



The Enforceability of Clickwrap Agreements

A Study of United States of America Contract Law and a
Survey of the Practices of Software Companies

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Table of Contents

- Table of Contents 2**
- Introduction 4**
- Abbreviations..... 6**
- 1 Purpose, Method and Materials..... 7**
 - 1.1 Purpose 7
 - 1.2 Method and Materials 7
 - 1.2.1 The Enforceability of Clickwrap Agreements..... 8
 - 1.2.2 A Survey of the Practices of Software Companies..... 11
 - 1.2.3 Analyzing the Findings..... 13
- 2 United States of America Contract Law 15**
 - 2.1 Contracts in General 15
 - 2.1.1 Formation of a Contract..... 15
 - 2.1.2 Conduct or Failure to Act as Manifestation of Mutual Assent..... 16
 - 2.1.3 Standardized Contracts 17
 - 2.1.4 Contracts of Adhesion 17
 - 2.2 “Money Now, Terms Later” or Rolling Contracts 19
 - 2.3 The Doctrine of Unconscionability 21
- 3 The Law of Clickwrap Agreements..... 23**
 - 3.1 Defining Clickwrap Agreements 23
 - 3.2 The Enforceability of Clickwrap Agreements 24
 - 3.2.1 Reasonable Notice of the Terms..... 26
 - 3.2.2 Clicking Through as Manifestation of Assent..... 32
 - 3.3 Modified Clickwrap Agreements 35
- 4 Analyzing the Enforceability of Clickwrap Agreements..... 41**
 - 4.1 The Enforceability of Online Contracts in General 41
 - 4.2 Clickwrap Agreements 42
 - 4.3 Modified Clickwrap Agreements 43
- 5 A Survey of the Practices of Software Companies..... 46**
 - 5.1 The Procedure and Definitions of the Survey..... 46
 - 5.1.1 The Company Sells Products or Services Online? 46
 - 5.1.2 Purchase Requires Registration? 46

5.1.3	Terms Available on the Website in Browsewrap Form?.....	47
5.1.4	Notice of Terms Before Entering Payment Information?	47
5.2	The Results of the Survey	49
6	Analyzing the Results of the Survey	52
6.1	The Survey in General	52
6.2	Comparing the Results of the Two Surveys	52
6.3	The Enforceability of Clickwrap or Modified Clickwrap Agreements	55
7	Summary and Conclusions.....	57
	References	59
	Primary Authorities	59
	United States Supreme Courts	59
	United States Court of Appeals	59
	United States District Courts	60
	Secondary Authorities	60
	Literature.....	60
	Restatements	61
	Law Reviews	61
	Articles.....	61
	Internet Resources	62

Introduction

An emerging area of the law is the legal effect of online agreements and this has been addressed by a number of different courts. When faced with these kinds of agreements the courts have been known to still apply the traditional principles of contract law and to focus on whether or not the plaintiffs have had a reasonable notice of and manifested assent to the online terms.¹ A common type of online agreement that has emerged with the rise of internet contracting is the clickwrap agreement. The definition of a clickwrap agreement is where a message is presented to the user on his or her computer screen that requires the user to assent to the terms of the agreement through the act of clicking an icon.² The terms of the agreement are immediately visible on the user's computer screen accompanied by a button labeled "I Agree" or something similar and through affirmative action the user must assent to the terms of the agreement by clicking the button.³ Modified clickwrap agreements are a new and slightly different type of presentation for clickwrap agreements. Whereas the terms of a clickwrap agreement are displayed immediately on the computer screen on the same web page where the "I Agree" button is located, by contrast, the terms of modified clickwrap agreements are not immediately visible but must be accessed through a hyperlink or by reference on how or where to find them.⁴ Users that assent to the terms of a clickwrap agreement has a duty to read the terms and as with any type of binding contract failure to read the terms of the contract does not excuse compliance with its terms.⁵

A survey was conducted in July and August of 2000 based on the top 100 personal computer software companies by 1999 calendar-year volume of revenue and examined whether they provided their terms online.⁶ By visiting all of the 100 different websites in the survey the author and her research assistant found that, out of the 64 companies in the survey that provided for ordering of products online, only eight of them provided their license agreements prior to the time that a customer was required to provide credit card information as part of the

¹ See, e.g., *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009) (citing *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa. 2007); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 28-30 (2d. Cir. 2002)).

² *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 45 UCC Rep.Serv.2d 1, 593-594 (S.D.N.Y. 2001).

³ *Adsit Co., Inc. v. Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007) (citing *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa. 2007)).

⁴ See, e.g., *Swift v. Zynga Game Network, Inc.*, 805 F.Supp.2d 904, 912 (N.D.Cal. 2011).

⁵ See, e.g., *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009).

⁶ See Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1860-1861 (2000).

order procedure.⁷ As such, 87.5% of the companies in the survey did not make pre-transaction disclosure of their terms which the author held was indicative of prevalence of the practice of delayed disclosure.⁸ Since it was close to 15 years ago that this survey was conducted and with the abundance of cases regarding online browsewrap, clickwrap, and recently modified clickwrap agreements, that have propped up in later years, a revisit to examining the practices of software companies is called for.

In this essay a similar survey will therefore be conducted with the purpose of examining the practices of software companies selling products or services online and to determine whether they provide disclosure of their terms in the form of browsewrap, clickwrap or modified clickwrap agreements prior to or in conjunction with the customer being required to enter payment information.⁹ As the findings will show the prevalence of the practice of delayed disclosure seems to be a relic of the past as all of the companies examined in the survey conducted in this essay provided disclosure in the form of a browsewrap, clickwrap or modified clickwrap agreement to customers prior to or in conjunction with entering payment information.¹⁰ 80% of these companies provided disclosure in the form of either a clickwrap or modified clickwrap agreement prior to or in conjunction with entering payment information and 65% of them even employed mandatory registration of accounts on their website prior to purchasing products.¹¹ This tendency of pushing disclosure of their terms on the customer early in the purchase process may be an indication of the opposite, the prevalence of pre-transaction disclosure. With the recent case law on clickwrap and modified clickwrap agreements and the fact that courts have consistently enforced these types of agreements if they measure up to the provisions of reasonable notice and manifestation of assent¹², software companies seem vehemently more willing to shove their terms at their customers early as they will stand a substantially better chance of enforcing the provisions within them, regardless of the fact of whether or not the customer actually reads the terms.

⁷ *Id.* at 1861.

⁸ *Id.*

⁹ *See infra* Part 1.2.2.

¹⁰ *See infra* Part 5.2.

¹¹ *Id.*

¹² *See infra* Part 3.2.

Abbreviations

Adsit	Refers to Adsit Company, Incorporated. (party in the case <i>Adsit Co., Inc. v. Gustin</i> , 874 N.E.2d 1018 (Ind. Ct. App. 2007))
CoStar	Refers collectively to CoStar Reality Information, Incorporated and CoStar Group, Incorporated (parties in the case <i>CoStar Reality Information, Inc. v. Field</i> , 737 F. Supp. 2d 496 (D. Md. 2010))
DSL	Refers to Verizon Internet Services' digital subscriber line service (service in the case <i>Forrest v. Verizon Communications, Inc.</i> , 805 A.2d 1007 (D.C. 2002))
iParadigms	Refers to iParadigms, Limited Liability Company (party in the case <i>A.V. v. iParadigms, Ltd. Liability Co.</i> , 544 F.Supp.2d 473, 232 Ed. Law Rep. 176 (E.D.Va. 2008))
NBOME	Refers to The National Board of Osteopathic Medical Examiners (party in the case <i>Jallali v. National Bd. of Osteopathic Medical Examiners, Inc.</i> , 908 N.E.2d 1168 (Ind. Ct. App. 2009))
Netscape	Refers collectively to Netscape Communications Corporation and America Online, Incorporated (parties in the case <i>Specht v. Netscape Communications Corp.</i> , 306 F.3d 17, 48 UCC Rep.Serv.2d 761 (2d. Cir. 2002))
PwC	PricewaterhouseCoopers
Restatement	Restatement (Second) of Contracts (1981)
TOS	Terms of Service
TOU	Terms of Use
U.C.C.	Uniform Commercial Code

1 Purpose, Method and Materials

1.1 Purpose

The purpose of this essay is to study the enforceability of clickwrap agreements formed over the internet in United States of America contract law regarding the online sale of products or services. It is also the purpose of this essay to conduct a survey of the practices of software companies to examine whether or not they provide disclosure of their terms in the form of a clickwrap, modified clickwrap or browsewrap agreement prior to or in conjunction with the customer being required to enter payment information when purchasing products or services online. The overarching questions of this essay will therefore be:

- Under which circumstances are clickwrap agreements enforceable?
- Do software companies provide disclosure of their terms to customers purchasing products or services online in the form of a browsewrap, clickwrap or modified clickwrap agreement prior to or in conjunction with entering payment information?
- What analysis can be drawn from answering the first two questions regarding the enforceability of clickwrap agreements and the survey of the practices of software companies?

1.2 Method and Materials

It is important when studying United States of America law in general to remember that you are dealing with a legal system built on federalism. As opposed to dealing with one coherent legal system you are studying more than 50 closely related but far from identical legal systems.¹³ The individual states have retained most of their legislative power the exceptions being those areas where the authority has been transferred to federal organs.¹⁴ In other areas the states retain and develop their own legal rules and one of those fields in particular is the central parts of contract law.¹⁵

¹³ MICHAEL BOGDAN, *CONCISE INTRODUCTION TO COMPARATIVE LAW* 121 (2013).

