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Contract's Adaptation and the Online Bargain

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CONTRACT'S ADAPTATION AND THE ONLINE BARGAIN

Nancy S. Kim*

The model of traditional contracts is that of two individuals negotiating terms that are to each party's advantage. This model persists even though it no longer reflects the reality of consumer contracts. This Article traces the evolution of modern day consumer contracts and explains how courts have accommodated business needs by distorting contract law. This Article argues that the doctrine of consideration should be reconceptualized in light of new technologies and changes in doctrinal application. It concludes that in order to restore contract law's legitimacy, courts must allocate the burdens of technological and doctrinal changes in a more evenhanded manner. One way to do this is to require that websites use their technical advantage to enable the consumer to indicate bargaining.

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I. INTRODUCTION

Modern day mass consumer contracts are facing a crisis of legitimacy. Increasingly, consumers are being asked to sign agreements that businesses do not actually expect them to read. Such expansive contracting threatens to undermine the seriousness with which consumers treat their contractual obligations. The problem is more acute online.¹

The modern day contracting environment is vastly different from that contemplated by traditional contract doctrine. The model of traditional contracts is that of two equally matched individuals negotiating terms.² This model persists even though it rarely, if ever, reflects modern day consumer contracts. As mass production became possible with industrialization, companies found it more convenient and efficient to create standard terms for mass consumer transactions.³ Courts accommodated changing market realities by enforcing these standard form contracts even though they were contracts of adhesion, and the consumer could not negotiate terms.⁴

Similarly, mass consumer software licenses evolved from a business reality confronted by software companies.⁵ Because their products could be easily duplicated and transferred, software companies came up with a novel way to get them to consumers—by licensing instead of selling them. The license required a mass market contract, but one that did not incur the transactional hassle of having the customer sign anything. Instead, software companies simply tucked the license alongside the compact disc containing the software and wrapped the entire package in plastic wrap. Courts eventually recognized the shrinkwrap license as a legitimate contract,⁶ which paved the way for courts to recognize the legitimacy of other innovative contracting forms, such as the clickwrap (which the user assents to by clicking on an icon indicating agreement) and the browsewrap (which is a hyperlink to a

1. See *infra* Part IV.

2. E. ALLAN FARNSWORTH, *CONTRACTS* 295–96 (3d ed. 1999) (“Traditional contract law was designed for a paradigmatic agreement that had been reached by two parties of equal bargaining power by a process of free negotiation.”).

3. *Id.*

4. *Id.* at 296–97.

5. See *infra* Part II.

6. See *infra* Part II.

web page containing legal terms which a user assents to by continuing to use the site after notice of the terms).⁷

Courts validated these innovative contracting forms because they approved of the business purpose of the terms.⁸ Unfortunately, businesses then exploited judicial validation of these contracting forms to include terms lopsided in their favor. They used shrinkwraps, clickwraps, and browsewraps to limit their business liability in a way that was imperceptible to the consumer.

Critics of these new contract forms complain that they make a mockery of longstanding contract formation doctrines by upsetting rules of offer and acceptance, and subverting the notion of assent.⁹ Others approve the practicality of these 'wrap contracts¹⁰ in an era of digital information, mass consumer transactions, and online activity.¹¹ The arguments of both sides have merit, yet the debate seems outworn. Companies continue to employ 'wrap contracts, and courts generally tend to enforce them even if they occasionally rein in wayward terms.¹² Many scholars have discussed at length their concerns regarding consent in the online context.¹³ Courts nevertheless have accepted 'wrap contracts as valid contracting forms. Rather than attempt to stuff the genie back in the bottle, this Article considers ways to better reflect the intent of the parties and thereby enhance the legitimacy of the 'wrap contract form. This Article adopts a practical view that attempts to

7. See Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 836–848 (2007) (discussing the leading cases acknowledging shrinkwrap, clickwrap and browsewrap licenses).

8. See *id.*

9. For a sample of the scholarly commentary on this topic, see Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 228 (2007) (noting that consumers are clicking in "record numbers" to agree to unfavorable one-sided terms); Kim, *supra* note 7 (discussing the lack of actual assent in 'wrap contracts); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006) (criticizing terms of use as contracts).

10. I use the term 'wrap contracts to refer to shrinkwrap, clickwrap and browsewrap contracts. This article focuses primarily upon clickwrap and browsewrap contracts.

11. See, e.g., 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) (noting that current licensing practices have benefitted consumers by unleashing a wave of new products); Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 342–43 (1996) (arguing that non-negotiated license agreements are efficient).

12. See *infra* Part II.

13. See, e.g., Kim, *supra* note 7; Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY,' *supra* note 11, at 241; Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002); Lemley, *supra* note 9; Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

balance the legitimate needs of businesses to assess risks and contain liabilities with the realities of the consumer contracting environment.

Most of the scholarly commentary concerning the treatment of online contracts has focused on assent. Yet, as explained in Part IV, assent cannot be so easily divorced from consideration. Currently, blanket assent forces the burdens of innovative contracting to fall solely upon the consumer while the website garners all the advantages.¹⁴ For example, companies aim to minimize the obtrusiveness of online agreements. Unobtrusive contracts, however, primarily advantage companies by allowing more onerous terms without also enhancing consumer awareness.

The requirement of consideration may provide a workable alternative to the all-or-nothing nature of assent. This Article proposes reconceptualizing the online bargain in a way that would more evenly allocate the burdens of contracting innovation between the consumer and the website or business.¹⁵ This proposal distills a contract to its essence. At its core, a contract is a mutually agreed upon exchange by two or more parties that should reflect their intent. Most, if not all, mass consumer contracts are not actual expressions of intent. Consent is not freely given but presumed or constructed. Contract law, then, should be concerned with developing ways to better express intent in an effort to protect the reasonable expectations of contracting parties given the contracting environment.¹⁶ Contract law may be adequate to govern digital era transactions; however, the *application* of that law must account for the differences between online and offline contracting environments.¹⁷ This Article advocates a type of contract adaptation that considers the changes wrought by the online environment and

14. For example, as Douglas Phillips notes,

[a]lthough EULAs may lower the transaction costs of software providers as compared to individually negotiated licenses, they impose high transaction costs for any customer wishing to understand the EULA's legal effect. And in making the costs of such an understanding prohibitive, they give the software provider an asymmetric information advantage. This asymmetry results in transaction terms that are inefficient.

DOUGLAS E. PHILLIPS, *THE SOFTWARE LICENSE UNVEILED* 81 (2009).

15. I use the term "website" in this Article to refer to companies that operate websites for their businesses.

16. See Moringiello, *supra* note 13, at 1309 ("Traditional contract rules, based on the model of two individuals meeting face-to-face to negotiate written terms, have been modified over the years to accommodate diverse methods of communicating those terms. In developing these modifications, courts recognized the traditional cautionary function served by the signed paper contract and fashioned new rules to account for the different signals sent to offerees by novel methods of contracting.").

17. See *id.* ("The problems posed by Internet contracting" require not great overhaul of existing law but an "adjustment to traditional rules to take into account the differences between paper and electronic communications.").

champions the molding of contract law to conform to these shifting realities. This approach thus acknowledges the reality of modern day contracting including how contracts are actually employed by companies and perceived by consumers in the online environment. Courts have *already* adapted contract law to conform to marketplace changes.¹⁸ This Article urges them to do so in a more evenhanded manner.

'Wrap contracts, like other contracts of adhesion, contain one-sided terms that have been drafted by the party with both the market power and the technological ability to offer them on a take-it-or-leave-it basis. Users typically fail to read the terms. More information fails to encourage reading if there is no meaningful way to access that information and no ability to negotiate different terms. Contract design, on the other hand, can signify intent in a way that words alone cannot.¹⁹ The burden of signifying intent should fall to the website, which is the only party capable of doing so.

Part II of this Article summarizes the evolution of contract's form. Part III then analyzes the expansion of contract's function. This Article uses figures of speech to illustrate how contracts protect or diminish the parties' legal rights and obligations. Part IV argues for and applies a reconceptualization of consideration in the online environment. The blanket nature of assent and recent case law enforcing 'wrap contracts make the often-ignored doctrine of consideration a better starting point for doctrinal innovation than assent. Part V concludes that courts should require websites to use their technological capability to express the intent of *both* parties in the online contracting environment. A more balanced allocation of modern contracting's burdens will strengthen the legitimacy of modern consumer contracts.

II. EVOLUTION OF CONTRACT'S FORM

A contract is a legally enforceable promise.²⁰ As production of goods became more sophisticated and specialized, and markets more competitive, producers needed to plan for the future in order to accurately calculate costs, maximize use of goods and capital, and

18. See *infra* Part II.

19. See Moringiello, *supra* note 13 (discussing the different signals sent by paper and electronic contracts).

20. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"); FARNSWORTH, *supra* note 2, at 3 (defining contract as "a promise, or a set of promises, that the law will enforce or at least recognize in some way"). Farnsworth notes that the law of contracts is generally concerned with "exchanges that relate to the future." FARNSWORTH, *supra* note 2, at 4.

remain in business.²¹ Contract law developed in order to enforce executory promises that were essential to a credit-based free enterprise system.²² Not surprisingly, contract law reflects the principles of individualism and *laissez faire* that enabled the free market system to flourish.²³ Under the traditional model of contract law, parties to a contract are on roughly equal footing²⁴ and can avoid oppressive contracts by shopping for terms and exercising their freedom of choice.²⁵ But as the business environment changed, this model of equality failed to reflect the reality of many contracting situations.²⁶

21. FARNSWORTH, *supra* note 2, at 8 (“Eventually . . . producers’ operations became more complex, and they began buying raw materials from suppliers, employing others to work for them, and selling through distributors. Producers then saw the need to plan for the future in order to compete with other producers. An exchange of promises looking to a future exchange of performances would give a producer the basis for predictable calculation.”).

22. *Id.* at 20; Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629 (1943) (“With the development of a free enterprise system based on an unheard of division of labor, capitalistic society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Common law lawyers, responding to this social need, transformed ‘contract’ from the clumsy institution that it was in the sixteenth century into a tool of almost unlimited usefulness and pliability. Contract thus became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way.”).

23. See Kessler, *supra* note 22, at 630 (“[O]ur legal lore of contracts reflects a proud spirit of individualism and of *laissez faire*. . . . Contract—the language of the cases tells us—is a private affair and not a social institution. The judicial system, therefore, provides only for their interpretation, but the courts cannot make contracts for the parties.”).

24. FARNSWORTH, *supra* note 2, at 295–96. See also *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971) (“The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality.”).

25. Kessler, *supra* note 22, at 630. Kessler depicts traditional contract law as follows:

Either party is supposed to look out for his own interests and his own protection. Oppressive bargains can be avoided by careful shopping around. Everyone has complete freedom of choice with regard to his partner in contract, and the privity-of-contract principle respects the exclusiveness of this choice. Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.

Id.

26. *Id.* at 631–32 (noting that mass production gave rise to the use of contracts of adhesion where the parties did not have equal bargaining power). Clayton P. Gillette notes, “Standard forms dominate both the consumer and the business environment so that only contracts that are sufficiently large, complicated, or idiosyncratic enough to justify negotiation over more than the basic terms of quantity, price, and delivery satisfy the meeting of the minds standard that underlies traditional notions of consent.” Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 679.

A. Mass Market Contracts

Industrialization enabled the mass production and sale of goods to consumers. Businesses found it more efficient to create standard terms for mass consumer transactions.²⁷ These standard terms were contained in form agreements.²⁸ These form agreements differed from traditional contracts because their terms were non-negotiable and offered to the consumer on a “take it or leave it” basis.²⁹ They became known as contracts of adhesion as the consumer was powerless to do anything other than adhere to their terms.³⁰

Despite their shortcomings, courts and commentators generally recognized that standard form agreements were efficient and, to varying degrees, socially beneficial.³¹ The Second Restatement of the Law Governing Contracts (Second Restatement) acknowledged that standardized agreements were essential to an economic system reliant upon mass production and distribution:

Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. . . . Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.³²

Because of their advantages, the use of standard form contracts

27. Kessler, *supra* note 22, at 631 (“The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract.”).

28. *Id.* at 631.

