CLICKING AND CRINGING: MAKING SENSE OF CLICKWRAP, BROWSEWRAP AND SHRINKWRAP LICENSES

By

Nancy Kim

Shrinkwrap, clickwrap and browsewrap licenses have complicated contract law by introducing non-traditional methods of contracting to govern the use of intangible property. The retention of ownership by the licensor, and the malleable qualities of software, give rise to the ability and the need to set parameters of use. The courts have tended to defer to the ownership rights of licensors by claiming that there is valid contract formation, even in "rolling contract" situations. Some commentators have argued that existing contract law doctrines – such as unconscionability and good faith -- are capable of addressing digital-era contracting dilemmas. While such arguments have their place in analyzing contract law enforcement, because these doctrines are standard contract defenses, they fail to explain a finding of contract formation. In this Article, I propose a theory for finding contract formation with non-negotiated licenses. A consumer's assent to a transaction should not be transmuted into blanket assent to each individual term of a non-negotiated contract. Instead, the concept of "assent" should be bifurcated into two parts, actual assent and presumed assent. Actual assent means express agreement, not simply to the transaction, but to each of the individual material terms. Presumed assent means express or implied agreement to the transaction and the contract generally, but does not include agreement to all the individual contract terms. Whether the licensee's assent to a given term may be presumed depends upon the operative effect of the term. The licensee may be presumed to have assented to provisions governing the "scope of license" or the "terms of use" (as further defined) to the software or a website because such terms establish the conditions upon which the licensor has agreed to make the intellectual property available. The licensee's adherence to those terms, however, would be conditioned upon notice. The caption of a "scope of license" or "terms of use" provision is not determinative. The licensee should not be presumed to have assented to provisions that impose affirmative obligations or purport to take away the licensee's legal rights. A requirement of active assent to certain terms re-allocates the balance of burdens away from the consumer to the party in the best position to accommodate it. I have divided this Article into two parts. Part I proposes a methodology for finding presumed assent that reconciles the business realities involved in software licensing with contract law principles. The proposed methodology first analyzes whether the putative licensee has assented and the nature of that assent (i.e. whether it is general assent to engage in a transaction or whether it manifests assent to the disputed term). The second step examines what terms govern the activity and determines enforceability according to the nature of the assent. Part II summarizes and analyzes the current case law using my proposed methodology, and applies the methodology to a sample license agreement.

INTRODUCTION

This Article seeks to expand the current discussion governing software licenses and argues that the *sui generis* nature of software licenses often necessitates deviations from the classical contract model of bargaining. A software license enables the licensee to use but not own the software. The retention of ownership by the licensor, and the intangible and malleable qualities of software, give rise to the ability and the need to set parameters of use. This does not mean that when it comes to software licenses, the licensor's exercise of ownership should be unchecked or that the licensee's rights should be unduly restricted. It does, however, mean that contract and commercial law doctrines may conflict with and offend property law principles of ownership.[1] While an absolute reconciliation of these two competing doctrines may be unlikely, this Article proposes a methodology that systematizes consideration of each.

Cases, scholarship and professional organizations evaluating non-negotiated software licenses[2] have tended to focus on the issue of contract formation, and specifically, on the matter of assent.[3] In many cases, the consumer or putative licensee does not actually read the software license terms but the courts have nonetheless found the requisite "assent" necessary for contract formation. In so doing, this Article argues

[1] While the interplay of contract and property doctrines arises in all software licensing transactions, I limit myself in this Article to discussion of *non-negotiated* licenses only.

[2] Non-negotiated software licenses refer to shrinkwrap, clickwrap and browsewrap agreements. *See* discussion, *infra*, Section XXX.

[3] *See*, the cases discussed *infra* Section III. The American Bar Association ("ABA") Joint Working Group on Electronic Contracting Practices recently completed a two-part project on the validity of the assent process in electronic form agreements. The first part of the project focused on click-wrap agreements. *See* Christina L. Kunz, Maureen E. Del Duca, Heather Thayer, and Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW 401 (2001). The second part of the project examined assent in the context of browse wrap agreements. *See* Christina L. Kunz et al., *Browse Wrap Agreement: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003) [hereinafter "*Browse Wrap Agreement*"].

that the courts are deferring to the licensor's property rights and the policy of facilitating business transactions rather than reaching an inevitable conclusion of assent under contract law. This Article refers to the judicial finding -- and in many cases, construction -- of assent in these cases as "presumed assent."

In this Article, I argue that resorting to presumed assent is often necessary, and desirable, to address the unique business needs associated with licensing software. Currently, courts purport to find actual assent where none exists in an attempt to enforce contracts that provide a net benefit to society. Yet, while a finding of presumed assent sometimes may be necessary to enforce socially desirable contracts, certain parameters should be set around such a legal construct. A failure to do so imposes *in toto* contract law principles that were established with consenting parties as a premise upon a transaction that occurred without one party's actual consent. The judicial transmutation of presumed assent into actual assent undermines one of the fundamental principles underlying contract law – that of individual autonomy. I propose that rather than purporting to find actual assent in order to enforce a license agreement, the courts should expressly acknowledge the use of presumed assent.

This Article further argues that, given the lack of actual agreement to terms, contract law's deference to industry norms is troubling and misplaced. In order to render a contract unenforceable on the grounds of unconscionability, the terms of the contract are considered "in the light of the general commercial background and the commercial needs of the particular trade or case."[4] Modern contract law and the Uniform Commercial Code (the "U.C.C.") state that contractual terms that reflect trade usage or

[4]U.C.C., § 2-302 cmt; *see also* William v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir., 1965).

industry standards should be interpreted as part of the contract.[5] Corbin suggests that the test should be whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."[6] But where there is a pronounced unevenness in the bargaining power within the industry, a set of industry standards or "norms" may be established that reflects the interests of only one side. Using industry standards as a guideline where contracts of adhesion are involved merely reinforces the overreaching by the party with greater bargaining power. While the licensing of software is in fact different from the sale of goods, many of the contractual problems arising from, and associated with, software licensing stem, not so much from the *sui generis* nature of software itself, but from the concerted effort by licensors to create standard, one-sided terms. Concerted efforts by software licensors to establish and shape licensing norms create industry standards that consumers soon learn to expect, even if consumers are personally opposed to those norms. This type of private legislation by the software industry is similar to norms that have been established in other industries, most notably, the insurance industry. It is thus, imperative for courts to recognize the normative-setting impact of enforcing license terms under the guise of contract principles where the result is actually driven by business or economic needs.

It may be useful at this point to explain what I mean by "actual" and "presumed" assent. I propose that the doctrinal concept of "assent" should be bifurcated into two parts, actual assent and presumed assent. Actual assent would require express agreement,

[5] *See* U.C.C. § 1-205 ("….any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."); RESTATEMENT, SECOND, CONTRACTS, §222 ("Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.") *Id*.
[6] ARTHUR L. CORBIN, CONTRACTS, § 128 (1963).

not simply to the transaction, but to each of the individual material terms. Notice and an opportunity to read the agreement would not suffice; the licensee would need to manifest assent to a particular, disputed term, not just to the transaction and the idea of the contract. Presumed assent would require express or implied agreement to the transaction and the contract generally but not to any individual or particular contractual term. The contract may thus be formed with a finding of presumed assent, but presumed assent would not be interpreted as blanket consent to all the contractual terms. Whether a given term may be deemed part of the contract, and enforceable, would depend upon its operative effect. If the provision concerns the "scope of license" or the "terms of use"(as further defined) to the software or a website, then those terms are enforceable (subject to the traditional contract law defenses) although the licensee's obligation to perform is conditioned upon actual notice. The licensee's right to use the intellectual property exists only as a result of the grant of license by the licensor; the scope of license describes the parameters of that right. The licensor, by structuring the agreement as one that is non-negotiable, has made a decision to create a business model based upon those license terms. The scope of license terms are the material terms of the transaction; the terms that the licensor believes are significant enough to warrant "deal breaker" status. The licensee has no rights to the intellectual property being licensed which preexist the license grant or exist independently of it.

On the other hand, the licensor should not be able to lump terms having nothing to do with the use of the product or service under the "Scope of License" or "Terms of Use" provision. The substance of the provision, and not the caption or heading, is determinative. The scope of license or terms of use include only those restrictions on the

licensee's ability to use the product or service. Those restrictions, however, must directly relate to, and arise out of, the license grant. If the operative effect of a term is to impose any obligation upon the licensee unrelated to how the technology is being used, or if the effect is to strip the licensee of any rights or remedies otherwise available to the licensee, then the court should require actual assent to such term. Often contained in non-negotiated licenses are "free-rider" provisions, included in an agreement because the drafter has no incentive *not* to include them.[7] Furthermore, even if these provisions are deal-breakers for the licensor, the licensee has preexisting interests that arise independent from the license grant that counterbalance the licensor's property interests. There is no reason for either party's interests to outweigh the other party's. The term is not enforced simply because it is in the contract. The non-enforcement of the term results in a gap in the contract. The courts should then refer to the U.C.C. or to other applicable law to fill in any such gaps.

I have divided this Article into two parts. Part I proposes a methodology for finding presumed assent that reconciles the business realities involved in software licensing with contract law principles. The proposed methodology first analyzes whether the putative licensee has assented and the *nature* of that assent (i.e. whether it is general assent to engage in a transaction or whether it manifests assent to the disputed term). The second step examines *what terms govern* the activity and determines enforceability according to the nature of the assent. Part II summarizes and analyzes the current case law using my proposed methodology. I suggest that often courts have contorted contract

[7] *See* discussion, *infra*, Section XXX. *See also* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 842-845 (discussing whether market pressure can discipline e-businesses' selection of standard forms).

law doctrine to enforce terms that were never actually agreed to, but which nonetheless were commercially reasonable, as explained in Part I.

