# CYBER-SURFING ON THE HIGH SEAS OF LEGALESE: LAW AND TECHNOLOGY OF INTERNET AGREEMENTS

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## I. INTRODUCTION

With the rapid expansion of the Internet and the World Wide Web[1], there has been a discernible and disturbing trend of linking to one-sided terms of use, purporting to bind casual visitors who are not involved in any commercial transacting. Such provisions found on web pages[2] can be extensive and carry potentially drastic consequences through court enforcement. Often placement of the provisions is unobvious, such as at the bottom of a web page,[3] and identified by various nonstandard phrases such as "terms of service,"[4] "terms of use,"[5] "user agreement,"[6] "legal stuff,"[7] "disclaimer,"[8] "conditions of use,"[9] or "user agreement."[10] Further, uniformly blended colors or shapes, distracting animations, or faded words or images can camouflage such labels. All of this can lead one to ask whether such terms are enforceable against the average cyber-surfer, as distinguished from sophisticated users engaged in electronic commerce. Are users blissfully ignorant of unread web terms acting at their peril or is there nothing to be concerned about?

One should not underestimate the importance of technological aspects in deciding legal questions of Internet contracting. Specifically, the Internet context for contracting involves countless varieties and computer processes, tricks and errors

[1] The "Internet" is the linkage of computer networks, and the "[World Wide Web]. . . is a collection of information contained on individual computers connected to the Internet." Stomp, Inc. v. Neato, LLC, 61 F. Supp. 2d 1074, 1075 n.1 (C.D. Cal. 1999); State v. Kirby, 161 P.3d 883, 885 (N.M. 2007) (quoting Sublett v. Wallin, 94 P.3d 845, 851 (N.M. Ct. App. 2004)).

[2] A web page is generally one document of a web site, which is a collection of pages. LAURA LEMAY, SAMS TEACH YOURSELF WEB PUBLISHING WITH HTML AND XHTML IN 21 DAYS 30 (Rafe Colburn & Denise Tyler eds., 3d ed. 2001).

[3] *E.g.*, Yahoo!, http://www.yahoo.com (last visited Apr. 16, 2008).

[4] *E.g.*, *id.*

[5] *E.g.*, Stanford Social Innovation Review, http://www.ssireview.org/ (last visited Apr. 16, 2008).

[6] *E.g.*, icollectmovieposters.com, http://www.icollectmovieposters.com/start-MoviePosters/ (last visited Apr. 16, 2008).

[7] *E.g.*, Advanced Simulation Technology Inc., http://www.asti-usa.com/ (last visited Apr. 16, 2008).

[8] *E.g.*, Java.com, http://www.java.com/en/ (last visited Apr. 16, 2008).

[9] *E.g.*, MSNBC, http://www.msnbc.msn.com/ (last visited Apr. 16, 2008); Welcome to the State of California, http://www.ca.gov/ (last visited Apr. 16, 2008).

[10] *E.g.*, The Chronicle of Higher Education, http://chronicle.com/ (last visited Apr. 16, 2008).

that uniquely affect the contracting experience. To date, with rare exceptions, authors, attorneys, and judges seem to have little insight into the legal ramifications as they relate to computer programming.[11] This article endeavors to raise the expertise of participants involved either directly or indirectly in the rule-making process. Likewise, from a transactional standpoint, attorneys who draft Internet agreements should understand the technical design and functioning of a particular web site to ensure that the provisions are drafted to cover the site's characteristics. Additionally, web site developers should work closely with attorneys to assure that a web site's design and functionality are maintained to keep with the legal terms and are presented in a manner that will help ensure enforceability. From a litigation point of view, attorneys, as partial advocators, will be able to find ideas herein for pursuing paths of investigation and discovery, or for new arguments for or against enforcement of a web-based contract. Further, by observing the intricacies of Internet technology, as they can affect the contracting experience, this article should provide attorneys and judges with a sharper understanding and analyses that will aid in drawing new distinctions in briefing and ruling, respectively, allowing them to reach the most fair and accurate results.

While several commentators and model code drafters have given detailed consideration to the topic of enforceable online contracts, considering the relative vastness of Internet use by the world population, amazingly few appellate opinions on point exist, and generally, the opinions are unrefined in their analyses. At the time of this publication, the development of a body of applicable case law is in its infancy, with very few published rulings on point before the year 2000, and the availability of such authorities did not become substantial until around 2003.[12] In

[11] An example of one such rare instance of an informative and insightful court decision explaining Internet structure and programming is *In re* DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 500–02, 508 (S.D.N.Y. 2001) (granting defendant's motion to dismiss because defendant's use of cookies to collect information about web users fell under an exception within the Electronic Communications Privacy Act).

[12] *See, e.g.*, Rob Hassett & Suellen W. Bergman, *Recent Developments in Internet Law* (1999), http://www.internetlegal.com/articles/recent_developments_in_internet_.htm ("The authors are not aware of any cases to date that directly address the issue of whether clickwrap agreements are enforceable"); Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005) (deciding whether an e-mail announcing a new dispute resolution policy provided sufficient notice to employees that the arbitration

2001, authors noted that the only published decision concerning Internet terms of service was a decision of a United States District Court.[13] Commentators continue to report that browse-wrap agreements, in particular, have not been addressed much by the courts.[14] In this area, countless unanswered legal questions remain to be resolved by the courts. Consequently, courts and commentators frequently have relied heavily upon traditional legal principles.[15] Similarly, authors have scoured the various jurisdictions for legal guidance, drawing law heavily from the trial courts and analogizing cases with no Internet context.

From the sparsely available decisions of American jurisdictions, one can discern a debatable split of authority as to whether browse-wrap agreements are enforceable.[16] Depending upon the circumstances and jurisdiction, courts have taken markedly divergent views regarding the enforcement of contracts

clause contained therein was contractually binding); Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004) (reviewing and modifying an order granting a preliminary injunction that enjoined the defendant from accessing the plaintiff's databases to obtain the contact information of domain name registrants in violation of the plaintiff's terms of use, which this court held did not contractually bind the defendant); Glasgow, Inc. v. Pa. Dep't of Transp., 851 A.2d 1014 (Pa. Commw. Ct. 2004). (deciding whether the rejection of a company's bid by the state was improper when the company failed to hit the "submit" button after inputting the bid information on the state's Internet bidding system).

[13] INTERNET LAW FOR THE BUSINESS LAWYER 75 n.35 (David Reiter et al. eds., 2001) (citing Ticketmaster Corp. v. Tickets.com, Inc., 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000)).

[14] *E.g.*, Dan Streeter, Comment, *Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363, 1384 (2002); Ian A. Rambarran, *Are Browse-Wrap Agreements All They Are Wrapped Up To Be?* 3 (Berkeley Electronic Press 2006), http://law.bepress.com/expresso/eps/1885 (citing Terry J. Ilardi, *Mass Licensing—Part 1: Shrinkwraps, Clickwraps & Browsewraps*, 831 PRAC. L. INST. 251, 255 (2005)). For a definition of "browse-wrap," see *infra* note 18 and accompanying text.

[15] *See, e.g.*, Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. 741 (2000) (analyzing past court decisions and attempting to apply the Restatement (Second) of Contracts and the U.C.C. (1999) to Internet commerce).

[16] *See* Regional Expert Conference on Harmonized Development of E-commerce Legal Systems in Asia-Pacific, Bangkok, Thailand, July 7–9, 2004, *Electronic Contracting: Legal Problem or Legal Solution?*, 130–31, *available at* http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf (discussing the split between the Second Circuit, which was affirming a decision of the Southern District of New York and the Eastern District of California, regarding the enforceability of browse-wrap agreements (citing Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002); Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974 (E.D. Cal 2000))).

made available through "hypertext links."[17] As analyzed below, some courts have viewed web site terms as clearly being contracts of adhesion because there is no opportunity to bargain. Other courts have had no difficulty in enforcing such provisions.

In order to helpfully differentiate this article from the many others that have preceded it in recent years, the following analysis includes various novel approaches. Primarily, this article uniquely explains, in relatively more detail, the technological aspects related to Internet contracting, by not depending solely upon legal authorities, but instead including concepts from, and citations to, many publications written for computer programmers. To make these concepts readily understandable by readers with legal backgrounds, the discussion minimizes technical terminology and instead provides explanations in laypersons' terms.

Additionally, this article emphasizes and addresses the most recently available case law concerning Internet agreements. Specifically, in order to present a more comprehensive and current discussion of judicial opinions, the authors have unearthed a large number of rulings in American jurisdictions, which is an improvement over prior articles that have addressed Internet contracting. Ideally, published appellate cases are the focus of legal writings, because generally, appellate decisions offer binding precedent in their respective jurisdictions. However, given the dearth of law on point from reviewing courts, many rulings of trial courts are addressed as well, providing valuable indicators of judicial philosophies. In contrast, many secondary authorities in this area are either not current or have addressed only a few of the available cases. With the law evolving quickly, publications can easily become out of date on the topic of web-based contracts. Further, in this article, a lesser emphasis is placed upon references to legal commentary because litigation results are better predicted by the judicial handling of actual cases. In that regard, although many authors have expressed divergent views and suggested various tests for hopeful adoption by courts or legislators, the value of their legal commentary is limited to the extent that judges and legislators actually put their views and suggestions into effect. Experience thus far has shown that views about Internet contracting are too

[17] *See* LEMAY, *supra* note 2, at 10 (explaining that a hypertext link allows a computer user to navigate from one point on the World Wide Web to another in a "non-linear" manner).

divergent, and the politics involved are too great, for one to expect that any commentator's viewpoint will be accepted and implemented as uniform law.

Another focus of this article is the effectiveness of the posted terms that are unassociated with any required manifestation of acceptance in order to proceed, and agreements that are typically associated with noncommercial navigation of pages on the World Wide Web (usually called "browse-wrap" agreements).[18] Such contracts are distinguishable from those where a user is required to accept an agreement by an action, such as clicking with a computer mouse on an image, or typing "yes" in a text box before proceeding further in a web site, Internet purchase, or computer program (generally called "click-wrap agreements" or "click-through").[19] In contrast, the majority of prior commentaries in this area have focused on electronic commerce, instead of the potential liability of the average, casual navigator. Additionally, few cases have addressed browse-wrap agreements,[20] and such decisions are in conflict with one another.[21] In focusing on

[18] *See, e.g.*, Christina L. Kunz et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent* 57 BUS. L. 401, 401 n.2 (2001) (distinguishing click-through agreements from browse-wrap agreements, which consist of posted terms to which a user is said to consent by simply using the web site). "Clickwrap" refers to online software license agreements requiring assent and "shrinkwrap" refers to "the licensing of tangible forms of software sold in packages." Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 22 n.4 (2d Cir. 2002) (citing Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585, 593–94 (S.D.N.Y. 2001)).

[19] *See, e.g.*, *Specht*, 306 F.3d at 22 n.4 (citing *Specht*, 150 F. Supp. 2d at 593–94 (describing "clickwrap" agreements); Rambarran, *supra* note 14, at 2 (describing "click-through" agreements)). However, commentators and courts often have not been consistent in stating definitions of such terms. *See infra* notes 75–83 and accompanying text (addressing the different ways in which "click-wrap" and "browse-wrap" agreements have been identified). Further adding uncertainty as to the terminology, authors and judges have used alternative words, including "click-free." *See, e.g.*, Kunz et al., *supra* note 18, at 401 (defining "click-free" as being synonymous with "browse-wrap").

[20] Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1326 (2005); Matthew D. Walden, Note, *Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions*, 58 WASH. & LEE L. REV. 1625, 1643 (2001).

[21] Melissa Robertson, Comment, *Is Assent Still A Prerequisite For Contract Formation In Today's E-conomy?*, 78 WASH. L. REV. 265, 266–67 (2003) (citing *Specht*, 150 F. Supp. 2d at 596; Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000); Pollstar v. Gigamania, Ltd., 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000); Ticketmaster Corp. v. Tickets.Com, Inc., 2000 U.S. Dist. LEXIS 12987, at *18 (C.D. Cal. Aug. 10, 2000), *aff'd* 248 F.3d 1173 (9th Cir. 2001); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting*

browse-wrap contracts, resorting to some analyses of analogous cases is worthwhile, such as those addressing click-wrap agreements.

Furthermore, this article seeks to be a positive force for change by making concrete suggestions for evolution in this area of law. Notwithstanding the puzzlingly sluggish pace of legal developments concerning Internet contracting, predictably, American jurisdictions are on the brink of publishing a wealth of appellate decisions about online contracts, considering indicators, such as the many trial-level cases progressing towards appellate processes and the increasing number of people going online. Therefore, there will clearly be a burgeoning demand for information and ideas for shaping the laws addressing electronic contracting.

## II. APPLICABLE LAW

### *A. Law Applying To Internet Terms*

To be sure, the rapid growth of the Internet has provided courts with new challenges in discerning the applicable law. However, case law holds that "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[22] Indeed, some commentators have opined that traditional contract law should govern Internet-based contracts.[23]

Depending on the topic, countless laws may govern an online contract, including general common law applicable to contracts, specific statutory or regulatory provisions, and jurisdictions worldwide. While such a broad scope of laws obviously cannot be covered comprehensively in this discussion, several illustrations will follow to demonstrate the concept. For example, federal courts have applied laws of various jurisdictions.[24] As another

*in the Electronic Age*, 77 N.Y.U. L. REV. 429, 289 (2002)).

[22] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004).

[23] *See, e.g.*, William J. Condon, Jr., Note, *Electronic Assent To Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 456 (2003/2004) (suggesting that "clickwrap agreements should be treated like ordinary contracts" (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996))).

[24] *E.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (applying state laws in determining whether there was an agreement to arbitrate). Further, laws and court rulings of countries worldwide may affect web site operators. As an example, Yahoo! sought in federal court a declaration

example, case law that applies specifically to public entities has required adherence to bid specifications in determinations of the validity of online bids.[25] In another instance, a court did not expressly decide whether to apply the Uniform Commercial Code ("U.C.C."), a state's commercial code, or the common law to Internet transactions involving downloadable software products.[26] The U.C.C., however, is implicated by users who purchase goods online, but not for accessing web pages for information.[27] Also, a California consumer fraud statute,[28] which regulates online transactions, provides that online vendors must display certain consumer information on specified screens the consumer would access.[29] Further, some states have laws enabling the use of digital signatures for accomplishing transactions.[30] Specifically, forty-eight states have adopted the Uniform Electronic Transactions Act,[31] which addresses the requirements of writings and signatures in electronic commerce.[32] Similarly, as for the Electronic Signatures in Global and National Commerce Act,[33] a court held that "the use or acceptance of electronic signatures" was not required of contracting parties, but was only optional.[34] In an analogous

that orders of a French court were unenforceable. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1201 (9th Cir. 2006).

[25] Glasgow, Inc. v. Pa. Dep't of Transp., 851 A.2d 1014, 1017 (Pa. Commw. Ct. 2004).

[26] Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 n.13, 35 n.18 (2002) (citing Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991)) (applying common law to an Internet transaction involving downloadable software products, however, failing to expressly state that the common law should always be applied).

[27] Dawn Davidson, Comment, *Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?*, 26 WM. MITCHELL L. REV. 1171, 1184 (2000) (citing U.C.C. § 2–102 (1999)). For an example of an impressively in-depth discussion of the U.C.C. in the context of sales via the World Wide Web, see Rambarran, *supra* note 14, at 19–28.

[28] CAL. BUS. & PROF. CODE § 17538 (Deering 2003).

[29] § 17538(d)(2)(A).

[30] F. LAWRENCE STREET & MARK P. GRANT, LAW OF THE INTERNET 19 (2001).

[31] UNIF. ELEC. TRANSACTIONS ACT § 1 (1999); Uniform Law Commissioners: Uniform Electronic Transactions Act, http://www.nccusl.org/Update/ (follow "Final Acts and Legislation" hyperlink; then select "Electronic Transactions Act"; then select "Legislative Fact Sheet") (2002).

[32] *See* UNIF. ELEC. TRANSACTIONS ACT § 3(a) (1999) (describing the scope of the Act).

[33] Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. §§ 7001–06 (2000).

[34] Prudential Ins. Co. of Am. v. Prusky, 413 F. Supp. 2d 489, 494 (E.D. Pa. 2005).

context, as to claims under the Americans with Disabilities Act,[35] a court determined that employers' e-mailed links to intranet-based arbitration provisions must provide some minimal level of notice that is sufficient to apprise those employees that continued employment would effect an agreement.[36]

In addition to laws in effect, there are proposed laws that could increasingly impact the effectiveness of online contracts. For instance, the Uniform Computer Information Transactions Act,[37] a vigorously debated model code that was adopted by the states of Virginia and Maryland,[38] specifies various means of giving conspicuous notice.[39] It has been controversial, in part because some claim that it would legalize contracts of adhesion.[40]

With regard to the scope of issues involved in online contracting, the most frequent focus of litigation has been on laws related to the element of assent, followed by frequent arguments over unconscionability, public policy, and contract interpretation. Those, and other topics, are addressed below. Other possible issues affecting whether a contract is enforceable include whether the parties were capable of forming a contract and whether there was consideration.[41] In some relatively rare situations, the question of consideration may be determinative in the context of the Internet.[42] However, based upon multiple theories regarding exchanges of benefits and detriments as between Internet application service providers[43] and users,[44] the

[35] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000).

[36] Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 556–57 (1st Cir. 2005).

[37] UNIF. COMPUTER INFO. TRANSACTIONS ACT (UCITA) § 101 (amended 2002).

[38] UCITA § 101 tbl. (amended 2002) (Jurisdictions Wherein Act Has Been Adopted); MD. CODE ANN. art. 22 § 22–101 (2007); VA. CODE ANN. § 59.1–501.1 (2007).

[39] UCITA §§ 112, 211 (amended 2002).

[40] STREET & GRANT., *supra* note 30, § 1.04.

[41] *See* Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 HAMLINE L. REV. 500, 547 (2003) (discussing requirements of a binding contract).

[42] *E.g.*, Kremen v. Cohen, 337 F.3d 1024, 1028–29 (9th Cir. 2003) (determining that consideration was absent where a party obtained registration of a domain name for free from Network Solutions, Inc.).

[43] An "Application Service Provider" [hereinafter "provider"] centrally distributes and manages "software-based services" via a network such as the Internet. Hugger-Mugger, L.L.C. v. Netsuite, Inc., No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003, at *4 (D. Utah Sept. 12, 2005).

[44] "User" herein indicates any person accessing web pages via the Internet through any electronic device. People accessing web pages typically are called "users" or "visitors." *E.g.*, *In re* Toys R Us, Inc., MDL No. M-00-1381-MMC,

requirement of consideration seems easily satisfied, and will not be explored further in this discussion.[45]

### *B. Issues Impacted By Internet Terms*

The questions of contract enforceability and scope can affect judicial determinations of a variety of correlated issues or procedural postures. For example, the binding nature of terms may support a claim of trespass to chattel, on the ground that a particular use of a web site violated provisions restricting use.[46] Similarly, using a web site beyond the scope of permissive uses may constitute a violation of the Computer Fraud and Abuse Act.[47] Rulings have addressed several other theories that often relate to enforcement of online contracts, including unfair competition, trademark infringement, and fraud.[48] An exhaustive listing of all affected claims is beyond the scope of this article, but the point is that web site agreements may be critical in determining many other claims. Additionally, as an example of procedures impacted, Internet terms may affect class actions.

2001 U.S. Dist. LEXIS 16947, at *16 (N.D. Cal. Oct. 9, 2001) ("defining 'user' as 'any person or entity who (A) uses an electronic communication service; and (B) is duly authorized by the provider of such service to engage in such use'" (quoting 18 U.S.C. § 2510(13) (2000))); LEMAY, *supra* note 2, at 31, 44 (using the terms as follows: "[m]ost of your users will access your site through your home page" and "[w]eb structures tend to be free-floating and enable visitors to wander aimlessly through the content.").