29. *Id.* at 632.

30. FARNSWORTH, *supra* note 2, at 297 (“[T]he only alternative to complete adherence is outright rejection.”). See also *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971) (“[I]n present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.”). The term “contracts of adhesion” is credited to Edwin Patterson, who used it in the context of insurance policies. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

31. Kessler, *supra* note 22, at 630 (“In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts.”); FARNSWORTH, *supra* note 2, at 296 (“Since standard forms can be tailored to fit office routines and mechanical equipment, they simplify operations and reduce costs.”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1222 (1983) (“Form documents promote efficiency within a complex organizational structure.”); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002) (While “[s]tandard-form exchanges obviously do not constitute the paradigm ‘bargain’ of classical contract law with the parties on equal footing and each term separately negotiated,” they “benefit both sellers and consumers.” (emphasis added)).

32. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

proliferated. Judicial recognition of adhesion contracts meant that other legal controls were required to keep abusive or socially harmful contracting practices at bay. Courts developed interpretation rules that recognized the limitations of standard form contracts.³³ For example, they interpreted ambiguous contract terms against the drafter.³⁴ Courts evaluating insurance contracts adopted the “reasonable expectations” rule set forth in Section 211(3) of the Second Restatement and held that if one party has reason to believe that the other party would not have entered into the agreement “if he knew that the writing contained a particular term, the term is not part of the agreement.”³⁵

The abuses of standard form contracts were also addressed by certain sections of the Uniform Commercial Code (UCC). Perhaps the most notable was Section 2-302, which empowers courts to invalidate contracts on the grounds of unconscionability.³⁶ Other UCC sections treated merchants differently from consumers, recognizing that merchants had greater bargaining power vis-à-vis other merchants than did consumers.³⁷ Section 2-207 addressed the problem of the “Battle of the Forms,” whereby merchants sought to have the terms of their form

33. FARNSWORTH, *supra* note 2, at 297–98 (noting that courts have developed “several techniques” to avoid harsh results in hard cases). *See also* Moringiello, *supra* note 13, at 1333–40 (discussing a half-century of cases in which courts have found a duty to explain terms where terms were delivered mechanically or where the contractual nature of the document was unclear).

34. *See* Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476, 1481 (11th Cir. 1995) (“If the claimant has established a reasonable interpretation, then under *contra proferentem*, which requires ambiguities to be construed against the drafter of a document, the claimant’s interpretation is taken as correct.”); HPI/GSA-3C, LLC v. Perry, 364 F.3d 1327, 1334 (Fed. Cir. 2004) (applying the rule of *contra proferentem* where contract had latent ambiguity); Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 539 (9th Cir. 1990) (“[A]mbiguities in insurance contracts must be construed against the insurer.”).

35. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981); Chicago & N. W. Transp. Co. v. Emmet Fertilizer & Grain Co., 852 F.2d 358, 360 (8th Cir. 1988) (declining to give drafting party the benefit of ambiguous language where “it relies on an undeclared interpretation of the license terms which it should have known would have been unacceptable to (the non-drafting party) at the time of negotiation”); Lancaster v. United States Shoe Corp., 934 F. Supp. 1137, 1140 (N.D. Cal. 1996) (holding that denial of benefits was improper under the reasonable expectations doctrine).

36. Section 2-302(1) states that if a court

finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

U.C.C. § 2-302(1) (2003).

37. *See, e.g., id.* § 2-201(2) (providing that a failure to object to a confirmation of the contract within ten days satisfies the writing requirement under the statute of frauds if the transaction is between merchants); *id.* § 2-207 (addressing contract formation and incorporation of terms by exchange of merchant commercial forms); *id.* § 2-314 (implied warranty of merchantability applies where seller is a merchant).

agreement prevail by submitting them last.³⁸ Under this section, additional or different terms in form acceptances or order confirmations are “proposals” which may require express acceptance in certain circumstances.³⁹ The irony of course is that after *ProCD, Inc. v. Zeidenberg*,⁴⁰ and its progeny, Section 2-207 effectively provides greater protection from standard form contract terms to merchants than to consumers, who generally do not fall under its provisions.⁴¹

B. Mass Market Software Licenses and the Rise of 'Wrap Agreements

As with standard form agreements generally, mass consumer software licenses developed out of business necessity.⁴² When personal computers were first introduced in the mass consumer marketplace, software companies were uncertain about whether copyright law protected software.⁴³ Even with copyright's protections, software producers were concerned about how to protect their products, which are easily reproducible and distributable.⁴⁴ Licensing software—rather than

38. See FARNSWORTH, *supra* note 2, at 168–69 (discussing the “battle of the forms” and the intent of the UCC drafters to use § 2-207 “to reduce the number of situations in which a party can seize upon a discrepancy in the forms as an excuse for not performing”).

39. U.C.C. § 2-207.

40. 86 F.3d 1447 (7th Cir. 1996).

41. *Id.* at 1452 (stating that because there is only one form involved in a consumer transaction, section 2-207 is irrelevant). *But see* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339 (D.Kan. 2000) (noting that nothing in the language of section 2-207 “precludes application in a case which involves only one form”).

42. See Thomas M.S. Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577, 578 (1994) (discussing how, in the absence of protection under copyright and patent laws, “[l]awyers for software developers were therefore driven to the conclusion that trade secret law provided the only protection for their clients’ programs”). Hemnes further explains that because a restriction on non-disclosure or resale on post-sales copies of software may have constituted a restraint on alienation, “[t]o get around the conflict between the need for non-disclosure on the one hand, and the right of alienation on the other, lawyers invented the software license.” *Id.* at 580. See also Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1242–43 (1995) (explaining how the copyrightability of software remained uncertain until the 1980 amendments to the Copyright Act); Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 313–14 (2003) (noting that software developers needed a mechanism to protect their copyrights and proprietary interests while sharing their products with others); Maureen A. O’Rourke, *Defining the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 488–90 (1995) (noting the differences between the “soft copy” and “hard copy” world and how they might compel licensing).

43. The U.S. Copyright Office permitted copyright registration on computer programs in 1964. Note, *Copyright Protection for Computer Programs*, 64 COLUM. L. REV. 1274, 1274 (1964). See also Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1048–49 (2005) (noting the “considerable uncertainty . . . about the scope of copyright protection for software” which prompted software producers to use licenses to protect their interests).

44. Oakley, *supra* note 43, at 1048–49.

selling it—enabled software producers to bypass the first sale doctrine which would have enabled consumers to transfer possession of their copy of a software product.⁴⁵ Furthermore, the first sale doctrine would have given software purchasers certain “fair use” rights, such as the right to make copies for purposes of interoperability.⁴⁶ By using a license, software companies could continue to control their product even after they had relinquished physical possession of it; however, they wanted the benefits of a license without the transactional hassle of having the customer sign anything. Accordingly, they bundled written terms with their products, encasing in plastic wrap both the paper containing the terms as well as the compact disc containing the software program. These terms became known as “shrinkwrap” licenses.⁴⁷ Earlier cases questioned the validity of shrinkwrap licenses,⁴⁸ but after the Seventh Circuit upheld shrinkwrap agreements in the oft-cited case *ProCD, Inc. v. Zeidenberg*,⁴⁹ most courts followed suit.⁵⁰ Judge Easterbrook’s opinion in *ProCD* exemplifies judicial prioritization of business needs over doctrinal fidelity.⁵¹

The validation of the shrinkwrap license paved the way for the acceptance of the “clickwrap” and “browsewrap” forms for online transactions. A clickwrap license is a digital agreement whose terms the user accepts by clicking on an icon that expresses consent or non-consent, such as “I Accept” or “I Decline.”⁵² Courts have approved clickwrap agreements, finding that a “click” accepts the terms contained on the website, even if the terms are viewable only through a hyperlink.⁵³ A browsewrap license contains the terms that govern the

45. See Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103, 1111–12 (discussing the implications of the first sale doctrine on software).

46. See *id.*; Jessica Litman, *Copyright and Information Policy*, 55 LAW & CONTEMP. PROBS. 185, 197–98 (1992); David A. Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine*, 30 JURIMETRICS J. 157, 163 (1990).

47. Lemley, *supra* note 42, at 1241.

48. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (holding a “box-top” license invalid under the UCC); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (finding that shrinkwrap license was preempted by federal copyright law).

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

50. *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); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005). Not all courts, however, have upheld shrinkwrap licenses. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006).

51. In addition to noting that ProCD’s database product could probably not be copyrighted, Judge Easterbrook stressed the importance of price discrimination, citing it as a cornerstone of ProCD’s business model and an advantage to consumers. *ProCD*, 86 F.3d at 1449–1450.

52. See Lemley, *supra* note 9, at 459–460.

53. *Id.* at 459 (“Every court to consider the issue has found ‘clickwrap’ licenses, in which an

use of a website or product.⁵⁴ These terms are usually hidden in an interior page that can be accessed only by clicking on a hyperlink at the bottom of a web page, which is marked “Terms of Use,” “Legal Notice,” or the like.⁵⁵ The user is not required to click “I agree” to the terms.⁵⁶ While courts formerly distinguished between the form of a clickwrap and a browsewrap, they are now concerned primarily with whether the user had notice.⁵⁷

III. EXPANSION OF CONTRACT'S FUNCTION

This Part III examines the expansion of contract's function that accommodated the evolution of contract's form from negotiated agreement to standard form to shrinkwrap and then clickwrap and browsewrap. In doing so, this Article employs figures of speech⁵⁸ to better illustrate a particular contractual purpose.

A. Contract as Shield

Some provisions in standard form contracts limit the liability of the contract drafter for the product or service it offers to the other party.⁵⁹ An example of this type of provision is a limited warranty or a warranty disclaimer. Companies need to assess the risks of entering into a particular type of business, producing a particular type of product, or entering into a particular type of transaction, especially given the uncertainty generated by tort and product liability law. Contract law

online user clicks ‘I agree’ to standard form terms, enforceable.”); Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2007–2008*, 64 BUS. LAW. 199, 200 (2008) (“By now the law seems pretty well-settled that a mere click of agreement on a web site acts as an acceptance of an offer to do what the web site proposes—and of the terms contained on the web site—even if those terms can only be reached by a hyperlink.”).

54. Lemley, *supra* note 9, at 460.

55. Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003).

56. *Id.*

57. Moringiello & Reynolds, *supra* note 53, at 200 (noting that “courts were not paying much attention to the once much-mooted distinction between browsewrap and clickwrap” and focused instead on whether the seller provided enough information “so that the buyer could know for what, if anything, it was contracting”). *But see* Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 993 (2008) (“A well-advised website designer would require some affirmative action from the user, indicative of assent to the document in question, in order to reliably produce a binding contract.”).

58. Metaphors and similes are figures of speech. A simile compares two unlike things, often in a phrase using “like” or “as.” WEBSTER'S II NEW COLLEGE DICTIONARY 1029 (1995) [hereinafter WEBSTER'S]. A metaphor transfers a term from an object that it ordinarily designates to an object it may designate only by analogy. *Id.* at 688.

59. *See* Kunz et al., *supra* note 55, at 281 & n.11.

enables parties to establish the rules of the transactions. The drafter of a form contract uses the contract as a shield to protect itself from claims by the other party and to contain or limit the responsibility it would have for the product or service it introduces into the marketplace.

There are implied warranties for sales of goods under the UCC.⁶⁰ Sellers, however, are able to disclaim these implied warranties using specific, expressly disclaiming, conspicuous language.⁶¹ The UCC, recognizing a company's need to assess and contain risks, permits businesses to both limit their liability and disclaim implied warranties.⁶² An unintended consequence of this ability, however, may be that it further perpetuates the use of standard form contracts to govern commercial transactions.

The introduction of digital products on a mass consumer level brought with it a somewhat different shield function. The digital product owner uses a contract (i.e. a shrinkwrap license) to draw boundaries of use around its product. In *ProCD, Inc. v. Zeidenberg*, for example, one of the relevant provisions in the shrinkwrap license stated:

The listings on this product are licensed for authorized users only. The user agreement provides that copying of the software and the data may be done only for individual or personal use and that distribution, sublicense or lease of the software or the data is prohibited. The agreement provides

60. U.C.C. § 2-314 (2003) (“[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.”); *id.* § 2-315 (“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”).

