

## Article

### Terms of Use

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Electronic contracting has experienced a sea change in the last decade. Ten years ago, courts required affirmative evidence of agreement to form a contract. No court had enforced a “shrinkwrap” license,<sup>1</sup> much less treated a unilateral statement of preferences as a binding agreement. Today, by contrast, more and more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract even if no one agrees to it. Every court to consider the issue has found “clickwrap” licenses, in which an online user clicks “I agree” to standard form terms, enforceable.<sup>2</sup> A majority of courts in the last ten

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1. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1248–53 (1995) [hereinafter Lemley, *Intellectual Property*] (cataloguing cases).

2. See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 781–83 (N.D. Tex. 2006); *Salco Distributions, L.L.C. v. iCode, Inc.*, No. 8:05-CV-642-T-27TGW, 2006 WL 449156, at \*2 (M.D. Fla. Feb. 22, 2006); *Mortgage Plus, Inc. v. DocMagic, Inc.*, No. 03-2592, 2004 WL 2331918, at \*4–5 (D. Kan. Aug. 23, 2004); *i-Systems, Inc. v. Softwares, Inc.*, No. Civ. 02-1951(JRT/FLN), 2004 WL 742082, at \*6 (D. Minn. Mar. 29, 2004); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 451–52 (E.D.N.Y. 2004) (enforcing a forum selection clause not initially visible in a clickwrap agreement); *i.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 330–31 (D. Mass. 2002); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532–33 (N.J. Super. Ct. App. Div. 1999); cf. *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C-98-20064JW, 1998 WL 388389, at \*3–9 (N.D. Cal. Apr. 16, 1998) (assuming such an agreement was enforceable without discussing the issue).

years have enforced shrinkwrap licenses, on the theory that people agree to the terms by using the software they have already purchased.<sup>3</sup> Finally, and more recently, an increasing number of courts have enforced “browsewrap” licenses, in which the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.<sup>4</sup> Collectively, I call shrinkwrap, clickwrap, and browsewrap licenses “terms of use,” because they control (or purport to control) the circumstances under which buyers of software or visitors to a public Web site can make use of that software or site.

The rise of terms of use has drawn a great deal of attention because of the mass-market nature of the resulting agreements. Companies draft terms of use with mass market transactions—and therefore with consumers or other small end us-

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3. *ProCD* was the first decision to enforce a shrinkwrap license. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448–49 (7th Cir. 1996). A number of courts before that time had refused to enforce them. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 102–03 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268–70 (5th Cir. 1988); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 763–66 (D. Ariz. 1993); cf. *Foresight Res. Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1009–10 (D. Kan. 1989) (dictum). Since *ProCD*, a majority of courts have enforced shrinkwrap licenses. See *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323–25 (Fed. Cir. 2003); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1106–07 (E.D. Cal. 2006); *Info. Handling Servs., Inc. v. LRP Publ'ns, Inc.*, No. Civ.A. 00-1859, 2000 WL 1468535, at \*2 (E.D. Pa. Sept. 20, 2000); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1090–91 (N.D. Cal. 2000); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 311–13 (Wash. 2000); cf. *Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc.*, 421 F.3d 981, 986–88 (9th Cir. 2005) (enforcing a notice of terms printed on the outside of a box and read before purchase, but distinguishing cases in which the terms weren't available until after purchase).

Nonetheless, a significant number of courts continue to refuse to enforce shrinkwrap licenses. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000); *Novell, Inc. v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1230–31 (D. Utah 1997), *vacated in part*, 187 F.R.D. 657 (D. Utah 1999); cf. *Morgan Labs., Inc. v. Micro Data Base Sys., Inc.*, No. C96-3998TEH, 1997 WL 258886, at \*4 (N.D. Cal. Jan. 22, 1997) (refusing to allow a shrinkwrap license to modify a prior signed contract).

4. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428–30 (2d Cir. 2004); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at \*1–2 (C.D. Cal. Mar. 7, 2003); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000); cf. *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C04-04825JW, 2005 WL 756610, at \*5 (N.D. Cal. Apr. 1, 2005) (enforcing a forum selection clause in a browsewrap while purporting not to rule on the enforceability of the browsewrap itself).

ers—in mind. Commentators—including myself—have focused on the impact of this new form of contract on consumers.<sup>5</sup> But

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5. Innumerable sources discuss this topic. See, e.g., Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 525–34 (1997); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 136–44 (1999) [hereinafter Lemley, *Beyond Preemption*]; Lemley, *Intellectual Property*, *supra* note 1, at 1274–92; Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1612–13 (1995) (suggesting that shrinkwrap license terms should be preempted when there is sufficient uniformity in the industry that the terms in effect amount to “private legislation” by software vendors); Maureen A. O’Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 56–77 (1997); Maureen A. O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 517–41 (1995); David A. Rice, *Public Goods, Private Contract, and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543, 602–05 (1992); Ramona L. Paetzold, Comment, *Contracts Enlarging a Copyright Owner’s Rights: A Framework for Determining Unenforceability*, 68 NEB. L. REV. 816, 819–22 (1989); Nathaniel Good et al., *Stopping Spyware at the Gate: A User Study of Privacy, Notice and Spyware 1–10* (July 2005) (working paper, on file with the University of Minnesota Law Review) (explaining that users don’t read End-User License Agreements (EULAs) before downloading programs, but regret it when told what terms those EULAs include); Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements* (N.Y.U. Sch. of Law, Law & Econ. Research Paper Series, Working Paper No. 05-10, 2005), available at <http://ssrn.com/abstract=799282>; Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements* (N.Y.U. Sch. of Law, Law & Econ. Research Paper Series, Working Paper No. 05-11, 2005), available at <http://ssrn.com/abstract=799274>.

For criticism of *ProCD* on contract law grounds, see, for example, Michael J. Madison, *Legal Ware: Contract and Copyright in the Digital Age*, 200 FORDHAM L. REV. 1025, 1049–54 (1998); Jason Kuchmay, Note, *ProCD, Inc. v. Zeidenberg: Section 301 Copyright Preemption of Shrinkwrap Licenses—A Real Bargain for Consumers?*, 29 U. TOL. L. REV. 117, 137–46 (1997); Kell Corrigan Mercer, Note, *Consumer Shrink-Wrap Licenses and Public Domain Materials; Copyright Preemption and Uniform Commercial Code Validity in ProCD v. Zeidenberg*, 30 CREIGHTON L. REV. 1287, 1296–97 (1997); Apik Minassian, Note, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569, 583–86 (1997); Robert J. Morrill, Comment, *Contract Formation and the Shrink Wrap License: A Case Comment on ProCD, Inc. v. Zeidenberg*, 32 NEW ENG. L. REV. 513, 537–50 (1998); Christopher L. Pitet, Comment, *The Problem With “Money Now, Terms Later”*: *ProCD, Inc. v. Zeidenberg and the Enforceability of “Shrinkwrap” Software Licenses*, 31 LOY. L.A. L. REV. 325, 345–47 (1997); Stephen P. Tarolli, Comment, *The Future of Information Commerce Under Contemporary Contract and Copyright Principles*, 46 AM. U. L. REV. 1639, 1647–48 (1997).

