MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 26 | Issue 4 Article 9

2000

Click and Commit: What Terms are Users Bound to When They Enter Web sites?

Dawn Davidson

CLICK AND COMMIT: WHAT TERMS ARE USERS BOUND TO WHEN THEY ENTER WEB SITES?

Dawn Davidson†

I. INTRODUCTION

The Internet[1] has grown at an explosive rate over the past several years[2] and is now more accessible than ever as it becomes a common and

† J.D. candidate, May, 2001; William Mitchell College of Law; B.A., psychology, 1998, University of Michigan.

1. The Internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." Reno v. American Civil Liberties Union, 521 U.S. 844, 844 (1997). The Internet provides a variety of communication and information retrieval methods including electronic mail ("e-mail"), "newsgroups," "chatrooms," and the "World Wide Web." *See id.* at 851. Together these tools constitute what is known to Internet users as "cyberspace" since it is "located in no particular geographical location but available to anyone, anywhere in the world with access to the Internet." *Id.*

2. *See* Geoffrey G. Gussis, *Website Development Agreements: A Guide to Planning & Drafting*, 76 WASH. U. L.Q. 721, 721 (1998). The Internet originated in universities, national laboratories, and the military, and prior to 1995 was hidden from the public view. *See generally* Gary Fresen, *The Internet: An Introduction to Basic*

practical means of communication for people all over the world.[3] Consequently, there is a "seemingly limitless target market" for those who publish information or conduct business over the Internet.[4] The phenomenal growth of the Internet as a global medium has posed new challenges for law[5] as legal issues arise as to the rights of Web site publishers and consumers of the products and services that Web sites offer.[6] In fact, "the law has difficulty catching up with the rapid growth and changes in the world of online commerce."[7]

In response to these legal issues there is an emerging trend to

---

Legal Risks that Impact Consumers, 10 LOY. CONSUMER L. REP. 64, 64 (1998). Now, the Internet has moved from the academic and research fields to become a part of many people's daily lives. *See* Gail L. Grant, *Business Models for the Internet and New Media*, 545 PLI/PAT 39, 41 (1999). Internet use continues to grow—the number of computers connected to the Internet doubles every 18 months, the number of users and e-mail addresses doubles every 12 months and the number of Web sites doubles every 3 months. *See id.*; *see also* Fresen, *supra* note 2, at 65.

3. *See* Joshua A. Marcus, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 245 (1998).

4. *See* Stephen J. Davidson & Scott J. Bergs, *Open, Click or Download: What Have You Agreed To? The Possibilities Seem Endless*, 16 COMPUTER LAW. 1, 1 (1999).

5. *See id.* at 1-8 (discussing the primary protections available for online works, reviewing how various courts have addressed approaches to contract formation over the Internet, and anticipating some legal issues that may arise as the number and manner of online information and business transactions increase). *See generally* Fresen, *supra* note 2, at 64 (addressing Internet issues involving intellectual property law, jurisdiction, criminal liability, fraud and theft, and federal pre-emption of state common law defamation actions).

6. "The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers . . . ." *Reno*, 521 U.S. at 852. The Web consists of elaborate documents, known as Web "pages" or Web "sites," stored in different computers all over the world. *See id.* Each Web site has its own address by which users can easily locate the site by typing it in the available space. *See id.* The people who post information on Web sites are known as Web site "publishers." *See id.* at 853. Any person with a computer connected to the Internet can publish information, and today those publishers include government agencies, educational institutions, commercial entities, advocacy groups, as well as individuals. *See id.*

7. Serge G. Avakian, *Global Unfair Competition in the Online Commerce*, 46 UCLA L. REV. 905, 905 (1999). Since the world of online commerce is rapidly changing, there are a number of challenges for the law. *See id.* For instance, due to the Internet's global reach, a party conducting business over the Internet displays its trademark around the world. *See id.* However, while the party's use of that trademark may be lawful in its country of origin, it is unclear if its use in other countries infringes on the trademark of other parties who may have the same or similar trademark in those nations. *See id.* "While trademark law is territorial in application the Internet does not recognize such territorial boundaries." *Id.* For courts and legislators who are struggling to address Internet legal issues, the primary difficulty they are faced with is finding the right analogy to apply when adapting traditional legal doctrines to the Internet. *See* Fresen, *supra* note 2, at 65.

privately regulate the use of Web sites on the part of Web site publishers.[8] This regulation has taken the form of creating legal and contractual terms for Web sites to impose obligations and limitations on the user's rights.[9] As a result, many Internet Web sites have contractual terms lurking in the background that may be binding on unsuspecting Web site users.

A. *Examples of Online Contracts*

There are many forms of Web agreements, each designed to protect different aspects of Web site development and use.[10] These agreements include content provider agreements, Web site development and service agreements, forum and chat room access agreements, advertising and linking agreements, and Internet user/Web access agreements.[11] This Comment focuses on one narrow form of these agreements: Web site user agreements.

Most Web site publishers have terms and conditions governing the rights of the users of their sites.[12] These terms and conditions usually include rules for use of content,[13] warranty disclaimers,[14] indemnity

---

8. *See* Fred M. Greguras et al., *Electronic Commerce: On-line Contract Issues*, 452 PLI/PAT 11, 24 (1996) (arguing that while on-line vendors are understandably concerned about uncontrolled dissemination of information, contracts can be drafted to provide protection to vendors as well as taking account of reasonable use of end-users).

9. *See* Jonathan D. Hart et al., *Cyberspace Liability*, 523 PLI/PAT 123, 169 (1998) [hereinafter *Cyberspace Liability*].

10. *See* J.T. Westermeier, *Web Agreements*, 505 PLI/PAT 321, 323 (1998).

11. *See id.*

12. Many Web sites on the World Wide Web now have some sort of a license/user agreement. *See, e.g., AltaVista* (visited Mar. 12, 2000) <http://-www.altavista.com/legal/termsofuse.shtml> (explaining AltaVista's policy regarding use of its Web site); *MapQuest* (visited Mar. 12, 2000) <http://www.mapquest.com> (putting forth the terms and conditions for end users of MapQuest); *ZDNet* (visited Mar. 12, 2000) <http://www.zdnet.com-/filters/terms> (containing ZDNet's user agreement); *see also* Jerry C. Liu et al., *Electronic Commerce: Using Clickwrap Agreements*, 15 COMPUTER LAW. 10, 10 (1998) ("Typical visitation terms restrict the visitor to using material at the Web site for non-commercial purposes only, or require the visitor to agree not to reproduce or distribute the content at the Web site.").

13. *See, e.g., ZDNet* (visited Mar. 12, 2000) http://www.zdnet.com-/filters/terms ("Users of the Service may use the content only for their personal, noncommercial use.").

14. *See, e.g., AltaVista* (visited Mar. 12, 2000) <http://www.altavista.com/-legal/termsofuse.shtml> Here the "Disclaimer of Warranties" states in relevant part:

> The Service is a free service offered by AltaVista Company.

provisions,[15] and even forum selection clauses in case a lawsuit arises.[16] In addition, many Web sites have terms limiting the Web site publisher's liability,[17] and almost all Web sites contain terms protecting their

---

> The Web changes constantly and no searching or indexing techniques can possibly index all pages accessible on the Web. As a result, AltaVista does not and cannot guarantee that your search results will be complete or accurate or that the links associated with the indexed sites will be accurate at the time of your search. . . .
>
> THE SERVICES AND ALL THE INFORMATION, PRODUCTS AND OTHER CONTENT (INCLUDING THIRD PARTY INFORMATION, PRODUCTS AND CONTENT) . . . INCLUDED IN OR ACCESSIBLE FROM THIS WEB SITE AND THE AV SITES, ARE PROVIDED "AS IS" AND ARE SUBJECT TO CHANGE AT ANY TIME WITHOUT NOTICE TO YOU. TO THE FULLEST EXTENT PERMITTED BY LAW, ALTAVISTA DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES (EXPRESS, IMPLIED AND STATUTORY, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT OF PROPRIETARY RIGHTS) AS TO THE SERVICES AND ALL THE INFORMATION, PRODUCTS AND OTHER CONTENT (INCLUDING THIRD PARTY INFORMATION, PRODUCTS AND CONTENT) INCLUDED IN OR ACCESSIBLE FROM THIS WEB SITE AND THE AV WEB SITES.

Id.

15. *See, e.g., ZDNet* (visited Mar. 12, 2000) <http://www.zdnet.com/-filters/terms>. The "indemnity" section of the User Agreement states:

> You agree to indemnify, defend and hold ZD and its affiliates, and their respective officers, directors, owners, agents, information providers and licensors (collectively, the "ZD Parties") harmless from and against any and all claims, liability, losses, costs and expenses (including attorneys' fees) incurred by any ZD Party in connection with any use or alleged use of the Service under your password by any person, whether or not authorized by you. ZD reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by you, and in such case, you agree to cooperate with ZD's defense of such claim.

Id.

