

ARE BROWSE-WRAP AGREEMENTS ALL THEY ARE WRAPPED UP TO BE?

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I. Introduction

Electronic agreements continue to fortify their presence in the digital commercial marketplace.³ Whether used to sell goods or services, or simply to define relationships, standardized electronic agreements have appeared in abundance in business-to-business or business-to-consumer transactions. Standardized electronic agreements, like their physical counterparts, offer the ability to address multiple concerns in a simple, efficient fashion.⁴ Although electronic contracts and electronic signatures⁵ have been accepted and promoted by federal and state governments, many fundamental aspects of contract law have been left for the courts to wrestle with when disputes arise.⁶

Today, there are essentially two types of standardized electronic agreements—the click-through agreement and the browse-wrap agreement.⁷ A click-through agreement is an agreement that requires an offeree to click on an acceptance icon, which evidences a manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is one that is typically presented at

³ See *ProCD, Inc. v. Zedienberg*, 86 F.3d 1447 (7th Cir. 1996) (applying the terms of a licensing agreement); see also Uniform Electronic Transactions Act (UETA) (state legislation); Electronic Signatures in Global Commerce and National Commerce (E-SIGN), 15 U.S.C.A. § 7001 (federal legislation). Attempts to supplement the Uniform Commercial Code with the Uniform Computer Information Transaction Act (UCITA) have thus far not succeeded, except in Virginia and Maryland.

⁴ RESTATEMENT (2d) OF CONTRACTS §211 cmt. a ("Scarce and costly time and skill can be devoted to a class of transaction rather than to details of individuals transactions."); Terry J. Ilardi, *Mass Licensing – Part 1: Shrinkwraps, Clickwraps & Browsewraps*, 831 PLI/Pat. 251, 255 (June 2005).

⁵ This term encompasses a wide variety of marks people use to show assent.

⁶ *Cairo, Inc. v. Crossmedia Services, Inc.* 2005 WL 756610, *4 (N.D. Cal. April 1, 2005) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

⁷ For purposes of this article the authors consider opt-in agreements as a type of click-through agreement because an offeree has to manifest acceptance by electronically checking a box.

the bottom of the website and where acceptance is based on “use” of the site. Litigation surrounding click-through agreements surfaced first, but browse-wrap litigation soon followed. Although neither agreement is particularly new (each has appeared well in advance of the ensuing litigation), few state and federal courts have addressed the enforceability of browse-wrap agreements and the terms therein.⁸ The dearth of settled law surrounding browse-wrap agreements⁹ creates uncertainty. This article discusses the development of browse-wrap contract law as it relates to formation, enforcement of specific terms and areas that are still to be addressed.

II. Creating Standardized Electronic Contracts

Legislatures at both the domestic¹⁰ and international¹¹ levels have committed to treating electronic contracts and electronic signatures in the same manner as their physical counterparts. However, only a handful of courts across the country have explored the extent of enforceability of browse-wrap agreements.¹² This predicament has left courts to revisit many fundamental aspects of contract law such as the “offeror is the master of the offer,”¹³ what a

⁸ See Terry J. Ilardi, *Mass Licensing – Part 1: Shrinkwraps, Clickwraps & Browsewraps*, PLI Order Number 5939, 831 PLI/Pat 251, 255 (June 2005).

⁹ Christina Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 289 (2003).

¹⁰ Note the number of states that have adopted UETA and the SEC information from Tamar’s materials.

¹¹ MLEC preamble (“Believing that the adoption of the “Model Law on Electronic Commerce by the Commission will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists.”).

¹² Christina Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 282-83 (2003).

¹³ See generally FARNSWORTH, CONTRACTS, 151 (2d ed 1990); *ProCD, Inc. v. Zedienberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (“A vendor, as master of the

reasonable offeree would expect, and what objective facts and legal principles support a finding of assent to bound to the terms of a contract.

Since litigation surrounding electronic agreements has surfaced, courts have generally focused on two fundamental components to determine whether a valid agreement has been formed - notice and assent. Only after finding that a contract has been formed do courts reach the interpretation or enforceability of particular terms of agreement. This section explores the formation component of standardized online agreements.

A. Notice Requirements for Online Agreements

Regardless of the type of standardized electronic agreement, courts emphasize the “notice” requirement. The focal point of this analysis is whether the offeree saw or had a reasonable opportunity to review the contract. Notice is particularly important in a digital environment because an agreement can be overlooked when a hardcopy contract is unavailable.¹⁴

Click-through and browse-wrap agreements fulfill the notice requirement in different ways. Adequate notice as to formation of a contract is usually easily satisfied with click-through agreements. This is because the technology underpinning click-through agreements prohibits a user from proceeding with a transaction without first having the *opportunity* to review the contract.¹⁵ Thus, there is little ground to argue lack of notice for contract formation purposes.¹⁶

offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance.”).

¹⁴ Christina Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 290 (2003) (noting other differences between electronic and physical contract transactions).

¹⁵ *ProCD, Inc. v. Zedienberg*, 86 F.3d 1447, 1449-1452 (7th Cir. 1996). For a discussion on notice see Kevin W. Grierson, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 ALR5th 309, 322 (2003); *see also* Laura Darden &

Notice in browse-wrap agreements is given through the conspicuous display of the contract.¹⁷ Typically, the terms and conditions appear as a hyperlink at the bottom or top of the website and come under the guise of “legal terms” or “terms of use.” These hyperlinks are normally highlighted in a different color from the background text or website wallpaper.¹⁸ The actual terms do not usually appear on the same page as the original hyperlink but are connected to another page. The terms are, in effect, incorporated by reference.¹⁹

Unlike the click-through agreements, browse-wrap agreements do not have the same notice guarantees because their terms are not similarly situated. Browse-wrap agreements create a predicament in which online offerees may be unaware that any terms are applicable. This was a point of contention in *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002). In *Specht*, the court rejected a browse-wrap agreement relating to downloading free software because the agreement came *after* the invitation to download and users could download the software without any indication that legal terms followed.²⁰ Thus, the court was unwilling to enforce the terms of agreement if the fruits could be received without notice of the terms.²¹

Charles Thorpe, *Forming Contracts Over the Internet: Click-wrap and Browse-Wrap Agreements*, available at http://gsulaw.gsu.edu/lawand/papers/su03/darden_thorpe/#11 (last visited Sept. 17, 2003).

¹⁶ However, if an end user is able to receive the fruits of the contract without reviewing the terms of the agreement, contract formation may not necessarily occur. *Softman Products Co., LLC v Adobe Systems, Inc.* 171 F.Supp.2d 1075 (C.D. Cal. 2001).

¹⁷ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir.2004).

¹⁸ See *Ticketmaster, Corp. v. Tickets.com., Inc.* No. CV99765HLHVBKX (C.D. Cal. 2003) (*Ticketmaster II*) (during the course of the litigation, the court noted that Ticketmaster moved the terms of use hyperlink to the top of the webpage).

¹⁹ See *Pollstar v. Gigmania Ltd.*, 170 F.Supp.2d 974, 980-82 (E.D. Cal. 2000).

²⁰ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 34-35 (2d Cir. 2002).

²¹ Moreover, the applicable terms of the agreement were only visible at the bottom of the screen and there was no indication from the top screen that binding terms were below. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 34-

Likewise, in *Motise v. America Online, Inc.*, 346 F.Supp.2d 563 (SDNY 2004), the court refused to impute notice of AOL's Terms of Service onto a non-AOL member who used the account of an AOL member when the non-member did not have notice of the terms before he logged on.²² The court in *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401-02 (2d Cir.2004), echoed a similar notice requirement when terms were presented to the defendant concurrently with the information it sought.²³

B. Manifesting Assent to Online Contracts

Standardized electronic agreements received their names from the manner by which the offerees signify assent²⁴ and each draws on two parallel principles of contract law. In click-through agreements, a contract is formed through the offeree's express acceptance of the proffered terms and conditions. A browse-

35 (2d Cir. 2002); *see id.* at 24 (applying California law with respect to formation); *see also DeFontes & Long v. Dell Computers Corporation*, C.A. No. PC 03-2636, pg. 10 (Jan. 2004) (refusing to enforce a browse-wrap agreement containing an arbitration clause because it was "inconspicuously located at the bottom of the website.").

²² *Motise v. America Online, Inc.*, 346 F.Supp.2d 563 (SDNY 2004) (noting that neither side cited *Specht v. Netscape Communications Corp.*) However, the court held that the terms of service, including the forum selection clause, were enforceable against the plaintiff because he was the sub-licensee of the licensee that agreed to those terms. *Motise v. America Online, Inc.*, 346 F.Supp.2d at 566.

²³ However, the court ultimately found that defendant was well aware of the terms and defendant's use was not sporadic. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir.2004); *see also Pollstar v. Gigmania Ltd.*, 170 F.Supp.2d 974, 981-82 (E.D. Cal. 2000) (noting the problem of not having conspicuous notice).