For criticism of *ProCD* on copyright preemption grounds, see Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 106–13 (1997); Charles R. McManis, *The Privatization (or “Shrink-Wrapping”) of American Copyright Law*, 87 CAL. L. REV. 173, 173–75

in the long run, terms of use may have their most significant impact not on consumers, but on businesses. The law has paid some attention to the impact of terms of use on consumers: virtually all of the courts that have refused to enforce a browsewrap license have done so to protect consumers.<sup>6</sup> Conversely, virtually all the courts that have enforced browsewrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license.<sup>7</sup> Further, those courts

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(1999); Brian Covotta & Pamela Sergeeff, Note, *ProCD, Inc. v. Zeidenberg*, 13 BERKELEY TECH. L.J. 35, 41–49 (1998); Thomas Finkelstein & Douglas C. Wyatt, Note, *Shrinkwrap Licenses: Consequences of Breaking the Seal*, 71 ST. JOHN'S L. REV. 839, 868–69 (1997); Jennett M. Hill, Note, *The State of Copyright Protection for Electronic Databases Beyond ProCD v. Zeidenberg: Are Shrinkwrap Licenses a Viable Alternative for Database Protection?*, 31 IND. L. REV. 143, 165–72 (1998); Mercer, *supra*, at 1331–44; Minassian, *supra*, at 592–601; Tarolli, *supra*, at 1652–56; Brett L. Tolman, Note, *ProCD, Inc. v. Zeidenberg: The End Does Not Justify the Means in Federal Copyright Analysis*, 1998 BYU L. REV. 303, 318–28 (1998); Note, *Contract Law—Shrinkwrap Licenses—Seventh Circuit Holds That Shrinkwrap Licenses Are Enforceable—ProCD, Inc. v. Zeidenberg*, 110 HARV. L. REV. 1946, 1950–51 (1997).

For arguments endorsing the result in *ProCD*, see Darren C. Baker, Note, *ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 NW. U. L. REV. 379, 400–06 (1997); Brandon L. Grusd, Note, *Contracting Beyond Copyright: ProCD, Inc. v. Zeidenberg*, 10 HARV. J.L. & TECH. 353, 361–66 (1997); Michael A. Jaccard, Note, *Securing Copyright in Transnational Cyberspace: The Case for Contracting with Potential Infringers*, 35 COLUM. J. TRANSNAT'L L. 619, 645–48 (1997); Jerry David Monroe, Comment, *ProCD, Inc. v. Zeidenberg: An Emerging Trend in Shrinkwrap Licensing?*, 1 MARQ. INTELL. PROP. L. REV. 143, 159–64 (1997); Joseph C. Wang, Casenote, *ProCD, Inc. v. Zeidenberg and Article 2B: Finally, the Validation of Shrinkwrap Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 439, 442 (1997).

6. See, e.g., *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 556–57 (1st Cir. 2005) (noting that an employer could not make a policy a provision of an employment agreement merely by posting it on the employee intranet); *Waters v. Earthlink, Inc.*, 91 F.App'x 697, 698 (1st Cir. 2003) (refusing to enforce an arbitration clause posted on a Web site in the absence of proof the consumer had seen the clause); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35–38 (2d Cir. 2002) (refusing to enforce browsewrap against consumers). One partial exception to this statement is *Dyer v. Northwest Airlines*, 334 F. Supp. 2d 1196, 1199–1200 (D.N.D. 2004), which held that a privacy policy posted on a Web site was not enforceable as a contract against the posting company. It is worth noting that in *Dyer* the plaintiffs brought a consumer class action suit and could not demonstrate even that their members had accessed the site in question. *Id.*

7. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428–30 (2d Cir. 2004); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C04-04825JW, 2005 WL 756610, at \*5 (N.D. Cal. Apr. 1, 2005); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at \*1–2 (C.D. Cal. Mar. 7, 2003); cf. *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (refusing to rule that browsewraps were unenforceable on a motion to dismiss).

that have enforced shrinkwrap and clickwrap licenses against consumers have protected consumers against certain clauses considered unreasonable.<sup>8</sup> However, courts presume that businesses know what they are doing when they access another company's Web site and are therefore more likely to bind them to that site's terms of use. Sophisticated economic entities are unlikely to persuade a court that a term is unconscionable.<sup>9</sup> And, because employees are agents whose acts bind the corporation, the proliferation of terms of use means that a large company likely "agrees" to dozens or even hundreds of different contracts every day, merely by its employees using the Internet. Since people rarely read the terms of use,<sup>10</sup> those multiple contracts likely contain a variety of different terms that may create obligations inconsistent with each other and with the company's own terms of use.

We faced a situation like this before, decades ago. As business-to-business commerce became more common in the middle of the twentieth century, companies began putting standard contract terms on the back of their purchase orders and shipment invoices. When each party to a contract used such a form,

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8. For example, courts have been unwilling to enforce onerous arbitration and choice of forum clauses against consumers, even when the consumer agreed to a standard form imposing such requirements. *See infra* notes 61–62, 65–71 and accompanying text. And the Uniform Computer Information Transactions Act (UCITA) forbids the use of electronic self-help in mass market transactions, even if the parties agree otherwise. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 816 (2001).

9. *See* Amy J. Schmitz, *Unconscionability's Fight for Fairness* 26 (2005) (working paper, on file with the University of Minnesota Law Review) (studying the use of unconscionability in courts and finding that most courts reject such claims); *cf.* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION § 29.4, at 392 (2002) ("Most claims of unconscionability fail.").

10. *See, e.g.*, *Straus v. Victor Talking Machs. Co.*, 243 U.S. 490, 501 (1917) ("[N]ot one purchaser in many would read such a notice, and . . . not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose."); Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 512–22 (2004). Indeed, the fact that these forms are never read is so notorious that one company, PC Pitstop, actually promised in its terms of use to pay money to anyone who read them and wrote in, and it was months before anyone noticed the term and collected a check. *See* Larry Magrid, *It Pays to Read License Agreements*, PC PITSTOP, <http://www.pcpitstop.com/spycheck/eula.asp> (last visited Nov. 6, 2006). Who knows if the story is apocryphal, but the fact that it seems plausible makes my point.

courts had to confront the question of whose terms controlled. After unsuccessful judicial experimentation with a variety of rules,<sup>11</sup> the Uniform Commercial Code (U.C.C.) resolved this “battle of the forms” by adopting a compromise: if the terms conflict, neither party’s terms become part of the contract unless a party demonstrates its willingness to forego the deal over it.<sup>12</sup> Rather, the default rules of contract law apply where the parties’ standard forms disagree, but where neither party insists on those terms.

I have three goals in this Article. First, I explain how courts came to enforce browsewrap licenses, at least in some cases. Second, I suggest that if courts enforce browsewraps at all, enforcement should be limited to the context in which it has so far occurred—against sophisticated commercial entities who are repeat players. Finally, I argue that even in that context, the enforcement of browsewraps creates problems that need to be resolved. Business-to-business (b2b) terms of use are the modern equivalent of the battle of the forms. We need a parallel solution to this “battle of the terms.” In Part I, I describe the development of the law to the point where assent is no longer even a nominal element of a contract. In Part II, I explain how recent decisions concerning browsewrap licenses likely bind businesses but not consumers, and the problems that that disparity will create for commercial litigation. Finally, in Part III I discuss possible ways to solve this emerging problem and some broader implications the problem may have for browsewrap licenses generally.