¹⁴ *Id.*

¹⁵ *Id.*

As a Swedish student of Swedish law examining United States of America contract law some difficulties are bound to arise. For starters the study of a foreign law system is a more difficult undertaking than the study of the law in one's native country, for obvious reasons.¹⁶ The biggest pitfall for someone studying a foreign law system has been described as when the student unconsciously or instinctively starts with the assumption that legal institutions, legal concepts and methods of working of that persons native legal system also exists in the legal system being examined.¹⁷ There are fundamental differences between the Swedish legal system to that of the system in the United States of America. The use of legislative history in the Swedish legal system as a binding source of law is a good example. Separating the methods and materials of these legal systems should prove fairly unproblematic given these differences. Legal writings and other sources of law in the studied legal system must be used and interpreted in precisely the same manner that they would be in the legal system they originated from.¹⁸ By extension the legal system in its entirety must be studied in order to understand the implications of a specific issue.¹⁹ Also, when studying law in a foreign language problems frequently arise. Since this essay is written in English there is no problem associated with translation however the interpretation of terms, especially legal terms that are often more precise and decidedly different from their counterparts in everyday usage, can prove problematic at times.²⁰ And finally, in order to fully understand the intricacies of legal rules the social context and purpose of these rules must be examined from different angles.²¹ In this essay this will mostly be reflected on through the lens of economic efficiency and that of social attitudes evident in legal discussion concerning this matter.²²

1.2.1 The Enforceability of Clickwrap Agreements

The substantive law of this essay primarily concerns the enforceability of clickwrap agreements formed over the internet in United States of America contract law regarding the online sale of products and services. The validity of online contracts in terms of form has already been the subject for much judicial discussion²³ and for the purpose of this essay standardized agreements formed over the internet are presumed a valid type of contracting

¹⁶ *Id.* at 29.

¹⁷ *Id.*

¹⁸ *Id.* at 32-33.

¹⁹ *Id.* at 35.

²⁰ *Id.* at 36-37.

²¹ *Id.* at 39-40.

²² *See infra* Part 6.2.

²³ *See, e.g.,* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U.L. REV. 429 (2002).

and any notion of validity of form for clickwrap agreements formed over the internet will only briefly be touched upon.²⁴ Because the survey that will be conducted in this essay covers multiple companies located in different states and with different jurisdictions this essay will be a multijurisdictional study. Therefore specific state laws and statutes will not be researched with the exception of the Uniform Commercial Code²⁵ that will be briefly mentioned in regards to “money now, terms later” or rolling contracts.²⁶

The primary source of material will be the case law of the different courts deciding on cases on the enforceability of clickwrap agreements. In the United States of America case law is the primary authority when determining substantive contract law through setting precedent by settling disputes.²⁷ The common law system operates under the principle of *stare decisis et non quieta movere*, which means “to adhere to precedent and not to unsettle things which are settled.”²⁸ Some case law carries mandatory precedent while other case law carry only persuasive precedent which is important since *stare decisis et non quieta movere* applies only to mandatory precedent.²⁹ In a legal issue governed by state law the mandatory precedent is based on two things: jurisdiction and court level. In terms of jurisdiction mandatory precedent emanates from decisions of courts in the same state. Decisions from courts in other states, sometimes called “sister courts”, carry only persuasive precedent.³⁰ Mandatory precedent also operates hierarchically. The courts in a state are bound by the decisions of higher courts, however they are not bound by decisions of courts of the same level or lower courts.³¹ This poses problems for a multijurisdictional study as different courts in different states are not bound by the decisions of their “sister courts” even when these decisions are of a higher court level. However, this is somewhat mitigated by the fact that judges often refer to decisions of earlier similar cases.³² Favorable or similar reasoning in the decisions of “sister courts” often enhance or carry very persuasive force for courts in other states dealing with similar issues. Sometimes cases that have been referred to prolifically are called “leading” or “seminal” cases regarding a specific topic and often carry heavy weight.³³ As the findings in this essay

²⁴ See *infra* Part 3.

²⁵ Henceforth referred to as “U.C.C.”.

²⁶ See *infra* Part 2.2.

²⁷ CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 7 (6th ed. 2004).

²⁸ *Id.* at 131.

²⁹ *Id.* at 132.

³⁰ *Id.*

³¹ *Id.* at 133.

³² *Id.* at 134.

³³ *Id.* at 135.

will show this is often the case in regards to clickwrap agreements.³⁴ While this essay does not cover all jurisdictions within the United States of America a fair number of them are represented and as such should cover most of the situations where clickwrap agreements are concerned.

For secondary authorities this essay deals mainly with articles, law reviews, the Restatement³⁵ and some internet resources. As opposed to primary authorities secondary authorities carry no binding force.³⁶ For a general overview of the different principles formulated in the decisions of the courts the Restatement will provide guidance. Out of the secondary authorities the Restatement is the most law-like of them all.³⁷ The Restatement is a consolidation of the principles of common law that has grown over the years and has been expressed in an organized manner. It is not created law, or new law, but a promulgated source of already existing common law in rule-like statements.³⁸ While not a binding source of law the Restatement is widely viewed as the most authoritative of the secondary sources and courts routinely refer to and in some cases even adopt the Restatement in their decisions.³⁹ In a multijurisdictional study this proves even more useful since while there might be differences in some states regarding a particular topic, as the Restatement is a consolidation of common law it should cover more ground than a specific decision in a particular state as a general guideline. Other secondary authorities like articles and law reviews will also be studied to the extent that they provide valuable insight in the discussion of the enforceability of clickwrap agreements and other areas of online contracting as well as the subsequent analysis.

The enforceability of shrinkwrap agreements will be briefly described and studied since they provide important precedent to the enforceability of clickwrap agreements and the enforceability of “money now, terms later” or rolling contracts.⁴⁰ They also provide analogous value in the analysis of the reasons to enforce online agreements and contracts of adhesion in general as well as to the analysis of delayed disclosure of terms.⁴¹ However, the study of the enforceability of browsewrap agreements won’t be the focus of this essay. Instead they will be briefly touched upon in cases where the interpretation of the courts is of value to what they

³⁴ See *infra* Part 3.

³⁵ Restatement (Second) of Contracts (1981). Henceforth referred to as “Restatement”.

³⁶ CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 8 (6th ed. 2004).

³⁷ *Id.* at 103.

³⁸ *Id.*

³⁹ *Id.* at 105.

⁴⁰ See *infra* Part 2.2.

⁴¹ See *infra* Part 6.2.

provide in the discussion of the enforceability of clickwrap agreements or modified clickwrap agreements, particularly in reference to questions of reasonable notice of the terms of the agreement.⁴² Browsewrap agreements will also be a part of the analysis of modified clickwrap agreements, how the introduction of this new definition has blurred the line of distinction between clickwrap agreements and browsewrap agreements.⁴³ The enforceability of browsewrap agreements is however beyond the scope of this essay. Lastly, the existence of a browsewrap agreement on websites that sell products or services online will be a part of the survey that examines the practices of software companies⁴⁴ and the following analysis of the results of this survey.⁴⁵

1.2.2 A Survey of the Practices of Software Companies

The survey conducted in this essay aims to examine whether software companies selling products or services on the internet provide disclosure to customers in the form of either a clickwrap, modified clickwrap or browsewrap agreement. The main question of the survey is whether or not the companies disclose terms of clickwrap or modified clickwrap sort to the customer before payment information has to be entered. The survey is based on a list of the top 50 companies located in the United States of America as ranked by the Global 100 Software Leaders by revenue⁴⁶ in 2012 produced by PricewaterhouseCoopers⁴⁷. The process conducted in the survey was to first visit each website, select a product or service for purchase and then continue on with the process of the purchase through one of the usual purchase process methods provided online. Whenever necessary an account was registered and the process of purchase was stopped whenever being required to enter payment information, such as through a prompt to enter credit card information⁴⁸ in order to avoid liability, or otherwise at the disclosure of a clickwrap or modified clickwrap agreement. When conducting the survey four questions were asked when visiting each website listed in the ranking:

- (1) The company sells products or services online?
- (2) Purchase requires registration?

⁴² See *infra* Part 3.2.1.

⁴³ See *infra* Part 4.3.

⁴⁴ See *infra* Part 5.1.3.

⁴⁵ See *infra* Part 6.2.

⁴⁶ PRICEWATERHOUSECOOPERS, GLOBAL 100 SOFTWARE LEADERS BY REVENUE (2013), available at http://www.pwc.com/en_GX/gx/technology/publications/global-software-100-leaders/assets/pwc-global-100-software-leaders-2014.pdf.

⁴⁷ Henceforth referred to as "PwC", <http://www.pwc.com> (last visited Mar. 20, 2015).

⁴⁸ For example the process of adding an item to a cart that can be subsequently checked out through a series of steps where personal information is entered and later credit card information. See, e.g., AMAZON.COM, <http://www.amazon.com> (last visited Mar. 19, 2015).

- (3) Terms available on the website in browsewrap form?
- (4) Notice of terms before entering payment information?

The results of this survey are contingent on the fact that a company sells products or services online. If the company does not sell products or services online it provides no value to the analysis of the problem of delayed disclosure of terms in internet transactions.

Whether or not the websites requires the user to register an account is important since in relevant case law regarding the enforceability of clickwrap agreements the necessity of registering an account as part of the transaction process and being confronted with a clickwrap presentation has been found as providing the customer with reasonable notice of the terms governing the transaction.⁴⁹ It is also indicative of the companies' willingness to make sure that they have disclosed the terms of the transaction to their customers early in the process of purchase.⁵⁰

While the enforceability of browsewrap agreements in regard to online contracts of sale is beyond the scope of this essay, the existence of a browsewrap agreement governing the terms of the transaction on the website is however relevant in the discussion of delayed disclosure of terms in regards to online standard form contracts.⁵¹ It is also indicative to whether or not the companies think they have provided adequate disclosure of the terms of the transaction, regardless if these agreements would be found unenforceable if challenged in court.⁵²

The importance of whether there is a notice of terms before the customer is required to enter payment information has been a point of discussion among various commentators. Some contend that delayed disclosure of terms prior to payment is an unfair and deceptive practice that is in violation of various federal and state acts.⁵³ However, others have found that delayed disclosure in "pay now, terms later" or rolling standard form contracts is not inherently worse for buyers as pro-seller terms are not more common in contracts disclosed after purchase.⁵⁴

⁴⁹ See *infra* note 170 and accompanying text.