61. *Id.* § 2-316(2) (“[I]n 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’ . . .”).

62. *Id.* § 2-719(1)(a) (“[T]he agreement may provide for remedies . . . in substitution for those provided in this Article and may limit or alter the measure of damages recoverable . . .”); *id.* § 2-719(3) (“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”). An exclusive remedy, however, should not “fail of its essential purpose.” *Id.* § 2-719(2).

The federal consumer protection law, the Magnuson–Moss Warranty Act, does not permit disclaimers of implied warranties if the product is accompanied by a written warranty but does not require any warranty whatsoever. 15 U.S.C. § 2302(b)(2) (2006) (“Nothing in this title . . . shall be deemed . . . to require that a consumer product or any of its components be warranted.”); 15 U.S.C. § 2308(a) (2006) (“No supplier may disclaim or modify . . . any implied warranty to a consumer with respect to such consumer product if . . . such supplier makes any written warranty to the consumer with respect to such consumer product . . .”). The Magnuson–Moss Act does, however, permit limitations of liability provided there is a “repair, replace or refund” remedy. *See* 15 U.S.C. § 2304(a)(3) (2006) (“[S]uch warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty . . .”); *id.* § 2304(a)(4) (“[S]uch warrantor must permit the consumer to elect with a refund for, or replacement without charge of, such product or part . . .”).

expressly that:

[Y]ou will not make the Software or the Listings in whole or in part available to any other user in any networked or time-shared environment, or transfer the Listings in whole or in part to any computer other than the computer used to access the Listings.⁶³

This contract provision was used to set limitations around the consumer's use of the product, thus "shielding" the software producer's business model from unfair business practices. The software producer, as the copyright holder, sold the license to use the software to the consumer. The scope of that license was contained in the shrinkwrap. Given the susceptibility of digital products to unauthorized copying and distribution, the Seventh Circuit enforced this shielding function and upheld the shrinkwrap as a valid contracting form.⁶⁴ Given the blanket nature of contractual assent,⁶⁵ however, acceptance of the shielding provisions meant acceptance of the provisions that served functions other than shielding.

B. Contract as Sword

A contract provision may serve a function other than simply shielding the drafter from liability for unfair or unauthorized business practices; it may affect and terminate rights held by the other party. One might argue that a limitation of liability or a warranty disclaimer also terminates a party's rights by prohibiting recovery for damages that would otherwise be available under contract law. Yet, the UCC expressly permits a party to do just that.⁶⁶ Regardless of whether software transactions are "sales" under the purview of the UCC,⁶⁷ the

63. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 645 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

64. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

65. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1970) (noting that assent to boilerplate clauses means assent to "the few dickered terms, . . . the broad type of the transaction, and . . . 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"). Many courts and commentators have taken Llewellyn's words to mean that there should be a "presumption" of assent to standard terms that are not unfair in presentation or substance. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 455 (2002) ("[T]he current legal approach supports Karl Llewellyn's vision that the law should create a presumption of assent (or 'blanket assent') to standard terms.").

66. See *supra* notes 60–62.

67. For a discussion of whether software transactions are "licenses" or "sales," see Kim, *supra* note 45. See also Richard A. Epstein, *ProCD v. Zeidenberg: Do Doctrine and Function Mix?*, in *CONTRACTS STORIES* 94, 100–04 (Douglas G. Baird ed., 2007) (discussing the implications of categorizing a software transaction as a license or a sale, including the applicability of the UCC provisions governing contract formation).

UCC can provide guidance regarding what are generally accepted fair and reasonable commercial practices. The limitation and warranty disclaimers are directly tied to the liability attached to the use of the product and reflects the drafter's attempt to calculate the risk of doing business, the risk of producing a particular product, or both. They are part of the product offering. Similarly, the license grant is part of what the seller/licensor is offering to the buyer/licensee. Essentially, the license is permission to use and a concomitant promise by the seller/licensor not to sue provided the buyer adheres to the scope of the license. The promise not to sue does not extend beyond any use greater than that expressly granted. The "assent" of the buyer/licensee then is not essential to the license grant, warranty disclaimer, or limitation of liability provisions.

By contrast, contract provisions which serve a "sword" function destroy the other party's rights⁶⁸ that are unrelated to the use of the product. Exclusive jurisdiction or mandatory arbitration clauses, for example, aim to destroy the non-drafting party's ability to bring a lawsuit in civil court or in a state that would otherwise have jurisdiction over the disputed matter. To illustrate, the following provision from a MySpace browsewrap serves a sword function because the MySpace member must submit to the governing law and exclusive jurisdiction of New York and must waive the right to a jury trial even though these matters pertain to ancillary issues of dispute resolution and not to the use of the networking service:

Disputes. The Agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to its conflict of law provisions. You and MySpace agree to submit to the exclusive jurisdiction of the courts located within the State of New York to resolve any dispute arising out of the Agreement or the MySpace Services. EACH OF THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION (INCLUDING, BUT NOT LIMITED TO, ANY CLAIMS, COUNTERCLAIMS, CROSS-CLAIMS, OR THIRD PARTY CLAIMS) ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.⁶⁹

68. This Article uses the term "rights" in a broader way to encompass Hohfeld's notion of "privileges." See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

69. Myspace.com, Terms & Conditions, <http://www.myspace.com/help/terms> (last visited Mar. 22, 2011).

A contract provision that functions as a sword should trigger more scrutiny by courts than those provisions that serve a shield function. While a company may legitimately carve out the scope of any license it grants and may limit its liability for damages, it should be permitted to take away the other party's rights only when it attains the other party's specific and actual assent.⁷⁰ Unfortunately, as currently construed, the blanket nature of assent is an all-or-nothing proposition, meaning that either a contract is formed in its entirety or not at all (even if specific provisions might be deemed unenforceable under a contract defense, such as unconscionability). Thus, the blanket assent approach requires a court that desires to acknowledge proper formation of shield provisions to acknowledge proper formation of sword provisions.

Judicial recognition of sword provisions, however, is more unsettling. Although the consumer has no ability to negotiate either a sword or shield provision with the mass software producer, the shield provisions are less troubling because they are directly tied to the use of the product. The software producer—not the consumer—should be the one to determine what type of product it offers to the consumer, including the scope of the license and the warranty, if any. The sword provisions, on the other hand, affect rights or entitlements that belong to the consumer. Courts have tried to respond to sword provisions by requiring notice and refusing to enforce sword provisions that constitute an unfair surprise. In *Specht v. Netscape Communications Corp.*, for example, the Second Circuit refused to enforce an arbitration clause in a browsewrap agreement due to lack of notice.⁷¹

As troubling as sword provisions may be, their purpose, like those of shield provisions, is to enable the drafting party to assess and minimize the risks of doing business by reducing costs and uncertainty. In other words, the ultimate function of sword provisions is shielding. In most cases, the company would not have agreed to enter into the transaction without the protection afforded by both the sword and shield provisions. Unfortunately, both sword and shield provisions have paved the way for contract provisions that do more than simply reduce business risk.

C. Contract as Crook

This Article uses the metaphor of a “crook”⁷² to describe a company's stealthy appropriation (via a non-negotiated agreement), of benefits

70. See Kim, *supra* note 7, at 826–34.

71. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d. Cir. 2002).

72. WEBSTER'S, *supra* note 58, at 268 (defining “crook” as “a bent or curved object:HOOK” and “[o]ne who lives by dishonest means”).

ancillary or unrelated to the consideration that is the subject of the transaction. Prior to the advent of 'wrap contracts, standard form agreements generally performed sword and shield functions. Even if their limitations of warranties and exclusions reduced the value of the bargain for the consumer, contracts of adhesion typically did not seek to extract additional benefits from consumers that were not part of the primary transaction without the consumer's actual, specific assent. For example, a hotel that charged an additional fee for late check-outs would have its customers separately initial the rate and late check-out fee.

The physical constraints of paper agreements acted as a natural rein on companies' contracting behavior as companies were generally reluctant to repel potential customers with multi-page contracts that required a signature. Even though shrinkwrap agreements did not require a signature, they too, were typically limited in size due to the impracticability, cost, and general undesirability of enclosing a bulky contract with a software product. With judicial validation of the clickwrap and browsewrap forms, however, companies further expanded the reach of their contractual clauses. They began to use contracts to extract from consumers additional benefits that were unrelated to the transaction. Given that digital terms are weightless, reproduction and distribution costs non-existent, and consumers highly unlikely to read online agreements, companies could add additional terms with no concomitant financial or reputational cost. Companies began using their online agreements to do more than contain costs and assess the risks of doing business. For example, the browsewrap of one social networking site gives it an "irrevocable, perpetual, nonexclusive, fully-paid and worldwide license" to user content.⁷³ While the website needs a license to post user content, the license that it gives itself is much broader than is strictly required to protect itself from liability. Most consumers are likely unaware of the rights granted via these crook provisions since most consumers fail to read online agreements.⁷⁴ More troubling, at least some consumers would have declined the primary transaction if

73. See Friendster, Friendster Terms of Service, <http://www.friendster.com/info/tos.php> (last visited Jan. 16, 2011).

74. See, e.g., Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 3 (N.Y. Univ. Sch. of Law, Ctr. for Law, Econ. & Org., Working Paper No. 09-40, 2009), available at <http://ssrn.com/abstract=1443256> (finding that "only about one or two in one thousand shoppers" of software access a product's EULA for at least one second.). Recently, a computer game retailer included a clause in its online contract that gave it a right to the "souls" of 7,500 of its online customers. *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOXNEWS.COM (Apr. 15, 2010), <http://www.foxnews.com/scitech/2010/04/15/online-shoppers-unknowingly-sold-souls/>. The customers had the option of nullifying the soul-claiming clause but very few did so. *Id.*

they had known about the additional benefits being extracted via the crook provisions. For example, Facebook users threatened to defect in droves when they discovered that the company, via a crook provision, intended to retain a perpetual license to user generated content.⁷⁵ Companies may also use crook provisions to resell and share customer personal information.⁷⁶

The crook is a more apt metaphor than the sword because the customer's use of the information or extraction of the entitlement is appropriated rather than destroyed. Furthermore, unlike sword or shield provisions, a crook provision is not designed to protect a company's business or assess its risks. Where a sword or shield provision is used, the purpose is defensive in that the company anticipates an undesired use or an offensive move by the consumer, such as a lawsuit, and the company seeks to curtail that use or block that move. By contrast, a crook provision anticipates no such offensive action by the consumer and has no direct relationship with the product or services offered by the company.

IV. RECONCEPTUALIZING THE ONLINE BARGAIN

Given the uniqueness of internet contracting, some have questioned whether contract law is up to the task of governing online transactions.⁷⁷ Consumers signing their name on a piece of paper register the significance of entering into a contract, even if they have no power to shape the terms of that contract. An online consumer, by contrast, may not even be cognizant of having entered into a contract.⁷⁸ Consumers

75. Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 18, 2009, <http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html>.

76. See, for example, Amazon's privacy policy, which requires visiting both the Conditions of Use and Privacy Policy web pages. Amazon.com, Conditions of Use, http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 (last visited May 18, 2011); Amazon.com, Privacy Notice, http://www.amazon.com/gp/help/customer/display.html/ref=footer_privacy?ie=UTF8&nodeId=468496 (last visited May 18, 2011). Similarly, J.Crew's privacy policy requires the visitor to click on two separate links. J.Crew.com, Terms of Use, <http://www.jcrew.com/footer/termsfuse.jsp> (last visited May 18, 2011); Jcrew.com, Our Privacy Policy, <http://www.jcrew.com/footer/privacy.jsp> (last visited May 18, 2011).

77. For a discussion of the issue of electronic contracting and contract doctrine, see Hillman & Rachlinski, *supra* note 65, at 432 (finding that while the online environment "changes some of the dynamics of standard-form contracting . . . , these difference do not call for a radically different legal regime").

