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Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum

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Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum

MICHELLE GARCIA

ABSTRACT

Large changes to online contracts have been underway since Shrinkwrap and Clickwrap licensing became hallmarks of digital licensing. Shrinkwrap and Clickwrap have changed how consumers enter into contracts by streamlining traditional notions of offer and acceptance. The deficiencies of Clickwrap and Shrinkwrap licenses are well documented, yet their validity is nearly universally upheld in courts. Another revolution in online contracts is taking place and no one is noticing. Today, a majority of Internet users enter into binding contracts online by merely browsing webpages. Browsewrap now stands poised to build upon the legal success of online licensing and become as accepted as Clickwrap in American courts. Several solutions to the abuses of End-User License Agreements (EULAs) such as Shrinkwrap and Clickwrap contracts have been proposed through model state regulation and the common law. However, these solutions cannot defend against the encroachment of Browsewrap. This Article argues that an unlikely solution is possible through the use of federal regulation in the form of copyright law.

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INTRODUCTION

Imagine entering into a contract where you have no knowledge of the terms, no way to decline acceptance, and no knowledge you have entered into an agreement. This is not some dystopian legal fantasy; it is the world of Browsewrap. If you visit any major website today, chances are you have entered into some kind of Browsewrap agreement with perhaps a forum selection clause or mandatory arbitration clause, as are commonly written into End-User License Agreements (EULAs). The act of simply going online has become fraught with unintended legal consequences due to the ubiquity of these one-sided contracts.

Since the late 1990s, contract scholars have decried the use of Shrinkwrap and Clickwrap licensing as an erosion of contract rights and a perversion of adhesion contracts.¹ A voluminous amount of scholarly writing has been dedicated to studying the legality of EULAs in the digital realm.² A pressing point of discussion among legal writers

1. See Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 (1999).

2. The sheer volume of legal writing on the subject of EULAs, Clickwrap in particular, would be impossible to adequately present here. For a more lengthy discussion of EULAs and their legality, see generally ROSS A. DANNENBERG ET AL., A.B.A. SECTION OF INTELLECTUAL PROP. LAW, *COMPUTER GAMES AND VIRTUAL WORLDS: A NEW FRONTIER IN INTELLECTUAL PROPERTY LAW* (1st ed. 2010); GENE K. LANDY & AMY. J.

who study such contracts is the widespread use of digital form contracts.³ As Paula Samuelson warned in her cautionary 1999 article to the *Journal of Electronic Publishing*:

Given the ubiquity of shrinkwrap licenses in the mass-market for software and given the intent of licensors to bind the entire market, the commercial effect of enforcing those [EULAs] would make them resemble property rights (that is, rights good against the world) more than contract rights (good only against the two parties to the contract). It is, moreover, a legal fiction to say that opening a package or installing software constitutes an agreement to the terms of a shrinkwrap license.⁴

The erosion of classic contracting ability between parties decried by Samuelson has undoubtedly come to pass in the form of widely accepted Browsewrap and Clickwrap agreements that now saturate the digital markets at levels few expected in the 1990s. The contracting climate created by digital EULAs and online licensing acceptance is troubling because it erodes basic consumer rights in relation to contracts. Indeed, the rise of Shrinkwrap, Clickwrap, and now Browsewrap threaten to overwhelm traditional standards for contracting between unequal bargainers such as large digital companies and their consumers.

This Article explores the current landscape of EULAs in the digital realm, tracing the recent controversies of Shrinkwrap and Clickwrap licensing, and proposes a new avenue of regulation via federal copyright law. It describes the defeat of common law contract formation defenses in Clickwrap cases that attacked the basic premise of the digital contracts' creation on offer and acceptance grounds, as well as the attempts to prevent enforcement through showings of unconscionability. This Article shows how the excesses of EULAs in Shrinkwrap and Clickwrap have been magnified tenfold through the rise of Browsewrap in the few cases that have examined the issue. Next, this Article surveys

MASTROBATTISTA, *THE IT/DIGITAL LEGAL COMPANION: A COMPREHENSIVE BUSINESS GUIDE TO SOFTWARE, IT, INTERNET, MEDIA, AND IP LAW* (Elsevier, Inc. 2008); NATIONAL RESEARCH COUNCIL, *THE ROLE OF SCIENTIFIC AND TECHNICAL DATA AND INFORMATION IN THE PUBLIC DOMAIN: PROCEEDINGS OF A SYMPOSIUM*, (Julie M. Esanu & Paul F. Uhlir, eds., 2003); Jamie J. Kayser, *The New New-World: Virtual Property and the End User License Agreement*, 27 *LOY. L.A. ENT. L. REV.* 59 (2006).

3. See Anita G. Ramasastry, *State Escheat Statutes and Possible Treatment of Stored Value, Electronic Currency, and Other New Payment Mechanisms* 57 *BUS. LAW.* 475 (2001). See also Robert A. Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, CORNELL LAW FACULTY PUBLICATIONS. Paper 29 (2005).

4. Pamela Samuelson, *Legally Speaking: Does Information Really Want to Be Licensed?*, 4 *J. Elec. Pub.* 3, (1999), <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=jep;view=text;rgn=main;idno=3336451.0004.305> (last visited Sept. 14, 2013).

the proposed improvements aimed at remedying the legal storm that erupted over EULAs and Clickwrap. It examines the inconsistent judicial decisions on digital EULAs and the defeat of legislative solutions aimed at reining in digital EULAs, all of which have decimated legal protection for consumers. The second half of this Article suggests a new route forward in protecting users from the extremes of online licensing through federal copyright regulation. It traces the history of interactions between copyright and contract law with an emphasis on digital contracts. It shows how copyright law has already made inroads into areas of traditional EULA control, and it examines the unique opportunity presented by the rise of Browsewrap to reopen discussion on the roles of uniform EULA regulation. Finally, this Article posits that the unlikely vehicle of copyright law “determinations” made by the Librarian of Congress may be the best hope to counteract the excesses of EULAs and remedy the lack of meaningful notice in online contract formation.

I. A BRIEF HISTORY OF THE MAJOR PLAYERS: SHRINKWRAP, CLICKWRAP AND BROWSEWRAP

Long before Internet use became commonplace, the software industry sparked major controversy in the 1990s by issuing EULAs in the form of Shrinkwrap licenses. A Shrinkwrap license refers to the contract paperwork that software manufacturers shipped. The software would usually arrive packaged in plastic film (Shrinkwrap) with a sticker across the front or a user manual listing the conditions for use of the software. The Terms and Conditions would usually contain wording similar to the now infamous licensing language below from ProCD’s national directory CD listings as they shipped in 1996, which later sparked a lawsuit over the legality of the licensing agreement:

Please read this license carefully before using the software or accessing the listings contained on the discs. By using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that may have been exported, the discs and the User Guide to the place where you obtained it.⁵

The long form of the licensing agreement would usually be inside the plastic film and would contain all of the Terms and Conditions as in any other contract, with the caveat that by the time a user had been given the opportunity to review the contract, the user would have already

5. ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 644 (W.D. Wis. 1996).

effectively assented to the creation of the agreement by opening the Shrinkwrap. In some instances, though not all, the license would include a window of time, such as ten days, during which a user could return the software and decline the licensing agreement.

With the rise of the Internet, a new type of EULA emerged called Clickwrap. Clickwrap is also known as web wrap, click proceed, and click through licensing.⁶ A Clickwrap license would appear to a software user as a single screen or a series of screens where the user would need to click an on-screen button stating that he or she read the Terms and Conditions of the software use and assented to the licensing agreement.⁷ Just as with Shrinkwrap licenses, legal scholars were outraged because “[t]he superior bargaining power of the software developer places the consumer in a ‘take it or leave it’ dilemma and many of her statutory entrenched rights may be curtailed by this agreement forced upon her.”⁸

The newest iteration of online contracting inspired by Shrinkwrap is Browsewrap. The term Browsewrap can refer to merely browsing a website, using a website, or to making a specific transaction which originated on the website.⁹ For example, a user who visits Bing.com to search for a website will have entered into a EULA with Terms and Conditions included, such as mandatory arbitration.¹⁰ As early as 2002, Clickwrap and Browsewrap agreements had become so common that researchers who surveyed website contracting practices described them as “industry standard.”¹¹ Many Browsewrap contracts center on a “Terms of Service Agreement” whereby a user visits a website and by viewing the

6. Though in some early cases, courts considered instances where a user would actually need to type, “AGREE” at multiple times during the online contracting process. See Dawn Davidson, *Click and Commit: What Terms are Users Bound to When They Enter Websites?*, 26 WM. MITCHELL L. REV. 1171, 1182 n.69 (2000).

7. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260–61 (6th Cir. 1996).

8. Tana Pistorius, *Shrink-wrap and Click-Wrap Agreements: Can they be Enforced?*, 7 JUTA’S BUS. L. 79, 86 (1999).

9. See Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the ‘Reasonably Communicated’ Test*, 77 WASH. L. REV. 481, 498–99 (2002).

10. MICROSOFT SERVICES AGREEMENT, <http://windows.microsoft.com/en-US/windows-live/microsoft-services-agreement> (last visited Sept. 14, 2013).

11. Susan E. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC’s Action Against Sears*, 8 N.W. J. TECH. & INTELL. PROP. 1, 42 (2009).

website, using the website or even just navigating to the website, the user agrees to be bound by the Terms of Service located elsewhere.¹²

In Browsewrap agreements, it is difficult to identify a moment or action analogous to the infamous clicking of “I Accept” seen in Clickwrap agreements. Another important difference between Browsewrap and Clickwrap or Shrinkwrap agreements is that Browsewrap agreements generally are not used to license software. Instead, Browsewrap agreements are almost universally used to govern the “Terms of Service” or “Conditions of Use” for using a particular website.¹³ For example, the American Airlines website (AA.com) contains on its main page a very small blue link labeled “Legal,” which redirects users to another page titled “Legal Information” with more links.¹⁴ One of those links, “AA.com Site Usage,” directs users to a third page which contains the Terms of Service regarding use of the entire website.¹⁵ Thus, by navigating through the first three pages to reach the contract language, a user will have already assented to the AA.com contract.

12. Sometimes the Terms of Service location will be listed on the main page of the website or a link will be provided where users can click to navigate to the listed Terms of Service. For example, by navigating to “Google.com,” a user agrees to Google’s “Terms of Service.” However, a user will not find the Terms of Service on Google’s homepage; rather, he or she must first scroll to the bottom of the page, click on “Privacy and Terms” and then click on “Terms of Service” which takes the user to a third page where the actual terms governing his or her use are located. See *Privacy and Terms*, GOOGLE, <https://www.google.com/> (last visited Sept. 23, 2013).

13. See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460–61 (2006).

14. AMERICAN AIRLINES, <http://www.aa.com> (last visited Sept. 29, 2013).

15. AA.COM SITE USAGE, <http://www.aa.com/i18n/footer/siteUsage.jsp> (last visited Sept. 14, 2013). The introduction states:

Thank you for visiting the American Airlines Web site titled “aa.com” In return for gaining access to the Site and using it, you agree to be bound by the following Agreement without limitation or qualification, so please carefully review this Agreement before proceeding. If you do not intend to be legally bound by these terms and conditions, do not access and use the Site. American Airlines reserves the right to change this Agreement and to make changes to any of the products or programs described in the Site at any time without notice or liability. Any such revisions are prospectively binding on you and therefore you should periodically visit this page when you use the Site to review the then current Agreement that binds you. American Airlines also reserves the right in its sole and unfettered discretion to deny you access to the Site at any time.