## I. THE DEATH OF ASSENT

Assent by both parties to the terms of a contract has long been the fundamental principle animating contract law.<sup>13</sup> In-

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11. For the history of the battle of the forms and the “mirror image” and “last shot” rules that preceded it, see E. ALLAN FARNSWORTH, *CONTRACTS* § 3.21 (1990). For an academic discussion of the battle of the forms, see, for example, Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1253–55 (1982); Victor P. Goldberg, *The “Battle of the Forms”: Fairness, Efficiency, and the Best-Shot Rule*, 76 OR. L. REV. 155, 158–65 (1997); John E. Murray, Jr., *The Definitive “Battle of the Forms”: Chaos Revisited*, 20 J.L. & COM. 1, 11 (2000).

12. U.C.C. § 2-207(3) (2003).

13. See *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002) (“Promises become binding when there is a meeting of the minds and consideration is exchanged. So it

deed, it is the concept of assent that gives contracts legitimacy and distinguishes them from private legislation. But in today's electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms.<sup>14</sup> The result, as Peggy Radin has put it, is "to move the word consent far from what it used to mean, and far from what it has meant in the political, legal, and social understanding of the institution of contract."<sup>15</sup>

#### A. STANDARD FORM CONTRACTS

The disintegration of assent results from the confluence of three different elements in the online environment. The first is the ease with which electronic contracting permits the imposition of standard form contracts on a large, anonymous mass of users. Anyone can now "contract" with those she encounters online by merely drafting a legal form and seeking whatever assent to that form the courts require.<sup>16</sup> Standard form contracts have been with us for decades,<sup>17</sup> and they can serve useful purposes in reducing transaction costs in mass-market, repeat-play settings.<sup>18</sup> In the online environment, these standard-

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was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today."). The U.C.C. defines a contract as the "legal obligation which results from the parties' agreement." U.C.C. § 1-201(11) (2003); *see also* FARNSWORTH, *supra* note 11, § 3.1.

14. Others have observed this as well. *See, e.g.*, Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1246 (2006); *cf.* Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 69 LAW & CONTEMP. PROBS. (forthcoming 2006) (analogizing such agreements to chattel servitudes disfavored in real property law).

15. Margaret Jane Radin, *Machine Rule: The Latest Challenge to Law* 28 (Jan. 31, 2005) (unpublished manuscript, on file with the University of Minnesota Law Review).

16. Indeed, even lawyers' fees are no longer an obstacle: you can buy your very own terms of use for a Web site ("[f]or use in all states") for just \$8.99 from FindLegalForms.com. *See* FindLegalForms.com, Terms of Use Agreement, <http://www.findlegalforms.com/xcart/customer/product.php?productid=28151> (last visited Nov. 6, 2006).

17. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983).

18. *See, e.g.*, ANTHONY KRONMAN & RICHARD POSNER, *THE ECONOMICS OF CONTRACT LAW* 73 (1979); Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1067 (2006); Baird & Weisberg, *supra* note 11, at

form agreements take the form of clickwrap licenses—agreements that visitors to a Web site sign electronically by clicking “I agree” to a standard set of terms. Clickwraps put some pressure on the classical notion of assent derived from bargained agreements, because they substitute a blanket, take-it-or-leave-it assent for the classical notion that the parties actually thought about and agreed to the terms of the deal.

Offline, such agreements are not all that common, in part because it is too much effort to get consumers to sign the standard forms. While they do exist in many contexts—renting cars is an oft-used example—most consumer transactions do not involve any written contract with the vendor at all. Merchants and consumers at grocery stores, restaurants, bookstores, clothing stores, and countless other retail outlets seem perfectly able to enter into contracts without a written agreement specifying their rights and obligations. Nonetheless, many of those same retail outlets impose standard form contracts on their online users, probably because it is easier to get someone to click “I agree” as part of an online transaction than it is to have a clerk obtain a signature on a written form.

Because the user has “signed” the contract by clicking “I agree,”<sup>19</sup> every court to consider the issue has held clickwrap licenses enforceable.<sup>20</sup> There is nothing inherently troubling about enforcing clickwrap licenses. Blanket assent to a form contract is still assent, albeit a more attenuated form than the assent that drives contract theory. But the prevalence of such standard form contracts online has arguably conditioned both consumers and courts to expect the retailer to set the terms of

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1253–55; Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 977 (2005).

19. The Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (ESIGN) confirm the general rule that a party can manifest assent in a variety of ways by making it clear that electronic signatures are valid. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(a) (2000); UNIF. ELEC. TRANSACTIONS ACT § 7, 7A U.L.A. 225 (1999).

20. See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 632 (8th Cir. 2005); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) (enforcing a forum selection clause not initially visible in a clickwrap agreement); *i-Sys., Inc. v. Softwares, Inc.*, No. Civ. 02-1951(JRT/FLN), 2004 WL 742082, at \*7 (D. Minn. Mar. 29, 2004); *i.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 329 (D. Mass. 2002); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999); cf. *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C-98-20064JW, 1998 WL 388389, at \*1–9 (N.D. Cal. Apr. 16, 1998) (assuming such an agreement was enforceable without discussing the issue).

the deal in writing, even when there is no similar expectation for parallel transactions offline.

#### B. SHRINKWRAP LICENSES

The growing judicial acceptance of shrinkwrap licenses has further undermined classical notions of assent. These licenses, common in the pre-packaged sale of physical copies of software in the 1980s and 1990s, included a license packaged within the shrinkwrap or loaded on the computer and provided that breaking the shrinkwrap or running the program constituted acceptance of the terms of the contract.<sup>21</sup> At least in the classic shrinkwrap license, the user never clicks or signs an agreement to any such terms.<sup>22</sup> Rather, the theory of the shrinkwrap license is that the user manifests assent to those terms by engaging in a particular course of conduct that the license specifies constitutes acceptance.

So-called “unilateral” contracts accepted by performance, while rare in the offline world, are not unheard of.<sup>23</sup> Two things make shrinkwrap licenses different, and more troubling, than traditional unilateral contracts. First, the user does not receive the contract terms until after she has shelled out money for the product. While some software products have a notice that terms are included inside, others do not, and in any event we do not generally think of necessary terms to an agreement being available only after the consumer has made the decision to purchase. In theory, shrinkwrap licenses solve this problem by permitting the buyer to return the software for a full refund, though that option is sufficiently inconvenient as to be impractical<sup>24</sup> and in any event turns out in practice to be illusory: software vendors and retail stores generally refuse to accept

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21. For background and history of shrinkwrap licenses, see Lemley, *Intellectual Property*, *supra* note 1, at 1239.

22. *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), discussed *infra*, was different, because Zeidenberg actually had to click “I accept” when faced with the terms, albeit only after he had loaded the software on his computer. *Id.* at 1450.

23. See, e.g., Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 551 (1983).

24. A partial exception is the UCITA, in force only in Virginia and Maryland, which provides that to be enforceable a shrinkwrap license must compensate the user for the costs of return. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 208 cmt. 6 (2001).

software returned under those conditions.<sup>25</sup> Second, the specified conduct that indicates acceptance is the opening of a package and the loading of software the consumer has already paid for—precisely the conduct one would expect the user to engage in if she had been unaware of the shrinkwrap license. Unlike a typical unilateral contract, in which one party accepts an offer by engaging in conduct that unmistakably indicates assent—say, painting my house—the conduct used as evidence of a shrinkwrap contract is hardly unambiguous evidence of assent.