78. Professor Richard Hillman conducted a study with his first year Contracts class of ninety-two students and found that few of them read more than the description of the goods and the price. Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY,' *supra* note 11, at 285, 286-94. An informal survey of my own first year Contracts students revealed that most of them

register keystrokes, not clicks. A recent study conducted by Rainer Bohme and Stefan Kopsell found that users tended to blindly accept terms whose presentation resembled an end user license agreement, probably because the ubiquity of such agreements have trained users to “accept” their terms without reading them.⁷⁹ As noted earlier, clicking is not even required for some courts to recognize a contract; a user may be deemed to have “accepted” the terms of a browsewrap merely by visiting a website.

As previously mentioned, most of the commentary regarding online contracts centers around whether there was assent.⁸⁰ Courts have typically tied the validity of assent to notice. Generally, if there was notice of the terms, the consumer is deemed to have manifested assent.⁸¹ Clickwrap agreements are generally less problematic from a notice standpoint than browsewrap agreements, but again, the crucial distinction lies in the existence of notice, rather than the form.

This Part argues that the doctrine of consideration—as opposed to assent—is a more robust method of addressing the problems of online contracts. The blanket nature of assent makes it an inflexible vehicle for mass consumer transactions.⁸² Consideration may provide a workaround this inflexibility.

A. Consideration and Form, Revisited

Before delving into this proposed reconceptualization of the online bargain, it is necessary to define what is meant by consideration. This is not an easy task. Karl Llewelyn once noted, “‘Consideration’ is not in any meaningful sense a topic. The term . . . relates to no unified body of states or problems of fact.”⁸³ The Second Restatement defines consideration somewhat obliquely by stating that “to constitute

were unaware that they may have entered into a contract with their online bank, their social networking website, or their email provider.

79. RAINER BÖHME & STEFAN KÖPSELL, 2010 ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYS., TRAINED TO ACCEPT? A FIELD EXPERIMENT ON CONSENT DIALOGS 2403 (2010), available at http://www1.inf.tu-dresden.de/~rb21/publications/BK2010_Trained_To_Accept_CHI.pdf.

80. For a broader, contextual approach to the problem of online contracts in the context of privacy, see Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. (forthcoming 2011) (on file with author) (proposing that courts abandon a strict reliance on standard form contract doctrine in privacy disputes and consider contextual factors).

81. Moringiello & Reynolds, *supra* note 53, at 434 (noting that courts discuss whether the buyer had notice of the terms rather than whether those terms were substantively fair).

82. Elsewhere, I have proposed eradicating the concept of “blanket assent.” See Kim, *supra* note 7. This Article, however, addresses another possible solution to the problem of online agreements.

83. K.N. Llewelyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777, 778 (1941).

consideration, a performance or a return promise must be bargained for.”⁸⁴ A performance or return promise is bargained for “if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”⁸⁵ As the Farnsworth treatise states, “[v]irtually anything that anyone would bargain for in exchange for a promise can be consideration for that promise. . . . [A]s long as part of what is given in exchange for a promise is consideration it is immaterial that the rest is not.”⁸⁶

These definitions are all ways of describing consideration as the price the offeree knowingly pays to get what the offeror is offering. This Article deliberately uses the word “knowingly” instead of “willingly,” as the latter term may cause one to infer voluntariness or desire to enter into a contract, rather than need or lack of choice. The unfortunate truth is that in mass consumer transactions, the consumer typically does not desire to accept the contract terms, but does so in order to obtain the good or service.

In a classic article, Lon Fuller identified the functions of consideration.⁸⁷ The first is evidentiary.⁸⁸ Consideration may also provide a cautionary or deterrent function.⁸⁹ Finally, the requirement of consideration may provide a channeling function in that it signals the enforceability of the promise, thus furnishing a “simple and external test of enforceability.”⁹⁰ Furthermore, “whatever tends to accomplish one of these purposes will also tend to accomplish the other two.”⁹¹

Both assent and consideration are essential to contract formation, but consideration has received scant attention in the academic literature on ‘wrap contracts. One notable exception is an article by Robert Hillman and Maureen O’Rourke concerning consideration and open source licenses.⁹² Hillman and O’Rourke observe that the doctrine of consideration “has always been something of a mystery and working out how it does or does not apply in the open source software setting increases our understanding of how the principle has served, and should continue to serve society.”⁹³ After a brief discussion of Fuller’s

84. RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981).

85. *Id.* § 71(2).

86. FARNSWORTH, *supra* note 2, at 47.

87. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

88. *Id.* at 800.

89. *Id.*

90. *Id.* at 801.

91. *Id.* at 803.

92. Robert A. Hillman & Maureen A. O’Rourke, *Rethinking Consideration in the Electronic Age*, 61 HASTINGS L.J. 311 (2009).

93. *Id.* at 315.

justifications for consideration, the authors conclude that “the most promising explanations for the consideration doctrine” are “the value of bargains and the capacity of our institutions to administer them.”⁹⁴ The authors spend the remainder of their article analyzing consideration in the context of open source licenses.⁹⁵

Hillman and O’Rourke first address the arguments both for and against viewing open source licenses as contracts.⁹⁶ Generally, open source licenses permit copyholders to use, transfer, copy, and modify software and source code, provided that any derivative work is subject to the same license terms regarding all or some portion of the subsequent work.⁹⁷ The open source model thus seeks to further the development and improvement of software by facilitating access to source code. Some have argued that open source licenses are not contracts because they lack consideration.⁹⁸ O’Rourke and Hillman argue that open source licenses do not lack consideration and are valid contracts.⁹⁹ Their conclusion rests primarily upon the social value of open source licenses and the capability of courts to enforce these licenses.¹⁰⁰ The authors also mention the issue of assent, noting that “under current practices, open source licenses rarely satisfy the notice and formation requirement of contract-formation law” but that they could do so by employing the clickwrap or shrinkwrap format.¹⁰¹

Yet, the concepts of consideration and assent are necessarily intertwined because one can have neither the motive nor the desire to give up something in exchange for something else, without knowing *what* one will be expected to give up. Not only does the open source license convey broad rights, it also imposes obligations upon the licensee that are independent of *how* the licensee uses the software. The open source license thus asks too much of the licensee without the licensee’s actual assent. It is precisely because the open source license goes beyond defining the boundaries of use that actual assent should be required. Not surprisingly, even sophisticated users of open source

94. *Id.* at 320.

95. While there are many types of open source licenses, typically the term refers to the relinquishment of a software developer’s copyrights to software code provided that subsequent users maintain the openness of any derivative works.

96. Hillman & O’Rourke, *supra* note 92, at 328–35.

97. *Id.* at 313–314.

98. *Id.* at 314.

99. *Id.* at 328.

100. *Id.* at 330 (“[C]ourts should have little difficulty applying a contractual framework to open source licenses.”).

101. *Id.* at 332–33.

software routinely run afoul of their license requirements.¹⁰² Given the potential for enormous liability for violating these licenses,¹⁰³ open source licensors should do more than set forth terms in a 'wrap agreement.

Hillman and O'Rourke briefly discuss the importance of knowledge or awareness of terms to contract formation. They conclude:

a contract is formed when a licensee acquires the software, such as by downloading it, even if the licensee does not have to manifest assent to the restrictions and even before the licensee modifies or distributes the software. The act of acquiring the software (assuming the licensee has knowledge of the restrictions) constitutes an implied-in-fact acceptance of the terms of use.¹⁰⁴

Yet, knowledge cannot be so cleanly separated from consideration. While the question of notice, constructive or actual, is typically associated with assent, it is also relevant to consideration. The issue of whether something is sought by the promisor involves motive. The Second Restatement, for example, notes that in a typical bargain, "the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration."¹⁰⁵ In other words, *why* did the promisor offer what she did—was it in exchange for the promisee's (or a third party's) promise or performance? For example, assume that X promises to Y that X will mow Y's lawn for \$50. X's motive in making the promise to Y to mow Y's lawn is to get paid \$50. X is induced to promise to mow Y's lawn by Y's promise to pay \$50.

Now, assume instead that X promises to mow Y's lawn in exchange for \$50 and a bag of oranges. Assume further that while Y knew that X expected a payment of \$50 for mowing Y's lawn, Y did not know that X *also* expected a bag of oranges at no additional cost. It would be absurd to speak in terms of Y's motive in giving up the bag of oranges if Y had not even known that it was part of the transaction. Furthermore, it seems that X should not be allowed to claim that X was induced to mow

102. Ashlee Vance, *The Defenders of Free Software*, N.Y. TIMES, Sept. 26, 2010, <http://www.nytimes.com/2010/09/26/business/26ping.html> ("[S]ome companies, even some technology savvy ones, may be violating the rather easy-to-follow requirements associated with free software licenses. . . . Quite often, companies that fail to live up to these requirements do so out of ignorance about the rules of engagement. Nonetheless, they become exposed to potentially expensive lawsuits.").

103. An attorney who handles open source license cases noted, "The thing that terrifies companies is the thought of shipping millions of TVs or phones and then having someone figure out that you didn't follow the licensing requirements. . . . It could be very costly." *Id.*

104. Hillman & O'Rourke, *supra* note 92, at 331.

105. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

Y's lawn by both the \$50 and the bag of oranges if X did not make clear that the bag of oranges was part of the consideration. A reasonable person in Y's position could not be expected to *know* that X expected both \$50 and a bag of oranges because typically those in Y's position pay money, and only money, for lawn mowing services. X's stealth "add-on" to the bargain should not be considered part of the bargain without Y's actual, specific consent.

In finding that open source licenses are, in fact, contracts, Hillman and O'Rourke focus on the substantive justifications for consideration. But in doing so, they ignore how open source licenses undermine the other important justifications of consideration, those of form. While adopting clickwrap and shrinkwrap contracts may satisfy the diluted version of offer, acceptance, and assent that courts use in the online context, the 'wrap forms do not fulfill the functions of consideration. The purpose of consideration is to enhance the reliability of testimony in cases of contract dispute, encourage deliberation before entering into contracts, and signify an intent to enter into a transaction that is legally binding.¹⁰⁶ Online contracts greatly diminish and often undermine all three of these functions.¹⁰⁷ Studies have indicated that consumers automatically click to accept terms of online agreements, if they are even asked to click on anything at all.¹⁰⁸ A consumer may simply be browsing a website without intent to be legally bound by contractual terms. Given that many websites state that they have the ability to modify their contractual terms at any time—without making the consumer aware of such change—'wrap agreements fail to satisfy even the evidentiary function. For example, the website of the Poetry Foundation states:

This Privacy Policy may be modified at any time and without notice to you. It is your responsibility to visit this web page frequently to review carefully the current Privacy Policy. Each and every time you access the Web site you shall be deemed to have agreed to the then current Privacy Policy.¹⁰⁹

This language is commonly found in browswraps. Youtube, for

106. Fuller, *supra* note 87, at 799.

107. Randy Barnett has argued that manifested consent can substitute for an informed bargained-for-exchange: "When one clicks 'I agree' to the terms on the box, does one usually know what one is doing? Absolutely. There is no doubt whatsoever that one is objectively manifesting one's assent to the terms in the box, whether or not one has read them." Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 635 (2002). Yet, the concept of manifested consent is much more attenuated when applied to website visitors, where the act of "consent" is merely using the website.