16. *See id.* This section of the agreement has the heading "Miscellaneous" and states in relevant part:

> This agreement shall be construed in accordance with the laws of the State of New York, and the parties irrevocably consent to bring any action to enforce this Agreement in the federal or state courts located in New York, NY, the Borough of Manhattan.

Id.

17. *See, e.g., AltaVista* (visited Mar. 12, 2000) <http://www.altavista.com-

intellectual property.[18] Although this practice appears to be a valid undertaking on the part of Web site publishers to protect their interests, the way in which these terms and conditions are presented to the users may raise legal issues as to their enforceability. The Web site user agreement's disturbing characteristic is that the agreements imply that they are effective automatically upon accessing and using the Web site.[19] The problem is that the terms and conditions often are written in the form of a contract, the existence of which is not easily known to Web site users. The only way to find the contracts is through a link[20] at the bottom of the home page or elsewhere. These links are usually one word or a

---

/legal/termsofuse.shtml>. The "Liability Disclaimer" states:

> IN NO EVENT SHALL ALTAVISTA OR ANY OF ITS AFFILIATES OR CONTENT PROVIDERS BE LIABLE FOR ANY DAMAGES WHATSOEVER, INCLUDING BUT NOT LIMITED TO ANY DIRECT, INDIRECT, SPECIAL, CONSEQUENTIAL, PUNITIVE OR INCIDENTAL DAMAGES, OR DAMAGES FOR LOSS OF USE, PROFITS, DATA OR OTHER INTANGIBLES, OR THE COST OF PROCUREMENT OF SUBSTITUTE GOODS AND SERVICES, ARISING OUT OF OR RELATED TO THE USE, INABILITY TO USE, UNAUTHORIZED USE, PERFORMANCE OR NON-PERFORMANCE OF THIS WEB SITE, ANY AV SITE OR THE SERVICES, EVEN IF ALTAVISTA HAS BEEN ADVISED PREVIOUSLY OF THE POSSIBILITY OF SUCH DAMAGES AND WHETHER SUCH DAMAGES ARISE IN CONTRACT, NEGLIGENCE, TORT, UNDER STATUTE, IN EQUITY, AT LAW OR OTHERWISE.

Id.

18. *See Cyberspace Liability*, *supra* note 9, at 169-170. Protecting intellectual property includes granting users the right to use material on the Web site only for personal, non-commercial purposes and prohibiting reproduction and/or redistribution of contents found on the Web site. *See id.*

19. *See, e.g., Alta Vista* (visited Mar. 12, 2000) <http://www.altavista.com/-legal/termsofuse.shtml> ("By using the Services, you are agreeing to all of these terms, conditions and notices, without modification."); *MapQuest* (visited Mar. 12, 2000) <http://www.mapquest.com> (scrolling to the bottom of the screen and clicking on "Copyright Notice/Terms of Use" reveals the following: "NOTICE: BY PROCEEDING TO USE THIS SERVICE, YOU ACKNOWLEDGE YOUR AGREEMENT WITH THE FOLLOWING TERMS AND CONDITIONS. IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, THEN DO NOT USE THIS SERVICE.").

20. "Links" are typically blue-colored or underlined texts or images that allow users to move from one Web page to another without typing in the Web address by using the computer mouse to click on the link. *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 852 (1997). Links lead often to other documents created by that Web site publisher, as is the case with the user agreements at issue, but can also be an avenue to other documents located anywhere on the Internet. *See id.* at 852-53.

short phrase among several other links.[21] Only close inspection of each Web site would reveal these "contracts."

For instance, ZDNet Internet information service has a "User Agreement" on an interior page of its Web site that can be found only by scrolling down to the bottom of the home page and clicking on the "terms and conditions" link.[22] AltaVista, another web site and search engine, has a similar agreement on an interior page that is identified only by clicking on the "Terms of Use" link at the bottom of the page.[23] Other Web sites use links identified by such words and phrases as "copyright,"[24] "copyright notice/terms of use,"[25] and "legal."[26]

Since the existence of these agreements is not known to most Internet users, their enforceability as contracts is questionable.[27] As of the time of this Comment, there have been no reported cases involving these particular types of online contracts. However, a closer look at common contract law principles and recent cases involving similar issues will shed some light on the possible path that courts may follow when presented with a case involving hidden or inconspicuous online user agreements.

This Comment analyzes the possible enforceability of the often inconspicuous agreements governing the use of Web sites. Section II lays out the common law principles of contract formation and the issues created when they are applied to Web site user agreements. Section III discusses a trend in recent cases involving computer software license agreements and analyzes the significance of these holdings on Web site user agreements. Section IV explores cases addressing issues of proper notice of terms, enforceability of adhesion contracts, and unconscionability. Section V considers the enforceability of particular provisions often found in Web site user agreements. Section VI concludes by recommending that Web site proprietors provide more adequate

21. *See, e.g., MapQuest* (visited Mar. 12, 2000) <http://www.mapquest.com>. At this Web site the user must scroll to the bottom of the home page to find several lines of small type set up as follows: "Copyright Notice/Terms of Use | Privacy | Help | MapQuest MapStore | MapQuest.com." *Id.* To get to the user agreement the user must find and click on "Copyright Notice/ Terms of Use." *See id.*

22. *See ZDNet* (visited Mar. 12, 2000) <http://www.zdnet.com>.

23. *See AltaVista* (visited Mar. 12, 2000) <http://www.altavista.com>.

24. *See, e.g., Mapquest* <http://www.mapquest.com> (providing a link to "Privacy Policy & Terms and Conditions" and then a second link labeled "Copyright Info").

25. *See id.*

26. *See, e.g., Lexis-Nexis* <http://www.lexis-nexis.com> (using a link designated "legal" on its homepage).

27. *See Cyberspace Liability, supra* note 9, at 171.

notice of their user agreements to increase the likelihood that courts will uphold them as enforceable contracts.

II. THE ISSUE OF CONTRACT FORMATION

A. *Elements of a Contract*

The term "contract" has been defined in many different ways.[28] The Restatement (Second) of Contracts defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[29] Corpus Juris Secundum states that a contract is "a promise supported by consideration, which arises, in the normal course of events, when the terms of an offer are accepted by the party to whom it is extended."[30] Therefore, a legally enforceable contract includes offer and acceptance, consideration, and mutual assent.[31]

Mutual assent is a critical component of contract formation.[32] A party may assent by words, acts or failure to act.[33] "The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties."[34] However, "a manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined."[35]

Another essential element of a contract is legal consideration.[36] Consideration is a bargained for exchange which consists of an act or promise of benefit to one party or a loss or detriment to another.[37] The central requirement of consideration is a bargained-for exchange of

28. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS 4 (1952). Corbin discusses several different definitions of "contract" and concludes that these definitions "are merely 'working definitions' that are useful only in so far as they aid in conveying our thoughts to others, and the rules are merely tentative 'working rules' that become confusing and harmful the moment that they cease to work." *Id.* at 6.

29. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1991).

30. *See* 17 C.J.S. *Contracts* § 2 (1999).

31. *See* 17 *id.*; *see also* RESTATEMENT (SECOND) CONTRACTS § 17 (stating in relevant part that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration").

32. *See* 17 AM. JUR. 2D *Contracts* § 26 (1991).

33. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19(1).

34. *Id.* § 22(1).

35. *Id.* § 22(2).

36. *See* 17 C.J.S. *Contracts* § 84 (1999).

37. *See* 17 *id.* § 83.

promises or performance.[38] Something is said to be bargained for if the promisor seeks it in exchange for his or her promise and the promisee gives it in exchange for that promise.[39] The absence of consideration precludes the formation of a contract.[40]

While some say that "contract" and "agreement" are synonymous, "agreement" is usually recognized as a wider term.[41] An agreement consists of nothing more than mutual expressions.[42] Thus, not all agreements rise to the level of an enforceable contract.[43] "In order to amount to a contract, the agreement must be of a nature to produce a binding result on the parties' mutual relations."[44] In other words, an agreement must have the elements set out above for it to be considered an enforceable contract.

B. Identifying Online User Agreements Issues

Considering the contract elements discussed above, a question arises as to the status of these online user agreements as enforceable contracts. First, it is uncertain whether there has been a true offer and acceptance and whether a manifestation of assent has occurred.[45] It seems obvious that a party cannot accept or assent to a contract that it does not know

---

38. *See* 17 *id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1991) stating:

> Requirement of Exchange; Types of Exchange
> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
> (3) The performance may consist of
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification, or destruction of a legal relation.
> (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Id.