⁵⁰ See *infra* Part 6.2.

⁵¹ See *infra* Part 6.2.

⁵² See *infra* Part 6.3.

⁵³ See Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1807 (2000).

⁵⁴ See FLORENCIA MAROTTA-WUGLER, ARE "PAY NOW, TERMS LATER" CONTRACTS WORSE FOR BUYERS? EVIDENCE FROM SOFTWARE LICENSE AGREEMENTS, 38 J. LEGAL. STUD. 309, 309-313 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799282.

Furthermore in terms of enforceability the manner in which disclosure of terms, prior to being required to enter payment information, is presented is important. As this essay will prove the enforceability of terms disclosed in the form of a clickwrap or modified clickwrap agreement prior to or in conjunction with being prompted to enter payment information is a relatively unproblematic issue if the terms of the agreement are given reasonable notice to the customer and the customer is required to assent to these terms through affirmative action.⁵⁵

The results of the survey conducted while writing this essay will be presented and later analyzed in comparison to the survey conducted by Braucher.⁵⁶ The findings will also be analyzed in relation to other standpoints in regards to delayed disclosure of terms prior to payment⁵⁷ and in reference to the conclusions found in the substantive law section regarding the enforceability of clickwrap and modified clickwrap agreements.⁵⁸ A more in depth description of the procedure of conducting the survey and the definitions of various terms used in it will be presented in the survey section below.⁵⁹

1.2.3 Analyzing the Findings

The first part of analyzing the enforceability of clickwrap agreements will be devoted to analyzing the traditional principles of United States of America contract law and how they pertain to clickwrap agreements.⁶⁰ In the second part the enforceability of clickwrap agreements will be analyzed in regards to the findings in the substantive law of this essay in particular the various case decisions that have been examined.⁶¹ In the third part the new definition of modified clickwrap agreements will be analyzed in relation to previous case law on clickwrap agreements and as compared to browsewrap agreements.⁶²

Regarding the results of the survey the results will first be analyzed in general and in terms of the limitations and scope of the survey.⁶³ Then the results of the survey will be analyzed in

⁵⁵ See *infra* Part 4.

⁵⁶ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000).

⁵⁷ See *infra* Part 6.2.

⁵⁸ See *infra* Part 4.

⁵⁹ See *infra* Part 5.

⁶⁰ See *infra* Part 4.1.

⁶¹ See *infra* Part 4.2.

⁶² See *infra* Part 4.3.

⁶³ See *infra* Part 6.1.

comparison to the survey conducted by Braucher.⁶⁴ The results of the survey will also be analyzed in this part in regards to another survey regarding delayed disclosure of terms and commentary regarding mandatory disclosure of terms.⁶⁵ The final part of this analysis will be devoted to the enforceability of clickwrap and modified clickwrap agreements where these types of agreements were found on the websites examined in the survey.⁶⁶

Finally, the essay will conclude with a summary and some final thoughts on the findings in the substantive law and the results of the survey.⁶⁷

⁶⁴ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000).

⁶⁵ See *infra* Part 6.2.

⁶⁶ See *infra* Part 6.3.

⁶⁷ See *infra* Part 7.

2 United States of America Contract Law

2.1 Contracts in General

“A contract is a promise or a set of promises for the breach of which the law gives remedy, or the performance of which the law in some way recognizes as a duty.”⁶⁸ This is the general definition of a contract as described in the Restatement and has been adopted by courts in various decisions.⁶⁹ This definition has however received criticism as saying a contract is a legally enforceable promise could seem as a rather redundant statement when a promise is only legally enforceable if it is in the form of a contract: “Nothing less than the whole body of applicable precedents suffices to define the term ‘contract’.”⁷⁰ The Restatement defines an agreement as the manifestation of mutual assent between two or more persons.⁷¹ This is important because mutual assent is a prerequisite for the formation of a legally binding contract. An agreement of exchange of promises or to exchange a promise for a performance or to exchange performances is what defines a bargain.⁷²

2.1.1 Formation of a Contract

In order to form a contract there has to be a manifestation of mutual assent. This requires that each of the parties of a contract either make a promise or begin or render a performance.⁷³ The test for whether or not there has been a manifestation of mutual assent is an objective one. A parties’ subjective intent not to be bound by a contract is irrelevant in light of said parties’ objective conduct.⁷⁴ According to the classical subjective theory of contract law for a legally binding contract to be formed there has to be a “meeting of the minds on the essential terms of the agreement.”⁷⁵ This means that the parties of a contract must have mutual assent to the same thing and in the same sense for the contract to be considered enforceable. The meeting of minds that occurs must apply to all the terms of the contract.⁷⁶ However, when considering the objective theory of contract law circumstances surrounding the objective conduct of the parties and whether a reasonable person would conclude that the parties

⁶⁸ Restatement (Second) of Contracts § 1 (1981).

⁶⁹ See, e.g., *Henke v. U.S. Dept. of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir. 1996).

⁷⁰ See *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 104 N.W.2d 661, 537 (1960).

⁷¹ Restatement (Second) of Contracts § 3 (1981).

⁷² *Id.*

⁷³ Restatement (Second) of Contracts § 18 (1981).

⁷⁴ See, e.g., *Anderson Marketing, Inc. v. Maple Chase Co.*, 241 F.3d 1063, 1066 (8th. Cir. 2001).

⁷⁵ *Homestead Golf Club, Inc. v. Pride Stables*, 224 F.3d 1195, 1200 (10th. Cir. 2000).

⁷⁶ *Id.* at 1199.

intended to be bound by a contract in regards to an objective manifestation of mutual assent is the basis of whether a legally binding contract is formed.⁷⁷

The making of an offer or a proposal by one of the parties followed by an acceptance of that offer by the other party is the usual form of manifestation of mutual assent.⁷⁸ One of the parties makes an offer and the other accepts this offer. The offer in of itself has to be intended as such in order to create a legally binding contract upon acceptance.⁷⁹ However, the Restatement also provides that a manifestation of mutual assent can occur even in cases where neither an offer nor acceptance has been identified. This is also true for some situations where the moment of formation cannot be determined.⁸⁰ Manifestation of assent can also be expressed through work, act or conduct of the parties' intention to form a contract.⁸¹

2.1.2 Conduct or Failure to Act as Manifestation of Mutual Assent

“(1) The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.”⁸² Certain acts or conduct may become the basis for which a legally binding contract is formed however this depends on the particular nature of the acts or conduct in question and the circumstances surrounding the transaction.

Establishing a general principle or criterion for determining whether a contract has been formed through certain acts or conduct is impossible and the circumstances for each situation must be evaluated on a case-by-case basis.⁸³

As a general rule of law silence and inaction, or otherwise failure to reject an offer when it is made, is not to be constituted as acceptance of an offer.⁸⁴ There are exceptions to this general rule however. Silence for instance can operate as acceptance under such circumstances when a party benefits from rendered services and knows the terms for which the services are being offered and has had a reasonable opportunity to reject the offer of these services. In these situations the party is assenting to the proposed terms and is accepting the offer through silence.⁸⁵ If the party receiving an offer by words or by conduct leads the party extending the

⁷⁷ Wilcher v. City of Wilmington, 139 F.3d 366, 40 Fed. R. Serv. 3d. 934, 373 (3rd. Cir. 1998).

⁷⁸ Restatement (Second) of Contracts § 22 (1981).

⁷⁹ Starr Farm Beach Campowners Ass'n, Inc. v. Boylan, 811 A.2d 155, 158 (Vt. 2002).

⁸⁰ Restatement (Second) of Contracts § 22 (1981).

⁸¹ Beaver v. Grand Prix Karting Ass'n, Inc., 246 F.3d 905, 909 (7th. Cir. 2001).

⁸² Restatement (Second) of Contracts § 19 (1) (1981).

⁸³ Johnson v. Capital City Ford Co., 85 So. 2d 75, 86-87 (La. Ct. App. 1st. Cir. 1955).

⁸⁴ Vogt v. Madden, 110 Idaho 6, 713 P.2d 442, 445 (Ct. App. 1985).

⁸⁵ Porter v. General Boiler Casting Co., Inc., 284 Md. 402, 396 A.2d 1090, 1095-1096 (1979).

offer to reasonably interpret that silence as an acceptance of the terms that silence constitutes an acceptance of the offer.⁸⁶ The conduct of a party is not considered effective as manifestation of mutual assent if the party does not intend to engage in the conduct and knows or has reason to know that the other party may infer assent from this conduct.⁸⁷ A contract may be voidable on the grounds of fraud, duress, mistake or other invalidating causes when a party has manifested assent even though the party did not in fact assent to the offer.⁸⁸

2.1.3 Standardized Contracts

Standardized contracts are enforceable when a party that manifest assent to or signs an agreement where the party has reason to believe the writing and writings like it are regularly used to dictate the terms of other agreements of the same type. The terms of the standardized agreement are integrated in the transaction and the writing is interpreted as treating all those in similar situations alike wherever reasonable.⁸⁹ However, if the party providing the terms of the agreement would have reason to believe that the other party would not manifest assent to the agreement if the other party had known that the agreement included a particular term that the party would not have accepted, that particular term is not part of the agreement.⁹⁰ Standard form contracts account for over 99% of all contracts in commercial and consumer transactions in an advanced economy for the transfer of goods, services and software.⁹¹ They are the contract form of choice for most of the transactions we do in everyday life. Whenever we purchase life insurance, when we lease a car or render the services of a firm for a performance, a standard form contract is governing the transaction. Standardization of contracts serves as an important function of the law of contract. By standardizing contracts it serves the need to eliminate as much as possible of the uncertainty of complicated transactions.⁹²

2.1.4 Contracts of Adhesion

Contracts of adhesion are not to be confused with standard form contracts. Although adhesion contracts are usually provided in the form of standardized contracts there are other elements

⁸⁶ John J. Brennan Const. Corp., Inc., v. City of Shelton, 187 Conn. 695, 448 A.2d 180, 187-188 (1982).