Until 1996, every court to consider the validity of a shrinkwrap license held it unenforceable.<sup>26</sup> The tide began to turn with Judge Easterbrook's 1996 opinion upholding a shrinkwrap license in *ProCD, Inc. v. Zeidenberg*.<sup>27</sup> *ProCD* held Zeidenberg bound to terms he first saw when he loaded ProCD's software into his computer, even though he paid for the software before being made aware of the terms.<sup>28</sup> The court's legal reasoning is certainly questionable. Judge Easterbrook relied on U.C.C. section 2-204, which provides that a contract can be formed in any way the parties agree.<sup>29</sup> But arguably he should have treated the additional terms as a proposed modification to the contract Zeidenberg entered into when he handed money to a store clerk in exchange for a box containing software. Under U.C.C. section 2-209, such proposed new terms can become part of the contract without additional consideration, but not if they make material changes to the contract, as ProCD's terms likely did.<sup>30</sup> *ProCD* also distinguished U.C.C. section 2-207, which deals with the situation of standard forms exchanged by the parties.<sup>31</sup> The court reasoned that section 2-207 could not apply unless the parties exchanged at least two

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25. Any number of people have tried to return software and been refused. For one story that ultimately resulted in a lawsuit and a settlement requiring return, see Ed Foster, *A Fatal Blow to Shrinkwrap Licensing?*, INFO WORLD, Dec. 20, 2004, <http://www.gripe2ed.com/scoop/story/2004/12/20/8257/4850>.

26. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 93 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988); *Ariz. Retail Sys. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993); cf. *Foresight Res. Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1010 (D. Kan. 1989) (dictum) (denying an injunction against a party that made adaptations to software in violation of the terms of the licensing agreement that accompanied the program and questioning the enforceability of such agreements generally).

27. 86 F.3d at 1447–48.

28. *Id.* at 1450–55.

29. *Id.* at 1452.

30. U.C.C. § 2-209 (2003).

31. 86 F.3d at 1452.

forms, an interpretation that finds some support in the language of the section but that leads to the peculiar result that merchant buyers get more protection against a seller's standard form than consumers do.<sup>32</sup> Despite these and other problems,<sup>33</sup> the *ProCD* opinion has proved influential. While a number of courts since 1996 have continued to reject shrinkwrap licenses,<sup>34</sup> still more courts have followed *ProCD* and enforced those licenses.<sup>35</sup>

Both the clickwrap and shrinkwrap cases may have conditioned courts to abandon the idea of assent when it comes to browsewraps. Legally, there is a big difference between a unilateral statement of desires and a statement of terms to which the other party has agreed. But once we have expanded agreement to include clicking on a Web site or engaging in conduct that we would expect the buyer to engage in anyway, it seems only a small step to enforce a unilateral statement of terms. As the argument goes, if we refuse to enforce browsewraps, a site owner will simply impose the same restrictions via clickwrap or shrinkwrap. Since no one reads the latter forms of contract anyway, and owners can include whatever terms they want,<sup>36</sup> it

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32. *Id.* For contrary reasoning regarding section 2-207 and shrinkwrap licenses, see *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 93 (3d Cir. 1991).

33. *ProCD* can also fairly be criticized for refusing even to discuss the issue of Supremacy Clause preemption, an issue briefed by the parties and necessary for the court to resolve in order to reach the result it did, and for playing fast and loose with the facts by assuming that *ProCD* was in fact engaged in price discrimination despite the absence of any evidence in the case that it was willing to sell to competitors at any price.

34. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000); *Novell v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1224 (D. Utah 1997), *vacated in part*, 187 F.R.D. 657 (D. Utah 1999); *Rogers v. Dell Computer Corp.*, 127 P.3d 560, 562 (Okla. 2005), *republished in* 138 P.3d 826, 827 (Okla. 2005); *cf. Morgan Labs., Inc. v. Micro Data Base Sys., Inc.*, No. C96-3998TEH, 1997 WL 258886, at \*2-4 (N.D. Cal. Jan 22, 1997) (refusing to allow a shrinkwrap license to modify a prior signed contract).

35. See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 632 (8th Cir. 2005); *Bowers v. Baystate Techs.*, 320 F.3d 1317, 1320 (Fed. Cir. 2003); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1086 (N.D. Cal. 2000); *Info. Handling Servs., Inc. v. LRP Publ'ns, Inc.*, No. Civ. A. 00-1859, 2000 WL 1468535, at \*1-2 (E.D. Pa. Sept. 20, 2000); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519 (W.D. Pa. 2000); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 307 (Wash. 2000).

36. Examples of the more remarkable terms included in such agreements include: terms that prevent you from deleting a program once you load it on your computer, e.g., *Kontiki Software DRM license* (on file with author); terms that forbid disparaging the seller, e.g., *Microsoft Frontpage 2002 license* (on file with author); terms that forbid benchmarking or reviewing the product,

seems a sort of formalism to require them to go through the effort of requiring some weak manifestation of assent.

### C. WEB SITES AS PROPERTY

The final nail in the online assent coffin is the overlap between contract claims and concepts of property. The fact that almost all of the Internet cases to enforce a browsewrap come up in the property/trespass context<sup>37</sup> inclines courts to take real property rules and apply them to contract law. I don't need agreement to my "no-trespassing" sign in the physical world: I only need to give notice of my desire to enforce the property rights the law has already given me. So perhaps it's not surprising that the courts in this context make the seemingly small jump to concluding the same is true of contract law. If I told you what I wanted you to do (or not to do) with my Web site, and you did something different, you must have breached the agreement that allowed you to come onto the site.

The problem is that the shift from property law to contract law takes the job of defining the Web site owner's rights out of

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e.g., Network Associates VirusScan license (on file with author); and my personal favorite, which speaks for itself:

Should you fail to register any of the evaluation software available through our web pages and continue to use it, be advised that a leather-winged demon of the night will tear itself, shrieking blood and fury, from the endless caverns of the nether world, hurl itself into the darkness with a thirst for blood on its slavering fangs and search the very threads of time for the throbbing of your heartbeat. Just thought you'd want to know that. Alchemy Mindworks accepts no responsibility for any loss, damage or expense caused by leather-winged demons of the night, either.

Alchemy Mindworks, <http://www.mindworkshop.com/alchemy/alchemy6.html> (last visited Nov. 6, 2006); cf. I Luv Video Register Agreement, [http://web.archive.org/web/20050311083818/http://www.salguod.com/blog/archives/2004/12/people\\_will\\_sig.html](http://web.archive.org/web/20050311083818/http://www.salguod.com/blog/archives/2004/12/people_will_sig.html) (last visited Nov. 6, 2006) ("I hereby surrender my soul for all eternity to the clerks at I Luv Video and will become part of their legion of zombies.").