Id.

II. THE LEGAL BACKDROP: PRESUMED ASSENT VIA SHRINKWRAP AND CLICKWRAP

A. *Shrinkwrap Software Licensing: Early Victory*

Contract scholars began to closely examine Shrinkwrap licensing for defenses against their enforceability, and, prior to 1996, Shrinkwrap licenses were often invalidated in cases such as *Step-Saver Data Systems, Inc. v. Wyse Technology*.¹⁶ In this 1991 case decided by the U.S. Court of Appeals for the Third Circuit, the court held that “the box-top license did not . . . constitute a conditional acceptance.”¹⁷ Under the common law requirements of contract formation, an agreement (i.e., a contract) cannot exist between two parties until one party has communicated an “offer” to enter into a contract.¹⁸ The second party must then “accept” the proposed offer by agreeing to the contracting terms.¹⁹ A contract does not come into existence until acceptance by the second party has been completed.²⁰ Thus, the court in *Step-Saver* concluded that even a form licensing contract must disclose its terms to the second party, who must then accept those terms to create a contract.²¹ The Shrinkwrap EULA in *Step-Saver* specified that the act of opening the packaging constitutes acceptance to the seller’s contract terms.²² However, the court held that the Shrinkwrap was void because it contained additional unagreed upon terms to the original contract between the buyer and the seller.²³ But *Step-Saver* proved to be an anomaly.

In the 1996 landmark case, *ProCD, Inc. v. Zeidenberg*, the U.S. Court of Appeals for the Seventh Circuit held that Shrinkwrap licenses were enforceable, valid contracts, stating: “Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”²⁴ The court considered the reasoning of earlier decisions on Shrinkwrap offer and acceptance and stated, “placing the package of software on the shelf is an ‘offer,’ which the customer ‘accepts’ by paying the asking price and leaving the store with the

16. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

17. *Id.* at 103.

18. *See* Restatement (Second) of Contracts § 22 (1981).

19. *Id.*

20. *Id.*

21. *Step-Saver*, 939 F.2d at 104.

22. *Id.* at 97.

23. *Id.* at 105–06.

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

goods A contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms”²⁵ But, the court then drew a distinction between ProCD’s licensing scheme and the earlier Shrinkwrap decisions, explaining:

A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed.²⁶

Shrinkwrap licensing quickly became industry standard among software companies, and soon other related industries began to regularly package licensing agreements like software Shrinkwrap agreements.²⁷ Contract scholars in the 1990s criticized Shrinkwrap licenses on several grounds.²⁸ As Mark Lemley wrote regarding the expansion of software Shrinkwrap contracts to contracts in other industries:

The “assent” a user supposedly manifests to the terms of the license by opening the package and using the software is a thinly disguised fiction. The user may not read the license terms. Also, it may be impossible or impractical for the user to comply with the license and reject the software for a number of reasons. Overall the shrinkwrap license unilaterally and fundamentally changes the nature of the bargain between the parties, making it difficult or impossible for the user to object to whatever terms the vendor chooses to include.²⁹

Legal scholars were revolted by the use of one-sided terms found in Shrinkwrap EULAs, which soon became decried as adhesionary contracts—standard form agreements with no way to negotiate terms.³⁰ Commentators criticized the new adhesionary Shrinkwrap licenses as harmful because they became “trap[s] for the weak and unwary”

25. *Id.* at 1450.

26. *Id.* at 1452.

27. See Robert J. Morrill, *Contract Formation and the Shrink Wrap License: A Case Comment on ProCD, Inc. v. Zeidenberg*, 32 NEW ENG. L. REV. 513 (1998).

28. See Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 JURIMETRICS J. 311, 317 (1995).

29. *Id.*

30. See Restatement (Second) of Contracts § 211(3) (1981).

consumers who had lost all bargaining power.³¹ Despite the efforts of countless contract scholars and authors of hundreds of articles examining various aspects of Shrinkwrap enforceability, in the wake of the *ProCD, Inc. v. Zeidenberg* decision to enforce the ProCD EULA, Shrinkwrap agreements were considered generally enforceable by the late 1990s.³²

III. THE CLICKWRAP CONUNDRUM AND THE DEFEAT OF COMMON LAW CONTRACT FORMATION DEFENSES

Clickwrap contracts built upon the success of cases like *ProCD* to analogize Clickwrap to Shrinkwrap. Companies persuaded courts to construe Clickwrap as the legal equivalent to Shrinkwrap despite the lack of physical form to the contracts and the fact that assent was in the form of clicking a digital button instead of removing shrinkwrap packaging.³³ Courts that encountered these new Clickwrap contracts used the 1990s case law on Shrinkwrap decisions to find the agreements generally enforceable notwithstanding several common law contract formation defenses regarding offer and acceptance.³⁴ Consumers and legal scholars quickly mounted efforts to test the legitimacy of Clickwrap through a wide variety of contract defenses.³⁵ Scholarly concerns over the validity of online licensing agreements have largely centered on the issues surrounding notice.³⁶ As a general principle of contract law, a party may use a document to create a contract provided that it gives reasonable notice of its terms to the other party.³⁷

A tension exists between the classic legal requirement of notice and the design of websites because websites, by their nature, attempt to be user-friendly, providing ease of access without bothering users by quoting jarring legal information. Website contracts are thus following the trend of a majority of paper contracts that have resorted to form

31. Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 351–55 (1996).

32. Nathan J. Davis, *CYBERLAW: A Note: Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 598 (2007).

33. *Id.* at 583–89.

34. *Id.*

35. *See, e.g.*, *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1334 (2000).

36. *See Ariz. Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 763 (1993).

37. *See* Restatement (Second) of Contracts §§ 33, 95 (1981).

language. Some scholars described this as being so prevalent that “likely ninety-nine percent of paper contracts consist of standard forms.”³⁸

From a practical standpoint, alerting a user to the fact that he or she will be entering into a binding legal contract by clicking a button runs contrary to the design of digital licenses, which attempt to make transactions as “painless” and as quick as possible for consumers visiting a site.³⁹ Despite a vigorous series of cases in every circuit challenging Clickwrap contracts, today such agreements are considered “generally enforceable.”⁴⁰ For example, in *Beard v. Paypal, Inc.*, the U.S. District Court for the District of Oregon suggested that Clickwrap agreements are now generally enforceable absent a showing of fraud—thus elevating Clickwrap agreements to the level of general enforceability that is given to more traditional offline contracts.⁴¹ In *Exceptional Urgent Care Center I, Inc. v. ProtoMed Medical Management Corp.*, the U.S. District Court for the Middle District of Florida upheld a Clickwrap contract on multiple grounds, stating even more succinctly that “there is also no dispute over the validity of clickwrap agreements.”⁴²

Some scholars critiqued Clickwrap contracts as an abuse of so-called “rolling contracts,” where a user would buy a piece of software and agree to the Terms via Clickwrap agreement.⁴³ Then the software company would “update” and change the licensing Terms without notice to users to make the license more restrictive, thus “rolling over” the assent given by the user initially as applicable to the new Terms.⁴⁴ Critics noted that it is highly implausible to expect that a software user would track down the new Terms and be able to decline the “update” of

38. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002).

39. Walter A. Effross, *A Web Site Checklist: Consider ‘Click-Wrap’ Pages, Linkage Disclaimers, and Forum Policies*, LEGAL TIMES, Mar. 1, 1999, at S34, available at <http://www.wcl.american.edu/faculty/effross/legattimesweb22.html> (last visited Sept. 15, 2013).

40. *Jackson v. American Plaza Corp.*, No. 08 Civ. 8980 (PKC), 2009 U.S. Dist. LEXIS 35847 at *11–12 (S.D.N.Y. Apr. 28, 2009). In 2010, courts, particularly in the Ninth Circuit, have gone further and have ruled that Clickwrap agreements are generally enforceable in all American jurisdictions. See Davis, *supra* note 32, at 583; see also *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1226–27 (D. Haw. 2010).

41. *Beard v. Paypal, Inc.*, No. 09–1339–JO, 2010 U.S. Dist. LEXIS 15517, at *2–5 (D. Or. Feb. 19, 2010).

42. *Exceptional Urgent Care Ctr. I, Inc. v. ProtoMed Med. Mgmt. Corp.*, No. 5:08–cv–284–Oc–10GRJ, 2009 U.S. Dist. LEXIS 44787, at *31 (M.D. Fla. May 14, 2009).

43. See Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744–45 (2002).

44. See James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 114–15 (2003).

the EULA since most users would not even read the entirety of the initial agreement, much less its successor.⁴⁵

The U.S. District Court for the Southern District of Florida tackled the issue of rolling contract assent in *Segal v. Amazon.com, Inc.*⁴⁶ In this case, two plaintiffs had been buying and selling goods on Amazon Marketplace when Amazon.com refused to disburse funds in the plaintiffs' "seller accounts."⁴⁷ This led the plaintiffs to sue in Florida, where they lived.⁴⁸ Amazon.com then moved to dismiss the lawsuit since its website's Terms of Service—which the plaintiffs assented to via Clickwrap agreement—included a forum selection clause that required claims be adjudicated in King County, Washington.⁴⁹ Plaintiffs argued that they had never read the Clickwrap contract or any of the later updates to the contract, but the court concluded, "Plaintiffs' admitted failure to read the Participation Agreement does not excuse compliance with its terms."⁵⁰ *Segal* and similar cases have led to the general enforceability of Clickwrap contracts, despite arguments from plaintiffs that no assent was given and thus no contract was formed.⁵¹

Another popular argument that appeared in court cases from the 2000s attempted to overturn Clickwraps on unconscionability grounds.⁵² Unconscionability is a defense against enforcing a contract on the grounds that the terms of the contract are excessively unfair to one party, and the fundamental inequality of the agreement voids the contract's "consideration."⁵³ Under contract law, all agreements must have some value or consideration from both parties before the contract is considered binding.⁵⁴ Legal commentators pointed to the overuse of standard forms in EULAs as evidence that no meaningful negotiation took place between the contracting parties and argued that the relative

45. See *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1369 (S.D. Fla. 2011).

46. *Id.*

47. *Id.* at 1368.

48. *Id.*

49. *Id.*

50. *Id.* at 1369.

51. *Id.* See also *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236–37 (E.D. Pa. 2007).

52. See Brian R. Suffredini, *Practical Guidelines for Creating Enforceable Online Agreements*, INTERNATIONAL IT AND OUTSOURCING NEWSLETTER, Issue 2 (Oct. 17, 2003).