39. *See* RESTATEMENT (SECOND) CONTRACTS § 71(2).
40. *See* 17 C.J.S. *Contracts* § 84 (1999).
41. *See* 17 *id.* at § 2.
42. *See* CORBIN, *supra* note 28, at 14.
43. *See* 17 C.J.S. *Contracts* § 2 (1999).
44. 17 *Id.*
45. *See* 17 AM. JUR. 2D *Contracts* § 26 (1991) (stating that a party cannot be held to have contracted if there was no assent).

exists. This issue likely depends on whether the online agreement is effectively brought to the user's attention.[46] If the Web site user has not manifested assent to the terms of the agreement, arguably there cannot be a binding contract.[47]

Second, there may not be a bargained-for exchange between Web site proprietors and the users of their sites. While it can be argued that there is sufficient consideration, since users are getting the benefit of the information or services that the Web sites offer and are contracting away some of their legal rights, which is a benefit to Web site proprietors, these agreements are not freely bargained for.[48] This issue takes into account the exchange between the Web site user and the Web site publisher and turns on whether the agreements are unenforceable adhesion contracts or otherwise unconscionable.[49] The practical implications of these questions are that they determine both Internet users and Web site publishers rights. With the immense popularity of the World Wide Web, the issues stated above are critically important to the future of electronic commerce globally.[50]

III. CURRENT TREND IN CONTRACT LAW

A. *Shrinkwrap and Clickwrap Cases*

Although there are no cases directly on point regarding the enforceability of Web site user agreements that are "hidden behind the scenes," there have been recent court decisions regarding the enforceability of "clickwrap" agreements.[51] Before examining these

46. *See Cyberspace Liability*, *supra* note 9, at 171 (discussing the enforceability of various types of Website disclaimers and visitor agreements).

47. *See* Westermeier, *supra* note 10, at 326.

48. Whether access to a Web site that is publicly offered and accessible by "surfing the net" constitutes consideration is beyond the scope of this Comment. There is a plausible argument that sufficient consideration does exist, and for purposes of this Comment this fact will be assumed. For more information on what constitutes sufficient consideration, see generally 17 C.J.S. *Contracts* section 84 (1999).

49. *See* 17 *id.*

50. *See* Westermeier, *supra* note 10, at 326; *see also* John C. Yates, *Electronic Commerce and Electronic Data Interchange*, 507 PLI/PAT 147, 149 (1998) (defining electronic commerce as a number of technologies and software tools to help facilitate communications and trading by electronic means).

51. *See, e.g.*, Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (holding that personal jurisdiction can be found by participation in a clickwrap agreement where there is purposeful availment); Hotmail Corp. v. Van$ Money Pie, Inc., 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998) (holding a clickwrap agreement enforceable where a user agrees online to the terms of service for the

decisions it is helpful to look at the legal precedent to what has been termed "shrinkwrap" agreements, the physical counterpart to clickwrap agreements.

Shrinkwrap agreements are agreements printed on, or found within, a computer program package that is wrapped in cellophane, or "shrink wrap" plastic.[52] Since these agreements are made known to the computer products purchaser only after the package is in hand, and often only after it has been opened, courts have been faced with the question of whether these agreements are enforceable, especially when the products are purchased by telephone.[53]

Initially, courts held that shrinkwrap license agreements were unenforceable because the agreements were created when the order was made over the phone.[54] Under this theory, the license agreements sent with the products were viewed as proposals to modify the contract, which require assent to become part of the contract.[55] Since buyers did not express their assent, the license agreements never became contract modifications.[56]

However, in an opinion authored by Judge Easterbrook, the Seventh

---

use of an e-mail account).

52. *See* Liu et al., *supra* note 12, at 10.

53. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997). Judge Easterbrook begins his opinion with an anecdote:

> A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

Id.

54. *See, e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 103 (3rd Cir. 1991) (finding that the parties performance of ordering and shipping the agreed upon goods demonstrated the existence of a contract and that the license agreement did not constitute part of that contract); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 765 (D. Ariz. 1993) (holding that by shipping the goods, defendants had entered into an agreement with plaintiffs that did not include the license agreement).

55. *See Arizona Retail*, 831 F. Supp. at 764-65 (holding that after entering into the contract, plaintiff was "not free to treat the license agreement as a conditional acceptance" and that the license agreement is best seen as a proposal to modify the contract between the parties, which is not effective without express assent).

56. *See id.* (concluding that the assent to the modification of the agreement must be express and cannot be inferred merely from a party's conduct in continuing with the agreement).

Circuit Court of Appeals reversed this trend in *ProCD, Inc. v. Zeidenberg*[57] and held that "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general . . . ."[58]

In *ProCD*, the issue presented to the 7th Circuit was how and when the contract was formed, in particular, whether a vendor may propose that a contract of sale be formed, not in the store or over the phone with the payment of money, but rather after the customer had the chance to inspect both the item and the terms.[59] The district court held the license agreement not enforceable as the agreement terms were not on the outside of the package and thus were unknown to the purchaser at the time of purchase.[60] The court reasoned that the buyer did not agree to terms that were unknown to the buyer at the time of purchase.[61] Judge Easterbrook disagreed with the holding of the district court and concluded that "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance."[62] He went on to declare that the license agreement at issue was a proposed contract that a buyer may accept by using the software after having an opportunity to read the license.[63]

Judge Easterbrook also authored *Hill v. Gateway 2000, Inc.*,[64] a case involving facts similar to *ProCD*. In *Hill*, a couple was held to be bound by an arbitration clause contained in a written contract found in the box in which their computer came.[65] Even though the Hills had not read the agreement, Easterbrook held that "[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome."[66]

Clickwrap agreements are the offspring of "shrinkwrap" agreements.[67] Clickwrap licenses are like shrinkwrap licenses except that they pop up on a screen before software can be installed on a computer or after a service is requested over the Internet.[68] Like its shrinkwrap

57. 86 F.3d 1447 (7th Cir. 1996).
58. *Id.* at 1449.
59. *See id.* at 1450-53.
60. *See id.* at 1450.
61. *See id.*
62. *Id.* at 1452.
63. *See id.*; *see also* U.C.C. § 2-204(1). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." *Id.*
64. 105 F.3d 1147 (7th Cir. 1997).
65. *See id.* at 1150-51.
66. *Id.* at 1148.
67. *See* Lui et al., *supra* note 12, at 10.
68. *See ProCD*, 86 F.3d at 1451 ("Much software is ordered over the Internet by

counterpart, clickwrap agreements face a debate over their validity. Clickwrap agreements require users to accept license terms before downloading software programs marketed on a Web site.[69] They also can be used to prevent users from browsing through a Web site without agreeing to visitation terms.[70] The essence of clickwrap agreements is that they prevent consumers from proceeding without clicking on an "I agree" or "I decline" button at the bottom of an agreement.[71] Because these agreements are a way of adapting shrinkwrap agreements to an online form,[72] courts have turned to shrinkwrap cases to help them decide the clickwrap issues.[73]

One of the first clickwrap agreement cases involved an online contract between a computer information and network service (Compuserve) and its subscriber (Patterson) to register his "shareware"[74] computer software with the online service.[75] The online "Shareware Registration Agreement" (SRA) asked all new shareware providers like Patterson to type "agree" at various points in the online document in recognition of their agreement to the terms and conditions presented online.[76] The court concluded that Patterson first agreed to the SRA when he typed "agree" in the online document[77] and declared that Patterson had entered into a written contract with Compuserve.[78] Without specifically holding, the *Compuserve* court implied that a contract formed

---

purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons . . . .").

69. *See* Liu et al., *supra* note 12, at 10. Clickwrap agreements are also known as "Web-wrap," "click-proceed," or "click-through" agreements. *See id.* These agreements are used in a "variety of contract applications" including software transactions where the user must accept the license terms prior to downloading software from a Web site, and Internet browsing agreements where the user is prevented from browsing through the Web site unless the user agrees to visitation terms. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.* (explaining that prior to examining enforceability of clickwrap agreements it is useful to examine established legal precedent to their counterpart, shrinkwrap agreements).

74. *See* Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1260 (6th Cir. 1996) (defining "shareware" as computer software generated and distributed through the Internet). Compuserve is a computer information service that contracts with "individual subscribers . . . to provide . . . access to computing and information services via the Internet . . . ." *Id.* Compuserve also provides its subscribers with computer software ("shareware") through the Internet. *See id.*

75. *See id.*

76. *See id.* at 1260-61.

77. *See id.* at 1261.