108. See BÖHME & KÖPSELL, *supra* note 79.

109. Poetry Foundation, Privacy Policy/Terms of Use, <http://www.poetryfoundation.org/foundation/privacy.html> (last visited Jan. 16, 2011).

example, states:

Although we may attempt to notify you when major changes are made to these Terms of Service, you should periodically review the most up-to-date version (<http://www.youtube.com/t/terms>). YouTube may, in its sole discretion, modify or revise these Terms of Service and policies at any time, and you agree to be bound by such modifications or revisions. Nothing in these Terms of Service shall be deemed to confer any third-party rights or benefits.¹¹⁰

Websites have the ability to make terms salient or hidden, and courts should recognize their technological advantage in evaluating the enforceability of contracts. Unlike negotiated contracts, the consumer has no ability to refuse certain terms. This is not to say that take-it-or-leave-it contracts should all be unenforceable. Rather, the website should be charged with indicating whether in fact the contract is a take-it-or-leave-it contract. All terms should not be presumptively valid or considered part of the bargain given the realities of online contracting. As previously noted, online contract terms are onerous and numerous, with no visible indication of the extent of terms. There is no additional cost to the website of including burdensome terms, either with respect to the economic costs of reproduction or loss of goodwill. Similarly, there is no customer relations benefit to streamlining terms to one or two pages. This contrasts with offline contracts, which may also be offered on a take-it-or-leave-it basis, but which signal the burdensome nature of the contract with the large number of pages. Offline, many companies seek to enhance the likelihood of enforceability by requiring their customers to initial each page. These signals are missing with online contracts.¹¹¹

The failure of consideration is even more pronounced with regard to crook provisions. A website uses crook provisions to appropriate benefits from the consumer without the consumer's knowledge. For example, customers who visit an online retailer submit their personal information to allow the website to process their credit card, communicate with the company about their purchases, and ship the purchased items. Customers may not be aware that the website is also

110. YouTube, Terms of Service, <http://www.youtube.com/t/terms> (last visited Mar. 21, 2010).

111. As Juliet Moringiello observes:

The assumption that a click serves all of the same purposes that a signature does is also flawed. . . . While it is clear that an offeree need not read contract terms in order to be bound by them, it is also clear that she must be given some signal that she is entering into a legally binding transaction so that she knows to read the offered terms. A signature provides that signal.

Moringiello, *supra* note 13, at 1331.

installing cookies on the customers' computers, selling and trading their personal information, and tracking their online movements.¹¹² The company thus receives an increase in the economic value of the exchange without the consumer's knowledge.

Courts have taken liberties with traditional doctrine to construct a contract out of a unilaterally imposed set of terms. For example, the "pay now, terms later" nature of shrinkwrap licenses, traditionally would be analyzed as a request for modification.¹¹³ Typically, consideration must be furnished for the modification, unless the transaction fell within the ambit of the UCC, which licenses do not (but then again, whether these are truly licenses is another matter).¹¹⁴ Yet, despite their "pay now, terms later" nature, courts consider shrinkwraps to be enforceable agreements, not attempted modifications. Mutual assent is often lacking with all three types of 'wrap agreements, for how is assent possible where most users are unaware that they are even entering into an agreement? Courts have nonetheless found constructive assent and constructive notice in order to enforce 'wrap contracts.¹¹⁵

Bargaining power typically means several different things.¹¹⁶ It can refer to one party's greater financial power over the other party. It can

112. See, e.g., *Clicking for Gold: How Internet Companies Profit from Data on the Web*, ECONOMIST, Feb. 27, 2010, at 9–11 (discussing how internet companies use customer tracking to enhance their sales and marketing efforts); Stephanie Clifford, *Your Online Clicks Have Value, for Someone Who Has Something to Sell*, N.Y. TIMES, Mar. 26, 2009, available at <http://www.nytimes.com/2009/03/26/business/media/26adco.html> (reporting on the economic value of customer data from website visitors).

113. For example, the district court that initially presided over *ProCD v. Zeidenberg* concluded that under either § 2-207 or § 2-209 of the UCC, the terms of the shrinkwrap agreement were not binding upon the purchaser because he never agreed to it expressly. See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 654–65 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996); see also *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 98–99 (3rd Cir. 1991) (finding user agreement not binding under UCC § 2-207); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (finding license agreement not binding under either § 2-207 or § 2-209).

114. See *ProCD*, 908 F. Supp. at 651–56 (discussing the applicability of the UCC to a shrinkwrap license agreement); see also Epstein, *supra* note 67, at 100–02 (noting that if a transaction is characterized as a sale, and not a license, the UCC applies, including the rules governing offer and acceptance).

115. 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); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005).

116. Daniel Barnhizer notes that "[m]odern American courts have largely failed to infuse the concept of inequality of bargaining power with legally coherent meaning." See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 199 (2005). He states that "many courts address inequality of bargaining power in terms of the weaker party's lack of meaningful alternatives, necessity, the nature of the good or service, or inability to negotiate terms" as well as "potential factors relating to characteristics of the parties and characteristics of the transaction" including "wealth, business sophistication, education or knowledge, race, gender, 'size' of the parties, monopoly power, and consumer status." *Id.* at 199–200 (internal citations omitted).

refer to one party's greater leverage in the marketplace due to its size or influence. It can mean education level or knowledge.¹¹⁷ This Article suggests another aspect of bargaining power which is especially relevant in the online context. A party may have bargaining power due to the technological advantage it has over the other party. Specifically, websites have the capability to set-up how the contracting process will proceed. They have the ability to highlight or hide terms. They can require the customer to click numerous times or not at all. They can scatter contractual terms over several web pages or locate all relevant terms in a central location. Websites, in other words, make choices about how to present contractual terms to the customer. The customer, on the other hand, is unable to control the structure of the transaction or the manner in which the terms are presented. The technical power to create the form of the contract rests entirely with the website. Furthermore, there is no realistic, practical way for the consumer to communicate requested changes.

Some might argue that contracts of adhesion exist offline too, and that courts have for decades enforced them.¹¹⁸ Yet, as Juliet Moringiello observed, there are "significant differences in popular perceptions of paper and electronic communications."¹¹⁹ The number of pages serves a signaling function. A thick document indicates more onerous terms and greater obligations for the nondrafting party. Customers might not read the fine print terms contained in a multi-page paper contract, but they are at least *aware* of the multiple pages which indicate the potentially burdensome nature of the transaction.¹²⁰ Consumers requesting a loan from a bank likely expect a lengthy document, whereas consumers wanting to buy a shirt will likely view with suspicion any contract that they are asked to sign at the cash register. A business may lose customers if it asks them to sign contracts before processing relatively minor purchases. Online, however, there is no signaling of terms.

117. *Id.* at 200. Barnhizer notes that some courts adopt an "we-know-it-when-we-see-it" approach." *Id.* at 201. See also Kenneth G. Dau-Schmidt and Benjamin C. Ellis, *The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan*, 20 *IND. INT'L & COMP. L. REV.* 1, 3 (2010) (noting that bargaining power "has been defined as the ability to induce an opponent to accept an agreement on one's own terms."); Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 *OR. L. REV.* 1, 50 (2006) (using a definition of unequal bargaining power where "one side has no meaningful opportunity to influence the terms of the agreement.").

118. As Mark Lemley has noted, however, "[o]ffline, such agreements are not all that common, in part because it is too much effort to get consumers to sign the standard forms." Lemley, *supra* note 9, at 466.

119. Moringiello, *supra* note 13, at 1310.

120. By distinguishing offline and online adhesion contracts, this Article is not suggesting that offline adhesion contracts should always be enforceable regardless of the substance of their terms.

Accordingly, the correlation between the burdensome nature of the contract terms and the importance of the transaction is often lost when the transaction occurs online.

B. How Crook Provisions Alter the Bargain

Courts have accommodated business realities in approving contracting innovations; yet, these contracting innovations have created new realities that have weakened the legitimacy of contracts.¹²¹ This Article suggests that courts expressly recognize as a bargaining advantage the technological ability that websites possess to select a contracting form. In doing so, courts should re-conceptualize the bargained-for-exchange when it takes place online. One click should not suffice to indicate agreement to crook provisions that misconstrue the nature of the bargain itself. As Fuller observed, the channeling function of form is unnecessary where the transaction is already divided into “definite, clear-cut business categories,”¹²² but where “[t]he ambiguity of the situation is . . . carefully cultivated and exploited” by one party, “[s]ome ‘channeling’ . . . would be highly desirable.”¹²³

While much of the scholarly commentary surrounding ‘wrap contracts concerns the whittling away of mutual assent or the uncertainty of establishing offer and acceptance,¹²⁴ the doctrine of consideration has also been much compromised by online contracts.¹²⁵ Courts have determined that assent to the online transaction, flexibly and creatively construed, means consent to all its terms. Companies then, through crook provisions, have included terms that often change the nature of the bargained-for-exchange itself. In other words, companies exploited the form of ‘wrap contracts so that their contractual nature was unclear, and

121. Woodrow Hartzog notes that adherence to traditional contract doctrine “often ignores the many ways relationships, representations and, ultimately, contracts are formed online.” Hartzog, *supra* note 80 (manuscript at 43).

122. Fuller, *supra* note 87, at 806.

123. *Id.*

124. See, e.g., Lemley, *supra* note 9, at 464 (discussing the “death of assent”); Kunz et al., *supra* note 55 (examining the rules governing implied assent); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1265–66 (1993) (proposing that courts consider how a “reasonable drafter” might understand the customer’s assent).

125. See Moringiello, *supra* note 13, at 1332 (“Form plays as much as a cautionary role in the contracting process as the signature does” which necessitates a consideration of “whether a person who is presented with 13 pages of Internet text . . . perceives that text in the same way that she would perceive 13 pages of printed matter.”). For an extended analysis of the consideration doctrine in the online context, particularly regarding open source licenses, see Hillman & O’Rourke, *supra* note 92.

they exploited it in a way that changed the bargain for the consumer.

To address this problem, online agreements containing crook provisions should be bifurcated and considered as two separate bargains. In the primary bargain, the website sets the terms. In the secondary bargain, the consumer grants a license to the website via the crook provisions, and the website promises to adhere to the scope of that license. Companies should enable the consumer to express the scope of the license through 'wrap agreements. More specifically, companies should allow consumers to indicate with a click each benefit or right that they grant to the website. While the author has elsewhere argued that websites should require a click for each limitation or right taken away (i.e. via a "sword" provision), this Article's proposal is different because it involves analyzing the problem of 'wrap agreements from the standpoint of consideration and crook provisions, and not assent and sword provisions.¹²⁶ As previously mentioned, existing case law makes a requirement of actual assent difficult to justify. Furthermore, the line dividing sword and shield provisions is often blurry. The line between crook and shield provisions is more distinct. Thus, it would be easier to both justify and administer a multiple clicking requirement to establish consideration than it would be to establish assent.

Online transactions are precisely the type of contracting situation that requires channeling. Fuller explained the significance of the channeling function as follows:

Just as channeling may result unintentionally from formalities directed toward other ends, so these other ends tend to be satisfied by any device which accomplishes a channeling of expression. There is an evidentiary value in the clarity and definiteness of contour which such a device accomplishes. Anything which effects a neat division between the legal and the non-legal, or between different kinds of legal transactions, will tend also to make apparent to the party the consequences of his action and will suggest deliberation where deliberation is needed. Indeed, we may go further and say that some minimum satisfaction of the desideratum of channeling is necessary before measures designed to prevent inconsiderateness can be effective.¹²⁷

To require that the consumer click for *each* benefit or right granted by the consumer to the website, rather than once to indicate agreement to *all* benefits or rights contained in the agreement, creates a more accurate bargain that may actually reflect the intent of the parties. Multiple clicking forces awareness and indicates to consumers that they are

126. In a previous article, I argued that companies should require a "click" to indicate assent to certain terms that limit rights. See Kim, *supra* note 7.

127. Fuller, *supra* note 87, at 803.

granting rights/benefits via a crook provision.

Furthermore, a multiple clicking requirement may be more palatable to judges who are more comfortable policing contracts on the basis of form rather than content.¹²⁸ A multiple clicking format thus fulfills the channeling function that the current “one click” blanket assent approach fails to do.

1. Bargaining for Intellectual Property Rights

Consumers who visit websites that do not charge a fee, such as social networking sites, understand that they make a bargain with the website. In exchange for the services provided by the website, they contribute “eyeballs,” increasing the website’s page views and thereby enhancing its ability to attract advertisers. What they may not realize is that some websites extract, via a crook provision, intellectual property rights that belong to the consumer. In some cases, the services being provided to the consumer are not worth the extraction of these rights.