²⁴ The term click-through or click-wrap agreement is a spin-off of "shrink-wrap" agreement, which is discussed in *ProCD, Inc. v. Zedienberg*, 86 F. 3d 1449, 1449 (7th Cir. 1997); *See Terry J. Iardi, Mass Licensing – Part I: Shrinkwraps, Clickwraps & Browsewraps*, PLI Order Number 5939, 831 PLI/Pat 251, 256 (June 2005).

wrap offeree, however, creates a contract by conduct—acceptance through use of the goods or service.²⁵

Click-through agreements require users to assent affirmatively to terms before downloading or using a service or product.²⁶ Online offerees manifest assent by clicking on icons such as “I Accept,” “I Agree” or “Yes.”²⁷ Click-through agreements are “open offers” and illustrate the basic principle that adopting a mark and placing it on the contract is all that is needed to create a binding agreement.²⁸

One of the first published decisions that applied this principle was *ProCD, Inc. v. Zedienberg*, 86 F.3d 1447 (7th Cir. 1997). In that case, ProCD sought to enforce its electronic license agreement against defendant Zedienberg, an end user who used ProCD’s software for commercial purposes in violation of ProCD’s license agreement.²⁹ Zeidenberg claimed the contract was unenforceable because it was not presented to him on the outside of the box.³⁰ However, the court rejected that argument because the agreement was clearly presented to Zeidenberg when he installed the software, and the product could not be used without indicating acceptance to the terms of the license by clicking on the acceptance icon.³¹

²⁵ FARNSWORTH, CONTRACTS 152-160 (2ed. 1990) (making a return promise or signifying assent by conduct).

²⁶ See *Specht v. Netscape*, at 21 at n.4; see also *Klocek v. Gateway, Inc.* 104 F. Supp.2d 1332, 1338 cmt. 6 (D.C. Kansas 2000); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003).

²⁷ *Ticketmaster Corp. v. Tickets.com, Inc.*, (2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003)).

²⁸ See generally FARNSWORTH, CONTRACTS 144-155 (2ed. 1990).

²⁹ *ProCD, Inc. v. Zedienberg*, 86 F.3d 1449, 1450 (7th Cir. 1997).

³⁰ *ProCD, Inc. v. Zedienberg*, 86 F.3d 1449, 1450 (7th Cir. 1997).

³¹ *ProCD, Inc. v. Zedienberg*, 86 F.3d 1449, 1952 (7th Cir. 1997). The same logic was also applied in *Caspin v. Microsoft Network, LLC*, 732 A.2d 528 (1999); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002) (enforcing a forum selection clause).

In contrast, browse-wrap agreements do not require users to assent affirmatively to the terms; rather, the agreement is formed by accepting or using the product or service.³² The legal basis for this agreement stems from the “implied-in-fact” principle, whereby conduct alone serves as the basis for assent.³³

Although “implied” assent is less clear than an express assent, “the distinction as such has no legal consequences.”³⁴ One of the first browse-wrap cases to address the enforceability of a browse-wrap agreement and apply this principle was *Pollstar v. Gigmania Ltd.* 170 F.Supp.2d 974 (E.D. Cal. 2000).³⁵ In *Pollstar*, the defendant argued the browse-wrap agreement at issue failed as a matter of law because there was no mutual assent.³⁶ The court, however, declined to invalidate the browse-wrap agreement because it recognized that “people sometimes enter into a contract by using a service without first seeing the terms ...”³⁷ Similarly, in *Ticketmaster v. Tickets.com*, 2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003), the Court denied defendant’s motion for summary judgment and ruled that a contract is formed “by

³² See *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003); *Cairo, Inc. v. Crossmedia Services, Inc.* 2005 WL 756610, *4 (N.D. Cal. April 1, 2005) (“It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes acceptances of the terms, which accordingly become binding on the offeree.”)

³³ FARNSWORTH, CONTRACTS 135 (2ed. 1990); See *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003); Christina Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 281 (2003).

³⁴ FARNSWORTH, CONTRACTS 135 (2ed. 1990).

³⁵ See *Pollstar v. Gigmania Lt.* 170 F. Supp.2d 974, 981 (2000) (“No reported cases have ruled on the enforceability of browse wrap license [agreements]”).

³⁶ See *Pollstar v. Gigmania Ltd.*, 170 F. Supp.2d 974, 982 (2000).

³⁷ See *Pollstar v. Gigmania Ltd.*, 170 F. Supp.2d 974, 982 (2000).

proceeding into the interior webpages after knowledge (or in some cases presumptive knowledge) of the conditions accepted when doing so.”³⁸

III. Enforcing Browse-Wrap Terms

To date, some state and federal courts have addressed the validity of browse-wrap agreements. Apart from that formation analysis, however, is whether terms included in the browse-wrap agreement should be enforced. No judicial district has developed a complete body of law regarding the enforceability of all the terms typically contained in browse-wrap agreements. Nevertheless, a perusal of the many websites reveals that there are essentially three categories of terms found in a browse-wrap agreement: Mandatory Terms, Prohibitory Terms and Consumer Protection Terms.³⁹ This section discusses the circumstances in which each category has been addressed by the courts.

A. Mandatory Terms

Mandatory Terms effectively require a party *to act* in a certain manner when disputes arise from transactions or actions on a website.⁴⁰ Provisions relating to arbitration, forum selection and choice of law are examples of

³⁸ *Ticketmaster v. Tickets.com*, 2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003).

³⁹ For a different characterization see Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 *HAMLIN L. REV.* 499, 508 (2003). Sandeen characterizes these terms as “Representations, Disclosures, and Instructions” and “User and Rights and Obligations.”

⁴⁰ Courts have routinely enforced mandatory terms within click-through contracts. For example, in *Forrest v. Verizon Communications*, 805 A.2d 1007 (DC 2002), the court enforced a forum selection clause against an end user that had the opportunity to review the terms. Similarly, in *Caspi v. Microsoft Network* the court enforced a click-through agreement relating to a forum selection clause. The court in *Lieschke vs. RealNetworks* also enforced an arbitration clause presented on the web by click-through agreement to stay court proceedings in Illinois pending arbitration in Washington.

mandatory terms. These terms are the most onerous of all terms and are typically contained in browse-wrap agreements.⁴¹ Courts across the country have addressed mandatory terms in the browse-wrap context several times.⁴²

In *Cairo, Inc. v. Crossmedia Services, Inc.* 2005 WL 756610 (N.D. Cal. April 1, 2005), the court addressed whether defendant Crossmedia's browse-wrap agreement and forum selection clause were enforceable against plaintiff Cairo in a declaratory relief action. Cairo claimed, among other things, that its business practice of using Crossmedia's retailer sale/promotional information for

⁴¹ Christina Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 281 (2003).

⁴² An often cited case for authority to allow enforcement of mandatory clauses such as forum selection clauses without affirmative consent comes from *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). In *Carnival Cruise*, the Supreme Court addressed whether the forum selection clause within a passenger ticket would be enforceable against a passenger injured aboard one of the defendant's ships. The type of contract at issue in that case was a commercial passage agreement contract wherein it was stated "the acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Ticket." The court found that no affirmative manifestation of assent was necessary in order for that term to be bound and enforced against the injured passenger. In fact, the Court stated "'Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation'" *Id.* at 593.

The court looked to see if it would be reasonable to enforce this term and concluded that it was unreasonable to assume that the forum selection clause would be negotiated with every passenger. Moreover, it was reasonable for cruise liners in "limiting the forum in which it potentially could be subject to suit," and the clause was reasonable because it dispelled "any confusion" as to the forum for resolution, sparing all parties and judicial resources from disputing that issue, and those savings are ultimately passed on to the passengers. *Id.* at 593-595. Finally, the court dismissed any bad faith on Carnival Cruise Lines's part because the chosen forum was its principal place of business and there was no evidence of fraud. The court also supported its decision by reasoning that the plaintiffs could have rejected those terms before proceeding with the transaction. *Id.* at 594. In sum, the court concluded that "'in light of the present-day commercial realities and expanding international trade we conclude that the forum selection clause should control absent a strong showing that it should be set aside.'" *Id.* at 591, quoting *The Bremen v. Zapata Off-Shore Co.*, 407 US 1, 12-13 (1972).

competitive purposes was not an unfair business practice. Crossmedia moved to dismiss based on the forum selection clause contained in its Terms of Use browse-wrap agreement posted on its website. Crossmedia argued that Cairo assented to the terms of the browse-wrap agreement posted on the company's website, but Cairo argued that no contract was formed without its express consent. The court rejected Cairo's contention and found Cairo had notice of the terms, and its frequent use of the website established grounds to impute Cairo's knowledge of and agreement to the terms of the browse-wrap agreement.

Next, the court addressed the validity of the forum selection clause and looked to the basic contract principles as its starting point.⁴³ At the outset, the court ruled that the party challenging the clause has a "heavy burden of proof" and must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"⁴⁴ Cairo failed to do so and the court readily enforced the term because Cairo failed to allege fraud or any overreaching defects with the contract that would render the forum selection clause unenforceable.⁴⁵

A forum selection clause was also addressed in *Net2Phone v. Superior Court*, 109 Cal.App.4th 583 (2003). In *Net2Phone*, plaintiff Consumer Cause brought an action against defendant Net2Phone under California's Unfair Competition Law. Consumer Cause was not a subscriber to Net2Phone's Internet phone services but sought to enjoin Net2Phone's practice of "rounding-up" charges to the nearest minute regardless of the actual time used.⁴⁶ Net2Phone

⁴³ *Cairo, Inc. v. Crossmedia Services, Inc.* 2005 WL 756610, *4 (N.D. Cal. April 1, 2005).