⁸⁷ Restatement (Second) of Contracts § 19 (2) (1981).

⁸⁸ Restatement (Second) of Contracts § 19 (3) (1981).

⁸⁹ Restatement (Second) of Contracts § 211 (1981).

⁹⁰ *Id.*

⁹¹ John J. A. Burke, *Contract as Commodity: A Notification Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000).

⁹² Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 533, 589 (1933).

that serve to constitute a contract of adhesion. Contracts of adhesion have been described as contracts modelled by seven distinct characteristics:

- (1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
- (2) The form has been drafted by, or on behalf of, one party to the transaction.
- (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
- (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
- (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
- (6) The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party.
- (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.⁹³

Accordingly contracts of adhesion are contracts where the terms of the contract are established solely by one of the parties entering into the agreement. These contracts are provided as “take-it-or-leave-it” terms that are not subject for bargaining.⁹⁴ As such, the parties of the contract find themselves in unequal bargaining positions. Enterprises with strong bargaining power often use standard form contracts when dealing with their counterparts of weaker bargaining position. The weaker party is often not in a position to shop around for better terms when purchasing goods or services. The competitors of the enterprises often use the same terms for their agreements and in some cases the author of the standardized agreement is in a position of either natural or artificial monopoly on the market.⁹⁵ Franchise agreements are good examples of the inherent dangers that are common with contracts of adhesion. Unequal bargaining positions between the parties in business contracts of the franchise agreement sort are commonplace. Typically in these kinds of agreements the terms of the contract are highly favorable to the franchisor while the franchisees are offered little protection. The courts will therefore be very cautious when interpreting the provisions and

⁹³ Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

⁹⁴ *Id.*

⁹⁵ Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

applying license agreements of this sort.⁹⁶ Contracts of adhesion are generally enforceable contracts unless they are shown to be unfair in the particular circumstances, to offend public policy or if they are unconscionable.⁹⁷

2.2 “Money Now, Terms Later” or Rolling Contracts

Shrinkwrap agreements are a different form of contract to that of a clickwrap agreement or a browsewrap agreement. The term “shrinkwrap agreement” comes from the retail software packages that are covered with plastic or cellophane where the license contained within these packages become effective when the customer tears open the wrapping.⁹⁸ The terms of the transaction and use of the product isn’t revealed to the customer until after it is purchased. This is an important distinction since this is a significantly more curtailed form of contract to that of the clickwrap agreement. The question of the enforceability of shrinkwrap agreements was tried in the case *ProCD, Inc. v. Zeidenberg* which is considered to be the leading case on shrinkwrap agreements.⁹⁹

ProCD, Inc. v. Zeidenberg was a case before the United States Court of Appeals for the Seventh Circuit that dealt with the issue of enforceability of shrinkwrap agreements for buyers of computer software. In the case at hand the plaintiff was ProCD, Incorporated who had compiled information into a computer database from more than 3000 telephone directories. A version of this database was sold in the form of CD-ROM discs.¹⁰⁰ The license agreement in question was encoded on the CD-ROM disc and was also printed in the manual which appeared on the users screen every time the software would run and limited the use of the application to non-commercial purposes.¹⁰¹ Zeidenberg bought a consumer package of the product from a retail outlet in Madison, Wisconsin. He then resold the information contained in the database to his customers for a lesser price than that of the plaintiff. ProCD, Incorporated filed suit against Zeidenberg as this conduct was in violation to the shrinkwrap agreement provided with the product he had purchased.¹⁰²

⁹⁶ *American Nursing Care of Toledo, Inc. v. Leisure*, 609 F. Supp. 419, 431 (N.D. Ohio 1984).

⁹⁷ *McInnes v. LPL Financial, LCC*, 466 Mass. 256, 994 N.E.2d 790, 798 (2013).

⁹⁸ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th. Cir. 1996).

⁹⁹ *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337 (D. Mass. 2002).

¹⁰⁰ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th. Cir. 1996).

¹⁰¹ *Id.* at 1450.

¹⁰² *Id.*

The court concluded that shrinkwrap agreements should be treated as ordinary contracts accompanying the sale of products and as such are governed by the U.C.C. and the common law of contracts.¹⁰³ The court held that instances where the detailed terms are provided after the exchange of money has occurred in transactions are common providing the example of purchase of insurance: “The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy.”¹⁰⁴ The type of contracts where a notice of the license is provided on the outside of the box and the detailed terms are contained on the inside accompanied with a right to return the software if the costumer feels the terms are unacceptable may be valuable to both buyers and sellers alike as a means of doing business.¹⁰⁵ In this case the terms of the shrinkwrap agreement expressly extended the right to return the software if the terms were deemed unacceptable and a notice of the license was also on the outside of the box.¹⁰⁶ The court, referring to § 2-204 (1) of the U.C.C., held that a vendor may invite acceptance by conduct.¹⁰⁷ The vendor, as master of the offer, proposes limitations on what kind of conduct should constitute acceptance.¹⁰⁸ Thus the buyer may accept the agreement by performing the act the vendor has proposed to treat as acceptance. In the opinion of the court, this is exactly what Zeidenberg had done by using the software after having an opportunity to read the terms of the agreement and failing to reject the terms by returning the product.¹⁰⁹ Shrinkwrap agreements are enforceable unless they are objectionable on grounds applicable to contracts in general such as if they violate a rule of positive law or if they are unconscionable.¹¹⁰

Similarly in *Hill v. Gateway 2000, Inc.* the court held that a shrinkwrap agreement was enforceable.¹¹¹ As an extension to the previous case law in *ProCD, Inc. v. Zeidenberg* rather than limiting the enforceability of shrinkwrap agreements to software licenses the court found that the decision in the previous case was a matter of the law of contract, not the law of software.¹¹² Requiring the customer to pay before being disclosed with the full terms of the

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1451.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1452.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1449.

¹¹¹ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 65 USLW 2458, RICO Bus.Disp.Guide 9183, 31 UCC Rep.Serv.2d 303, 1148-1150 (7th. Cir. 1997).

¹¹² *Id.* at 1149.

agreement is common for air transportation, insurance and many other endeavors.¹¹³ As such “pay now, terms later” contracts are enforceable as long as the customer has had an opportunity to review the terms and return the product if they disapprove.¹¹⁴

2.3 The Doctrine of Unconscionability

As held by the court in the *ProCD, Inc. v. Zeidenberg* case a shrinkwrap agreement or any terms of the agreement is unenforceable if the court finds it unconscionable.¹¹⁵ “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.”¹¹⁶ The cornerstone for discussion on the term unconscionability has been the case *Williams v. Walker-Thomas Furniture Co.* especially in regards to the consumer sales context.¹¹⁷ In this case the term unconscionability is generally described as an absence of meaningful choice for one of the parties in conjunction with contract terms that are unreasonably favorable to the other party.¹¹⁸ In online contracting the core principles of the ruling in *Williams v. Walker-Thomas Furniture Co.* still apply however the context for which the courts look at the transaction in e-commerce cases has broadened.¹¹⁹

In *Comb v. PayPal, Inc.* the court found that a clickwrap agreement was both procedurally and substantively unconscionable and therefore refused to enforce it.¹²⁰ The court described unconscionability as a defense that is applicable to contracts in general and could be raised in defense of the arbitration provision concerned in the case.¹²¹ Unconscionability has both a procedural and a substantive component.¹²² For a contract to be considered procedurally unconscionable there must be present an existence of unequal bargaining positions and hidden terms, something that is common in contracts of adhesion.¹²³ The substantive component of an unconscionable contract is that it produces overly harsh or one-sided results that “shock the

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th. Cir. 1996).

¹¹⁶ Restatement (Second) of Contracts § 208 (1981).

¹¹⁷ Cory S. Winter, *The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249, 269 (2008).

¹¹⁸ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

¹¹⁹ Cory S. Winter, *The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249, 269 (2008).

¹²⁰ *Comb v. PayPal, Inc.*, 218 F.Supp.2d 1165, 1172-1177 (N.D.Cal. 2002).

¹²¹ *Id.* at 1172. (citing *Blake v. Ecker*, 93 Cal.App.4th 728, 113 Cal.Rptr.2d 422 (Cal. App. 2d. 2001)).

¹²² *Id.* (citing *Blake v. Ecker*, 93 Cal.App.4th 728, 113 Cal.Rptr.2d 422, 742 (Cal. App. 2d. 2001)).

¹²³ *Id.*

conscience”.¹²⁴ The elements of procedural and substantive unconscionability operate on a sliding scale where the more significant the presence of one is, the less significant the other needs to be.¹²⁵ Finally, “[a] claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, its purpose, and effect.”¹²⁶

¹²⁴ *Id.*

¹²⁵ *Id.* (citing *Blake v. Ecker*, 93 Cal.App.4th 728, 113 Cal.Rptr.2d 422, 743 (Cal. App. 2d. 2001)).

¹²⁶ *Id.*

3 The Law of Clickwrap Agreements

3.1 Defining Clickwrap Agreements

The case *Specht v. Netscape Communications Corp. DC*¹²⁷ provides us with the clearest definition of what a clickwrap agreement is. It is described as a message presented to the user on his or her computer screen that requires the user to assent to the terms of the agreement through the act of clicking an icon.¹²⁸ This sort of agreement is usually made between a computer software vendor providing an application which a consumer purchases or otherwise obtains a copy of the product. The consumer becomes the end user as a legally binding contract is formed between the two parties. This is most often done when the consumer downloads the software from the company's website and manifests assent to the terms of the contract by checking a box that says "I Agree" or something similar and thus assents to the terms of the contract governing the transaction.¹²⁹ The product that the clickwrap agreement pertains to cannot be obtained or used by the consumer unless the icon is clicked that establishes assent to the terms of the agreement.¹³⁰ This was the case in *Specht v. Netscape Communications Corp. DC* when a user attempted to obtain the Navigator software the full text of the Navigator license agreement would appear on a web page. A plainly visible query asking: "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." was displayed accompanied with three buttons or icons: "Back", "No" and "Yes".¹³¹ Clicking the button labeled "Back" would return the user to an earlier step of the download preparation whereas "No" would terminate the download if clicked. In order to proceed with the download the user was required to click the "Yes" button which established assent to the license agreement and it was an essential step in order to obtain the software.¹³²

Clickwrap agreements are important documentation of the legal relationship between for example the consumer and the computer software vendor. As the internet has become more and more a part of our lives so has the prevalence of clickwrap agreements. Online banking websites, user-generated content websites, social networking sites, free e-mail services (such

¹²⁷ *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 45 UCC Rep.Serv.2d 1 (S.D.N.Y 2001).

