § 2-719(2) (2003). Section 2-719(1)(a) provides:

[T]he agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts . . . .

<sup>213</sup> The provision is poorly drafted; although the language can be interpreted as “any misuse” by any person, the more reasonable interpretation of this provision would require the misuse to have been conducted by the licensee. To the extent that the licensor is purporting to make the licensee responsible for misuse by third parties, it imposes an affirmative obligation that is not expressly agreed to and there is unlikely to be a default state law that imposes such an obligation absent extenuating circumstances.

California. Licensee agrees that all claims shall be subject to binding arbitration under the rules of the American Arbitration Association (“AAA”). This License constitutes the entire agreement between the parties with respect to use of the Software and supersedes any previous agreements.

*This provision restricts the licensee’s ability to bring a lawsuit. This provision is enforceable if the licensee actually assented to it. If it did not, then assent cannot be presumed. The court would then refer to the Magnuson-Moss Warranty Act, which permits informal dispute resolution procedures provided they conform to certain requirements.*<sup>214</sup>

#### CONCLUSION

Licensors may fear that the manipulability of software makes it susceptible to infringers who may be difficult to locate and control.<sup>215</sup> I do not wish to resolve in this Article whether a licensor’s fears of infringement are legitimate; my Article assumes that they are.<sup>216</sup> Regardless of whether this fear is well founded,<sup>217</sup> owners of intellectual property should be permitted

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<sup>214</sup> Magnuson-Moss Warranty Act, 16 C.F.R. §§ 703.1–703.5 (2008).

<sup>215</sup> See Madison, *supra* note 72, at 313–14 (“In a world of mass-marketed software . . . developers needed a mechanism to protect both copyright interests and their confidential information while simultaneously sharing these products with the world at large.”). Those who claim that a producer of software is adequately protected by patent law ignore that many software producers do not file patents. John R. Allison, Abe Dunn & Ronald J. Mann, *Software Patents, Incumbents, and Entry*, 85 TEX. L. REV. 1579 (2007).

<sup>216</sup> As Mark Lemley explains, while today it is generally accepted that copyright law protects computer software, the issue remained unresolved through the late 1970s until the enactment of the 1980 amendments to the Copyright Act. The same uncertainty reigned over the patentability of computer software. See Lemley, *Intellectual Property*, *supra* note 5, at 1242–43; see also O’Rourke, *supra* note 1, at 488–90 (noting the ways in which the soft copy world differs from the hard copy world which may compel licensing of software). Providers of electronic databases, however, may not be protected under copyright law and may need the protection offered by a license. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996); see also Jennett M. Hill, Note, *The State of Copyright Protection for Electronic Databases Beyond ProCD v. Zeidenberg: Are Shrinkwrap Licenses a Viable Alternative for Database Protection?*, 31 IND. L. REV. 143 (1998).

<sup>217</sup> See Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 446–52 (2003), for a discussion of evolution of the clickwrap agreement as a mechanism for protecting the commercial value of computer programs and databases.

to establish the parameters of any license grant. The freedom to do so, however, is subject to the preexisting rights of the licensee. The courts have used the language of contract law to uphold nonnegotiated software licenses even where actual assent was absent. This Article argues that rather than upholding such agreements by claiming that the licensee actually assented to the terms, the courts should expressly acknowledge the use of presumed assent. Presumed assent should only be applied to the scope of the license terms or the terms of use. A finding of presumed or actual assent is necessary to contract formation; however, a contract might still be found unenforceable if traditional contract defenses, such as unconscionability, are applicable. Furthermore, the obligation to perform in accordance with the terms of use or the scope of license should be subject to notice. Thus, the condition to the effectiveness of those provisions where there is only presumed, not actual, assent should depend upon an opportunity to read the terms.