53. Jeffrey C. Fort, *Understanding Unconscionability: Defining the Principle*, 9 LOY. U. CHI. L.J. 765, 771 (1977).

54. A.G. Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis*, 17 INT'L & COMP. L.Q. 137, 139 (1968).

bargaining power was so unequal as to invalidate Clickwrap contracts.⁵⁵ Scholars contended that the saturation of form contracts in standard Clickwrap agreements created fundamentally unfair contracting climates online.⁵⁶

Another popular criticism of Clickwrap agreements is that many of these EULAs only display the contract terms after payment.⁵⁷ For example, a user may click through a series of screens to license and pay for a piece of software upfront, but only after downloading the program finally encounter the license terms or be informed that the licensing agreement may be found in an accompanying user manual or later e-mail.⁵⁸ This is a process that mimics the Shrinkwrap contracting method. Interestingly, in these instances, courts have split on whether Clickwrap contracts should be generally enforceable.⁵⁹

It is important to note that despite the wide range of cases discussing the legality of Clickwrap agreements, courts have yet to articulate a clear standard defining the elements necessary to create a valid Clickwrap contract. Perhaps the closest decision to an articulable standard came from a district court within the U.S. Court of Appeals for the Third Circuit in *Hoffman v. Supplements Togo Management, L.L.C.*⁶⁰ The district court noted that there is still a considerable dispute over what is required to make a Clickwrap agreement enforceable, but suggested that Clickwrap agreements are enforceable so long as there is a button with some indication that clicking amounts to acceptance.⁶¹ In *Grosvenor v. Qwest Communications Intern. Inc.*, the U.S. District Court for the District of Colorado agreed that there is a need for a button to signify that clicking equals assent.⁶² It enunciated that requirement,

55. See Hillman, *supra* note 43, at 751.

56. See Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 840–41 (2006).

57. See Sean F. Crotty, *The How and Why of Shrinkwrap License Validation Under the Uniform Computer Information Transactions Act*, 33 RUTGERS L.J. 745, 764 (2002).

58. See *Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957(JCH), 2011 U.S. Dist. LEXIS 18132, at *19 (D. Conn. Feb. 24, 2011), *aff'd*, 697 F.3d 110 (2d Cir. 2012).

59. See *id.*; see also *Southwest Airlines Co. v. BoardFirst L.L.C.*, No. 3: 06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230 (N.D. Tex. 2007).

60. *Hoffman v. Supplements Togo Mgmt, L.L.C.*, 18 A.3d 210, 220 (N.J. Super. Ct. App. Div. 2011).

61. *Id.*

62. *Grosvenor v. Qwest Commc'ns Int'l, Inc.*, No. 09-CV-2848-WDM-KMT, 2010 WL at 3906253 *2 (D. Colo. Sept. 30, 2010).

stating, “as a rule, a clickwrap is valid where the terms of the agreement appear on the same screen with the button the user must click.”⁶³

Simply put, the Clickwrap conundrum can be summed up as the status quo today. Legal scholars and users are extremely uncomfortable with the lack of notice and oppressive terms inherent to the user experience with EULA Clickwraps. However, courts in every circuit have held Clickwrap contracts to be valid, “sett[ing] on a mechanical assent analysis that only seeks to determine whether or not the ‘I Agree’ button was indeed clicked[,]”⁶⁴ even in extreme situations beyond traditional adhesionary contract parameters.⁶⁵ Regardless of the near universal dislike among legal experts and users for EULAs, regulatory attempts through the Uniform Commercial Code to alleviate the concerns regarding EULAs, and Clickwrap in particular, have stalled.⁶⁶ The rise of Browsewrap has amplified the problems of Clickwrap due to even more extreme lack of notice, conflicting understandings of website “use,” and unspecified points of acceptance.

IV. A SURVEY OF BROWSEWRAP CASE LAW AND THE LIMITATIONS OF JUDICIAL RELIEF

A. *Initial Browsewrap Cases: Hybrid Digital Contracts*

The term “Browsewrap” was mentioned early on in the 2000 case, *Pollstar v. Gigmania, Ltd.*, where the U.S. District Court for the Eastern District of California considered the legality of a Clickwrap agreement and remarked, “No reported cases have ruled on the enforceability of a browse wrap license.”⁶⁷ Judicial silence on Browsewrap contracts ended in 2002 with the *Specht v. Netscape Communications Corp.* decision, which is today considered the seminal case on Browsewrap contracts.⁶⁸ In *Specht*, Netscape attempted to compel arbitration pursuant to a hybrid Clickwrap-Browsewrap contract and dismiss the plaintiffs’ complaint

63. *Id.*

64. Davis, *supra* note 32, at 598 (2007).

65. A contract of adhesion exists where “one party has absolutely no bargaining power or ability to change the contract terms.” See *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 370–71 (Tex. App. 2000) (noting that a contract of adhesion is not automatically unconscionable).

66. See Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 419 (2003).

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

68. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 23–24 (2d Cir. 2002).

that Netscape's software was illegally monitoring online activities.⁶⁹ *Specht* foreshadowed many future Browsewrap cases since the underlying issue was the plaintiffs' attempt to contest the mandatory arbitration clause in a forum of the company's choosing within the EULA.⁷⁰ As detailed in some recent Browsewrap surveys,⁷¹ arbitration clauses are almost always part of the standard EULAs found in websites with Browsewrap contracts, such as AstronomyDaily.com,⁷² multi-map.com,⁷³ dell.com,⁷⁴ ubizen.com,⁷⁵ and nokia.com.⁷⁶ All of these EULAs have clauses stating that mere use or navigation to the website constitutes acceptance of the company's Terms of Service, which in turn includes an exclusive jurisdiction clause.⁷⁷

Netscape offered several toolbar and search plug-in options to users that employed standard Clickwrap agreements where users needed to signify their assent to the displayed terms before they could download the software.⁷⁸ Notably, the software contained a software plug-in called "Communicator."⁷⁹ Netscape also offered a software download called "SmartDownload" that was bundled with Communicator but could be downloaded separately and did not display license terms on the same screen.⁸⁰ As the U.S. Court of Appeals for the Second Circuit noted:

The signal difference between downloading Communicator and downloading SmartDownload was that no clickwrap presentation accompanied the latter operation. Instead, once plaintiffs . . . clicked on the "Download" button located at or near the bottom of their screen, and

69. *Id.* at 20–21.

70. *Id.* at 20.

71. Lisa Arrasmith, *Browsewrap Clauses in Current Shrinkwrap and Clickwrap Contracts*, CPTECH.ORG, <http://www.cptech.org/ecom/ucita/licenses/browsewrap.html> (last visited Sept. 16, 2013).

72. *Usage Agreement*, ASTRONOMY DAILY, <http://web.archive.org/web/20100816155010/http://www.astronomydaily.com/usage.html> (last visited Sept. 16, 2013).

73. *Conditions of Use*, MULTIMAP, <http://web.archive.org/web/20100516094343/http://www.multimap.com/tacondit.htm> (last viewed on Sept. 16, 2013).

74. *Terms and Conditions*, DELL, http://www.dell.com/us/en/gen/misc/policy_007_policy.htm (last visited Sept. 16, 2013).

75. UBIZEN, *Web site Use Policy*, http://web.archive.org/web/20050312022737/http://www.ubizen.com/_website_use_policy/ (last visited on Sept. 16, 2013).

76. *Site Terms*, NOKIA, <http://www.nokia.com/global/terms/terms/terms/terms-conditions/> (last visited Sept. 16, 2013).

77. *See supra* notes 72–76.

78. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 21–22 (2d Cir. 2002).

79. *Id.*

80. *Id.* at 22–23.

the downloading of SmartDownload was complete, these plaintiffs encountered no further information about the plug-in program or the existence of license terms governing its use.⁸¹

The only reference to any licensing terms for SmartDownload was located on a separate screen that essentially hid the program's contract terms from users until after the download had already taken place.⁸² Furthermore, the website suggested the Terms were identical to the "Communicator" program, perhaps to make users believe they need not read the Terms.⁸³ Ultimately, the court in *Specht* determined, "a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms."⁸⁴ The court did not preclude the possibility that valid online contracts could be formed via Clickwrap or Browsewrap, or through a hybrid such as the bundled Clickwrap and Browsewrap SmartDownload contract.⁸⁵ However, the court did issue a strong warning to similar actors: "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."⁸⁶

The court did not agree with the defendants' arguments that Browsewrap cases must necessarily be decided in line with the older Clickwrap cases.⁸⁷ Instead, the court spoke at length of cases like *ProCD, Inc. v. Zeidenberg* as examples of assent "by conduct."⁸⁸ The *Specht* decision suggested that the clicking of a download button should be accompanied by "reasonably conspicuous" notice, leaving open for interpretation the instances where notice of the contract terms was ambiguous.

Interestingly, the *Specht* decision foreshadowed many of the common issues associated with Browsewrap cases. One of the *Specht* plaintiffs never visited the Netscape website where the download was available, but instead downloaded the software from a third party site

81. *Id.* at 23.

82. *Id.*

83. *Id.*

84. *Id.* at 29–30.

85. *Id.* at 32–34.

86. *Id.* at 35.

87. *Id.* at 32–33. However, some argue that Browsewrap and Clickwrap processes are in essence legally identical because "if we refuse to enforce browsewraps, a site owner will simply impose the same restrictions via clickwrap or shrinkwrap." Lemley, *supra* note 13, at 469.

88. *Id.* at 32–33 (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

that contained a hyperlink for “more information.”⁸⁹ This link then directed the user to yet another page within the Netscape domain where the Terms could be viewed.⁹⁰ Thus, this plaintiff would have needed to navigate through multiple pages on two different companies’ websites to even determine the threshold question of whether the software was bound by a license.

The existence of a discrete moment when a user could assent or decline also sets this case apart from several later iterations of Browsewrap agreements. Netscape’s terms were conditioned upon a specific user act, which can be isolated and examined—namely, the moment when the plaintiffs downloaded the software. In many ways, Netscape’s bundled software, “SmartDownload Communicator,” is an example of a bygone era from the early 2000s when software licensing was still the main vehicle of online agreements.

B. Notice via User Action

One would expect that the judicial landscape after *Specht* would reflect the strong admonishment from the opinion in favor of conspicuous notice and informed consent. Instead, many later Browsewrap cases follow an opposing trend where the manifestation of assent to EULA terms is increasingly ambiguous. Hybrid Clickwrap-Browsewrap contracts where a user completed a discrete act, like downloading a program or clicking “I Agree,” seem to have made the lack of conspicuous contract terms less troubling for courts after *Specht*.

89. *Id.* at 24–25.

90. The court in *Specht* stated:

Unlike the four named user plaintiffs who downloaded SmartDownload from the Netscape website, the fifth named plaintiff, Michael Fagan, claims to have downloaded the plug-in program from a “shareware” website operated by ZDNet, an entity unrelated to Netscape. Shareware sites are websites, maintained by companies or individuals, that contain libraries of free, publicly available software. The pages that a user would have seen while downloading SmartDownload from ZDNet differed from those that he or she would have encountered while downloading SmartDownload from the Netscape website. Notably, instead of any kind of notice of the SmartDownload license agreement, the ZDNet pages offered only a hypertext link to “more information” about SmartDownload, which, if clicked on, took the user to a Netscape webpage that, in turn, contained a link to the license agreement. Thus, a visitor to the ZDNet website could have obtained SmartDownload, as Fagan avers he did, without ever seeing a reference to that program’s license terms, even if he or she had scrolled through all of ZDNet’s webpages.

Id. at 24–25.