78. *See id.* at 1264.

online is enforceable.[79]

In *Hotmail Corp. v. Van$ Money Pie, Inc.*,[80] another clickwrap case, a subscriber to Hotmail's electronic mail (e-mail) account was sued for breach of contract and several intellectual property claims after failing to abide by the online service agreement to which he had agreed when he became a Hotmail subscriber.[81] The court found that Hotmail was likely to prevail on its breach of contract claim and issued a preliminary injunction against the defendant, Van$ Money Pie.[82] Although the court did not directly address the validity of the online agreement, the electronic commerce community viewed the decision as an encouraging sign that courts would extend shrinkwrap contract concepts to online agreements.[83]

The electronic commerce community appears to have been correct. In the most recent clickwrap case, *Caspi v. Microsoft Network, L.L.C.*,[84] the Superior Court of New Jersey refused to invalidate a forum selection clause found in an online agreement on the grounds that to do so would invalidate the entire agreement.[85] In an effort to avoid invalidating the agreement, the court implied the general circumstances surrounding clickwrap agreements create enforceable contracts.[86]

B. Possible Effect of Shrinkwrap/Clickwrap Cases

Although the facts relating to the agreements in both clickwrap and shrinkwrap cases are somewhat different from the facts relating to the web site user agreements that are the subject of this Comment, at least one commentator believes that these decisions increase the likelihood that

79. *See id.*; *see also* Liu et al., *supra* note 12, at 12.
80. 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998).
81. *See id.* at 1021.
82. *See id.* at 1025 ("[I]f defendants are not enjoined they will continue to create [spam and/or pornographic] accounts in violation of the Terms of Service.").
83. *See* Liu et al., *supra* note 12, at 12.
84. 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).
85. *See id.* at 531-32. In this case, the Plaintiff, before subscribing to the online service provided by Microsoft, was prompted by Microsoft software to view multiple computer screens of information, including the membership agreement containing the forum selection clause. *See id.* at 530. The prospective members had the option to click on "I Agree" or "I Don't Agree" depending on whether or not they assented to the terms of the agreement. *See id.* The court refused to hold the forum selection clause unenforceable on the grounds that it "would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented." *Id.* at 532.
86. *See id.* at 532.

Web site user agreements will be deemed enforceable.[87]

One major difference between online user agreements and shrinkwrap and clickwrap agreements is that the latter involve the sale of goods (software) to which the Uniform Commercial Code (U.C.C.) applies, whereas the former are merely agreements governing the use of a free service or information provided on the Internet.[88] Since Web site user agreements often do not involve a sale of goods, or the sale of anything for that matter, the U.C.C. usually cannot be used directly to determine their enforceability.[89] However, the underlying issues in all of these cases involve the law of contracts in general, regardless of the issues specifically addressed in the U.C.C.,[90] and the reasoning behind these decisions can be applied to contracts outside the scope of the U.C.C. such as the user agreements in question. Furthermore, it is not uncommon for courts to analogize and apply U.C.C. concepts to cases not involving the sale of goods.[91]

In terms of clickwrap agreements, the most important difference is that these agreements appear on the computer screen and require the user to agree to the terms before being able to use the software.[92] This characteristic likely eliminates the issue of whether the clickwrap agreement is effectively brought to the attention of the consumer, whereas this remains the central issue in determining Web site user

87. *See Cyberspace Liability*, *supra* note 9, at 172 (discussing links on Web sites to user agreements that include a provision that by using the Web site the user agrees to be bound by the terms of the visitor agreement). The authors of that article believe that in light of *ProCD* such an approach increases the likelihood that the terms of the agreement will be deemed enforceable. *See id.*

88. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) (explaining why the decision in *ProCD* applies— "we treated [the agreement in ProCD] as a contract for the sale of goods . . . ."); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (applying several U.C.C. provisions to the analysis, including sections 2-204, 2-606, and 2-316).

89. *See* U.C.C. § 2-102 (1999) (stating in relevant part "this Article applies to transactions in goods"). Whether information qualifies as "goods" is beyond the scope of this Comment and is unnecessary to the analysis presented here.

90. *See Hill*, 105 F.3d at 1149 (addressing Plaintiff's request to limit *ProCD* to software, the court declared that "*ProCD* is about the law of contract, not the law of software").

91. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1973) ("Uniform Commercial Code § 2-302 is literally inapplicable to contracts not involving the sale of goods, but it has been proven very influential in non-sales cases.").

92. *See* Stomp, Inc. v. Neato, L.L.C., 61 F. Supp.2d 1074, 1081 n.11 (C. D. Cal. 1999) ("A 'clickwrap agreement' allows the consumer to manifest its assent to the terms of a contract by 'clicking' on an acceptance button on the website. If the consumer does not agree to the contract terms, the website will not accept the consumer's order.").

agreements' enforceability.[93] However, it is encouraging that courts have been finding these particular online agreements, or at least parts of them, enforceable because it illustrates that courts are acknowledging the need for protection of online products and services.

It seems that the shrinkwrap agreement cases will be more helpful in determining the validity of online user agreements. In shrinkwrap license transactions, a consumer buys the product and can use it without finding or reading the agreement, so a question arises regarding adequate notice and knowledge of these terms.[94] Thus, the central issue in both shrinkwrap cases and online user agreements is one of contract formation and adequate notice of contract terms.[95]

In *Hill*, a customer ordered a computer over the phone and when it arrived there was a list of terms in an agreement said to govern unless the customer returned the computer within thirty days.[96] The agreement probably was part of several other papers included in the box, and there was nothing forcing the Hills to read the terms before using the computer. Since the customer did not read this agreement until after purchase, and may very well not have been read it at all (because it could have been overlooked or simply avoided), the court needed to decide whether the terms were effective as the parties' contract.[97]

These facts are similar to the circumstances surrounding online user agreements. Web site users are free to enter a Web site and use the information or the service before reading the user agreement. In fact, a Web site user may not even be aware of the user agreement terms unless he or she knows to scroll to the bottom of the screen and link to its terms. Yet these agreements, once they are found, often state that by using the Web site the user is bound by the terms of the agreement.[98] In light of the

93. *See Cyberspace Liability*, *supra* note 9, at 171-72 (describing methods of effectively bringing an online agreement to the attention of the user, one method being the requirement to click on "I agree" to manifest assent).

94. *See* Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, COM. L.J., 197, 226 (1999) (reviewing U.C.C. concepts as they apply to current trends in shrinkwrap licenses).

95. *See* ProCD Inc. v. Zeilenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (reversing district court's holding that the agreement was ineffectual because its terms did not appear on the outside of the package and the purchaser did not, and could not, agree to terms that were secret at the time of purchase).

96. *See Hill*, 105 F.3d at 1148.

97. *See id.* Here the plaintiffs' argument was that the arbitration clause in the agreement did not stand out from the rest of the agreement. *See id.* They conceded noticing the statement of the terms but denied reading it closely enough to discover the agreement to arbitrate. *See id.*

98. *See Cyberspace Liability*, *supra* note 9, at 169-72 (discussing the issues

decision in *Hill*, where the court held the agreement enforceable, it seems likely that there would be a similar outcome in cases involving the enforceability of Web site user agreements.[99] This is particularly true if the holding in *Hill* is interpreted literally, where Judge Easterbrook stated that "[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome."[100] But even if a user need not read the agreement, this holding still leaves open the question of whether the user must at least know or have reason to know of the existence of the agreement.

Furthermore, the policy considerations upon which *ProCD* and *Hill* were decided will also play a role in determining the enforceability of standard form online user agreements. The problem is that the software industry's magnitude has made it impossible for software developers to negotiate each sale individually.[101] Judge Easterbrook determined in *ProCD* and *Hill* that the standardization of agreements is essential to a system of mass production and distribution.[102] Thus, the argument and solution is that if the software industry is going to survive, it will need laws that validate shrinkwrap license agreements.[103]

A similar argument can be made for online user agreements. Publishers of Web sites need to protect their interests, especially since their products and services are being offered to people all over the world.[104] Yet due to the massive growth of the World Wide Web, including the products and services offered within it, Web site publishers find it

typically addressed in website user agreements).

99. *See id.* (applying the holding in *ProCD* that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and reject them by returning the product). The court went on to hold that by keeping the computer for more than thirty days the Hills accepted Gateway's offer, including the arbitration clause. *See Hill*, 105 F.3d at 1150.

100. *Hill*, 105 F.3d at 1148.

101. *See* Rolling, *supra* note 94, at 211. "Since the proliferation of personal computers, literally millions of software programs are sold annually. The practical problems that come along with an industry of this magnitude include the inability of software developers to negotiate each sale individually." *Id.*

102. *See Hill*, 105 F.3d at 1149 (discussing in both opinions the common practice of transactions in which the exchange of money precedes the communication of detailed terms and the practical considerations supporting this practice); ProCD v. Zeitenberg, 86 F.3d 1447, 1450 (7th Cir. 1996); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1991) (stating standardization of agreements is essential to a system of mass production and distribution).

103. *See* Rolling, *supra* note 94, at 211 ("Some argue that the shrinkwrap concept is necessary in light of the mass market approach to software.").

104. *See generally* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991) (explaining why having customers from many locales makes it necessary to have a standardized agreement including a forum selection provision).

impossible to negotiate each agreement governing each individual's use of the site.[105] For the Internet to prosper and continue to function efficiently, some sort of a standardized form of contracting is necessary.

