Loyola Consumer Law Review

Volume 20 | Issue 3 Article 5

2008

Be Careful What You Click for: An Analysis of Online Contracting

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By Rachel S. Conklin*

I. Introduction

Thanks to the Internet, a shopper in Chicago can make a purchase from a seller in Shanghai, any time of the day or night, with nothing more than a click of the mouse.[1] That click will form an agreement which differs from the traditional 'sign-on-the-dotted-line' format in how it satisfies the traditional requirements of a contract. It is estimated that seventy-six percent of United States consumers have made a purchase online, citing convenience and the ability to comparison-shop as particular advantages of the practice.[2] While online shopping has broad appeal, the majority of online consumers have at one time or another abandoned a transaction over uncertainty or distrust of the website.[3] Consumer distrust arises primarily out of

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[1] David Friedman, *Contracts in Cyberspace* 3 (University of California, Berkeley, Berkeley Program in Law & Economics, Working Paper Series, Working Paper No. 116, June 1, 2001) ("[C]yberspace has no geographical boundaries. Purchasing good or services from the other side of the world is as easy as purchasing them from your next door neighbor.").

[2] Lauri Giesen, *Hand Holding*, INTERNET RETAILER, March 2006, *available at* http://www.internetretailer.com/article.asp?id=17763&ref=ya (citing Forrester Research data) (last visited Jan. 27, 2008); *see also U.S. Online Sales projected to top $210 billion in 2006, according to study*, TMCnet.com, Dec. 22, 2006, http://www.tmcnet.com/usubmit/2006/12/22/2192580.htm (citing Forrester Research data).

[3] Jennifer LeClaire, *What To Do About Runaway E-Shoppers*, CIO TODAY, July 3, 2007, *available at* http://www.cio-today.com/story.xhtml?story_id=121003S6J55F. The article states that sixty-five percent of online consumers have abandoned a shopping cart, or failed to complete a purchase

concerns over safety and security of the website[4] and a lack of confidence with the parameters of the bargain itself[5]– an issue directly impacted by the clarity of the contract formed online.

Online contracting encompasses more than the final click of a purchase or download. During a typical online session, an Internet user may unknowingly form numerous contracts, just by visiting a particular website.[6] For instance, the terms and conditions of the use of a website may be listed in small print along the bottom of the site, or alternatively, on a separate page accessed only by clicking a link.[7] Even if the site never presents its terms and conditions to the user, those terms and conditions may be legally binding.[8] In a recent article, Michelle Slatalla, a frequent contributor to the *New York Times*, described noticing a ten dollar charge on her credit card from an unfamiliar source.[9] Slatalla deduced that after purchasing movie tickets online, her husband entered his e-mail address in a pop-up on the site to receive promotions in the future, unaware that the promotion program cost ten dollars per month.[10] Slatalla eventually

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because they were not confident in the website's security according to data from VeriSign.

[4] Iakov Y. Bart, Venkatesh Shankar, Fareena Sultan & Glen L. Urban, *Are the Drivers and Role of Online Trust the Same for all Web Sites and Consumers* 7 (Massachusetts Institute of Technology, Center for eBusiness @ MIT, Paper No. 217, April 2005).

[5] Bart, Shankar, Sultan & Urban, *supra* note 4, at 5-6.

[6] Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 463 (2006).

[7] Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up To Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173, 174 (2007) ("[A] browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on 'use' of the site."); *see also* Terry J. Ilardi, *Mass Licensing – Part 1: Shrinkwraps, Clickwraps & Browsewraps,* PRACTISING LAW INSTITUTE – PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES 256-57 (June 2005) ("[T]he license terms and conditions [of a browsewrap contract] are not presented[,] and the user must click on a link if they wish to examine the terms and conditions.").

[8] Lemley, *supra* note 6, at 459.

[9] Michelle Slatalla, *Who Charged This? You, That's Who.*, N.Y. TIMES, April 19, 2007, *available at* http://www.nytimes.com/2007/04/19/ fashion/19Online.html. Slatalla's weekly column for the New York Times "Cyberfamilias" discusses the dynamic between families and the internet, although this article was not an entry in her column.

[10] Slatalla, *supra* note 9.

discovered that she and her husband had been members of the program for sixteen months.[11]

Online contracts must comply with the customary legal requirements of offer and acceptance, but these prerequisites can exist in non-traditional ways in the realm of the Internet[12] The two main forms of online contracts are clickwrap and browsewrap.[13] Clickwrap agreements require the user to make some manifestation of his or her intent to be bound by a contract after being presented with that contract's terms, for instance by clicking a button labeled "I Agree" after viewing the terms.[14] On the other hand, the terms of a browsewrap contract are often inconspicuous or even unavailable to a consumer online; a contract is accepted by performance as the consumer continues to navigate the website or uses a product or service found on the site.[15] Slatalla's article does not mention whether her husband was presented with the terms of the ten-dollar–per-month promotion program.[16] If not, Slatalla's husband likely accepted a browsewrap contract for the program when he typed his e-mail address into the pop-up even though he was never presented with the program's details, including the price.

Clickwrap contracts have been accepted as valid by United States courts virtually every time they have been challenged.[17] The U.S. judiciary has considered the legality of browsewrap contracts a number of times as well, but has yet to clearly articulate when such contracts are permissible.[18] The courts currently have an opportunity to define the parameters for browsewrap contracts that will serve consumers' and online retailers' best interests. Section II of this paper will provide a summary of the foundations of traditional

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[11] *Id.*

[12] Lemley, *supra* note 6, at 459-60.