⁴⁴ *Cairo, Inc. v. Crossmedia Services, Inc.* 2005 WL 756610, *4 (N.D. Cal. April 1, 2005), quoting *The Bremen v. Zapata Off-Shore Co.*, 407 US 1, 15 (1972).

⁴⁵ *Cairo, Inc. v. Crossmedia Services, Inc.* 2005 WL 756610, *4 (N.D. Cal. April 1, 2005).

⁴⁶ The specific issue in this case was whether a private attorney general was "closely related" to the consumers who were bound by the terms of the agreement, which included a forum selection clause. *Net2Phone v. Superior Court* 109 Cal.App.4th 583, 588-89 (2003).

moved to dismiss or stay the action in the trial court pursuant to both an End User License Agreement, and a Terms of Use browse-wrap agreement posted on each page of the website. The trial court denied the motion and Net2Phone sought a writ of mandamus.

The appellate court found that the browse-wrap agreement was valid and enforced the forum selection clause. When it specifically addressed the forum selection clause, the court, like the *Cairo* court, reiterated the basic law related thereto.⁴⁷ Thereafter, the court rejected the defendant's proposition that it was unfair that the terms had to be accessed through a hyperlink and that the clause was unenforceable because it was offered on a take it or leave it basis.⁴⁸

In *Hubbert et al. v. Dell Corp.* No. 02-L-786 (Ill. App. Ct. 8/12/2005), the Illinois Appellate Court addressed both a choice of law provision and arbitration clause in a browse-wrap agreement. In *Hubbert*, putative class action plaintiffs filed a complaint against Dell Corporation for allegedly engaging in false and misleading advertising with respect to a microprocessor. Dell moved to dismiss or, in the alternative, compel arbitration pursuant to the Terms and Conditions of Sale hyperlink located on the bottom of each of the webpages on Dell's site.

The court held the choice of law clause was *reasonably related* to the transaction because Dell was based in Texas and the matter involved basic contract law.⁴⁹ Further, the court held that the choice of law clause posed no public policy obstacles to the enforcement thereof.

Next, the appellate court addressed the validity of the arbitration clause. Plaintiffs argued that the clause was not part of the contract because they were not required to press on an "I Accept" button (i.e., a click-through button). The lower court sided with plaintiffs and held the term was not part of the online agreement because (1) defendant did not provide text that manifested clear assent to the

⁴⁷ *Net2Phone v. Superior Court*, 109 Cal.App.4th 583, 588-89 (2003).

⁴⁸ *Net2Phone v. Superior Court*, 109 Cal.App.4th 583, 588-89 (2003).

⁴⁹ *Hubbert et al. v. Dell Corp.* No. 02-L-786 (Ill. App. Ct. 8/12/2005) (citing *Falbe v. Dell, Inc.*, No. 04-C-1425 (N.D. Ill. 2004)).

terms and conditions prior to completing the transaction, (2) the terms and conditions were not displayed on a web page that the plaintiffs had completed in placing their orders, and (3) no language on the website suggested that plaintiffs were performing an affirmative act that would bind them to submit their claims to arbitration.

The appellate court reversed the lower court and held the Terms and Conditions of Sale were part of the agreement. First, the appellate court noted that hyperlinked terms were conspicuously located on multiple pages in the ordering process and should therefore be treated in a similar fashion to a “multipage written paper contract.” Second, the court found that notice of the terms should be imputed to plaintiffs because they had to go through three different pages before completing the transaction, all of which stated “All sales are subject to Dell's Term[s] and Conditions of Sale.”⁵⁰

The appellate court also reversed the trial court’s finding that the arbitration clause was unconscionable. First, the court found that the term was not procedurally unconscionable because the contrasting font of the hyperlink made it conspicuous. Further, the court rejected the contention that adhesion contracts are automatically unconscionable. Second, the court found the substantial unconscionability argument equally untenable because, *inter alia*, the arbitration forum was not inherently biased nor did class action law enhance plaintiffs’ rights to avoid the substantive rights and obligations of the parties.

However, unlike the Illinois court in *Hubbert*, the *Specht v. Netscape Communications Corp.* court appears to have applied a more stringent standard to mandatory arbitration provisions than did the Illinois court, ostensibly because such a provision is a de facto waiver of the First Amendment right to have disputes decided in a court of law.

⁵⁰ The language explicitly contained wording relating to “Conditions of Sale” as it related the sale of products, not the use of the website.

For example, in *Specht* the court invalidated a browse-wrap agreement that contained an arbitration clause. In that case, defendant Netscape moved to compel a putative class of plaintiffs to arbitrate their issues pertaining to a software program available on Netscape's website. Plaintiffs opposed the motion and claimed they had no notice of defendant's website license terms and that there was no formation. The court affirmed the lower court and held that no agreement was formed as no mutual assent existed.⁵¹ While the court's holding expressly referred to the entire license agreement, the court analyzed the arbitration clause in terms of an arbitration agreement⁵² as well and appeared particularly troubled about enforcing the arbitration clause without any indication that arbitration could be a consequence of downloading the software.⁵³

B. Prohibitory Terms

Prohibitory terms refer to restrictive terms that are essentially explanatory in nature. Prohibitory terms typically define rights associated with intellectual property and proprietary information. The following cases show the instances in

⁵¹ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (holding that plaintiffs are not bound by the arbitration clause contained in [defendants' license] terms").

⁵² *See Specht v. Netscape Communications Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) ("Arbitration agreements are no exception to the requirements of manifestations of assent.")

⁵³ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 32 (2d Cir. 2002). *Hubbert* and *Specht* appear to be irreconcilable. It appears that in *Hubbert* the Illinois court was driven, in part, to its holding because the terms of use appeared on several pages that were part of the purchasing process. However, in *Specht*, the consumer could receive the free software and be bound by the terms by simply clicking on a download link that was well above the terms of use. Nevertheless, the language to which the Illinois court referred is located at the bottom of Dell's website. Based on the author's analysis of the website there is no indication that the purchase of products carries with it terms of agreement. Thus, to that extent, the facts and holdings of both cases appear to be irreconcilable. However, when a customer wishes to make a purchase, he or she must now affirmatively accept the terms and conditions of sale.

which browse-wrap agreements have been litigated in terms of commercial use of information or use beyond merely informational usage.⁵⁴

In *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004), the circuit court reviewed a preliminary injunction order against Verio on unfair competition grounds brought by Register.com.⁵⁵ Specifically, Register.com sued Verio, an entity that was using the personally identifiable information posted by Register.com⁵⁶ to solicit business from people or entities that registered for a domain name with Register.com. Verio's actions were in direct contravention of the agreement posted by Register.com, which was displayed in tandem with the personally identifiable information. Verio claimed that it was not bound by the terms of agreement because the terms were not displayed until after the request for information was made.⁵⁷ In effect, Verio argued that it had not received notice of the terms and conditions. The court rejected Verio's argument because Verio had visited Register.com's site many times and knew the terms and conditions that came with the site.⁵⁸

Verio also contended that it was not bound by the agreement because Verio did not click on an "I agree" icon.⁵⁹ The court rejected that argument as

⁵⁴ See also *FareChase Inc. v. American Airlines*, No. 067-194022-02 (D.C. Tex. (Feb 12, 2003), available at http://www.eff.org/legal/cases/AA_v_Farechase/20030310_prelim_inj.pdf (granting a preliminary injunction for using the information on the website for commercial purposes), *appeal at 02-03-00082-CV*.

⁵⁵ The court never reached the merits of Register.com because the court reviewed the grant of preliminary injunction where the plaintiff need only show a likelihood of success on the merits.

⁵⁶ A noteworthy distinction is that Register.com does not stand for precedence relating to the consent before consumer information is given.

⁵⁷ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004).

⁵⁸ The court specifically made a distinction between Verio's use and the use of a consumer that used the website only once or a few times. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004). The court intimated that in the latter scenario, the "notice" argument could carry more force.

⁵⁹ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402 (2d Cir. 2004).

well and noted that contracts are enforced when an offeree takes the benefit of the contract, even when assent is not expressly communicated.⁶⁰

The court faced a slightly different unfair competition issue on a motion to dismiss in *Pollstar v. Gigmania*, 170 F.Supp.2d 975 (E.D.Cal. 2000). In that case, Pollstar alleged a violation of California's Unfair Competition Act and a breach of contract claim. Pollstar claimed that it created, at great expense to itself, a database of up-to-date and time sensitive information about future concert performances.⁶¹ Pollstar claimed that Gigmania uses the information compiled by Pollstar to compete against it and, in essence, "free-rides" on the information Pollstar has compiled.⁶² Pollstar claimed Gigmania's "free-ride" use was a breach of the browse-wrap agreement.⁶³ Gigmania claimed that the contract failed as a matter of law because there was no mutual assent and moved to dismiss.⁶⁴ The district court denied Gigmania's motion to dismiss after it recognized that Gigmania had notice of the terms of license, albeit the terms were not that conspicuous.⁶⁵

Litigation in the context of unfair competition also surfaced in *Ticketmaster Corp. v. Tickets.com*. One point of contention in that case related to the claim that Tickets.com, in contravention of the browse-wrap agreement (once at the bottom of the website and by the time of litigation on the top), improperly used Ticketmaster's concert event information and deep-linked into Ticketmaster's website.⁶⁶ Defendant Tickets.com moved for summary judgment

⁶⁰ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

⁶¹ *Pollstar v. Gigmania*, 170 F.Supp.2d 975, 976 (E.D.Cal. 2000).