Although there may be sound policy reasons for both shrinkwrap license agreements and online user agreements, the goals of each should not come at the unfair expense of customers and users.[106] Currently, consumers are charged with full knowledge of the shrinkwrap license agreement terms despite the fact that it may not be possible to read the terms prior to purchase.[107] This situation would also be the case if online user agreements were held enforceable. It appears that the burden of these license agreements falls on the consumer to find and understand them even when the agreements are not readily apparent.[108] In order to reallocate the burdens and to comply with "fundamental fairness," both software manufacturers and Web site publishers should be forced to provide effective notice.[109]

One distinguishing fact must be pointed out between shrinkwrap cases such as *Hill* and the user agreements at issue. In *Hill* the purchasers were held to have knowledge of the agreement, even if they did not read it, and the court did not address the issue of notice of the agreement's terms.[110] On the other hand, with online user agreements the main issue is whether there is adequate notice of the terms to have knowledge of the existence of the agreement. As seen in the analysis above, the holdings in the clickwrap and shrinkwrap cases still do not provide a concrete answer as to the enforceability of Web site user agreements. A deeper analysis of general contract law principles will help shed some light on this dilemma.

---

105. *See* Gussis, *supra* note 2, at 721 (discussing the growth of the World Wide Web).

106. *See* Rolling, *supra* note 94, at 228.

107. *See id.*

108. *See id.* The author makes an interesting point that while the burdens of the bargain have been allocated to the consumer, it is really the manufacturers who are in the position to make these licenses workable and in compliance with notice requirements of the U.C.C. *See id.*

109. *See id.* at 227. The author of this article presented a long analysis of the Uniform Commercial Code and shrinkwrap licenses leading up to her final determination that "[m]anufacturers of software should be forced to provide notice to the buyer of particular terms before the item is purchased, including material conditions that are placed on the consumer upon acceptance of the agreement." *Id.*

110. *See* Hill v. Gateway 2000, 105 F.3d 1447, 1148 (7th Cir. 1997) (stating that the Hills conceded noticing the statement of the terms but denied reading it closely enough to discover the agreement to arbitrate).

IV. EXPLORING CONTRACT COMMON LAW FOR THE ANSWER

A. *Mutual Assent and Notice of Terms*

The main issue with the Web site user agreements' enforceability is whether they are effectively brought to the attention of Web site users. If the user does not know of the agreement, he or she cannot logically assent to its terms.[111] It may not be enough for Web publishers to include a link to their visitor agreements at the bottom of the home page in small type. The answer likely turns on whether a court would deem the bottom of the home page as a reasonably noticeable location.[112]

1. Notice Requirement in the Warsaw Convention

The issue of notice has been extensively explored in cases concerning the Warsaw Convention.[113] The Warsaw Convention, also known as the Unification of Certain Rules Relating to International Transportation by Air, was adopted by the United States in 1929.[114] The Convention dealt with several issues, one being financial protection of air carriers in case of disaster.[115] In an attempt to deal with this issue, the Convention established an $8300 limit of liability for international air carriers.[116] In exchange for this financial security, carriers were required

111. *See Cyberspace Liability*, *supra* note 9, at 171.

112. *See id.* at 172. The authors of this article seem to believe that such a location is in fact reasonably noticeable, stating "[m]any web publishers include a link to their visitor agreement in a reasonably noticeable location, such as at the bottom of the home page and perhaps other high traffic pages . . . ." *Id.*

113. *See generally* Terence Sweeney, *The Requirement of Notice in the Warsaw Convention*, 61 J. AIR L. & COM. 391, 391 (1996) (reviewing the controversy over the notice requirement of the Warsaw convention and whether the Convention provides a sanction of loss of limits for failure to provide notice of the liability limitations).

114. *See* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 497 (1967). While the United States was a Convention participant, due to dissatisfaction regarding the low limits of liability, the U.S. gave notice of its withdrawal from the Convention on November 15, 1965. *See id.* After the carriers agreed to raise the limit on liability and provide notice of the limit, the United States withdrew its notice of withdrawal and agreed to continue to participate in the Convention. *See id.*

115. *See* Sweeney, *supra* note 113, at 392. The author identified two main issues facing the international air industry at the time the Convention was adopted: (1) the need for uniform rules governing such issues as jurisdiction and documents of trade; and (2) financial protection in case of disaster, due to concern that potentially high damage awards resulting from accidents could stunt the growth of the industry. *See id.* at 392-93.

116. *See id.* at 393. This amount has since changed, but even in 1929 the United States found this limitation amount intolerably low. *See id.* As a result, an

to provide a ticket to their passengers containing liability limitation notice.[117]

In response to the notice requirement, many cases have emerged dealing with the issues of what constitutes adequate notice and what the consequences are of failure to provide such notice.[118] One line of cases has resulted in findings that the Convention intended that carriers lose their liability limit for failure to provide adequate notice to the passengers.[119]

In *Mertens v. Flying Tiger Line, Inc.*,[120] the passenger's ticket was not

---

agreement was created for all carriers doing business in the United States, whereby the carriers agreed to raise the limit of liability to $75,000 and provide notice of the limit using specific standards. *See id.* at 394. The author identifies the purpose of these liability limitations as a way of making the industry attractive for investment. *See id.* at 393.

117. *See id.* at 393. The relevant text of Article 3 of the Convention reads:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> . . . .
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Id.

118. *See, e.g.*, Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (holding that the air carrier did not lose the benefit of damages limitation by failing to provide notice of that limitation); Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 514 (2d Cir. 1966) (holding that airline could not limit its liability under the Convention where the printed booklet containing the provision was unnoticeable and insufficient to notify passengers of its existence); Warren v. Flying Tiger Line, Inc., 352 F.2d 494, 498 (9th Cir. 1965) (finding inadequate notice where passenger tickets were delivered as they boarded and passengers were not afforded reasonable opportunity to read ticket before boarding plane).

119. *See, e.g.*, Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Bd., 479 F.2d 912, 914, 917-19 (D.C. Cir. 1973) (upholding a regulation forcing carriers to provide a ten-point type notice to be able to retain the benefit of the limitation of liability); *Warren*, 352 F.2d at 494 (finding liability limitation not applicable where passengers were not afforded reasonable opportunity to read ticket containing the liability limitation clause before boarding plane); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 857 (2d Cir. 1965) (using the unnoticeable and unreadable character of the writing as a factor in determining that the carrier was not entitled to limitation of liability).

120. 341 F.2d 851 (2d Cir. 1965).

delivered to him until he was on the plane.[121] The court refused to allow the carrier to limit its liability in this case primarily because of the ticket delivery timing.[122] The court, however, also based its decision on the finding that "the statement concerning the limitation of liability was printed in such manner as to virtually be both unnoticeable and unreadable, especially in an aircraft about to take off."[123]

The issue of notice was revisited in *Lisi v. Alitalia-Linee Aeree Italiane,*[124] where the passenger ticket was unquestionably delivered to and received by the passenger, but the notice contained in the ticket was challenged as being inadequate.[125] Here, the ticket front had the following message in small print: "Each passenger should carefully examine this ticket, particularly the Conditions on page 4."[126] Judge Kaufman concluded that the district court appropriately characterized the "notice" to that passenger as "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract.'"[127] He went on to say that the exculpatory statements were "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."[128] Consequently, the court found that the notice provided did not meet the required standards, and that the carrier was not entitled to the liability limitation benefits.[129]

The Warsaw Convention cases' significance to user agreements is their adequate notice analysis. Although in such cases the facts differ in that there is an actual written notice requirement in the Convention, this notice requirement can be inferred from the general contract law principle requiring mutual assent to an agreement.[130] It is obvious that in

121. *See id.* at 857.
122. *See id.*
123. *Id.*
124. 370 F.2d 508 (2d Cir. 1966).
125. *See id.* at 513-14. In this case the court framed the issue as "whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures." *Id.* at 513 (citing Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 857 (2d Cir. 1965)).
126. *Lisi,* 370 F.2d at 513.
127. *Id.* at 514.
128. *Id.* Judge Kaufman also noted the reasoning in *Mertens* for precluding the carrier from limiting its liability was that the required statement on the ticket "was printed in such a manner as to virtually be unnoticeable and unreadable." *See id.* His allusion to that statement confirmed the importance of that part of the reasoning in *Mertens.*
129. *See id.*
130. *See* Sweeney, *supra* note 113, at 393. The author notes that in return for this limitation of liability on the part of international air carriers, the carriers were

order for mutual assent to exist both parties must have knowledge of the agreement.[131] And for Internet users to have knowledge of online user agreements they must be given notice of their existence.[132]

The type of notice that is given to Web site users is often nothing more than a one word or short phrase link at the bottom of a home page.[133] More importantly, this link usually does not stand alone at the bottom of the page but rather is among several other links and often in a smaller type than the rest of the information on the page.[134] The effect is the same as that in *Lisi* where the court found that the statement on the ticket was so artfully camouflaged that its presence was concealed.[135] With all of the other activity on Web sites today designed to catch the attention of the end-user, the likelihood of a person realizing the importance of the link displayed at the bottom of the screen is very small.[136]

---

required to accept liability without fault and to provide written notice of the limit of liability on the ticket; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1991) (stating that the formation of a contract requires a manifestation of mutual assent).