[45] *See* Walden, *supra* note 20, at 1633–34 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 71–72, 75 (1979)) (arguing that the requirement of consideration can be satisfied relatively easily).

[46] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404–05, 444 (2004) (upholding a preliminary injunction against accessing computers premised on a claim of trespass to chattels).

[47] Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (2000); *see also* EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 58, 62 (1st Cir. 2003) (citing 18 U.S.C. § 1030(a)(4)) (assuming for procedural reasons that that the fraud requirement of the CFAA was satisfied where the defendant contests a preliminary injunction to prevent the defendant from using a computer program to gather pricing information from the plaintiff's web site).

[48] *See, e.g.*, Hotmail Corp. v. Van Money Pie Inc., No. C-98-20064 JW, 1998 U.S. Dist. LEXIS 10729, at *16–19 (N.D. Cal. Apr. 16, 1998) (affirming the grant of a preliminary injunction against imitating a trademark or domain name, where plaintiff would likely prevail in its claim that defendant breached terms of service prohibiting subscribers' transmission of unsolicited commercial bulk e-mail, and in its claims of fraud and trespass to chattel); Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 448–51 (E.D. Va. 1998) (addressing issues of trademark violations, computer fraud, and trespass to chattel, and stating that the "[u]nsolicited Bulk E-mail Policy and its Terms of Service bar both members and nonmembers from sending bulk e-mail through AOL's computer systems.").

For instance, an appellate court remanded a matter to a trial court for a determination of class certification, noting that a potential antagonism existed between putative class members; only some members might have been bound by online arbitration provisions, because they made reservations by telephone instead of by Internet.[49] At the other end of the spectrum, courts may sometimes find a provider's terms of use to be irrelevant where other issues are already dispositive.[50]

## III. NOTICE

### *A. Generally*

Contracts that exist in computerized format are not necessarily unenforceable.[51] Instead, most litigation has focused upon

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[49] Hotels.com, L.P. v. Canales, 195 S.W.3d 147, 156–57 (Tex. App. 2006).

[50] *E.g.*, *In re* Toys R Us, Inc., 2001 U.S. Dist. LEXIS 16947, at *2 n.2 (N.D. Cal. Oct. 9, 2001) (declining to take judicial notice of Toys R Us, Inc.'s posted privacy policy, as judicial notice was unnecessary to resolve a motion to dismiss); Chance v. Ave. A, Inc., 165 F. Supp. 2d 1153, 1156, 1158–63 (W.D. Wash. 2001) (deciding various claims regarding unauthorized use of cookies, without basing analysis on any online contract with users).

> Cookies are data files placed on a computer's hard drive by a . . . web site's server. Cookies enable much of the information exchange that occurs on the Internet by allowing the interactions between a specific computer and a web server to develop a memory of the communications between the two parties.

*Id.* at 1156.

[51] Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 26 n.11 (2d Cir. 2002) (providing "'a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.'" (quoting Electronic Signatures in Global and National Commerce (E-Sign) Act, 15 U.S.C. § 7001(a)(1) (2000))); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 530, 532 (N.J. Super. Ct. App. Div. 1999) (discerning no material difference between an electronic agreement and a printed ticket, and upholding a forum selection clause in a scrollable window with a provision for clicking "I Agree"); Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1011 (D.C. Cir. 2002) ("A contract is no less a contract simply because it is entered into via a computer."); FTC v. Cleverlink Trading Ltd., No. 05 C 2889, 2006 U.S. Dist. LEXIS 82264, at *17–18 (N.D. Ill. Oct. 26, 2006) (rejecting the argument that a contract was not binding because the written contract was unsigned when the agreement was formed alternatively via the Internet by a user clicking on an "Accept" box.); Hauenstein v. Softwrap Ltd., No. C07-0572MJP, 2007 U.S. Dist. LEXIS 60618, at *8 (W.D. Wash. Aug. 17, 2007) (rejecting argument that signature was required to accept arbitration agreement when plaintiff's acceptance was "manifested through his 'clicking' the 'I agree' button"); Carfax, Inc. v. Browning, 2007 Ala. LEXIS 194, at *5 (Ala. Sept. 21, 2007) ("[T]he enforceability of contracts formed on the Internet—is not in dispute."); CAL. CIV. CODE § 1633.7(b) (2000) ("A contract may not be denied

whether a visitor actually noticed or reasonably should have noticed contract terms as a prerequisite to accepting the terms. Judges have struggled in analyzing such questions of notice or sometimes have avoided deciding these questions by first reaching other dispositive questions.[52]

What constitutes sufficient notice in cyberspace depends upon the views of individual judges, and there are divergent views. In the Internet context, the sufficiency of notice has involved analyses of the placement and obviousness of the hypertext link[53] leading to the page of terms and of the contract language. Some jurisdictions require a computer user to notice and click on a phrase expressly indicating agreement, whereas others require a reasonable opportunity to become aware of the terms.[54] In one example, a court found that a party did not agree to what looked like a posted web site agreement.[55] Another court found that terms available via a hyperlink were "inconspicuously located at the bottom of the web page" and, thus, there was insufficient notice.[56] Yet another court, in reversing an order granting summary judgment, decided that allegations of an Internet posting resembling an advertisement were sufficient to allege a contract offer that was capable of acceptance.[57] As a further refinement, repeat visitors to a web page may be uniquely subject to enforcement because it is more likely that they noticed or

legal effect or enforceability solely because an electronic record was used in its formation.").

[52] *E.g.*, Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1172 n.9, 1173, 1177 (N.D. Cal. 2002) (assuming, without deciding, that users entered into an online contract, after noting weak evidence, and reaching a disposition on grounds of unconscionable terms).

[53] Words or images can serve as hypertext links that cause a browser to send a request for a web page from a server computer that transmits one back to the user's client computer. *See, e.g.*, GREG PERRY, SAMS TEACH YOURSELF VISUAL BASIC 6 IN 21 DAYS 622 (1998) (explaining that when a request is entered into in a browser, the browser will interact with server, which will send a result to the browser).

[54] *E.g.*, Register.com v. Verio, Inc., 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000) (holding that the user was bound by known terms of use by electronically submitting queries to a database), *aff'd*, 356 F.3d 393, 403 (2d Cir. 2004) (disagreeing with the view that a user needs to click on a phrase or icon indicating agreement for a contract to be formed).

[55] Jones v. Tread Rubber Corp., 199 F. Supp. 2d 539, 544 (S.D. Miss. 2002).

[56] DeFontes v. Dell Computers Corp., No. PC 03-2636, 2004 R.I. Super. LEXIS 32, at *17 (R.I. Super. Ct. Jan. 29, 2004).

[57] Lim v. .TV Corp. Int'l., 121 Cal. Rptr. 2d 333, 336–37 (Cal. Ct. App. 2002) (citing Harris v. Time, Inc., 237 Cal. Rptr. 584, 587 (Cal. Ct. App. 1987)).

should have noticed posted terms.[58]

### *B. Actual Notice*

Irrespective of whether a provider's web page design served as reasonable notice, a user's actual observation of web site terms may suffice to show notice[59] but not necessarily assent.[60] In keeping with that kind of reasoning, in one case, plaintiffs unsuccessfully asserted the theoretical failure to read an agreement accompanying a compact disk for installation where a court further required them to allege they actually did not read the agreement.[61]

### *C. Extrinsic Notice*

Notice of web sites' terms may be validly given through various means of communicating outside of an electronic medium, including printed invoices or mailings. The idea that terms, which were beyond a party's perception, were incorporated by reference in such information usually has not been an obstacle to finding an agreement, where the party could have accessed the incorporated terms via the Internet. To illustrate, a decision found valid notice where mailed invoices referenced on the first page, in bold, terms that were posted on a web page, and the consumer noticed the link, but declined to read the terms.[62]

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[58] *See* Druyan v. Jagger, 2007 U.S. Dist. LEXIS 64445, at *16–17 (S.D.N.Y. Aug. 27, 2007) (finding sufficient notice where a party visited a web site repeatedly for approximately five years, and a link to the terms was placed immediately above a link to access the web page); *see also* James J. Tracy, Legal Update, *Browsewrap Agreements:* Register.Com, Inc. v. Verio, Inc., 11 B.U. J. SCI. & TECH. L. 164, 171 (2005) (suggesting that *Register.com*, 150 F. Supp. 2d 393, resulted in hidden contractual terms being enforceable against frequent users).

[59] Cairo, Inc. v. Crossmedia Servs., Inc., No. C 04-04825 JW, 2005 U.S. Dist. LEXIS 8450, at *7, 9, 13 (N.D. Cal. Apr. 1, 2005) (finding notice where a party admitted actual knowledge of the terms of use the day before litigation was threatened by letter, even though a party's automated search programs were incapable of reading the terms).

[60] A court decided that actual notice and reading did not equate with assent. Martin v. Snapple Beverage Corp., No. B174847, 2005 Cal. App. Unpub. LEXIS 5938, at *19 n.14 (Cal. Ct. App. July 7, 2005).

[61] Scott v. Bell Atl. Corp., 726 N.Y.S.2d 60, 64 (N.Y. App. Div. 2001) (citing Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996)), *modified*, Goshen v. Mut. Life Ins. Co. of New York, 774 N.E.2d 1190 (N.Y. 2002).

[62] Briceno v. Sprint Spectrum, L.P., 911 So. 2d 176, 180 (Fla. Dist. Ct. App.

Other providers sometimes successfully made similar arguments to the effect that links on web pages and agreements in print served as an alternative form of notice.[63] As another example of extrinsic notice of terms of use, employers may require that employees sign written agreements restricting the employees' use of computerized information.[64] Additionally, a court found reasonable notice where a party received an e-mailed invoice referencing an agreement, but did not take minimal steps to scroll down the screen to observe it.[65] Also, a court enforced a forum selection clause related to a consumer's registration of a domain name with Network Solutions, Inc., where the Registration Agreement accompanied a letter, stating in bold with underlining, that registrants should read the agreement carefully.[66] Similarly, a court enforced an arbitration provision where the terms were called to the attention of the consumer by a separate notice referencing both a web site and a toll-free telephone number for accessing terms.[67] In a case addressing notice in the fact-specific context of a carrier's shipping to a

2005).

[63] Fiser v. Dell Computer Corp., 165 P.3d 328, 334, 336 (N.M. Ct. App. 2007).

> In this case, we need not decide the outer reaches of what type of notice and assent is necessary to form a contract in a transaction consummated solely over the internet. That is because we hold that Fiser's conduct in keeping the computer after receiving the written terms and conditions constitutes acceptance of the terms contained therein.

*Id.*; *see also* Int'l Star Registry of Ill. v. Omnipoint Mktg., LLC, No. 05 C 6923, 2006 U.S. Dist. LEXIS 68420, at *10, 11 (N.D. Ill. Sept. 6, 2006) (enforcing a forum selection clause where invoices gave notice of web-based terms). *But see* Aral v. Earthlink, Inc., 36 Cal. Rptr. 3d 229, 240–42, 244 (Cal. Ct. App. 2005) (finding that where the provider argued that it mailed agreement to customers, the court did not reach the question of notice and declined to enforce the forum selection provisions as being against a public policy of ensuring a suitable forum for consumers).

[64] *Cf.* Paul S. Chan & John K. Rubiner, *Access Denied: Claims Brought Under the CFAA Have a Less Daunting Burden of Proof than That Required by the Trade Secrets Act*, 28 L.A. LAW. 22, 25 (2006) (noting the importance of having "employees sign confidentiality agreements or institute other measures to maintain the secrecy of the . . . computerized information" to prevent them from later using such information for the benefit of later employers).

[65] Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d. 125, 129–130 (D. Mass. 2000).

[66] Weingrad v. Telepathy, Inc., No. 05 Civ. 2024 (MBM), 2005 U.S. Dist. LEXIS 26952, at *11–12 (S.D.N.Y. Nov. 3, 2005).

[67] Crawford v. Talk Am., Inc., No. 05-CV-0180-DRH, 2005 U.S. Dist. LEXIS 23181, at *2, 13–14 (S.D. Ill. Oct. 6, 2005) (rejecting plaintiff's arguments that one should not be required to own a computer and know how to navigate the Internet where using a telephone call to obtain the terms was an option).

customer, a court concluded that there was sufficient proof of reasonable notice, in part because the customer used the shipper's software with a click-through design, incorporating terms posted online.[68] In other cases, however, arbitration provisions were held not binding where parties asserted the provision of extrinsic notice.[69]

### *D. Proof Difficulties*

Providers may falter in their ability to garner sufficient proof that a user accessed a web page in such a way as to receive reasonable notice.[70] In this regard, one skeptical court noted missing proof regarding material facts such as: "Were [ ] customers only able to access the internet through these web sites? How prominently were the links displayed? How were they labeled or explained?"[71] Further, considering the applicable body of cases as a whole, parties have generally filed greatly unreliable and incomplete proof of web site content at the applicable time and of users' interactions.[72] Making proof more

[68] EIJ, Inc. v. UPS, Inc., No. CV 03-7301 CBM (JWJx), 2004 U.S. Dist. LEXIS 18481, at *3, 13 (C.D. Cal. Sept. 8, 2004); *see also* Treiber & Straub, Inc. v. UPS, Inc., No. 04-C-0069, 2005 U.S. Dist. LEXIS 37037, at *21–22 (E.D. Wis. Aug. 31, 2005) (finding that the shipper's air bill was validly incorporated by reference to its web site terms).

[69] Manasher v. NECC Telecom, No. 06-10749, 2007 U.S. Dist. LEXIS 68795, at *15–16 (D. Mich. 2007) (finding the invoice statement merely informed the reader of where to find the online agreement that was not incorporated by reference); Hotels.com, L.P. v. Canales, 195 S.W.3d 147, 156 (Tex. App. 2006) (leaving intact the lower court's finding of insufficient notice where mailed confirmations of telephonic orders referred to a link to posted terms); Schwartz v. Comcast Corp., No. 05-2340, 2006 U.S. Dist. LEXIS 81588, at *9 (E.D. Pa. Nov. 8, 2006) (finding, as to terms available on a web site, that evidence of a general policy to have employees personally hand over a printed subscriber agreement to customers did not establish notice of an arbitration provision as to the particular customer).

[70] *See, e.g.*, Waters v. Earthlink, Inc., No. 02-1385, 2003 U.S. App. LEXIS 22424, at *3–4 (1st Cir. Oct. 31, 2003) (finding there was no strong supporting evidence putting the customer on notice that he must arbitrate any dispute with the internet service provider).

[71] *Id.* at *3–4. In contrast, another court found declarations from a provider's president to be "substantial evidence" that a computer user technologically must have accessed a screen stating agreement to terms in order to complete a registration form. Cohn v. Truebeginnings, LLC, No. B190423, 2007 Cal. App. Unpub. LEXIS 6232, at *4, 7 (Cal. Ct. App. July 31, 2007).

[72] *See, e.g.*, Conference Am., Inc. v. Conexant Sys., Inc., No. 2:05-cv-01088-WKW, 2007 U.S. Dist. LEXIS 66867, *27–28 n.11 (D. Ala. 2007) (noting that the judge found testimony as to a former employee's awareness of a change in the web site terms to be unsupportive of the contention that the web site terms had

difficult, more sophisticated users may use software to disguise their identities.[73]

### *E. Effect of Design*

#### 1. Generally

Courts often place importance on the placement and other attributes of text when determining whether providers sufficiently called a user's attention to online agreements. Indeed, judges have shown a strong interest in considering the circumstances of the particular web page design when ascertaining whether there was any unfairness, including concealment of terms or distraction away from them.[74]

In addition to the common usage of terms "browse-wrap" and "click-wrap," methods of posting, contracts have also been categorized along the same lines as "active, semi-active or passive."[75] An active method of posting involves requiring a visitor to do some affirmative act, such as clicking on the word "accept," to enter a web site beyond a certain page (usually the home page).[76] A passive method does not involve bringing terms to the visitor's attention.[77] A semi-active design involves "conspicuous notice," but no affirmative act by the visitor.[78]

Links to contract terms are commonly unnoticeable and placed at the bottom of home pages and some other high-traffic pages.[79] Some web sites combine both browse-wrap and click-wrap terms, such that a case might involve analyses of both. In that regard, a court found it unclear which type existed where clicking on a phrase to indicate agreement did not also require the opening of

been changed and noting that "[n]o altered version of the web site had been produced").

[73] *See, e.g.*, Matrixx Initiatives, Inc. v. Doe, 42 Cal. Rptr. 3d 79, 81 (Cal. Ct. App. 2006) (noting that posters of anonymous messages on an Internet message board "had used identity-obfuscation software that enabled them to avoid being identified").

[74] *See, e.g.*, Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (discerning nothing unfair "about the style or mode of presentation, or the placement of the provision").

[75] Orrie Dinstein & Jonathan B. Wilson, *Web Site Terms and Conditions of Usage*, *in* INTERNET FORMS AND COMMENTARY 97, 100 (Jonathan B. Wilson & Julia A. Gladstone eds., 2002).

[76] *Id.* at 100–01.

[77] *Id.*

[78] *Id.* at 100.

[79] Walden, *supra* note 20, at 1632.

a window of agreement terms.[80] Noting that the trial judge ruled that consumers accessed a click-wrap license, a reviewing court analyzed whether there was assent to a click-wrap contract, notwithstanding the factual background, and found that the web site was instead hyperlinked to browse-wrap terms.[81]

Many courts have had no trouble deciding to enforce click-wrap agreements, including in circumstances where proceeding further into a web site, or installing software, are technologically conditioned upon a user clicking on text or images to indicate acceptance.[82] It makes perfect sense that the frequency of cases enforcing click-wrap agreements should generally be higher, as assent is more clearly expressed by clicking on words or buttons indicating agreement.

In sharp contrast, browse-wrap agreements have not received such widespread and quick acceptance, and their enforcement chances remain somewhat unpredictable as they steadily gain acceptance.[83] Nonetheless, operators choose browse-wrap approaches as a trade-off to a reliable means of showing assent because of design considerations and to avoid hindering user's

[80] Hotels.com, L.P. v. Canales, 195 S.W.3d 147, 155–56 (Tex. App. 2006).

[81] Martin v. Snapple Beverage Corp., No. B174847, 2005 Cal. App. Unpub. LEXIS 5938, at *10–11, 16–17 (Cal. Ct. App. Filed July 7, 2006).

[82] *See, e.g.*, Condon, *supra* note 23, at 446 (noting that "many federal and state courts enforce clickwrap agreements."); Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1177–78 (E.D. Mo. 2004) (finding the software agreement, which was disclosed prior to installing the game, was valid and enforceable); I-Systems, Inc. v. Softwares, Inc., Civil No. 02-1951 (JRT/FLN), 2004 U.S. Dist. LEXIS 6001, at *20–23 (D. Minn. Mar. 29, 2004) (finding that the lower court had insufficient information to determine whether the contract was breached and that a jury could have found that the defendant accepted the licenses); Hughes v. McMenamon, 204 F. Supp. 2d 178, 181 (D. Mass. 2002) (upholding a forum selection clause contained in a click-wrap agreement, where the subscriber did not contest that he had agreed to the "Terms of Service"); I.Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338–39 (D. Mass. 2002) (holding that a party accepted a click-wrap license agreement each time it installed software and "clicked on the box stating 'I agree'"); Lieschke v. RealNetworks, Inc., Nos. 99 C 7274, 99 C 7380, 2000 U.S. Dist. LEXIS 1683, at *3, 8 (N.D. Ill. Feb. 10, 2000) (enforcing arbitration provision of click-wrap agreement included in software downloaded from web site of RealNetworks, Inc.); Siedle v. Nat'l Assoc. of Sec. Dealers, Inc., 248 F. Supp. 2d 1140, 1143–44 (M.D. Fla. 2002) (finding the click or electronic agreements made with defendant were enforceable and valid).