The primary advantage to the approach outlined in this Article is that it sets as a default, licensing policies that are subject to the U.C.C.,[8] other applicable law, and to ordinary (as opposed to industry specific) standards of reasonableness. By contrast, the current law governing non-negotiated licenses establishes, as a default, license terms that are clearly biased in favor of the licensor. Shifting the burden created by the non-negotiated form of the contract accomplishes two important objectives. First, it eliminates free-rider provisions, which are those terms that do not affect the licensor's decision to enter into the transaction. Those provisions that are not free-riders, on the other hand, will require actual assent and will be called to the reader's attention. A requirement of an affirmative manifestation of consent requires the consumer to consider whether the proposed transaction in fact is what he or she had bargained for. Forcing the consumer to click numerous times may be a hassle for the consumer, but if we are to take the notion of contractual assent seriously, it should be. To do otherwise would be privileging transaction facilitation over the other objectives of contract law, namely enforcing the intent of the parties. Second, the resultant consumer frustration may motivate the customer to select another, less contractually demanding, licensor, or it may encourage licensors to streamline agreements and provide less onerous terms to avoid losing customers. The consumer is forced to weigh the contractual provisions as part of his or her cost-benefit calculation in entering into the transaction. As it should be under

[8] Using the U.C.C. as a "gap-filler," does not include section 1-205 which incorporates trade usage where industry norms have been established through adhesion contracts. *See* discussion, *infra*, section XXX.

the contract model, the contractual terms would more closely reflect what the parties have bargained for, thereby enhancing the economic efficiency of the exchange.

My proposal is admittedly contrary to the current assumption under contract law that all provisions in a contract reflect the bargain. I argue that a consumer's assent to the transaction should not be transmuted into blanket consent to each individual term of a non-negotiated contract. A requirement of active assent to certain terms re-allocates the current balance of burdens away from the consumer to the party in the best position to accommodate it. As Friedrich Kessler wrote, "freedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract."[9] Vendors have been quick to take advantage of new modes of contracting to accommodate new types of products and services; it's time that they shared some of the costs associated with these forms of contracting as well.

[9]Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of* Contract, 43 COLUM. L. REV. 629, 642 (1943).

I. Setting the Parameters of Presumed Assent: A Proposed Methodology

Let's say that you're downloading software from YOUCH[10], a networking website. Before you can start the download process, a clickwrap agreement appears. In large lettering, a statement appears that you must click the "I AGREE" box in order to proceed. You click the "I AGREE" box, without reading the terms contained in the other provisions of the electronic agreement. Are you bound by the terms of the clickwrap agreement? Assume further that one of the terms of the clickwrap agreement requires you to permit YOUCH to release your personal information to advertisers. Another provision prohibits you from installing software that blocks pop-up ads. Assume that a pop-up ad releases a virus that infects and deletes some of your files. Let's assume further that desktop icons appear as a result of your use of YOUCH's software. You try to delete those icons, and even to remove YOUCH's software, but are unable to do so. You seek assistance from YOUCH's customer support, but are told that, pursuant to the terms of their clickwrap agreement, YOUCH is not responsible for any viruses caused by use of their website or their software. To make matters worse, you have just been informed by snickering acquaintances that your profile is being distributed by YOUCH to advertise their "Lonely Singles Meet Your Match" marketing campaign. Your grinning digital image along with a statement about your favorite songs, books and foods are distributed far and wide by YOUCH's marketers in the form of a jiggling pop-up box – a use which you ignorantly agreed to when you clicked the "I AGREE" box.

[10] Youch is a product of the author's imagination.

Far from being the product of this Author's overactive imagination, such contract terms are common on networking websites,[11] even if their enforceability has not yet been tested in a court of law. Generally, absent a finding of unconscionability, the terms of clickwrap licenses have been held to be enforceable.[12] There are several problems with relying upon the doctrine of unconscionability to prevent enforcement of non-negotiated agreement. First, courts have generally been reluctant to strike down agreements on the basis of unconscionability provided that there has been notice and an opportunity to read the contract terms. In addition, the doctrine of unconscionability looks to industry norms to determine whether a term is enforceable which may be problematic where the norms are set by the industry players with greater bargaining powers. For example, consumers may not like the fact that their credit card companies charge them hefty finance charges

[11] *See* for example the end user license on www.kazaa.com which states, "Sharman reserves the right to run advertisements and promotions on Kazaa…. You agree that Sharman is not responsible or liable for any loss or damage of any sort incurred as the result of any such dealings or as the result of the presence of such advertisers on Kazaa and/ or kazaa.com. You agree, so long as you have not entirely deleted Kazaa from your computer, not to take any action, including downloading other software, to disable or block the display of advertising by the Software." *See also* the terms of use at www.myspace.com (stating that "MySpace.com takes no responsibility for third party advertisements which are posted on this MySpace Website or through the MySpace Services, nor does it take any responsibility for the goods or services provided by its advertisers. MySpace.com is not responsible for the conduct, whether online or offline, of any User of the MySpace Services. MySpace.com assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, any User or Member communication. MySpace.com is not responsible for any problems or technical malfunction of any telephone network or lines, computer online systems, servers or providers, computer equipment, software, failure of any email or players due to technical problems or traffic congestion on the Internet or on any of the MySpace Services or combination thereof, including any injury or damage to Users or to any person's computer related to or resulting from participation or downloading materials in connection with the MySpace Services. Under no circumstances shall MySpace.com be responsible for any loss or damage, including personal injury or death, resulting from use of the MySpace Services, attendance at a MySpace.com event, from any Content posted on or through the MySpace Services, or from the conduct of any Users of the MySpace Services, whether online or offline."); www.friendster.com ("By publishing, displaying, or uploading (collectively, "Posting") any text, links, photos, video, messages, or other data or information (collectively, "Content") on or to the Website (including on or to your profile), you automatically grant, and you represent and warrant that you have the right to grant, to Friendster an irrevocable, perpetual, non-exclusive, fully paid, worldwide license to use, copy, perform, display, and distribute such Content and to prepare derivative works of, or incorporate into other works, such Content, and to grant and authorize sublicenses of the foregoing."

[12] *See* discussion, *infra*, Section XXX.

but they lack an alternative. Credit card finance charges are not unconscionable because all credit card companies charge them.

There is another problem raised by using unconscionability in the non-negotiated agreement context, and that is one that strikes at the integrity of contract doctrine. How can a consumer be deemed to have assented to terms that he or she never read? Even if the consumer was given an opportunity to read the terms, if the consumer never actually read them, there could not be actual assent to those terms. Unconscionability is a defense to contract enforcement, meaning that a contract must have already been formed. Contract law's present insistence upon blanket assent means that if we wish to enforce *any* of the terms, we have to enforce *all* of the terms, provided that an applicable defense does not apply. In other words, if you had actually read the agreement, you might have agreed to the provision prohibiting you from using YOUCH's website to market to its members; yet you might have been unwilling to agree to the use of your image in YOUCH's advertisements. Yet, if we want to enforce YOUCH's right to prohibit your marketing activity on its website, we must also say that YOUCH has a right to use your image in its advertising. The only way for you to escape this situation would be if you could successfully use the unconscionability doctrine to defend against enforcement. But, your use of the doctrine of unconscionability would likely fail if, for example, the practice of using member profiles in banner ads for social networking sites was commonplace; you were simply unaware of it because it was the first time that you had joined a social networking website.

In this Section, I set forth my proposed methodology for analyzing non-negotiated software licenses. Part A provides a brief discussion of assent in contract law, and

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

A. Actual Assent v. Presumed Assent.

One of the basic requirements for contract formation is mutual assent.[13] Mutual assent has not been interpreted to mean agreement upon all the terms of a contract. Provided that the parties demonstrate mutual assent to the transaction, disagreement about the meaning of a particular term will not nullify its existence. The Restatement expressly distinguishes between terms that have been expressly agreed upon and those that are implied in law:

> (1) A term of a promise or agreement is that portion of the intention or assent manifested which relates to a particular matter.
> (2) A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.[14]

The existing contract interpretation rules then govern how to determine the meaning of contract terms. For example, some courts will determine the meaning of a term in accordance with its ordinary usage or "plain meaning,"[15] although many courts will examine such meaning in the light of circumstances existing at the time the contract was

[13]For example, under the Restatement, contract formation requires a bargain in which there is both a "manifestation of mutual assent to the exchange" and consideration. RESTATEMENT, (SECOND) OF CONTRACTS, § 17 (1978).
[14] *Id*. § 5.
[15] *See* Prudential Ins. Co. of America, Inc. v. Superior Court, 119 Cal. Rptr. 2d 823 (2002) (Cal. Ct. App. 2002) ("The plain meaning of a policy provision governs, and an insured's reasonable expectations are not considered except where the policy provisions are ambiguous".) *Id*. at 599

made.[16] The relevant circumstances include course of dealing, course of performance and trade usage.[17] The courts will also look to the "reasonable expectations" of the parties in determining whether to enforce contractual terms.[18]

1. A license as a lease, not a sale.

Software licenses occupy a unique place in the law because they raise both contract law issues and issues of property rights. Legal commentary of software licenses tends to be limited to discussion of non-negotiated agreements, such as shrinkwraps, clickwraps and browsewraps[19], and often lumps these three types of licenses together. In fact, software is licensed in a variety of ways. In many cases, the licensee enters into the license "agreement" simply by opening the package containing the software. In many other cases, however, the licensee has spent months negotiating the terms of the license agreement. A software license encompasses both extremes as well as variations in between. The focus of this Article, however, is solely on non-negotiated software licenses and unless otherwise specifically stated, "software license" shall refer to non-negotiated licenses only.

[16] *See* Peterson v. Elk, 93 P3d 458, (Alaska 2004) (Washington courts reject the "plain meaning" rule of contractual interpretation and interpret the terms of a contract in light of conduct, subsequent acts of the parties, and circumstances surrounding contract formation, as well as the literal meaning of the language itself.") *Id. at* 465; s*ee also* Pacific Gas and Electric Company v. Drayage & Rigging Co. Inc., 442 P.2d 641 (Cal. 1968) ("A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.") *Id*. at 644.

[17] *See generally* Nanakuli Paving and Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981); C-Thru Container Corp. v. Midland Mfg. Co., 533 N.W. 2d 542 (Iowa 1995).