¹²⁸ *Id.* at 593-594.

¹²⁹ See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U.L. REV. 429, 487 (2002).

¹³⁰ *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 45 UCC Rep.Serv.2d 1, 594 (S.D.N.Y. 2001).

¹³¹ *Id.*

¹³² *Id.*

as Hotmail, Gmail or Yahoo! Mail) and virtually all e-commerce sites requires the user to assent to the clickwrap agreement governing the site's ground rules before using the service or before making a purchase.¹³³ These agreements contain the Terms of Use¹³⁴ for the software and limits what the end user can do with the product or what they can use it for. Clickwrap agreements are usually long and complex contracts that include many terms and most of the litigation that has materialized as a result of clickwrap agreements are over one of six basic types of terms: forum selection clauses, choice of law provisions, agreements to arbitrate, software TOU, service TOU or limitations of liability.¹³⁵ Clickwrap agreements come in standard form where the agreement appears on the computer screen and the user either accepts the terms of the agreement or rejects them. The user has no power to bargain over any of the terms of the agreement and must adhere to the contract terms on a "take-it-or-leave-it" basis. Since the consumer only has the choice of either accepting or rejecting the terms of the agreement as provided and the transaction is contingent on acceptance of the terms when purchasing the goods or services this makes clickwrap agreements contracts of adhesion.¹³⁶

3.2 The Enforceability of Clickwrap Agreements

Clickwrap agreements have usually been held to be valid and enforceable whenever the courts have had the occasion to consider them.¹³⁷ The courts have generally found that when considering the terms of a contract, absent fraud or mistake, if a party signs a contract and has the opportunity to read the terms of this contract, whether he or she actually does so or not, they are bound by it.¹³⁸ This holds true as well when applied to clickwrap agreements: "Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms. A customer on notice of contract terms available on the internet is bound by those terms."¹³⁹

¹³³ Cory S. Winter, *The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249, 270 (2008).

¹³⁴ Henceforth referred to as "TOU".

¹³⁵ Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 578 (2007).

¹³⁶ William J. Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U.L. REV. 433, 436 (2003).

¹³⁷ See *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 45 UCC Rep.Serv.2d 1, 594 (S.D.N.Y. 2001) (citing *In re RealNetworks, Inc., Privacy Litigation*, 2000 WL 631341 (N.D.Ill. 2000); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 1998 WL 388389 (N.D.Cal. 1998)).

¹³⁸ See, e.g., *Nickens v. Labor Agency of Metro. Washington*, 600 A.2d 813, 817 n. 2 (D.C. 1991).

¹³⁹ See, e.g., *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009).

When presented with the issue of the enforceability of clickwrap agreements the courts still apply the traditional principles of contract law.¹⁴⁰ Since clickwrap agreements are standard form contracts when considering the enforceability of clickwrap agreements the courts have relied on the objective theory of contracts when deciding whether or not to enforce the terms of the agreement.¹⁴¹ Therefore, when considering the enforceability of standard form contracts, the courts have substituted notice of terms for the meeting of the minds in the classical subjective theory of contracts.¹⁴² The combination of reasonable notice of the contractual nature of the offered terms and whether or not the accepting party has had an opportunity to review the terms of the agreement serves as the basis for the “reasonable communicativeness” test used by the courts when considering standard form contracts.¹⁴³ As such, when determining if clickwrap agreements should be enforceable the courts have generally focused on the fact of whether or not the existence of the terms of a contract has been given adequate notice to the purchaser.¹⁴⁴

When considering the formation of a contract the courts have basically taken to a mechanical approach of determining if assent to the terms of the agreement has been given. This has consistently been done by simply testing whether or not the clicking of an icon can be proven.¹⁴⁵ Whenever there is an absence of fraud or deception the courts will find assent to the terms to be present in most cases. The courts have made it clear that this will be the conclusion they come to when deciding these cases regardless of whether or not the user fails to read, carefully consider or otherwise recognize the binding effect of clicking “I Agree” when downloading or purchasing software.¹⁴⁶

Being subject to the traditional principles of contract law in which contracts of adhesion have been found to be enforceable unless they are unconscionable or violate public policy clickwrap agreements, as they too are contracts of adhesion subject to the traditional principles of contract law, can be targeted with similar claims.¹⁴⁷ It has even been suggested

¹⁴⁰ See, e.g., *Adsit Co., Inc. v. Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007) (citing *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa 2007)).

¹⁴¹ Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1314 (2005).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1319.

¹⁴⁵ Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 579 (2007).

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., *Comb v. PayPal, Inc.*, 218 F.Supp.2d 1165 (N.D.Cal. 2002).

that clickwrap agreements are especially vulnerable to challenges of procedural unconscionability.¹⁴⁸

3.2.1 Reasonable Notice of the Terms

In *Specht v. Netscape Communications Corp. CA*¹⁴⁹ the defendants, Netscape Communications Corporation and its corporate parent America Online, Incorporated¹⁵⁰, offered various software programs, including Communicator and SmartDownload, which could be obtained free of charge by visitors to the website.¹⁵¹ Five of the six plaintiffs had downloaded Communicator from Netscape's website and installed this software.¹⁵² When installing the software the plaintiffs were automatically shown a scrollable text of Communicator's license agreement and were unable to complete the installation unless they clicked the "Yes" button to indicate assent to the license terms.¹⁵³ The installation of the software would be aborted if the user did not press the "Yes" button to indicate assent and five of the plaintiffs clicked the "Yes" button when installing the software. The agreement made no mention of the SmartDownload software and contained an arbitration clause.¹⁵⁴ Communicator could be obtained independently from SmartDownload, however all plaintiffs except one downloaded and installed Communicator in connection with downloading Smartdownload.¹⁵⁵ The plaintiffs had accessed a web page that stated "SmartDownload Communicator" urging them to "Download with Confidence Using SmartDownload!" and near the bottom of the web page was the prompt "Start Download" and a tinted button labeled "Download" which, by clicking on the button, the plaintiffs initiated a download of the SmartDownload software.¹⁵⁶ The difference in downloading Communicator and SmartDownload was that the downloading of SmartDownload was not accompanied by a clickwrap presentation.¹⁵⁷ The only reference to the SmartDownload license terms on the web page was located in the text that became visible only if the users had scrolled down to the next screen.¹⁵⁸ Had the plaintiffs scrolled down they would have encountered the invitation:

¹⁴⁸ Cory S. Winter, *The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249, 291 (2008).

¹⁴⁹ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 48 UCC Rep.Serv.2d 761 (2d. Cir. 2002).

¹⁵⁰ Henceforth referred to as "Netscape".

¹⁵¹ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 48 UCC Rep.Serv.2d 761, 21 (2d. Cir. 2002).

¹⁵² *Id.* at 21-22.

¹⁵³ *Id.* at 22.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 23.

¹⁵⁸ *Id.*

“Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software.”¹⁵⁹ By clicking on this invitation a hypertext link would have taken them to a separate web page entitled “License & Support Agreements” containing yet another hyperlink to the license agreement of SmartDownload, a separate but similar agreement to the clickwrap agreement of Communicator.¹⁶⁰

In terms of the SmartDownload license agreement the court found that a reasonably prudent offeree would not necessarily have known or learned of the existence of the SmartDownload license prior to acting and assenting to it with constructive notice of its terms.¹⁶¹ The offer directed at the plaintiffs did not carry an immediately visible notice of the existence of license terms or the requirement of unambiguous manifestation of assent to those terms.¹⁶² Reference to the existence of terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.¹⁶³ Regarding the terms of the Communicator license agreement the court found that it expressly applied only to Netscape Communicator and Netscape Navigator and governed disputes concerning Netscape’s browser programs only and not plug-in programs like SmartDownload.¹⁶⁴ The Communicator license agreement contained a merger clause but made no reference to the SmartDownload license agreement and any dispute regarding the defendant’s unlawful use of SmartDownload is collateral to the Communicator license agreement.¹⁶⁵ Therefore the court found that the plaintiffs were bound by the Communicator clickwrap agreement.¹⁶⁶ However, any claim regarding the Communicator clickwrap agreement was irrelevant to the claim of the SmartDownload license agreement.¹⁶⁷

*Forrest v. Verizon Communications, Inc.*¹⁶⁸ was a case before the United States Court of Appeals of Columbia where the question of whether a forum selection clause mandating that claims should be brought in the jurisdiction of Virginia, regarding the appellant’s purported class action involving consumers’ attempts to register for and use of Verizon Internet

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 23-24.

¹⁶¹ *Id.* at 30.

¹⁶² *Id.* at 31.

¹⁶³ *Id.* at 32.

¹⁶⁴ *Id.* at 36.

¹⁶⁵ *Id.* at 36-37.

¹⁶⁶ *Id.* at 22.

¹⁶⁷ *Id.* at 36.

¹⁶⁸ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002).