[13] Ilardi, *supra* note 7, at 256. Discussions of browsewrap sometimes focus on "spyware." Spyware generally refers to software installed on an internet user's computer without her knowledge or permission. This paper does not address spyware specifically.

[14] *Caslon Analytics guide online consumers,* http://www.caslon.com.au/consumersguide16.htm (last visited Jan. 27, 2008) [hereinafter *Caslon*].

[15] Rambarran & Hunt, *supra* note 7, at 178.

[16] Slatalla, *supra* note 9.

[17] Lemley, *supra* note 6, at 459.

[18] *See infra* Section III (discussing the way various jurisdictions have dealt with clickwrap and browsewrap agreements).

contracting and how those fundamentals apply online. Section III will discuss case law regarding online contracting, focusing on browsewrap. Section IV will analyze the possible marketplace effects of future court decisions on browsewrap and will test these outcomes for economic efficiency. Finally, Section V will discuss how the courts can influence market behavior to increase online contracting as they regulate the use of browsewrap in future cases.

II. Contract Theory

A. Fundamentals

The traditional legal theory of bargains identifies three conditions required to form a contract: offer, acceptance, and consideration. When these conditions are met, a contract is binding and enforceable.[19] If the bargain is fair, the value of the bargain is proportional to the value of the consideration for each party, regardless of how small or large that consideration may be.[20]

The most beneficial effect of a contract is to facilitate deferred exchanges.[21] Typically when a bargain is struck, the parties do not simultaneously perform their promises.[22] Without a contract, the party that is scheduled to perform second would have an incentive against performance because she could acquire the benefit of the first party's promise without doing anything in return.[23] This in turn creates an incentive for the first party to refrain from making the promise at all, since he knows the second party will likely breach.[24] Thus, without a contract to insure future performance, parties would rarely strike bargains for deferred exchange.[25] Alternatively, when a contract makes both promises enforceable, the second party will not be able to appropriate the benefit of the first party's performance

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[19] ROBERT COOOTER & THOMAS ULEN, LAW & ECONOMICS 190 (4th ed. 2004).

[20] COOTER & ULEN, *supra* note 19, at 191.

[21] DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 156-57 (2005).

[22] COLE & GROSSMAN, *supra* note 21, at 156-57.

[23] *Id.* at 158-60 (using game theory to analyze contracts).

[24] *Id.*

[25] *Id.*

without paying compensatory damages.[26] The second party will have an incentive to perform, and the first party will be willing to enter into the bargain.[27]

B. Fundamentals Online

An agreement formed online must fulfill the traditional requirements to be considered an enforceable contract; however, the principles of offer and acceptance operate in somewhat novel ways.[28] Clickwrap agreements require the user to make some manifestation of their intent to be bound by the contract.[29] This can include clicking a button labeled, "I Accept," typing those same words into a box, or checking one of two boxes marked "Accept" and "Decline."[30] The website's performance of the contract is conditioned on the user's manifesting consent by clicking the proper button.[31]

Browsewrap agreements are generally passive presentations of contract terms; the terms may be listed at the bottom of a webpage, accessible by clicking on a link which directs the user to a separate webpage, or even found in an email which is sent to the user after the contract has been formed.[32] Internet users may not realize the terms of a browsewrap contract are available to them if they do not notice or actively seek out the terms.[33] Whereas express manifestation of acceptance is required to form a clickwrap agreement, browsewrap agreements are generally accepted implicitly through continued use of the site, or use of the site's products, services or information.[34]

The contents of online contracts for goods and services typically mirror paper contracts for goods and services. Online and

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[26] *Id.* at 158.

[27] COLE & GROSSMAN, *supra* note 21, at 158.

[28] Rambarran & Hunt, *supra* note 7, at 178.

[29] *Caslon, supra* note 14. Also referred to as "click-through" or "click to agree."

[30] *Id.*

[31] *Id.*

[32] *Id.*; *see also* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 22 (2d Cir. 2002).

[33] *Caslon, supra* note 14.

[34] *Id.*; *see also* Rambarran & Hunt, *supra* note 7, at 178-79 ("implied-in-fact acceptance").

paper contracts often specify procedures the user must comply with, such as arbitration in the case of conflict.[35] These contracts also explain the user's rights and restrictions regarding the bargained-for good or information.[36] Finally, the contract discloses what the user gives up in the exchange and what rights the user gains against the website.[37]

C. Transaction Costs

In a perfect world, parties wishing to form contracts would be able to find each other and negotiate mutually beneficial bargains without burdens or inefficiencies.[38] In the real world, many circumstances hinder the process of bargaining for a contract. Some examples include parties over or undervaluing the exchange, agreements in which one side has more information than the other, and high costs associated with finding and negotiating with bargaining partners.[39] These hindrances to efficient contracts, known as transaction costs,[40] burden the bargaining process because parties must factor them into the price that they are willing to pay for an exchange.[41]

One of the most notable characteristics of the Internet is the possibility for almost instant gratification. For example, after a bargain has been struck for a song online, the buyer can immediately download and play that song in his own home. This reduces transaction costs by eliminating the difficulty in finding a bargaining partner and reducing the time needed to perform.[42] Speed and efficiency are particular advantages of browsewrap. The user can

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[35] Rambarran & Hunt, *supra* note 7, at 180-81 (Mandatory Terms).

[36] *Id.* at 184 (Prohibitory Terms).

[37] *Id.* at 186-87 (Consumer Protection Terms).

[38] COLE & GROSSMAN, *supra* note 21, at 162 (neoclassical economic model of perfect contracts).

[39] *Id.*

[40] *Id.* at 164 (discussing the gap between the neoclassical view of contracts and the institutional view of contracts).