[18] Wessells v. Department of Highways, 562 P.2d 1042, 1048 (Alaska 1977) ("Contracts should be interpreted to comply with the reasonable expectations of the parties.")

[19] *See generally id.*

While the type of agreement varies, what all software licenses share is retention of ownership by the owner and a product that is keenly susceptible to copyright infringement and misuse.[20] Many courts, understanding the practical aspects and limitations of selling software, contort existing contract doctrine to enforce agreements that in other contexts would be unenforceable for lack of assent, or the existence of some voiding condition or circumstance, such as mistake.[21] In so doing, however, the courts establish a precedent that applies to all types of non-negotiated contracts, including those having nothing to do with software

My proposed methodology starts with the basic question: Does the license meet the technical requirements of contract formation? This seemingly simple and straightforward question has complex implications stemming from contract law's failure to provide a middle ground between assent and lack of assent. A finding of assent leads to a finding of contract formation; on the other hand, a lack of assent means that no contract was formed.[22] Not surprisingly, courts that wish to uphold a particular transaction or *type* of transaction, have been more willing to find assent even in the absence of bargaining power. "Assent" has thus been construed to mean acquiescence rather than *agreement*. While one of the objectives of contract law is universally

[20] The Second Circuit in Specht v. Netscape Communication Corp., 306 F.3d 17 (2d Cir. 2002) noted that it it is this manipulable quality that differentiates software from other goods: "Downloadable software…is scarcely a "tangible" good, and, in part because software may be obtained, copied, or transferred effortlessly at the stroke of a computer key, licensing of such Internet products has assumed a vast importance in recent years." *See also* Raymond T. Nimmer, *Issues in Licensing: An Introduction*, 42 HOUSTON L. REV. 941, 942 (2005)(describing conditional transactions as licenses).

[21] *See*, e.g., Specht v. Netscape Communications Corp., *supra* note XXX and ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), *infra* at Section I.

[22] In the absence of a finding of mutual assent, the courts might yet find an implied-in-law, or quasi, contract. Quasi contracts, based in equity, are legal fictions imposed in order to prevent unjust enrichment. *See* Casden v. Magryta, 225 N.W. 511, 512 (Mich. 1929); Kammer Asphalt Paving Co. v. East China Township Sch., 443 Mich. 176, 504 N.W. 2d 635, 640 (Mich. 1993); Luithly v. New Era Vending, Inc., No. 98-5507, 1999 U.S. App. LEXIS 10653 (1999)at *12-14 (6th Cir. May 20, 1999). In a transaction

acknowledged as being the promotion of individual autonomy, "assent" is often stripped of any requirement of voluntariness or volition. While such a passive notion of assent seems inconsistent with the very reason why we enforce contracts, in fact, it reflects another of contract law's goals, which is to encourage and facilitate economic transactions.[23] Contracts, while important in clarifying the terms of transactions, also stall their progression. Simplifying the contracting process – by discouraging or even preventing negotiations – thus shortens the time from transaction inception to completion. The transaction is thus streamlined by allowing assent to be found even where the contracting party did not have actual knowledge of a particular term. In actuality, if one did not know of a particular contractual term, one could not have assented to such term. In contract law, however, provided that the contracting party demonstrated assent to entering into the transaction[24] the courts have not much concerned themselves with whether the party had actual knowledge, and thus actually assented to, the contractual term at issue. Instead, the courts have focused on notice and an opportunity to read the relevant contractual terms.

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

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involving presumed assent, the parties intend to enter into the transaction with an awareness that it shall be governed by contractual terms, but does not actually assent to those terms.

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

[24] With shrinkwrap agreements, the courts have not even required an opportunity to read the contract terms prior to entering into the transaction. *See* ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)..

contractual terms should *not* be upheld where they are offered on a "take-it-or-leave-it" basis. In some cases, assent may be presumed because the term is one that the putative licensee would have agreed to if he or she had actually read it. Assent can be presumed either when the term is reasonable and unsurprising, or because it was a deal breaker term, so significant to the licensor's business objectives that a refusal to accept the terms would have terminated the transaction.[25] If the provision is one affecting the scope of the license, or the terms of use, it should be upheld provided that the licensee received notice. The licensee does not have an independent or preexisting right to use the intellectual property of the licensor. The licensor, furthermore, is not required to provide a license to the licensee, and certainly not on whatever terms the licensee chooses. A lack of actual assent should not, therefore, prevent contract formation because in many cases, assent can be presumed as long as there was notice and an opportunity to read the provisions. Assent, however, cannot be presumed in all cases, or with respect to all terms in a contract. A putative licensee might be presumed to have assented to certain terms, but not to others. In the next section, I will discuss which terms should be enforced in the absence of actual assent.

B. The Operative Effect of Terms: Why it Matters

As explained above, if a party manifests actual assent to a contract, then that contractual term becomes part of the transaction. This section addresses what happens where a party manifests intent to enter into a transaction, but does not manifest assent to a particular term in the contract. Where parties dispute the meaning of a particular term, or have omitted it altogether, courts will often determine meaning by reference to trade

[25] These terms are discussed in greater detail in Part B, *infra*.

usage and industry norms. Where control in a given industry is concentrated, there is often a systemic lack of bargaining power. Contract terms are imposed in a transaction by the party with greater bargaining power; these terms become duplicated and standardized within the industry. These terms thus evolve into standard terms in form contracts, offered on a take-it-or-leave-it basis, and representative of industry norms. This type of private legislation has occurred in many industries, including the insurance industry, the consumer credit industry, and in the subject of this article, the software industry. Given the systemic lack of bargaining power in the software industry,[26] notice and/or an opportunity to read terms has little or no meaning – and does not mean that a party has acted either knowingly or willingly. On the other hand, the party has manifested a desire to participate in the transaction. Does that, however, mean that she or he should be bound to all of its terms? Assume a consumer logs onto a website and clicks "I agree" without reading the multi-page electronic contract. Has the consumer agreed to those contract terms? Commonsense would tell us no. One could not agree to something that one has never read. Yet, barring any unconscionable terms, the answer is likely Yes under existing law even though our hypothetical consumer could not have actually agreed to those contract terms if she never read them, even if she had the opportunity to do so. What the courts actually mean when they say the consumer has demonstrated assent is two things: (1) the consumer expressed a willingness to engage in the transaction; and (2) the consumer can be *presumed* to have agreed to the contract terms. There was no actual agreement to those terms where the consumer had not actually read them. Contract law imputes agreement where there was an opportunity to read the contract and

[26] A systemic lack of bargaining power exists in other industries as well but I focus my discussion in this paper to the software industry and the unique issues that arise with respect to licenses.

does not require actual assent. The assumption is that the consumer *would have* agreed to the terms because they are reasonable and/or because the consumer had no choice but to agree to them. This begs the question, What terms can the consumer be presumed to have assented to?

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

Libertarians might ask, so what? The consumer is a free agent, at liberty to visit another site. Nobody is forcing the consumer to purchase goods from this particular e-tailer, or use this website or software. But in fact, in many cases, due to the systemic bargaining imbalance within a particular market segment, the terms may have become so uniform and standardized that the consumer effectively has no choice. It is not a viable option for the consumer to decline the terms of any particular agreement since the terms are the same in the agreement offered by a competitor website. So, the consumer clicks away and hopes for the best.

This situation is quite different from the model contract scenario which is assumed by contract doctrine. Not only does one party lack bargaining power with respect to a particular transaction, but one class of parties lacks bargaining power within a given market sector. The party's "assent" in such a case is void of volition and merely reflects a failure on the part of the consumer to resist market forces through self-deprivation. Where the available "good" involves necessities such as credit or insurance,

this deprivation has very real social and economic consequences. Similarly, given the ubiquity of software and digitally-available information, it is highly unlikely that even the most ardent supporter of contractual autonomy would forego an ill-advised "click" on the basis of principle and an understanding of contract law, alone. Instead, those who are aware of the consequences of doing so, click and cringe, and pray that whatever we have agreed to is either benign, unlikely to be enforced, or so horrible that it will be deemed unconscionable.

A refusal to accept standardized contractual terms is simply unrealistic in many cases. Refusing to purchase software that is subject to the terms of a shrinkwrap agreement, or clicking "I Disagree" to electronic contracts containing objectionable terms is irrational and would force one to reject many of the benefits of technological advancements. The claim that such contracts are agreements reflective of free will is just plain fiction.

On the other hand, allowing a consumer or putative licensee to take advantage of the transaction and then reject the offered terms also raises problems. The licensor is not obligated to provide any products or services, and has a right to determine how much risk it will assume in order to engage in business. The calculation of that risk is often reflected in the contractual terms, such as the licensor's limited warranty and limitation of liability. The licensor may wish to offer the product, but only with some restrictions on the licensee's use. The licensor continues to own the intellectual property embodied in the software and likely wishes to restrict how the licensee will use it. In particular, because of the readily manipulable nature of digital information, the ease with which the licensor's business objections can be subverted makes it much easier to sympathize with

the licensor's desire for specific license terms or terms of use. Courts, sympathetic to the licensor's plight, have tended to enforce licenses under contract law, finding mutual assent provided there was a reasonable opportunity to review the terms.[27] But, as discussed above, such an opportunity is hollow if it provides no option for the consumer to negotiate other than to decline to enter into the transaction altogether. This does not mean that the licensor should bear the burden of the consumer's refusal to read contractual terms; but nor should it mean, as it has in the past, that the consumer should bear the burden of ferreting out onerous terms in a multi-page contract *even if given the opportunity to do so.* What it does mean is that if the licensor wishes to impose certain onerous terms upon the licensee, the licensor must receive the licensee's actual assent to those terms. This shifts the burden of establishing contractual terms on the party in the best position to bear it – the party with greater bargaining power.

But, some may wonder, what difference does the requirement of actual assent make if the consumer effectively has no choice given the prevalence of onerous terms in standard form contract for similar products/services? The additional transaction impediments required to manifest actual assent does slow down the contracting process, but that is an inconvenience that affects both parties. The current accepted form of non-negotiated contracts now burdens only the consumer, and offers no incentive to the licensor to offer streamlined agreements or reasonable terms.[28] On the contrary, judicial

[27] In ProCD v. Zeidenberg, the Seventh Circuit did not even require review of terms prior to purchase but merely an opportunity to return the purchased item after review of the shrinkwrap license. See discussion, Section II, *infra* at XXX.