[83] *See* Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 282–83 (2003) (discussing the factors that may have led to the enforcement of browse-wrap agreements in certain cases, but not others).

access to content.[84] Some providers are concerned over the potential decrease in traffic and revenue caused by the use of click-wrap contracts.[85]

One commentator suggests that utilizing technology in lieu of terms to prevent unwanted use of web sites, such as using code for the prevention of deep linking, may be preferable.[86] While computer programming can control many aspects of use, that approach is not a panacea due to countering technologies or varying computer parameters. For example, a trial court found that a provider unsuccessfully tried to block unauthorized commercial use where the user used software as an identity mask; the court issued an injunction.[87] Thus, a combined approach of technological deterrence and online terms would be optimal to control Internet usage.

2. Scroll Bars

Courts have been divided on the question of whether requiring the use of a scroll bar to view a contract is an obstacle to manifesting assent, but the weight of authority indicates that scroll bars do not present such an obstacle. Arguably, the physical effort of scrolling to read terms is analogous to turning pages in paper contracts, and no more onerous.[88] Not surprisingly, courts repeatedly have rejected arguments that contracts were unenforceable because the use of a scroll bar revealed only portions of the contract at any time.[89] One court

[84] *Id.* at 280.

[85] Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 475 n.2 (2002).

[86] Susan Y. Chao, Note, *Contract Law-Electronic Contract Formation-District Court for the Central District of California Holds That a Web-Wrap Site License Does Not Equate to an Enforceable Contract*-Ticketmaster Corp. v. Tickets.com, Inc., 54 SMU L. REV. 439, 445 n.49 (2001). For a definition of "deep linking," see *infra* note 162 and accompanying text.

[87] Temporary Injunction at 3 para. 9, Am. Airlines, Inc. v. Farechase, Inc., Cause No. 067-194022-02 (Dist. Ct. Tex., Mar. 8, 2003), *available at* http://www.eff.org/legal/cases/AA_v_Farechase/20030310_prelim_inj.pdf.

[88] Bar-Ayal v. Time Warner Cable Inc., No. 03 CV 9905(KMW) 2006 U.S. Dist. LEXIS 75972, at *43 (S.D.N.Y. Oct. 16, 2006).

[89] *See, e.g.*, Feldman v. Google, Inc., No. 06-2540, 2007 U.S. Dist. LEXIS 22996, at *21–22 (E.D. Pa. Mar. 28, 2007) (finding the scrolling requirement no obstacle where part of the agreement was immediately visible in the scroll box, which included boldface text advising users to read the terms carefully and to indicate assent); Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004) (finding plaintiff's forum selection clause, which appeared in a window that showed ten lines of the "terms and conditions" at a time, to be

opined that a scrolling design supported a finding of adequate notice where reaching the place to click to indicate acceptance required scrolling past the contract provisions.[90] In an analogous decision involving an employer's intranet,[91] a district court held that an electronic page contained an arbitration provision placed too low on the page to be enforced.[92] The court also considered the distracting design aspect that "an employee would not scroll to the end of the page once the link to the form they were required to return was apparent."[93] The factual distinction there was that the scroll bar's connection to a distracting feature, which deterred users from scrolling further, was the obstacle to enforcement; the obstacle was not just the use of scrolling. Such critical reasoning impliedly seems to be subjecting the electronic medium to more stringent scrutiny than tests traditionally applied to printed agreements. Given the nature of web sites as contrasted with paper-based writings, application of different factors, such as discretion levels, makes perfect sense.[94]

3. Pop-Up Windows

One of the particularly volatile means of giving notice includes pop-up windows, or boxes that are designed to appear in a portion of a screen that appears on top of another page. Pop-up-window blocking has become a standard feature in software products.[95] Some computer code processing may be disabled by

valid and enforceable); Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010–11 (D.C. 2002) (upholding a forum selection clause and noting that the use of a "scroll box" does not affect the provision of notice (citing Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d 125, 129–30 (D. Mass. 2000); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (upholding forum selection clause placed in window with scrollbar))); *In re* RealNetworks, Inc., No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584, at *17 (N.D. Ill. May 11, 2000) (upholding a license agreement placed in a pop-up window with a scroll bar); *Bar-Ayal*, 2006 U.S. Dist. LEXIS 75972, at *43–44 (finding acceptance where scrolling involved thirty-eight screens of text to read the entire agreement).

90 Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. App. 2001).

91 An "intranet" is like the Internet, but is restricted to a smaller number of computers and users "in a secure and private environment." BEN FORTA ET AL., THE COLDFUSION 4.0 WEB APPLICATION CONSTRUCTION KIT 23 (1998).

92 Carfagno v. Ace, Ltd., Civil No. 04-6184 (JBS), 2005 U.S. Dist. LEXIS 12614, at *31–32 (D. N.J. June 28, 2005).

93 *Id.* at *33.

94 *See infra* notes 132–68 and accompanying text.

95 *See, e.g.*, Mitchell v. Ga. Dept. of Cmty. Health, 635 S.E.2d 798, 803 (Ga. App. 2006) (not reaching the party's contention of not seeing disclaimers caused by pop-up blocker); Associated Bank-Corp. v. Earthlink, Inc., 2005 WL 2240952, at *1, 2 (W.D. Wis. Sept. 13, 2005) (noting the fact that an Internet service

use of a "browser" menu and, therefore, prevent the window from opening.[96] Many users click to close or conceal a pop-up window before it loads onto the screen, viewing them as annoying.[97] Pop-up windows may have been programmed to disappear after a specified period of time.[98] One court considered it important to enforcement that a pop-up window did not disappear; the user could read the terms as long as desired.[99] Another court found that notice was insufficient when the web page design consisted of only a small button labeled with a question mark, placed in a corner, with no other indication of linking to terms.[100] Given the various causes for pop-up windows to remain or become hidden from view, such a means of communicating terms is perhaps the most vulnerable to a litigant's attack.

4. Technological Variations

a. Generally

Whether by design or inadvertence, elements of a web site may be displayed or used differently depending upon the particular hardware, software, or connection. The potential for technological variations no doubt gives rise to numerous cases involving evidentiary disputes related to what the user viewed.

provider delivered software to customers for blocking pop-up windows).

[96] *See* JENNIFER NIEDERST, WEB DESIGN IN A NUTSHELL 24 (2d ed. 2001) (explaining the pros and cons of using JavaScript to create pop-up windows). This comprehensive book is ideal reading for judges and attorneys who want to delve into the technical parameters that make up a web viewing experience without getting bogged down in technical jargon. A "browser" is computer software, including software called "Netscape" and "Explorer," which is used to navigate and view web pages. LEMAY, *supra* note 2, at 12.

[97] NIEDERST, *supra* note 96, at 24; *see also* U-Haul Int'l, Inc. v. WhenU.com, Inc., 279 F. Supp. 2d 723, 725 (E.D. Va. 2003) ("Computer users, like this trial judge, may wonder what we have done to warrant the punishment of seizure of our computer screens by pop-up advertisements."). Further, depending upon the codes used, even an inadvertent click outside the borders of a pop-up window may cause the larger window to appear on the top layer and, therefore, conceal the pop-up window. Computer codes allow the designer to specify which window layer will appear on top and be visible to the user. *E.g.*, NIEDERST, *supra* note 96, at 480 (listing computer code used to define a simple window layer).

[98] *See* R. ALLEN WYKE ET AL., JAVASCRIPT UNLEASHED 392 (3d ed. 2000) (listing window object methods, including aspects that affect duration).

[99] *In re* RealNetworks, Inc., No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584, at *17 (N.D. Ill. May 11, 2000).

[100] Sotelo v. DirectRevenue, LLC, 384 F. Supp. 2d 1219, 1228 (N.D. Ill. 2005).

In view of the wide array of computer-generated results that are possible, questions of the accuracy, weight, and admissibility of proof as to appearances of electronic contracts, should be taken seriously. Judges should insist upon parties meeting their respective burdens of proof with trustworthy Internet-related proof more emphatically than has occurred to date. For example, a party objected to a provider's exhibit depicting a contract on the ground that it did not reflect accurately the " 'densely worded, small-size text that was hard to read on the computer screen.' "[101]

b. Design Bypassing

Web sites with built-in flexibility may allow users to bypass an intended method for giving notice of an Internet contract. An unsophisticated Internet user may have a strong argument against enforceability in such a situation, due to lack of notice or acceptance. For example, where a button is used to submit a form, that button can be activated by typing the "enter" key while the cursor is in a form text box, instead of clicking on the button, unless computer codes have been created to disable that key's function.[102] A user's assent may, therefore, be debatable where terms of use expressly state that acceptance occurs by "clicking" on a button (as is typical), but instead the user presses the "enter" key. Similarly, a showing of notice, via a provider's web site, may be defeated by a consumer's proof of accessing the information separately from a third party's web site, and thereby bypassing intended notice.[103] A case reported that a technologically sophisticated user bypassed software that contained a click-wrap agreement designed to give notice by successfully installing a computer service.[104] Because users generally have an obligation to read terms where providers gave

[101] Am. Online, Inc. v. Superior Court of Alameda County, 90 Cal. App. 4th 1, 6 (Cal. Ct. App. 2001).

[102] "A form is *submitted* when somebody presses the ENTER key with the cursor in a text field, or when they push a *submit button*." DAVE THAU, THE BOOK OF JAVASCRIPT: A PRACTICAL GUIDE TO INTERACTIVE WEB PAGES 135 (2000). Providers may dictate the acts required to constitute assent, such as clicking on a button; *see infra* note 195 and accompanying text.

[103] *See* Sotelo, 384 F. Supp. 2d at 1228 (stating that plaintiff raised a triable issue of fact whether he had notice of a provider's terms where "spyware" was accessed via a third-party's web site). "Spyware" has been defined as software downloaded over the Internet with a user's consent that allows tracking use and targeted advertising. *Id.* at 1222 n.1.

[104] Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 550 (Cal. App. 2005).

reasonable notice,[105] they should not be able to argue successfully such an issue of design bypassing where they defeated a design for giving notice of terms with a specific intent to defeat notice of terms of use.

c. Hardware and Software Environments

A variety of factors may affect how contract terms are displayed on a computer at a given time, as illustrated by the following examples. Hidden programming languages[106] work differently depending upon the browser and version used to access a web page.[107] Older browsers, or any browsers where JavaScript was disabled by menu settings, may ignore some codes, and fail to display parts of a web page if the developer neglected to write alternative codes.[108] Computer programmers can anticipate such differences, including whether the particular browser supports certain codes, and change web page elements, by detection of the browser used, [109]but often do not. Additionally, computer users can access menus on browsers and disable "cookie" files, which may change the viewing experience.[110] Monitors handle differently colors, contrasts, and clarity, such that what appears on one computer may look markedly different on another.[111] A web page can appear as intended on one computer, yet be unreadable on another.[112] Accessing pages on WebTV, mobile telephones, and handheld computers may yield unintended or deliberately compromised viewing results.[113] In that regard, with the increasing use of smart cell phones for accessing data services such as web pages,

105 *See infra* note 172 and accompanying text.

106 A programming language involves typed instructions for computers to follow. GARY ROSENZWEIG, SAMS TEACH YOURSELF FLASH MX ACTIONSCRIPT IN 24 HOURS 8 (2002).

107 THAU, *supra* note 102, at 7; ELIZABETH CASTRO, XML FOR THE WORLD WIDE WEB 16 (2001).

108 WYKE ET AL., *supra* note 98, at 75–76.

109 *See* MICHAEL D. THOMASSON, ASP 3 FAST & EASY WEB DEVELOPMENT 296 (2000) (describing a component of IIS/Windows 2000 that allows programmers to determine a browser's capabilities).

110 ELIZABETH CASTRO, PERL AND CGI FOR THE WORLD WIDE WEB 176 (1999).

111 NIEDERST, *supra* note 96, at 27.

112 LEMAY, *supra* note 2, at 54.

113 *Id.* at 57; KATHLEEN KALATA, INTRODUCTION TO ASP.NET 2.0 xiii (2005) ("Today, with the wide range of Internet-enabled devices, Internet applications must support devices such as mobile phones and hand-held devices that do not support JavaScript.").

and the phones' frequently limited ability to display such pages as intended, with all details, or in their full context,[114] contract notice under such circumstances will predictably become a hotbed of litigation. Furthermore, web pages may be delivered in component parts, involving several different requests (such as for various images).[115] Therefore, it is possible that if a connection is interrupted, such as by a dropped cell phone signal, or a disconnected telephone line, the whole page will not load onto the screen as designed, and thereby deprive the user of notice of terms.

d. Computer Programming Bugs

Programming bugs or poor design may cause a separate page of terms to fail to download, which would deprive the user of notice.[116] Because certain segments of codes may lie dormant and activate only when a user has followed a certain sequence of events (such as checking a particular form box), the unintended effects of programming bugs may become apparent only on rare occasions and never be observed by most users.[117] Thus, where a user credibly claims that a page looked differently than it appears to others, an expert skilled in understanding and debugging computer codes may be of assistance to discovering the truth.

5. Contract Organization

Courts have been divided over the importance of the placement of the text in question in a lengthy contract. The placement of a provision near the end of an agreement has been deemed immaterial to finding adequate notice.[118] In contrast, clauses

[114] *See* LEMAY, *supra* note 2, at 57 (discussing the problems that portable technologies have displaying internet pages that use HTML).

[115] FORTA, *supra* note 91, at 25.

[116] As one example of temporarily unavailable terms coincidentally encountered by the authors, on March 4, 2006, after clicking on the link labeled "Legal Notice" placed at the bottom of the home page of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), the authors viewed this error message on different computer monitors: "We're sorry, but there is no UNESCAP Web page that matches your entry." However, the terms did appear in subsequent days. *See* United Nations Economic and Social Commission for Asia and the Pacific, Legal Notice, http://www.unescap.org/legal.asp (last visited Apr. 16, 2008).

[117] PassMark BurnIn Test FAQ, http://www.passmark.com/support/bit_faq.htm (last visited Apr. 16, 2008).

[118] *E.g.*, Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super.

have not been enforced when they were buried within several pages of terms.[119]

6. Formatting

Courts have found compatible with online contract enforcement providers' uses of varied fonts or text formatting. For instance, an opinion notes that capitalized letters in some paragraphs did not make a material difference when compared to other paragraphs of an online contract that predominantly was set forth in lower case letters.[120] Similarly, another decision held that a forum-selection clause need not have been set forth in capital letters like the other paragraphs.[121] A lack of contrast, however, between the type font and page background may prevent the enforcement of an agreement. In that regard, a court observed that users might not become aware of an online agreement where notice of the agreement consisted of "small gray print on gray background" without the typical underlining to indicate a hypertext link.[122]

### *F. Delayed Notice*

Where all or some of a provider's terms are not apparent immediately upon visiting a web site, but only later upon navigation to a separate web page, an argument may be made that any use in the interim was not pursuant to contract.[123] Additionally, where users encounter provisions later in using a feature of a web page, such as in a forms completion process, there may be a delay in noticing such terms, and thus, temporary ineffectiveness up to that point. In an analogous situation involving software downloading and installation, a trial court found that assent was lacking where the alleged harm occurred before users had an opportunity to notice and to reject a

Ct. App. Div. 1999) (noting and enforcing a forum selection clause placed at the beginning of the last paragraph of an online contract).

119 *E.g.*, Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 746 (W.D. Tex. 1998) (holding a forum selection clause to be unenforceable where it was "inconspicuously buried within the several page contract").

120 *Caspi*, 732 A.2d at 532.

121 Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010–11 (D.C. 2002) (citing Vitricon, Inc. v. Midwest Elastomers, Inc., 148 F. Supp. 2d 245, 247 (E.D.N.Y. 2001); *Caspi*, 732 A.2d at 532).

122 Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

123 *E.g.*, *id.* at 982 (concluding that a contract arguably existed upon further use of a web site, notwithstanding the fact that users lacked immediate notice).

contract.[124] Some providers may design sites to bind visitors to terms placed in sub-pages navigated after web site entry and outside of the main contract page.[125] On this point, one court analogized the Internet scenario to an apple stand, where one arguably is not bound to pay for the first apple taken at a place where a sign showing a price was not yet visible.[126] In that case, the conditions of use did not appear until after the computer user submitted the query.[127] The court held that the conditions were not binding as to the first use, but were binding upon subsequent uses when the conditions were known.[128] Similarly, another court held that repeated visits to a web site imputed notice of terms of use.[129] Further, notice delayed until after some use of a service may come too late for enforcement, if it is at a point where users' means of cessation of use has become confusingly difficult.[130]

Similarly, a provider's posting of revised or new terms can be another form of delayed notice. Courts have found a lack of evidence to conclude that users ever visited web sites after providers unilaterally posted revised agreements to indicate contract formation.[131]

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[124] Williams v. Am. Online, Inc., No. 00-0962, 2001 Mass. Super. LEXIS 11, at *9–10 (Mass. Super. Ct. Feb. 8, 2001).

[125] Tarra Zynda, Note, Ticketmaster Corp. v. Tickets.com, Inc.: *Preserving Minimum Requirements of Contract on the Internet*, 19 BERKELEY TECH. L.J. 495, 515 (2004).

[126] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 401 (2d Cir. 2004).

[127] *Id.* at 401.

[128] *Id.* at 402.

[129] Cairo, Inc. v. Crossmedia Servs., No. C 04-04825 JW, 2005 U.S. Dist. LEXIS 8450, at *13–14 (N.D. Cal. Apr. 1, 2005) (citing *Register.com*, 356 F.3d at 401–02).

[130] *See* Sotelo v. DirectRevenue, LLC, 384 F. Supp. 2d 1219, 1228 (N.D. Ill. 2005) (determining that notice after installation of spyware was ineffective, in part because uninstalling the spyware was confusing, as contrasted with physically returning a purchased product).

[131] Douglas v. U.S. Dist. Court for Cent. Dist. of Cal., 495 F.3d 1062, 1066 (9th Cir. 2007) (citing Matanuska Valley Farmers Cooperating Ass'n v. Monaghan, 188 F.2d 906, 909 (9th Cir. 1951)) (finding that unilaterally changed web site terms were merely a non-binding offer, and the customer had no obligation to check the web site for modifications, notwithstanding continued use of service); BellSouth Commc'ns Sys., L.L.C. v. West, 902 So.2d 653, 656–57 (Ala. 2004) (finding unenforceable an arbitration clause that was posted to the internet because BellSouth could not show that the defendant continued to use the internet service after the change in terms was posted). *But see* XPEL Techs. Corp. v. Md. Performance Works, Ltd., No. SA-05-CA-0593-XR, 2006 U.S. Dist. LEXIS 47158, at *20–21 (W.D. Tex. May 19, 2006) (finding adequate notice of revised forum selection clause, based upon end-user license agreements that

### *G. Analogy to Paper Contracts*

When deciding Internet-related cases, judges often adopt the traditional law of contracts as applied to agreements that are memorialized on paper.[132] Some authors have opined that browse-wrap agreements are like typical contracts.[133] While there are some similarities, the enormous differences should not be overlooked. Primarily, paper is static, while web pages can be dynamic in countless ways, limited only by the imagination and skill of the site developer. From a technological standpoint, there are no rules requiring any certain design or structure.[134] Also, providers can change their web pages in an instant by saving a revised web page, or other file containing codes, to a ready computer server.[135]

Additionally, web site operators find it impossible to control absolutely the way a page appears to every computer user because of unpredictable technological variables.[136] Unknown changes may occur because of browsers, operating systems, menu preference settings, monitor resolution, connection speed, color handling, and fonts.[137]

"The Web is not merely the electronic equivalent of a newspaper or magazine—it is a communication medium that is limited only by the lack of innovation and creativity of web site designers."[138] Web site designers are taught to create a page for visitors to scan and get the gist of the content; users are not expected to read every word from top to bottom of a web page.[139] Further, Internet developers have been catering to visitors who expect "eye-popping animations" and "mind-blowing

multiple times had referenced the possibility of amendments); Waters v. Earthlink, Inc., No. BACV01-11887WGY, 2006 WL 1843583, at *3 (Mass. Super. Ct. June 19, 2006) (rejecting argument that the original contract continued after successor providers posted replacements where plaintiff claimed lack of notice of the new contracts).