Under copyright law, the author of a creative work owns the copyright to that work.¹²⁹ The copyright owner, however, may license or assign some or all of the rights to the work by agreement.¹³⁰ Because ‘wrap agreements are recognized as legally enforceable contracting forms even though consumers rarely read their terms, copyright owners may license their rights to a work without even realizing it. For example, on the *classmates.com* website, the terms of use state as follows:

When you participate in the Classmates community you are granting Classmates certain rights to use the Content you submit or post through the Website. By submitting Content you grant us a royalty-free, worldwide, non-terminable, non-exclusive license to use, reproduce, modify, adapt, edit, market, publish, store, distribute, have distributed, publicly and privately display, communicate, publicly and privately perform, transmit, have transmitted, create derivative works based upon, and promote such Content (in whole or in part) in any medium now known or hereafter devised, for editorial, commercial, promotional and all other purposes including, without limitation, the right to publish your name in connection with your Content; and the right to sublicense any or

128. See Moringiello, *supra* note 13, at 1347 (“Courts are often reluctant to police the content of standard forms but they regularly police form. In regulating the form of Internet contracts, judges must consider the ways in which individuals perceive electronic communications.”).

129. 17 U.S.C. § 201(a) (2006).

130. *Id.* § 201(d). While some may wonder whether an author may contractually assign the copyright to a work that has not yet been created, business norms and policy would likely compel enforcement by the courts.

all of these rights. You acknowledge that Classmates owns all right, title, and interest in any compilation, collective work or other derivative work created using or incorporating the Content. . . . No compensation will be paid for the use of your Content, including, without limit, any photograph you may provide.¹³¹

In other words, by posting content on *classmates.com*, consumers grant a “non-terminable” license to use that content, presumably even after they have stopped using the website, requested the content be removed, or both. Furthermore, the website can publicize the consumer’s name with the content, and use any photograph that a consumer posts to the site for any purpose, including marketing purposes. The website could, for example, distribute content created by a consumer on a banner ad, accompanied by a photograph of the consumer and his or her real name. Many consumers are probably not aware of the provision and some might forgo *classmates.com*’s services if they realized that this was the price for using the services.

2. Bargaining for Consumer Information

A common type of crook provision involves the appropriation of personal data by websites. A company may sell or trade a customer’s personal information and track online activity by using cookies or tags. It typically discloses these practices in its privacy policies.¹³² The collection of data by websites in accordance with a conspicuously disclosed privacy policy is generally acknowledged to be legally permissible.¹³³

131. Classmates.com, Terms of Service, <http://www.classmates.com/cm/reg/terms#content> (last visited Mar. 22, 2011).

132. Some uncertainty exists regarding whether privacy policies are contracts enforceable against the website. See, e.g., *In re Nw. Airlines Privacy Litig.*, No. Civ.-04-126(PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004) (finding that general statements regarding website’s privacy policy were not contractual). When courts have considered whether website privacy policies are contracts, they have done so by asking whether the terms are enforceable promises by the website to protect consumer privacy, and not whether the terms are enforceable promises by the consumer. See *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005); *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459. Unfortunately, a finding that privacy policies are self-imposed contractual obligations by the website may create perverse incentives whereby websites use them to reduce or terminate obligations to protect privacy. Rather than enhancing consumer privacy, websites may provide more disclosures and caveats that merely protect them and offer nothing to the consumer.

133. *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299; *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459. See also Richard Raysman & Peter Brown, *Contractual Nature of Online Policies Remains Unsettled*, N.Y. L.J., Aug. 10, 2010, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?hubtype=practiceMore&id=1202464402856&slreturn=1&hblogin=1>; Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control Over Personal Information?*, 111 PENN. ST. L. REV. 587, 588 (2007) (“[I]f the website complies with its own promises, there is little else to prevent the site from doing with the information whatever it wants . . . besides the website company’s

It is unclear what legal right or interest, if any, consumers have in their personal information. Some scholars argue that consumers should have a property interest in personal information.¹³⁴ Others view the interest that consumers should have as a privacy interest.¹³⁵ Both characterizations, while suitable in some contexts, are inappropriate in others. Some personal information may reflect or be subsumed by a privacy interest, but other personal information is public and should not be protectable by either a property or privacy claim. A company, for example, may include addresses and phone numbers of residences in a directory without getting approval from the homeowners. In many cases, a consumer's privacy interest depends upon the context, including how the personal information is being used.¹³⁶ While it may be helpful to discuss the use of personal information in certain contexts as being a property or privacy interest, to do so when discussing the use of personal information more generally and in the abstract often proves unhelpful or misguided. In discussing a particular problematic use of information or type of information, referring to one or both of these categories (information as property or information as privacy) may be relevant and appropriate. Neither the concept of property nor that of privacy, however, captures all uses of all types of personal information. Consequently, when discussing the wide range of uses of consumer information *generally*, it may be less helpful to think of the type of information or even the type of use than the method by which the information is obtained.

This Article proposes thinking about a consumer's legal interest in personal information as a proprietary interest. To describe the

own interest in attracting and maintaining customers.”).

134. For a discussion of the issues and problems associated with recognizing information privacy as property, see Vera Bergelson, *It's Personal But Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379 (2003); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125 (2000). *But see* Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1547 (2000) (finding the creation of an intellectual property right in individual data to be “a very bad idea.”). *See also* *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459 (finding that information voluntarily provided by plaintiffs belonged to website and that disclosure of such information would not be highly offensive to a reasonable person).

135. *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000) (arguing that meaningful autonomy requires a degree of freedom from monitoring by others); Andrew J. McClurg, *A Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63 (2003) (advocating a privacy tort based response to unauthorized consumer data profiling).

136. As Jacqueline Lipton notes “information cannot be property in the same sense that land and other tangible items can be property” Accordingly, there will be significant differences between rights in information and rights in tangible property. Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 140–41 (2004).

consumer's interest in personal information as a proprietary interest captures two very important insights. First, it describes the consumer's interest in personal information because the term "proprietary" captures both property and privacy interests without necessarily embodying one or the other. The term proprietary is therefore a better generic term when discussing personal information more generally. Specific types of personal information then may be subcategorized as involving privacy or property interests. Second, the term proprietary reflects the method by which information is captured. Personal information is obtained through the online version of a bargained-for-exchange. Consumers may not own all personal information in a property sense; however, they do not have to relinquish such information either. A consumer filling out a website form with personal information does so in order for the website to process credit card information and deliver the ordered items. The consumer does not fill out the information with the intent of assisting the website in its future marketing and sales efforts. In some cases, consumers may have declined the website's services if they were aware of how it uses their personal information.¹³⁷ For example, after discovering that she was being tracked by cookies¹³⁸ she thought she had erased, one woman said, "Instead of going to Amazon, I'm going to the local bookstore."¹³⁹ She added, "My information is now being bartered like a product without my knowledge or understanding."¹⁴⁰ A website's use of consumer personal information may be more than annoying—it might expose consumers to a greater risk of identity theft.¹⁴¹ The consumer's interest is proprietary because the personal

137. For example, users of the website Reunion.com were asked to provide their e-mail addresses and passwords; they did not realize that the site would then send solicitations to all of their e-mail contacts. Wendy N. Davis, *Spam—A Lot: Networking Sites Spur Another Look at Bogus E-mails*, A.B.A. J., Mar. 2010, at 17.

138. Some plaintiffs have argued that the use of cookies and other tracking devices may constitute "electronic surveillance" and thus, violate the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et. seq.* and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. *See, e.g.*, Class Action Complaint, *Weindorf v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (Nos. 00 CIV. 4871(AKH), 00 CIV. 6219(AKH), 00 CIV. 6249(AKH)), 2000 WL 35600895. The applicability of these acts to online tracking is an important issue but is beyond the scope of this article.

139. Tanzine Vega, *Code That Tracks Users' Browsing Prompts Lawsuits*, N.Y. TIMES, Sept. 21, 2010, at B3.

140. *Id.*

141. Haynes, *supra* note 133, at 592 (noting that unwitting disclosures may "result in identity theft, as well as contribute to the less pernicious, but thoroughly irritating and often expensive, increase in spam"). As Dan Barnhizer notes, "Before the information era, producers did generate consumer profiles based upon information gleaned from their interactions with those consumers. But the informational inputs for those models were incomplete compared to what can be gathered and processed today, and much of the data lacked the fluidity that characterizes today's models." Daniel D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69, at 90 (2006) (citation omitted).

information is *about* the consumer, but it is also obtained via a bargained-for-exchange and thus creates a contractual interest which *belongs to* the consumer.

The submission of information by consumers should be viewed as a license by them to the website to use that information. What consumers do not indicate, because the contracting form does not allow them, is the scope of the license to use the information. The practical problem, of course, is that the licensee/company, not the licensor/consumer, drafts the scope of the license. Not surprisingly, websites grant themselves a very broad license to use the information.¹⁴² Companies take advantage of their technological power over the contracting form to incorporate crook provisions to increase the value of their bargained-for-exchange—without having to bargain for it.

For example, on the *gap.com* website, located under “Terms of Use” is the following:

Your submission of personal information through the Sites is governed by our privacy policy, which can be reached by clicking on the “Privacy Policy” link located in the footer section of the Sites (the “Privacy Policy”). This Agreement incorporates by reference the terms and conditions of the Privacy Policy.¹⁴³

The customer must then return to the home page and then click on the “Privacy Policy” hyperlink nestled at the bottom of the page. The privacy policy is several pages long and states that Gap can use the personal information in a variety of ways:

When you provide personal information to one of our Gap Inc. brands (Gap, BananaRepublic, Old Navy, Gap Outlet, Banana Republic Factory Store, Piperlime, or Athleta), we may share that information with our other Gap Inc. brands.

... If you purchase Athleta brand products through our website or by placing a catalog order by phone or mail, we may share your name, postal address, and shopping history with like-minded organizations whose privacy policies meet the Direct Marketing Association’s privacy standards, for their direct mail marketing purposes. We do not share email addresses for such purposes.¹⁴⁴

142. *Id.* at 609 (In none of the actions involving privacy policies “did the privacy policy provide any protection to the consumers that they would not have had absent the policy. And in a few cases, the policy actually gave the website company greater leeway to use personal information, because the statute at issue had an exception for consent or authorization by a party to the communication.”).

143. Gap.com, Terms of Use, <http://www.gap.com/customerService/info.do?cid=6754&mmlink=5058,1901277,13&clink=1901277> (last visited Mar. 22, 2011).

144. Gap.com, Privacy Policy, <http://www.gap.com/customerService/info.do?cid=2331&mmlink=5058,1901277,14&clink=1901277> (last visited Mar. 22, 2011).

The Privacy Policy also states that it may track the consumer's movements on the websites:

We use "pixel tags" (also called "web beacons" or "clear gifs"), which are tiny graphic images, on our websites and in our emails. Pixel tags help us analyze our customers' online behavior and measure the effectiveness of our websites and our advertising. We work with service providers that help us track, collect, and analyze this information.

Pixel tags on our sites may be used to collect information about your visit, including the pages you view, the features you use, the links you click, and other actions you take in connection with the sites. This information may include your computer's Internet protocol (IP) address, your browser type, your operating system, date and time information, and other technical information about your computer. We may also track certain information about the identity of the website you visited immediately before coming to our site. We do not otherwise track any information about your use of other websites.

Pixel tags and cookies in our emails may be used to track your interactions with those messages, such as when you receive, open, or click a link in an email message from us.

We also work with third-party companies that use tracking technologies to serve advertisements on our behalf across the Internet. These companies may collect information about your visits to our websites and your interaction with our advertising and other communications. If you would like more information about this practice and to know your choices about not having your information used by these companies, please visit http://www.networkadvertising.org/managing/opt_out.asp.

We may combine the information we collect through cookies and pixel tags with other information we have collected from you. This information may be used to improve our websites, to personalize your online experience, to tailor our communications with you, to determine the effectiveness of our advertising, and for other internal business purposes.¹⁴⁵

The crook provisions grant the retailer the right to receive unbargained-for benefits which have measurable economic value.