For example, in *Van Tassell v. United Marketing Group, LLC*, the U.S. District Court for the Northern District of Illinois noted, “[b]ecause clickwrap agreements require affirmative action on the part of the user to manifest assent, courts regularly uphold their validity when challenged.”⁹¹ Here, plaintiffs had been automatically enrolled in a “United Marketing Membership” program after making a purchase on another website that passed the plaintiffs’ credit card information on to United Marketing.⁹² The consumers’ automatic enrollment into the Membership Program was only disclosed in the Terms and Conditions, and a direct link to the Terms and Conditions was not provided on the original purchase website.⁹³ Perhaps unsurprisingly, the defendants in *Van Tassell* also unsuccessfully attempted to compel arbitration per their Terms and Conditions and have the suit dismissed entirely.⁹⁴ The court did not question the accessibility of the Terms and Conditions; instead, it focused on the conspicuousness of the Terms and Conditions.⁹⁵ In order for a user to have found out that her purchases were subject to a digital contract, the user not only would have had to scroll down without reason to do so, but also would have had to “make the illogical leap that ‘Customer Service’ means binding ‘Conditions of Use’ and click on that link,” which finally redirected the user to another webpage where the Terms of Service was contained.⁹⁶

Again, the court was able to point to a discrete moment when users should have received notice regarding the website’s Conditions of Use—the point of purchase on the websites. The *Van Tassell* court seemed to conclude that the lack of notice at that moment, coupled with the multistep process users would have needed to undertake to find the Terms and Conditions, made the EULA unenforceable. Unfortunately, decisions like *Van Tassell* and *Specht* where Browsewrap EULAs were invalidated are more often the exception rather than the rule among the circuit courts today.

In the 2005 Illinois decision, *Hubbert v. Dell Corp.*, users purchased computers on Dell’s website, which required each user to customize his or her own computer by configuring the model and type.⁹⁷ On five of

91. *Van Tassell v. United Mktg. Group, LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011).

92. *Id.* at 774.

93. *Id.* at 788–89.

94. *Id.* at 789–93.

95. *Id.* at 790–93.

96. *Id.* at 792.

97. *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 117–18 (Ill. App. Ct. 2005).

those customization pages, “[Dell’s] ‘Terms and Conditions of Sale’ were accessible by clicking on a blue hyperlink.”⁹⁸ The plaintiffs sued Dell for false advertising regarding the speed of the computers’ processors.⁹⁹ The court considered whether a mandatory arbitration clause was part of the contract created between the parties when users purchased computers on Dell’s website, Dell.com, which listed its Terms and Conditions of Service on another webpage, but within the same website as the point of purchase.¹⁰⁰ The court analogized the location of the Terms elsewhere on the website as the modern day equivalent of “page turning” and found that hyperlinking in blue-colored type was conspicuous enough for Dell to overcome the charge of unconscionability.¹⁰¹ Generally, for a court to void a contract on the basis of unconscionability, a contract must be substantively and procedurally unconscionable.¹⁰² Here, the plaintiffs alleged that the agreement was excessively one-sided and thus, lacked the consideration necessary to form a valid contract.¹⁰³ Additionally, the plaintiffs argued that the agreement was procedurally unconscionable because the website users lacked notice of the contract terms, which were accessible only via hyperlink.¹⁰⁴ In response, the court stated:

The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink’s contrasting blue type makes it conspicuous. Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.¹⁰⁵

Thus, the court held that the Browsewrap agreement Terms could not be invalidated on substantive and procedural unconscionability grounds, and the court ordered the dispute to mandatory arbitration.¹⁰⁶ Merely displaying a hyperlink satisfied conspicuousness requirements.¹⁰⁷ The court also rejected the plaintiffs’ contention that Dell should have used a Clickwrap to display the Terms and Conditions of Service and suggested

98. *Id.* at 118.

99. *Id.*

100. *Id.* at 120–21.

101. *Id.* at 121.

102. *Id.* at 124.

103. *Id.* at 120–21.

104. *Id.* at 124.

105. *Id.* at 121.

106. *Id.* at 126.

107. *Id.* at 121.

that Browsewraps were the equivalent of Clickwrap agreements when blue hyperlinks were displayed.¹⁰⁸

The *Hubbert* case would, at first glance, appear to set a reasonable standard for displaying Terms and Conditions. However, *Pollstar v. Gigmania*,¹⁰⁹ decided in 2000, is cited significantly more than *Hubbert*, decided in 2005.¹¹⁰ In *Pollstar*, the court made a determination in direct contrast to *Hubbert* on the question of display.¹¹¹ *Pollstar* alleged that Gigmania copied information from the *Pollstar* website for use on its own competing site, which violated *Pollstar*'s Terms of Service.¹¹² The court considered whether a contract had been created by the Browsewrap license from the main page of *Pollstar*'s website, which had a very small notice. In determining whether the notice was valid, the court stated:

This license agreement is not set forth on the homepage but is on a different web page that is linked to the homepage. However, the visitor is alerted to the fact that "use is subject to license agreement" because of the notice in small gray print on gray background [M]any users presumably are not aware that the license agreement is linked to the homepage. In addition, the homepage also has small blue text which when clicked on, does not link to another page. This may confuse visitors¹¹³

However, the court determined that gray text on a gray background signified meaningful notice to a user that she was entering into a valid online contract.¹¹⁴ This defies the original standard of "[r]easonably conspicuous notice of the existence of contract terms" from the seminal Browsewrap decision in *Specht*.¹¹⁵ Users would effectively have had to highlight random portions of *Pollstar*'s website in order to determine that the hidden text existed at all, much less the fact that the hidden text signified the creation of a legally binding agreement.

C. Off-Site Notice

Perhaps an even more troubling string of cases holds that "notice" of Browsewrap contract terms does not need to accompany website

108. *Id.* at 120–22.

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

110. *Hubbert*, 835 N.E.2d 113.

111. *See Pollstar*, 170 F. Supp. 2d at 981.

112. *Id.* at 976–77.

113. *Id.* at 981.

114. *Id.*

115. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002).

browsing, but can instead be delivered offline after browsing has already taken place. For example, in *Briceño v. Sprint Spectrum, L.P.*, the Florida Third District Court of Appeal held that Briceño was bound by an online “amendment” to a telephone services contract that obligated her to arbitrate disputes with the telephone service company.¹¹⁶ The court determined that Briceño had received notice as a result of her receipt of an invoice that notified her of the amendment and of a location on the Internet at which she could view its terms.¹¹⁷ In addition, the court concluded that she was afforded the opportunity to cancel her contract if she did not wish to be bound, despite the fact that she neither read the terms of the Amendment, nor in any way affirmatively indicated her assent to be bound by its terms.¹¹⁸ Unlike the situations in *Hubbert* or *Van Tassell*, Briceño’s contract was created offline, through a rolling contract with her telephone company that “updated” her agreement to include a new mandatory arbitration clause that could only be viewed online at the company’s website.¹¹⁹

Similarly, in *Southwest Airlines Company v. BoardFirst L.L.C.*, the U.S. District Court for the Northern District of Texas held that BoardFirst had the requisite knowledge that using the plaintiff’s website would form a valid Browsewrap contract by virtue of its receipt of the cease and desist letters from Southwest Airlines once litigation had commenced.¹²⁰ BoardFirst offered its customers the ability to board flights earlier than other passengers in return for a small fee.¹²¹ Southwest Airlines does not have set boarding times for passengers and instead creates the boarding order based on the time that a passenger “checked in” on the Southwest website.¹²² BoardFirst would “check in” for its customers on the Southwest website so the customers could be placed at the top of the boarding order, in boarding group A.¹²³ The Southwest website had a Browsewrap contract in place that forbade use of the “check in” service to any user other than the individual passenger.¹²⁴ Southwest Airlines sued BoardFirst alleging that the company had violated the Terms and Conditions on its website and

116. *Briceño v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 181 (Fla. Dist. Ct. App. 2005).

117. *Id.* at 180–81.

118. *Id.*

119. *Id.* at 178.

120. *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230, at *13 (N.D. Tex. Sept. 12, 2007).

121. *Id.* at *4.

122. *Id.* at *1–3.

123. *Id.* at *3–4.

124. *Id.* at *5.

sought an injunction to stop BoardFirst's use of Southwest.com.¹²⁵ BoardFirst claimed it lacked knowledge of any contract terms and that it did not enter into any agreement with Southwest Airlines.¹²⁶

The court held that off-site notice of the Browsewrap existed because BoardFirst at least had knowledge of the Terms as early as when Kate Bell, BoardFirst's founder, received the December 20, 2005 cease-and-desist letter from Southwest.¹²⁷ Southwest argued that "in continuing to use the Southwest site despite having actual knowledge of the Terms, BoardFirst effectively manifested its acceptance of Southwest's 'offer' to use the site subject to the Terms, thus forming a binding contract between the parties."¹²⁸ Here, the court decided that BoardFirst received notice of the existence of the Browsewrap agreement when it received a letter stating that the Terms of Service applied to use of the website.¹²⁹ Interestingly, the court did not consider how the acceptance of the Terms in December of 2005 affected BoardFirst's earlier activity on the Southwest website. So, unlike the earlier Browsewrap cases like *Hubbert* and *Gigmania*, where the courts inferred notice from small type at the bottom of the websites, in *BoardFirst*, the court further diminished the notice requirement, concluding that notice of the Browsewrap, occurring in the form of a letter relating to a current lawsuit, was sufficient.¹³⁰

In 2011, *Schnabel v. Trilegiant Corp.* broke with this line of cases by voiding a hybrid Clickwrap-Browsewrap and holding that "simple reference to a 'welcome email' is a far cry from the language necessary to indicate manifest agreement to the later email's terms and conditions."¹³¹ In *Schnabel*, after the plaintiff consumers made purchases from a variety of websites, a pop-up advertisement window appeared asking if they would like to save money through the "Great Fun" discount program.¹³² A small box inside the advertisement asked for the consumer's city of birth, which when entered prompted another pop-up window displaying the following language: "Thanks for trying Great Fun! Watch for your welcome email, arriving soon. Also, in approximately two business days

125. *Id.* at *33–34.

126. *Id.* at *11–21.

127. *Id.* at *13.

128. *Id.*

129. *Id.* at 20–21.

130. *See id.*

131. *Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957(JCH), 2011 U.S. Dist. LEXIS 18132, at *19 (D. Conn. Feb. 24, 2011), *aff'd*, 697 F.3d 110 (2d Cir. 2012).

132. *Id.* at *1–3.

(excluding holidays) you'll receive an email with instructions on how to get your gift. If we can't send the email, we'll automatically mail you the details."¹³³ The Terms and Conditions of the website were contained in the "welcome e-mail" from Trilegiant, which all of the plaintiffs denied receiving.¹³⁴

Here, it is difficult to pinpoint when this hybrid Clickwrap-Browsewrap contract would have been created. Some plaintiffs believed that they were still communicating with the original website, not Trilegiant's pop-up advertisement.¹³⁵ Furthermore, a user entering her city of birth hardly constitutes the classic "I agree" action seen in most Clickwrap contracts. The plaintiffs interacted with a small pop-up advertisement window instead of a full website, and the window did not even contain a way to access the full website, let alone the Terms and Conditions.¹³⁶ The *Schnabel* decision to void the hybrid Clickwrap-Browsewrap is a significant break from decisions like *Sprint Spectrum* and *BoardFirst*.¹³⁷ However, since *Schnabel* did not enforce the off-site contract Terms and Conditions, this further complicates any prediction of the outcome of future litigation.