131. It can be argued that this knowledge need not be actual but rather that it can be constructive. Judge Easterbrook implies so much in his bold statement that "[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome." Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997). This statement can be interpreted as meaning that as long as the party should reasonably know of the existence of the contract they will be bound to its terms.

132. *See Cyberspace Liability*, *supra* note 9, at 172 (pointing out that enforceability of visitor agreements depends on whether it is effectively brought to the attention of the user).

133. *See id.*

134. *See, e.g., AltaVista* (visited Mar. 12, 2000) <http://www.altavista.com>. At this web site the user must scroll to the bottom of the home page to find several lines of small type set up as follows:

Shopping | Money | News | Sports | Travel | Careers
Health | Entertainment | World | Women | Real Estate | Local
About AltaVista | Help | Contact Us | Advertise with Us | Affiliate Network
Business Solutions | Job Openings | Press Room | Privacy | Terms of Use | A CMGI Company

Id. In order to find the user agreement the user must find and click on "Terms of Use."

135. *See* Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 514 (2d Cir. 1966).

136. *See, e.g., supra* note 21, 134. All of these Web sites have extensive graphic design displaying lots of information across the page. The "important" information is brought to the attention of users by contrasting colors and different font styles and sizes. However, the links at the bottom of the page, and in particular the links to the user agreements are not presented in such a way as to alert the user that it is important information. More importantly, these links are placed in what is arguably a *low* traffic area of the Web site.

For its importance to be effectively conveyed, the link to the user agreement would need to be set apart from other information on the page. This could be done by positioning the link in a high traffic area, changing the size or font style, or by using a contrasting color.[137] When these characteristics were absent the court in *Lisi* held that the limited liability notice on the airline ticket was inadequate and consequently the carrier was not allowed to exclude or limit its liability.[138] If the issue of online user agreements notice was brought to the attention of the *Lisi* court, it is likely that the court would characterize the link at the bottom of the home page as being "camouflaged in Lilliputian print" and deem the link ineffectual for purposes of providing adequate notice of the agreement's existence.[139] And with the agreement's inadequate notice amounting to lack of mutual assent, the court would likely conclude that there is no contract and that the terms of the user agreement cannot be enforced against the aggrieved party.

2. *Notice Requirement in* Carnival Cruise Lines

The United States Supreme Court addressed the notice issue in *Carnival Cruise Lines, Inc. v. Shute.*[140] This case was not within the context of the Warsaw Convention's liability limitations notice requirement but rather was a case involving the enforceability of a forum-selection clause found in a form passage contract that came with a passenger cruise ticket.[141] The form passage contract consisted of three pages of fine print, and the passengers were directed to the contract by an admonition written in the left-hand corner of their passenger tickets that read: "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3."[142] Although the majority concluded that the passengers had sufficient notice of the forum-selection

137. *See Cyberspace Liability, supra* note 9, at 172; *see also Lisi*, 370 F.2d at 514.

138. *See Lisi*, 370 F.2d at 514. The same standard is embraced by Article 2 of the Uniform Commercial Code with respect to disclaimers of warranties. *See* U.C.C. §§ 1-201, 2-316 (1973).

139. *See Lisi*, 370 F.2d at 514; *see also* Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Bd., 479 F.2d 912, 917 (D.C. Cir. 1973). Here the court found that the rationale for the notice requirement was to afford passengers ample opportunity to comprehend the limitations of liability to which they were subjected, and give them a chance to purchase alternative insurance. *See id.* "The court felt that the passenger should not be forced to traverse an obstacle course created by the carriers in order to successfully discover their rights . . . ." Sweeney, *supra* note 113, at 401.

140. 499 U.S. 585 (1991).

141. *See id.* at 587.

142. *Id.*

clause and held the clause enforceable, the Court avoided the notice question by stating that "[r]espondents essentially have conceded that they had notice of the forum-section provision."[143]

However, the dissenting justices in this case did not take so kindly to the majority's view that a cruise ticket purchaser is "fully and fairly notified" about the existence of the forum-selection clause in fine print on the back of the ticket.[144] The dissent noted that because of the small type and notice placement, "only the most meticulous passenger is likely to become aware of the forum-selection provision."[145] The dissent's discussion is quite similar to that in *Lisi* where the court found that notice was "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract.'"[146]

In an analysis of the *Carnival Cruise* decision, one commentator thought it unusual that the majority vehemently declared the consideration of notice a nonissue[147] and suggested that this disavowal of consideration of the sufficiency of notice may imply a lack of approval on the majority's part.[148] Because of the majority's statement's significance regarding notice sufficiency not being an issue, the possibility is raised that had the notice issue been considered, the case may have been decided differently and the notice may not have been held to be adequate.[149] Considering the dissent's comments on the notice insufficiency and the fact that the majority failed to address the issue, it is possible that the dissent's analysis will have a greater impact on the issue should it arise in the future.[150]

In the case of online user agreements, the link at the bottom of the

143. *See id.* at 590. The court cited to Respondent's brief which stated that "[t]he respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated." *Id.*

144. *See id.* at 597; *see also* Sweeney, *supra* note 113, at 416 (discussing the importance of the fact that the dissent "immediately took issue with the majority's accession to the assertion that there was actual notice in the case.").

145. *Carnival Cruise Lines*, 499 U.S. at 597 (Stevens, J., dissenting).

146. *See Lisi*, 370 F.2d at 514; *see also* Sweeney, *supra* note 113, at 416-17 (considering the effect of the dissent's analysis in *Carnival Cruise Lines*).

147. *See* Sweeney, *supra* note 113, at 422.

148. *See id.* (inferring that the extensive disavowal of consideration "can be interpreted as the Court's discomfort with the notice provided and the Court's desire not to be in any way perceived as holding that the notice was acceptable.").

149. *See id.*

150. *See id.* at 423. The author did go on to point out that although he argues the importance of the dissent's implied requirement of adequate notice, the fact is that it is only a dissent and it does not possess "the precedential effect of a majority opinion." *See id.*

home page is at most only a few words and is usually in small print.[151] Furthermore, as opposed to *Carnival Cruise Lines* where the words on the back of the ticket urged the passengers to read the contract and made it clear that acceptance of the ticket was subject to the contract terms, the words at the bottom of a Web site home page do not specifically state that it is a link to an agreement by which the user is bound.[152] In fact, there is usually nothing about the link that makes it stand out from the rest of the information on the page. Nor is there other conspicuous notice to the user that an agreement governing the use of the service can be found through the link at the bottom of the screen. Most World Wide Web users would likely not even see the link in small print at the bottom of the page, let alone click on it and find the agreement. Only the most meticulous Internet user will likely be aware of a user agreement. In light of the dissent's discussion in *Carnival Cruise Lines*, it is highly doubtful that the link to these agreements would be deemed to be in a reasonably noticeable location and even more doubtful that the agreements would be held enforceable.

B. Adhesion Contracts and Unconscionability

The next issue that could affect the online user agreements' enforceability is whether these agreements are freely bargained for, which turns on the adhesion contracts enforceability issue in general.[153]

"Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms."[154] Mere inequality in

151. As stated at the beginning of this Comment, these links are usually identified by such words and phrases as "copyright," "legal," and "copyright notice/terms of use." Examples of these links can be seen at *Zdnet* <http://www.zdnet.com>; *AltaVista* <http://www.altavista.com/legal/termsofuse.html>.

152. *See supra* note 21. Some Web site user agreements say that by using the Web site the user is bound by the terms of the agreement. *See Altavista* (visited Mar. 12, 2000) <http://www.altavista.com/legal/termsofuse.shtml>. However, this statement is not encountered until the user links to and finds the user agreement. *See id.*

153. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (stating that one of the purposes of standardized agreements, or adhesion contracts, is to "eliminate bargaining over details of individual transactions"); *see also* Carnival Cruise Lines v. Shute, 499 U.S. 585, 585 (1991) (citing the holding of the Court of Appeals that the forum-selection clause should not be enforced because it was not "freely bargained for . . . .").

154. AEB & Assocs. Design Group, Inc. v. Tonka Corp., 853 F. Supp. 724, 732 (S.D.N.Y. 1994).

bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable.[155] In fact, one of the purposes of standardized agreements is to eliminate bargaining over details, and parties are not necessarily expected to understand or even read the standard terms.[156] In order for an adhesion contract to be held invalid, the plaintiff must allege both a lack of meaningful choice about whether to accept the provision in question, and that the disputed provisions are so one-sided as to be oppressive.[157]

With Web site user agreements, it is arguable that the Web site user actually chooses to accept the contract terms. Many user agreements state that use of the service signifies acceptance of and agreement to the terms and conditions.[158] Yet a person cannot accept terms that are unknown to him or her, which is often the case with these online agreements. This brings us back again to the existence of online user agreements notice issue. Since it is likely that a plaintiff would be able to prove that he or she was not given sufficient notice that the Web site user agreement existed, it is probable that a court would find the plaintiff lacked meaningful choice about whether to accept the agreement terms.