Services' digital subscriber line service¹⁶⁹, should be applied to the class action.¹⁷⁰ In order to become subscribers to the DSL the user must first agree to all the terms of the agreement, including the forum selection clause found in the final section of the main text, which for internet users was located in a scroll box displayed on their computer monitors where only a small portion of the document was visible at any given time.¹⁷¹ At the very top of the agreement a notification was visible stating: "PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY" and to be able to enter into the agreement the user was required to click a button labeled "Accept" below the scroll box.¹⁷²

The court found that the appellant had been given adequate notice of the forum selection clause in the agreement.¹⁷³ When reading through the agreement the appellant would have inevitably discovered the forum selection clause before accepting the agreement.¹⁷⁴ The fact that the notice was not provided in capital letters or placed in the section entitled "Limitations of Liability and Remedies" instead of the "General Provisions" section is not a reason to deem notification of the clause insufficient.¹⁷⁵ The clause in question was formatted in appearance and type size in a manner that was consistent with the agreement as a whole.¹⁷⁶ The terms of the agreement were immediately visible to the user when registering as a subscriber to the DSL and the fact that the electronic version of the agreement used a scroll box in order to view the contents of the agreement, and in doing so only displaying part of the agreement at any one point in time, was not reason enough to deem the provision of adequate notice insufficient in this case.¹⁷⁷ The court therefore found that the appellant had been provided with adequate notice of the forum selection clause in the agreement.¹⁷⁸

The case *Adsit Co., Inc., v. Gustin*¹⁷⁹ was a case before the United States Court of Appeals of Indiana. The plaintiff was Adsit Company, Incorporated¹⁸⁰, a Muncie-based retailer of new, used and rebuilt parts and accessories for Mercedes-Benz automobiles, that does business

¹⁶⁹ Henceforth referred to as "DSL".

¹⁷⁰ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1008-1009 (D.C. 2002).

¹⁷¹ *Id.* at 1010.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1010-1011 (citing *Vitricon, Inc. v. Midwest Elastomers, Inc.*, 148 F.Supp.2d 240, 247 (E.D.N.Y. 2001)).

¹⁷⁶ *Id.* at 1010.

¹⁷⁷ *Id.* at 1010-1011.

¹⁷⁸ *Id.* at 1010.

¹⁷⁹ *Adsit Co., Inc. v. Gustin*, 874 N.E.2d 1018 (Ind. Ct. App. 2007).

¹⁸⁰ Henceforth referred to as "Adsit".

over the phone and the internet. When placing an online order from Adsit the customer must first click on a button labeled “I Accept” located at the bottom of the web page describing the policy of the Adsit company.¹⁸¹ Mary Gustin placed an order on Adsit’s website for two camel-colored leather seat covers and two camel-colored leather armrests.¹⁸² Mary later, with her daughter-in-law Julie’s permission, provided Adsit with Julie’s credit card number and information since it was company policy to only ship wares to the address of which the credit card number was registered.¹⁸³ Within six days of receiving the seat covers Kevin and Julie returned the seat covers to the California address from which they were sent and reversed the charge on their credit card. According to a representative from Adsit the company never received the goods.¹⁸⁴ Adsit filed a breach of contract complaint against Julie, later adding Mary as a defendant.¹⁸⁵

The court held that “[t]o determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement.”¹⁸⁶ The court concluded that Adsit had given reasonable notice of their terms since in order to complete the transaction the user had to accept the policy which was immediately visible when placing the order. The user must take affirmative action by clicking the “I Accept” button when placing the order and if the user does not agree to the terms the transaction is canceled.¹⁸⁷ The court held that the defendants had reasonable notice of the terms of the agreement and had manifested assent to the clickwrap agreement containing the forum selection clause.¹⁸⁸ The clickwrap agreement containing the forum selection clause was therefore enforceable.¹⁸⁹

*Jallali v. National Bd. of Osteopathic Medical Examiners*¹⁹⁰ was a case before the United States Court of Appeals of Indiana that concerned Massood Jallali, a Florida resident that had taken a number of exams provided by The National Board of Osteopathic Medical

¹⁸¹ Adsit Co., Inc. v. Gustin, 874 N.E.2d 1018, 1020-1021 (Ind. Ct. App. 2007).

¹⁸² *Id.* at 1021.

¹⁸³ *Id.* at 1022.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1023. (citing Feldman v. Google, Inc., 513 F.Supp.2d 229, 236 (E.D.Pa 2007)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Jallali v. National Bd. of Osteopathic Medical Examiners, Inc.*, 908 N.E.2d 1168 (Ind. Ct. App. 2009)

Examiners¹⁹¹, a non-profit corporation that administers certification exams to persons attempting to become licensed physicians in the United States of America and Canada, two of which he had taken electronically.¹⁹² Jallali had, prior to taking an exam in August 2005, created an account on the NBOME website and in doing so NBOME holds that Jallali had electronically acknowledged that he read, understood and agreed to certain terms including a clause establishing jurisdiction to the courts of Indiana for any conflict of law regarding the agreement.¹⁹³ Jallali subsequently sued NBOME in Florida seeking access to the exams NBOME had administered to him, the answer keys to the exams and the methodology of which the exams were scored.¹⁹⁴

The courts stated that “[f]orum selection clauses found in form contracts are enforceable if they are reasonable and just under the circumstances...” and that the same principles apply to clickwrap agreements.¹⁹⁵ The court established that the primary focus of the court when determining whether or not a clickwrap agreement is enforceable is if the party accepting the agreement has had reasonable notice of and manifested assent to the terms.¹⁹⁶ NBOME was able to provide evidence that Jallali, in order to be able to take the last two exams electronically, had to have assented to the clickwrap agreement. To be able to take the last two exams electronically Jallali had to have registered an account on NBOME’s website, which would require Jallali to have first clicked “Accept” under a dialog box that contained an “ACKNOWLEDGE AND AGREEMENT”, before acquiring an account on the website.¹⁹⁷ Therefore the court concluded that the forum selection clause in the clickwrap agreement to be enforceable.¹⁹⁸

In *Major v. McCallister*¹⁹⁹ the appellant used the website of ServiceMagic that offered free referrals to prescreened construction contractors to find someone to help remodel her home located in Springfield, Missouri.²⁰⁰ The terms and conditions of ServiceMagic included liability limitations and disclaimers, a choice of law provision for Colorado and a forum

¹⁹¹ Henceforth referred to as “NBOME”.

¹⁹² *Jallali v. National Bd. of Osteopathic Medical Examiners, Inc.*, 908 N.E.2d 1168, 1170-1171 (Ind. Ct. App. 2009).

¹⁹³ *Id.* at 1171.

¹⁹⁴ *Id.* at 1171-1172.

¹⁹⁵ *Id.* at 1173.

¹⁹⁶ *Id.* (citing *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa. 2007)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1173-1174.

¹⁹⁹ *Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. S.D. 2009)

²⁰⁰ *Id.* at 228.

selection clause limited to Denver County, Colorado. These terms were hyperlinked on each web page that the appellant accessed when going through the process of entering the project information.²⁰¹ The appellant didn't look at these terms when using the website.²⁰² During this process a pop-up screen stating "We're Matching Your Project to Top-Rated Pros in Springfield, MO" and a new web page notifying the appellant that the project had been matched to four prescreened professionals which was followed by a "Submit for Matching Pros" button next to which was a blue hyperlink to the website's terms accompanied by the notice: "By submitting you agree to the Terms of Use."²⁰³ Still not reading these terms the appellant clicked the "Submit for Matching Pros" button and contracted with the co-defendants McCallister and Kalupto Creations. The appellant later became dissatisfied and sued the defendants in Greene County, Missouri. The case was dismissed on the basis of the forum selection clause and the appellant later filed an appeal to the United States Court of Appeals of Missouri.²⁰⁴ Appearing before the court the appellant denied assenting to the forum selection clause as she claimed the notice of the terms of the agreement were inadequate and no click was required to accept them.²⁰⁵

The court, in accordance with earlier case law, ascertained that when dealing with the legal effects of online agreements the courts still apply traditional principles of contract law and focus on whether the plaintiff has manifested assent to the online agreement and if the plaintiff had a reasonable notice of the terms.²⁰⁶ The court did however classify the agreement in the *Major v. McCallister* case as a browsewrap agreement since there was no actual click involved to accept the terms.²⁰⁷ Browsewrap agreements operate in the manner that they indicate in some fashion that use of the website constitutes acceptance of the Terms of Service²⁰⁸ and courts usually uphold browsewrap agreements if the user "has actual or constructive knowledge of a site's terms and conditions prior to using the site."²⁰⁹ The court, in contrast to the circumstances in the decision of *Specht v. Netscape Communications Corp.*

²⁰¹ *Id.* at 228-229.

²⁰² *Id.* at 229.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009); *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa. 2007)).

²⁰⁷ *Id.* at 230. (citing *U.S. v. Drew*, 259 F.R.D. 449, 462 n. 22 (C.D.Cal. 2009); *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2-3 (E.D.Mo. 2009)).

²⁰⁸ Henceforth referred to as "TOS".

²⁰⁹ *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. S.D. 2009) (citing *Southwest Airlines Co. v. BoardFirst, LLC*, 2007 WL 4823761, 5 (N.D.Tex. 2007)).

CA²¹⁰, found that ServiceMagic had put the notice of the existence of license terms immediately visible by providing a blue hyperlink and the notice “By submitting you agree to the Terms of Use” right next to the button the appellant pushed. A second hyperlink to the terms was visible on the same web page without scrolling and every web page the appellant went through in the process had similar hyperlinks.²¹¹ The court therefore concluded that the website terms were not so inconspicuous that a reasonably prudent internet user could not know or learn of the existence of the contract terms, or the fact that a click wasn’t needed to assent to them, to not enforce the browsewrap agreement.²¹²

3.2.2 Clicking Through as Manifestation of Assent

*Feldman v. Google, Inc*²¹³ was a case before the United States District Court of Pennsylvania. In the case the plaintiff, a lawyer with his own law firm Lawrence E. Feldman & Associates had purchased advertising from the defendant Google, Incorporated’s Adwords Program in order to attract potential clients who may have been harmed by drugs under scrutiny by the U.S. Food and Drug Administration.²¹⁴ The case concerned a forum selection clause in Adwords’ online agreement.²¹⁵ To open an account on Adwords website the advertiser had to go through a series of steps in an online sign-up process where in order to activate said account the advertiser had to have visited his or her account page where the Adwords contract was displayed.²¹⁶ The web page displaying the Adwords contract had a notice on the top of the page in bold print stating: “Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below.” These terms were offered to the advertiser in a window with a scroll bar that allowed scrolling down to view the entirety of the contract and in the preamble, immediately visible at first impression, a statement that consent to the terms listed in the agreement constituted a binding agreement with Google was provided.²¹⁷ Without having to scroll down a box with the words: “Yes, I agree to the above terms and conditions” was located at the bottom of the web page. In order to proceed to the next step the advertiser would have been required to click on this box and unless he or she did so and instead tried to click the “Continue” button at the bottom of the web page the advertiser would have been

²¹⁰ See *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 48 UCC Rep.Serv.2d 761 (2d. Cir. 2002).