[41] *Id.*

[42] Antonio Cordella, *Does Information Technology Always Lead to Lower Transaction Costs?*, GLOBAL COOPERATION IN THE NEW MILLENNIUM 854, 855-56 (The 9th European Conference on Information Systems, June 27, 2001), http://is2.lse.ac.uk/asp/aspecis/20010024.pdf.

form a binding contract without spending any time proceeding through multiple screens or acknowledging contract terms. This is particularly useful if the Internet user is familiar and comfortable with a website. If a consumer makes frequent purchases on a particular website, she may prefer not to scroll through the same terms and conditions before each purchase.

However, online contracts can increase transaction costs as well, primarily in the form of uncertainty.[43] If an Internet user is wary of inadvertently accepting a hidden contract, or if the user knows contract terms are available but has difficulty finding them, the added outlay of time and effort could actually exceed that of driving to a store and forming a paper contract for a good or service. Asymmetric information between the parties also adds to transaction costs.[44] This situation occurs when one party has significantly more information than the other, or when one party does not understand the information presented to it by the other party.[45] If a consumer is unaware he is forming a contract, the website has superior knowledge regarding the terms of that contract and consequently, the parties have asymmetric information. Browsewrap contracts can create situations where the parties are not equally informed about the terms and conditions, including one party remaining unaware that a contract has been formed. If consumers are uneasy with the situation, they may find themselves with an incentive to refrain from online contracting.

D. Uncertainty and E-commerce

Consumers have overwhelmingly demonstrated their approval of e-commerce with their dollars; U.S. shoppers are expected to spend $157.4 billion online this year.[46] However, consumers have

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[43] COLE & GROSSMAN, *supra* note 21, at 14; *see generally* Cordella, *supra* note 42 (discussing, in part, the use of information technology to reduce uncertainty and therefore lower transaction costs).

[44] *See* COLE & GROSSMAN, *supra* note 21, at 164 (discussing elements of imperfect contracts).

[45] COLE & GROSSMAN, *supra* note 21, 164-65 (discussing incomplete and asymmetric information).

[46] Josephina Malory, *Consumers Dissatisfied With eCommerce Transactions, Customer Service*, ASSOCIATED CONTENT, September 17, 2007, *available at* http://www.associatedcontent.com/article/382828/consumers_dissatisfied_with_ecommerce.html (citing Forrester Research data).

repeatedly indicated that they are very concerned with the presence of uncertainty in e-commerce: eighty-four percent of online shoppers have at least some doubts about the trustworthiness of e-retailers.[47] Consumers fear they may be putting themselves at risk by agreeing to provisions of the website that they are not aware of or comfortable with,[48] this can include misuse of personal information, constraints on future behavior,[49] and adverse financial effects.[50]

The burden of uncertainty has concrete effects in e-commerce: sixty-five percent of online consumers have failed to complete a transaction due to a lack of trust in a website.[51] Browsewrap contracts can augment this uncertainty; the browsewrap-related cases that have made it to court generally involve internet users feeling misled by browsewrap.[52] Any uncertainty that browsewrap adds to a transaction also increases the burden of transaction costs in that contract.

III. Case Histories and Procedural Backgrounds

The courts are currently in the midst of determining the enforceability of browsewrap, but have already signaled their approval of clickwrap. As recently as ten years ago, courts had not enforced either clickwrap or browsewrap contracts.[53] However, beginning in the 1996, "shrinkwrap" contracts laid the foundation for a shift in the requirements of offer and acceptance.[54] Shrinkwrap contracts refer to licensing and terms of use provisions for products

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[47] Giesen, *supra* note 2 (discussing research results showing customers do not think companies are protecting their credit card data well enough).

[48] Bart, Shankar, Sultan & Urban, *supra* note 4, at 5 (listing factors affecting consumer confidence in website security).

[49] *Id.* at 6-7 (detailing the effect of privacy and security concerns in online transactions).

[50] *Id.* at 5 (noting that financial risk of losses incurred while interacting with a website).

[51] LeClaire, *supra* note 3, at 2 (citing VeriSign research).

[52] *See infra* Section III (discussing court cases involving clickwrap and browsewrap agreements).

[53] Lemley, *supra* note 6, at 459 (citing Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1248-53 (1995)).

[54] Lemley, *supra* note 6, at 468 (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1447-48 (7th Cir. 1996)).

like software that are sealed inside the plastic packaging of the product.[55] Consumers cannot read or review the terms of the contract until they have opened the plastic wrap; however, opening the package constitutes acceptance of the contract.[56] Judicial acceptance of shrinkwrap signaled an expanded acknowledgment of the idea of acceptance by performance, which is the basis of valid browsewrap contracts.[57]

Not long after judicial acceptance of shrinkwrap, the courts began to recognize clickwrap agreements under the same principles. In the case *I.Lan Systems v. Netscout Service Level Corp.*, the court held that if retaining software packaged with a shrinkwrap license constituted acceptance, clicking a button to specifically signal assent constituted an even more explicit form of acceptance.[58] In this 2002 case, the court stated that clickwrap contracts were valid and appropriate.[59]

Judicial acceptance of browsewrap contracts has not been as clear cut as that of clickwrap. The remainder of this section will first discuss in detail two cases that present differing views of browsewrap contracts, *Specht v. Netscape Communications*[60] and *Register.com, Inc. v. Verio, Inc.*[61] Then the section will consider, in light of two more recent cases, *Hubbert v. Dell Corp.*[62] and *Fiser v. Dell Computer Corp.*,[63] whether a path laid by shrinkwrap and clickwrap contracts, will lead to judicial acceptance of browsewrap contracts.