37. Indeed, all four cases to enforce a browsewrap involved allegations of a competitor linking to or scraping data from the Web site, and included allegations of trespass to chattels and other torts as well. See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 393 (2d Cir. 2004); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C04-04825JW, 2005 WL 756610, at \*1 (N.D. Cal. Apr. 1, 2005); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at \*1 (C.D. Cal. Mar. 7, 2003); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 975 (E.D. Cal. 2000). This fact may also explain the otherwise surprising application of criminal statutes against computer hacking to enforce terms of use attached to Web sites. See Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1597 (2003).

the hands of the law and into the hands of the site owner. Property law may or may not prohibit a particular “intrusion” on a Web site,<sup>38</sup> but it is the law that determines the answer to that question. The reason my “no-trespassing” sign is effective in the real world is not because there is any sort of agreement to abide by it, but because the law already protects my land against intrusion by another. If the sign read “no walking on the road outside my property,” no one would think of it as an enforceable agreement. If we make the conceptual leap to assuming that refusing to act in the way the site owner wants is

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38. There is a vibrant debate among courts on this point. *Compare* Oyster Software, Inc. v. Forms Processing, Inc., No. C-00-0724-JCS, 2001 WL 1736382, at \*13 (N.D. Cal. Dec. 6, 2001), *Am. Online, Inc. v. Nat'l Health Care Disc., Inc.*, 174 F. Supp. 2d 890, 892 (N.D. Iowa 2001), *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000), *Ebay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1065–66 (N.D. Cal. 2000), and *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (all finding access to a Web site or computer server to be a trespass), *with* Ticketmaster Corp. v. Tickets.com, Inc., No. CV997654HLH(BQRX), 2000 WL 525390, at \*4 (C.D. Cal. Mar. 27, 2000) (refusing to apply the doctrine of trespass to chattels to the Internet in the absence of proven harm), *Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003) (refusing to apply trespass to chattels to an individual's email sent to Intel employees), and *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 901 (Tex. App. 2001) (finding no cause of action for conversion of information posted online because the information was not property).

Commentators have also taken disparate positions on this point. *See* Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (1999); Edward W. Chang, *Bidding on Trespass: eBay, Inc. v. Bidder's Edge, Inc. and the Abuse of Trespass Theory in Cyberspace-Law*, 29 AIPLA Q.J. 445 (2001); Bridget A. Clarke, *When Not to Pour Spam into an Old Bottle: Intel v. Hamidi*, J. INTERNET L., Nov. 2001, at 20; Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 U. DAYTON L. REV. 179 (2001); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217; Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003); Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 145–47 (2001); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521 (2003); David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL'Y 109 (2005); David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 341 (2003); Maureen A. O'Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 VAND. L. REV. 1965, 1966–67 (2000); Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002); I. Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, J. ONLINE L., Oct. 1996, para. 7, [http://www.wm.edu/law/publications/jol/95\\_96/hardy.html](http://www.wm.edu/law/publications/jol/95_96/hardy.html); *cf.* Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 357–64 (2003) (arguing that many debates, including this one, depend on whether the decision-maker takes a perspective internal to the Internet or an external perspective).

also a breach of contract, it becomes the site owner rather than the law that determines what actions are forbidden.<sup>39</sup> The law then enforces that private decision. One might like or dislike the vesting of such control in a site owner as a matter of policy, but doing so is an abandonment of the notion of assent. It is easier to abandon that notion if we conflate property and contract (call it “protract”<sup>40</sup>) in this way.

## II. ENFORCEMENT OF BROWSEWRAP LICENSES

### A. BUSINESS VS. CONSUMER TRANSACTIONS

The standard-form contract is designed for circumstances in which one party is in control of the transaction, is a repeat player, and has an interest in setting the terms. Typically, these are consumer or small business mass-market transactions. But while the law has started to enforce browsewraps, it has also evolved to provide significant protection to consumers who are allegedly bound by those “agreements.” An examination of the cases that have considered browsewraps in the last five years demonstrates that the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals.

The four main cases in which courts have enforced browsewraps have the same basic fact pattern. The plaintiff runs a Web site. The defendant is a smaller company, often a competitor, who repeatedly accesses the plaintiff’s Web site to collect data, often using software “robots.” The plaintiff objects to this access, nominally because of load on its servers, but in fact because the plaintiff wants to make sure the defendant cannot access its data. The defendant may or may not be aware of the terms of use, but it is generally aware that the plaintiff objects to the defendant’s use of the site. Indeed, the plaintiffs often use technical means to block the defendant from accessing the site, and defendants try to evade those means. Courts generally conclude that because of this repeated interaction, the defendant was at least aware of the terms of use even though it never assented to those terms. And because the cases

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39. Cf. Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 434–35 (2003) (explaining that courts sometimes approach Internet access controls through the lens of property, and sometimes through contract).

40. Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHL.-KENT L. REV. 1257, 1259 n.7 (1998).

all include property as well as contract claims, it is all too easy for courts to conflate the two, concluding that the niceties of assent don't really matter because the Web site owner was merely enforcing rules they had the legal power to impose on users of their property.<sup>41</sup>

In *Ticketmaster v. Tickets.com*, for example, the plaintiff sold tickets to concerts and similar events online and had exclusive rights to sell tickets for a number of events.<sup>42</sup> Tickets.com competed with Ticketmaster. When it could not sell tickets to a particular event because of Ticketmaster's exclusivity, it linked to the place customers could buy that ticket on Ticketmaster's site. To create such a link, Tickets.com regularly searched the Ticketmaster site using a robot. Ticketmaster objected to Tickets.com's use, even though it got sales from this link, likely because it thought it could disadvantage its competitor by making it unable to link directly to the Ticketmaster site. Ticketmaster sued on a variety of theories. While the district court rejected its copyright and trespass claims,<sup>43</sup> and initially rejected its contract claims as well,<sup>44</sup> it ultimately held that Ticketmaster might be able to enforce its terms of use against Tickets.com because Tickets.com was aware that Ticketmaster objected to its competitor accessing and linking to the Ticketmaster site.<sup>45</sup>

Most of the other cases that have enforced browsewrap licenses involve somewhat similar facts. In *Cairo, Inc. v. Crossmedia Services, Inc.*, rather than linking to Crossmedia's site, Cairo scraped Crossmedia's uncopyrighted information to make it available to customers.<sup>46</sup> In *Pollstar v. Gigmania*, the defen-

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41. Ironically, however, at least some of the courts that have made this easy equation have in fact allowed Web site owners to stop conduct that the doctrines of nuisance or trespass to chattels would not have prevented. See *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at \*1 (C.D. Cal. Mar. 7, 2003) (permitting a contract claim to go forward based on a browsewrap); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLH(BQRX), 2000 WL 525390, at \*1 (C.D. Cal. Mar. 27, 2000) (refusing to apply the doctrine of trespass to chattels in the same context).

42. 2000 WL 525390, at \*1.

43. *Id.*

44. *Id.*

45. *Ticketmaster*, 2003 WL 21406289, at \*1. The court denied summary judgment on Ticketmaster's contract claim, but appeared to leave open the legal question whether sending a "spider into the TM interior web pages . . . can lead to a binding contract." *Id.*

46. No. C04-04825JW, 2005 WL 756610, at \*3-6 (N.D. Cal. Apr. 1, 2005). Data "scraping" involves the automated collection of a class of data from a

dant accessed the plaintiff-competitor's Web site to scrape information.<sup>47</sup> In *Register.com v. Verio*, the plaintiff maintained a WHOIS directory—a collection of contact information required by Internet rule to be open to the public—and objected to the defendant's effort to collect that information via robot and use it in its marketing efforts.<sup>48</sup> The defendants in all these cases repeatedly accessed the plaintiffs' Web sites, and were made aware of the terms of use by the lawsuit, if not before, although the claims for past conduct in many cases involved access engaged in by a robot that couldn't read or understand those terms of use. Each of these cases also included claims for trespass to chattels.