[28] *See* Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transactions Costs,* 47 WM. & MARY L. REV (2006); *but cf* Robert A. Hillman and Jeffrey J. Rachlinkski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (discussing how market forces may discipline drafters of standard forms).

deference to licensors' legitimate business concerns[29] has resulted in the licensors taking greedy advantage of consumers lack of power by imposing multi-page terms that are accepted by a simple click. Robert Hillman has conducted an empirical study that suggests that requiring advance disclosure of website terms will likely fail to increase consumer actually reading such terms.[30] He acknowledges that while requiring methods of attracting attention, "such as requiring bold text or clicking after each term on the screen (or both), might increase reading,…analogous strategies in the paper world have had mixed results, probably in part because consumers, worn down by the contracting process, are unlikely to be riveted to attention by such formalities."[31] Yet, Internet transactions are different from real world transaction in significant ways. First, the real world consumer has expended more effort in reaching a retail location. The consumer has expended time and costs in terms of gas and parking. Searching for alternative vendors also takes much more effort. In the same way that price comparison shopping is much easier on the Internet than running from shop to shop at the local mall, so is it easier to move from website to website, not in order to review contract *terms* but to

[29] Robert Oakley explains how license agreements evolved with technology: "Standard form contracts became an issue in the consumer technology context when computers evolved from being essentially a business commodity….to being a consumer commodity….In such an environment, it was no longer possible to have a negotiated contract between the seller and each and every customer. There was also considerable uncertainty at the time about the scope of copyright protection for computer software….In an innovative experiment and with great uncertainty about their validity, these contracts began to take the form of shrinkwrap licenses…Over the years as the technology evolved, the licenses have evolved along with it to include so-called clickwrap licenses. Browsewrap licenses were added as the Internet developed with its ability to create hyperlinks that would take a customer to a license agreement at another location." Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1048-49 (2005); *see also* Robert W. Gomulkiewicz and Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L. J. 335 (1996) – arguing that mass-market end user license agreements provide substantial benefits for distributing information products and that for broad distribution, individually negotiated contracts are not feasible. *Id*. at 341-42.

discover which websites offer a more pleasant experience. Website marketers are very aware of the benefits of making transactions as seamless as possible. In the same way that a consumer is more likely to return to a shopping site that processes transactions with "one-click," so too, might that same consumer refuse to return to a site that requires numerous clicks to approve onerous legal terms. In other words, requiring multiple clicks burdens the consumers, but it also burdens the licensor.[32] The transactional hurdles would likely result in real costs to the licensor in terms of aborted transactions and timed-out web exchanges, thus providing an incentive to the licensor to rethink its contractual offerings.

While limiting presumed assent to license grant or scope of use provisions may be simple in theory, many licensors may simply attempt to cram more terms and conditions in paragraphs captioned "License Grant" or "Scope of Use." Implementing the proposed methodology thus requires that the operative effect of the provision – rather than its caption – should determine whether actual or presumed assent is required. Generally, terms that restrict the licensee's use of the intellectual property would require only presumed assent. The terms of use would then be enforceable provided that traditional contract defenses did not apply. In other words, lack of actual assent to license grant provisions or terms of use would not prevent contract *formation* even though traditional contract law defenses may still bar *enforcement* of those terms. On the other hand, terms unrelated to use of the software or website that impose an affirmative obligation on the

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[30] Robert H. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire*, 104 MICH. L. REV. 837, 839-840 ("(E)-consumers may still have ample rational reasons for not reading and cognitive processes that deter reading and processing terms.")
[31] *Id*. at 844.
[32] *Id*. at 844.

licensee or which require the licensee to relinquish otherwise existent rights would require actual assent. These two categories of terms are discussed below.

1. Affirmative Obligation Provisions.

If the relevant contractual term imposes an affirmative obligation that is not directly related to the use of the licensor's intellectual property, the licensor should be required to show that the licensee actually assented to that particular term. Let us return to the hypothetical presented at the beginning of this Article where you wish to download software from YOUCH's website. In order to start the download process, you must accept the terms of an electronic contract. You have clicked on the "I accept" button but did not read the terms of the contract. Your clicking expresses your assent to enter into the transaction, but not your actual assent to the individual contractual terms. Is the provision prohibiting you from deleting those pesky desktop icons enforceable? Under existing case law, because you have manifested assent to the transaction, it is likely that provision would be held enforceable unless it were unconscionable. An unconscionability analysis would examine whether that term was unreasonably favorable to YOUCH, and whether you had a "meaningful choice" regarding whether or not to enter into the transaction. Let pretend that the software is being provided to users at no charge. Using this test for unconscionability, there is a strong possibility that the provisions would be upheld. You are not required to download the optional software and you are free to join other networking sites that do not have this requirement. The term, while favorable to YOUCH, is not unreasonable especially if the software is being provided for free. The clause whereby you unwittingly consented to advertise YOUCH's

singles matching services, while surprising to you, is not particularly oppressive or shocking particularly since you are free to go elsewhere and had an opportunity to review the terms of the agreement prior to acceptance. Yet the result is wrong. One could argue that the provision in question is contrary to industry norms and defeats the "reasonable expectations" of the parties. Yet, what *are* the reasonable expectations of the parties with respect to a practice that is novel, i.e. the giving away of software in exchange for a license to use the customer in advertising? The argument regarding reasonable expectations and industry norms carries some weight only as long as the practice is novel. If other companies determine that this method is an effective marketing tool, then it could quickly become an industry norm, as one-sided as this norm may be. An establishment of an industry norm would then defeat any claims of subsequent consumers that the provision was an unfair surprise, or defeated their reasonable expectations.

Under my proposed methodology, your assent to the terms of the contract can be presumed with respect to those terms that restrict your ability to use YOUCH's software and/or its website. Your assent would not be presumed, however with respect to terms that impose an affirmative obligation not directly related to your use of YOUCH's intellectual property. Terms that impose affirmative obligations would require express consent. In our hypothetical, your assent to the license grant would be presumed, but not to the others terms. Your failure to read the provisions of the contract would not prevent contract formation, but it would affect whether a particular provision becomes a binding part of that contract. This does not, however, mean that YOUCH would *never* be able to enforce a contract containing an agreement on the part of the licensee to participate in advertising campaigns. In order for such a provision to be enforceable, YOUCH would

need the licensee's express consent. YOUCH could obtain such consent, for example, by requiring the consumer to "initial" the marketing provision – this could take the form of an electronic click immediately following the provision. Obtaining actual assent to a term in a shrinkwrap agreement would be more complicated if it does not pertain to the scope of the license – and it should be. The licensor should not be able to foist obligations not directly related to the scope of the license upon the licensee without the licensee's actual consent. Thus, provisions that do not restrict the licensee's use of the software contained in shrinkwrap agreements would be *per se* unenforceable unless the consumer was asked to initial such terms at the time of purchase – in the same way that consumers currently are asked to initial individual provisions of car rental agreements or other important, but not intuitive, provisions in other types of form agreements. This requirement of actual assent would shift the burden that currently exists on X to sift out the onerous provisions onto the party better situated to do so – the contract drafter. The contract drafter is in the best position to point out the material terms and draw them to the licensee's attention. This may slow down the transaction, but the result would burden both parties; currently, the burden of non-negotiated contracts is borne by only the consumer.

Shifting the burden of affirmative obligation provisions from the consumer/putative licensee to the contract drafter accomplishes two important objectives. First, it encourages economic efficiency in transactions by eliminating free rider provisions. Such provisions are included in non-negotiated contracts even though their presence or absence would not affect either party's decisions to enter into the transaction. Often their inclusion in contracts reflects a surfeit of caution, an obsessive desire for no-additional-

cost complete legal coverage, or simply reflects boilerplate carried over from a prior form agreement. Those provisions that are not free-riders, on the other hand, will be called to the reader's attention and will remain in the contract. Contract drafters faced with the requirement of calling out affirmative obligation provisions will either conform their contracts, if the provision is considered important enough (i.e. if it is part of what is being bargained for), or they will drop the provision as unnecessary, thus streamlining and facilitating the contracting process. Consumers, too, will gain from this requirement. Currently, the overwhelming verbiage presented in form agreements makes it difficult to distinguish innocuous provisions from those requiring more scrutiny and contemplation. A requirement of an affirmative manifestation of consent to an affirmative obligation term attracts the consumer's attention and requires the consumer to consider whether the proposed transaction in fact is what she or he had bargained for. If the answer is yes, the consumer will proceed to click, I AGREE. If the answer is no, he will click, I DON'T AGREE. The consumer faced with such a decision may not be enthusiastic about the available options, but at least he or she is made aware of the consequences of engaging in the transaction. The act of assenting forces the consumer to acknowledge the existence of a particular term. While the consumer may still be powerless to negotiate such term, heightened consumer awareness in and of itself is a societal benefit. The affirmative obligation provision then becomes part of what is bargained for, and is weighed in the consumer's cost-benefit calculation. The resulting agreement thus more accurately reflects what both parties wanted and encourages the efficiency of the transaction. Currently the assumption under contract law is that all provisions in a contract reflect the bargain. This assumption does not reflect the reality where non-negotiated contracts are

involved. A consumer may want a particular good or service, but not the ancillary provisions that he may not have bothered to read. The court thus transmogrifies the consumer's assent to the transaction into a blanket assent to the terms of the contract, most of which have not even been read. This does not mean that the consumer should be permitted to set the terms of the bargain nor that a consumer should be allowed to pick and choose the provisions at his sole discretion. What it does mean is that the contract drafter should not be able to get *more* than what he bargained for. Requiring actual assent to terms that impose an affirmative obligation upon the consumer provides an incentive to the contract drafter to streamline the contracting process. The licensor risks losing business or harming its reputation by putting forth onerous terms that will require the putative licensee's acknowledgement and active consent. The Internet, itself, may facilitate consumer action. Consumers can easily send unhappy emails to licensors. Individuals can share and disseminate information by posting comments in blogs and consumer-oriented websites ridiculing onerous clickwrap terms[33]. Such a requirement forces both parties to consider the importance of such terms in the context of the transaction as a whole; more importantly, it forces each party to acknowledge that the *other* party recognizes and accepts the importance of such term. For the putative licensee, it indicates that the particular term is not just harmless boilerplate that will never be implemented or enforced by the licensor. Currently, many consumers simply ignore contractual terms and hope for the best. A requirement of active assent makes it harder to play ostrich. The repeated indignity of forced assent to unreasonable terms may, in turn, result in collective action by consumers. Even if it does not, heightened awareness of a

[33] Some websites have responded to such complaints by modifying their license terms. For example, CD Baby recently overhauled its clickwrap agreement in response to complaints from potential users about the

party to a contract is in and of itself socially beneficial.[34] Furthermore, such a requirement re-allocates the current balance of burdens away from the consumer to the party in the best position to accommodate it.