A. *Specht v. Netscape Communications*

In 2002, the Second Circuit Court of Appeals decided the case of *Specht v. Netscape Communications Corp.* with a clear reluctance

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[55] Lemley, *supra* note 6, at 467.

[56] *Id.*

[57] *Id.* at 468.

[58] I.Lan Sys. Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002).

[59] *Id.*

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

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

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

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

to enforce browsewrap contracts.[64] Plaintiffs initiated a free software download on the Netscape website in order to install Communicator, Netscape's internet browser, on their computers.[65] After clicking the link to download Communicator, plaintiffs were led to a screen that read, "Download with Confidence Using SmartDownload!"[66] There was a button at the bottom of the screen labeled "Download."[67] After clicking the button, the software downloaded and a prompt instructed plaintiffs to install Communicator. Clicking the prompt initiated a pop-up containing Communicator's licensing terms; plaintiffs could not complete the installation of Communicator without agreeing to the terms. After clicking to acknowledge their agreement, the installation proceeded.

However, two pieces of Netscape software actually installed on plaintiffs' computers during the transaction.[68] Just out of view on the "Download with Confidence" screen was a link to licensing terms for a second piece of software, SmartDownload.[69] These terms were accessible by scrolling down the webpage. If the link was clicked, the screen would navigate to a screen displaying the terms and conditions, otherwise the terms were never brought to the user's attention. SmartDownload was not a necessary component of Communicator. The out-of-view terms included notice to the plaintiffs that SmartDownload would transmit a detailed record of any download made using SmartDownload to Netscape. In addition, plaintiffs agreed to participate in arbitration to resolve any disputes regarding the SmartDownload.

Plaintiffs eventually became aware of the SmartDownload software on their computers, felt Netscape had violated their privacy, and brought a class action suit against the company.[70] Netscape moved to stay the court proceeding and compel arbitration based on the terms of the SmartDownload licensing agreement. The District Court held that it was not clear to plaintiffs that clicking on the

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[64] James J. Tracy, *Browsewrap Agreements: Register.com v. Verio, Inc.*, 11 B.U. J. SCI. & TECH. L. 164, 165-66 (2005).

[65] *See Specht*, 306 F.3d at 21-25 for facts and procedural history.

[66] *Id.* at 22.

[67] *Id.*

[68] *Id.* at 22-23.

[69] *Id.* at 22.

[70] *Specht*, 306 F.3d at 21-23.

Download button would form a contract with Netscape for the SmartDownload software. Without mutuality of assent, the contract for SmartDownload, including the binding arbitration agreement failed. The Court of Appeals for the Second Circuit, reviewed the claims and affirmed the district court's decision and reasoning.[71]

In *Specht*, all of the parties agreed that the clickwrap contract between Netscape and its website users was valid, but the court agreed with the plaintiffs that the browsewrap contract was not valid.[72] The court held that the browsewrap contract failed because there was no manifestation of assent by the plaintiffs.[73] The court asserted that a "reasonably prudent" Internet user would not have known that he had accepted Netscape's offer to download SmartDownload because he did not realize it was a separate offering from Communicator.[74] Without an understanding that they were facing a separate contract, the court held that plaintiffs could not give their assent to that contract and therefore, no contract existed.[75]

B. *Register.com, Inc. v. Verio, Inc.*

Two years later, in 2004, the Court of Appeals for the Second Circuit revisited the topic of browsewrap contracts in *Register.com, Inc. v. Verio, Inc,* but this time the court showed much less hostility to the idea of a browsewrap contract.[76] Verio, an Internet services provider, downloaded the names of individuals who had registered new websites with Register.com on a daily basis.[77] After the download was complete, Verio would receive an e-mail that included the names of newly registered individuals and the terms of the contract they had formed with Register.com by completing the download. The terms included a prohibition on advertising to the individuals whose personal information was included in the download.

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[71] *Id.* at 21.

[72] *Id.* at 35.

[73] *Id.* at 28-29, 35.

[74] *Id.* at 35.

[75] *Specht*, 306 F.3d at 35.

[76] Tracy, *supra* note 64, at 165.

[77] *See Register.com, Inc.* 356 F.3d at 395-98 for facts and procedural history.

However, on a regular basis Verio would send out solicitations for Internet services to the individuals listed in the Register.com download.[78] In United States District Court for the Southern District of New York, Verio argued that based on the precedent in *Specht*, it had not formed a contract with Register.com. Verio asserted that there was no mutuality of assent because the terms of the contract were not presented until after the transaction was complete. Verio maintained that since no contract had been formed with Register.com, it did not violate any agreement when it advertised to the individuals listed in the download. The district court granted Register.com a preliminary injunction.

On an interlocutory appeal of the preliminary injunction, the Court of Appeals for the Second Circuit reviewed the district court's grant of a preliminary injunction prohibiting Verio from further downloads from Register.com. The appellate court affirmed the district court's decision holding that it was possible to form an online browsewrap contract, even where the terms were not disclosed until after the transaction had been completed, if the Internet user had proper notice of those terms. Because Verio was repeating the process of downloading information from Register.com on a daily basis, they could not claim to lack mutuality of assent each day.[79] Rather, Verio did have advance notice of the terms of Register.com's contract and by proceeding with the downloads, Verio accepted those terms and formed a valid contract.

The appellate court differentiated between *Verio* and *Specht*, based on notice.[80] Because Verio repeatedly downloaded information from Register.com's website, Verio had adequate notice of the terms of the browsewrap contract, unlike the plaintiffs in *Specht* who were not aware that they were forming a contract at all.[81] The case may indicate a growing willingness by the courts to accept browsewrap contracts.[82] For instance, the reasonable Internet user considered by the *Specht* court to have been unaware a contract was being formed

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[78] *Id.* at 396-97.