A website may also employ a clickwrap that incorporates by reference the terms of its privacy policy that is only accessible via a hyperlink. For example, on *wellsfargo.com*, a customer must click to agree to the terms of the online access agreement in order to access the website.¹⁴⁶ In the seventeenth paragraph of the thirty-three page, single-spaced,

145. *Id.*

146. Wells Fargo, Online Access Agreement, <https://online.wellsfargo.com/common/html/wibdisc.html> (last visited Mar. 22, 2011).

eight-point font document, the agreement states: “All information gathered from you in connection with using the Service will be governed by the provisions of the Wells Fargo Privacy Policy, including the Online Privacy Policy.”¹⁴⁷ The user must then review the terms of both privacy policies in order to determine what Wells Fargo may do with customer information.¹⁴⁸

One might argue that the privacy provisions are part of the bargain between the website and the consumer, but such an argument defies both reality and common sense given that most consumers fail to read privacy policies and often mistakenly believe that laws protect use of their personal information. For example, a recent study found that 62% of surveyed Americans mistakenly believe that if a website has a privacy policy, it means that the site cannot share information with other companies without permission, and 54% mistakenly believe that a privacy policy requires a website to delete a consumer’s information upon request.¹⁴⁹ Furthermore, 46% of respondents mistakenly believe that if a website has a privacy policy, “it means that you have the right to sue the website for violating it.”¹⁵⁰

It is doubtful that most websites would rather walk away from the transaction than give up the benefits granted in a crook provision. Retailing websites such as the *gap.com* are in the business of selling consumers clothing. The benefit they receive from collecting consumer information is additional or ancillary to the payment they receive for their goods. One might argue that the benefits companies accrue from the collection of consumer data get passed to the consumer in the form of lower prices. Even if this were so,¹⁵¹ my proposal does not prohibit lower or variable pricing in exchange for collecting personal information. Rather, it establishes a mechanism by which to determine whether the collection of personal data is in fact part of the primary transaction or whether it is an ancillary or “free rider” benefit. I am skeptical that a retailer (as opposed to a social networking site) would decline to sell products to a consumer who chose not to permit tracking

147. *Id.*

148. Wells Fargo, Privacy Policy for Wells Fargo and Wachovia Companies, https://www.wellsfargo.com/privacy_security/privacy/individuals (last visited Mar. 22, 2011).

149. See JOSEPH TUROW ET AL., CONTRARY TO WHAT MARKETERS SAY, AMERICANS REJECT TAILORED ADVERTISING 21 (2009), available at http://graphics8.nytimes.com/packages/pdf/business/20090929-Tailored_Advertising.pdf.

150. *Id.*

151. As William Woodward has remarked in the context of choice of law and choice of forum clauses in contracts, whether savings from using contracts of adhesion are indeed passed along to consumers depends upon many business factors. William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 17 (2006).

or the sale of personal information. In the offline world, some consumers routinely decline to provide retailers with a requested phone number or e-mail address for their marketing purposes; however, when this happens, retailers typically do not forego the sale and refuse to complete the transaction.¹⁵² Even those websites that do not charge for their services, such as social networking sites, might prefer to limit or restrict their use of consumer data rather than lose a potential user.

Given the complexities of online tracking and the difficulties of online disclosure, this Article proposes that if a website intends to include behavioral tracking or the sale of member data to third parties as part of its bargain, it should do so expressly in its technical design. That a company might have been able to obtain a customer's personal information elsewhere is irrelevant because the basis of the proprietary interest is in contract, not property or privacy. In other words, a company might have obtained the information elsewhere but did not. The company obtained it from the customer who gave the information for specific purposes, as part of a bargained-for-exchange.

3. Clicks as Online Bargaining

A browsewrap may be an acceptable contract form when used to shield a website from liability for an offered product or service. It is a stretch, however, to claim that there is a contract at all when a website uses a browsewrap as a crook to exploit a customer's personal information relinquished for one purpose (e.g. the purchase of a product) but used for additional purposes (e.g. to improve the website's marketing efforts). The crook provisions do not pertain to or directly affect the product or service being offered. They are essentially free rider provisions in that they are furtively included in browsewrap agreements simply because the website can do so without the consumer's knowledge. Thus, unlike sword or shield provisions, crook provisions are not economically efficient. They give too much to the website and take away too much from the consumer.¹⁵³

There is an implied bargain between the consumer and the website, although *what* is being bargained for is uncertain. The consumer inputs

152. Furthermore, the California Supreme Court recently held that a zip code was personal identification information and, therefore, retailers could not request it for marketing purposes from customers making credit card purchases because such conduct violated a California statute. *Pineda v. Williams-Sonoma Stores, Inc.*, 246 P.3d 612, 614 (Cal. 2011).

153. Data may be the most valuable asset on the web and the least recognized by consumers as having value. See *Clicking for Gold: How Internet Companies Profit from Data on the Web*, *ECONOMIST*, Feb. 27–Mar. 5, 2010, at 9 (The “biggest websites have long recognized that information itself is their biggest treasure.”).

personal information in order to receive advertised goods or services; the website offers and agrees to sell the goods through the advertised process in exchange for payment. The website intends to use the information to process credit cards and deliver goods, but *also* for marketing and sales purposes. What is unclear, then, is whether the website would offer the goods at the *same* price if it were unable to reuse consumer information for purposes that are not necessary to order fulfillment.

Even those websites, such as social networking sites, that do not charge money for their services implicitly bargain for the provision of their services. Facebook, for example, allows its members to use its site and share content in exchange for the ability to advertise to them and to their friends, and thereby generate revenue. Miguel Helft, a reporter for the *New York Times*, wrote:

When you sign up for Facebook, you enter into a bargain. You share personal information with the site, and Facebook agrees to obey your wishes when it comes to who can see what you post.

At the same time, you agree that Facebook can use that data to decide what ads to show you.¹⁵⁴

Prior to the proliferation of present-day intrusive and extensive tracking technology, the bargained-for-exchange on non-retail websites was much more transparent— eyeballs for services or information. A user visited a website in order to obtain information or to take advantage of the website's services; in exchange, the user presented an advertising opportunity and increased the website's page views. The more page views a website had, the more value it had to advertisers and the more it could charge for advertising space. But in the past few years, sophisticated technology that is invisible to the average website visitor has complicated this straightforward exchange. Helft noted that the bargain with Facebook "is a complicated deal that many people enter into without perhaps fully understanding what will happen to their information."¹⁵⁵

The problem of course is that while the website can and does specify the scope of the license that it offers to the customer by stating what the customer can and cannot do on the website, the scope of the license granted by the customer to the use of the customer's personal information or content is determined by the *website*. Consequently, consumers are usually unaware of the myriad provisions to which they

154. Miguel Helft, *Facebook Vows to Fix a Flaw in Data Privacy*, N.Y. TIMES, Oct. 19, 2010, at B1, available at <http://www.nytimes.com/2010/10/19/technology/19facebook.html>.

155. *Id.*

have “agreed” with a single click or simply by browsing a website. Where the provisions serve shield or sword functions, the consumer’s actual assent to the provisions may be irrelevant from an efficiency standpoint¹⁵⁶ because the *website* would not have entered into the bargain without those liability-limiting provisions, and the consumer likely would have accepted the provisions given their limited purpose and standard nature.¹⁵⁷ But this is not necessarily true where the contract acts as a crook, i.e. where it requires the consumer to unknowingly grant the website certain benefits ancillary to the primary transaction. Therefore, online contracting must provide a way for the consumer to indicate whether it will continue with the transaction after being notified about the crook provision and for the website to indicate how important the crook provisions are to the transaction.¹⁵⁸

One way for a website to permit a customer to express bargaining is by forcing the customer to click to indicate the scope of license. A click “costs” a website both in terms of customer goodwill and the increase in likelihood that it will lose a sale with each transactional hurdle. By requiring a click for each requested use of customer information, a website indicates whether it in fact wants the use of the information or whether it has included it simply as a free rider.

Opponents may object to this proposal because it burdens consumers by requiring them to click numerous times. *That is exactly the point.* The website should bargain for *each* use rather than assume it is comprehensively granted after a single click. Consumers are otherwise unable to indicate the scope of the license to use personal information or content. A website has the power to enable consumers to indicate the scope of the license that they are granting. Thus, the website should exercise this power by structuring their online agreements to require consumers to click after each permitted use. For example, in the *gap.com* agreement previously introduced, consumers would indicate

156. Sword and shield provisions may still be unenforceable on grounds of equity or for lack of notice.

157. In discussing Easterbrook’s reasoning in *ProCD v. Zeidenberg*, Richard Epstein notes that there were “two important facts” about the case that were especially relevant: “First, the disputed provision is perfectly standard and does not in fact vary from one transaction to another. Second, there are no recorded instances in which any potential software purchaser has been ever able to obtain a waiver of any of the restrictions found in these agreements, including the use limitation at issue in *ProCD*.” Epstein, *supra* note 67, at 104. He further notes that Easterbrook’s “functional view of the law of contract is that it allows bargains by which both parties are able to improve their economic position.” *Id.*

158. See also Samuelson, *supra* note 134, at 1158 (If “software and Internet companies have devised licenses to cover virtually every Internet transaction between them and their companies, it may seem only fair for the customers to start insisting on contractual terms that serve their interests as well.”). Samuelson proposes default licensing rules based on trade secrecy laws. *Id.* at 1151–67.

their scope of license as follows:

Your submission of personal information through the Sites is governed by our privacy policy, which can be reached by clicking on the “Privacy Policy” link located in the footer section of the Sites (the “Privacy Policy”). This Agreement incorporates by reference the terms and conditions of the Privacy Policy.

When you provide personal information to one of our Gap Inc. brands (Gap, Banana Republic, Old Navy, Gap Outlet, Banana Republic Factory Store, Piperlime, or Athleta), we may share that information with our other Gap Inc. brands. [AGREE] [DISAGREE] If you purchase Athleta brand products through our website or by placing a catalog order by phone or mail, we may share your name, postal address, and shopping history with like-minded organizations whose privacy policies meet the Direct Marketing Association’s privacy standards, for their direct mail marketing purposes. [AGREE] [DISAGREE] We do not share email addresses for such purposes. . . .

We use “pixel tags” (also called “web beacons” or “clear gifs”), which are tiny graphic images, on our websites and in our emails. Pixel tags help us analyze our customers’ online behavior and measure the effectiveness of our websites and our advertising. We work with service providers that help us track, collect, and analyze this information.

Pixel tags on our sites may be used to collect information about your visit, including the pages you view, the features you use, the links you click, and other actions you take in connection with the sites. [AGREE] [DISAGREE] This information may include your computer’s Internet protocol (IP) address, your browser type, your operating system, date and time information, and other technical information about your computer. We may also track certain information about the identity of the website you visited immediately before coming to our site. [AGREE] [DISAGREE] We do not otherwise track any information about your use of other websites.

Pixel tags and cookies in our emails may be used to track your interactions with those messages, such as when you receive, open, or click a link in an email message from us. [AGREE] [DISAGREE]

We also work with third-party companies that use tracking technologies to serve advertisements on our behalf across the Internet. These companies may collect information about your visits to our websites and your interaction with our advertising and other communications. [AGREE] [DISAGREE] If you would like more information about this practice and to know your choices about not having your information used by these companies, please visit http://www.networkadvertising.org/managing/opt_out.asp.

We may combine the information we collect through cookies and pixel tags with other information we have collected from you. [AGREE] [DISAGREE] This information may be used to improve our websites, to

personalize your online experience, to tailor our communications with you, to determine the effectiveness of our advertising, and for other internal business purposes.