⁶² *Pollstar v. Gigmania*, 170 F.Supp.2d 975, 977 (E.D.Cal. 2000).

⁶³ *Pollstar v. Gigmania*, 170 F.Supp.2d 975, 977 (E.D.Cal. 2000).

⁶⁴ *Pollstar v. Gigmania*, 170 F.Supp.2d 975, 980 (E.D.Cal. 2000). Defendant also claimed that plaintiff's unfair competition claim was preempted by the Copyright Act, but the court rejected that argument because plaintiff had pled that the information was "hot news." *Id.*

⁶⁵ *Pollstar v. Gigmania*, 170 F.Supp.2d 975, 980 (E.D.Cal. 2000).

⁶⁶ See <http://computing-dictionary.thefreedictionary.com/deep+linking> (Providing a hyperlink on a website or on the results page of a search engine to a page on

on the breach of contract claim. The court found that since Tickets.com could have had notice of the license and a contract may be formed after Tickets.com moved through the website's interior pages, Ticket.com's motion for summary judgment must be denied.⁶⁷

IV. The Final Frontiers

The case law discussed above has essentially required courts to move through a three step analysis with respect to browse-wrap agreements and the terms contained therein. First, courts addressed whether "notice" was properly rendered. Second, courts looked to how consent was given and whether it would be fair under the particular circumstances to find assent. These two steps essentially pertain to formation. The third step focused on whether the substantive requirements for the particular terms have been met. Put another way, that analysis entails looking at the relationship of the clause to the thing bargained for.

Onerous terms such as those with respect to choice of law, forum selection and binding arbitration terms have been enforced in different jurisdictions. The last category yet to yield decisions in the browse-wrap context relates to Consumer Protection Terms. With that said, however, courts have not yet addressed facets of the Prohibitory Terms pertaining to the use of copyrights and trademarks.⁶⁸ Nevertheless, given that intellectual property rights are similar to

another website that is not the website's home page. Many results of a search engine provide deep links to websites, because many search engines index any and all pages on the Web.)

⁶⁷ *Ticketmaster v. Tickets.com*, 2003 U.S. Dist. Lexis 6483, Copy L. Rep. (CCH) ¶28607 (C.D. Cal. Mar. 6, 2003).

⁶⁸ An owner's intellectual property rights are largely defined by statute; for example, the Copyright Act 17 U.S.C.A. §§ 101 et seq. and the Lanham Act

the rights afforded to a business' "hot news" information posted on a website, it is very likely that intellectual property rights will be given the same protection.⁶⁹

Consumer Protection Terms arise out of concepts of fairness and equity.⁷⁰ Terms falling within this category generally aim to protect the public. Encompassed in this category are terms relating to the use of personal information, limitations on damages, and warranties.⁷¹ This section discusses whether the browse-wrap online contract model fits the particular term that is trying to be enforced and looks at the substantive requirements for the particular term.

A. Warranties and Remedies

Contractual terms that disclaim warranties and limit remedies are well established in traditional contract law. The sale of goods is governed by some version of every state's Uniform Commercial Code and services are governed by

Trademark Act of 1946 (Lanham Act) 15 U.S.C.A. §§ 1051-1127 define the rights of copyright and trademark respectively.

The reader should further note that the Court declined to address the copyright arguments in *Pollstar v. Gigmania, Ltd.*, 170 F.Supp.2d 974, 981 (E.D. Cal. 2000) and related defenses because copyright infringement was not pled.

⁶⁹Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 HAMLIN L. REV. 499, 513 (2003) (noting that intellectual property notices are superfluous).

To the extent that a set of terms are over encompassing as to copyrights and valid uses, it will be subject to defenses such as copyright misuse. *See Davidson & Associates, Inc. v. Internet Gateway*, 334 F.Supp.2d 1164, 1182; *see also* Mathew D. Walden, *Could Fair Use Equal Breach of Contract, An Analysis of Informational Website User Agreements*, 58 WASH. & LEE L.R. 1625, 1629-30, 1662-63 (citing to 17 U.S.C. § 301 and noting that fair use defense will supersede use rights limited under state contract law).

⁷⁰ FARNSWORTH, CONTRACTS 323 (2ed. 1990).

⁷¹ For an analysis of how limitations on remedies have been treated in the click-through context see *i.Lan Systems, Inc. v. NetScout Service Level Corp.*, 183 F. Supp.2d 328 (D.Mass 2002).

the common law. Websites typically follow the same rules of governance,⁷² but most websites mix components of each of these general categories making it necessary to evaluate the primary purpose of the contract.⁷³

1. Substantive Law Pertaining to Goods: Warranties and Remedies

The sale of goods over the web is governed by Article 2 of the Uniform Commercial Code, although the extent to which Article 2 applies to intangible items like computer programs is still being debated.⁷⁴

Article 2 describes three types of warranties: an express warranty,⁷⁵ implied warranty of merchantability⁷⁶ and implied warranty for a particular purpose.⁷⁷ Express warranties can be created by an affirmation of fact, a description of the goods or a sale of the model.⁷⁸ Implied warranties of merchantability are created when merchants who deal in goods of the kind in dispute hold themselves out as “having knowledge or skill peculiar to the practice or goods involved in the

⁷² UCITA has created another category pertaining to informational content. That term refers to text, sound or images displayed to the recipient and not to the underlying program used to deliver that content. *See* UCITA §§102(a)(37) & 102(a)(52) (published information content) & cmt. 33. For example, a “Westlaw search program is not informational content, but the text of the case is.” UCITA §102 cmt. 46. Most information available on websites consists of published informational content as it is made for the public at large.

UCITA has only been adopted by Maryland and Virginia. Other states view that statutory scheme as too favorable to merchants. Nevertheless, to a large extent the analysis relevant to Article 2 will apply with regard to informational content.

⁷³ *See generally* Raymond T. Nimmer, *Images and Contract Law--What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 32 (1999).

⁷⁴ U.C.C. § 2-105 (“The definition of goods is based on the concept of movability”); Steven P. Mandell et al., *Drafting Software Licenses for Litigation*, 879 PLI/Pat. 649, 677-78(Oct.-Dec. 2006).

⁷⁵ U.C.C. § 2-313.

⁷⁶ U.C.C. § 2-314.

⁷⁷ U.C.C. § 2-315.

⁷⁸ U.C.C. 2-313(1)(a)-(c).

transaction."⁷⁹ Finally, the implied warranty for a particular purpose applies to sellers that know how the particular buyer wishes to use the good.⁸⁰

Apart from express warranties, which are exceptionally difficult to disclaim, offerors may simply use the specific terminology as enumerated under Article 2.⁸¹

⁷⁹ U.C.C. § 2-104(1); Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1310 (1997). Under UCITA section 404(b):

“There is no [implied] warranty under subsection (a) with respect to: (1) subjective characteristics of the informational content, such as the aesthetics, appeal, and suitability to taste; ¶ (2) published informational content; or ¶ (3) a person that acts as a conduit or provides no more than editorial services in collecting, compiling, distributing, processing, providing, or transmitting informational content that under the circumstances can be identified as that of a third person.”

⁸⁰ U.C.C. 2-315; *See also* UCITA §404 cmt. 1 (“This section creates a new implied warranty. The warranty focuses on data conveyed in a relationship of reliance. It recognizes an implied assurance in such contracts that no data *inaccuracies* are caused by a failure of reasonable care.”). Under UCITA section 404(a) an implied warranty is attached to a merchant’s specially created informational content. That section states:

“Unless the warranty is disclaimed or modified, a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides, or transmits informational content, warrants to that licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care.”

See also UCITA 404(a) & cmt. 2:

“This warranty is based on the expectation of a person receiving data in a special relationship of reliance that the data are not made inaccurate because of the provider's lack of reasonable care in performing the contract. The warranty is limited to inaccuracies caused by a failure to use reasonable care. One who hires an expert cannot expect infallibility unless the express terms clearly so require. Reasonable efforts, not perfect results, provide the appropriate standard in the absence of express terms to the contrary....What constitutes reasonable care depends on the commercial circumstances and the contracted for duties. For example, in a contract to transmit computer information, there is no duty to screen or vouch for accuracy, but merely to avoid a lack of reasonable care in the transmission that causes inaccuracies. A data provider in a context where major loss of human life is possible has a higher degree of care than a provider in other settings.”

⁸¹ 17 Am. Jur.2d Consumer Product Warranty Acts §§5 *et seq.* (discussing the Manguson-Moss Warranty Act).

For example, to disclaim a warranty of merchantability, merchants are required to mention "merchantability" when disclaiming the implied warranty.⁸² Warranties for a particular purpose may be disclaimed by simply using generally known phrases like, "AS IS."⁸³ Both, however, require the disclaimer be conspicuously located.⁸⁴ Under article 2-316, all three warranties may be disclaimed by contract

⁸² U.C.C. § 2-316 cmt.3

⁸³U.C.C. § 2-316(3) & cmt.4 ("Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language"); *See also* UCITA § 406(1) requires specific language be used as well:

- (A) To disclaim or modify the implied warranty arising under Section 403, language must mention "merchantability" or "quality" or use words of similar import and, if in a record, must be conspicuous.¶
- (B) To disclaim or modify the implied warranty arising under Section 404, language in a record must mention "accuracy" or use words of similar import.