[132] *Cairo*, 2005 U.S. Dist. LEXIS 8450, at *12 (quoting *Register.com*, 356 F.3d at 403) (holding Terms of Use to be binding where plaintiff visited the defendant's web site with awareness of the terms of use).

[133] *See, e.g.*, Streeter, *supra* note 14, at 1388 (describing a browse-wrap license as an offer that may be accepted through a particular action, such as using the offeror's software to access part of a web site).

[134] LEMAY, *supra* note 2, at 49.

[135] *Id.* at 14–15.

[136] NIEDERST, *supra* note 96, at 29.

[137] *Id.* at 30–31.

[138] FORTA, *supra* note 91, at 12.

[139] LEMAY, *supra* note 2, at 524.

interactivity."[140] Web pages today can have "nifty graphics and snazzy sounds."[141] They can incorporate "techniques used by artists in traditional animation studios."[142] One common effect type is to have animations, images, or text changing upon the cursor rolling over a portion of a page.[143] Such effects might draw a reader's attention away from contract terms. Imagine the difficulty of trying to concentrate on noticing or reading a contract while rapidly moving animation dances before one's eyes, or while a sound effect or a catchy tune are playing.

Internet-based documents may include interactive features, including fill-able forms, links, movies, and sounds.[144] Further, dynamic pages can interact with databases[145] before assembling and displaying the final web page on a screen.[146] Moreover, the elements of a web page can change in content contemporaneously as a computer user completes a form.[147]

Indeed, a web page may be overloaded with such varied elements. In such instances, terms may be difficult to find among the clutter.[148] Too many images on a web page can be distracting.[149] One can easily envision a web site containing fast-moving animation that invites computer users to navigate into another topical area, thereby causing them to be distracted away from contractual provisions.

The overuse of uniformity in design may also create obstacles to notice of terms. For example, text lacking in color contrast with the background can be difficult to read.[150] Also, text placed

140 DEREK FRANKLIN & JOBE MAKAR, MACROMEDIA FLASH MX ACTIONSCRIPTING 8 (2002); *see also* SHAM BHANGAL, FOUNDATION ACTIONSCRIPT 1 (2000) (explaining that the advent of Flash script allowed designers to add "mind-blowing effects" and increase user interactivity).

141 MATTHEW PIZZI ET AL., MACROMEDIA FLASH MX UNLEASHED 22 (2002).

142 *Id.* at 210.

143 WYKE ET AL., *supra* note 98, at 550.

144 CHRISTOPHER SMITH & SALLY COX, SAMS TEACH YOURSELF ADOBE ACROBAT 5 IN 24 HOURS 12 (2002).

145 A "database" is made up of computer files consisting of a "structured collection" of information. FORTA, *supra* note 91, at 96.

146 *See id.* at 14 (explaining that "Dynamic Web pages communicate with databases to extract [information]" and then display that information to the user).

147 *E.g.*, TOM NEGRINO & DORI SMITH, JAVASCRIPT FOR THE WORLD WIDE WEB: VISUAL QUICKSTART GUIDE 66–67 (2d ed. 1998).

148 *See* Moringiello, *supra* note 20, at 1332 (arguing that viewers do not perceive printed terms the same way as web pages and the two should, therefore, not be treated equally in the law).

149 LEMAY, *supra* note 2, at 539.

150 *Id.* at 544.

over a background image may be harder to read.[151]

Web sites may be designed to allow users to specify a customized page as to appearance and content; this further complicates matters.[152] An interesting question could arise regarding whether a user is deemed to have knowledge of an agreement when the provider allowed the user to create distractions or impediments to viewing the contract. In such instances, arguably, the user could have been unreasonable in failing to read the contract, having caused the predicament, and, thus, should be bound. A contrary contention could be that a user acted very reasonably in missing the contract where the web site, by design, invited the user to make design changes that prevented the user's awareness of terms.

A particular Internet address can be customized in accordance with codes arranged for by the provider, and, thus, appear differently on different computers, or at different times, depending upon codes or software configurations causing changes in response to various events.[153] For instance, code may be written to detect a computer's browser software and deliver a custom web page most suitable to it.[154] "Cookie" text files that are saved on a user's computer upon a prior Internet visit can be retrieved upon subsequent visits to customize the content of a web page.[155] That method is typically used to retrieve passwords automatically so that the computer user can efficiently bypass the login page or immediately click on a submit-type button.[156] Where a web site was designed to login automatically and to bypass the pages having notice of the current terms, there may have been no notice given to the computer user. Similarly, like cookie files, session variables saved on a computer server, or database information, can be retrieved upon a subsequent visit to customize a web page.[157] Such codes might be used to bypass the

151 *Id.*

152 *E.g.,* Amy Lynne Bomse, Note, *The Dependence of Cyberspace*, 50 DUKE L.J. 1717, 1736 (2001) (citing "My Yahoo" as an example of a web page that users may customize).

153 *See, e.g.*, LARRY ULLMAN, PHP FOR THE WORLD WIDE WEB xii (2d ed. 2004) (discussing how PHP allows web designers to create dynamic web pages).

154 *See* SCOTT MITCHELL & JAMES ATKINSON, SAMS TEACH YOURSELF ACTIVE SERVER PAGES 3.0 IN 21 DAYS 394–96 (2000) (showing an example of a code that would allow a browser to see whether or not it supports frames).

155 *Id.* at 299–300, 315.

156 *Id.* at 315.

157 A session variable is temporarily stored information in a database on a server computer with information tied to a computer user, such as the time of

terms of use, where a computer user recently visited the web page of terms.[158]

Different people may use the same computer and Internet provider account to access the Internet, thereby causing a prior user's experience to deprive a subsequent person's opportunity to view web terms, where a page was designed in such a way so as to give notice only upon the first use. If such a person acted on behalf of the other, notice to the agent may have sufficed to impute notice and assent to the principal.[159]

There is also the possibility that computer code causes unintended content due to a latent "bug" created in the writing of the codes.[160] One computer user's experience may differ from another's (such as a failure to display contract terms) when a unique combination of events (such as page linking or form filling) causes the programming "bug" to be processed. In such instances, an expert capable of understanding the particular code used to create a web page might be able to diagnose, after the fact, how it caused an unintended result following a certain triggering sequence of events.

Computer hardware can affect a viewer's perceptions. A fifteen-inch monitor may reduce or cut off content on a screen as compared to a seventeen-inch one.[161] That could make the

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the last visit. *Id.* at 344–47.

[158] *See id.* at 348–49 (describing how a session variable can save a user's preference, indicated by a form submission, and then omit specified text for that user).

[159] *E.g.*, Hofer v. Gap, No. CIV.A. 05-40170-FDS, 2007 WL 2827380, at *9 (D. Mass Oct. 1, 2007) (finding that a party was bound by an online contract where the party's friend and authorized agent "could not order tickets or make reservations without 'clicking through' [the disclaimer]"); Abramson v. Am. Online, Inc., 393 F. Supp. 2d 438, 440–41 (N.D. Tex. 2005) (finding that a son had the authority to bind his mother to a user agreement of America Online, Inc.); Motise v. Am. Online, Inc., 346 F. Supp. 2d 563, 566 (S.D.N.Y. 2004) (finding that a stepson was bound by his stepfather's consent to a user agreement with America Online, Inc.); *cf.* Network Solutions, Inc. v. Hoblad, B.V., 82 F.App'x 845, 846 (4th Cir. 2003) (relying on the trial court's finding that the "Appellants were bound by the [domain-name] registration agreements [with Network Solutions, Inc.,] because the intermediaries had acted as Appellants' agents in executing those agreements").

[160] *See* MITCHELL & ATKINSON, *supra* note 154, at 436–43 (discussing the implications of web designers failing to de-bug their code); WYKE ET AL., *supra* note 98, at 878, 882 (explaining that debugging means finding and fixing errors in code).

[161] *See* Ticketmaster Corp. v. Tickets.com, Inc., No. CV99-7654-HLH, 2003 WL 21406289, at *2, 6 (C.D. Cal. Mar. 7, 2003) (granting summary judgment in part, stating "that a user without an especially large screen would have to scroll down the page to read the conditions of use.").

difference as to whether a visitor observed a link or terms without the necessity of scrolling down or sideways.

Unlike paper contracts, unless prohibited by design, Internet navigation could bypass pages giving notice of terms, making it unfair to impute notice to the computer user. A web site may link directly to a sub-page instead of a home page intended to be the entry point.[162] While persons generally can see and feel when they are skipping over paper pages, when using a computer, they may lack information that orientates them as to the path of travel from one page to the next. To address that aspect, web site operators often provide links to pages called "site maps," or have graphical charts, showing a path of the web pages, placed at the top of each page. Similarly, a browser menu of favorite web pages can link directly to a sub-page, allowing a "back-door" type of entry.[163] Where a page is divided into frames, a web page may link to only one frame without showing the whole page as intended.[164] A link on a web page may be designed to show another web page as a frame inside the first web page.[165] Web site designers can counter such entries or displays by redirecting visitors to a main page[166] or by placing contract notices on all possible points of entry. Monolithic web pages are also possible.[167] Analogously, imagine written contracts printed on pages four feet in length, and how that might hinder noticing terms of use placed at the bottom. Scrolling to read text can become tedious to visitors.[168]

Commentators, attorneys, and judges thus far have not

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[162] The concept has been called "deep linking," which involves a hyperlink to a site other than a home page that was designed for entry. *E.g.*, Streeter, *supra* note 14, at 1366 n.20 (citing *Ticketmaster Corp.*, 2003 WL 21406289, at *1). However, providers can utilize code to force a default web page to be delivered as the first screen viewed as to a particular Internet address. FORTA, *supra* note 91, at 27.

[163] *See, e.g.*, Department of Command, Leadership, and Management, How to Navigate This Web Site, http://www.carlisle.army.mil/usawc/dclm/navigate.htm (last visited Apr. 16, 2008) (discussing the features of this web site's browser and demonstrating a back-door entry that allows users to bypass the main menu).

[164] *See* NEGRINO & SMITH, *supra* note 147, at 53 (discussing how to insure web pages fit into their frames). A web page can be designed as a layout of separate pages showing on one screen consisting of a frame set. *Id.* at 51.

[165] *See id.* at 52 (discussing how to prevent one web page from opening within a window in another web page).

[166] *E.g.*, *id.* at 53.

[167] LEMAY, *supra* note 2, at 46.

[168] *Id.* at 546.

exhibited a clear understanding of such technical nuances. Rarely are opinions impressive in showing a mastery of the technology involved. Attorneys' arguments and court opinions generally turn upon overly simplified views and cursory analyses of Internet technologies. The above concepts should be analyzed in detail to reach a fair and accurate disposition of a legal dispute. However, jurists should not go to the opposite extreme and adopt strategically opportunistic positions as to such technologies. Parties may be tempted to engage in mere speculation as to the many technological possibilities that could have affected their contracting experience. Web page viewings are mostly predictable and regular; Internet-based variations that would materially affect contracts are much more the exception rather than the rule.

### *H. Analogy to Shrinkwrap Licensing*

There have been many commentaries that explore the analogy of shrinkwrap authorities to other electronic contract types, and so the topic will be only briefly called to the readers' attention here, as being a related analysis. One court concluded that the factual differences between "shrinkwrap" and "click wrap" licenses made any analogizing unhelpful.[169] The court observed that shrinkwrap licenses that have been found to be binding have involved repeated displays of terms during computer use, prominent displays on computers, and printed terms delivered in packaging, whereas the web page at issue lacked reasonably conspicuous notice of contract terms to enable an unambiguous manifestation of assent.[170]

### *I. Failure to Read Contracts*

Internet site visitors actually may notice terms of use, yet nonetheless seek to avoid them, and argue that they were being

[169] *See* Specht v. Netscape Commn'cs Corp., 306 F.3d 17, 32–33 (2d Cir. 2002) (rejecting defendants' argument that the clickwrap agreement on its web site could be analogized to shrinkwrap agreements that were found enforceable in prior cases).

[170] *Id.* at 32–33 (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 251 (NY App. Div. 1998); M.A. Mortenson Co. v. Timberline Software Corp., 970 P.2d 803, 809 (1999), *aff'd* 998 P.2d 305 (2000); I.Lan Sys. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass 2002)).

induced to refrain from reading the provisions. Under traditional contract law, parties may not avoid contracts if their own neglect to read terms was unreasonable under the circumstances.[171] Hence, outside of the Internet context, courts have required parties to go to great lengths to request and obtain documents incorporated by reference in their signed document. Web site visitors need not have actually accessed contract terms for them to be enforced if a party provided reasonable notice of terms available for reading on a web page.[172] Parties may be bound by unread terms if they violated the duty to use reasonable care to read them.[173] For instance, a court held a party to a contract when the party failed to click on a hyperlink to read terms; the court analogized to paper-based contracts.[174] Another court considered the possible deception involved in contract formation where the registration process for an online service was spread over eighty screens, ultimately finding that the forum selection clause, which was at issue, contravened public policy.[175] In an

[171] *E.g.*, Treiber & Straub, Inc. v. UPS, 474 F.3d 379, 385 (7th Cir. 2007) (holding a business was bound by online terms notwithstanding a failure to read the terms, even though not a regular user of the web site); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 528 (W.D. Pa. 2000) (finding party bound by terms notwithstanding her failure to read them, in view of a signed software registration form stating that she had read and agreed to the license terms); *see also* Verizon Commc'ns Inc. v. Pizzirani, 462 F. Supp. 2d 648, 655–56 (E.D. Pa. 2006) (rejecting argument that misleading descriptions of the agreement, omitting references to revisions and non-competition clauses, induced failures to read, where e-mails gave notice, and the user clicked on boxes to affirm reading the terms and there was no time pressure); Conference Am., Inc. v Conexant Sys., Inc., No. 2:05-cv-01088-WKW, 2007 U.S. Dist. LEXIS 66867, at *34 (M.D. Ala.) (finding sufficient notice of web site terms, after a party was twice referred to the web site, and unjustified failure to read them for pricing, after requesting services); Marsh v. Marsh, 949 S.W.2d 734, 741–42 (Tex. App. 1997) (citing Pearce v. Pearce, 824 S.W.2d 195, 199 (Tex. App. 1991) (holding that a post-marital agreement was not unconscionable where party failed to read it)).

[172] Schlessinger v. Holland Am., N.V., 16 Cal. Rptr. 3d 5, 11 (Cal. Ct. App. 2004) (upholding the trial court's finding that a plaintiff had "ample opportunity to familiarize herself with the terms of the contract via [the defendant's] web site").

[173] *E.g.*, Moringiello, *supra* note 20, at 1312 (citing JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.41, at 392 (West 5th ed. 2003); DeJohn v. .TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003)); Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. App. 2001); *DeJohn*, 245 F. Supp. 2d at 919.

[174] *DeJohn*, 245 F. Supp. 2d at 919, 924–26 (citing Tatar v. Elite Gold, Inc., No. 01 CIV. 2433 (RLC), 2002 WL 2031605, at *3 (S.D.N.Y. Sept. 5, 2002); *Barnett*, 38 S.W.3d at 204).

[175] Scarcella v. Am. Online, No. 1168/04, 2004 N.Y. Misc. LEXIS 1578, at *3–

analogous analysis involving a statutory claim of deceptive practices, a court found a record to be inconclusive as to whether a consumer reasonably would have noticed certain policy disclosures where they were separated from a broadly worded contract that expressly constituted the "entire agreement."[176]

One particular scenario, affecting a determination whether a user unreasonably fails to read terms, might be where a user becomes familiar with terms after repeated visits, and does not expect upon subsequent visits that some provisions could be modified.[177] Another technical possibility is that, depending upon computer codes and menu settings, a computer may not load the most current Internet terms because it loads a file previously stored on the computer, called the "cache."[178] Thus, if web terms were added or updated after a computer visited a web site once, there is a possibility the computer will not download the updated version. Arguably, operators should be held to a high standard of calling contract changes to users' attention. That kind of argument preceded a settlement with an Internet service provider.[179]

Computers may have been adjusted in ways that unintentionally make contracts more difficult to notice or read. For example, menus allow computer users to change monitor resolutions, and that may reduce the dimension of the browser

5, 7–8 (Civ. Ct. N.Y. City Sept. 8, 2004) (citing British West Indies Guar. Trust Co., Ltd. v. Banque Internationale A Luxembourg, 172 A.D.2d 234, 234 (NY App. Div. 1991)).

[176] Zurakov v. Register.com, Inc., 304 A.D.2d 176 (N.Y. App. Div. 2003). The *Zurakov* court stated plaintiff's argument that the disclosure of defendant's practice of pointing a newly registered domain name to the 'Coming Soon' page was not contained in the contract but instead was buried in hundreds of pages in defendant's web site, and that a reasonable consumer could not be expected to scour defendant's Web site to find these disclosures, which consisted of but a few sentences. *Id.*

[177] To counter users' overlooking of recently added information, web page designers are taught that pages highlighting new modifications are useful to enable a user to find that information without searching tediously. A web page is generally one document of a web site, which is a collection of pages. LEMAY, *supra* note 2, at 556.

[178] *See* MITCHELL & ATKINSON, *supra* note 154, at 193 (discussing problems that arise from using a cache).

[179] *See* Gwendolyn Mariano, *Juno Settles Terms-of-Service Dispute*, CNET NEWS.COM, June 9, 2002, http://news.com.com/2102-1023-901740.html (reporting that, pursuant to a settlement, an internet service provider agreed to give subscribers conspicuous notice of any material changes to the service agreement at least thirty days before the effective date).

window and sometimes hide text.[180]

Users' skills are different and they may not know how to navigate pages.[181] Users should expect only some, but not much, sympathy from the courts, where there are beginner levels of computer literacy. One court noted that computer use might be difficult, yet nonetheless found a user's claim of difficulty printing an agreement to be exaggerated.[182] In addition, users' physical capabilities differ. Often people report difficulty in reading a screen as compared to paper.[183] For visually impaired persons, some web site developers may not have designed their pages to enable complete reading by screen-reading software.[184] Persons with disabilities, who are deterred from reading terms because of the lack of accessibility features, may argue lack of notice.[185] Computer users have different traits and experience

[180] NIEDERST, *supra* note 96, at 17, 18, 20, 21.

[181] *See* Moringiello, *supra* note 20, at 1345 (citing Sirkka L. Jarvenpaa & Peter A. Todd, *Consumer Reactions to Electronic Shopping on the World Wide Web*, 1 INT'L J. ELECTRONIC COM. 59 (1996–1997) (discussing consumers' attitudes toward and familiarity with online shopping and communications)).

[182] *In re* RealNetworks, Inc., No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584, at *9–10 (N.D. Ill. May 11, 2000) ("Although any computer use can be intimidating, the process of printing the License Agreement is no more difficult or esoteric than many other basic computer functions, and the melodrama and over exaggeration with which Intervenor describes the alleged impossibility of printing the License Agreement is disingenuous.").