[79] *Id.* at 401. (Comparing the situation to a defendant who takes an apple from a roadside stand, and after taking a bite, notices a sign that says "Apples – 50 cents apiece." The defendant may arguably be excused for taking the apple on the first day, but cannot take a new apple each day claiming to be unaware of the sign.)

[80] *Id.* at 402.

[81] *Id.*

[82] Tracy, *supra* note 64, at 170-71.

may nonetheless under the Verio analysis be bound to browsewrap contracts on websites that the user has visited several times, even if the user is not actually aware of the contracts.[83]

C. *Hubbert v. Dell Corp.* and *Fiser v. Dell Computer Corp.*

Hubbert is a class action suit, brought by plaintiffs who purchased Dell computers online in 2000 and 2001.[84] In order to complete the purchases, plaintiffs had to fill out several pages of information online;[85] each page included a visible, blue link to the "Terms and Conditions of Sale."[86] In addition, a paper copy of the terms and conditions was included in each computer's shipping container.[87] However, consumers were never required to open, view or accept these terms in order to complete their purchase.[88]

After receiving their computers, the plaintiffs felt that Dell had misled them as to the computers' processor speed and brought a class action suit.[89] Dell moved to stay the action and compel arbitration based on an arbitration clause found the Terms and Conditions of Sale.[90] Plaintiffs argued that they had formed a contract with Dell for the computer itself by proceeding through multiple information screens, but had not contracted in with regard to arbitration clause.[91] The district court agreed with the plaintiffs, holding that the arbitration clause was not part of the contract between the parties.[92] The court determined that because the Terms and Conditions were not adequately communicated to the consumers,

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[83] *See also id.* at 171.

[84] *Hubbert.*, 835 N.E.2d at 117 .

[85] *Id.* at 118; *see also* Meredith R. Miller, Contractsprof Blog: Illinois Appeals Court Enforces "Browse-Wrap Agreement," http://lawprofessors.typepad.com/contractsprof_blog/2005/08/illinois_appeal.html (August 27, 2005) (last visited Feb. 28, 2008).

[86] *Hubbert*, 835 N.E.2d at 118.

[87] *Id.*

[88] *Id.* at 118, 120-21; Miller, *supra* note 85.

[89] *Hubbert*, 835 N.E.2d at 118.

[90] *Id.*

[91] *Id.* at 119.

[92] *Id.* at 117.

the plaintiffs had not manifested their assent to the terms.[93] Using reasoning similar to the *Specht* holding, the court indicated there was no mutuality of asset, and thus there was no contract based on the Terms and Conditions, which in turn made the arbitration clause unenforceable.[94]

However, unlike *Specht*, the appellate court strongly disagreed and held that the district court's reasoning was erroneous.[95] The appellate court stated that the blue link to the Terms and Conditions was conspicuously displayed in many places on the Dell website and throughout the purchase process.[96] The court held that because the link was clearly placed on the site, clicking, or choosing not to click on the hyperlink, is similar to deciding whether to turn the page of a written contract.[97] The court held that the Terms and Conditions was part of the contract between the parties, and the plaintiffs were bound by that contract to arbitrate.[98] In 2006, the Illinois Supreme Court declined to hear the case, making most browsewrap agreements enforceable in the state.[99]

Robert Fiser, a New Mexico resident, found himself in an almost identical position to the Illinois residents in *Hubbert*. Fiser purchased a computer from the Dell website, going through the same steps as the *Hubbert* plaintiffs.[100] Fiser was also dissatisfied with the computer and brought a suit against Dell.[101] Just as in *Hubbert*, Dell moved to stay the action and compel arbitration based on an arbitration clause found in the Terms and Conditions, while Fiser argued that he had not agreed to the arbitration provision.[102] The district court found for Dell, [103] and the appellate court affirmed.[104]

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[93] *Id.* at 120.

[94] *Hubbert*, 835 N.E.2d at 120.

[95] *Id.* at 121-22.

[96] *Id.* at 121.

[97] *Id.*

[98] *Id.* at 122.

[99] See Hubbert v. Dell Corp., 844 N.E.2d 965 (Ill. 2006).

[100] *Fiser,* 165 P.3d at 331.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 343.

The appellate court noted that the issue of whether a browsewrap contract is binding on a consumer was an issue of first review in New Mexico.[105] However, the court declined to decide the case on these grounds, and instead determined that Fiser's use of the computer after a written copy of the Terms and Conditions were delivered to him along with the computer constituted acceptance.[106] While the court declined to make a determination on the browsewrap contract, the New Mexico Supreme Court has agreed to hear the case and now has an opportunity to make an influential holding on browsewrap.[107]

V. Possible Effects of Future Browsewrap Court Decisions

Only four years passed between the 2002 *Specht* decision and the 2006 *Hubbert* decision, but a much more favorable judicial treatment of browsewrap seems to have emerged over this short period. Time will tell if the New Mexico Supreme Court follows the same trend. In particular, *Verio* and *Hubbert* place a greater emphasis on internet consumer responsibility, most clearly illustrated by *Hubbert*'s likening the failure to click on a hyperlink to the decision not to turn the page of a paper contract.[108]

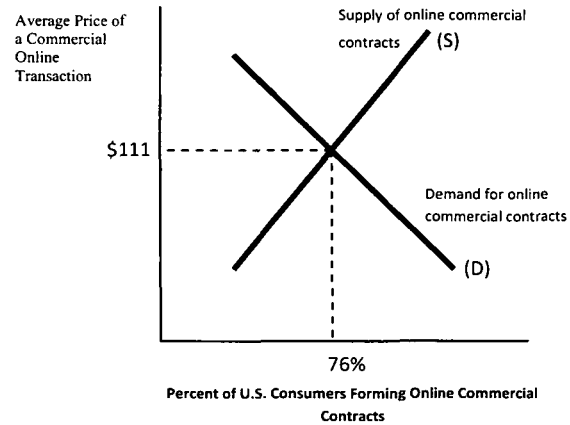

FIGURE 1: E-RETAILERS AND CONSUMERS REACH EQUILIBRIUM ON THE SUPPLY AND DEMAND OF ONLINE COMMERCIAL CONTRACTS.