⁸⁴ U.C.C. § 2-316(2); U.C.C. § 103(b) ("Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

- (i) for a person:

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; and

- (ii) for a person or an electronic agent, a term that is so placed in a record or display that the person or electronic agent may not proceed without taking action with respect to the particular term.;

See also A & M Produce Co. v. FMC Corp., 135 Cal.App.3d 473, 483 n.5 (1982), *citing* Civ. Code §1201 ("A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A

and there is no requirement that consumers expressly consent to the disclaiming of those terms.

Article 2 also specifically enumerates the types of remedies available in the event of a seller's or buyer's breach.⁸⁵ Damages may take the form of consequential or incidentals,⁸⁶ specific performance or replevin,⁸⁷ liquidation or limitation of damages,⁸⁸ cancellation or recession,⁸⁹ contractual modification or limitation of remedy.⁹⁰ The sections most pertinent to this analysis, however, are those relating to (1) liquidation damages and (2) limitations of remedy because they do not apply by default.

Under 2-718(1), liquidated damages must be "reasonable in light of the anticipated or actual harm caused by the breach." Damages that are unreasonable will not be enforced and may also be considered unconscionable.⁹¹ Moreover, liquidation damages should only be used if damages will be difficult to estimate. Another limitation on damages comes from section 2-719, wherein it states that parties may agree to limit available remedies to repair or replace. Terms as such must be clear and cannot be unconscionable.

Section 2-718 does not require that express assent be evidenced before parties may enforce the liquidated damages provisions. In contrast, parties must

printed heading in capitals ... is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."); *See also Hulsev v. Elsinore Parachute Center*, 168 Cal.App.3d 333, 339 & n.1 (1985).

⁸⁵ U.C.C. 2-701 et seq.

⁸⁶ U.C.C. 2-710 (Seller's incidentals); 2-715 (Buyers rights).

⁸⁷ U.C.C. 2-716 (Buyers rights).

⁸⁸ U.C.C. 2-718.

⁸⁹ U.C.C. 2-720.

⁹⁰ U.C.C. 2-719.

⁹¹ U.C.C. 2-718(a) & cmt. 1 (noting "A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.").

“expressly” agree to repair and replace damages in order for them to be the exclusive remedy.⁹²

2. Applicability of Browse-Wrap Agreements to Limitations on Damages in Goods Transactions

Based on the foregoing law, there appears to be no impediment to enforcing browse-wrap agreements that disclaim warranties. Disclaimers must be “conspicuous.” This means that the terms within the browse-wrap agreement must put a reasonable person on notice that a disclaimer exists. If courts choose to import the warranty conspicuous requirement to contract formation as well, the analysis could lead to different results because many disclaimers are located at the bottom of the website in font size smaller than size 10. Therefore, contracts like that could be classed as inconspicuous.⁹³ Merchants disclaiming warranties related to the implied warranty of merchantability or warranty for a particular

⁹² U.C.C. 2-719(1)(b). Like Article 2, UCITA provides that parties may seek to limit the extent to which the nonbreaching may recover. Although consequential and incidental damages may be limited or modified in some circumstances, these damages are not recoverable for informational content absent a special relationship under UCITA. See UCITA §§ 803(d), 807(b)(1); 404(a). When incidental and consequential damages are limited, though, their limitation must not be “unconscionable.” UCITA § 803(d). In addition, under section 804, parties may stipulate to damages and limit the amount either side may recover if that amount is “reasonable in light of: (1) the anticipated loss at the time of contracting; (2) the actual loss; or (3) the actual or anticipated difficulties of proving loss in the event of breach.” UCITA § 804. Section 804 uses limiting language like “reasonable” and like section 803, liquidated damages are limited with words like “unconscionable.” On the other hand, if parties choose the “repair or replace” option, parties may “expressly agree” that the merchant provide accurate information in its stead. UCITA § 803(a)(2). In sum, the “remedy limiting” sections of UCITA are virtually identical to Article 2.

⁹³ See *Hubbert et al. v. Dell Corp.* No. 02-L-786 (Ill. App. Ct. 8/12/2005).

purpose should locate the warranty/contract very close to the “Buy Now” button or else run the risk of having that disclaimer rendered useless.⁹⁴

Nevertheless, express assent is not required before warranties are disclaimed. Thus, an implied-in-fact analysis may be used to show assent to the warranty disclaimer. That analysis does not necessarily apply with respect to terms limiting remedies to repair and replacing substandard products, however. This is because section 2-719 requires that parties “expressly” agree to those types of remedies. A contract based on an implied-in-fact assent, *i.e.* where there is no clear assent, will face obstacles to enforcement. The practical effect of failing to obtain an offeree’s express consent will mean that the return, repair and replacement limitation will be considered an option rather than the exclusive remedy. Thus, using a browse-wrap agreement may not be adequate to limit damages to repair or replace a defective good.⁹⁵

3. Substantive Law Pertaining to Services: Warranties and Remedies

Contracts for services are governed under the common law principles. If companies provide services through the use of computers such as internet access, electronic storage, and internet radio, the common law will likely govern as well.⁹⁶

⁹⁴ See also *DeFontes & Long v. Dell Computers Corporation*, C.A. No. PC 03-2636, pg. 10 (Jan. 2004) (refusing to enforce a browse-wrap agreement containing an arbitration clause because it was “inconspicuously located at the bottom of the website.”); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 34-35 (2d Cir. 2002).

⁹⁵ U.C.C. 2-719 cmt. 2 (requiring that “If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed”).

⁹⁶ See Lee Kissman, *Revised Article 2 and Mixed Goods/Information Transactions: Implication for Courts*, 44 SANTA CLARA L. REV. 561, 577 & n.115 (2004); Jennifer Cannata, *Time Is Running Out For Customized Software Resolving The Goods Versus Service Controversy For Year 2000 Contractual Disputes*, 21 CARDOZO L. REV. 283 (1999); Raymond T. Nimmer, *Images and*

In the context of service contracts, the performance of the service is generally not discussed in terms of warranties.⁹⁷ The obligations regarding the standards of performance are grounded in principles of tort, stemming from contractual relations.⁹⁸ The Restatement (Second) of Torts 299A states “one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade”⁹⁹ Williston also states that a promisor rendering performance is obligated to perform with “reasonable care.”¹⁰⁰ Moreover, no implied warranties are accorded to offerees in service contracts.¹⁰¹ Thus, unlike the law pertaining to goods, no particular language must be used to disclaim warranties as such. However, the well settled law related to procedural and substantive unconscionability will still apply.¹⁰²

Contract Law--What Law Applies to Transactions in Information, 36 HOUS. L. REV. 1, 32-34 (1999); see generally *Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991).

⁹⁷ Raymond T. Nimmer, *Images and Contract Law--What Law Applies to Transactions in Information*, 36 Hous. L. Rev. 1, 45 (1999) *cf* *Centex Homes v. Buecher*, 95 S.W.3d 266, 272-73 (2002) (holding that “[t]hrough the implied warranty of good workmanship, the common law recognizes that a new home builder should perform with at least a minimal standard of care.”)

⁹⁸ Raymond T. Nimmer, *Images and Contract Law--What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 47-48 n.163-168 (1999) (collecting cases).

⁹⁹ Raymond T. Nimmer, *Images and Contract Law--What Law Applies to Transactions in Information*, 36 Hous. L. Rev. 1, 32-34 (1999).

¹⁰⁰ Raymond T. Nimmer, *Images and Contract Law--What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 48 n.170 (1999) citing 9 WILLISTON & JAEGER, 5 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1012C, at 38; UCITA attempts to codify the common law rule, as it relates to merchants, by attaching an implied warranty where there is special relationship of some sort. UCITA § 404(a).

¹⁰¹ Raymond T. Nimmer, *Images and Contract Law--What Law Applies to Transactions in Information*, 36 Hous. L. Rev. 1, 47-48 (1999).

¹⁰² Restatement (Second) Of Contracts § 208.

Limiting damages in lieu of consequential and special damages in service contracts is defined by case law and in some instances by statutory law.¹⁰³ Under Restatement (Second) of Contracts section 356, damages may be liquidated in the agreement if damages will be hard to anticipate and hard to prove. Liquidated damages must, however, be a reasonable anticipation of the damages; otherwise, it will likely be declared a penalty.¹⁰⁴ The law addressing liquidated damages in service contracts, in general, does not require parties to affirmatively assent to that particular term.¹⁰⁵ However, for service contracts that could be classed as primarily for personal or home use, “express assent” may be required as “assent” was contemplated for the protection of the consumer.¹⁰⁶

¹⁰³ See Cal. Civ. Code §1671 (“a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.”).

¹⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 356(a) (“A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty”).

¹⁰⁵ For property transactions see CAL. CIV. CODE § 1677 (Any provision liquidating damages in a real estate transaction requires “The provision [be] separately signed or initialed by each party to the contract.”) E-SIGN and UETA (not California’s UETA) specially exempts real estate transactions from their statutory reach.

¹⁰⁶ Cal Civ. Code §1671 (“The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated damages are sought to be recovered from either: ¶ (1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party’s personal, family, or household purposes; or ¶ (2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support. ¶ (d) In the cases described in subdivision (c), a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”).