Similarly, in the *classmates.com* agreement, consumers would indicate the scope of the license by clicking after each right granted as follows:

When you participate in the Classmates community you are granting Classmates certain rights to use the Content you submit or post through the Website. By submitting Content you grant us a royalty-free [AGREE] [DISAGREE], worldwide [AGREE] [DISAGREE], non-terminable [AGREE] [DISAGREE], non-exclusive [AGREE] [DISAGREE] license to use [AGREE] [DISAGREE], reproduce [AGREE] [DISAGREE], modify [AGREE] [DISAGREE], adapt [AGREE] [DISAGREE], edit [AGREE] [DISAGREE], market [AGREE] [DISAGREE], publish [AGREE] [DISAGREE], store [AGREE] [DISAGREE], distribute [AGREE] [DISAGREE], have distributed [AGREE] [DISAGREE], publicly [AGREE] [DISAGREE] and privately display [AGREE] [DISAGREE], communicate [AGREE] [DISAGREE], publicly [AGREE] [DISAGREE] and privately perform [AGREE] [DISAGREE], transmit [AGREE] [DISAGREE], have transmitted [AGREE] [DISAGREE], create derivative works based upon [AGREE] [DISAGREE], and promote [AGREE] [DISAGREE] such Content (in whole or in part) [AGREE] [DISAGREE] in any medium now known or hereafter devised [AGREE] [DISAGREE], for editorial [AGREE] [DISAGREE], commercial [AGREE] [DISAGREE], promotional [AGREE] [DISAGREE] and all other purposes [AGREE] [DISAGREE] including, without limitation, the right to publish your name in connection with your Content [AGREE] [DISAGREE]; and the right to sublicense any or all of these rights [AGREE] [DISAGREE]. You acknowledge that Classmates owns all right, title, and interest in any compilation, collective work or other derivative work created using or incorporating the Content. [AGREE] [DISAGREE] . . . No compensation will be paid for the use of your Content, including, without limit, any photograph you may provide.

The number of clicks thus corresponds to the scope of the license and better reflects an actual bargained-for-exchange. The more uses the website desires, the more clicks it must extract from the consumer. To clarify, a social networking or similar website has an implied limited license to post user-generated content which would not require any clicking. The excessive clicking scenario would apply only in those instances where the website seeks to use consumer generated content for purposes other than to provide the services. Multiple clicking strikes a compromise between blanket assent and contract invalidity. It necessarily includes an implied promise by the company not to exceed

the scope of the license constructed—through clicking—by the consumer. Consumers could seek restitution or damages, depending upon the claim, against companies that exceed the scope of the license granted by the consumer.¹⁵⁹

Currently customers are lulled into contracts online. The channeling function of consideration has been cast aside. Without realizing it, visitors to a website may have engaged in a contractual relationship. An obtrusive requisite click changes the painlessness of contracting by forcing a formality on what would otherwise seem to be a casual, non-legal encounter. It thus satisfies the function of legal formalities. First, it serves a channeling function. It may be unclear, for example, whether notice of a hyperlink counts as notice of the terms on another page. A click, however, clearly indicates the status of a particular use. Multiple clicking would serve a cautionary function in that consumers would be forced to think about what they are doing. They could no longer ignore terms that reveal extensive tracking and selling of data. Companies would be forced to think twice before stuffing their online agreements with unnecessary terms just because they have thus far been able to get away with doing so. Consequently, they might tailor their terms to reflect a true bargained-for-exchange.

Retailing websites may have to reconsider whether they want to risk losing sales in order to get additional uses from information that was given by a customer to fulfill an order. Some might argue that part of the bargained-for-exchange for a retail website is the ability to use personal information for marketing or advertising purposes. For example, a retail website intends to use the information to process credit cards and deliver goods but *also* for marketing and advertising purposes. In that case, the website can structure the bargain to reflect its intent. It can provide incentives, such as bonuses or discounts, to consumers who permit online tracking to offset the burden of multiple clicking. It can refuse to sell goods to consumers who do not relinquish their personal information for marketing purposes (although that is unlikely).

On the other hand, non-retail websites that provide content free of charge may continue to insist upon intrusive tracking, but consumers are then made aware of the extent of that tracking. Other websites may decide to charge subscription fees in lieu of tracking and selling of customer information. Still others may expressly pay consumers for the use of their data.¹⁶⁰ Multiple clicking in essence imposes a tax on uses

159. Additionally, a website's use of consumer information beyond the scope of the license granted by the consumer may be relevant in consumer protection enforcement and similar proceedings.

160. Julia Angwin & Emily Steel, *Web's Hot New Commodity: Privacy*, WALL ST. J., Feb. 28, 2011, available at <http://online.wsj.com/article/SB100014240527487035290045761607640379202>

of information unrelated to the primary transaction. To impose a technological burden forces the retailer to consider whether the risk of losing a user is worth the potential uses of personal information or user generated content. Unlike the terms of a standard form contract, which are rarely read and thus impose little or no good will cost, customers are likely to be annoyed by having to click multiple times in order to grant a license to multiple uses of information or content. Accordingly, in order to maintain and enhance customer relations, it is likely that companies will retreat from their current acquisitive stance and compete on the quality of their website experience, including their contracting process.¹⁶¹ Consumers then may actually shop for terms if the terms impede their online experience the way that multiple clicking surely will.

Multiple clicking is not the only way for websites to indicate online bargaining. Websites, wishing to avoid multiple clicking, may have an incentive to build alternative bargaining features into the technical design of their sites.¹⁶² They may, for example, have customers fill out a license form that expressly permits specified uses of information which the website can retain in their files. In order to be enforceable, however, the license form must be typed out by the consumer. When the customer revisits the website, a notice could remind customers of their choices and provide them with the option of altering or retaining those choices. Margaret Jane Radin has suggested “new possibilities for individualization” with online contracts: “For a large proportion of consumer transactions in the past, individual negotiation was not cost-effective. That situation is changing. It is (or will soon be) technically feasible for a website to offer a menu of contractual terms, each with its price.”¹⁶³

Unfortunately, companies currently have no incentive to create variable pricing schemes or to reconfigure their website designs to create more efficient bargaining scenarios. A requirement that companies enable customers to indicate online bargaining through clicking or other

74.html?mod=djemalertTECH (noting that some companies are pushing privacy as a “product” and noting that, as awareness of the value of data grows, “some are seeking to protect it, and sometimes sell it”).

161. See also Mann & Siebeneicher, *supra* note 57, at 1011 (“For the great majority of internet retailers, the ease of the shopping experience is more important than concerns about possible future liability. . . . Thus, few retailers . . . use contracting interfaces sufficiently robust to make it reasonable to expect that their contracts are enforceable against their customers.”).

162. Alternatively, if websites wish to avoid multiple clicking designs, they may simply limit their use of customer information.

163. Radin, *supra* note 13, at 1150–51. Radin notes, however, that there may be various policy problems that arise with such contract customization since the “opportunity to purchase better terms may seem to exacerbate distinctions between haves and have-nots.” *Id.* at 1151.

means may thus spur innovation that is beneficial to consumers.

V. CONCLUSION

In *The Death of Contract*, Grant Gilmore rather dramatically pronounced that the “[c]ontract is dead,”¹⁶⁴ by which he meant that contract rules were dissolving and that contract was being reabsorbed into tort.¹⁶⁵ The proliferation of ‘wrap contracts might lead one to think that Gilmore could not have been more wrong. It is contract that seems to be overwhelming tort. Through the use of browserwraps and clickwraps, companies seem to be trying to manage their potential liability under tort law through shield and sword contractual provisions.

Yet, the contracting of everything may still accomplish what Gilmore predicted as the future impuissance of contracts. The very ubiquity of contracts diminishes their potential usefulness; when contracts mean anything and everything, contracts mean nothing.¹⁶⁶ They become an illusion, a farce, another example of how the law is divorced from reality. Consumers become conditioned to signing without reading. Then, the enforceability of contracts is not determined by the terms in a document, but by the boundaries of tort, property, and what a just society can stomach.¹⁶⁷ Then the law and policymakers are forced to step in.¹⁶⁸ Lawrence Friedman wrote:

The most dramatic changes touching the significance of contract law in modern life also came about, not through internal developments in contract law, but through developments in public policy which systematically robbed contracts of its subject-matter. . . . The growth of these specialized bodies of public policy removed from “contract” (in the sense of abstract relationships) transactions and situations formerly

164. GRANT GILMORE, *THE DEATH OF CONTRACT* 112 (1974).

165. *Id.* at 95.

166. See also Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 397 (2008) (speculating that “the more we enter into form-adhesive agreements, the more our collective notion of contract become watered-down.”).

167. As of the writing of this Article, a recent case involving a EULA highlights this point. Eric Felten, *Video Game Tort: You Made Me Play You*, WALL ST. J., Sept. 3, 2010, http://online.wsj.com/article/SB10001424052748703369704575461822847587104.html?mod=WSJ_Opinion_LEFTTopOpinion. In that case, a gamer is suing a gaming company for gross negligence for failing to warn users of the addictive qualities of its product. A judge in Hawai’i has permitted the suit to continue, in a challenge to the enforceability of the EULA, which limits the liability of the gaming company.

168. This may be even more true if standard form contracts are regarded differently by consumers of different socio-economic status. Zev J. Eigen, for example, argues that “observed differences of interpretations and experiences with boilerplate vary with socio-economic status [SES], such that high SES actors view the enforceability of contracts they have signed as more malleable than lower SES actors.” Eigen, *supra* note 166, at 387.

governed by it.¹⁶⁹

The law of contracts is then pushed aside by these subcategories such as labor law or insurance law and made a residual category, which governs only that which is “left over after all the ‘specialized’ bodies of law have been added up.”¹⁷⁰ It is the failure of contracts—of too much fine print and too many non-negotiable terms in home loan and credit card form contracts—that resulted in the Great Recession and more consumer financial regulation.¹⁷¹ Drafting parties are not immune from contract’s failures. Mortgage servicing units, for example, allegedly failed to read foreclosure documents before signing them.¹⁷² Their failure to read only exacerbated the housing crisis and exposed them to lawsuits from investors.¹⁷³ The contracting of everything has conditioned society not to take seriously the contracting of anything.

This Article attempts to give meaning back to contracts. It might seem surprising that in a discussion of contract’s adaptation, this Article has not compared contracts to animals—e.g., “contracts are like polar bears that have evolved with very large feet to help them distribute their weight more evenly on ice,” or “contracts are like camels, and need to develop an online hump to survive.” But the adaptation of contracts is not like that of animals. Animals are living, breathing creatures; contracts are not. The evolution of living creatures originates from a naturally occurring genetic variation; contracts, on the other hand, are instruments of our creation. Just as common law lawyers in the nineteenth century transformed the “clumsy institution” of contract to respond to the needs of a developing free enterprise system,¹⁷⁴ if contract law is to remain vital in our society and to our interactions with each other, we must make it responsive to the needs of our increasingly digital and globalized environment.¹⁷⁵

169. LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 24 (1965).

170. *Id.* at 8. *But see* FARNSWORTH, at 35 (In many instances, “the general rules of contract law have been successfully accommodated to the peculiarities of particular transactions, thus avoiding fragmentation into separate branches of law.”).

171. Congress recently enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009. This was not the first time legislators stepped in to curb the contracting abuses of credit card companies. In the 1970s, state governments enacted special legislation to regulate the substantive content of credit card contracts and impose disclosure requirements in response to consumer concerns. *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).

172. Robbie Whelan & Ruth Simon, *States to Probe Mortgage Mess*, WALL. ST. J., Oct. 12, 2010, <http://online.wsj.com/article/SB10001424052748704518104575546512922974100.html>.

173. *Id.*

174. Kessler, *supra* note 22, at 629.

175. Llewelyn warned that

Judicial accommodation of a changing business environment should be applauded; however, it should not operate in a one-sided manner, solely in favor of businesses. A website has the ability to enable both parties to express their intent, and in order for a contract to mean anything, it must reflect the intent of *both* parties. This Article explains how one aspect of contract doctrine, the doctrine of consideration, can be reconceptualized to better reflect the intent of the parties in the online contracting environment. Courts recognized that mass production of consumer goods required some adjustments to traditional contract doctrines.¹⁷⁶ They should also recognize the practical effects of these adjustments upon consumers. A more even allocation of the burdens of modern day contracting between businesses and consumers may help restore the legitimacy of contracts.

no legal chaos could readily rival that of an uncritical continuance of purely traditional Contract doctrine into any era of transition which had not yet become non-contract and had not yet built into clarity its own ways and doctrine. . . . Surely such a body of doctrine vitally needs such critical restudy.

Llewelyn, *supra* note 83, at 782.

176. *See supra* Part III.