[183] *E.g.*, *id.* at *16–17 ("If Intervenor needs to plaster his face against the screen to read the License Agreement, he must then have to do the same to read anything on his computer, in which case, doing so does not seem like an inordinate hardship or an adjustment out of the ordinary for him.").

[184] *See* SMITH & COX, *supra* note 144, at 375–77 (noting that some web designers may forget about "visually impaired Internet users" who cannot easily access the universally-popular PDF document). Also, the National Federation of the Blind filed a lawsuit against Target Corporation, alleging that the Target.com web site was "difficult if not impossible for blind customers to use." Amended Complaint for Injunctive and Declaratory Relief and Damages for Violations of the Unruh Civil Rights Act, Cal. Civ. Code s 51, the California Disabled Persons Act, Cal. Civ. Code s 54, and the Americans With Disabilities Act, 42 U.S.C. ss 12101, et seq. at 1, Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006) (No. C 06-01802 MHP) 2006 WL 1045357, *available at* http://www.dralegal.org/downloads/cases/target/nfb_v_target_complaint.pdf. On September 6, 2006, the Court granted, in part, Defendant's motion to dismiss. *Nat'l Fed'n of the Blind*, 452 F.Supp.2d at 956, 965 (N.D. Cal. 2006). The court, however, determined that the Complaint adequately alleged a cause of action for, inter alia, violation of the Americans with Disabilities Act. *Id.* at 956 ("In sum, the court finds that to the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim [under the Americans with Disabilities Act].").

[185] Disabled users may use assistive technologies for navigation, such as

levels; web site designers should use clear organization and explanations to try to accommodate the full spectrum of visitors.[186]

Further, judges should not assume that the availability of printing terms necessarily indicates a user's negligent failure to read a contract. A web site operator may not have arranged for a printer-friendly version of a page to make a printed document fully legible.[187] Browsers and printers may handle formatting in different ways, such as changing color contrasts or shrinking contents.[188] Hence, parties should have the opportunity to show that the particular viewing experience did, or did not, lend itself to allowing adequate notice and reading of Internet-based provisions.

### *J. Fairness of Internet Designs*

A factor that judges have considered is whether a design should be enforced as a matter of fairness. Appearing to give a strong approval to the use of agreements created through links on Internet sites, one decision stated that there was no perceived unfairness in providing access to terms via a hyperlink because the practice is common.[189] A concurring opinion in another case, however, astutely recognized that the fairness of expecting consumers to read contracts by access through Internet links should depend upon factors such as whether the computer user is contemporaneously online, is a proficient computer user, or has computer and Internet access.[190]

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software that reads text aloud. NIEDERST, *supra* note 96, at 74. Thus, for example, embedding text in graphics may prevent their perception of a contract provision.

[186] A web page is generally one document of a web site, which is a collection of pages. LEMAY, *supra* note 2, at 587–91; *see also* LAURA LEMAY, TEACH YOURSELF WEB PUBLISHING WITH HTML 3.0 IN A WEEK 286, 288, 291 (2d ed. 1996) (advising web designers to keep writing and design clear and straightforward).

[187] *See* NIEDERST, *supra* note 96, at 63 (discussing "printer-friendly" documents); *see also* LEMAY, *supra* note 2, at 548 (suggesting that web sites include an external text or PDF version of a document that can be printed in its entirety).

[188] *See* NIEDERST, *supra* note 96, at 62–63 (discussing browser print settings).

[189] Net2Phone, Inc. v. Superior Court of L.A. County, 135 Cal. Rptr. 2d 149, 153 (Cal. Ct. App. 2003).

[190] Schlessinger v. Holland Am., N.V., 16 Cal. Rptr. 3d 5, 12–13 (2004) (Johnson, J., concurring); *see also* Verizon Commc'ns. Inc. v. Pizzirani, 462 F. Supp. 2d 648, 656 (E.D. Pa. 2006) (noting that the user was a sophisticated businessman whose employment involved reading contracts).

While web pages may not be designed to have features that duplicate those already available on browsers' menus, such duplication may help support a finding that a user should have been aware of terms. For example, some pages place buttons adjacent to terms that print the web page or make the text larger.[191] Because such features, helpful to learning contract terms, are in the immediate zone of perception, unsophisticated users would be harder pressed to convince judges that they did not know how to execute menu items, such as "File" and "Print" via browsers' menus. One court considered it important that a sophisticated computer user could have printed, saved, and expanded a contract from a small screen.[192]

Although various laws may nullify unfair contract terms, web site operators still knowingly include them on web pages as a psychological tool to deter unwanted uses of a web site.[193] Judges, therefore, should have a heightened awareness of deceptively arranged or aggressively drafted provisions that are placed on web sites for their business-related impacts; these are not realistically enforceable. Perhaps the relative rarity of any litigation commenced by providers over browse-wrap agreements further indicates that providers use them mainly as psychological deterrents and do not realistically expect to enforce them in courts, as to an average visitor. Alternatively, because of the lack of legal guidance in this area, providers may be gambling that courts someday will adopt their cutting-edge terms.

## IV. ASSENT

Generally, mere access of a web site may be sufficient to manifest assent to terms of use.[194] However, electronic contract terms may dictate the particular acts required to constitute assent.[195] For instance, "a contract can be formed by proceeding into the interior web pages after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing

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[191] *E.g.*, The Blackstone Group Terms of Use, http://www.blackstone.com/terms.html (last visited Apr. 17, 2008).

[192] Verizon Commc'ns v. Pizzirani, 462 F. Supp. 2d 648, 656 (E.D. Pa. 2006).

[193] Sandeen, *supra* note 41, at 522–23.

[194] *E.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004).

[195] *See* Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d. 125, 129–30 (D. Mass. 2000) (finding contract formation in part because electronic agreement did not unambiguously preclude mailing a check for renewal of domain name registration).

so."[196]

One trial judge indicated a preference for a change in law that would require "an unmistakable assent to the conditions easily provided by requiring clicking on an icon which says, 'I agree' or the equivalent."[197] The approach would amount to imposing the use of click-wrap agreements upon providers, where the computer programming requires an affirmative act, as distinguished from mere navigation. Generally, judges readily find assent to such click-wrap agreements.[198] Unless all providers are compelled by law to place mandatory terms and acceptance as the web page users' view, it seems unlikely that providers would volunteer, or users would appreciate, such an unattractive arrangement. Given the realities of a world in which people are accustomed to contracting in countless ways, and user preferences, in deciding assent, judges or other fact-finders should consider a variety of parameters that may affect a determination of whether assent occurred.

One such possible circumstance could be the occurrence of an unintentional act of assent. For example, as to a web site providing that mere use constitutes assent, inadvertent use may nonetheless be shown when the programming automatically redirects the initial page to another page, without any user input.[199] Further, computer users may have indicated their assent, or acceptance of particular terms, by inadvertence, such as by a premature click on a form submission button.[200] This

196 Ticketmaster Corp. v. Tickets.com, Inc., No. CV99-7654-HLHVBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (denying in part and granting in part a motion for summary judgment, and analogizing to cases involving facts outside the Internet context); *see also* Shaw v. Hyatt Int'l Corp., 461 F.3d 899, 902 (7th Cir. 2006) (concluding that a user accepted an offer by reserving a hotel room through a web site); Cohn v. TrueBeginnings, LLC, No. B190423, 2007 WL 2181897, at *3 (Cal. App. Aug. 2, 2007) (upholding the trial court's finding that assent was given by clicking on "continue" button notwithstanding a failure to click on a link to terms).

197 *Ticketmaster*, 2003 WL 21406289 6483, at *2.

198 *See, e.g.*, Mortgage Plus, Inc. v. DocMagic, Inc., No. 03-2582-GTV-DJW, 2004 U.S. Dist. LEXIS 20145, at *17 (D. Kan. Aug. 23, 2004) (finding assent where software installation involved clicking on the word "yes" in order to indicate acceptance of terms); Bar-Ayal v. Time Warner Cable Inc., No. 03 CV 9905 (KMW), 2006 U.S. Dist. LEXIS 75972, at *51–52 ( S.D.N.Y. Oct. 16, 2006) (finding assent to arbitration provisions by a user clicking on "Accept" eight times in installing software).

199 Hidden computer codes can redirect a computer from the requested web page to another. MITCHELL, *supra* note 154, at 190.

200 Amelia H. Boss, *Electronic Contracting: Legal Problem or Legal Solution?*, *in* Harmonized Development of Legal and Regulatory Systems for E-Commerce

aspect differentiates remote electronic contracting from in-person negotiations where the other party has an ability to observe a mistaken manifestation of assent. Thus, there have been proposals for laws allowing users to promptly act to undo a transaction.[201]

Most published cases have involved web site providers that tried to show the assent of a visitor or consumer.[202] The opposite scenario has occurred less often—i.e., providers have sought to avoid an agreement advanced by a computer user, by arguing that the user failed to follow all conditions for acceptance.[203] For example, a governmental defendant lawfully rejected a contract due to a bidder's forgetful failure to click on the submit button as required by administrative instructions.[204] The court reasoned that the manifestation of assent was analogous to credit card purchases in stores, or online, where clicking on a button is a prerequisite to banks processing a charge.[205]

Proving authority to assent for a party may be especially difficult for providers because generally, the identity of the user actually operating the computer would be unknown, and only possibly learned through investigating and discovery

in Asia and the Pacific: Current Challenges and Capacity-Building Needs 125, 130 (2005), *available at* http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf.

[201] *Id.* at 137–38 (discussing the Uniform Electronic Transactions Act and the Uniform Computer Information Transactions Act).

[202] *See, e.g.*, Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000) (finding a user agreed to abide by terms without question that the user manifested its assent to be bound by the terms when it electronically submitted queries to the database); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1081 n.11 (C.D. Cl. 1999) (finding a "clickwrap" agreement allowed the consumer to manifest assent to the terms of a contract by clicking on an acceptance button of the web site).

[203] *See, e.g.*, Conscoop-Consoriza Fra Coop. Di Prod. v. United States, 159 F.App'x 184, 185–86 (Fed. Cir. 2005) (finding a bid untimely when it arrived late on a server but was sent on time).

[204] Glasgow, Inc. v. DOT, 851 A.2d 1014, 1016 (Pa. 2004). The opinion is unclear as to whether the court fully understood that typing into a web page form is not transmitted from the user's computer to the server computer until clicking on the submit button or otherwise submitting form elements to the server. *Id.* at 1018 (analogizing electronic transactions involving already transmitted information where clicking on a button is still required to show acceptance); *see also* MITCHELL, *supra* note 154, at 224 (technical explanations of the function of a submit button).

[205] *Glasgow*, 851 A.2d at 1018. Clicking occurs when a user holds a mouse button down and releases it, and an event is triggered on a computer. WYKE ET AL, *supra* note 98, at 367.

procedures.[206] Analogizing to a shrinkwrap case, a court found valid acceptance notwithstanding the fact that the individual agent accepting the agreement remained unknown because the entity had ratified acceptance by accepting the benefits.[207] Further, where a party intentionally or negligently causes another to believe that an agent has ostensible authority to contract, a consumer may be bound by the agent's act of clicking on the screen to indicate assent.[208]

## V. CONTRACT INTERPRETATION

### *A. Express Terms*

#### 1. Generally

Enforcement of Internet contracts may depend upon the particular language that courts are asked to interpret. Courts may be called upon to determine whether particular language expressed any intent to form a contract[209] or was ambiguous.[210]

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[206] In one case, a court found that a party was entitled to conduct discovery as to whether agents had authority to bind a party to a contract by visiting a web site. *See* Health Grades, Inc. v. Decatur Mem. Hosp., 190 F.App'x 586, 589 (10th Cir. 2006).

[207] Mortgage Plus, Inc. v. DocMagic, Inc., 2004 U.S. Dist. LEXIS 20145, at *19 (D. Kan. Aug. 23, 2004).

[208] Hugger-Mugger, L.L.C. v. Netsuite, Inc., No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003, at *19–20 (D. Utah Sept. 12, 2005) (finding party bound by clickwrap agreement, where provider reasonably believed there was authority to bind the entity).

[209] *See, e.g.*, Trell v. Am. Ass'n of the Advancement of Science, No. 04-CV-0030E (Sr), 2007 U.S. Dist. LEXIS 36942, at *18–19 (W.D.N.Y. May 18, 2007) (applying traditional contract law to Internet-based advertisement to conclude that it was not an offer to contract); *see also* Schoedinger v. United Healthcare of the Midwest, Inc., No. 4:04-cv-664 SNL, 2006 U.S. Dist. LEXIS 80956, at *13–14 (E.D. Mo. Nov. 6, 2006). In *Schoedinger*, an insurance "Administrative Guide" directed physicians to use an insurance company's web site in order to expedite payment. *Schoedinger*, 2006 U.S. Dist. LEXIS 80956, at *5. The web site informed health care providers about patient eligibility and healthcare claims processing. *Id.* at *5. The court held that the documents on the web site did not create a contract between the parties because the documents did not manifest a willingness to create a contract and contained "generalized language and put the reader on notice that the claims procedure could change in the future." *Id.* at 13.

[210] *See, e.g.*, Durick v. Ebay, Inc., 2006-Ohio-4861, 12–17 (Ohio App. 7 Dist. 2006) (rejecting the argument that the online terms of Ebay, Inc., were ambiguous and concluding that the language in the user agreement clearly prohibited sales of prescription drugs).

While existing and potential online provisions are too numerous to explore exhaustively,[211] some will be addressed in this discussion to illustrate that Internet contract enforcement may depend upon the particular wording.

2. Scope

One court reasoned that a plaintiff's claims fell within the scope of particular language based upon a plain reading.[212] Similarly, as to arbitration provisions, courts look at the contract language to define their scope.[213]

3. Forum Selection Clauses

Courts differ on their holdings regarding forum selection clauses. In one legal action, although the parties argued that a forum selection clause contained ambiguous and conflicting provisions, the particular wording clearly showed that the parties had not agreed to the selected court forum.[214] In another case, a court rejected a claim that language equated with a forum selection clause where it did not mandate a forum for litigation, but instead mandated one for arbitration.[215] Another court interpreted a forum selection clause as being mandatory when it provided that exclusive jurisdiction "resides" in a forum.[216] Similarly, a court interpreted "exclusive jurisdiction" to mean that a forum selection clause was mandatory.[217]

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[211] One need only navigate randomly through web sites to see the potential varieties of terms of use. However, some categories are common in web site agreements, such as assent, forum-selection, arbitration, indemnity, privacy, acceptable use, modifications, copyright, license, trademarks, warranties, limits of liability, integration, and severability.

[212] DeJohn v. .TV Corp. Int'l, 245 F. Supp. 2d 913, 915, 917, 920–21 (N.D. Ill. 2003) (interpreting Register.com's agreement that provided a right to refuse to process a domain name application and ruling that language did not guarantee error-free domain name registration as it applied to plaintiff's claims for breach of contract, after registrations were rejected because of inaccurately posted prices).

[213] DeFontes v. Dell Computers Corp., 2004 R.I. Super. LEXIS 32, at *22 (contract language defines scope of arbitration).

[214] Cairo, Inc. v. Crossmedia Servs, 2005 U.S. Dist. LEXIS 8450, at *14–15 (N.D. Ca. 2005).

[215] Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 745 (W.D. Tex. 1998); *see also* Cohn v. Truebeginnings, No. B190423, 2007 Cal. App. Unpub. LEXIS 6232, at *11 (Cal. Ct. App. 2007) (forum selection clause interpreted to be permissive, rather than mandatory, or venue-selection clause).

[216] Koch v. Am. Online, Inc., 139 F. Supp. 2d 690, 694 (D. Md. 2000).

[217] Hugger-Mugger, L.L.C. v. Netsuite, Inc., No. 2:04-CV-592 TC, 2005 U.S.

4. Lawsuits Between Users

One decision interpreted the language of an online user agreement, deciding that it did not apply to lawsuits between computer users and not involving the provider.[218] Another court decided that an online release provision did apply in favor of a provider in an action also involving a user suing another user.[219]

5. Timing

According to the express wording of one agreement, a user's initial acceptance of terms of service also applied to subsequent accounts with America Online.[220] Further, language stating that a revision was effective "as to" Internet services used after the terms' posting, meant that it was inapplicable to claims as to services rendered before the posting.[221]

6. Copying

A court decided that particular online language sought to prohibit users from copying and republishing web site content.[222] Conversely, another court determined that an Internet service provider's terms granted it a broad license to use files uploaded by a user.[223]

7. Incorporation

Incorporation by reference is another issue addressed by the courts in consideration of Internet agreements. A court found that an arbitration provision and incorporated contract was not part of an agreement, stating that it was "subject to" the online terms because there was no clear language of intent to

Dist. LEXIS 33003, at *23 (D. Utah Sept. 12, 2005).

[218] Evans v. Matlock, No. M2001-02631-COA-R9-CV, 2002 Tenn. App. LEXIS 906, at *6 (Tenn. Ct. App. Dec. 23, 2002) (involving claims between users of the e-Bay auction web site and an attempt to enforce the arbitration provision).

[219] Grace v. eBay Inc., 16 Cal. Rptr. 3d 192, 196, 203 (Cal. Ct. App. 2004) (involving a defamation claim between users and against e-Bay, and language addressing disputes between users and release of provider), *review granted*, 19 Cal. Rptr. 3d 824, *review dismissed*, 21 Cal. Rptr. 3d 611.

[220] Dix v. ICT Group, Inc., No. 23184-4-III, 106 P.3d 841, 844 (Wash. Ct. App. Feb. 17, 2005).

[221] BellSouth Commc'ns Sys., L.L.C. v. West, 902 So. 2d 653, 657 (2004).

[222] Siedle v. Nat'l Assoc. of Sec. Dealers, Inc., 248 F. Supp. 2d 1140, 1144 (M.D. Fla. 2002).

[223] Bennett v. Am. Online, Inc., No. 06-13221, 2007 U.S. Dist. LEXIS 72474, *19–20 (D. Mich. Sept. 28, 2007).

incorporate, and the incorporated terms were insufficiently described.[224] A bid was untimely, as to a solicitation of the United States Navy, based upon interpretation of language on a web page referring to a separate document accessible via a link as being the governing terms.[225]

8. Privacy

In cases involving litigation over online privacy policies, courts have found that language amounting to broad statements of policy do not constitute contracts.[226] As another refinement, an online communication alone does not show a user's implied consent or agreement to allow a third party to intercept consumers' private information, but instead sufficient notice is required to support a finding of implied consent.[227]

### *B. Implied Terms*

Web sites commonly convey implied terms, as well as express ones. For instance, there is the common presence of password screening on web pages, thereby implying restriction to certain users.[228] As another example, as between providers, a court found an implied agreement was formed by writing and use of hidden computer codes intentionally designed to allow access to the web site.[229] Another court looked upon the concept of implied terms with disfavor, and required a statement of express terms on the web page or a link "clearly marked as containing restrictions."[230] Further, there is no blanket presumption of open, public access to a web site just because it is accessible via

[224] Affinity Internet, Inc. v. Consol. Credit Counseling Servs. Inc., 920 So.2d 1286, 1288–89 (Fla. Dist. Ct. App. 2006).

[225] Conscoop-Consoriza Fra Coop. Di. Prod. v. United States, 159 Fed. App'x 184, 185–86.

[226] *See, e.g.*, Dyer v. Nw. Airlines Corps., 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004).

[227] In re Pharmatrak Privacy Litig., 329 F.3d 9, 21 (1st Cir. 2003), *remanded to* 292 F. Supp. 2d 263 (D. Mass. 2003) (determining that web sites gave no indication that use constituted consent to collection of personal information by a third party, pursuant to the Elec. Commc'ns Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2511, 2520 (2000)).