4. Applicability of Browse-Wrap Agreements to Limitations on Damages in Service Transactions

Generally speaking, common law service contracts do not require parties to affirmatively assent to the terms that would disclaim or limit damages to a certain amount. This means that terms as such may be used in browse-wrap agreements. However, consumer contracts, such as those in California, clearly contemplate that parties "agree" to the specified amount, making it less likely that acceptance by implication will withhold judicial scrutiny.¹⁰⁷ That premise is further supported if we look at the underlying policies for having consumer protection terms in the first place, which was to try to ensure that consumers were well aware of all the pitfalls associated with the terms. Notwithstanding those arguments, nothing appears to preclude the enforcement of liquidated damages when contained in a browse-wrap agreement. However, the terms will still be subject to common law doctrines such as procedural and substantive unconscionability.

5. Conclusions About Limiting Terms in Goods and Services Contracts

Limiting terms differ from the prohibitory and mandatory terms discussed in section III. The terms of limitation do not simply restate the rights associated with a good or service as do prohibitory terms. Instead, limiting terms have characteristics of mandatory terms, which usually require consumers to relinquish certain rights such as the right to seek redress where the contract was entered into or performed. However, limiting terms do not require consumers to perform certain rights, such as filing suit in certain forums, nor do they preclude the types of remedies one can obtain. With that said, it appears that limiting terms will not

¹⁰⁷ Cal. Civ. Code § 1671(c)(1).

face an obstacle to enforcement because onerous mandatory terms have been enforced that may serve precedence for less onerous terms.

The primary obstacle to enforcement, aside from the notice and assent requisites (aka formation), seems to be the procedural requirements like the type of language that must be used or the font size that should be used in the sale of goods. Browse-wrap contracts in this context are not immune from substantive requirements either and they will face challenges related to what is being taken away from the consumer in relation to other terms of the contract.

B. Terms Pertaining to Consumer Information

The use of consumer related information is a hotly debated topic.¹⁰⁸ A significant amount of litigation stems from website privacy policies, which are viewed by some as an executory contract between the website and its users.¹⁰⁹ Apart from the litigation related to those policies, debate has also centered around tracking the online footprint of consumers and what is done with that information.

In 2000, the Federal Trade Commission surveyed consumer concerns and found that some 92% of online consumers are concerned about how their consumer information may be misused. That same study estimated that the fear of the misuse of consumer information would cost online businesses approximately \$18 billion in 2002. That fear continues to grow as consumers flock¹¹⁰ to the Internet.¹¹¹

¹⁰⁸ WILLIAMS & SMYTH, COMPUTER AND INTERNET LIABILITY, STRATEGIES, CLAIMS AND DEFENSES, § 4.01(C) (2003 Supp.) ("One of the most commonly voiced concerns with regard to online privacy is the tremendous increase in the practice by commercial interests of gathering and sharing personal information about individual Internet users.").

¹⁰⁹ L.J. KUTTEN, COMPUTER SOFTWARE PROTECTION, LIABILITY-LAW-FORMS, §9:56 n.3 (2006).

¹¹⁰ Wall Street Journal, Monday November 21, 2005 (reporting that online sales in 2005 are expected to be \$26 billion); Majority of U.S. Adults Believe They Are More Susceptible to Identity Theft During the Holiday Season, *available at*

Many concerns have centered on protecting the expectations of consumers.¹¹² The effect of those concerns has led courts,¹¹³ legislatures,¹¹⁴ regulators,¹¹⁵

<http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-22-2005/0004221337&EDATE=> (noting that in a survey commissioned by Sun Microsystems “one in three adults have been a victim of identity theft or know someone who has been victimized and a majority say they are likely to stop shopping and banking with institutions that put their personal data at risk.”).

¹¹¹ Identity Theft: Shocking Statistics, *available at* <http://bankinfosecurity.com/node/2686> (noting that “ID theft cost Americans \$52.6 billion in 2004.”).

¹¹²Online Privacy Alliance, *Guidelines for Online Privacy*, at, <http://www.privacyalliance.org/resources/ppguidelines.shtml> (last visited March 1, 2004).

Notice and Disclosure

An organization's privacy policy must be easy to find, read and understand. The policy must be available prior to or at the time that individually identifiable information is collected or requested.

The policy must state clearly: what information is being collected; the use of that information; possible third party distribution of that information; the choices available to an individual regarding collection, use and distribution of the collected information; a statement of the organization's commitment to data security; and what steps the organization takes to ensure data quality and access.

The policy should disclose the consequences, if any, of an individual's refusal to provide information. The policy should also include a clear statement of what accountability mechanism the organization uses, including how to contact the organization.

¹¹³ See *In re Pharmatrak, Inc.*, 329 F.3d 9 (2003); *In Re DoubleClick, Inc. Privacy Policy*, 154 F.Supp.2d 497 (SDNY 2001); *Liescke v. RealNetworks*, 2000 WL 198424 (Feb. 11, 2000).

¹¹⁴ For a list of bills before the Congress in 2006 see Center for Democracy and Technology at www.cdt.org/legislation/109/3 (last visited Nov. 11, 2006).

¹¹⁵ Federal Trade Commission, *Privacy Online: Fair Information Practice in the Electronic Market Place*, *available at* <http://www.ftc.gov/reports/privacy2000/privacy2000.pdf> (last visited March 1, 2004).

consumer advocates¹¹⁶ and industry consortiums¹¹⁷ to set standards on the use of consumer information. That resulted in a myriad of different statutes and principles. Some commentators have noted, "American law covering personal information is 'a patchwork of uneven, inconsistent, and often irrational' federal and state rules."¹¹⁸

Types of Information

There are essentially two categories of electronic consumer information. The first category of consumer information is personally identifiable information, which includes a website visitor's name, address, telephone number and social security number.¹¹⁹ The second category of consumer information is the non-

¹¹⁶ Electronic Privacy Information Center, www.epic.com (last visited March 1, 2004).

¹¹⁷ Online Privacy Alliance, *Guidelines for Online Privacy*, at <http://www.privacyalliance.org/resources/ppguidelines.shtml> (last visited March 1, 2004). This is a consortium made up of thirty of the leading businesses: Acxiom, AOL Time Warner, Apple Computer, AT&T, Boeing, Cendant, Dell, DoubleClick Inc., EarthLink, Inc., eBay Inc., EDS, Equifax, Ernst and Young, Experian, IBM, Intuit, MCI, Microsoft, PricewaterhouseCoopers, Reed Elsevier, SAS Institute Inc., Sun Microsystems, Verizon Communications, Yahoo!, American Advertising Federation, Association for Competitive Technology, Business Software Alliance, Association of National Advertisers, American Association of Advertising Agencies, Information Technology Association of America, Internet Alliance, Motion Picture Association of America, The United States Chamber of Commerce.

¹¹⁸ JULIAN MILLSTEIN ET AL, *DOING BUSINESS ON THE INTERNET, FORMS AND ANALYSIS*, § 10.03 (2006) ("There is no comprehensive privacy protection legislation in the United States that addresses the collection, storage, transmission or use of personal information on or from the Internet or in other business environments."); Vera Bergelson, *It's Personal But Is It Mine?*, 37 U.C. DAVIS L. REV. 379, 391 (2003), quoting FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 80 (1997).

¹¹⁹ Cal. Bus. & Prof. § 22577(a); Federal Trade Commission, *Privacy Online: Fair Information Practice in the Electronic Market Place*, available at <http://www.ftc.gov/reports/privacy2000/privacy2000.pdf> (last visited March 1, 2004). (pdf page 46 n. 54); *Microsoft Makes Federal Privacy Push*,

identifying information such as click-stream data (websites previously visited), gender, age and hobbies.¹²⁰ The latter category refers to electronic information that does not readily identify consumers.

a. Personally Identifiable Information

Several pieces of federal legislation already regulate the use of personal information. Although federal legislation appears to be rooted in particular industries like the banking sector or telecommunications and cable industry,¹²¹ a penumbra of law based around electronic privacy is evolving. For example, the Cable Communications Policy Act of 1984¹²² and the Video Privacy Protection

http://www.betanews.com/article/Microsoft_Makes_Federal_Privacy_Push/1131043763 (November 3, 2005).

¹²⁰ Federal Trade Commission, *Privacy Online: Fair Information Practice in the Electronic Market Place*, available at <http://www.ftc.gov/reports/privacy2000/privacy2000.pdf> (last visited March 1, 2004). (pdf page 46 n. 53, 54, 59).

¹²¹ Vera Bergelson, *It's Personal But Is It Mine?*, 37 U.C. DAVIS L. REV. 379, 391-92 (2003). For example, the financial and banking industries have recently had to comply with the Gramm-Leach-Bliley Act, 15 U.S.C.S. § 1681 (2002), which requires financial institutions to disclose to their customers how the company uses a customer's personal information. *Id.* at 391 n.55. Similarly, the Financial Modernization Service Act, 15 U.S.C.S. §§ 6701, 6801, 6901 (2003) expands consumer protection by requiring financial institutions to allow consumers to opt-out and forbid a company's use of personal information. *Id.* at 392 n. 55

Likewise, privacy protection is extended in the area of telecommunications in the Electronic Communications Privacy Act of 1986, 18 U.S.C.S. § 521 which guards against the interception of electronic communications. *Id.* at 392 n. 56. In addition, the Children's Online Privacy Protection Act of 1999, 15 U.S.C.S. § 6501 *et seq.*, forbids collection of information from minors under the age of thirteen.

Educational institutions also must protect student records. *See* Family Education and Privacy Act of 1974, 20 U.S.C.A. § 1232(g)(2002).