2. Provisions that Take Away Legal Rights

Contractual provisions that diminish the consumer's legal rights should also be subject to the standard of actual assent. Because such rights are those which exist independently from the consumer's right to use the software or other licensed product, the licensee cannot be presumed to have relinquished them. I use the term "right" loosely here to include privileges otherwise available to the licensee that do not derive from or arise out of the license grant. Examples of provisions restricting or diminishing rights include those compelling arbitration in the event of a dispute and provisions limiting the choice of forum. Currently, such provisions are standard in many non-negotiated software licenses. There are a number of explanations offered for why and how these provisions originated. Many commentators state that such provisions are essential to the drafting party. For example, some scholars argue that the provision eliminating the licensee's right of first sale under the Copyright Act is necessary to protect the licensor's intellectual property rights.[35] While many critics have questioned the validity of such arguments on substantive grounds, the focus of this Article is on the process by which such provisions are incorporated into agreements. A consumer may be

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overwhelming legalese. Email on file with author.

[34] *See* Richard A. Hillman & Jeffrey J. Rachlinkski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 441 (2002)("Consumers concerned about the possibility of exploitation can try to avoid terms they consider exploitative and refuse to transact with businesses that have reputations for offering and enforcing manipulative contract terms. In addition, the aggregate decisions of many consumers can pressure businesses into providing an efficient set of contract terms in their standard forms.") *Id*. at 441-42.

unaware that he or she has abdicated certain rights or privileges by entering into the transaction.[36] Even if such provisions are not contrary to public policy or otherwise invalid,[37] agreement to their terms should not be presumed but actively sought. Non-negotiated standard form contracts, by their very nature, assume passive acceptance by the consumer. While there are numerous arguments for such contracts, acceptance of their *form* should not mean wholesale acceptance of their terms. A requirement of affirmative assent merely shifts the presumption that currently exists in favor of the party without control in structuring the transaction. Instead of presuming acceptance, the presumption is that such terms are *not* part of the transaction. The burden is thus on the contract drafter to prove acceptance of these particular terms by the consumer. The terms may still be offered on a "take-it-or-leave-it" basis; however, it will require a little more effort on the part of the contract drafter, and a lot more willful blindness on the part of the consumer, to do so.

3. Using U.C.C. Article 2A as default terms.

Any gaps in the contract created by the non-enforcement of terms requiring actual assent should be filled using the U.C.C. Article 2A provisions governing leases, with the notable exception of U.C.C. section 1-205. That section provides as follows:

> (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of

[35] The accuracy of this belief has been frequently and vigorously debated. .

[36] As Friedrich Kessler noted, "freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system….The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable – the standard mass contract….The individuality of the parties which so frequently gave color to the old type contract has disappeared. The stereotyped contract of today reflects the impersonality of the market." Friedrich Kessler, *supra* note 9, at 630-31.

[37] While many critics have questioned the legitimacy and validity of such claims on substantive grounds, the focus of this Article is on the validity of the *process* by which such provisions are incorporated into contracts.

> such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
> (3) ….[A]ny usage of trade in the vocation or trade in which (the parties) are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

As discussed in section XXX above, in an industry governed by contracts of adhesion, the creation of industry "standards" does not reflect mutually agreed terms. This does not mean that such terms would never be included as part of a contract; it does, however, mean that in order to so include them actual --and not presumed – assent would be required.

Article 2A of the U.C.C. governs leasing transactions. Like a lease of goods, a license of intellectual property conveys certain property rights without conveying title or ownership. Unlike a seller of goods and similar to a lessor, a licensor maintains ownership in the property and thus has a greater interest in their use by the licensee. Article 2A is thus a more appropriate place to locate "gap fillers" than is Article 2.

II. Making Sense of Non-negotiated Software Licenses.

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

A. An Overview of the Law Governing Non-negotiated Licenses

Software licenses are usually categorized as negotiated or non-negotiated. Non-negotiated agreements typically include shrinkwrap, browsewrap, and clickwrap licenses. A shrinkwrap license refers to an agreement that is wrapped in plastic and included with a disc containing a software program. The licensee manifests assent to the terms of the shrinkwrap either by tearing open the plastic wrap containing the software, or by installing the software.[38] A clickwrap agreement is electronically transmitted and requires clicking on a button indicating assent prior to downloading software or accessing a website. A browsewrap license purports to bind an individual accessing a website but does not require the user to expressly manifest assent.[39] The form of these licenses evolved to accommodate the form of the product that was being licensed and the perceived need for protection. As technology enabled different venues or applications, the form of the licenses adapted to these changes.

This Section examines the current law pertaining to each of these types of licenses.[40]

1. Shrinkwrap licenses.

Does a customer enter into a contract when he or she unwraps a software package? The first courts to address the issue of shrinkwrap agreements concluded in the negative. In *Step-Saver v. Wyse Technology*,[41] the Third Circuit held that a "box-top" license was

[38] *See* ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
[39] *See*, *Browse-wrap Agreements*, *supra* note 3. While browsewraps agreements often do not involve the downloading of software, they do purport to govern a licensee's access and use of a licensor's website. Because a website owner has a proprietary interest in its website, I do not distinguish between browsewraps used to download software and those used merely to govern use of a site.
[40] This section offers only a cursory overview of the law governing shrinkwraps, clickwraps and browsewraps because this territory has been well-trod by other scholars. *See*, for example, Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: "There's a New Sheriff in Town!"*, 35 U. RICH. L. REV. 943, 949-991 (2002).
[41] 939 F.3d 91 (3d Cir. 1991).

invalid under the Uniform Commercial Code.[42] The Court determined that the contract for the sale of the software product was made when the product was purchased; therefore, any terms contained in the shrinkwrap were merely unaccepted "proposals for modification," under U.C.C. Section 2-207. In other words, the consumer never assented to the terms of the shrinkwrap agreement. The Fifth Circuit in *Vault Corp. v. Quaid, Inc.*[43] stated that a shrinkwrap license was an unenforceable "contract of adhesion."

In 1996, however, the Seventh Circuit in the landmark case of *ProCD, Inc. v. Zeidenberg*, concluded that "(s)hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)."[44] The plaintiff, ProCD, compiled information from over 3,000 telephone directories into a computer database.[45] It sold a version of the database, called Selectphone, on compact discs. The plaintiff claimed that the database cost more than ten million dollars to compile and additional resources to maintain. ProCD sold its database to the general public for personal use at a significantly lower price than it did to manufacturers and retailers. The court discussed the economic efficiency of ProCD's price discrimination policy and the financial benefits to consumers.[46] Rather than tailoring the product to suit a particular user[47] ProCD decided

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[42] *Id*.
[43] 847 F.2d 255 (5th Cir. 1988).
[44] GET CITE.
[45] The court assumed that the database could not be copyrighted. *Id*. at XXX.
[46] The court stated that

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

to contractually bind its customers to its price discrimination policy. The outside of each box stated that the software was subject to enclosed license terms. The license, which limited use of the program to non-commercial purposes, was contained in the user's manual and appeared on the user's screen every time the software was run. The defendant, Matthew Zeidenberg, purchased a consumer package of SelectPhone and formed a company to resell the information contained in the database on the Internet for a price that was less than what ProCD charged its commercial customers. Zeidenberg argued that ProCD made an offer by placing the software in stores. He stated, and the district court agreed, that he "accepted" the offer by purchasing the software. The Seventh Circuit disagreed, stating that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure." It further noted that while contracts are often formed simply by paying for a product and walking out of the store, the U.C.C. permits contracts to be formed in other ways. Since *ProCD*, the courts have generally upheld the enforceability of shrinkwrap licenses.[48]

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

[47] The Court hints that modifying the product might be more cumbersome than contractual enforcement:

> To make price discrimination work…the seller must be able to control arbitrage…Vendors of computer software have a harder task (than airline carriers or movie producers). Anyone can walk into a retail store and buy a box….even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone. Instead of tinkering with the product and letting users sort themselves – for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price – ProCD turned to the institution of contract." *Id*. at 1450.

[48] See Bowers v. Baystate Technologies, 320 F.3d 1317 (Fed. Cir. 2003), Adobe v. One Stop Micro, 84 F. Supp. 2d 1086 (N.D. Cal. 2000), Peerless Wall & Window Coverings v. Synchronics, 85 F. Supp. 2d 519 (W.D. Pa. 2000); but see Novell v. Network Trade Center, 25 F. Supp. 1218 (D. Utah 1997), Klocek v. Gateway, Inc. 104 F. Supp. 2d 1332 (D. Kan. 2000). While a minority of courts have refused to enforce shrinkwrap licenses even after ProCD, these cases lack a consistent rationale and are distinguishable on their facts.