A second group of cases in which courts enforced a browsewrap against a business did so not against a competing business, but against the drafter of the browsewrap itself.<sup>49</sup> In that circumstance, it is fair to say that the party relying on the contract for its cause of action has conceded its enforceability.<sup>50</sup>

In the few cases that have enforced a browsewrap term against a consumer, the issue was not the creation of a contract, but whether a company could modify an established contract with a customer by adding an arbitration clause.<sup>51</sup> The company in both such cases notified the customer of the change and linked to the new clause online without requiring assent to the change.<sup>52</sup> Although the court in *Briceño v. Sprint Spectrum*, for example, held that the term in question was not uncon-

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Web site. See, e.g., George H. Fibbe, *Screen-Scraping and Harmful Cybertrespass After Intel*, 55 MERCER L. REV. 1011, 1012–13 (2004).

47. 170 F. Supp. 2d 974, 976 (E.D. Cal. 2000).

48. 356 F.3d 393, 395–97 (2d Cir. 2004).

49. See, e.g., *Net2Phone, Inc. v. Superior Court*, 135 Cal. Rptr. 2d 149, 150–54 (Cal. App. 2d 2003). In that case, the court found a forum selection clause enforceable even though it required clicking on a link to read it. *Id.* at 151, 153. However, the case didn't involve the contract drafter seeking to enforce the contract, but rather a third party seeking to rely on the contract. *Id.* at 152.

50. *But see Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20–21 (2d Cir. 2002) (refusing to enforce a browsewrap term); *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) (holding the defendant's online privacy policy insufficient to sustain a breach of contract action).

51. See *Briceño v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 178 (Fla. Dist. Ct. App. 2005).

52. *Id.* at 179; see also *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 117–19 (Ill. App. Ct. 2005), *appeal denied*, 844 N.E.2d 965 (Ill. 2006) (enforcing an arbitration clause included in an online "Terms and Conditions of Sale" hyperlink).

scionable, it did not expressly consider the enforceability of the agreement itself.<sup>53</sup>

Contrast the general circumstances in which courts have enforced browsewrap terms of use with the cases in which courts have refused to enforce them. In *Specht v. Netscape Communications Corp.*, Netscape sought to enforce terms of use against individuals who downloaded free software from the Netscape site.<sup>54</sup> Netscape pointed to the fact that it had terms of use on its site and that those terms provided that anyone who visited the site necessarily agreed to those terms.<sup>55</sup> The individuals claimed that they had not seen any link to the terms of use and had not read those terms. The court held that because Netscape did not show the terms of use to the individuals downloading the software, much less require them to agree, the terms did not constitute an enforceable agreement.<sup>56</sup> And in *Campbell v. General Dynamics Government Systems Corp.*, the

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53. *Briceño*, 911 So. 2d at 181. Ironically, the same Florida appellate court later held in a case involving business entities that additional terms supposedly added to a written contract in much the same way were not part of the agreement. *Affinity Internet, Inc. v. Consol. Credit Counseling Servs., Inc.*, 920 So. 2d 1286, 1289 (Fla. Dist. Ct. App. 2006).

54. 306 F.3d at 20.

55. *Id.* at 32–33. This sort of Catch-22 provision—by coming to the site, you agree to terms that you can't possibly read without coming to the site—is surprisingly common in browsewraps. See, e.g., Ed Foster's Gripelog, EULA Nasties, <http://www.gripe2ed.com/scoop/story/2004/5/13/0529/97735> (last visited Nov. 6, 2006) (“[The Wal-Mart Credit Card user agreement states that b]y using the Site . . . you agree to abide by the . . . policies described in the Site. If you do not agree to abide by these terms and conditions or any future terms and conditions, please do not use the Site . . . .”); IBM Terms of Use—United States, <http://www.ibm.com/legal/us/> (last visited Nov. 6, 2006) (“By accessing, browsing, and/or using this web site, you acknowledge that you have read, understood, and agree, to be bound by these terms . . . . If you do not agree to these terms, do not use this web site.”); Quikbook-Legal Information Notices, <http://www.quikbook.com/legal.html> (last visited Nov. 6, 2006) (“Please read the following information carefully before accessing our Web site (“Site”) . . . . By using the Site in any manner (for example, entering the Site, browsing . . .) you are indicating your agreement to be bound by the following terms and conditions of service (“Terms and Conditions”) . . . . If you do not agree with all of the provisions of these Terms and Conditions, please do not enter or use the Site.”); XE.com—Terms of Use, <http://www.xe.com/legal/#terms> (last visited Nov. 6, 2006) (“Your use of this website or of any content presented . . . indicates your acknowledgement and agreement to these Terms of Use . . . .”).

Indeed, the problem is even worse than indicated above, because most sites provide that their terms will change periodically and that the user is automatically bound to those changed terms. They generally suggest that the user “periodically visit” the terms of use to “determine the then current terms to which you are bound.” IBM Terms of Use—United States, *supra*.

56. *Specht*, 306 F.3d at 35.

First Circuit held that an employer could not bind an employee to terms that the employer put on its Web site, because merely posting information on an intranet and sending an e-mail to that effect did not constitute adequate notice of a change that would affect the employee's legal rights.<sup>57</sup> The court distinguished cases in which individuals had in fact manifested their assent to changes in the terms of employment.<sup>58</sup>

What is notable about these cases, considered together, is the division the courts seem to be creating between enforceability against businesses and enforceability against individuals.<sup>59</sup> This may be merely an accident of the facts of the various cases courts have faced. But there is reason to believe the business-consumer distinction is more than coincidence. The law is regularly more solicitous of consumers than of commercial entities in enforcing standard form contracts. A number of Internet contract cases outside the browsewrap context impose limits on class action restrictions,<sup>60</sup> arbitration clauses,<sup>61</sup> and choice of law and forum provisions<sup>62</sup>—precisely the sorts of terms that,

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57. 407 F.3d 546, 558 (1st Cir. 2005).

58. *Id.* at 555. The court made it clear that its holding was limited to the particular facts before it and not a general requirement for contracting outside the employment context. *Id.* at 559.

59. Nonetheless, not all efforts to enforce browsewrap terms of use against businesses are successful. *See, e.g., Affinity Internet, Inc. v. Consol. Credit Counseling Servs., Inc.*, 920 So. 2d 1286, 1288–89 (Fla. Dist. Ct. App. 2006) (refusing to enforce terms of use on a Web site that were alleged to be additional to an actual written contract between the parties).

For an interesting variation on the problem, see *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1321 (11th Cir. 2006) (rejecting a claim that a company had violated the Stored Communications Act by accessing an individual's Web site in violation of the terms of use, and rejecting the argument that requiring a clicked agreement to those terms prevented the site from being "accessible to the general public").

60. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

61. Despite a federal policy favoring arbitration clauses, one recent study documented that courts found arbitration clauses unconscionable at twice the rate they found other provisions unconscionable. *See Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186 (2004). For an example of an electronic arbitration clause found unconscionable, see *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002).