¹²² 47 U.S.C.S. § 521 (2003).

Act¹²³ require consumers to opt-in, that is, give their affirmative consent by marking a box with a check mark.¹²⁴

The Children's Online Privacy Protection Act (COPPA) also adds to the legislative patchwork by mandating that affirmative parental consent be given for certain uses of a child's information.¹²⁵ The same could be said for the Electronic Communications Privacy Act (ECPA),¹²⁶ and the Computer Fraud and Abuse Act (CFFA).¹²⁷

In 2003, the California legislature modified the Business and Professions Code to address the use of personal identifiable information submitted by a consumer to a website.¹²⁸ This amendment noted that no California law regulates how and the extent to which personally identifiable consumer information is used and collected on the Internet.¹²⁹ This law requires commercial operators of websites or online services "to post privacy policies that inform consumers who are located in California of the Web site's or online service's information practices with regard to consumers' personally identifiable information and to abide by those terms."¹³⁰ However, section 22575 stops short of requiring website operators from mandating a website user's consent before the information is taken.

¹²³ 18 U.S.C.S. § 2701 (2003).

¹²⁴ Kent Walker, *The Cost of Privacy*, 25 HARV. J.L. & PUB. POL'Y 87, 116. However, the opt-out function allows the user/consumer to elect to withhold his or her consent to the use of their personal information. The difference between the two is essentially the default setting – the opt-in function starts with the customer saying "No," where as the opt-out begins with the customer saying "Yes." (2001).

¹²⁵ 15 U.S.C.A. § 6501(9) &(10).

¹²⁶ 18 U.S.C.A. § 2701.

¹²⁷ 18 U.S.C.A. §1030.

¹²⁸ CAL. BUS. & PROF. CODE § 22575. This piece of legislation mirrors the language of COPPA, discussed above, except for the fact that no affirmative consent is required when personally identifiable information is used.

¹²⁹ CAL. BUS. & PROF. CODE § 22575 preamble.

¹³⁰ CAL. BUS. & PROF. CODE § 2(a) Declaration.

Consumer advocacy and industry consortium groups have also advocated empowering consumers with a greater ability to control how their information is used by the companies to which the information is given first hand, and how the information is subsequently used by different companies.¹³¹ For example, the Online Privacy Alliance declares that:

Individuals must be given the opportunity to exercise choice regarding how individually identifiable information collected from them online may be used when such use is unrelated to the purpose for which the information was collected. At a minimum, individuals should be given the opportunity to opt out of such use.

Additionally, in the vast majority of circumstances, where there is third party distribution of individually identifiable information, collected online from the individual, unrelated to the purpose for which it was collected, the individual should be given the opportunity to opt out.

b. Non Personally Identifiable Information

The use of this type of information appears to be less regulated but has not been ignored. This category of information refers to information that does not specifically identify the Internet user, but refers to general information about the habits of that user. Typically, this type of information is gathered with the use of cookies,¹³² spyware,¹³³ web bugs,¹³⁴ and other programs that track the

¹³¹ See also JULIAN MILLSTEIN ET AL, *DOING BUSINESS ON THE INTERNET, FORMS AND ANALYSIS*, § 10.04 (2006) (identifying other industry groups).

¹³² See Jessica J. Thill, *The Cookie Monster: From Sesame Street to Your Hard Drive*, 52 *SOUTH CAROLINA LAW REVIEW* 921 (2001) (defining cookies as “numerical identifiers deposited onto a user’s hard drive in order to recognize an

whereabouts of those surfing the Internet. In most instances, the ultimate purpose of those tracking devices is to offer targeted advertising which is currently a multi-billion dollar market.¹³⁵

The debate surrounding the use of cookies has been around for many years and U.S. legislatures have been slow to address concerns related to cookies. On the other hand, courts have interpreted existing legislation to apply to the use of tracking cookies. For example, in *In Re DoubleClick, Inc. Privacy Policy*, 154 F.Supp.2d 497 (SDNY 2001), consumers brought a class action suit against DoubleClick for accessing and intercepting communications under the Electronic Consumer Protection Act.¹³⁶ DoubleClick tracked consumers by adding cookies on to user's hard drives when the consumers visited particular websites. Thereafter, DoubleClick used that information to build profiles on the consumers

Internet user each time she accesses a certain website. Internet companies use cookies primarily to collect information about the user – site preferences, shopping habits, search queries, clickstreams and sometimes even a user's name, email address, and other personal information. However, cookies also allow a website to personalize site information, offer shopping cart capabilities, remember user names and passwords for future visits, and monitor website traffic.”

¹³³ JULIAN MILLSTEIN ET AL, DOING BUSINESS ON THE INTERNET, FORMS AND ANALYSIS, § 10.02 (“Spyware’ is a term that has come to be applied to a range of software technologies that enable the remote monitoring of activities on an individual user's computer.”)

¹³⁴ JULIAN MILLSTEIN ET AL, DOING BUSINESS ON THE INTERNET, FORMS AND ANALYSIS, § 10.02 (“involve the placing of a text file or graphic on a Web page or in an e-mail message for the purpose of tracking or monitoring activity on that page or e-mail.”)

¹³⁵ See www.marketingvox.com/archives/2006/04/20/iabpwc_internet_advertising_revenues_at_record_125_billion (reporting online advertising hit a record of \$12.5 billion); www.iab.net/news/pr_2006_05_30.asp (noting that online advertising revenue increased over 30% during the first quarter of 2006).

¹³⁶ *In Re DoubleClick, Inc. Privacy Policy*, 154 F.Supp.2d 497, 507 (SDNY 2001) (plaintiffs also pled under the Computer Fraud and Abuse Act, but they failed to meet their burden relating to loss as required under that statute and since the court's discussion on this point did not involve consent it will not be discussed).

based on certain searches they performed.¹³⁷ Targeted advertising would then be prompted by the DoubleClick planted cookie if the user visited a website serviced by DoubleClick. In essence, that cookie would send a message to DoubleClick servers about the consumer's recent Internet history, which included searches made by the consumer, and offer advertising that tracked the previous visits. Plaintiffs claimed these actions violated ECPA. The court, however, rejected that argument because the information the consumers submitted to the websites was intercepted with the consent of the owners of the website.¹³⁸

Concurrently with the rise of the *DoubleClick* litigation, the Electronic Privacy Information Center (EPIC) filed a complaint that prompted the Federal Trade Commission to investigate DoubleClick for the use of "online profiling" in contravention of its privacy policy.¹³⁹ EPIC urged the FTC to require DoubleClick to obtain the "express consent" of Internet users before tracking their online activities on the web.¹⁴⁰ The FTC did not, however, proceed further than the face of the privacy policy and concluded DoubleClick had not engaged in unfair business practices in contravention of its policy.¹⁴¹

In *In re Pharmatrak, Inc.*, the court addressed the use of cookies under the ECPA as well. Plaintiffs in this case sued pharmaceutical companies with an online presence¹⁴² and a tracking service company called Pharmatrak for the use

¹³⁷ *In Re DoubleClick, Inc. Privacy Policy*, 154 F.Supp.2d 497, 502-03 (SDNY 2001); Yonatan Lupu, *The Wiretap Act & Web Monitoring: A Breakthrough for Privacy Rights?* 9 VIRGINIA J. L. & TECH. 3, 13 (2004).

¹³⁸ *In Re DoubleClick, Inc. Privacy Policy*, 154 F.Supp.2d 497, 510-12 (SDNY 2001);

¹³⁹ Jessica J. Thill, *The Cookie Monster: From Sesame Street to Your Hard Drive*, 52 SOUTH CAROLINA LAW REVIEW 921, 927-28 (2001).

¹⁴⁰ Jessica J. Thill, *The Cookie Monster: From Sesame Street to Your Hard Drive*, 52 SOUTH CAROLINA LAW REVIEW 921, 927-28 (2001).

¹⁴¹ Jessica J. Thill, *The Cookie Monster: From Sesame Street to Your Hard Drive*, 52 SOUTH CAROLINA LAW REVIEW 921, 928 (2001).

¹⁴² *In re Pharmatrak, Inc.*, 329 F.3d 9, 16 (1st Cir. 2003) (American Home Products Corp., Glaxo Wellcome, Inc., Pfizer, Inc., Pharmacia Corp., and SmithKline Beecham Corp.).

of personal information and other identifying information.¹⁴³ Plaintiffs alleged that they were invited to the pharmaceutical websites to learn about certain drugs and obtain rebates.¹⁴⁴ While on those websites, the consumers were tracked with persistent cookies,¹⁴⁵ and data was collected about the users' habits on the various pharmaceutical websites.¹⁴⁶ The court reported that Pharmatrak used approximately 18.7 million persistent cookies through the software it sold to those websites.¹⁴⁷

Pharmatrak offered the information it gathered to pharmaceutical companies by means of a comparative analysis.¹⁴⁸ The pharmaceutical companies were able to understand the manner in which consumers accessed the website, the time they spent on the site, and the visitor's IP address.¹⁴⁹ Most of the pharmaceutical websites stated that they wanted no personally identifiable information about the consumers.¹⁵⁰ However, it became evident that the non personally identifiable information could be combined with personal information by running a relative easy software program.