As many scholars have noted, the ProCD court's analysis of the U.C.C. leaves much to be desired.[49] U.C.C. section 2-204(1) states: "A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Judge Easterbrook, writing for the court, turned this provision on its head so that the parties' conduct no longer established the existence of the agreement. According to Easterbrook, the agreement assigned meaning to the conduct rather than the other way around. Under this analysis, the placement of software on a store shelf would not constitute an offer to sell, nor would payment and dominion over the software copy constitute an acceptance of that offer or even an offer to buy the software. In fact, the *meaning* assigned to the buyer's conduct would be determined by the agreement contained within the software box. Thus, if the terms within the box stated that the buyer agrees to pay a $50 monthly maintenance fee, then the buyer's purchase and dominion of the software would indicate assent to that *even though such purported assent occurred after the conduct* which purports to establish such assent. Perhaps most notably, the ProCD court held that Zeidenberg demonstrated assent to the shrinkwrap license terms by retaining and using the software *even though a consumer could be expected to undertake these actions for reasons other than to demonstrate assent*. As Corbin stated, "(A)n offeror can not, merely by saying that the offeree's silence will be taken as an acceptance, cause it to be operative as such….It is substantially the same case as where an offeror attempts to give the meaning of an acceptance to some other ordinary act of the offeree that the latter wishes to do without

[49] *See* Deborah W. Post, *Common Sense and Contracts Symposium: Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205 (2000)(stating that Judge Easterbrook ignored the U.C.C. sections 2-207 and 2-206, the commentary to these sections, the

giving it such a meaning. If A offers his land to B for a price, saying that B may signify his acceptance by eating his breakfast or by hanging out his flag on Washington's birthday or by attending church on Sunday, he does not thereby make such action by B operative as an acceptance against B's will."[50] Under ProCD, assent to the terms of a shrinkwrap license is thus presumed and the burden is placed upon the consumer to disaffirm assent. In other words, Easterbrook's analysis places an affirmative obligation upon the consumer to establish non-consent to the terms of the shrinkwrap agreement – something which is anathema to contract law which has long maintained that silence, or inaction, should not constitute acceptance.[51] Zeidenberg's failure to object to the terms of the shrinkwrap agreement – which can only be expressed by taking affirmative steps to return the software – is thus construed as assent, even where such failure can be attributable to other causes, such as ignorance or logistical constraints.

An alternative, and better, contract law analysis of the transaction in ProCD would view the defendant's act of paying for and carrying the software out of the store as acceptance of the store's offer to sell the software product.[52] The terms of the shrinkwrap agreement do not govern the sales transaction, which is complete at the time payment is made by the consumer and accepted by the store. The consumer does not, and in fact, logically cannot, assent to these terms prior to the completion of the sales transaction. The terms fail as modifications to the sales transaction because they are not supported by consideration nor is the consumer compelled to accept any such attempted modifications.

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existing precedent interpreting the statute and the commentary of scholars and experts on Article 2). *Id*. at 1226.

[50] CORBIN ON CONTRACTS, §72.

[51] CORBIN ON CONTRACTS, §71, 72; RESTATEMENT, SECOND, CONTRACTS, §69.

[52] The Supreme Court of Kansas, in a recent opinion, held that a shrinkwrap agreement submitted after the buyer had accepted the seller's proposal was a request for modification. *See* Wachter Management

This does not, however, mean that the terms of the shrinkwrap agreement are without any role or effect. The consumer's assent to the scope of the license can be presumed because the consumer must accept the licensor's business practices provided that they are not unconscionable. The terms of the scope of license or terms of use provide the consumer with notice of the software producer's business policies and the conditions upon which the software is being provided. *The absence of the consumer's express consent does not mean that those terms do not nonetheless govern the relationship.* The consumer's act of accepting the offer to sell the software (or, alternatively, the consumer's offer to purchase the software which is then accepted by acceptance of payment) does not then give the *consumer* the right to establish the terms of the relationship with the software producer. While the consumer's purchase of the software does not thereby demonstrate actual assent, assent to the scope of license terms can be presumed because the licensor has the power to establish the terms upon which the software shall be provided. The licensor's ownership of the software entitles it to establish the parameters of its business provided that it does not trammel on the consumer's unrelinquished preexisting rights or impose affirmative responsibilities unrelated to how the software is used. In other words, while the licensor does not have the right to force the licensee to undertake affirmative acts or to relinquish legal rights, nor should the licensee have the right to provide the terms by which the licensor chooses to conduct its business.

2. Clickwrap licenses.

Company v. Dexter & Chaney, Inc., 144 P.3d 747 (2006). That court distinguished ProCD v. Zeidenberg and Hill v. Gateway because those cases involved non-negotiated consumer contracts.

ProCD addressed the enforceability of a shrinkwrap license which accompanies the purchase of software contained in a box. In many cases, however, software is distributed over the Internet pursuant to the terms of a clickwrap agreement. In some ways, clickwrap agreements are less problematic than shrinkwrap agreements for the simple reason that a user expressly manifests assent by clicking. Generally, clickwrap agreements do not permit a user to progress until and unless the user clicks on a box containing the words "I agree" or some similar expression of agreement. Often, the user is asked to acknowledge the terms of a clickwrap agreement by clicking more than once. Not all clickwrap agreements, however, are alike. While some agreements display all their provisions on a singe computer page, many clickwrap agreements appear in small textboxes that require constant scrolling in order to review their terms. The "assent" buttons, however, do not appear within the text box but are readily apparent on the screen. This cumbersome and aggravating method of providing clickwrap terms, while simultaneously facilitating the user's ability to express assent, seems specifically designed to encourage users to simply click on the "I agree" button without reading the terms.[53]

Clickwrap agreements do not raise the same contract formation concerns as shrinkwrap agreements because the user typically has notice of the terms and has an opportunity to read them *prior* to engaging in the contractual relationship. A user is also not required to take onerous affirmative steps to disaffirm the contract by, for example, returning the merchandise; a simple click will do.[54] Courts have refused to uphold clickwrap agreements, however, if users do not have sufficient notice of their terms, or do

[53] *See* for example, www.terrioronguard.com.

not have to affirmatively accept the terms of use.[55] This does not mean that clickwrap agreements do not raise *any* contractual issues at all. In particular, many commentators find their "take-it-or-leave-it" nature troubling; they are not, however, inherently *more* troubling than other contracts of adhesion simply because their terms are digital rather than inscribed on paper.[56]

One of the first cases to address the issue of clickwrap agreements *CompuServe, Inc. v. Patterson*,[57] involved a forum selection clause. The defendant, Patterson, was a resident of Houston, Texas who claimed never to have visited Ohio.[58] The plaintiff was Compuserve, a computer information service headquartered in Columbus, Ohio.[59] Patterson subscribed to CompuServe's computing and information services via the Internet and placed certain computer software products as "shareware" on the CompuServe system for others to use and purchase.[60] When Patterson became a shareware provider, he entered into a "Shareware Registration Agreement" ("SRA") with CompuServe.[61] Pursuant to the SRA, CompuServe provided its subscribers access to the shareware that Patterson created as an independent contractor.[62] The SRA incorporated by reference two other documents, the CompuServe Service Agreement (the "Service Agreement") and the Rules of Operation. Both the SRA and the Service Agreement

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[54] *See* Caspi v. Microsoft Network, LLC, 732 LLC, 732 A.2d 528 (N.J. App. Div. 1999); Davidson & Assocs. V. Internet Gateway, 420 F. 3d 630 (8th Cir. 2005).
[55] *See* Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002) (Second Circuit refused to enforce an arbitration clause contained in a license agreement that was not readily apparent to user downloading software); Pollstar v. Gigmania, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (court refused to enforce an online license agreement because the link to it was not sufficiently obvious).
[56] For a comprehensive analysis and comparison of paper-based and electronic-based standard form contracts, *see* Richard A. Hillman and Jeffrey J. Rachlinkski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429 (2002).
[57] 89 F.3d. 1257 (6th Cir., 1996).
[58] *Id*. at 1260.
[59] *Id*.
[60] *Id*.
[61] *Id*.

stated that they were entered into in Ohio.[63] The Service Agreement further provided that its terms were governed by and construed in accordance with Ohio law.[64] The court noted that the SRA required Patterson to type "AGREE" at various points in the document "in recognition of [his] on line agreement to all the above terms and conditions."[65] Patterson marketed his software for several years on CompuServe's system.[66] CompuServe later began to market a similar software product which gave rise to Patterson's allegations of trademark infringement. CompuServe filed a declaratory judgment in the federal district court for the Southern District of Ohio, relying on the court's diversity subject matter jurisdiction.[67] Patterson filed a motion to dismiss on several grounds, including lack of personal jurisdiction.[68] The district court granted Patterson's motion to dismiss for lack of personal jurisdiction.

On appeal, the Sixth Circuit addressed the issue of whether Patterson's contacts with Ohio were sufficient to support the district court's exercise of personal jurisdiction.[69] The Sixth Circuit referred to the Internet as representing "perhaps the latest and greatest manifestation of…historical globe-shrinking trends." The court assumed the enforceability of the clickwrap agreement, noting that Patterson "entered into a written contract with CompuServe which provided for the application of Ohio law," and stated that he "then purposefully perpetuated the relationship with CompuServe via repeated communications with its system in Ohio." The court emphasized that Patterson was "far

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[62] *Id*.
[63] *Id*.
[64] *Id.*
[65] *Id*. at 1260-61.
[66] *Id*.
[67] *Id.* CompuServe sought a declaration that it had not infringed any common law trademarks of Patterson's, or of Patterson's company, FlashPoint Development, and that it was not otherwise guilty of unfair or deceptive trade practice. *Id.*
[68] *Id*.

more than a purchaser of services; he was a third-party provider of software who used CompuServe, which is located in Columbus, to market his wares in Ohio and elsewhere."[70] The court stated that while "merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio," that act *in conjunction* with Patterson's placement of his software product into the stream of commerce and other factors established sufficient contact to establish jurisdiction.[71] Patterson manifested actual assent to the SRA first at his computer in Texas, which was then transmitted to CompuServe in Ohio.[72]