²¹¹ *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. S.D. 2009).

²¹² *Id.* at 231.

²¹³ *Feldman v. Google, Inc.*, 513 F.Supp.2d 229 (E.D.Pa 2007).

²¹⁴ *Id.* at 231.

²¹⁵ *Id.* at 232.

²¹⁶ *Id.* at 233.

²¹⁷ *Id.*

returned to the same web page and could not advance to the next step.²¹⁸ The advertiser would not have been able to activate his or her account if he or she did not agree to the Adwords contract. The plaintiff had activated his account and placed ads and charges were incurred.²¹⁹

The court concluded that the Adwords agreement was a clickwrap agreement and that these types of agreements require that the user consent to any terms or conditions that the agreement entails in order to proceed with the internet transaction.²²⁰ The Adwords agreement had given the users reasonable notice of its terms since in order to activate an Adwords account the user had to visit a web page where the agreement was displayed in a scrollable text box with instructions to indicate assent if the user agreed to the terms.²²¹ The user had to take affirmative action in order to proceed to the next step and click the “Yes, I agree to the above terms and conditions” button to constitute assent to all of the terms.²²² Because the user would not have been able to activate his or her account without agreeing to all of the terms the requirements of an express contract and mutual assent are satisfied.²²³ As such the court found the clickwrap agreement to be enforceable in this respect since plaintiff had assented through clicking on the button labeled: “Yes, I agree to the above terms and conditions”.²²⁴

In *A.V. v. iParadigms, Ltd. Liability Co*²²⁵ the plaintiffs were four minor high school students who filed a complaint against iParadigms, Limited Liability Company²²⁶ alleging copyright infringement based on iParadigms’ digital archiving of the plaintiffs’ copyrighted materials and a counterclaim from iParadigms seeking indemnification against all plaintiffs.²²⁷

iParadigms owns and operates a propriety technology system that seeks to prevent plagiarism by evaluating the originality of written works called Turnitin. A student must first register by creating a profile on the Turnitin website to be able to submit a paper. The student must also click an “I Agree” button to the terms of the “User Agreement”, also referred to as the “Clickwrap Agreement”, to complete the final step in the profile creation process. The “User Agreement” was displayed directly above the “I Agree” button that the students must click to

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 236 (citing *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 48 UCC Rep.Serv.2d 761, 22 (2d. Cir. 2002)).

²²¹ *Id.* at 237.

²²² *Id.*

²²³ *Id.* at 237-238.

²²⁴ *Id.* at 238.

²²⁵ *A.V. v. iParadigms, Ltd. Liability Co.*, 544 F.Supp.2d 473, 232 Ed. Law Rep. 176 (E.D.Va. 2008)

²²⁶ Henceforth referred to as “iParadigm”

²²⁷ *A.V. v. iParadigms, Ltd. Liability Co.*, 544 F.Supp.2d 473, 232 Ed. Law Rep. 176, 477 (E.D.Va. 2008).

complete the process.²²⁸ Each of the plaintiffs in the case had clicked the “I Agree” button and read the terms of the clickwrap agreement prior to submitting their works for evaluation to Turnitin but in an attempt to prevent Turnitin from archiving their written works the plaintiffs included a disclaimer on the face of their works stating they did not consent to Turnitin archiving them.²²⁹

The court found that the plaintiffs had entered into a valid and enforceable agreement when they clicked the “I Agree” button to acknowledge the terms of the clickwrap agreement as the first line of the agreement, which was immediately visible directly above the “I Agree” link, stated that: “Turnitin and its services are offered to you, the user [‘User’], conditioned on your acceptance without modification of the terms, conditions, and notices contained herein.”²³⁰ By the act of clicking on the “I Agree” button to create a Turnitin profile and entering the Turnitin website the plaintiffs had accepted iParadigms offer and a legally binding contract had been formed based on the clickwrap agreement. Furthermore the existence of a disclaimer on the face of the written works stating that the plaintiffs did not give consent to Turnitin to archive their works does not modify the agreement or render it unenforceable since the clickwrap agreement itself provided that the agreement was not subject for modification.²³¹

The case *CoStar Reality Information, Inc. v. Field*²³² concerned the website of the plaintiffs CoStar Reality Information, Incorporated and CoStar Group, Incorporated²³³ who provided commercial real estate information through a database that includes photographs of real property and enabled users to find property for rent and sale.²³⁴ CoStar issues licenses to the authorized users of the website to access the database and charges a subscription fee based on individual contracts with CoStar. The words “Login/Use Subject to Terms” appears in the login portion of CoStar’s website where the user enters his or her username and password, includes a hyperlink to the word “Terms” that sends the user to another web page that contains CoStar’s TOU. In order to be able to access the database it is required of the user to select a link in order to accept the Terms and Conditions upon the first use and later at

²²⁸ *Id.* at 477-478.

²²⁹ *Id.* at 478.

²³⁰ *Id.* at 480.

²³¹ *Id.* (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d. Cir. 2004)).

²³² *CoStar Reality Information, Inc. v. Field*, 737 F. Supp. 2d 496 (D. Md. 2010)

²³³ Henceforth referred collectively to as “CoStar”.

²³⁴ *CoStar Reality Information, Inc. v. Field*, 737 F. Supp. 2d 496, 499 (D. Md. 2010).

periodic intervals throughout the license term.²³⁵ The defendant Mark Field was doing business as Alliance Valuation Group which had a license agreement with CoStar that prohibited unauthorized users from sharing its passcode with third parties, from providing third parties with access to the database or from sublicensing use of the database.²³⁶ Field had provided defendant Pathfinder Mortgage Company with his login information and listed other individuals who were not employees of Alliance or independent contractors as authorized users under the license agreement.²³⁷ Among the claims in the case was breach of contract of the license agreement.²³⁸ CoStar held that a contract was formed with the affirmative action of clicking the “I Agree” box and as such accepting the TOU of its internet database.²³⁹

The court concluded that there was no Maryland case law directly addressing the formation of a contract in the internet context but acknowledged that other jurisdictions have enforced contracts of the TOU sort when the website provider requires the user to affirmatively click an “Agree” button before entering the website.²⁴⁰ The court stated that, as with any type of contract, failure to read an enforceable online agreement does not excuse compliance with its terms.²⁴¹ The court subsequently concluded that the affirmative act of clicking an “Agree” button before entering a website binds the user to the TOU associated with using the website if the owner of the website can provide evidence to this fact.²⁴² CoStar was able to provide evidence that the user was required to click on the “Agree” button before being permitted to enter the passcode database on the initial login to the database and on a monthly basis thereafter.²⁴³

3.3 Modified Clickwrap Agreements

The case *Swift v. Zynga Game Network, Inc.*²⁴⁴ was a United States District Court case that concerned plaintiff Rebecca Swift’s purported class action regarding defendant Zynga Game Network, Incorporated’s “special offer” transactions offered in connection with said

²³⁵ *Id.* at 500.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 501.

²³⁹ *Id.* at 505.

²⁴⁰ *Id.* (citing *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009); *A.V. v. iParadigms, Ltd. Liability Co.*, 544 F.Supp.2d 473, 232 Ed. Law Rep. 176, 480 (E.D.Va. 2008); *DeJohn v. The .TV Corp. Int’l*, 245 F.Supp.2d 913, 921 (N.D.Ill. 2003)).

²⁴¹ *Id.* (citing *Burcham v. Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009)).

²⁴² *Id.* at 510.

²⁴³ *Id.*

²⁴⁴ *Swift v. Zynga Game Network, Inc.*, 805 F.Supp.2d 904 (N.D.Cal. 2011).

company's free online video games.²⁴⁵ The plaintiff alleged that she had suffered harm after accepting these "special offers" for which two separate TOS agreements were arguably relevant.²⁴⁶ The first of which was the YoVille TOS containing an arbitration provision and the second, the Universal TOS, which was supposed to supercede the YoVille TOS and contained amendments to the arbitration provision.²⁴⁷ According to the plaintiff the defendant had not provided her with sufficient notice that the arbitration provision had changed.²⁴⁸ The defendant held that the plaintiff accepted the YoVille TOS when she first logged in to play the YoVille game by clicking an "Accept" button and since the YoVille TOS included provisions that terms could be changed and continued use constituted acceptance of these terms she was also bound by the Universal TOS.²⁴⁹

The court concluded that the plaintiff had an opportunity to review the terms of the YoVille TOS that was provided in the form of a hyperlink located immediately below the "I Accept" button.²⁵⁰ This was a modified clickwrap presentation²⁵¹ where the plaintiff was required to click the "I Accept" button that was located directly above a statement indicating that clicking on the button served as assent to the YoVille TOS and the blue hyperlink took the user directly to the terms of the agreement.²⁵² The court contrasted the circumstances in this case with those of *Specht v. Netscape Communications Corp. CA* where the only reference to the SmartDownload license terms were visible only after scrolling down to another screen where a hyperlink to yet another webpage containing a list of license agreements including the terms of SmartDownload.²⁵³ In *Specht v. Netscape Communications Corp. CA* the court found that a reasonably prudent internet user would not have learned or known of the existence of the license terms before agreeing to download the SmartDownload software²⁵⁴ and there was no requirement that the user clicked on anything referencing TOS.²⁵⁵ Making a more favorable reference to the similar but different circumstances in *Register.com, Inc. v. Verio, Inc.* where

²⁴⁵ *Id.* at 906.