[228] EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 63 (1st Cir. 2003).

[229] Chance v. Ave. A, Inc., 165 F. Supp. 2d 1153, 1161 (W.D. Wash. 2001).

[230] *EF Cultural Travel BV*, 318 F.3d at 63 (rejecting arguments that a copyright symbol or page-by-page design of access implied restriction against use of robot to download information at a high speed).

the World Wide Web.[231]

A debatable question could arise when the web page features implied terms that conflict with the formal contract. An implied contract may not be enforced where an agreement to an express contract is shown.[232] For instance, the terms of use might state unequivocally that copying is prohibited, while a print button could encourage such use. In the Internet context, it may sometimes be unfair to hold a consumer to an implied contract, as the message may come across only mysteriously or equivocally, and the consumer may not understand how hidden codes are restricting use, unless the design includes explanatory feedback. To inform users of implied terms, a web page could be designed to create a pop-up dialog box, as a user attempts to print, indicating that copying is prohibited.

As limitless possibilities exist, case law still has a long way to go to define the concept of implied contracts in the Internet. For example, still remaining to be addressed is a variety of available computer programming techniques that can restrict or enable how web pages are used. Hidden codes[233] can disable the right mouse button to deter copying, with the implication being that copying is not authorized. A print button can be added to a web page, thereby implying that copying is approved. Further, codes can require that the home page[234] be accessed first, and redirect users to the home page when they try to link to a sub-page,[235] thereby implying that "back door" entries are disapproved. Codes can make pages load at the top level, preventing a web page from loading a page into a frame, which infers that use of frames is disapproved.[236] Hidden codes can check for uncompleted portions of forms, and reject processing until completed with specified information,[237] thereby indicating that use by partial form completion is unauthorized. Additionally,

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231 *Id.*

232 DeJohn v. .TV Corp. Int'l, 245 F. Supp. 2d 913, 918 (N.D. Ill. 2003).

233 Code that makes up a page is not visible on the screen using a browser. CASTRO, *supra* note 110, at 162.

234 A "home page" is generally the starting point leading to navigation of the remainder of a web site. LEMAY, *supra* note 2, at 48.

235 *See* STEPHEN WALTHER & JONATHAN LEVINE, SAMS TEACH YOURSELF E-COMMERCE PROGRAMMING WITH ASP IN 21 DAYS 75 (2000).

236 *See* NIEDERST, *supra* note 96, at 250.

237 *Id.* at 34. For example, an Internet form can be designed to respond with a rejection message when an e-mail address is not in the acceptable form of having characters before and after a "@" symbol. ROSENZWEIG, *supra* note 106, at 216.

web page design may convey implied terms, such as a simple statement "play now," next to an online game, thereby inferring a license to access the interactive work of art.

## VI. UNCONSCIONABLE CONTRACTS

### *A. Generally*

In the Internet context, as with earlier forms of contracting, the defense of unconscionability may be shown based upon on procedural circumstances surrounding the transaction and substantive fairness of the particular language.[238] Although the lack of opportunity to bargain indicates a procedurally unconscionable contract, not all jurisdictions agree that this factor alone is determinative.[239] Courts have been inclined to find that consumers have alternative sources for obtaining Internet-related services as a factor indicating that there is no unconscionability.[240] A court observed that users could not demonstrate a lack of opportunity to contract other than with one large entity—Microsoft Corporation—where users had other options for obtaining Internet access, e-mail, and similar services.[241] Contractual unconscionability relates to a contract or provision that "no sensible person would make and no fair person would accept."[242] Further, a court may require that the terms are more than just unfair, but also shock the conscience.[243]

### *B. Procedural Element*

One case held that hyperlinks labeled "Terms and Conditions of Sale" in contrasting blue color, together with emphasized language in the text of the agreement itself, factually supported a conclusion that the terms were conspicuous and, hence, not

238 *See* Hubbert v. Dell Corp., 835 N.E.2d 113, 123 (Ill. App. Ct. 2005).

239 *See id.* at 124 (holding that the trial court erred in treating inability to bargain as being sole factor in determining unconscionability).

240 *See, e.g.*, Pichey v. Ameritech Interactive Media Servs., 421 F. Supp. 2d 1038, 1050 (W.D. Mich. 2006) (observing evidence that consumers could have contracted with other providers or registered their web site with search engines themselves).

241 Caspi v. Microsoft Network, 732 A.2d 528, 531 (N.J. Super. Ct. App. Div. 1999).

242 Briceno v. Sprint Spectrum, L.P., 911 So. 2d 176, 179 (Fla. Dist. Ct. App. 2005) (citation omitted).

243 Susan Rabin & Christopher Q. Pham, *Barristers Tips: Contracts of Adhesion*, 28 L.A. LAW. 11, 12 (2006).

unconscionable.[244] Although conspicuity was not an element per se, the court seemed to take the conspicuity of the phrase into consideration. In another instance, a user's inability to negotiate, and an inequality of bargaining power, did not indicate an unenforceable adhesion contract when the party could have contracted elsewhere for the services,[245] or where a party had a fair opportunity to reject a form agreement.[246] Also, courts have considered that a computer user having no time limit to read terms indicates an enforceable forum selection clause.[247] A court rejected an argument of surprise, premised on the grounds that the web site failed to require users to access and indicate agreement.[248]

### *C. Substantive Aspect*

Whether terms are substantively unconscionable generally depends on the particular contract language, and not factors attributable to the Internet context. Plenty of resources exist on this topic, and the realm of language possibilities is endless, such that this article has a limited discussion in the area. One decision, for example, concluded that plaintiffs failed to meet their burden to show that they would be deprived of any remedy to which they were entitled, if arbitration were required.[249] Another court rejected an argument that a contract was unconscionable on its face, where it provided for exclusive forums.[250]

Often plaintiffs have argued that either a forum selection clause or arbitration agreement is unconscionable because a class

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[244] *Hubbert*, 835 N.E.2d at 121–22.

[245] DeJohn v. .TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003). *But see* Douglas v. Talk Am. Inc., 495 F.3d 1062, 1068 ("In California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a 'take-it-or-leave-it' contract to a customer—even if the customer has a meaningful choice as to service providers." (citation omitted)).

[246] Novak v. Overature Svcs., 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

[247] *Id.* at 451; Riensche v. Cingular Wireless LLC, No. C06-1325Z, 2006 U.S. Dist. LEXIS 93747, at *21–22 (W.D. Wash. 2006) (rejecting a contention based upon a time-out feature on a web site making it expire after 15 minutes and requiring a customer's re-typing of personal information, where no evidence showed customer felt pressured, and a customer could take as long as desired to review agreement).

[248] Oestreicher v. Alienware Corp., 502 F. Supp. 2d 1061, 1070 (N.D. Cal. 2007).

[249] *Hubbert,* 835 N.E.2d at 126.

[250] *Novak*, 309 F. Supp. 2d at 452.

action would be unavailable to assert claims regarding consumer protection.[251] Courts have taken divergent views as to whether deprivation of a class action makes a provision unenforceable. For example, one trial court concluded that there is no right to a procedural device of class actions and that deprivation of them has no effect on enforcement of an arbitration provision.[252] Sometimes a rule against deprivation of class actions is applied, but the facts are found insufficient to support a finding of unconscionability. For example, a court enforcing an arbitration provision available online and in a shipped contract, found insufficient evidence of a scheme to cheat large numbers of consumers out of small sums.[253] Another theory plaintiffs have prevailed upon is an argument that terms are illusory, and, thus, unconscionable because a provider expressly retained unfettered discretion to modify the terms.[254]

## VII. PUBLIC POLICY

Similar to contracts made outside of the Internet context, terms of service may not be enforced due to their being in violation of a jurisdiction's public policy, as to which countless theories may apply, depending upon the jurisdiction and circumstances. The sources of law that may potentially make contract provisions unenforceable are so numerous that an exhaustive discussion of them falls well outside of the scope of this article. Sufficient discussion of policies will be included to demonstrate the point. Further, not all policies favor consumers. There are public policies recognized that may be in tension with consumer rights, including the goals of commercial expansion, efficient business, and judicial processing.[255]

To take one specific example, a broad disclaimer of warranties may be unenforceable and may violate statutory provisions or public policy.[256] Exculpatory provisions may violate public policy.[257] One decision determined that enforcement of America

[251] *See, e.g.*, *infra* text accompanying section VIII.C.4.

[252] DeFontes v. Dell Computer Corp., No. PC 03-2636, 2004 R.I. Super. LEXIS 32, at *28 (R.I. Sup. Ct. 2004).

[253] Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1201–02 (C.D. Cal. 2006) (finding that plaintiff spent a "significant amount of money" when he purchased a computer from Dell, Inc. for over $1,600.00).

[254] *DeFontes*, 2004 R.I. Super. LEXIS 32, at *35–36 (citation omitted).

[255] Condon, *supra* note 23, at 456.

[256] Sandeen, *supra* note 41, at 538.

[257] *Id.* at 543.

Online's forum selection clause would necessitate a waiver of the statutory remedies of the Consumers Legal Remedies Act, in violation of that law's anti-waiver provision[258] and California public policy.[259] Commentators have argued for policy-based restrictions when a user's privacy may be invaded through the use of "spy ware."[260] One case declined to reach the issue of whether arbitration terms were unenforceable on the grounds that the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act reflected legislative intent to preclude arbitration.[261] Another decision questioned, without deciding, whether terms could purport to exclude competitors from viewing a web site without raising serious public policy concerns.[262] A court held that enforcement of the forum-selection clause would contravene the public policy embodied in a state's provisions regarding small claims, such as providing low-cost access to a forum.[263] A court found formation of a contract at the time that a buyer ordered a computer, but declined to enforce additional terms available via the Internet, facsimile, mail, and computer packaging, including arbitration provisions because public policies behind small claims procedures would have been violated.[264] A court determined that there was no public policy against the National Association of Securities Dealers' prohibiting commercial copying of its web site.[265] Further, Section 301 of the Copyright Act would arguably preempt Internet terms restricting copying.[266]

[258] *See* CAL. CIV. CODE, § 1751 (Deering 2007).

[259] Am. Online v. Super. Ct., 108 Cal. Rptr. 2d 699, 702 (Ct. App. 2001).

[260] *See, e.g.*, Wayne Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1548–49 (2006).

[261] Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 40 n.21 (2d Cir. 2002).

[262] EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 63 (1st Cir. 2003).

[263] Scarcella v. Am. Online, No. 1168/04, 2004 N.Y. Misc. LEXIS 1578, at *12 (Sup. Ct. N.Y. County Sept. 8, 2004).

[264] Licitra v. Gateway, Inc., 189 Misc.2d 721, 726, 728–30 (Sup. Ct. Richmond County 2001).

[265] Siedle v. Nat'l Ass'n of Sec. Dealers, Inc., 248 F. Supp. 2d 1140, 1145 (M.D. Fla. 2002).

[266] *See* Walden, *supra* note 20, at 1671–72 (explaining the Copyright Act, 17 U.S.C. § 301 (1994)).

## VIII. PARTICULAR TYPES OF AGREEMENTS

### *A. Introduction*

Provider contracts contain a limitless variety of provisions. Some typical provisions include the topics of warranty, licenses, releases, and privacy. For example, a provider successfully asserted the effectiveness of a broad release provision in defense of a lawsuit that included a dispute between users.[267] Primarily addressed below are the kinds of provisions commonly litigated and encountered in published cases, i.e., the areas of forum selection, arbitration, and privacy. Moreover, included herein is an analysis of indemnity provisions because the law remains greatly unrefined on the topic as it pertains to the Internet; exposure to liability as to users and providers could be great, and enforceability in future litigation could be highly debatable depending upon the circumstances.

### *B. Arbitration Cases*

#### 1. Notice

One primary debate over online arbitration provisions has focused upon notice to the user. Under one view, absent a showing that it would be reasonable to assume that a plaintiff would have seen links to terms, an appellate court could not hold that the plaintiff agreed to arbitrate disputes with defendants.[268] The court listed some factors for ascertaining sufficient notice: "Were. . .customers only able to access the internet through these web sites? How prominently were the links displayed? How were they labeled or explained?"[269]

Another case involved the reversal of a trial judge's view that consumers had not accepted the terms of a sale.[270] The trial judge reasoned that the terms were not accepted because (1) text on the web site did not manifest a clear assent to the terms and conditions before the order could proceed, (2) the terms and

[267] Grace v. eBay Inc., 16 Cal. Rptr. 3d 192, 196 (Cal. Ct. App. 2004) (involving broad language regarding users releasing eBay from claims and demands "of every kind and nature, known and unknown, . . . arising out of or in any way connected with such disputes.").

[268] Waters v. Earthlink, Inc., 91 F.App'x 697, at *4 (1st Cir. 2003).

[269] *Id.* at 698.

[270] Hubbert v. Dell Corp., 835 N.E.2d 113, 121 (Ill. App. Ct. 2005).

conditions were not displayed on a web page upon placing orders, and (3) no language on the pages placed the plaintiffs on notice that an affirmative act would create a binding agreement.[271] The reviewing court disagreed, emphasizing that a blue hyperlink entitled "Terms and Conditions of Sale" appeared on numerous web pages the plaintiffs accessed in the ordering process and on pages used for marketing.[272] The court reasoned that the hyperlinks "should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract."[273] Additionally, the court concluded that the blue color of the link made it conspicuous.[274] The court further observed that the fact that plaintiffs had purchased computers online showed that they were not novices when using computers.[275]

Another decision, seemingly demanding high standards for giving notice, held that plaintiffs did not accept arbitration terms where they would have had to scroll down a web page to a screen below a download button.[276] Also a factor in the decision was that consumers were urged to download free software at the immediate click of a button, by words placed before the terms, thus enticing consumers away from the other page portions.[277] The court applied a standard of whether a reasonably prudent Internet user under the circumstances would not have known or learned of the existence of the terms.[278] In addition, a court held that a pop-up window of terms satisfies the writing requirement of the Federal Arbitration Act.[279]

2. Unconscionable Provisions

Another focus of litigation over arbitration terms has been the defense of unconscionability. Courts have determined that the placement of an arbitration provision in an agreement, without

271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.*
275 *Id.*
276 Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 31–32 (2d Cir. 2002).
277 *Id.* at 32.
278 *Id.* at 31.
279 Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2006); *see also* In re RealNetworks, Inc., No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584, at *6–9 (N.D. Ill. 2000).

calling attention to it, is procedurally unconscionable, depending upon whether there was burying of the language in lengthy text.[280] As for the element of substantive unconscionability, a court enforced an arbitration provision, notwithstanding an argument that class actions were barred as to small claims.[281] Another court viewed multiple aspects as collectively supporting a finding of an unconscionable arbitration provision, including the provider's unilateral option to avoid arbitration, provisions barring consumers' consolidation of small claims and a forum selection clause deterring customers residing nationwide from bringing such claims.[282]

### *C. Forum-Selection Provisions*

#### 1. Generally

Forum selection clauses are by far the most litigated topic related to a provider's online contracts.[283] This article does not

[280] *RealNetworks*, 2000 U.S. Dist. LEXIS 6584, at *15 (finding no procedural unconscionability where arbitration language is not in fine print at agreement end and was not buried); Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007) (finding procedural unconscionability where the arbitration language was buried in a lengthy paragraph under a generalized heading).

[281] *RealNetworks*, 2000 U.S. Dist. LEXIS 6584, at *19–20 (N.D. Ill. 2000). The case is part of a split of authority as to enforcement of forum selection clauses where class actions involving small claims are barred. *See supra* text accompanying notes 251–52.

[282] Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1169–76 (N.D. Cal. 2002) (analyzing terms as to PayPal, Inc.'s online payment service).

[283] *See*, *e.g.*, Net2Phone, Inc. v. Super. Ct. of L.A., 135 Cal. Rptr. 2d at 157–58 (dissenting opinion citing forum selection decisions, and addressing web page's language). The subject Net2Phone provision stated:

> These Terms of Use shall be governed and construed in accordance with the laws of the State of New Jersey. You agree that in any legal action or proceeding between you and Net2Phone for any purpose concerning this Agreement, you agree to submit to exclusive jurisdiction the state and federal courts of New Jersey and you expressly waive all defenses to jurisdiction. Any cause of action or claim you may have with respect to the Site, Services or Materials must be commenced within one (1) year after the claim or cause of action arises or such claim or cause of action is barred. Net2Phone's failure to insist upon or enforce strict performance of any provision of these Terms of Use shall not be construed as a waiver of any provision or right. Neither the course of conduct between the parties nor trade practice shall act to modify any provision of these Terms of Use. Net2Phone may assign its rights and duties under these Terms of Use to any party at any time without notice to you.

Net2Phone Terms of Use, http://web.net2phone.com/site/terms.asp (last visited Apr. 17, 2008).

delve into the many applicable topics, but focuses upon issues associated with the Internet in particular. Given a presumption favoring enforcement of forum selection provisions,[284] web-based provisions are especially enforceable in this area of law. The fact that a forum selection clause is in electronic form does not affect the analyses.[285] Further, a click-wrap agreement for a commercial web site may be worded to avoid litigation in jurisdictions by (1) stating that the providers will not sell in other jurisdictions, or (2) providing for a forum selection clause.[286]

2. Notice

In one case, a forum selection cause was not a basis for exercising personal jurisdiction where its language did not provide adequate notice to the party because it expressly governed a different category of people.[287] The case noted that even forum selection clauses in adhesion contracts might be enforceable if the clause provided adequate notice that there was an agreement to the jurisdiction.[288] Additionally, a court upheld a forum selection clause, where a click-wrap agreement required the activation of a button to indicate acceptance of terms.[289]

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[284] *See, e.g.*, Schlessinger v. Holland Am., 16 Cal. Rptr. 3d 5, 9–11 (Cal. Ct. App. 2004) (enforcing a forum selection clause where a consumer could have accessed terms by way of web site or other means); Int'l Sta Registry of Ill. v. Omnipoint Mktg., LLC, No. 05 C 6923, 2006 U.S. Dist. LEXIS 68420, at *8–11 (N.D.Ill. 2006) (enforcing a forum selection clause where invoices incorporated by reference web-based terms).

[285] DeJohn v. .TV Corp. Int'l, 245 F. Supp. 2d 913, 921 (referencing Forrest v. Verizon Comm'cns., Inc., 805 A.2d 1007, 1014 (D.C. Ct. App. 2002)); *see also* Koresko v. RealNetworks, Inc., 291 F. Supp. 2d 1157, 1163 (E.D. Cal. 2003) (accepting terms including a forum selection clause when plaintiff clicked "I agree"); Leatherwood v. Cardservice Int'l, Inc., 929 So.2d 616, 616 (Fla. Dist. Ct. App. 2006) (affirming in a per curium opinion the trial court finding that a party entered into a contract with a venue clause by clicking on "I accept").

[286] *See* Stomp, Inc., v. NeatO, LLC, 61 F. Supp. 2d 1074, 1080–81 (C.D. Cal. 1999) (stating in dicta that the forum selection clause did not involve such provisions in deciding personal jurisdiction). *Accord* Am. Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc., 106 F. Supp. 2d 895, 904 (N.D. Tex. 2000).

[287] Nam Tai Elecs., Inc. v. Titzer, 113 Cal. Rptr. 2d 769, 777 (Cal. Ct. App. 2001) ("The language on which appellant seeks to rely appears on its face to govern litigation between registered users and Yahoo!—not registered users and third parties."), *overruled by* Pavlovich v. Superior Court, 127 Cal. Rptr. 2d 329 (Cal. 2002).

[288] *Id.* (quoting Hunt v. Superior Court, 97 Cal. Rptr. 2d 215, 219 (Cal. Ct. App. 2000)).