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[105] *Fiser*, 165 P.3d at 334.

[106] *Id.* at 334-35 (citing *ProCD*, *supra* note 54 as precedent).

[107] Fiser v. Dell Computer Corp., 162 P.3d 172 (N.M. 2007).

[108] *Hubbert*, 835 N.E. 2d at 121.

While consumers should feel responsible for investigating contracts that they form online, judicial approval of browsewrap could have a negative effect on some consumers' willingness to enter into contracts online. Consumers are already sensitive to Internet uncertainty, and a portion may become more reluctant to transact online if they fear being bound to contracts that are not immediately discernible.[109] The remainder of this section will present an economic analysis of expansion or contraction scenarios of browsewrap contracting. The analysis will include statistics from various market, academic and institutional research to more clearly illustrate the scenarios. These statistics have not been independently verified and are included to better illustrate the analysis; they are not presented as predictions.

A. Judicial Acceptance of Browsewrap

The courts are seemingly following the same path of judicial acceptance of browsewrap that was laid by shrinkwrap and clickwrap. *Figure 1* represents the equilibrium in the market immediately preceding a court decision.[110] S represents the supply of contracts available from websites to make purchases online, and D represents the demand that Internet users have for those contracts. The equilibrium point is located where consumer demand for online contracts meets online retailers' willingness to supply online contracting options. In this analysis, the equilibrium price is $111, the average dollar amount of online transactions;[111] the equilibrium quantity of consumers participating in online contracting is seventy-

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[109] *See* discussion *supra* Section II.

[110] *See* COLE & GROSSMAN, *supra* note 21, at 5-9, for a discussion of supply, demand and equilibrium.

[111] Eric Enge, *The Impact of Comparison Shopping Sites on E-Commerce Sales*, SearchEngineWatch.com, Aug. 1, 2007, http://searchenginewatch.com/showPage.html?page=3626572 (last visited Feb. 24, 2008). This dollar amount is the average price of a transaction on HealthPricer.com, a site that sells health and beauty products. However, it is reasonably representative of the average overall internet purchase. In 2005, the average online purchase from a website that utilized VeriSign internet security services was $146, most likely a higher number than the overall average since all sites in the sample were able to afford VeriSign's services (Press Release, VeriSign, Internet Commerce Grows 88 Percent by Dollar Volume and 39 Percent by Transaction Volume: Fraud Remains a Concern (February 28, 2005) *available at* http://www.verisign.com/verisign-inc/news-and-events/news-archive/us-news-2005/page_028572.html (last visited Feb. 24, 2008)).

six percent, the percentage of consumers willing to make purchases online.[112]

If the courts choose to recognize wider use of browsewrap, consumers will bear the burden of this decision. E-retailers will not need to alter their sites; rather, they will gain confidence that any browsewrap contracts on their sites are valid and binding. Because websites will not need to make any initial changes, the supply of online contracting options will remain the same. Internet users will then have to decide whether the transaction costs from browsewrap are burdensome. If the speed and efficiency provided by browsewrap outweighs the uncertainty it also instills, net transaction costs will fall and consumers will continue to demand online contracts at the same or increased rate. Alternatively, if the net transaction costs rise, consumers will react to this increased burden to online contracting by demanding less contracts online.

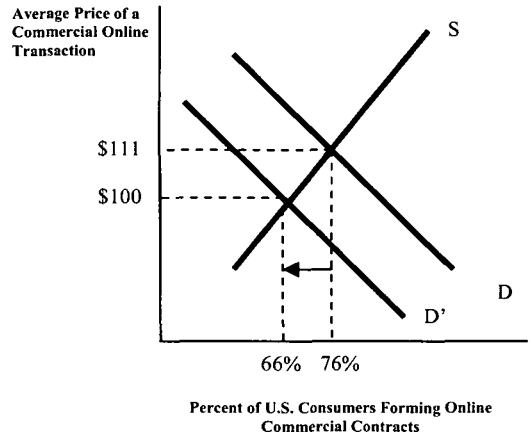

FIGURE 2: WEBSITE USERS DEMAND FEWER ONLINE CONTRACTS DUE TO THE INCREASED BURDEN OF TRANSACTION COSTS RELATED TO ONLINE CONTRACTS WHEN THE LEGALITY OF BROWSEWRAP EXPANDS

Browsewrap does allow increased time and efficiency, but consumers' fears and apprehensions would likely lead the increased transaction cost of uncertainty to outweigh the benefits for a significant number of consumers. Most likely, in the aggregate, consumers would find a net burdening effect as a result of greater acceptance of browsewrap. The more burdensome browsewrap

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[112] Giesen, *supra* note 2 (citing data from *Digital Window Shopping: The long delay before buying*, ScanAlert, (Research Report July 2007)).

becomes to users, the greater the chance that some users will choose to forego some or all online contracting.