D. *Spiders and Robots: Notice by Automated Computer Program*

Another vein of Browsewrap cases which is in some ways even more troubling to proponents of traditional contracting principles involves the enforceability of Browsewrap agreements where the only contact between the website and the alleged contracting party is through an automated piece of software similar to a customized search program. This software, known as a trawling spider, robot, or query program, gathers data from a website which then attempts to enforce the website Terms and Conditions on the owner of the robot, most often for the purpose of compelling arbitration.¹³⁸

The earliest of these cases was in 2004 in *Register.com, Inc. v. Verio, Inc.* where the U.S. Court of Appeals for the Second Circuit considered whether the use of a search robot to access a website subjected the

133. *Id.* at *3.

134. *Id.* at *4–6.

135. *Id.* at *4.

136. *Id.* at *12.

137. See *Briceño v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 181 (Fla. Dist. Ct. App. 2005); *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230 (N.D. Tex. Sept. 12, 2007).

138. See James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 7–8 (2007).

robot's owner to the website Browsewrap agreement.¹³⁹ In this case, the robot was designed to automatically submit queries to a registrar of domain names under the Internet Corporation for Assigned Names and Numbers (ICANN).¹⁴⁰ Verio created the search robot to retrieve registration information on newly registered domain names.¹⁴¹ Verio would also market its web design services to new domain name registrants, assuming that these entities would be in need of web designers.¹⁴² At the time Verio began querying the database, Register's website's Terms of Use, called a "restrictive legend," prohibited the use of the ICANN information for "mass solicitations 'via email.'"¹⁴³ Register received complaints from users about contact from Verio by e-mail, telephone and direct mail, so it changed the Terms of Use to prohibit solicitations by direct mail and telephone as well.¹⁴⁴ Verio complied with the original Terms and stopped sending mass-market e-mails, but "refused to stop marketing by direct mail and telephone."¹⁴⁵ The court held that Register could impose new conditions so long as they were within the parameters of the conditions for access to ICANN, and the court further stated that Verio could only pursue its policy violation arguments through the administrative ICANN process.¹⁴⁶

On the subject of the search robot, the court concluded that because Verio submitted multiple queries to the database website, Verio had received notice of the website Terms of Use, but it declined to explain how Verio actually received such notice.¹⁴⁷ Instead, the court stated, "[f]urthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument [that it failed to receive notice because only the robot visited the site where the conditions were available] fails."¹⁴⁸ The court even went on to state puzzlingly that, "Verio visited Register's computers daily to access WHOIS data [the new ICANN entries] and each day saw the terms of Register's offer"—thus imputing the search robot's page views and EULA "knowledge" with Verio's own!¹⁴⁹ The court made no distinction between use of a website

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

140. *Id.* at 395–96.

141. *Id.* at 396.

142. *Id.*

143. *Id.* at 397.

144. *Id.*

145. *Id.*

146. *Id.* at 400–01.

147. *Id.* at 401.

148. *Id.*

149. *Id.* at 402.

by an individual and an automated program, which moves the classic contract requirements of offer and acceptance further away from the reality of Browsewrap litigation.¹⁵⁰

A year later in 2005, the U.S. District Court for the Northern District of California in *Cairo, Inc. v. CrossMedia Services, Inc.* held that the defendant's Browsewrap agreement, which stated that an agreement would be created if a user continued to utilize the site, provided sufficient notice and was binding on users.¹⁵¹ Here, the plaintiff only accessed the CrossMedia Services website through an automated program.¹⁵² However, the court imputed knowledge to the plaintiff arising out of repeated use of the site via a "robot" that automatically monitored the site, stating: "Cairo's repeated and automated use of CMS's web pages can form the basis of imputing knowledge to Cairo of the terms on which CMS's services were offered even before Cairo's notice of CMS's cease and desist letter."¹⁵³ The court thoroughly reviewed the actual notice received from the cease and desist letter and drew a distinction between past use of the website prior to the actual notice, and the use of the website from that point forward—a distinction the court in *Southwest Airlines Co. v. BoardFirst, L.L.C.* ignored.¹⁵⁴ In *CrossMedia*, the court definitively held that repeated use of a website by an automated program imputes knowledge of the content of that website—in essence allowing the program use of the website to function as the legal equivalent of actual individual use.¹⁵⁵

E. Some Conclusions

Even these few cases on Browsewrap reveal a startling new landscape for website users—they are more likely to inadvertently become subject to Browsewrap agreements with very restrictive terms. Take for instance, the Terms and Conditions from the Fujifilm Australia website:

This FUJIFILM Australia Website ("Website") is owned and operated by FUJIFILM Australia Pty Ltd (ABN 80 000 064 433) ("the Company"). Your access to the Website is conditional upon your acceptance and

150. *Id.*

151. *Cairo, Inc. v. CrossMedia Servs., Inc.*, No. C 04-04825 JW, 2005 U.S. Dist. LEXIS 8450, at *4–5 (N.D. Cal. April 1, 2005).

152. *Id.* at *6–7.

153. *Id.* at *13–14.

154. *See Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230, at *21 (N.D. Tex. Sept. 12, 2007).

155. *CrossMedia*, at *14.

compliance with these terms and conditions, the FUJIFILM Australia Pty Ltd Privacy Policy, notices, disclaimers and any other terms and conditions or other statements contained on the Website (known collectively as “Terms of Use”). Your use of, and/or access to, the Website constitutes your agreement to the Terms of Use. The Company reserves the right to amend the Terms of Use at any time at its sole discretion.¹⁵⁶

As in this example, many websites now routinely state that any browsing on its website, however brief, constitutes “use” of the website subject to its EULA, which a user “assents” to merely by visiting the website. Further, the website can modify the terms of the EULA at any time without notice to the user under the theory of “rolling assent.”¹⁵⁷ The Terms of Service usually contain some kind of mandatory binding arbitration agreement, effectively cutting off judicial relief to users.

Between the widespread use of binding arbitration and the increased use of Browsewrap agreements with no specified point of assent, courts have been unable to draw any meaningful distinction between Browsewrap and Clickwrap. Courts now routinely uphold Clickwrap EULAs, and by equating Clickwrap to Browsewrap, courts have essentially given websites free reign to write more and more restrictive Browsewrap agreements that will be upheld as binding contracts. The small number of Browsewrap cases where plaintiffs have successfully invalidated EULAs share one common element—a point in time that the court could specifically identify as the moment when notice should have been provided, such as completing a sale (*Van Tassell*)¹⁵⁸ or downloading software (*Specht*).¹⁵⁹ But, with more recent Browsewrap language, such as the Fujifilm Browsewrap stated above, where the assenting behavior is merely accessing the website rather than completing a specific action, it is very difficult to identify a moment when the website should have provided notice.¹⁶⁰ The ambiguous point

156. FUJIFILM AUSTRALIA, *Website Terms of Use*, <http://www.fujifilm.com.au/terms-and-conditions/website-terms-of-use> (last visited Sept. 17, 2013) (emphasis added).

157. As seen in language from the Terms of Service for popular websites like Yahoo!: Yahoo! provides the Yahoo! Services (defined below) to you subject to the following Terms of Service (“TOS”), which may be updated by us from time to time without notice to you . . . By accessing and using the Yahoo! Services, you accept and agree to be bound by the terms and provision of the TOS. YAHOO!, *Terms of Service*, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited Sept. 17, 2013).

158. See *Van Tassell v. United Mktg. Group, LLC*, 795 F. Supp. 2d 770 (N.D. Ill. 2011).

159. See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

160. See FUJIFILM AUSTRALIA, *supra* note 156.

of assent remains problematic for digital EULA litigants because courts have difficulty setting a standard of behavior for websites that would invalidate a specific EULA while still upholding the general principles of EULA enforceability, per the substantial case law from Clickwrap and Shrinkwrap agreements.

It is also important to underscore another commonality between nearly all Browsewrap cases—websites' attempts to quash potential lawsuits through mandatory arbitration clauses. As the cases above note, nearly every website involved in Browsewrap disputes not only employed arbitration clauses, but required mandatory binding arbitration in forums convenient to the contracting websites. These few cases represent only the tip of a much larger iceberg, where a majority of potential plaintiffs are shepherded into arbitration agreements that they cannot easily challenge.

V. PROPOSED SOLUTIONS TO THE EULA CONTROVERSY: A SERIES OF LEGISLATIVE DEAD ENDS

In 1999, it was difficult to predict how the Internet would be used for commercial activity. However, most legal scholars recognized the need for regulation of sales and leases for intangible goods such as intellectual property.¹⁶¹ The American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) responded to vocal concerns from legal scholars over the encroaching and pervasive use of Shrinkwrap licenses and began writing a model act on digital commercial activity, known as UCC Amendment 2B or UCC2B.¹⁶² UCC2B was drafted to close the gaps in online transaction regulation, especially those affecting intangible goods, such as licensing agreements. In 2002, the American Bar Association Working Group report on UCC2B stated:

[UCC2B] is an enactment similar to Article 2 of the Uniform Commercial Code (the "UCC"). However, whereas Article 2 governs sales of goods, UCITA [UCC2B] applies to licenses of computer software and other computer information transactions. A codification of the law governing computer information transactions was thought necessary

161. See generally Andres Sawicki, Comment, Repeat Infringement in the Digital Millennium Copyright Act, 73 U. CHI. L. REV. 1455 (2006).

162. For more information on other contemporaneous viewpoints, see Robert W. Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891 (1998); see also Daniel C. Miller, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435 (2003).

since computer information transactions had become a significant factor in the national and even international economy. Moreover, publishers of computer software and providers of information databases in electronic form usually “license” their products or access to their information, rather than selling or leasing the products or information outright.¹⁶³

However, the *ProCD, Inc. v. Zeidenberg* decision to uphold the validity of Shrinkwrap licenses changed “the dynamics of [the UCC2B] negotiations.”¹⁶⁴ The UCC2B proposal grew in scope until ALI withdrew support from the project altogether and the effort was renamed the Uniform Computer Information Transaction Act (UCITA).¹⁶⁵

UCITA was a broad attempt to reorder intersecting laws on intellectual property, digital contracting, and the Internet. In this attempt, UCITA redefined software sales to be generally construed as licenses, not goods, so that individual buyers would not have any ownership rights over software.¹⁶⁶ Instead, buyers would be subject to sellers’ restrictions, which would be determined by individual contracts between the parties.¹⁶⁷ UCITA also allows software vendors to limit their individual liability for defective products, which some commentators argued would allow software companies to engage in fraudulent business practices by contracting out of liability.¹⁶⁸ Criticism of UCITA grew and due to organized opposition, NCCUSL’s efforts to enact the proposal at the state level failed miserably. By 2003 commentators stated, “UCITA has generated unceasing controversy since its inception that has not abated with the recent amendments,” and that they regard “UCITA as a highly flawed piece of legislation.”¹⁶⁹ UCITA also drew stiff opposition from librarian organizations. The American Library Association joined

163. John M. Vittone, *American Bar Association Working Group Report on the Uniform Computer Information Transactions Act*, AMERICAN BAR ASSOCIATION, 2–3 (Jan. 31, 2002), <http://www.americanbar.org/content/dam/aba/migrated/leadership/ucita.authcheckdam.pdf>.

164. *Id.* at 3.

165. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Uniform Computer Information Transactions Act*, available at http://www.uniformlaws.org/shared/docs/computer_information_transactions/ucita_final_02.pdf (last visited Sept. 17, 2013).