The *Pharmatrak* court noted some similarities to the *DoubleClick* litigation, but made a critical distinction. The website owners in *DoubleClick* had authorized DoubleClick to obtain personal information, whereas, in *Pharmatrak*, the websites had expressly forbade the use of personal information.¹⁵¹ The court

¹⁴³ *In re Pharmatrak, Inc.*, 329 F.3d 9, 15 (1st Cir. 2003) (names, addresses, telephone numbers, email addresses, dates of birth, genders, insurance statuses, education levels, occupations, medical conditions, medications, and reasons for visiting the particular website).

¹⁴⁴ *In re Pharmatrak, Inc.*, 329 F.3d, 12 (2003).

¹⁴⁵ *In re Pharmatrak, Inc.*, 329 F.3d, 14 (2003) (cookies that did not expire after the user left the website).

¹⁴⁶ *In re Pharmatrak, Inc.*, 329 F.3d, 14 (2003).

¹⁴⁷ *In re Pharmatrak, Inc.*, 329 F.3d, 15 (2003).

¹⁴⁸ *In re Pharmatrak, Inc.*, 329 F.3d, 12 (2003).

¹⁴⁹ *In re Pharmatrak, Inc.*, 329 F.3d, 13 (2003).

¹⁵⁰ *In re Pharmatrak, Inc.*, 329 F.3d, 12 (2003).

¹⁵¹ *In re Pharmatrak, Inc.*, 329 F.3d 19-21 (2003).

in *Pharmatrak* found this difference warranted a different result than the *DoubleClick* result.

Significantly, in *Phramatrak*, the circuit court was *unwilling* to find that the website users “consented” to the use of their personal information based on the mere use of a website or purchase of services from a website¹⁵² because nothing on the website suggested that the website users’ use of the website would amount to consent to use their personal information by a third party.¹⁵³ In fact, the Court stated:

Pharmatrak makes a frivolous argument that the internet users visiting client Pharmacia's webpage for rebates on Detrol thereby consented to Pharmatrak's intercepting their personal information. On that theory, every online communication would provide consent to interception by a third party.¹⁵⁴

In other instances, consumers have also sought to protect their online privacy rights by focusing on the privacy policies themselves. For example, toysrus.com settled a California based class action suit wherein plaintiffs alleged that the company used cookies and web-bugs to track the purchasing preferences of visitors on the toysrus.com website.¹⁵⁵ Thereafter, ToysRUs forwarded that information to another company without the knowledge of the consumer.¹⁵⁶ Those actions were apparently contrary to the site’s own privacy policies. Ultimately, toysrus.com settled the claim and was required to pay “attorney's fees and costs of up to \$900,000, edit its website to include clear and conspicuous

¹⁵² *In re Pharmatrak, Inc.*, 329 F.3d 21 (2003).

¹⁵³ *In re Pharmatrak, Inc.*, 329 F.3d, 21 (2003) (“The pharmaceutical companies' websites gave no indication that use meant consent to collection of personal information by a third party. Rather, Pharmatrak's involvement was meant to be invisible to the user, and it was. Deficient notice will almost always defeat a claim of implied consent.”)

¹⁵⁴ *In re Pharmatrak, Inc.*, 329 F.3d 21 (2003).

¹⁵⁵ Stephen F. Ambrose, Jr., Joseph W. Gelb, *Consumer Privacy Regulation & Litigation in the United States*, 59 BUS. LAW. 1251, 1255 (2004).

¹⁵⁶ Stephen F. Ambrose, Jr., Joseph W. Gelb, *Consumer Privacy Regulation & Litigation in the United States*, 59 BUS. LAW. 1251, 1255 (2004).

links to its privacy policy, provide notices as to policy changes, and obtain consent before engaging in activities outside the parameters of its privacy policy.”¹⁵⁷

c. Browse-Wrap and Assent to Privacy Policies

While there is a general trend towards protecting consumer information, no law mandates website owners to obtain the “express consent” of the average adult Internet user. A strong argument can be made that implied consent through the use of a browse-wrap privacy policy will affect the terms stated therein. That position is further bolstered by California’s Business and Professions Code section 22575 *et seq.*, as it does not require express assent, but mandates that websites post a conspicuous notice regarding the privacy policy. However, that result could be read as contrary to the *Pharmatrak* decision as the court seemed unwilling to find “consent” through mere use of a website. Still, *Pharamatrak* could be harmonized with California’s privacy act because the court emphasized a lack of indicia pertaining to what might result in consent. Presumably, if a privacy policy is posted with indicia as such, it could be grounds to enforce the policy against the user. The effect as such would be consistent with the browse-wrap cases described above, especially the *Specht* case.

Privacy terms are treated differently when compared to those related to arbitration, choice of law, venue and unfair trade practices. The latter terms have been enforced without regard to the initial notice of terms. In other words, the terms appear under the guise of “terms of use,” not “arbitration terms” or the like.

¹⁵⁷ Stephen F. Ambrose, Jr., Joseph W. Gelb, *Consumer Privacy Regulation & Litigation in the United States*, 59 BUS. LAW. 1251, 1255 (2004). In a similar vein, the Federal Trade Commission brought charges against Guess.com for misrepresenting terms stated in its privacy policy. *Id.* at 1153. *See also Collegenet, Inc. v. XAP Corporation*, 03-CV-1229-BR , page 15(July 17, 2006).

In fact, California requires a privacy statement to be part of a home page or the next significant page on the website.¹⁵⁸ Alternatively, the privacy statement may be posted by hyperlink or the like.¹⁵⁹ Some of the most popular e-commerce industry players have chosen to post a hyperlinked privacy policy.¹⁶⁰ According to the Federal Trade Commission the top 100 commercial websites post privacy

¹⁵⁸ Cal. Bus. & Prof. Code § 22577(b)(1).

¹⁵⁹ Cal. Bus. & Prof. Code § 22577(b)(2)-(3).

¹⁶⁰ See Alexa, available at,

http://www.alex.com/site/ds/top_sites?ts_mode=lang&lang=en (according to this web-traffic monitoring company the following companies are the top 25 most active and all but google.com had their own individually linked privacy policies); See www.yahoo.com (<http://privacy.yahoo.com/privacy/us/>); www.msn.com (<http://privacy2.msn.com/en-us/default.aspx>); www.ebay.com (<http://pages.ebay.com/help/policies/privacy-policy.html>); www.passport.net (<https://accounts.services.passport.net/PPPrivacyStatement.srf?x=3.200.4104.0&cbalt=www&vv=320&lc=1033>); www.amazon.com (<http://www.amazon.com/exec/obidos/tg/browse/-/468496/104-4992407-3895939>); www.microsoft.com (<http://www.microsoft.com/info/privacy.msp>); www.myspace.com (<http://viewmorepics.myspace.com/misc/privacy.html?z=1&Mytoken=20040917113647>); www.aol.com (http://about.aol.com/aolnetwork/aol_pp); www.go.com (http://disney.go.com/corporate/privacy/pp_wdig.html); www.bbc.co.uk (<http://www.bbc.co.uk/privacy/>); www.alibaba.com (http://www.alibaba.com/trade/servlet/page/help/rules_and_policies/privacy_policy); www.cnn.com (<http://www.cnn.com/privacy.html>); www.fastclick.com (<http://www.fastclick.com/company/privacy.html> (not directly linked from homepage); www.blogger.com (<http://www.blogger.com/privacy>); www.ebay.co.uk (<http://pages.ebay.co.uk/help/community/png-priv.html?ssPageName=f:f:UK>); www.craigslist.org (<http://www.craigslist.org/about/privacy.policy.html>); www.imdb.com (<http://www.imdb.com/privacy>); www.xanga.com (<http://help.xanga.com/about/privacypolicy.htm>); www.comcast.net (<http://www.comcast.net/privacy/>); www.adultfriendfinder.com (<http://adultfriendfinder.com/go/page/privacy.html>); www.apple.com (<http://www.apple.com/legal/privacy/>); www.casalemedia.com (<http://www.casalemedia.com/privacy.html>)

policies.¹⁶¹ Laws like California's and the action of online companies appear to have forged a requirement that privacy policies be their "own animal." This strongly suggests that the privacy policies should not be "noticed" in the "terms of use" portion of the website to avoid the effect of procedural unconscionability. Instead, privacy policies should be their own hyperlink.

Indeed, posting privacy terms apart from other terms of use appears to be well grounded. Consumer information in the browse-wrap context is different from the categories discussed above because consumer information is used by companies for purposes *unrelated* to the initial transaction. For example, cookies are often used to track how the user got to the website and so forth. The information given by consumers is not typically the basis of the bargain and may be used outside the scope of the transaction, especially when the information is sold to other companies for marketing purposes.

V. Conclusion

Browse-wrap agreements have grown out of the need to govern the relationship between the website host and the users that visit the website. Over the past several years a body of law has developed that supports the use of browse-wrap agreements, as long as notice is proper and the terms are in accord with fundamental aspects of contract law. Case law, legislation and industry custom have each contributed to how browse-wrap contracts should be treated in certain contexts. Some terms that have escaped judicial review appear to be related to intellectual property and consumer protection terms. Nevertheless, given analogous precedence and industry trend, there may not be obstacles to enforcing those terms, but care must be given to ensure consumer expectations are addressed so as to avoid an unfair result.

¹⁶¹ Enforcing Privacy Promises: Section 5 of the FTC Act, *available at* <http://www.ftc.gov/privacy/privacyinitiatives/promises.html> (last visited Dec. 19, 2005)