If consumers determine that the net transactions costs are burdensome when browsewrap is approved, users will reduce their demand for online contracts. This scenario is represented in *Figure 2*: the demand curve will shift to the left and the quantity of online contracts formed will fall. A website security software maker has found that websites receive an average of fourteen percent higher sales when the site prominently displays its secure status to consumers.[113] Considering the high number of consumers concerned with online security, a conservative estimate of two-thirds of these consumers (or approximately ten percent of the increased sales) it is

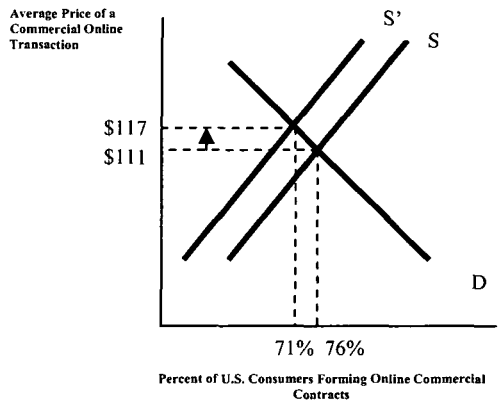

FIGURE 3: WEBSITES REDUCE THE SUPPLY OF ONLINE CONTRACTS IN RESPONSE TO THE BURDENS IMPOSED BY A RESTRICTION ON BROWSEWRAP

predicted will either abandon online contracting or participate to a lesser degree. The market will contract as websites and Internet users reach a new equilibrium at sixty-six percent of shoppers contracting online at a lower average price of ninety-six dollars per transaction.

B. Greater Restriction of Browsewrap

The courts could choose to restrict browsewrap beyond the fact pattern in *Specht*. For instance, courts could choose to enforce browsewrap only where there has already been a clickwrap or paper contract between the parties specifically sanctioning use of browsewrap in future transactions. In a situation like this, websites

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[113] Eric Enge, *Role of Trust in E-Commerce Sales*, SearchEngineWatch.com, July 11, 2007, http://searchenginewatch.com/showPage.html?page=3626363 (last visited Feb. 24, 2008).

would bear the costs imposed by the court decision as they would be forced to make expenditures to bring their sites into compliance with the law. In addition, some websites may opt not to switch to click-through contracting and may cease operation.

E-retailers are generally very responsive to the desires of their consumers. For instance, to address consumer safety concerns, nearly eighty percent of e-retailers voluntarily use an address verification system at checkout to prevent fraud.[114] It seems likely that the vast majority of websites would conform to a court restriction on browsewrap rather than drop out of the market altogether. For the purposes of this illustration, half as many firms will drop out of the market, five percent, as consumers that left due to increased uncertainty when browsewrap was accepted. However, because they are forced to bear the burden of the court decision, some websites will leave the market either because they cannot continue their business without relying on browsewrap, or because the cost of updating their websites to comply with the court decision is too arduous. As a result, the supply curve will shift to the left, and the market will come to a new equilibrium where fewer online contracts are formed. Consumers will find slightly fewer online contracting options available and will have to pay a slightly higher average price as a result. (*Figure 3*) The average price of a transaction will be $117, and seventy-one percent of consumers will continue to shop online when faced with these higher rates.

C. Wealth Maximization

So far, it appears that the market for online contracts is tightened whether browsewrap is accepted or restricted. However, the courts can avoid this undesirable effect by ensuring their decisions produce incentives for increased, rather than decreased, economic activity.[115] To achieve this outcome, the courts must first determine which party can avoid harm at the lowest cost.[116] To

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[114] Mark Brohan, *Internet Retailer Survey: Money Matters*, INTERNET RETAILER, September 2007, available at http://www.internetretailer.com/article.asp?id=23584 (last visited Feb. 24, 2008).

[115] Coase theorem advocates allocating contract rights in a way that minimizes costs and maximizes wealth. Ronald Coase won the Nobel Prize in economics for this theorem, which was initially laid forth in Coase's *The Problem of Social Cost* 3 J. Law & Econ 1 (1960). For a more detailed look at the Coase Theorem, see COLE & GROSSMAN, *supra* note 21, at 72-79.

[116] COLE & GROSSMAN, *supra* note 21, at 74 (least cost avoider).

determine the least cost avoider, the contraction in the percent of consumers willing to form a contract online when browsewrap is accepted and restricted must be compared (*Figure 4*). When browsewrap is accepted and consumers bear the burden of increased uncertainty, the percent of consumers transacting online falls to sixty-six percent. When browsewrap is restricted and websites bear the cost burden of complying with the ruling, the percent of consumers willing to contract online falls to seventy-one percent. Since websites can bear the burden of a court decision against them more easily than consumers, the websites are the least cost avoiders.

Next, if the cost burden is allocated by the courts to the least cost avoider (here the websites) wealth will be maximized where, despite an increased burden, online contracting actually increases. This is a feasible result since Internet users will be more confident contracting online if they have greater trust of e-retailers. The decreased uncertainty should outweigh the slower speed clickwrap contracts will require over browsewrap as consumers have to click several more times to signal their assent. If an increase in demand resulting from decreased uncertainty is greater than the contraction in supply due to the cost burden borne by websites, the scenario is wealth maximizing.