62. *See Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229, 231 (Cal. App. 2d 2005); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 701–02 (Cal. App. 2001); *Scarcella v. Am. Online, Inc.*, 811 N.Y.S.2d 858, 858–59 (N.Y. App. Div. 2005) (per curiam); *Dix v. ICT Group, Inc.*, 106 P.3d 841, 843–45 (Wash. Ct. App. 2005), *review granted*, 126 P.3d 820 (Wash. 2005). *But see Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690, 695–96 (D. Md. 2000) (finding a forum selection clause not sufficiently unfair or unreasonable to be unenforceable);

like many browsewrap terms, extend beyond the rights the intellectual property (IP) owner would have had without contract. Hopefully courts will similarly limit the ability of spyware providers to justify their behavior by pointing to terms of use attached to their products.<sup>63</sup>

One plausible reading of the cases is that courts in browsewrap cases show greater solicitude to consumers than to businesses, and will enforce browsewraps primarily in business-to-business (b2b) rather than business-to-consumer (b2c) transactions, and perhaps only in repeat transactions.<sup>64</sup> Courts may be willing to overlook the utter absence of assent only when there are reasons to believe that the defendant is aware of the plaintiff's terms. That awareness may be more likely with corporations than individuals, perhaps because corporations are repeat players, because they themselves employ terms of use and therefore should expect that others will, or because some evidence in each individual case suggests they are in fact more aware of those terms. Whether by accident or by design, the result has so far been the same: browsewraps end up having significance not in mass-market contract cases, but in what are really b2b property cases.

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Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999) (enforcing a forum selection clause in a clickwrap agreement); Groff v. Am. Online, Inc., No. PC97-0311, 1998 WL 307001, at \*2-6 (R.I. Super. Ct. May 27, 1998) (holding that the plaintiff did not meet his burden of persuasion regarding the unenforceability of a clickwrap forum selection clause).

63. "Spyware" is "software that is installed in a computer without the user's knowledge and transmits information about the user's activities over the Internet." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006). For an argument that consumers shouldn't always be allowed to "consent" to the installation of spyware on their computers, see Andrea M. Matwyshyn, Technoconsen(t)sus 1-4 (May 2006) (working paper, on file with the University of Minnesota Law Review).

64. An alternative formulation is that if a Web site visitor knew or should have known of the existence of the terms of use, it will be bound by them even if it didn't read them, and corporations are generally assumed to be aware of them while individuals are not. *Cf.* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 402 (2d Cir. 2004) (distinguishing *Specht* on the theory that the parties in that case didn't have notice of the terms). This alternative formulation fails to explain the application of browsewraps against software robots, which aren't capable of reading or assenting to terms of use. Such cases could perhaps be explained as *sui generis*, based on a plaintiff's use of the Robot Exclusion Header, which is an electronic no-trespassing sign but not an agreement conditioning use on particular terms. Under this formulation, a Web site that posts terms of use but does not employ the Robot Exclusion Header would not be able to enforce those terms of use against a robot.

## B. THE PROBLEMS WITH B2B BROWSEWRAPS

Applying browsewraps to b2b transactions may prove unworkable, particularly if courts are willing to presume knowledge of terms merely from repeated visits to a site. Consider the predicament of a large company employing a number of white-collar workers. Those workers have computers at their desks and spend part or all of the day online—searching the Web; visiting competitor, supplier, or customer sites; buying goods or services; and the like. Each of those employees acts as an agent of the company, with apparent and likely actual authority to engage in those work-related acts.<sup>65</sup> If browsewraps are enforceable against corporations generally, a large company can plausibly be said to enter into hundreds of different agreements every day.

The problem is worse than the sheer number of contracts suggests. Many of those commitments are likely to overlap, creating a mosaic of contractual commitments that may conflict. Sometimes contradicting commitments occur even within a single transaction. An employee seeking to buy a desk chair may search on Yahoo!, click on an ad from a company that compares prices, and go from there to one or more retail stores that can sell and ship chairs. Each of those pages has terms of use that purport to govern the employee's conduct. In *Cairo, Inc. v. Crossmedia Services, Inc.*, Cairo's offending robots moved seamlessly across Crossmedia's site, which hosted advertising circulars for dozens of big-box retailers and the sites of each of those retailers.<sup>66</sup> Each site had a browsewrap, and each browsewrap had a choice-of-forum provision.<sup>67</sup> Every time Cairo sent a robot onto the Crossmedia site, that robot nominally agreed that any litigation about that visit would be litigated "only" in no fewer than eight different jurisdictions.<sup>68</sup> The district court enforced one of those choice-of-forum provisions,<sup>69</sup> but in doing so it had to violate seven others.

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65. I am leaving aside the tougher question of whether employees who surf the Internet for personal reasons during work hours are agents whose acts bind the corporation.

66. No. C04-04825JW, 2005 WL 756610, at \*3 (N.D. Cal. Apr. 1, 2005).

67. *Id.* at \*2.

68. The terms of use agreements requiring exclusive jurisdiction in Atlanta, Chicago, Denver, San Jose, Seattle, and elsewhere are on file with the author.

69. *Cairo*, 2005 WL 756610, at \*6.

In theory, one could think of these contradictory terms as a relatively cabined problem. The problem shouldn't arise all that often if courts limit terms of use to governing only the conduct that occurs while the employee is actually visiting the Web site imposing the terms. The company will still have to confront the myriad of terms that govern its behavior in the aggregate, but for any given transaction it ought to be rare that more than one set of terms apply.

In fact, however, many terms of use go much further, purporting to govern not just the use of a Web site but any transaction between the parties. In *Cairo*, the problem was not just that the Cairo robot visited multiple sites: Crossmedia also visited the Cairo site, and Cairo's own terms of use purported to govern not just that visit but any transaction between the parties.<sup>70</sup> There are numerous other examples of terms of use that purport to govern any interaction between the parties, whether or not the interaction arises out of the visit to the Web site.<sup>71</sup> Further, one can easily imagine terms of use spiraling in this direction. If my company can get an advantage over competitors or business partners by imposing my terms on them more generally, it is surely only a matter of time before those adversaries figure that out and do the same to me.

Once terms of use govern any relationship between the parties, the potential for overlapping and contradictory terms grows exponentially. When Microsoft employees visit Yahoo!'s site and Yahoo! employees visit Microsoft's site, those visits bind each company to the other's terms. In these circumstances, it is practically impossible for the company to monitor, much less control, the entering-into of such "contracts" without preventing any employee from accessing a Web site not on an approved list of sites, each of which has negotiated a deal with

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70. See, e.g., Cairo Terms of Use Agreement (on file with author).