166. See Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461, 464–65 (2001).

167. *Id.*

168. See *Controversy*, THE UNIFORM COMPUTER INFORMATION TRANSACTION ACT: ETHICAL ISSUES IN SOFTWARE CONTRACT LAW, <http://www-cs-faculty.stanford.edu/~eroberts/cs181/projects/ucita/controversy.html> (last visited Sept. 17, 2013).

169. Letter from Emily Sheketoff, Exec. Dir., Am. Library Ass’n, et al., to the President and House of Delegates, Am. Bar Ass’n (Jan. 30, 2003), available at <http://archive.ala.org/washoff/ucita/ABAltr0203.pdf>.

with the Association of Research Libraries, the American Association of Law Libraries, the Special Libraries Association, the Medical Library Association, and the Art Libraries Society of North America to create a national coalition entitled Americans for Fair Electronic Commerce Transactions (AFFECT), to oppose UCITA.¹⁷⁰

AFFECT found much to criticize in the proposed UCC2B and divided its concerns into five main categories: (1) “Software purchased would no longer belong to the buyer;”¹⁷¹ (2) “UCITA would permit invasions of privacy;”¹⁷² (3) “Software companies could knowingly ship defective products;”¹⁷³ (4) “UCITA would allow software to be disabled without notification;”¹⁷⁴ and (5) “UCITA would threaten existing

170. See *Who We Are*, AMERICANS FOR FAIR ELECTRONIC COMMERCE TRANSACTIONS, <http://web.archive.org/web/20021201180218/http://ucita.com/who.html> (last visited Oct. 16, 2013).

171. The website lists the following reasons under this category:

UCITA valids [sic] a business model under which licensees are bound to the terms in “shrink-wrap” or “click-on” agreements merely by opening a package or clicking “I agree” to a usually lengthy [sic], complicated agreement.

UCITA allows restrictions on use to be revealed after purchase.

UCITA allows software publishers to change the terms of the contract after purchase.

UCITA allows software vendors to prohibit the transfer of software from one person to another or from one company to another, even in the course of a merger or acquisition.

UCITA allows terms that may severely limit the use of the product.

UCITA allows restrictions that prohibit users from criticizing or publicly commenting on software they purchased.

Why We Oppose UCITA, AMERICANS FOR FAIR ELECTRONIC COMMERCE TRANSACTIONS, <http://www.ucita.com/why.html> (last visited Sept. 18, 2013).

172. *Id.* (“UCITA allows software publishers to legally track and collect confidential information about personal and business activities of licensees. UCITA allows software and information products to contain ‘back door’ entrances, potentially making users’ systems vulnerable to infiltration by unauthorized hackers.”).

173. The website lists the following reasons under this category:

UCITA allows software publishers to deny both large and small businesses many of the current warranty protections they have under present law.

UCITA valids [sic] a business model in which software publishers may sell their products “as is” and disclaim liability for product shortcomings. Imagine buying a refrigerator or stove where the producer does not guarantee that the product will work correctly.

If the consumer wants to sue over a defective product, UCITA allows the software publisher to restrict legal action to a specific jurisdiction—a particular county, state or even a different country.

Id.

174. The website lists the following reasons under this category:

privileges granted under federal copyright laws.”¹⁷⁵ AFFECT has nearly 40 active member organizations including multiple consumer rights groups and large companies, such as ConocoPhillips and Boeing.¹⁷⁶ AFFECT wrote the following warning regarding UCITA:

If signed into law in any state, UCITA will undermine consumer and privacy protections. This proposed legislation would change the rules for purchase and use of computer software and information products for businesses, individuals and non-profits. And if successful, UCITA will cost software consumers billions. In essence, the UCITA legislation validates a “shrink-wrap” or “click-on” approach to electronic licensing, superseding consumer protections, copyright law, and privacy protections.¹⁷⁷

AFFECT’s warnings proved to be accurate and notwithstanding the failure of UCITA, *ProCD, Inc. v. Zeidenberg* paved the way for judicial acceptance of EULAs.¹⁷⁸ Within one year, NCCUSL’s proposed model statutes had only been adopted by two states, Maryland and Virginia, which remain the only states to have adopted UCITA to the present day.¹⁷⁹ Three states were so outraged by the proposed UCITA legislation

UCITA allows software publishers to shut down mission critical software *remotely* without court approval and without incurring liability for the foreseeable harm caused.

UCITA allows software publishers to modify the terms of contracts *after* the sale simply by sending an e-mail—regardless of whether the consumer receives the notification or not.

UCITA allows software publishers to remove their product, simply because usage fees arrive late.

UCITA puts consumers at the mercy of software publishers to “blackmail” users for more fees by their unhindered ability to disable or remove their product for unspecified “license violations.”

Id. (emphasis in original).

175. The website lists the following reasons under this category:

UCITA would permit an end-run around federal copyright law in mass-market licensing agreements that are used by virtually all consumers and that are the mainstay of most library and business operations.

UCITA threatens fair use privileges that allow for the provision of fundamental library services like inter-library loan, archiving and preservation.

UCITA threatens “first sale” privileges that permit donation, transfer or resale of a product.

Id.

176. *Who We Are*, *supra* note 170.

177. *Why We Oppose UCITA*, *supra* note 171.

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

179. *See* MD. CODE ANN., COM. LAW § 22-101 (LexisNexis 2005); VA. CODE ANN. § 59.1-501.1 (2013).

that UCITA “bomb shelter,” also known as anti-UCITA provisions, were passed “to shield . . . state’s citizens from UCITA laws enacted in other states.”¹⁸⁰ What began as an attempt to update UCC law for the Internet age instead resulted in extreme internal dissension between legal academics on how ideal regulations for intangible transactions should look. The controversy came to a head in early 2003 when the American Bar Association withdrew the UCITA resolution from consideration.¹⁸¹ The stiff opposition of AFFECT coupled with the withdrawal of ABA support for UCC2B left legislative solutions to the Clickwrap conundrum mired in disunion. The UCC remains murky at best on the question of commercial transactions involving intellectual property, which has led to an Internet free-for-all. Courts lack consistency in dealing with increasingly restrictive standard form digital contracts and EULAs that erode consumer protection.

In 2003, legal scholars again tackled the problems of Clickwrap and Browsewrap by identifying the main problem: lack of informed consent. The Joint Working Group on Electronic Contracting Practices and the UCC Committee of the Business Law Section of the American Bar Association proposed a test to determine reliable assent.¹⁸² The test considers whether the:

- (1)[U]ser is provided with adequate notice of the existence of the proposed terms;
- (2)[U]ser has a meaningful opportunity to review the terms;

180. UCITA “Bomb-Shelter” Legislation, AFFECT, 1, <http://affect.ucita.com/pdf/UCITABombShelter.pdf> (last visited Sept. 18, 2013).

181. The controversy and the ABA’s subsequent withdrawal of the UCITA resolution from consideration are explained as follows:

The withdrawal of the UCITA resolution followed in the wake of increasing opposition to this controversial act within the ABA. Prior to the opening of the ABA Midyear Meeting in Seattle this weekend, UCITA failed to garner support from six ABA sections, including the Business Law, Intellectual Property, Litigation, Torts and Insurance Practice and Science and Technology sections. In addition, two committees, the Section Officers’ Council’s Technology Committee and the ABA Standing Committee on Law and National Security failed to support passage of the resolution. Seven of the nine members of the ABA Working Group appointed to review UCITA in 2001 advised the House of Delegates that recent amendments to UCITA still did not make UCITA appropriate for approval at this time.

See Carol Ashworth, *UCITA Fails to Receive American Bar Association Approval* (Feb. 11, 2003), <http://www3.wcl.american.edu/cni/0302/33202.html>.

182. Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 280–81 (2003).

(3)[U]ser is provided with adequate notice that taking a specified action manifests assent to the terms; and

(4)[U]ser takes the action specified in the latter notice.¹⁸³

This four-part test is appealing in its simplicity. However, efforts to enact these clear guidelines and similar endeavors to protect consumers from unfair contract terms have been stalled by the bad blood between critics on either side of the UCITA debate.¹⁸⁴ Attempts to regulate online agreements are thus tinged by the history of UCITA dissension and failure—not to mention the effective and highly vocal activism by AFFECT, concerned academics, consumer groups and librarians. Proposed guidelines are haunted by the extreme backlash and internal debate that continues to brew on online forums and among contract scholars frustrated with failed legislative proposals.¹⁸⁵

VI. CUTTING THE GORDIAN KNOT: FEDERAL COPYRIGHT LAW AND LICENSING AGREEMENTS

A. *Copyright and Contract Law: A History of Tensions in the Digital Realm*

In order to explain how copyright law is poised to become the instrument of regulation for online contracts, it is first necessary to explain the interactions between contract law and copyright law. Many early Internet legal commentators who studied the implications of the online expansion of contract law and copyright argued strongly for the regulation of contractual freedom via copyright law. For example, in 1998, Harvard Law Professor William W. Fisher, III wrote, “the question of the proper scope of intellectual property rights on the Internet and the question of the proper magnitude of contractual freedom on the Internet should be understood as interdependent.”¹⁸⁶ He singled out standard form contracts in the form of Clickwrap licenses as the primary imbalance of contractual freedom:

Click-through licenses [Clickwrap] and copyright management systems typically place consumers in a “take it or leave it” position.

183. *Id.*

184. See Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1071–73 (2005).

185. See Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 470–73 (2008).

186. William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1212 (1998).

Opportunities for customized arrangements are virtually nonexistent. Customers commonly do not read the “terms and conditions” they are agreeing to. Finally and perhaps most importantly, the potential consumers of an intellectual product are often not in a position, before deciding whether to agree to a limitation on its use, to predict how valuable the product will be to them and how burdensome will be the limitation in question. In short, Internet-related contracts commonly implicate a dangerous combination of two conditions: the impediments to customization typical of contracts of adhesion[] and informational asymmetries¹⁸⁷

In sum, Fisher argued that the extension of contractual terms beyond normal copyright protections of materials “should be disallowed” and licensed products should only be protected by contractual terms within the copyright statutory protections.¹⁸⁸

Other writers contended that some kind of hybrid Internet law, based on contract law and free from state regulation, would best serve the needs of new Internet merchants who interacted with a global marketplace.¹⁸⁹ Legal scholars who examined contract law on the Internet in the 1990s drew parallels between widespread Shrinkwrap licensing practices and the growing use of Clickwrap. For example, in 1995, commentator Mark Lemley wrote about the use of standard form Shrinkwrap contracts to expand owners’ rights far beyond the statutory guarantees of copyright law.¹⁹⁰ Standard clauses, among other common terms, commonly prohibit “uses of the product that would have been permitted by the application of the fair-use doctrine in copyright law” and “[r]equire[] that the user pay royalties for a period longer than would be permitted by copyright or patent law.”¹⁹¹

Some commentators focused on the copyright implications of Internet contracts and found that the Internet had created a marketplace for copyrighted works that used contract law to frustrate the fundamental goals of copyright protection.¹⁹² Internet contracts often expanded copyright protection to parallel Shrinkwrap licensing terms

187. *Id.* at 1245.

188. *Id.* at 1246.

189. See Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 *IND. J. GLOBAL LEGAL STUD.* 211, 226 (1997).

190. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 *S. CAL. L. REV.* 1239, 1242–48 (1995).

191. Fisher III, *supra* note 186, at 1241 (citing Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 *S. CAL. L. REV.* 1239, 1242–48 (1995)).