In *Caspi v. Microsoft Network, LLC,*[73] the Superior Court of New Jersey upheld a forum selection clause in a click-wrap agreement. *Caspi* involved a class action complaint against Microsoft[74] arising out of Microsoft's alleged practice of "unilateral negative option billing".[75] The named plaintiffs were residents of different states and they purported to represent a nationwide class of 1.5 million MSN members. Microsoft moved to dismiss the complaint for lack of jurisdiction and improper venue by reason of a forum selection clause which was in every MSN membership agreement and thus, purported to bind all the named plaintiffs and members of the class.[76] The forum selection clause provided that the governing law was that of the State of Washington, and further provided that each member consents "to the exclusive jurisdiction and venue of

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[69] *Id*.
[70] *Id*. at 1264.
[71] *Id*. at 1265.
[72] *Id*. at 1261.
[73] 732 A.2d 528 (NJ Super 1999)
[74] The defendants were two related corporate entities, Microsoft Network, LL.C. and Microsoft Corporation but this Article will refer to them both simply as "Microsoft," as did the court in the actual case. *See id*. at 529.
[75] Under this practice, Microsoft without notice or permission from MSN members, unilaterally increased membership fees attributing the change to changes in the service plans. *Id*.
[76] *Id.*

courts in King County, Washington in all disputes arising out of or relating to your use of MSN or your MSN membership."[77]

Finally, in *Davidson & Associates v. Jung*,[78] the Court of Appeals for the Eighth Circuit upheld a clickwrap agreement that prohibited reverse engineering. In that case, the appellee, Blizzard, created and sold software games, and provided a gaming service available exclusively to purchasers of its games[79] Because it was concerned about piracy, Blizzard restricted access to its service and required agreement to a clickwrap agreement that prohibited reverse engineering. By reverse engineering, the appellants were able to create an online gaming system as an alternative to Blizzard's system. The appellants' system contained operational differences from Blizzard's system and enabled users to play pirated versions of appellee's games.[80] The Court stated that the appellants had expressly relinquished their right to reverse engineer by agreeing to the terms of the license agreement.[81]

3. Browse-wrap Agreements

Browsewrap agreements are terms that are posted on a website and that do not require users to affirmatively manifest their consent. In most cases, the website or the browsewrap includes a statement that the user's continued use of the website or the downloaded software manifests assent to the those terms. Often, the terms of browsewraps are prominently displayed; but the existence of the browsewrap itself is

[77] *Id*.
[78] 422 F.3d 630 (8th Cir. 2005).
[79] *Id.* at 633.
[80] *Id*. at 636.
[81] *Id*. at 639.

hidden on a page that few users bother to visit – the "Legal" or "terms" pages.[82] Unless the user is expressly looking for such information, she is unlikely to find it.

Generally, courts will enforce browswrap agreements only if the user had adequate notice of their terms[83]. In other words the terms must be both conspicuous and accessible. In *Specht v. Netscape Communications Corp.*,[84] for example, the Second Circuit refused to enforce an arbitration clause in a browsewrap agreement because users were able to download the free software without indicating assent or acknowledging the license agreement. Furthermore, in order to view the license terms, the users were required to scroll down *past* the software download button and then access the agreement by clicking on a hyperlink. Notice was also at issue in *Pollstar v. Gigmania, Ltd.*,[85] where the court refused to enforce the terms of an online license agreement because the link to it was hard to read. Notably, that court did not rule that the license agreement was unenforceable, only that the website did not give users adequate notice of it. In *Register.com v. Verio, Inc.*,[86] the Second Circuit found that Verio's continued use of Register.com's WHOIS database constituted consent to Verio's terms of use, expressly rejecting Verio's argument that they were not enforceable because the user had not clicked an "I agree" icon. Finally, in *Ticketmaster Corp. v. Tickets.com, Inc.*, [87] Ticketmaster claimed that Tickets.com's use of automated search software violated Ticketmaster's terms of use. Tickets.com used information obtained through its search

[82] *See* www.jstor.org/about/terms.html; www.starwoodhotels.com/corporate/terms_conditions.html; www.ge.com/en/ge/gl_terms.htm.
[83] Mark Lemley has argued that enforcement of browsewraps should be limited to sophisticated commercial entities who are repeat players. *See* Mark A. Lemley, *Terms of Use*, (SSRN).
[84] 306 F 3d 17 (2d Cir. 2002).
[85] 170 F. Supp. 2d 974 (2000).
[86] 356 F.3d 393 (2d Cir., 2004).
[87] Ticketmaster Corp. v. Tickets.com, Inc. No. CV99-7654-HLH(VBKx), 2003 U.S. Dist. Lexis 6483 (C.D. Cal. March 7, 2003).

software to provide "deep links" from its website to Ticketmaster's event listings, thus enabling Tickets.com users to bypass Ticketmaster's homepage. A prominent notice on Ticketmaster's website stated that by proceeding beyond the home page, the user had accepted the terms of use. The court agreed, ruling that a contract could be formed, simply by proceeding to Ticketmaster's interior web pages "after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so."[88]

B. Balancing Individual Autonomy with Business Interests

Although licenses are analyzed by courts as contracts, traditional contract doctrine often fails to explain the wide range of judicial decisions. In fact, courts often strain against the constraints of contract law, and the requirements of notice and assent, in order to enforce the terms of a shrinkwrap or browsewrap agreement that pass the test of reasonableness but fail on the issue of formation. In *ProCD*, for example, Judge Easterbrook found mutual assent to enter into the shrinkwrap agreement, even though logically, how could one enter into a contract without even knowing of its existence?

Clickwrap agreements, although often lumped together with browsewrap and shrinkwrap agreements, are less troubling from a doctrinal perspective in that they require a manifestation of consent (albeit blanket consent) by the user. In reality, however, this distinction is one without a difference. While the licensee's click manifests

[88] In a previous decision on the case, the court ruled that merely posting terms and conditions on a website does not create a contract unless the user had actual knowledge of the contract terms. *Ticketmaster Corp. v. Ticket.com, Inc.*, No. CV99-7654-HLH(BQRx), 2000 U.S. Dist. Lexis 12987 (Cal. Aug. 10, 2000), *aff'd* without opinion 248 F.3d 1173 (9th Cir., 2001).

assent to the transaction and to the contractual relationship, often the user does not read – and therefore, cannot actually assent to -- the contractual terms themselves[89]. The cases governing non-negotiated software licenses frame the issue as one of contract formation. Yet, to understand the wide range of judicial opinions, it is necessary to move beyond a discussion of contract doctrine and examine the business environment in which these licenses were created. As the court in *Step-Saver Data Systems, Inc. v. Wyse Technology* noted in discussing shrinkwrap licenses:

> When these form licenses were first developed for software, it was, in large part, to avoid the federal copyright law first sale doctrine…Because of the ease of copying software, software producers were justifiably concerned that companies would spring up that would purchase copies of various programs and then lease those to consumers. Typically, the companies, like a videotape rental store, would purchase a number of copies of each program, and then make them available for over-night rental to consumers. Consumers, instead of purchasing their own copy of the program would simply rent a copy of the program, and duplicate it. This copying by the individual consumers would presumably infringe the copyright, but usually it would be far too expensive for the copyright holder to identify and sue each individual copier. Thus, software producers wanted to sue the companies that were renting the copies of the program to individual consumers, rather than the individual consumers.
>
> As many commentators have argued, these types of agreements (and form agreements in other industries) provide a societal benefit by facilitating transactions. In other words, they should be enforced not because they manifest the classic signs of

[89] The Second Circuit in *Register.Com, Inc. v. Verio, Inc*, recognized the difference between notice as a prerequisite to performance and the dubious need for expressions of assent when it stated that "(t)here is a crucial difference between the circumstances of *Specht*, where we declined to enforce Netscape's specified terms against a user of its software because of inadequate evidence that the user had seen the terms when downloading the software, and those of *Ticketmaster*, where the taker of information from Ticketmaster's site knew full well the terms on which the information was offered but was not offered an icon marked "I agree," on which to click. Under the circumstances of *Ticketmaster, we see no reason why the enforceability of the offeror's terms should depend on whether the taker states (or clicks) "I agree."….We recognize that contract offers on the Internet often require the offeree to click on an "I agree" icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of a contract. But not in all circumstances."*

bargaining, but because they are good for society, and are generally not harmful to the licensee. As Easterbrook notes in *ProCD*,

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

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

A more palatable explanation of the rationale underlying *ProCD* and other cases upholding contracts "formed" without notice, is that there is little harm in enforcing the contractual term. While actual assent may be missing, the consumer's assent can be presumed because the consumer *would have agreed to the term if he or she had actually read it* or else the licensor *would not have permitted the transaction at all.* In nearly all the cases upholding the terms of a non-negotiated software license, the licensor was suing because the licensee was using the software or product in a manner expressly prohibited by the licensor, not because the licensor wished to enforce an affirmative obligation term (such as payment of additional money). The courts, while using the language of contract law, were deferring to the ownership concepts of property. If I decide to sell my car to you, I no longer have the right to tell you what to do with it. If I lease my car to you, however, it remains mine and I should therefore have the ability to set parameters on your use. If I own a store, your presence is permitted unless I decide to kick you out. If you purchase an item of clothing from my store, your ability to return it is subject to my policy on exchanges and refunds.

The courts must use the language of contracts because the contract is the vehicle by which the license is made, but it is the transfer of (some) rights that affects the analysis of the contract. If, for example, the shrinkwrap license is not enforceable as a contract due to lack of assent, then the licensor has lost control over his or her ownership of the property. If you then decide to use the data stored in my software to undermine my business, I am helpless to stop you. Although I do not have an obligation to provide you with the data in the first place, if I do, you will be able to use it in a manner that hurts my business unless I can protect myself with the only means available – a contract. Without a legal right to stop you from using the software to my detriment, there is then no economic incentive for me to develop and distribute it in the first place.[90] The intangible nature of the product, that is not the disc itself but the information contained therein, makes the need for contract enforcement – the tangible quality of the words on the page or on the website – more compelling. If you use my website to provide deeplinks from your website, thereby undermining my business, I cannot stop you unless I have a contractual right to do so. Unlike in the real world, I can't kick you out of my store or repossess the car. The only method of enforcement available to me is afforded by contract.