71. For example, Microsoft's general terms of use provide that not just a specific Web site interaction, but any "services that Microsoft provides to you," are subject to its terms. Microsoft—Information on Terms of Use, <http://www.microsoft.com/info/copyright.msp> (last visited Nov. 6, 2006). The BuyDomains.com general terms of use set out policies governing "dispute[s] between You and BuyDomains regarding the ownership of any Domain Name." BuyDomains.com: Terms of Use, <http://www.buydomains.com/info/terms-of-use.jsp> ¶ 9 (last visited Nov. 6, 2006). The license then goes further and requires visitors not to bring any intellectual property claim of any type against it, whether related to a BuyDomains domain name or not. *Id.* Finally, it requires arbitration of "any dispute you may have with BuyDomains other than those set out above." *Id.*

the company in advance.<sup>72</sup> More likely, companies will do what consumers do with mass market agreements today—they will simply ignore the existence of those “contracts” until it is in the interest of one side or the other to insist upon them in court.<sup>73</sup> Courts will then have to find some way to choose between those terms. And if electronic contracting based on Extensible Markup Language takes off,<sup>74</sup> companies may not even have that option. Their robots will be asked to agree to terms, any mismatch between the terms will become apparent, and robots will either have to be programmed to ignore them or the terms will kill the deal. In either case, we will have entered the battle of the electronic forms. And surely the lesson of the last battle of the forms was that it was ultimately a futile exercise, removing contract law from the realm of actual agreement and into the realm of rampant formalism.<sup>75</sup> U.C.C. section 2-207 was an effort to replace that formalism with substance.

### III. PREVENTING THE BATTLE OF THE ELECTRONIC FORMS

The new battle of the electronic forms is a problem created by a few courts that expanded contract law in a particular class of browsewrap cases—those that are really allegations of trespass to Web sites. The ideal first-order solution is to recognize that we have gone astray in these cases and that trying to analyze them under contract law doesn’t help create certainty or promote any of the values contract law is supposed to serve. Even the Uniform Computer Information Transactions Act (UCITA), the abortive effort to create a model law of software

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72. One possible private solution to this battle of terms is for companies to include in their terms of use provisions that none of their employees are authorized to assent to other companies’ terms of use. But it is not clear that such a term would be enforceable, particularly in a context in which the company regularly ratified transactions nominally subject to those very terms of use it purported to reject.

73. See FARNSWORTH, *supra* note 11, § 3.21, at 261 (“In practice, most of these transactions are carried out without incident, even though there is no contract.”).

74. On electronic contracting of this sort, see, for example, Robert J. Glushko et al., *An XML Framework for Agent-based E-commerce*, COMM. ACM, Mar. 1999, at 106, 106–14. On its legal implications, see, for example, Clayton P. Gillette, *Interpretation and Standardization in Electronic Sales Contracts*, 53 SMU L. REV. 1431, 1431 (2000) (exploring the issues raised by XML-based electronic contracting in the areas of contract and sales law).

75. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58–59 (1963).

contracting that was heavily criticized for being pro-plaintiff,<sup>76</sup> required a manifestation of assent to create a contract.<sup>77</sup> If I'm right that those cases dispensing with the assent requirement are really driven by the underlying property claim, courts should analyze that property claim directly, rather than clouding it in a pseudo-contract theory.<sup>78</sup> Saying that browsewraps are enforceable only where the drafter already had a right to prevent a particular use is the functional equivalent of refusing to enforce those browsewraps. The concept of contract does no useful work in either case. Indeed, it does affirmative harm by preventing courts from addressing the disputed policy issues at the heart of the property claim. At a bare minimum, courts must resist the temptation to slide further down the slippery slope, enforcing browsewraps in other contexts because they have enforced them in this one.

Refusing to enforce browsewraps is a good idea. But even if we get rid of browsewraps, the battle of the electronic forms could well occur with clickwraps, and there traditional principles of contract law do seem to support enforcement. The problems may be lessened because many sites won't actually require clicks, and people who click to agree are more aware that they are engaging in conduct with legal significance. But the battle of the electronic forms will still persist.

We solved the battle-of-the-forms problem in the Uniform Commercial Code by enacting U.C.C. section 2-207. That section replaced the "last shot" rule, where the accident of which form was sent last determined the conditions of the agreement, with a functional rule that distinguished between merchants and consumers.<sup>79</sup> Between companies, the terms each side proposed became part of the contract unless they materially altered the deal, or unless one party insisted that it wouldn't do the deal without that term, and the other party didn't similarly insist on its own terms.<sup>80</sup>

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76. See, e.g., Lemley, *Beyond Preemption*, *supra* note 5, at 118–23; McManis, *supra* note 5, at 173–75; David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 21–24 (1999).

77. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 208 (2001). Only Maryland and Virginia have adopted the UCITA.

78. *But cf.* Madison, *supra* note 39, at 433–38 (arguing that property and contract claims should be treated in an integrated fashion).

79. U.C.C. § 2-207(2) (2003).

80. *Id.* There is disagreement among the courts and commentators as to when terms become part of the transaction. Many courts have held that conflicting terms in standard forms simply drop out, with gaps filled by the

U.C.C. section 2-207 by its terms may not apply to the electronic battle of the forms, because there are no “forms” being exchanged as part of offer or acceptance in the context of a particular sale.<sup>81</sup> But it is certainly possible to imagine updating the U.C.C. provisions to account for this new problem. A reasonable rule might simply drop any conflicting terms out of a multi-term situation. Agreed-upon terms would still apply; as with section 2-207, terms that one side included and the other didn’t could be included, but only if they don’t materially change the deal. Application of such a new rule would presumably ratify what the courts have done so far in consumer browsewrap cases: refused to add these terms to the contract, at least where they involve significant changes. Or we could (and I would) go further, and refuse to enforce any browsewrap term replacing a default rule already written into contract law.<sup>82</sup>

#### IV. CONCLUSION

In the final analysis, the problems terms of use pose stem from a combination of factors: judicial willingness to weaken or even eliminate the notion of assent when presented with a form that purports to be a contract, and the ease with which technology allows companies (and perhaps even individuals) to present forms that purport to be contracts. I don’t want to suggest that all contracts must look like the prototypical model of sophisticated parties bargaining over terms. But as we move fur-

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U.C.C. default rules. *See, e.g.,* *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579–80 (10th Cir. 1984); *S. Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 567 P.2d 1246, 1254 (Idaho 1977); *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83, 86–87 (N.D. 1985). *But see* FARNSWORTH, *supra* note 11, § 3.21, at 263–64; John E. Murray, Jr., *The Chaos of the “Battle of the Forms”: Solutions*, 39 VAND. L. REV. 1307, 1354–65 (1986).

81. *See* *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (rejecting the application of section 2-207 for this reason). Some question whether the Seventh Circuit was correct to do so, however.

82. Other solutions are also possible. Omri Ben-Shahar and Victor Goldberg propose that in battle-of-the-forms cases courts should choose the “best” or “most reasonable” of the terms. *See* Omri Ben-Shahar, *An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms*, 25 INT’L REV. L. & ECON. 350, 357–63 (2005); Goldberg, *supra* note 11, at 166–71. Robert Gomulkiewicz has proposed greater reliance on default rules in the context of software warranties, *see* Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. MARSHALL J. COMPUTER & INFO. L. 393, 400–02 (1997), though he would not go so far as to have such default terms displace shrinkwrap licenses. *Id.* at 402.

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ther and further from that model, we introduce problems into contract law analysis, because the principles of contract law fit less and less well with the things we call contracts. At some point it makes little sense to talk of parties agreeing at all, and we need to fall back on substantive law—whether the law of property or the default rules of the U.C.C.—to govern disputed conduct. Wherever the line is between agreement and unilateral action, browserwraps are on the wrong side of the line.