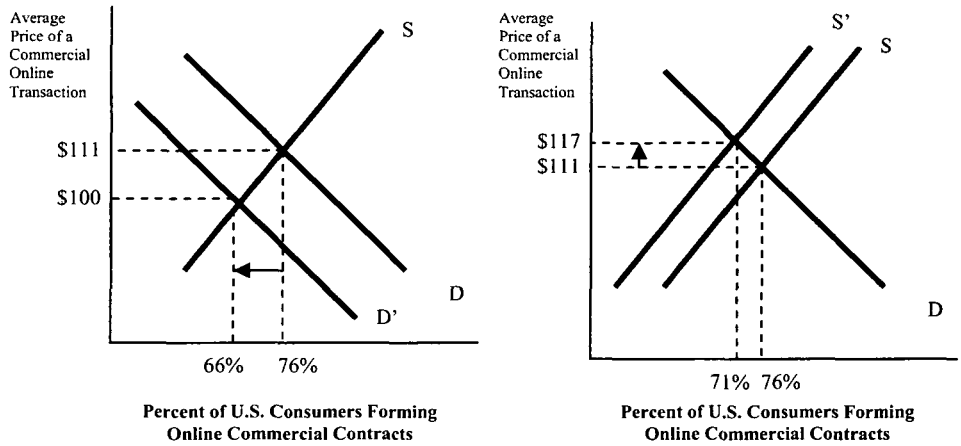

FIGURE 4: COMPARISON OF DEMAND CONTRACTION VERSUS SUPPLY REDUCTION DUE TO EXPANDED OR REDUCED USE OF BROWSEWRAP

A wealth maximizing graphical view is represented in *Figure 5*. When websites are forced to remove browsewrap from their sites and adjust their business models, the market will reach equilibrium at seventy-one percent of consumers shopping online and an average transaction price of $117. This new equilibrium will result in a

reduced amount of consumers shopping online. However, in response to the greater transparency online, users will feel more confident and increase their demand for online contracts. In this example, the same ten percent of consumers who left the market when uncertainty increased will have the opposite reaction when uncertainty decreases. The demand curve shifts to the right, and the market again moves to a new equilibrium point with eighty-one

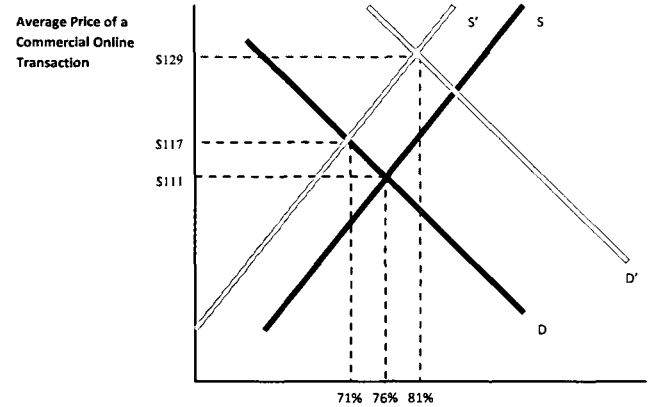

FIGURE 5: POSSIBLE WEALTH MAXIMIZING EFFECTS OF RESTRICTING BROWSEWRAP

percent of consumers shopping online at an average transaction price of $129. This is a higher number of online shoppers than either the initial equilibrium of seventy-six percent or the reduced equilibrium of seventy-one percent and a higher price per transaction. Thus, due to the court decision restricting browsewrap, a greater number of online contracts will be formed, thus maximizing the wealth of all parties.

VI. Role of the Court

The manner in which court decisions could influence online contracting may not be completely traditional. There are many barriers to enforcement in online contracting.[117] Parties contract regularly over international boundaries; if the U.S. courts went so far as to fully ban browsewrap, there would be no way to feasibly enforce this law outside the U.S.[118] In addition, as technology

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[117] Friedman, *supra* note 1, at 3.

[118] *Id.* at 3.

continues to advance, a restriction on browsewrap may become obsolete as some other method of contracting becomes widespread.[119]

However, one thing that does carry weight online is reputation.[120] A site like eBay decreases uncertainty by allowing buyers and sellers to leave reviews of each other as a reference for reliability in future transactions.[121] Court decisions restricting browsewrap could have a similar effect on the reputation of online contracting. While no court decision would ever reach or monitor all websites, it is likely the majority of sites that wish to conduct business in the U.S. would comply with the court decisions. Consumers might exhibit increased trust in online contracting overall, and a decrease in the transaction cost of uncertainty if this occurs, because they will be confident that the majority of sites will comply with the rulings. This would be particularly likely if sites chose to post some sort of recognizable icon publicizing their compliance with all U.S. laws. In this case, some of the twenty six percent of consumers who do not currently shop online may decide to start.

VII. Conclusion

Over the past few decades, agreements between buyers and sellers have evolved to satisfy the requirements of a contract in novel ways. Some of these new formations, such as shrinkwrap and clickwrap, have come into widespread use and make bargaining quick and easy for all parties. The traditional requirements of a contract, including offer and acceptance, must still be met for these agreements to be legally binding. Browsewrap may be the most efficient type of contract created so far. A consumer generally is not presented with the terms of a browsewrap bargain and does not need to alter his or her behavior to indicate acceptance. The price of this efficiency is that the consumer may be unaware of the terms he or she has agreed to, or may be unaware that a contract has been formed at all. The U.S. judiciary should use case law to clarify when browsewrap does and does not constitute a binding contract. If restriction on the practice is deemed necessary, rather than hindering e-commerce, the overall number of contracts formed online may

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[119] *Id.* at 3-4.

[120] *Id.* at 4.

[121] *Id.* at 5.

actually increase. Boundaries outlining the acceptable uses of browsewrap would give websites an incentive to present contracts to consumers in a more upfront and clear manner. This should reduce the uncertainty many consumers feel when proceeding with transactions online. If consumers' increased confidence is great enough, it will lead to an overall increase in the number of contracts formed online, a result that will leave both buyers and sellers in a better position. Internet contracting is not in danger of disappearing – for instance, nearly $160 billion dollars is expected to be spent in purchases online this year. Yet, that number could be even higher if more people feel secure contracting online. The courts have an opportunity to create a stronger forum for buyers and sellers on the Internet; they should not miss the chance.