The plaintiff may have a more difficult time convincing the court that the contract terms unreasonably favor the other party and are oppressive to the plaintiff. This analysis depends in part on the Web site users' reasonable expectations, since an agreement that can be reasonably expected by one party is not likely to be oppressive to that same party. When thinking about Web site users' reasonable expectations, one must consider the Web site user agreements' purpose. With the World Wide Web's immense popularity[159] and its global availability,[160] Web site publishers need to protect their interests with agreements that set out restrictions on use, limitations of liability, and warranty disclaimers.[161] The

155. *See* Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1511-12 (S.D.N.Y. 1985) (holding that an arbitration clause, in an adhesion contract, was enforceable because it was not outside the reasonable expectations of the plaintiffs and it was not contrary to public policy).

156. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981). The comment further explains that while a party may not read the terms of a standardized agreement because they trust the good faith of the other party, "they understand that they are assenting to the terms not read or not understood." *See id.*

157. *See* 17 C.J.S. *Contracts* § 12 (1999).

158. *See supra* note 19.

159. *See* Gussis, *supra* note 2, at 721 ("[T]here is no sign that the immense popularity of the World Wide Web . . . is diminishing.").

160. *See id.* Currently an estimated 40 million people around the world use the Internet. *See* Fresen, *supra* note 2, at 65.

161. *See* E. Leonard Rubin & Sharon E. Kohn, *A Primer On Current U.S.*

need for Web site publishers to protect their services, especially given their tremendous use, should not be a surprise to Web site users. Most of the actual terms and conditions contained in these user agreements would not be outside the Web site users' reasonable expectations.[162] Users should expect that web site publishers will want to control the manner in which the service they provide and information that they post is used. Likewise, users should expect Web site publishers to limit the publishers' potential liability to their audience since the publishers' audience is comprised of people who access the Internet from all over the world. Therefore, absent a specific showing of unfairness, undue oppression, or unconscionability, a court will likely find user agreements on their face to be enforceable adhesion contracts.[163]

Courts usually examine adhesions contracts with special scrutiny to assure the agreements are not applied in an unfair or unconscionable manner. An unconscionable contract is one such as no person except under a delusion would make, on the one hand, and that no honest and fair person would accept on the other.[164] Unconscionability is the doctrine under which courts may deny contract enforcement because of procedural abuses arising out of the contract formation process, such as deception or fraud, or substantive abuses relating to the terms' fairness.[165] Courts use different tests and factors to determine whether a contract is unenforceable as unconscionable.[166] Included in these considerations are factors of assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness.[167] If a court finds a contract or any of its terms to be unconscionable, the court may refuse to enforce the entire contract

---

Copyright Law And Its Applicability To The Digital Environment, 527 PLI/PAT 627, 641-51 (1998) (discussing the applicability of basic copyright law to the Internet and offering tips and examples of how to protect Web sites with license agreements).

162. *See* AEB & Assoc. Design Group, Inc. v. Tonka Corp., 853 F. Supp. 724, 732 (S.D.N.Y. 1994) (reasoning that the terms in the Confidentiality Agreement were not beyond the reasonable expectations of the parties because it was necessary to protect the business interest of the other party).

163. *See* Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1512 (S.D.N.Y. 1985) (stating that absent a specific showing of unfairness, undue oppression, or unconscionability, the court will not refuse to give effect to the arbitration clause in the adhesion contract, and in doing so, the court recognized that there is nothing inherently unfair about the arbitration clause and it is therefore valid and enforceable.)

164. *See* 17 C.J.S. *Contracts* § 132 (1999).

165. *See* 17 *id.* § 4 ("Procedural abuses include deceptive practices and refusal to bargain over the terms of the contract, while substantive abuses involve the fairness or oppressiveness of the contract itself.").

166. *See id.*

167. *See id.*

or any of its terms.[168]

The thrust of this note has dealt with the procedural element of the doctrine regarding unfairness in the formation of the contract. As seen in the examination of common law principles such as mutual assent, it is possible that many online user agreements would be held unenforceable due to a failure of adequate notice and thus a failure of a manifestation of mutual assent.[169] In this case it would be unnecessary to prove that the substance of the agreement was unconscionable because the lack of mutual assent alone renders the agreement unenforceable because it never amounted to a contract.[170]

There may be other things that are unfair about the formation of these contracts, mainly the inequality in the bargaining process. This issue was considered above in relation to standardized agreements.[171] Inequality in the bargaining process alone would not create an unenforceable contract, however, since the inequality needs to be found together with terms that are unreasonably favorable to the stronger party.[172] However, the substance of most Web site user agreements will not be unconscionable. The essence of such a showing is that no decent, fairminded person would view the result without being possessed of a profound sense of injustice.[173] As discussed above, most of the terms in these user agreements are not unreasonably favorable to the Web site proprietors, and in fact they are likely within the Web site users'

---

168. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981), stating:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Id.

169. *See id.* § 17.

170. *See id.* This result is because the requirement of a manifestation of mutual assent to form a contract implies that a contract is not formed when the agreement lacks mutual assent. *See id.*

171. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 585 (1991) (considering whether the forum-selection clause should not be enforced because it was not freely bargained for).

172. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) ("A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party."). Inequality in bargaining power may be proven together with terms unreasonably favorable to the stronger party. *See id.*

173. *See* Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1512 (S.D.N.Y. 1985).

reasonable expectations. Although it may seem unfair to bind a Web site user to terms of an agreement that he or she has never seen, there is for the most part nothing "inherently unfair" about the agreements' content as they pertain to protecting Web sites or the interests of their proprietors.[174]

Although many user agreements have similar provisions, no two agreements are the same and it is possible that a specific agreement may have unfair terms.[175] Therefore, under the doctrine of unconscionability, it will be necessary to determine the enforceability of user agreements case by case.

V. ENFORCEABILITY OF PARTICULAR PROVISIONS

Since the fate of user agreements is unknown, it must be assumed that there is at least a possibility that they may be deemed enforceable. The fact that Web site user agreements may be enforced as a whole, however, does not mean that any particular agreement or part of an agreement is in fact enforceable.[176] One particular provision in some of these agreements that may give courts concern is the warranty disclaimer.[177]

The U.C.C. governs warranty disclaimers in the sale of goods.[178] U.C.C. section 2-316 declares that for warranties to be excluded in writing, the writing must be conspicuous.[179] The U.C.C. defines a "conspicuous"

---

174. *See id.*

175. *See, e.g., AltaVista* (visited Mar. 12, 2000) <http://www.altavista.com-/legal/termsofuse.shtml> (stating that "[b]y using the services [available through AltaVista's website], you are agreeing to all of [the] terms, conditions and notices, without modification [contained in the terms of use]"); *ZdNEt* (visited Mar. 12, 2000) <http://www.zdnet.com/filters/terms> ("You agree to comply with any additional copyright notices, information, or restrictions contained in any content available on or accessed through [ZDNet internet information service].").

176. *See* 17A AM. JUR. 2d *Contracts* § 387 (noting that "unimportant parts or provisions [of a contract] may be severed from the agreement without impairing its effect or changing its character . . . .").

177. *See supra* note 17.

178. *See* David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 45 BUS. LAW. 2289, 2302-03 (1990) (discussing warranty disclaimers under the U.C.C.).

179. *See* U.C.C. § 2-316 stating in relevant part:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

term or clause as one that is "so written that a reasonable person against whom it is to operate ought to have noticed it."[180] Comment 1 to section 2-316 notes that the requirements for warranty disclaimers are designed to protect buyers from "unexpected and unbargained language of disclaimer."[181] The problem with a warranty disclaimer in an online user agreement is not necessarily that the provision itself is inconspicuous as it is found within the agreement, but rather that the link to get to the agreement may be inconspicuous. Although section 2-316 does not identify whether notice (in this case the icon/link) of warranty disclaimers must be conspicuous, this requirement can be inferred from the policy behind 2-316 and the fact that a reasonable person will not have the opportunity to see the warranty disclaimer within the user agreement without finding the agreement by clicking on the link.[182] So once again, the issue arises as to whether the icon/link at the bottom of a Web site's homepage is enough notice to be considered conspicuous.

The text of section 1-201, which defines "conspicuous," proposes several ways to make a term attention-calling.[183] For instance, language is conspicuous if it is in larger type or is in a contrasting type or color.[184] This description is strikingly similar to that in *Lisi* where the court pointed out the insufficiency of the position, size, type face, and color of the exculpatory statements on the back of a passenger airline ticket.[185] With

---

Id.

180. *Id.* § 1-201(10). The wording of this definition suggests that courts should take a subjective approach to determine if a disclaimer is conspicuous. *See* Bernard F. Kistler, Jr., *U.C.C. Article Two Warranty Disclaimers and the "Conspicuousness" Requirement of Section 2-316*, 43 MERCER L. REV. 943, 948-49 (1992). However, comment 10 to section 1-201 suggests an objective approach by noting that the test is "whether attention can reasonably be expected to be called to it." *See* U.C.C. § 1-201 cmt. 10.