192. Lemley, *supra* note 190, at 1280.

found in paper EULAs shipped with software, creating situations where access to information was lessened.¹⁹³ As Niva Elkin-Koren described:

Users are arguably always subject to restrictions when they use a copyrighted work. But restrictions imposed by copyright law are limited and reflect the balance between the need to induce creation and the need to guarantee public access to information. If copyright owners are free to use contractual arrangements to restrict use and are then able to use copyright to prevent any use that is not subject to these restrictions, owners are gaining absolute monopoly over their works.¹⁹⁴

Despite the warnings of writers like Elkin-Koren, courts attempted early on to create a sharp divide between copyright law and contract law in favor of individual contracts. In the landmark Shrinkwrap decision from *ProCD, Inc. v. Zeidenberg*, the court notably stated, “whether a particular license is generous or restrictive, a simple two-party contract is not ‘equivalent to any of the exclusive rights within the general scope of copyright’ and therefore may be enforced.”¹⁹⁵ Thus, *ProCD*, which paved the way for widespread acceptance of Shrinkwrap and later Clickwrap contracts, ruled in favor of interpreting contract law independently from and superior to any overlapping copyright law principles.¹⁹⁶ This reasoning was echoed in later decisions, such as *Bowers v. Baystate Technologies, Inc.*, where the U.S. Court of Appeals for the Federal Circuit held that the Copyright Act did not preempt the Shrinkwrap contract in question and that the contract could expand the protections to the seller beyond those afforded by copyright law.¹⁹⁷

B. *The Role of the Digital Millennium Copyright Act in Policing Internet Law*

The Digital Millennium Copyright Act (DMCA)¹⁹⁸ was enacted in 1998 to implement international treaties and effectively extended the reach of copyright law and limited the liability of Internet Service Providers (ISPs) for illegal or infringing uses of copyrighted material by ISP users.¹⁹⁹ Section 1201(a)(1) of the DMCA requires that every three

193. *Id.* at 1245–48 (discussing Shrinkwrap user license agreements).

194. Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 109–10 (1997).

195. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996).

196. *Id.* at 1454–55.

197. *Bowers v. Baystate Techs. Inc.*, 320 F.3d 1317, 1323 (Fed. Cir. 2003).

198. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

199. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (December 1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

years the Librarian of Congress issue determinations on whether any classes of copyrighted works are subject to exemptions from copyright restrictions.²⁰⁰ Not only have these determinations directly altered copyright law, but they have also affected Internet law generally by removing restrictions from intellectual property. Section 1201 provides:

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.²⁰¹

These Librarian determinations of noninfringing uses are a very unique form of Internet regulation because the determinations are made every three years and can be revised to reflect new advances in digital user experiences. Thus, the DMCA has a built-in series of hearings and determinations that are revisited often to perfect existing regulation of areas touched by copyright law. Per the Copyright Office “Legislative Requirements for Rulemaking Proceedings,” a series of rulemaking proceedings take place every three years.²⁰² The Register of Copyright is to “provide notice of the rulemaking, seek comments from the public, consult with the Assistant Secretary for Communications and Information of the Department of Commerce, and recommend final regulations to the Librarian of Congress.”²⁰³

The proceedings are thus marked by clear checks and balances through the involvement of both official recommendations from the Department of Commerce and more informal “comments” from the public.²⁰⁴ While it may seem puzzling to view EULAs through the lens of the quasi-legislative process determined by the Copyright Office, copyright law has already been closely tied to Internet law generally, and to EULAs more recently.

As very early Internet commentators pointed out, in a legal sense everything on the Internet could be subject to copyright violations. For example, in *Ticketmaster Corp. v. Tickets.com, Inc.*, the U.S. District

200. 17 U.S.C. § 1201(a)(1)(C) (2012).

201. *Id.* § 1201(a)(1)(D).

202. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,826 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

203. *Id.*

204. *Id.*

Court for the Central District of California considered whether transferring users from event pages on Ticketmaster.com to other pages within the website violated copyright law, questioning the legality of mere navigation from one website to another.²⁰⁵ The court concluded, “hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved, the customer is automatically transferred to the particular genuine web page of the original author This is analogous to using a library’s card index”²⁰⁶ Even more pertinently, the court considered whether the “small print” on Ticketmaster.com’s Browsewrap contract was enforceable.²⁰⁷ Ticketmaster’s Terms of Service stated, “no deep [hyper]linking to the site” was permitted.²⁰⁸ The court went on in a later ruling to state:

[T]he time, place, venue, price, etc. of public events are not protected by copyright even if great care and expense is expended in gathering the information Thus, unfair as it may seem to T[icketmaster], the basic facts that it gathers and publishes cannot be protected from copying. To be sure, the manner of expression and format of presenting those facts is protectable, but T[ickets.]com has taken great care not to use the T[icketmaster] format and expression in publishing the facts it takes from T[icketmaster].²⁰⁹

The court weighed the power of the Ticketmaster EULA against the reach of copyright regulation and determined that copyright regulation effectively trumped the Browsewrap contract because Ticketmaster had attempted to contract terms beyond copyright protections.²¹⁰ The court also drew a distinction between the website Terms of Service and Shrinkwrap contracts, stating:

[C]ases[] where the packing on the outside of the CD stated that opening the package constitutes adherence to the license agreement contained therein . . . [have] been held to be enforceable. That is not the same as this case because the “shrink-wrap license agreement” is open and obvious and in fact hard to miss. Many web sites make you click on “agree” to the terms and conditions before going on, but Ticketmaster does not. Further the terms and conditions are set forth so that the

205. Ticketmaster Corp. v. Tickets.com, Inc. (*Ticketmaster I*), No. CV99-7654 HLH, 2000 U.S. Dist. LEXIS 4553, at *4–6 (C.D. Cal. Mar. 27, 2000).

206. *Id.* at *6.

207. *Id.* at *8.

208. *Id.*

209. Ticketmaster Corp. v. Tickets.com, Inc. (*Ticketmaster II*), No. CV99-7654-HLH, 2000 U.S. Dist. LEXIS 12987, at *10 (C.D. Cal. Aug. 11, 2000).

210. *See id.* at *11–14.

customer needs to scroll down the home page to find and read them It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site.²¹¹

Given the initial understandings of online content, however odd the discussions may seem today, as part of a potential canon of copyrightable digital content, it perhaps is not unreasonable that the Librarian determinations of the DMCA have become such a powerful source of Internet regulation through copyright law. The most recent 2010 Librarian determinations²¹² on works exempt from copyright law touched upon wide ranging areas of Internet law.²¹³ The new 2010 determinations allow: the incorporation of motion picture DVDs into new works for comment or criticism,²¹⁴ the circumvention of controls on

211. *Ticketmaster I*, 2000 U.S. Dist. LEXIS 4553, at *8.

212. James H. Billington, *Statement of the Librarian of Congress Relating to Section 1201 Rulemakings*, U.S. COPYRIGHT OFFICE (July 26, 2010), available at <http://www.copyright.gov/1201/2010/Librarian-of-Congress-1201-Statement.html>.

213. The doctrine of copyright Fair Use is a highly developed area of intellectual property law which deals generally with the exceptions and factors required to prove statutory exceptions under the U.S. Code Title 17 Chapter 1 Section 107, Limitations on Exclusive Rights: Fair Use, which states in pertinent part that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2012). For a general discussion of the Fair Use doctrine, see Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990).

214. Billington, *supra* note 212. Included in one of the six classes of works were:

- (1) Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable

executable programs on wireless telephone handsets,²¹⁵ the connection of wireless telephone handsets to telecommunications networks,²¹⁶ the investigation or correction of security flaws in video games,²¹⁷ the protection of computer programs by dongles,²¹⁸ and literary works in e-book format with access controls.²¹⁹ In practical terms, the determinations mean that formerly copyrighted material may be copied for educational use, that cellphone companies must allow users the

grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

- (i) Educational uses by college and university professors and by college and university film and media studies students;
- (ii) Documentary filmmaking;
- (iii) Noncommercial videos.

Id.

215. *Id.* (“(2) Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.”).

216. The press release explains:

- (3) Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.

Id.

217. For video games:

- (4) Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works, when circumvention is accomplished solely for the purpose of good faith testing for, investigating, or correcting security flaws or vulnerabilities, if:
 - (i) The information derived from the security testing is used primarily to promote the security of the owner or operator of a computer, computer system, or computer network; and
 - (ii) The information derived from the security testing is used or maintained in a manner that does not facilitate copyright infringement or a violation of applicable law.

Id.

218. *Id.* (“(5) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace[.]”).

219. *Id.* (“(6) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into a specialized format.”).

ability to “tether” their smartphones to act as wireless hotspots, and that companies may reverse engineer video games to search for security flaws, among other new uses. Again, the changes to copyright regulations have far reaching implications for a variety of users since so many copyrighted works are used in a range of digital mediums.

However, from a contract perspective, copyright regulations are usually far removed from classic discussions of contract legality. Copyright regulation of EULAs through the DMCA has only recently encroached on software licensing. The landmark Librarian determination for EULAs in 2010 was spurred by controversy over Apple’s popular iPhone and iPod Touch devices. The determinations made waves in the legal communications community by legalizing the “jailbreaking,” also known as the “rooting” of smartphones.²²⁰ By jailbreaking an iPhone, a user can remove the limitations placed by individual cellphone manufacturers.²²¹ For example, by jailbreaking the Apple iPhone, a user obtains access to the complete Unix file system, which makes up the operating system of the smartphone.²²² Users can then download any application (i.e., smartphone “app”) or program for the phone instead of being limited to downloading from the approved programs available through Apple’s “App Store.”²²³ Since Apple dominated the smartphone market during the Librarian fact finding, the Apple iPhone became the public face of the fight over the legality of jailbreaking smartphones.²²⁴

Before the Librarian of Congress created a Fair Use copyright exception for jailbreaking smartphones in 2010, individual smartphone owners were issued a copy of the User Policy from the phone manufacturer, which included a EULA governing the Terms of Use. The popular Apple devices were shipped with EULAs which stated, among other terms, that the software was “licensed, not sold to you by Apple

220. To read more about jailbreaking, see Jenna Wortham, *Unofficial Software Incurs Apple’s Wrath*, N.Y. TIMES (May 13, 2009, 8:47 AM), http://msl1.mit.edu/furdlog/docs/nytimes/2009-05-12_nytimes_iPhone_jailbreaks.pdf. See also Nicolas Seriot, *iPhone Privacy*, http://seriot.ch/resources/talks_papers/iPhonePrivacy.pdf (last visited Sept. 18, 2013).

221. See Wortham, *supra* note 220.

222. See *The iOS Environment*, iOS Developer Library, APPLE, <https://developer.apple.com/library/ios/documentation/iphone/conceptual/iphoneosprogrammingguide/iPhoneAppProgrammingGuide.pdf> (last visited Oct. 16, 2013).

223. See Wortham, *supra* note 220.

224. See Jacqui Cheng, *Apple officially surpasses 10 million iPhones sold in 2008*, ARS TECHNICA (Oct. 21, 2008, 5:29 PM), <http://arstechnica.com/apple/news/2008/10/apple-officially-surpasses-10-million-iphones-sold-in-2008.ars>.