Generally, the court decisions in this area recognize the technology provider's dilemma and, in the interests of furthering economic efficiency and facilitating business, have enforced these agreements – at least, where there has been notice.[91] Often, notice

[90]*See generally* Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 941 (2005) See also Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L. J. 479, 496-499 (1995) (discussing why licensors may feel the need to include particular provisions that track the Copyright Act).

91In ProCD v. Zeidenberg, supra note XXX, for example, the court addressed the realities of the way business is conducted in the software industry:

has been interpreted as an "opportunity to read," even where such opportunity was in practicality, fictitious. The decisions, however, reveal that the lack of notice and an opportunity to read prior to the transaction does not necessarily render an agreement invalid;[92] a particular provision, however, should not be enforced until the licensor has

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> Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer pay place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with Byte-Pusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms--so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age. *Id*. at 1452.

92 The court in ProCD v. Zeidenberg, supra note XXX, for example, noted that in certain industries, transactions in which the exchange of money precedes detailed terms is common and requiring consumers to actually sign contractual terms would result in higher prices and greater inconvenience:

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

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the U.C.C. in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information--but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract." *Id*. at 1451.

The court in Pollstar v. Gigmania. Ltd.170 F.Supp. 2d 974 (2000), cited to the ProCD court's rationale, concluding that "(w)hile the court agrees with Gigmania that the user is not immediately confronted with the notice of the license agreement, this does not dispose of Pollstar's breach of contract claim. Taking into consideration the examples provided by the Seventh Circuit – showing that people sometimes enter into a contract by using a service without first seeing the terms – the browser wrap agreement may be arguably valid and enforceable." *Id*. at 982. *See also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir., 1997).

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

For example, in *Register.com v. Verio, Inc.*,[93] the defendant Verio sold a variety of web site design, development and operation services which competed with the plaintiff Register.com's web site development business. Verio obtained daily updates of information from Register.com's computers relating to newly registered domain names via an automated software program. Verio's practice of email solicitations to those registered names was inconsistent with the terms of the restrictive legend Register attached to its responses to Verio's queries. Some of the recipients of Verio's solicitations believed they were coming from Register (or an affiliate), and was sent in violation of the registrant's election not to receive solicitations from Register.[94] When Register sent Verio a cease and desist letter, it refused. Verio claimed that it never became contractually bound to the conditions imposed by Register's restrictive legend because, in the case of each query Verio made, the legend did not appear until after Verio had submitted the query and received the WHOIS data.[95] Verio contended that it did not receive legally enforceable notice of the conditions Register intended to impose and therefore, should not be deemed to have taken WHOIS data from Register's systems subject to Register's conditions. The court rejected Verio's argument, stating that:

> Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and infrequent. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable

[93] 356 F.3d 393 (2d Cir., 2004).
[94] *Id*. at 396-97.
[95] *Id*. at 401.

> force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument fails.[96]

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

> The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples - 50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money. P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.[97]

In other words, the licensee's claim of "lack of notice" is disingenuous, not because it had such notice at the time the transaction was entered into, but because it

[96] *Id*.

subsequently had notice and chose not to comply with such terms. Similarly, in *ProCD v. Zeidenberg*, the defendant was being sued for using the ProCD data in a manner that the defendant knew was contrary to the licensor's business model given the pricing differential of the commercial and non-commercial versions of the product. As the owner of the software, the licensor has the right to establish the way in which his or her property may be used and how it might price its product. Zeidenberg had no independent right to use that software, and is only permitted to do so pursuant to a license granted by ProCD. The issue of whether Zeidenberg actually assented to the scope of license terms is irrelevant; what *is* relevant is that he knew what they were when he engaged in the prohibited behavior. While Zeidenberg is not obligated to act in accordance with such terms until he becomes aware of them, once he becomes aware of the terms of use, he is bound by them. The same is not true if the provisions impose an affirmative obligation or deprive the licensee of a legal right. ProCD, as licensor, cannot force Zeidenberg to perform affirmative acts (such as start a business promoting ProCD's products) via a shrinkwrap license; it can, however, determine the scope of the license granted to Zeidenberg. Zeidenberg, in purchasing the software, is buying only a limited right to use the software without being sued by the actual owner – ProCD – and that permission is granted contingent upon the terms of use contained in the license. The grant of that permission, however, cannot diminish Zeidenberg's preexisting legal rights. Returning to the car leasing analogy, if I let you lease my car, I can set the parameters of your use. If you don't abide by my wishes, I can take away your right to use my car. If you are not aware of my conditions – for example, that I don't want you to smoke in my car – you can smoke until I find out about it and tell you to stop. You cannot continue to smoke in

[97] *Id*.

my car knowing that I don't want you to because it is, afterall, my car. Nor can I make you pay for cleaning the car to rid it of the odor of smoke unless you knew beforehand that smoking was prohibited. I can impose conditions of use, but you must actually be aware of them before I can enforce them against you or sue you for non-compliance. And while I can impose conditions of use upon you, I can't impose affirmative obligations upon you that are unrelated to how you use my car. For example, I can't make you pay for a tune-up after you have borrowed the car, unless you knew about it beforehand and agreed to that requirement.

C. Sample License Analysis

The key issue with all three types of agreement is not whether a contract has been *formed* but what are the enforceable terms of that contract? This Article argues that those terms that are part of the contract include those to which the licensee has *actually* assented, and those pertaining to the scope of license or terms of use which do not impose affirmative obligations or deprive the licensee of legal rights. What happens then in the event that a non-negotiated license agreement contains affirmative obligation terms unrelated to the scope of the license to which the licensee has not actually assented?

I have applied my methodology to a sample shrinkwrap license agreement which contains many of the provisions found to be standard in such agreements. In bold, I have indicated how my proposed methodology would be applied in determining the enforceability of the agreement:

SAMPLE LICENSE AGREEMENT

By opening this package and installing the product, you are consenting to be bound by this License. If you do not agree to all of the terms of this License, return the product to the place of purchase for a full refund within thirty (30) days. **[This provision imposes an affirmative obligation upon the licensee and would not be enforceable because there is no actual assent].**

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[98] In Davidson & Associates v. Jung, *supra* note XXX, the appellants were able to create an alternative online gaming system by reverse engineering. While the court in that case upheld the prohibition against reverse engineering contained in the contract, under the approach proposed in this Article, such a prohibition would require actual assent. The appellants in Davidson & Associates, however, would still be prohibited from the infringing activity under the Digital Millenium Copyright Act which prohibits a person from circumventing a technological measure that controls copyrighted protected works. *See* Davidson & Associates v. Jung, *supra* note XXX, at 639-642.

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INDEMNITY

Licensee agrees to indemnify Licensor for any third-party claims arising out of misuse, infringing use, or other illegal use of Software. [**This provision uses language that appears to impose an affirmative obligation upon the Licensee.[104] Ordinarily, the Licensee would be liable for any infringement caused by her misuse; however, she would not be obligated to indemnify the Licensor against all claims filed against the**

[99] Section 2A-212 states that "…a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind." Section 2A-211 of the revised Uniform Commercial Code states that "a merchant regularly dealing in goods of the kind warrants that the goods will be delivered free of the rightful claim of a third party by way of infringement or the like."

[100] *See* U.C.C. 2A-214.

[101] The revised Section 2A-214 requires that in a consumer lease, the following specific language must be utilized in order to disclaim the implied warranty of merchantability, "The lessor undertakes no responsibility for the quality of the goods except as otherwise provided in this contract." In order to disclaim all implied warranties of fitness in a consumer lease, the contract must include the following: "The lessor assumes no responsibilities that the goods will be fit for any particular purpose for which you may be leasing these goods, except as otherwise provided in the contract." *Id.*

[102] Section 2A-211 provides that "(a) warranty under this section may be excluded or modified only by specific language that is conspicuous and contained in a record…." Revised U.C.C.. Section 2A-214 requires that warranty disclaimers must "be in a record and conspicuous." It further acknowledges that limitations of liability may be valid. See section 2A-214(4): "Remedies for breach of warranty may be limited in accordance with this article with respect to liquidation or limitation of damages and contractual modification of remedy." Warranties are relevant in determining whether there has been a contractual breach; limitations of liability determine the nature and extent of the remedy. Section 2A-503 addresses remedies and expressly provides that "the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article."

[103] Section 2A-503(2).

[104] The provision is poorly drafted; although the language can be interpreted as "any misuse" by any person, the more reasonable interpretation of this provision would likely construe the misuse to have been conducted by Licensee.

Licensor. Because the provision imposes an affirmative obligation upon the Licensee, it would not be part of the agreement between the parties without actual assent. As a practical matter, a third party suing the Licensor on the basis of misuse by Licensee would have to prove the Licensor's involvement, whether by passive knowledge or active assistance].

GOVERNING LAW

This License shall be governed by and construed in accordance with the substantive laws in force in the State of California. Licensee agrees that all claims shall be subject to binding arbitration under the rules of the AAA. This License constitutes the entire agreement between the parties with respect to use of the Software and supersedes any previous agreements. [**This provision restricts the Licensee's ability to bring a law suit. This provision is enforceable if the Licensee actually assented to it. If it did not, then assent cannot be presumed. The court would then refer to the Magnuson Moss Warranty Act which permits informal dispute resolution procedures provided they conform to certain requirements].**[105]

III. CONCLUSION

The question of whether the owner of a product can sell the product is different from whether the owner *must* sell it. The owner of the intellectual property rights to software code may be free to sell copies of its software but, for whatever reason, may wish to license copies instead. Licensors may fear that the manipulability of software makes it susceptible to infringers who may be difficult to locate and control. Those who claim that a producer of software is adequately protected by patent law ignore that many software producers do not file patents because they are reluctant to reveal source code. I do not wish to resolve in this Article whether a licensor's fears of infringement are legitimate; my Article assumes that they are. Regardless of whether this fear is well-founded, owners of intellectual property should be permitted to establish the parameters of their business. The freedom to do so, however, is subject to the preexisting rights of the licensee. The courts have used the language of contract law to uphold non-negotiated

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

[105] MAGNUSON MOSS WARRANTY ACT, Sections 703.1-703.5.