181. *See* U.C.C. § 2-316 cmt.1 (1999). The goal of section 2-316 is also to avoid the surprise or fine print waiver of rights by the buyer. *See* Kistler, *supra* note 180, at 945-46 (citing 3 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE (1983)). Kistler points out the similarity of this goal to the goal of the U.C.C. unconscionability provision which states that "[t]he principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." U.C.C. § 2-302 cmt. 1 (1973); *see also* Kistler, *supra* note 180, at 945.

182. *See* U.C.C. § 2-316 cmt.1 (identifying the purpose of the section as seeking to "protect a buyer from unexpected and unbargained language of disclaimer"); § 1-201(10) (explaining that conspicuousness requires that the disclaimer is written so that a reasonable person ought to have noticed it).

183. *See id.* § 1-201 (10); *see also* Kistler, *supra* note 180, at 947-48 (considering the text of section 1-201 (10) and possible ways of drawing attention to a warranty disclaimer).

184. *See* U.C.C. § 1-201 (10).

185. *See* Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 514 (2d Cir. 1996).

this definition in mind, it is nearly impossible that a link to user agreements that is strategically placed in the middle of several other links in small type at the bottom of the Web page would be found to be conspicuous. Consequently, under such circumstances, a warranty disclaimer should be ineffectual under U.C.C. section 2-316.[186]

Another provision that will presumably be objectionable is the forum selection clause.[187] Generally, forum selection clauses are prima facie valid and enforceable.[188] Some courts will decline to enforce a clause only if it fits into one of three exceptions to the general rule: (1) the clause results from fraud or "overweening" bargaining power, (2) enforcement would violate public policy, or (3) "enforcement would seriously inconvenience trial."[189]

In *Carnival Cruise Lines*, the Supreme Court held that the corporate vendor's inclusion of the forum selection clause in the consumer contract did not in itself constitute overweening bargaining power.[190] In its reasoning for holding the forum selection clause enforceable, the Court stated that it would be "entirely unreasonable" to assume that the passengers of the cruise ship would negotiate the terms of a forum selection clause in an ordinary commercial cruise ticket and that common sense dictates that a ticket of this kind would be a form contract, the terms of which are not subject to negotiation.[191]

Likewise, it seems that common sense dictates that a forum selection clause in a Web site user agreement is not subject to negotiation and that the Web site user would not have similar bargaining power as the Web site publisher. In addition, public policy and trial convenience likely fall in

---

The court characterized the notice as being "camouflaged in Lilliputian print . . ." and implied that the term was purposefully concealed. *See id.*

186. *See* U.C.C. § 2-316 (1999). Enforceability of warranty disclaimers may also be subject to other state and federal consumer protection laws such as the Magnuson-Moss Warranty Act. *See* 15 U.S.C. § 2303 (a) (1994) ("Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty . . . .").

187. *See, e.g.*, Carnival Cruise Lines v. Shute, 499 U.S. 585, 585 (1991) (addressing the validity of a forum-selection clause in a cruise passenger's contract); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 528 (N.J. Super. Ct. App. Div. 1999) (dismissing suit on basis of a valid forum selection clause).

188. *See Caspi*, 732 A.2d at 530.

189. *See id.* The court cites this rule in relation to New Jersey law, and it goes on to say that "[t]he burden falls on the party objecting to enforcement to show that the clause in question fits within one of these exceptions." *Id.*

190. *See Carnival Cruise Lines*, 499 U.S. at 595.

191. *See id.* at 593. The court went on to give reasons why a forum selection clause like the one in the passengers' contract would be reasonable including the fact that "a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit." *See id.*

favor of enforcing forum selection clauses in online agreements.[192] Since users of any particular Web site can be anywhere in the world, it is not unlikely that a problem on a Web site could subject the Web site publisher to litigation in several different fora.[193] For this reason, Web site proprietors have a special interest in limiting the venues in which they could potentially be subject to suit. And, if the selected forum is the Web site publishers' principle place of business, which it usually is, then it is the most convenient place for the publishers to have a trial and the most reasonable place for someone using their online service to expect suit to be brought.[194] Thus, a reasonable forum-selection clause should be valid if it is found within an enforceable online user agreement.[195]

VI. CONCLUSION/RECOMMENDATION

The analysis in this Comment has led to several uncertain conclusions. First, generally Web site user agreements, as standardized contracts, are likely to be enforced by the courts due to public policy considerations that such standardized agreements "are essential to a system of mass production . . . ."[196] Second, despite the fact that Web site users probably lack meaningful choice in accepting the terms of Web site user agreements, most user agreements are not unreasonably favorable to the Web site publishers so as to render them unenforceable adhesion contracts. Third, while user agreements may be procedurally unconscionable due to the lack of notice and mutual assent to the terms, most user agreements would not be deemed substantively unconscionable since the terms are generally fair and should be within Web site users' reasonable expectations. Finally, while warranty disclaimers would

192. *See Caspi*, 732 A.2d at 531 (reaffirming the holding in Wilfred MacDonald, Inc. v. Cushman, 606 A.2d 655 (N.J. Super. Ct. App. Div. 1992) that, "as a general matter, enforcement of forum selection clauses is not contrary to public policy . . . .").

193. *See Carnival Cruise Lines*, 499 U.S. at 593 ("Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora.").

194. *See id.* at 595 (reasoning that the clause selecting Florida as its forum for litigation was reasonable since the cruise lines principle place of business was in Florida "and many of its cruises depart from and return to Florida ports").

195. *See Caspi*, 732 A.2d at 532 (explaining that since the plaintiffs must have known that they were entering into a contract, there was no reason to permit them to disavow the forum selection clause within the contract). The court stated that "[t]o conclude that plaintiffs are not bound by the [forum selection] clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented." *Id.*

196. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1991).

probably not pass muster because of the inconspicuous link to get to the agreement, a forum-selection clause within an enforceable user agreement would likely be held valid based on the necessity of Web site publishers to limit possible litigation fora.

The tentative conclusions stated above all come down to the same question: whether Web site users have knowledge of and have assented to the terms of these user agreements so as to create an enforceable contract.[197] This question necessarily encompasses the issue of sufficient notice of the agreement. As the section discussing the adequacy of notice illustrates, the location and presentation of links to Web site user agreements would not be held to be reasonably noticeable in a court using the standards required under the Warsaw Convention,[198] or those discussed in the *Carnival Cruise Lines* dissent.[199] Although there is no such notice requirement, as of yet for Web site user agreements, and it is unknown how courts will approach the issue, courts should question the type of notice provided to users and set a standard as to what is sufficient notice in this context. This standard should take into account the discussions in such cases as *Lisi* and *Carnival Cruise Lines*, where the location and style of the notice was considered.[200] Under these standards, courts should require at a minimum that links to the agreements be conspicuous so that Web site users are likely to distinguish them from the other information in the page. In addition, courts should require some sort of statement alerting users that their use of the site constitutes acceptance of terms and conditions that can be found through the link.

In light of the fact that online user agreements' fate is uncertain and it is impossible to know what standards a court may use to determine the issue, it is important that Web site proprietors take some steps to provide better notice to the users of their sites so as to increase the likelihood that courts will enforce their user agreements.[201] This step can be done by having the agreement pop up on the computer screen requiring users

197. *See* 17 AM. JUR. 2D. *Contracts* § 26 (1991).

198. *See* Sweeney, *supra* note 113, at 393 (stating the Warsaw Convention requires carriers "to accept liability without fault and to provide a ticket to . . . passengers" containing "notice of the limit of liability").

199. *See also Carnival Cruise Lines*, 499 U.S. at 597 (finding the provision unreasonable where the passenger must purchase the ticket before he can read the provisions of the contract).

200. *See* Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 514 (2d Cir. 1996); *Carnival Cruise Lines*, 499 U.S. at 587.

201. *See Cyberspace Liability*, *supra* note 9, at 171 (suggesting methods for bringing visitor agreements to the attention of users); *see also* Rolling, *supra* note 94, at 225 (arguing generally that more notice should be provided of shrink-wrapped licenses to computer software purchasers).

who wish to enter a Web site to click on "I agree" before they enter the Web site, much like the structure of a click-wrap agreement.[202] Alternatively, since this device may put off potential users, Web publishers could still use a link to the agreement but make sure to place it in a reasonably noticeable location and high-traffic area of the page.[203] To further ensure notice of this link, it should be in larger font, a different font or color, and could be accompanied by a statement declaring that there are terms and conditions governing the use of the Web site.[204] All of these tactics create a favorable inference that a reasonable Internet user has knowledge of the agreement, which in turn increases the likelihood that the terms of the agreement are accepted and assented to by the user, thus creating an enforceable contract.

202. *See Cyberspace Liability, supra* note 9, at 171.
203. *See id.* at 172.
204. *See id.*

***