[289] Novak v. Overture Servs. Inc, 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004).

Another court considered that such a provision viewed by scrolling through part of the agreement constituted adequate notice.[290] Under specific circumstances where the top of an agreement stated "PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY", and below there was an "Accept" button, a court held that a provider reasonably communicated a forum selection clause.[291] The court did not require capital letters or large font.[292] Additionally, it found the use of a scroll box acceptable.[293] In another case, a plaintiff disputed that it was bound by the terms of service posted on the defendant's web site, because the plaintiff's representative did not remember clicking the "Accept" button before proceeding into the web site.[294] The court concluded, however, that computer records showed acceptance of the terms of service, including a forum selection clause because it would have been impossible for a user to gain entry into the web site unless the user agreed to accept the terms of service.[295]

3. Unconscionable Provisions

A forum selection clause that is procedurally unconscionable is generally not an obstacle to its enforcement. For instance, a case noted that the inability to bargain did not prevent enforcement, and, therefore, the placement of such a non-negotiable provision on a web site was permissible.[296] Another decision determined that the Yahoo! terms of service constituted a typical adhesion contract because the terms did not afford users an opportunity to negotiate.[297] Further, while such a contract theoretically could be enforced if it clearly and unambiguously advised users that they are agreeing to litigate disputes in a forum, the particular language governed litigation between registered users and Yahoo! and not registered users and third parties. Hence, the

290 Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. App. 2001).

291 Forrest v. Verizon Commc'ns., Inc., 805 A.2d 1007, 1010 (D.C. 2002).

292 *Id.*

293 *Id.*

294 Eslworldwide.com, Inc. v. Interland, Inc., No. 06 CV24503 (LBS), 2006 U.S. Dist. LEXIS 41935, at *6 (S.D.N.Y. June 21, 2006).

295 *Id.*

296 Net2Phone, Inc. v. Superior Court, 135 Cal. Rptr. 2d 149, 153 (Cal. Ct. App. 2003).

297 Nam Tai Elecs, Inc. v. Titzer, 113 Cal. Rptr. 2d 769, 777 (Cal. Ct. App. 2001), *overruled by* Pavlovich v. Superior Court, 127 Cal. Rptr. 2d 329 (Cal. 2002) (overruling *Nam Tai* on other grounds).

court determined that there was no enforceable forum selection clause to serve as a basis for exercising personal jurisdiction.[298]

Sometimes judges may not reach questions of whether unconscionable forum selection clauses exist, because other issues are dispositive or plaintiffs fail to meet their burden to raise and support applicable issues. For example, a court expressly did not decide objections regarding a forum selection clause being an unenforceable part of an adhesion contract, and instead resolved the matter on other grounds.[299] The party described the terms on a computer monitor as "'densely worded, small-size text that was hard to read on the computer screen.'"[300] Similarly, a case determined that a forum selection clause in an agreement of Register.com was enforceable, where the plaintiff simply did not argue that the clause resulted from fraud, the forum was inconvenient, or the law was fundamentally unfair.[301] Another court found that a plaintiff failed to meet the burden to show that enforcement of a forum selection clause would be unreasonable.[302]

The many cases involving America Online, Inc.'s forum selection clause are not included herein, but a sampling of them provides insightful guidance as to how courts might rule. For example, a succinct decision held that a forum selection clause contained in a contract of America Online, Inc. was enforceable and not unreasonable or the result of unequal bargaining power.[303] Another court, during litigation involving Network Solutions, Inc., held that unequal bargaining power did not render the contract unenforceable, but that unfair use of bargaining power also was required.[304]

4. Public Policy

Some courts have refused to enforce online forum selection clauses where they would adversely impact a public policy reflected in a statutory provision. To illustrate, in several cases, courts have determined that the agreed forum would deprive

298 *Nam Tai Elecs.*, 113 Cal Rptr. 2d at 777.

299 Am. Online, Inc. v. Superior Court (Mendoza), 108 Cal. Rptr. 2d 699, 713 n.17 (Cal. Ct. App. 2001).

300 *Id.* at 703.

301 DeJohn v. The .TV Corp. Int'l, 245 F. Supp. 2d 913, 921 (N.D. Ill. 2003).

302 Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d 125, 129 (D. Mass. 2000).

303 Celmins v. Am. On Line, 748 So. 2d 1041, 1041 (Fla. Dist. Ct. App. 1999).

304 Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. App. 2001).

plaintiffs of the ability to bring a class action pursuant to statutory provisions related to consumer protection.[305] A case followed a similar line of reasoning in declining to enforce a forum selection clause where the purpose of a consumer protection statute would be undermined.[306] The decisions, however, have differed among the jurisdictions as to class actions. "Jurisdictions have split as to whether the unavailability of a class action mechanism would in itself make a forum selection clause unenforceable."[307] Additionally, the many cases involving America Online, Inc. provide a convenient case study for demonstrating disagreements among the jurisdictions. While some courts have declined to enforce the clause of America Online, Inc.,[308] others have enforced it.[309]

### *D. Express Indemnity Provisions*

#### 1. Generally

While indemnity provisions certainly are not new, providers' online postings of indemnity provisions, for binding average Internet navigators, is a relatively recent trend with largely untested and potentially devastating ramifications. In the

[305] *See, e.g.*, *Mendoza*, 108 Cal. Rptr. 2d at 702; Dix v. ICT Group, 106 P.3d 841, 845 (Wash. Ct. App. 2005).

[306] Am. Online, Inc. v. Pasieka, 870 So. 2d 170, 172 (Fla. Dist. Ct. App. 2004).

[307] Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1012 (D.C. 2002); *see also Dix*, 106 P.3d at 845 (describing different outcomes in three different jurisdictions regarding class action suits and forum selection clauses).

[308] *See, e.g.*, *Pasieka*, 870 So. 2d at 172; *Mendoza*, 108 Cal. Rptr. 2d. at 715; Williams v. Am. Online, Civil Action No. 00-0962, 2001 Mass. Super. LEXIS 11, at *10 (Mass. Sup. Ct. 2001) ("Public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia.").

[309] *See, e.g.*, DiLorenzo v. Am. Online, Inc., No. 605867/96 (N.Y. Sup. Ct. Jan. 22, 1999) (noting that local laws for consumer protection had been enforced in foreign jurisdictions), http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/March%201999/dilore.htm; AOL Time Warner, Inc. v. Gates, No. 604141/02, 2003 N.Y. Misc. LEXIS 751, at * 6 (May 15, 2003); Freedman v. Am. Online, Inc., 294 F. Supp. 2d 238, 246 (D. Conn. 2003), *vacated by* No. 3:03cv1048 (PCD), 2004 U.S. Dist. LEXIS 1388 (D. Conn. Jan. 30, 2004); Hughes v. McMenamon, 204 F. Supp. 2d 178, 181 (D. Mass. 2002); Am. Online, Inc. v. Booker, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (enforcing forum selection clause of America Online, Inc. as being "freely negotiated"); Koch v. Am. Online, 139 F. Supp. 2d 690, 695 (D. Md. 2000) (enforcing America Online, Inc.'s forum selection clause, notwithstanding the argument that class actions would be barred, since the individual claim was not shown barred).

majority of such provisions, the language broadly indicates that users shall provide indemnity to providers and their affiliates as to any claim that is related to the use. Although some indemnity provisions expressly depend upon a user's wrongdoing, others merely require any relatedness of the use to a lawsuit. Theoretically, the purported meanings of some provisions could have casual visitors financing exorbitant litigation into financial ruin, and strictly liable for providing indemnity merely because a party made a claim somehow related to a visitor's use of web pages, regardless of the merits of the claim. Before the popular use of the Internet, masses of average consumers did not face repeated exposures to indemnity provisions that could lead to liabilities for large amounts of money!

There is only a modicum of law addressing enforcement of indemnity provisions in Internet contracts. Indicating that indemnity provisions sometimes may be enforced, one decision upheld an Internet indemnity agreement, notwithstanding several arguments made against it.[310] The lack of more guidance from the courts is explained by the observation that unilateral indemnity provisions are infrequently invoked by Internet providers in any litigation, but instead are helpfully used for the psychological impact of deterring lawsuits that might be brought by visitors.[311] Given the highly frequent occurrence of very broadly worded indemnity provisions in Internet provider's contracts, and the potential that providers may sometimes experience more incentive to be aggressive in their enforcement, it is worthwhile to explore the topic in detail herein, and predict the ramifications. Referencing traditional law, such as that analyzed below, is important for predicting how courts will handle disputes over indemnity provisions.

2. Traditional Indemnity Rules

a. Historical Policies

A historical goal of enforcing indemnity laws is to make an

[310] Travelocity.com LP v. CGU Ins. Co., No. 4:01-CV-367-Y, 2003 U.S. Dist. LEXIS 13448, at *19 (N.D. Tex. July 31, 2003). In another case, for procedural reasons, a judge did not address an argument that indemnity terms e-mailed to a web site visitor were too vague for enforcement. G.M. Sign, Inc. v. Franklin Bank, S.S.B., No. 06 C 949, 2006 U.S. Dist. LEXIS 68900, at *2–3, 9 (N.D. Ill. Sept. 14, 2006).

[311] *See* Internet Forms *supra* note 85 at 103.

equitable adjustment such that the responsible party is not unjustly enriched and contributes so as to avoid an innocent or less responsible party's having to pay damages.[312] Traditionally, express indemnity provisions have been considered enforceable.[313] Courts have generally been willing to decline enforcing indemnity provisions more often in favor of consumers as compared to merchants.[314] Absent certain negative factors, however, courts have been hesitant to invalidate parties' voluntary agreements to allocate risks of losses.[315] Significantly, one court determined that indemnification is not required for claims that are frivolous.[316] Moreover, courts traditionally have required fair notice involving conspicuousness of an indemnity clause.[317]

b. Interpretation

Indemnity provisions have been enforced in accordance with customary rules of contract interpretation, and parties' intent, but also have been strictly construed. [318] Ambiguous indemnity provisions are construed against the indemnitee.[319] Typically, a broad indemnity provision is allowed if it is clear.[320] Because Internet-based indemnity provisions typically contain incredibly broad-form language, virtually unlimited in scope, judicial determinations in this area rarely will turn upon whether the parties intended a narrow application, but instead upon whether

312 Sherri L. Sweers & Thomas B. Quinn, *The Law of Indemnity in Wyoming: Unraveling the Confusion*, 31 LAND & WATER L. REV. 811, 811–12 (1996).

313 Warren B. Daly, Jr., *Contribution and Indemnity: The Quest for Uniformity,* 68 TUL. L. REV. 501, 508 (1994).

314 Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 479 (1995).

315 *Id.* at 520; John J. Smither, Features, *A Primer on Indemnity*, 41 Hous. Law. 26, 28 (2004) (discussing that ambiguity may be negative factor).

316 Texaco, Inc. v. Cent. Power & Light Co., 955 S.W.2d 373, 378 (Tex. App. 1997).

317 Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 169 (Tex. App. 2002) (citations omitted).

318 Daly, *supra* note 313, at 509; MEMC Elec. Materials, Inc. v. Albemarle Corp., No. 01-05-00420-CV, 2007 Tex. App. LEXIS 1176, at *9 (Tex. App. 2007) ("Indemnity provisions are to be strictly construed, pursuant to the usual principles of contract interpretation, in order to give effect to the parties' intent as expressed in the agreement.").

319 Calloway v. Reno, 939 P.2d 1020, 1028 (Nev. 1997), *withdrawn,* 971 P.2d 1250 (Nev. 1998).

320 J. Miller Express, Inc. v. Pentz, 667 N.E.2d 1018, 1022 (Ohio Ct. App. 1995).

such breadth shocks the conscience under the circumstances.

c. Unconscionable Terms

Courts typically disfavor enforcement of indemnification provisions that would require a party to pay for the negligence of another.[321] As an illustration of traditional law, a court held that when a broad indemnification clause exists without the express assent of the indemnitor and is placed obscurely on an invoice back, it is deemed to be unconscionable.[322] In ascertaining whether indemnity clauses are unconscionable as a matter of law, courts have considered whether: 1) they are reasonable in light of business and commercial conditions; 2) the parties have differing bargaining powers; 3) the parties have expectations; and 4) one party is in a better position than the other to protect against the loss.[323]

d. Public Policies

Importantly, courts long have declined to enforce indemnity agreements where public policy would be violated.[324] For example, an entire contract was held void where it required a consumer to indemnify the other party due to violation of particular consumer-protection statutes.[325] A particular statutory provision may reflect public policy and apply to prevent enforcement of an indemnity clause.[326] Courts may also disfavor enforcement of indemnity provisions due to strict adherence to

[321] *See, e.g.*, Gormly v. I. Lazar & Sons, Inc., 926 F.2d 47, 49 (1st Cir. 1991) (discussing such provisions as being generally against public policy); Maxon Corp. v. Tyler Pipe Indus., Inc., 497 N.E.2d 570, 576 n.7 (Ind. Ct. App. 1986) (holding a broad indemnity provision in small print unenforceable against consumer); Clark C. Johnson, Note, Collapsing the Legal Impediments to Indemnification, 69 IND. L.J. 867, 870 (1994) (discussing the breakdown of traditional barriers to indemnification).

[322] Maxon Corp. v. Tyler Pipe Indus., Inc., 497 N.E.2d 570, 577 (Ind. Ct. App. 1986).

[323] Cent. Bank v. Kaiperm Santa Clara Fed. Credit Union, 236 Cal. Rptr. 262, 274 (Cal. Ct. App. 1987) (finding an indemnification agreement reasonable under particular circumstances).

[324] Cathleen M. Devlin, Comment: *Indemnity and Exculpation: Circle of Confusion in the Courts*, 33 EMORY L.J. 135, 138–39 (1984); Daly, *supra* note 313, at 508 (citing Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1217 (5th Cir. 1986)).

[325] Holiday Universal, Inc. v. Haber, 1990 Mass. App. Div. 69, 70–71 (Mass. App. Div. 1990).

[326] Daly, *supra* note 313, at 508–09.

competing laws and the policies they reflect.[327]

In a very helpful decision that could be cited as being analogous to Internet cases, a court set forth several possible factors indicating public policy violations, even absent any supportive constitutional or statutory provision.[328] Such factors include: 1) when involvement of gross negligence or intentional misconduct exists; 2) if encouragement of torts would result; 3) when the risk is more than a possibility; 4) if one side had superior bargaining power; and 5) if the provision would affect a significant portion of the public.[329] Another case listed similar factors.[330] Exculpatory provisions will be held invalid when certain factors are present, including: 1) the business is suitable for public regulation; 2) the party seeking exculpation performs necessary services for the public; 3) one side has superior bargaining power; 4) there is no provision for purchasers to be able to pay for protection against negligence; and 5) the purchaser is under seller control and subject to risks created by a seller.[331]

Narrowly selected topical areas in which there is particular hostility to indemnity terms are also possible. For example, hostility has been exhibited in matters involving the construction industry.[332]

3. Predicted Judicial Handling

The present generations of bench officers and legislators, who are among the first associated with a globally connected computer network, must ask: "Under what circumstances is it fair for users to be held accountable to fund litigation involving their Internet activities?"

A potentially important guiding concept to consider in the context of modernly developing Internet law is that, generally,

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[327] *See, e.g.*, Steven B. Lesser, Feature, *The Great Escape: How to Draft Exculpatory Clauses That Limit or Extinguish Liability*, 75 FLA. B.J. 10, 18 (2001) (mentioning Florida courts' handling of indemnification clauses that violate established law).

[328] Finkler v. Toledo Ski Club, 577 N.E.2d 1114, 1117 (Ohio Ct. App. 1989) (citations omitted).

[329] *Id.*

[330] Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444–46 (Cal. 1963).

[331] *Id.* at 445–46 (describing the six-factor test that could be argued as being applicable by analogizing it to aid decisions of issues of first impression in Internet context).

[332] Johnson, *supra* note 321, at 887.

courts have defined the public interest by reference to contemporaneous and flexible perceptions of justice under the circumstances.[333] Judges probably would not be locked into traditional indemnity rules, but could flexibly consider the nuances associated with the World Wide Web and make adjustments accordingly.

Analogizing to Internet-related decisions addressing forum selection clauses and arbitration provisions where attempts at enforcement have often failed, one can predict that courts will often decline to enforce indemnity provisions, on the grounds that they are unconscionable or against public policy. Courts could decline to enforce indemnity agreements where consumers experienced an unfair use of power.[334] As with those analogous decisions, a limitless number of fact-specific provisions regarding public policy could apply. The particular language, inequality of bargaining power, and adhesion contracts could affect the analysis.

In the developing area of the World Wide Web, there is plenty of room for debate as to whether broadly worded indemnity provisions[335] are tolerable as to casual visitors of web sites. The

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[333] Devlin, *supra* note 324, at 165, 170.

[334] *See supra* text accompanying note 331.

[335] Examples of indemnity provisions on the World Wide Web include:

> You agree to indemnify and hold Yahoo! and its subsidiaries, affiliates, officers, agents, employees, partners and licensors harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of Content you submit, post, transmit or otherwise make available through the Service, your use of the Service, your connection to the Service, your violation of the TOS, or your violation of any rights of another.

Yahoo! Terms of Service, http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html (last visited Apr. 18, 2008).

> You will indemnify and hold us (and our officers, directors, agents, subsidiaries, joint ventures and employees), harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your breach of this Agreement, or your violation of any law or the rights of a third party.

Ebay.com, Your User Agreement, http://pages.ebay.com/help/policies/user-agreement.html (last visited Apr. 18, 2008).

> aNet may only be used for lawful purposes. Transmission of any material in violation of any U.S. or state regulation is prohibited. This includes, but is not limited to: material legally judged to be threatening or obscene, material in violation of any trademark, copyright, patent, statutory or common law, and material protected by trade secret. The Client agrees to indemnify and hold aNet harmless from any claims resulting from the Client's use of its services which damages the Client or another party.

aNet.com Terms and Conditions, http://anet.net/policy.html (last visited Apr.

historical goal of avoiding unjust enrichment at the expense of another would be served when users are culpable or responsible for damages in violation of a duty, but not when they are merely innocent participants. Hence, clauses broadly applying to blameless user involvement should not be enforced unless there are alternative justifications, such as considerations of business realities in particular circumstances.

With regard to the business realities of the World Wide Web, indemnity can serve a critically useful role in countering the widespread danger of misuse. For instance, users might abuse providers' services allowing people to post documents to publicly available web pages, thereby causing exposure to liability for copyright infringement.[336] While requiring mischievous users to pay for their harmful misdeeds makes sense, broad wording of indemnity provisions, purporting to require completely innocent users to fund the potentially costly litigation of sophisticated online businesses, does little to address any legitimate business needs. Even where there are business justifications for providers' indemnity clauses, injustice would result if the justification were applied to users whose use was not, in fact, associated with that justification.

To exemplify the concepts by particular hypothetical situations, providers in the business of allowing users to interact with their server by posting web pages, text, or images for public viewing might be justified in advancing strongly worded indemnity provisions. In that scenario, providers could justifiably be concerned with users possibly engaging in various law violations that may spawn expensive lawsuits, such as copyright infringement, defamation, and invasion of privacy or dissemination of a computer virus. Even when providers enable such interactive services, a given user may not participate in any action that supports the prosecution of a lawsuit.[337] When a user willingly posts defamatory comments, or uses sophisticated hacking software, fairness may exist in support of requiring indemnification. In contrast, when average Internet visitors

18, 2008).

[336] *See* Heidi Pearlman Salow, *Liability Immunity for Internet Service Providers–How Is It Working?*, 6 J. TECH. L. & POL'Y 0, 1 (2001) (discussing the problems that may arise for providers when users are permitted to make postings).