Inc. for use only under the terms of this License.”²²⁵ It was not until midway through 2009 that Apple began to issue statements to users stating that the illegality of jailbreaking Apple devices stemmed from copyright law, instead of referring users to the wording in its own EULA.²²⁶ The abrupt change in justification from Apple came as a direct result of lobbying by groups such as Electronic Frontier Foundation (EFF), who petitioned the Librarian of Congress during its last three-year fact-finding period to rule that jailbreaking smartphones should be legal under the Fair Use doctrine.²²⁷ Thus, in an unexpected move, the DMCA transformed the discussion over the legality of the Apple EULA regarding jailbreaking from a question of contract law to a question of copyright Fair Use governed by the DMCA. The 2010 Librarian determination that the restrictions placed on smartphones by cellphone companies were not the proper subject of copyright protection made licensing the protection code via EULA impossible.²²⁸ Simply put, the code that prevented jailbreaks is no longer protected by copyright law, which means that no license can apply to the code. This in turn moves the code outside the protection of contract law as well since it is not the proper subject of a licensing agreement.

This Librarian determination was groundbreaking because it highlighted the overlap between copyright regulation and contract law. The Librarian of Congress has now considered links on Internet websites as well as the mobile mediums by which users access the Internet. Perhaps unexpectedly, the Librarian of Congress has emerged as an arbiter of the intersection of copyright law and contract law due to the large overlap of legal precedent in relation to the Internet.

225. Apple iPhone Software License Agreement, APPLE, available at <http://www.apple.com/legal/sla/docs/iphoneos31.pdf>. The agreement states:

1. General. The software (including Boot ROM code and other embedded software), documentation, interfaces, contents, fonts and any data that came with your iPhone (“Original iPhone Software”), as may be updated or replaced by feature enhancements, software updates, or system restore software provided by Apple (“iPhone Software Updates”), whether in read only memory, on any other media or in any other form (the Original iPhone Software and iPhone Software Updates are collectively referred to as the “iPhone software”) are licensed, not sold, to you by Apple Inc. (“Apple”) for use only under the terms of this License. Apple and its licensors retain ownership of the iPhone software itself and reserve all rights not expressly granted to you.

Id. (emphasis added).

226. Mike Schramm, *Apple Says Jailbreaking is Illegal*, TUAW (Feb. 13, 2009, 1:45 PM), <http://www.tuaw.com/2009/02/13/apple-says-jailbreaking-is-illegal/>.

227. *Id.*

228. See Billington, *supra* note 212.

VII. WHY THE DMCA IS THE BEST HOPE FOR REMEDYING
DIGITAL LACK OF NOTICE

In light of the 2010 Librarian of Congress determinations on jailbreaking smartphones, it is clear that the DMCA has the potential to use copyright law in areas that were traditionally left to private contracts between parties. From a contract perspective, the 2010 determinations are stunning because suddenly, the tersely written language from smartphone EULAs simply did not matter anymore—the Librarian determinations had re-centered the legal battle to a determination of copyright law.

The discussion over the legality of the Shrinkwrap smartphone EULAs, which mirrored the legal discussion from Clickwrap EULAs, was thus halted entirely by the requisite triennial Copyright Librarian determinations under the DMCA.

EULAs are prevalent in Browsewrap and Clickwrap contracts online, and the DMCA represents a unique opportunity to balance federal regulation with the use of technology. The DMCA, through the jailbreaking decision, has begun to look at overly restrictive EULAs related to software through the lens of the Fair Use copyright exception. Just as the Apple devices ran on proprietary software which shipped with a classic Shrinkwrap contract with a EULA in the Terms of Service, so too do many, if not a majority of, software programs, which are downloaded via Clickwrap agreements with very restrictive licensing terms. As detailed above, there is complete agreement among circuit courts that a Clickwrap agreement is both legally valid and the equivalent of classic software licensing in Shrinkwrap contracts. To the Librarian of Congress, it is possible that the close connection between Shrinkwrap and Clickwrap EULAs could justify an investigation into online contracting practices, since legally, there is no difference between the two.

There are also indications that courts may be comfortable with allowing the DMCA to consider questions of digital EULA enforceability. In the 2004 case *Davidson & Associates, Inc. v. Internet Gateway, Inc.*, the U.S. District Court for the Eastern District of Missouri considered the reverse engineering of video games on CD-ROMS, which contain the classic Shrinkwrap licenses, for the purposes of creating a rival open source alternative online gaming system to Battle.net, which then employed a hybrid Clickwrap-Browsewrap license.²²⁹ In negotiating the

229. *Davidson & Assocs., Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164 (E.D. Mo. 2004).

terms of all the competing EULAs, the court considered in great depth the Fair Use provisions of the Copyright Act under the DMCA as possible defenses for plaintiffs.²³⁰ The court finally decided the case on DMCA grounds by weighing the Fair Use defense of “interoperability” against the DMCA penalties for anti-circumvention technology and eventually held in favor of the licensing party.²³¹ Thus, *Internet Gateway* is a clear example of a court’s use of the DMCA in conjunction with digital EULAs to balance copyright protections against Fair Use. It altered the legal discussion of digital contracts from the EULA-controlled, purely contractual defenses currently dominating Browsewrap agreements, to a more nuanced view of contract law aligning with DMCA considerations. The DMCA could use its broad authority over copyrighted digital material, i.e., all material subject to licenses, to redesign the methods of digital contracting without overstepping into areas of traditional contract law, like determinations on valid offer and acceptance or unconscionability claims. Instead, the DMCA would offer a fresh venue to rehear the arguments for and against standard regulation of digital contracts. As detailed above, solutions to the Clickwrap conundrum and concerns about overreach by digital EULAs have generally stalled. The cases reveal a landscape of erosion of consumer rights, confusion over notice requirements, and outright dissension among circuits on fundamental questions of online contract formation. Similarly, legislative attempts to overhaul existing contract regulation for Internet transactions have fallen prey to internal controversy over UCITA.

It is imperative that federal regulation be considered as a possible route forward in solving the Clickwrap conundrum and stopping the spread of overly powerful Browsewrap agreements. Quite simply, the common law has failed to stop the abuses of Clickwrap and Browsewrap. In most circumstances, the UCC has proven to be well equipped to strike a balance between corporate concerns and protecting users from contracting abuses. Unfortunately, the proposed UCC2B/UCITA provision was a failure. Contract scholars continue to be deeply divided by UCC2B/UCITA, and with the withdrawal of support from the American Bar Association, further progress on state codification of UCC2B/UCITA in the future seems unlikely at best. Similarly, national efforts to reopen discussion on enacting guidelines for creating enforceable contracts such as the proposed standards from the Joint

230. *Id.* at 1180–83.

231. *Id.* at 1135.

Working Group on Electronic Contracting Practices²³² have been stalled by the acrimony from the UCITA proposal. Fortunately, the work done by these groups does not need to languish any longer. The next Librarian determinations in 2013 are a timely opportunity for contract scholars to revisit the entrenched problems of EULAs with a fresh perspective in the forum of the Librarian hearings. The main source of EULA litigation, mandatory arbitration clauses, could be negotiated and standards could be established to prevent unequal bargaining by removing form contracts with arbitration requirements as a proper subject of intellectual property protections.

Similarly, the individual cases discussed here also foretell of the shortcomings of the judiciary in correcting digital EULA abuses. The rise of Browsewrap has accelerated the inability of courts to reign in digital EULAs by muddling the point at which courts can convincingly invalidate contracts due to lack of assent. The court in *Ticketmaster Corp. v. Tickets.com, Inc.* stated, “[i]t cannot be said that merely putting the terms and conditions in this fashion [listed on the website] necessarily creates a contract with any one using the web site[,]”²³³ but the effectiveness of Clickwrap cases since *ProCD, Inc. v. Zeidenberg* has created a legal climate where Clickwrap agreements are routinely enforced.²³⁴ Browsewrap is building on the successes of Clickwrap to push the boundaries of enforceable contracts even further. Now, it is all too likely that any user clicking through a website can become bound to an overly restrictive EULA without even meaning to contract, and can be left without a meaningful chance to decline acceptance. In the robot cases, users can send queries to a variety of websites looking for publicly available information and inadvertently become bound to a EULA from a website the users never even viewed.

232. Kunz et al., *supra* note 182, at 281. The proposed test suggests that a user would validly and reliably assent to a Browsewrap agreement if the following four elements are met:

- (1) The user is provided with adequate notice of the existence of the proposed terms.
- (2) The user has a meaningful opportunity to review the terms.
- (3) The user is provided with adequate notice that taking a specified action manifests assent to the terms.
- (4) The user takes the action specified in the latter notice.

Id.

233. *Ticketmaster Corp. v. Tickets.com, Inc. (Ticketmaster I)*, No. CV99-7654 HLH, 2000 U.S. Dist. LEXIS 4553, at *8 (C.D. Cal. Mar. 27, 2000).

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

Instead of watching the common law continue to erode contract protections in adhesionary contracts through digital EULAs, the DMCA could easily adopt a simple four-part test, such as the standard proposed during the Librarian hearing process by the Joint Working Group on Electronic Contracting Practices.²³⁵ The DMCA also has the built-in protection of the agency-required three-year review of the copyright doctrine to self-correct any imbalances created by changes to contracting requirements. Any change made by the DMCA would not become a far-ranging tyranny of copyright law over contract law because new regulatory requirements would only extend to digital copyrighted material, such as licenses. Thus, the basic tenants of digital contracts could remain intact, but the DMCA could regulate the licensing of intellectual property since such material falls under the purview of the DMCA. While the ultimate scope of any DMCA intervention into EULAs generally is unclear, the Librarian determinations would at least provide a new start to the lofty goals of remedying online contract unfairness. The impetus for UCC2B and the concerns in dozens of judicial opinions paint a clear picture of an Internet where standard form contractual terms have begun to overwhelm consumers who have little-to-no individual bargaining power. The DMCA can rebalance copyright law and contract law by insisting on a limit to adhesionary EULAs, thus extending copyright protection beyond the carefully crafted balances of intellectual property.

The possibility that the DMCA's intervention in the field of EULA regulation could result in a complete failure is hardly remote given the entrenched acrimony over UCITA. However, the DMCA is the best hope for individual consumers to regain some semblance of traditional contract bargaining power. Individual consumers, digital companies, and legal commentators all have a role to play in shaping the playing field of digital contracts. The DMCA is a venue where the political process of reforming EULAs and salvaging informed consent could finally take place.

CONCLUSION

As detailed above, the presumed legality of Clickwrap agreements has hardly quieted the outrage felt by many users and legal commentators who find such electronic form contracts disquieting, to say the least. Browsewrap agreements have gone even further than

235. Kunz et al., *supra* note 182, at 281.

Clickwrap and have exacerbated the contract concerns related to the assent requirement in traditional negotiated agreements.

One opportunity for change is available in the fact-finding that the Librarian of Congress conducts every three years. This Article posits that the recent 2010 expansion of the DMCA regulation into the arena of legalizing the jailbreaking of smartphones should also be viewed as an unexpected intervention into an area which, until the DMCA involvement, had been under the complete control of contract law through EULAs. It is this involvement that has become the best chance to reclaim the traditional contract protections of notice and conscionability. If copyright law, under the guise of license regulation, can invalidate the current lopsided “bargaining” of EULAs in favor of a more transparent process to assess contractual assent, then users and legal commentators should attempt to use the new shield of the DMCA copyright regulation to defend against the further encroachment of Clickwrap and Browsewrap.