[337] Sega Enters., Ltd. v. MAPHIA, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (citing Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995)).

negligently fail to update anti-virus software causing an infected server, arguably, fairness for requiring indemnification nonetheless does not exist, as providers in an ongoing business can best protect their own servers with professionally updated software.

The providers of merely passive web sites that enable the viewing of information without contributing to the web sites' content have much less to fear from users lacking technical means to disseminate their communications, thereby creating grounds for a lawsuit. If one were to consider who is better able to absorb the expense, the facts would vary depending upon the parties' wealth, but, generally, providers would be better suited as ongoing businesses. Home-based computer users would be stunned to learn of a need to arrange for web-surfing insurance coverage, coverage that is generally not available in the marketplace. Applying the traditional factors discussed above, users could argue that because providers are uniquely positioned to take technological steps against many types of damaging errors, provisions should be required to exclude the providers' own negligence from indemnity requirements. For instance, providers' negligence might occur when providers fail to encrypt credit card information as to stored files or online transmissions, thereby resulting in identity theft that financially harms third parties.

Users could likely successfully argue that requiring users to fund an expensive lawsuit would shock the conscience when the users were simply casual visitors, innocent of any wrongdoing, and uninvolved in any commercial activity. Otherwise, according to the indications of the sparse case law, users might be judicially compelled into the position of having to finance even frivolous lawsuits somehow related to their use.[338] Hypothetically, for instance, a user might e-mail a link to a web page to another person, not knowing that the link contains content defaming the recipient who, upon learning of the content, files a lawsuit against the provider. In that situation, the user would fall within the broad scope of the typical indemnity provisions that require indemnity for a claim "related to" the use because the page access led to the potential plaintiff learning of the content upon which to base his claim. Imposing an obligation of indemnification upon such an innocent user would be unfair

[338] *See supra* Part VIII.D.1.

because the user's only relation to the claim was as an innocent messenger of a web site address. Accordingly, provisions imposing an obligation of indemnification would likely be unenforceable when the provisions purport to apply, even in the absence of the user's breach of contract or another violation of law.

Predictably, inconsistency and uncertainty will characterize decisions regarding indemnity for many years, akin to what has been occurring in other areas of Internet contract law. The diverse experiences in the development of indemnity law in traditional contexts may predict future developments regarding the Internet. Indemnity clauses that were "apparently similar" have nonetheless produced different results in the absence of clear and rigid rules.[339] One commentator noted the confusing result of "widely divergent decisions" concerning the interpretation of indemnity contracts in one state.[340]

As laws develop, it remains to be seen whether providers will actually attempt to litigate their indemnity provisions against users, and whether courts will scrutinize consumer indemnity agreements in the context of the Internet, as they have, for example, in construction-related contracts.[341] One can envision that many of the issues already litigated with regard to forum selection clauses and arbitration provisions will arise in regard to indemnity provisions (e.g., conspicuous notice, clear terms, assent, public policy, and unconscionability). Indemnity provisions will probably encounter even more scrutiny than the other types of provisions, due to courts traditionally demanding relatively more prerequisites of parties in that context. Therefore, courts can be expected to invalidate far more indemnity provisions as compared to arbitration and forum selection clauses. One strong basis to make that distinction is the observation that in the indemnity situation, exposure to great financial losses and perhaps insolvency is at stake. In contrast, the provisions regarding arbitration or forum selections generally involve much less harmful results, such as relocation of the place of litigation and the loss of the ability to recover a positive cash flow via a judgment.

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[339] Charles M. Pisano, Comment, *Judicial Interpretation of Indemnity Clauses*, 48 LA. L. REV. 169, 180–81 (1987).

[340] Haskell Shelton, *Michigan's Murky Law of Contractual Indemnity*, 75 MICH. B.J. 1182, 1185 (1996).

[341] *See supra* note 332 and accompanying text.

## IX. SUGGESTIONS FOR CHANGE

### *A. Design*

The law should allow a flexible array of means of Internet-based contracting, so as not to hinder creative design and effective commerce, but require some form of conspicuous notice of contract terms. Ideally, a web site requiring clicking upon a clearly labeled button before further use of a web site would make a court's task easier. In that regard, a provider would be taking much less risk of contract failure by requiring assent up front, before allowing access to the web site's other pages. Yet, as a practical matter, providers seek to make their sites more attractive. "A designer's job is to make things look pretty."[342] A lengthy contract prominently constituting the first page of every web site would be an unattractive feature discouraging use. Studies have shown that the fewer steps involved in an online transaction, the more likely that transactions will be finalized.[343] A requirement of prominent click-wrap agreements seems unworkable in the realities of the marketplace and should not be one of the pursued changes in the law.

### *B. Fairness*

Commentators have expressed contrary views as to whether it is fair to enforce browse-wrap agreements. One view is that browse-wrap agreements should be unenforceable as adhesion contracts that lack mutual assent and sufficient notice.[344] One commentator opined that the tests for unconscionability are too stringent in the context of browse-wrap agreements, considering the goals of consumer protection against oppressive terms and certainty for contracting parties.[345] In contrast, some commentators suggest that there should be no trend towards restricting Internet contracts for consumer protection, but that other goals should be emphasized, such as consistent treatment

342 PIZZI, *supra* note 141, at 152.

343 Robertson, *supra* note 21, at 295.

344 *See* Jennifer Femminella, *Online Terms and Conditions Agreements: Bound by the Web*, 17 ST. JOHN'S J. LEGAL COMMENT. 87, 126 (2003) (expressing this viewpoint); *see also* Robertson, *supra* note 21, at 290.

345 Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1046, 1052, 1065 (2005).

of shrinkwrap and click-wrap licenses and encouragement of developing technologies.[346] One viewpoint is that judges could allow the market to determine its own destiny in favor of Internet commerce and information growth.[347] One writer suggests that there should be a compromise between the desire of providers to avoid an overly complicated interface in order to attract visitors and assuring visitors' agreement to terms.[348] Another refined proposal is that judges should enforce terms of use when private information is provided as a service, but not when web sites are of a public nature, providing unrestricted information in the public domain.[349] In predicting trends in the law, one commentator expressed the opinion that courts may begin to enforce online agreements that they previously have been reluctant to enforce.[350]

Many people commenting on model codes, including those associated with entities running their own movements, have been outspoken about their desire for fairness to consumers. One commentator viewed most web site terms as being generally fair and not unreasonably favorable to the providers.[351] To the contrary, as discussed above, web sites are commonly associated with one-sided language, such as broad indemnity provisions.[352]

Perhaps the alarming nature of some terms of use that attorneys have individually drafted for providers have motivated individuals and groups into action. Attorneys, while drafting extreme Internet agreements to zealously advocate protection for their clients, may have collectively and unintentionally created a catalyst for an upcoming backlash of unfavorable law from the courts and legislative bodies.

Disregarding all browse-wrap agreements, or mandating the use of click-wrap agreements, would be overly drastic. The optimal approach would be a middle ground. With potentially heavy traffic and the unpredictable ways unobserved visitors might utilize that Internet information, understandably web site providers want to protect their interests by requiring assent to their terms of use.[353] To accommodate the competing goals,

346 Streeter, *supra* note 14, at 1367.
347 Zynda, *supra* note 125, at 495.
348 Chao, *supra* note 86, at 445.
349 Zynda, *supra* note 125, at 511.
350 Tracy, *supra* note 58, at 165.
351 Davidson, *supra* note 27, at 1201.
352 *See, e.g.*, *supra* section VIII.D.1.
353 Davidson, *supra* note 27, at 1173–74, 1195–96.

browse-wrap provisions should be approved in general concept, but subjected to a higher and uniform level of scrutiny and a surgically precise analysis that considers the realities of the unique technological parameters involved in a particular case.

### *C. Fact or Law Questions?*

According to one view, the determination of reasonable communication of terms is based upon the particular facts of each case.[354] Some courts have held, however, that the issue of reasonable notice regarding an online agreement is a question of law for the courts.[355] Decisions should turn on the particular circumstances, as the limitless possibilities cannot be anticipated, and legitimate factual disputes might arise as to what a user viewed. Just and accurate results are at stake, and courts should become increasingly sensitive to the nuances of Internet computing, and not making overly generalized principles of law based upon poor briefing by parties or simplistic understandings of technology. Technologies allow web pages of countless designs and various functional events. To facilitate fact-finding, uniform legislation could be implemented that specifies the nature and placement of text that could serve as a rebuttable presumption of reasonable notice. As an example of legislative guidance, a California statutory provision specifies acceptable formats for businesses regarding the design of web pages with noticeable links to privacy policies.[356]

### *D. Enforceable Language*

Traditional case law has sometimes required drafters of form contracts to sufficiently explain their terms.[357] Users on the Internet are faced with the difficult choice of reading and understanding legal terminology or not reading the terms in the hopes that it does not come back to haunt them.[358] A very large

354 Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test*, 77 WASH. L. REV. 481, 509 (2002).

355 Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532–33 ("The issue of reasonable notice regarding a forum selection clause is a question of law for the court to determine.").

356 CAL. CIV. CODE § 1798.83 (Deering 2007).

357 Moringiello, *supra* note 20, at 1312.

358 Lydia J. Wilhelmi, *Ensuring Enforceability: How Online Businesses Can Best Protect Themselves from Consumer Litigation*, 86 MARQ. L. REV. 181, 181 (2002).

percentage of contracts found on the Internet contain convoluted legalese and long, compound sentence structures that are difficult to comprehend, even for experienced judges or counsel. When terms apply to average Internet surfers who simply access web pages and do not engage in sales or purchasing, courts and legislators should require explanations in readily understandable and plain terms. The competing concerns of having attractive and functional web pages are not a concern with regard to requirements of contract wording. This requirement of presenting understandable terms should be heightened as to web-based agreements involving casual Internet navigators. Such visitors cannot reasonably be expected to pay substantial fees to consult attorneys before they access and view a site, where no economic interests are implicated and low-cost access to Internet-based information is involved. Some of the policy reasons for enforcing terms would not apply to browse-wrap agreements outside of the commercial context. For example, one rationale for enforcement of forum-selection clauses is that consumers will enjoy savings in a competitive market.[359] But where a visit involves a gratuitous viewing of content, the visitor, who spends nothing, stands to gain no savings.

Predictably, in the future, many Internet terms of use will be held unenforceable. This forecast is based upon factors such as that terms typically are very aggressively written to favor a provider, and that many concepts are yet to be tested in the courts such that providers' attorneys have been drafting clauses without the benefit of judicial or legislative guidance. Primarily, the general concept of declining to give the force of law to unconscionable provisions should be a major role in the development of Internet contract law, in order to enforce the value of fairness over one-sided provisions that apparently have resulted from aggressive advocacy of counsel in a new frontier of the Internet, or from inadvertently inept drafting due to the great voids in the law failing to provide needed guidance.

### *E. Need for New Uniformity in the Law*

Overall, Internet contract law is in an unfortunate state of disarray and confusion. Even after more than a decade after the Internet gained widespread use,[360] the law applicable to browse-

[359] Das, *supra* note 354, at 506.

[360] In 1995, the World Wide Web's registration became largely commercial,

wrap agreements remains unsettled.[361] Many commentators agree that Internet contracting sorely needs uniformity of rules.[362] However, the details of uniform regulations are where vast differences of opinion arise. Courts have reached conflicting conclusions as to click-wrap agreements.[363] Courts are taking conflicting views of similar fact patterns. Like the various court decisions, there are a variety of commentator opinions about Internet contracting. To allow the status quo in the law to be perpetuated is to invite a hodgepodge of unpredictable and conflicting decisions and unfair results.

There is some value in applying traditional contract law to Internet contracts, as is indicated by rulings that continue to rely upon well-established rules.[364] Some authors disagree with those opining that the status quo is fully satisfactory.[365] Commentators have opined that Internet-based contracts are not unique, but analogous to earlier machine-based contracts, such as vending machines.[366] But there are potentially unique aspects of the Internet, including a great number of web site designers creating unlimited arrays of visual displays, unlike standardized company machines. Part of the new variety is due to the fact that modern computer program languages have become much easier and more accessible for a large number of people to apply, as opposed to just professional programmers.[367] Instead of just trained professionals developing technology, there is an open and informal system of sharing codes.[368] Unlike paper agreements

totaling ninety-seven percent. National Science Foundation, "A Brief History of NSF and the Internet," http://www.nsf.gov/news/special_reports/cyber/internet.jsp (last visited Mar. 31, 2008).

361 Tracy, *supra* note 58, at 171.

362 *E.g.*, Streeter, *supra* note 14, at 1391–92 (suggesting that uniform rules would help foster Internet commerce).

363 LAW OF THE INTERNET § 1.03[3], at 1–36.

364 *See, e.g.*, In re McDonald's French Fries Litig., 503 F. Supp. 2d 953, 957–58 (N.D. Ill. 2007) (applying existing state laws regarding viability of claims based upon express warranties made on web page).

365 *See, e.g.*, Jean Braucher, *Replacing Paper Writings with Electronic Records in Consumer Transactions: Purposes, Pitfalls and Principles*, 7 N.C. BANKING INST. 29, 32 (2003) ("Some of the enabling laws for electronic commerce do not reflect a full appreciation of the differences between paper writings and electronic records."); *see also supra* text accompanying notes 344–352.

366 *See, e.g.*, Moringiello, *supra* note 20, at 1308.

367 *See, e.g.*, ROSENZWEIG, *supra* note 106, at 9. However, modern businesses typically engage formalized Internet development teams for making web sites, including systems analysts, software architects, market researchers, graphic designers, database administrators and developers.

368 CASTRO, *supra* note 110, at 217–19.

that get limited circulation, the Internet is uniquely accessible to many visitors worldwide; crafting new law is needed.

There are multiple efforts towards uniform codes for electronic commerce.[369] One example of efforts towards uniformity is the Americans for Fair Electronic Commerce Transactions, which promotes principals for achieving fairness.[370] While one movement that has been underway to adopt a model code has been controversial in the details, the fundamental premise of UCITA[371] remains highly desirable, i.e., achieving uniformity, even-handed and predictable law as to electronic commerce, including terms posted on the World Wide Web. One reason for creating uniform codes on electronic commerce is to create predictable legal outcomes to allow commercial predictability.[372] Other stated goals of arriving at conventions of electronic commerce are to provide vendors and sellers with guidance, to foster confidence for encouraging increased business, and to protect consumers.[373]

As for the jurisdictions that could participate in the changing of laws addressing Internet contracts, while contract law traditionally has been state-based, precedent for federal regulation in the area already exists. For example, the Federal Arbitration Act can set some standards for enforceability of arbitration provisions[374] and there is legislation applicable to electronic agreements.[375]

## X. CONCLUSION

An author astutely observed that a "review of case law regarding shrinkwrap, clickwrap, and browsewrap licenses

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[369] *See, e.g.*, John D. Gregory, *The Proposed UNCITRAL Convention on Electronic Contracts*, 59 BUS. LAW. 313, 313 (2003) (addressing The United Nations Commission on International Trade Law).

[370] AMERICANS FOR FAIR ELECTRONIC COMMERCE TRANSACTIONS (AFFECT), *12 Principles for Fair Commerce in Software and Other Digital Products*, Technical Version (2007), http://www.stopbeforeyouclick.org/12PrincTechnical.htm (last visited Mar. 27, 2008).

[371] *See supra* text accompanying note 38.

[372] Gregory, *supra* note 369, at 317.

[373] Budnitz, *supra* note 15, at 787.

[374] *See*, Federal Arbitration Act, 9 U.S.C. § 2 (2000) ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.").

[375] *See supra* text accompanying notes 33–34.

demonstrates that judicial unpredictability will reign until a more certain legislative framework can be developed for dealing with the many variations involving these agreements."[376] Although legal guidance from the reviewing courts and legislatures incredibly continues to be relatively sparse, there are some conclusions that can be drawn from existing law. For example, whether web terms are enforceable has depended in part upon the area of law being applied, such as arbitration or forum-selection clauses,[377] and the circumstances surrounding the Internet use.[378] The law is evolving continually, but an enormous amount of refinement is still needed to provide predictability and guidance to both Internet application providers and their users.

Generally, from the cases published in the most recent months, the authors perceive apparent trends of (1) web site owners increasingly carefully and cleverly designing their web sites for increased enforceability, and (2) judges feeling more at ease with requiring users to apply effort and expertise in accessing the technology to read and assent to the terms as Internet use becomes more commonplace in society.[379] In sum, predictably, Internet users will be increasingly unsuccessful in convincing judges to reject web site terms on the bases of notice and assent,[380] and their courtroom battlefronts will focus more upon careless or unconventional web site designs, technological flukes, new technologies, computer bugs and computer-challenged

[376] Richard G. Kunkel, *Recent Developments in Shrinkwrap, Clickwrap and Browsewrap Licenses in the United States*, 9 MURDOCH U. ELEC. J. LAW 2, para. 64 (2002), http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93.html.

[377] *See supra* text accompanying section VIII.

[378] *See*, *e.g.*, *supra* text accompanying notes 17 and 74.

[379] *See, e.g.*, Oestreicher v. Alienware Corp., 502 F. Supp. 2d 1061, 1070 (N.D. Cal. 2007) ("[I]n the context of high-end products such as personal computers where consumers are expected to shop with care."). Other commentators recently expressed similar observations to the effect that the most recent case law about applying traditional contract law to electronic transactions is sufficiently well settled. *See generally* Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2006–2007*, 63 BUS. LAW. (forthcoming 2007), http://digitalcommons.law.umaryland.edu/fac_pubs/440/.

[380] Increasingly, parties are conceding the binding nature of online contracts instead of raising such issues. *See* Whitnum v. Yahoo! Inc., 16 Misc. 3d 1137A, 1137 n. 1 (N.Y. Sup. Ct. 2007) (granting motion to dismiss) ("Plaintiff has not disputed that she agreed to these terms by clicking the 'I accept' button on the internet.").

plaintiffs.[381] Moreover, various issues involving public policy will long remain vulnerable to litigants' attacks. As aptly stated by a commentator: "Tomorrow's courts will be required to weigh adhesive conditions in mass contracts against the risk of stifling ecommerce."[382]

With regard to whether unique treatment of Internet provisions is warranted, one author verbally painted imagery of a customer seeing a lengthy contract posted at a grocery store entrance, and questioned whether the Internet is distinguishable enough from such traditional scenarios to justify terms of use.[383] To some extent, the nature of cyberspace makes the widespread use of extensive terms understandable and justifiable. The potential for a number of visitors is much more than the average physical business establishment. Visitors on the World Wide Web are unseen with unobservable conduct and demeanor, differing from one's physical presence at a place of business. Furthermore, the law regarding the Internet is unrefined unlike traditional meeting places. Such considerations create an understandable need for providers to protect themselves with agreements.

In sum, while providers are justified in trying preemptively to shield themselves from exposures to lawsuits, given the expansive and open nature of the World Wide Web, providers should not be permitted to enforce overreaching terms in court by stating relatively hidden provisions purporting to expose average users or consumers to virtually unlimited liability or other unexpectedly oppressive obligations, particularly in the non-commercial context.

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[381] Predictably, the nature and capabilities of computer devices will undergo constant change, thereby creating new factual circumstances needing to be addressed in the area of Internet contracts. Since 1980, the power of computing has doubled each 18 months. The 3rd Intl. Symposium on Digital Earth Brno, Czech Republic, Sept. 21-25, 2003, www.isprs.org/publications/PDF/digitalearth03.pdf.

[382] Leon E. Trakman, *Adhesion Contracts and the Twenty First Century Consumer* 86 (Berkeley Electronic Press 2007), http://law.bepress.com/unswwps/flrps/art67/.

[383] Sandeen, *supra* note 41, at 500.