²⁴⁶ *Id.* at 907.

²⁴⁷ *Id.* at 907-908.

²⁴⁸ *Id.* at 909.

²⁴⁹ *Id.* at 910.

²⁵⁰ *Id.* at 912.

²⁵¹ *See Id.*

²⁵² *Id.* at. 911.

²⁵³ *Id.* (citing *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 48 UCC Rep.Serv.2d 761, 23-24 (2d. Cir. 2002)).

²⁵⁴ *Id.* (citing *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 48 UCC Rep.Serv.2d 761, 20, 32 (2d. Cir. 2002) ("Where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.")).

²⁵⁵ *Id.*

the user saw the terms, had admitted it was aware of them²⁵⁶ and the court in that case had found there was no reason that enforceability of the terms should depend on whether the plaintiff was offered an “I agree” button to manifest assent.²⁵⁷ The court, in the case at hand, found this line of reasoning more applicable even though the circumstances differed in that the plaintiff had given no admission that she was aware of the terms and the fact that there was a click box for assent.²⁵⁸ Based on these reasons the court held that the plaintiff had been provided with sufficient notice of the contractual terms she was assenting to and modified clickwrap presentations are enforceable where “...providing a user with access to the terms of service and requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button.”²⁵⁹

*Fteja v. Facebook, Inc.*²⁶⁰ was a United States District Court case regarding a forum selection clause contained in Facebook’s TOU governing user accounts on its website.²⁶¹ In order to create an account on the website the user was first required to fill out several fields of personal and contact information and then click on an initial “Sign Up” button after which the user would proceed to a web page entitled “Security Check” that required the user to reenter a series of letters and numbers displayed on the web page.²⁶² On this web page a second “Sign Up” button similar to the initial one was found containing a sentence immediately below the button stating: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.” where the line “Terms of Service” was an underlined hyperlink leading to the TOU.²⁶³ To create a Facebook account plaintiff Fteja must have clicked the second “Sign Up” button and if given effect he would have assented to the TOU.²⁶⁴

Because the terms and conditions were not displayed on the web page where the second “Sign Up” button was located but were viewable only after clicking a hyperlink the court first entertained the notion that TOU might be a browsewrap agreement.²⁶⁵ However the court

²⁵⁶ *Id.* at 912. (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402 (2d. Cir. 2004)).

²⁵⁷ *Id.* (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d. Cir. 2004)).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 912.

²⁶⁰ *Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829 (S.D.N.Y. 2012).

²⁶¹ *Id.* at 834.

²⁶² *Id.* at 834-835.

²⁶³ *Id.* at 835.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 835-836. (citing *Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362, 366 (E.D.N.Y. 2009) (“...[W]here website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.”)).

went on to ascertain that the Facebook TOU was not exactly a true browsewrap²⁶⁶ since in the case at hand the user was required to manifest assent to the TOU by clicking the second “Sign Up” button whereas this additional action is not required beyond merely visiting the web page as in browsewrap agreements.²⁶⁷ This requirement of manifesting assent through clicking the second “Sign Up” button led the court to reason that the TOU had something in common with clickwrap agreements as well.²⁶⁸ The court concluded that the Facebook TOU was not a pure clickwrap agreement either as it did not contain any mechanism that forced the user to actually examine the terms of the agreement before assenting.²⁶⁹ The TOU is similar to that of a browsewrap agreement in that the terms are only viewable by clicking on a hyperlink and not displayed immediately on the web page. The TOU is also similar to the terms of a clickwrap agreement in that assent has to be manifested through affirmative action by clicking the second “Sign Up” button to assent to the hyperlinked terms however assent can be given without the user actually being presented with the terms of the agreement.²⁷⁰ When determining whether the terms of the TOU have been reasonably communicated, where the user has to take an affirmative action to assent to the TOU, but also has to take further action in order to view the terms of the agreement the court reminds us that “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”²⁷¹ By drawing an analogy between requiring a user to click a hyperlink in order to view the terms of an agreement on another screen to that of terms appearing on another paper for example on a cruise ticket stating: “SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT – ON LAST PAGES 1, 2, 3”²⁷² The court assessed that clicking on the hyperlink to access the TOU is the twenty-first century equivalent of turning over the cruise ticket as in both cases the consumer is prompted to examine the terms of the sale that is located somewhere else and whether or not the consumer is actually bothered to look is

²⁶⁶ *Id.* at 837. (citing Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006) (“...[I]n which the user does not see the contract at all but in which the license terms provide that using a website constitutes agreement to a contract whether the user knows it or not.”)).

²⁶⁷ *Id.* (citing *Southwest Airlines Co. v. BoardFirst, LLC*, 2007 WL 4823761, 4 (N.D.Tex. 2007) (“Browsewraps may take various forms but typically they involve a situation where a notice on a website conditions use of the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink.”)).

²⁶⁸ *Id.* (citing *U.S. v. Drew*, 259 F.R.D. 449, 462 n. 22 (C.D.Cal. 2009) (“Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website”)).

²⁶⁹ *Id.* at 837-838.

²⁷⁰ *Id.* at 838.

²⁷¹ *Id.* at 838-839. (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d. Cir. 2004)).

²⁷² *Id.* at 839. (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 1991 A.M.C. 1697, 113 L.Ed.2d 622, 59 USLW 4323, 587 (U.S.Wash. 1991)).

irrelevant.²⁷³ Fteja was informed of the consequences of clicking on the “Sign Up” button and was shown where to click, which was immediately below this button, in order to understand those consequences.²⁷⁴ For all of these reasons the court concluded that Fteja had assented to the terms of the TOU and the forum selection clause contained therein and as such the contract was held enforceable.²⁷⁵

The case *Vernon v. Qwest Communications Intern., Inc.*²⁷⁶ concerned the enforceability of an arbitration clause in a subscriber agreement.²⁷⁷ The plaintiffs argued that the subscriber agreement that contained the arbitration clause was unenforceable because the agreement was never presented to customers.²⁷⁸ In order to enroll in or upgrade their service via the internet a customer was required to click an “I agree” box of “Terms and Conditions” appearing on their computer monitor to be able to complete the enrollment checkout process.²⁷⁹ The terms and conditions of the service were set forth in the subscriber agreement and the customer was informed of this in the text that also asked the customer to “[p]lease review the terms, which include arbitration and limits on Qwest liability.”²⁸⁰ Later on that same checkout web page the customer was told that “[y]our internet services and equipment are offered under terms found at www.qwest.com/legal/; click Broadband Subscriber Agreement. Please review the terms, which include arbitration and limits on Qwest liability. If you do not agree, call Qwest to cancel your service within 30 days.”²⁸¹

The court held that courts are being asked to apply common law principles to ever-evolving transactional settings as the general principles of contract formation has not changed with the emergence of e-commerce.²⁸² In other cases the courts have also been confronted with hybrid arrangements where, like in situations involving browsewrap agreements, the terms of the agreement are not being displayed on the same screen as an accept button, but are accessible with the use of a hyperlink, however the customer must take affirmative action by pressing a

²⁷³ *Id.* (citing *Centrifugal Force, Inc. v. Softnet Communication, Inc.*, 2011 WL 744732, 7 (S.D.N.Y. 2011) (“Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.”)).

²⁷⁴ *Id.* at 840.

²⁷⁵ *Id.* at 841.

²⁷⁶ *Vernon v. Qwest Communications Intern., Inc.*, 857 F.Supp.2d 1135 (D. Colo. 2012).

²⁷⁷ *Id.* at 1141-1142.

²⁷⁸ *Id.* at 1142.

²⁷⁹ *Id.* at 1145.

²⁸⁰ *Id.* at 1145-1146.

²⁸¹ *Id.* at 1146.

²⁸² *Id.* at 1149. (Citing *Van Tassell v. United Marketing Group, LLC*, 795 F.Supp.2d 770, 789 (N.D.Ill. 2011)).

“click” button.²⁸³ “Under this hybrid arrangement, the customer is told that consequences will necessarily flow from his assenting click and also is placed on notice of how or where to obtain a full understanding of those consequences.”²⁸⁴ The court concluded that in the case at hand the plaintiffs had reasonable notice of the subscriber agreement and as such the arbitration clause contained within.²⁸⁵ When a party incorporates terms and conditions by reference in a contract and seeks to enforce them, “[i]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.”²⁸⁶ Evidence of assent may however be gleaned from the totality of the circumstances.²⁸⁷ The customers had been made aware of the subscriber agreement through multiple types of communications.²⁸⁸ Through letters, providing customers a notice of the new subscriber agreement, stating: “Qwest will assume you have accepted these terms unless you contact Qwest within 30 days of your transfer date.”²⁸⁹ For customers signing up for the “Price of Life” program either by phone or by internet they were informed of they would be subject to the subscriber agreement that could be found at “www.qwest.com/legal.”²⁹⁰ Finally, customers purchasing internet services must install software on an installation disc that specifically informed them that they should read the subscriber agreement and described where to find it.²⁹¹ The same window in the installation process highlighted the fact that the terms and conditions of the service was subject to arbitration and limit of liability clauses and each of the plaintiffs clicked the “I accept” button in this window.²⁹² Based on these facts the court concluded that the plaintiffs had manifested assent to the terms and conditions of the subscriber agreement as it is undisputed that each of the plaintiffs continued to use the high speed internet service for several months after installing the necessary software.²⁹³

²⁸³ *Id.*

²⁸⁴ *Id.* at 1149-1150. (citing *Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829, 839-840 (S.D.N.Y. 2012); *Swift v. Zynga Game Network, Inc.*, 805 F.Supp.2d 904, 911-912 (N.D.Cal. 2011) (“[F]inding formation of a valid contract where the software in question involved a ‘modified clickwrap’ process in which the terms of service were not visible on the page but were accessible via a hyperlink.”)).

²⁸⁵ *Id.* at 1150.

²⁸⁶ *Id.* (citing *Taubman Cherry Creek Shopping Center, LLC v. Neiman-Marcus Group, Inc.*, 251 P.3d 1091, 1095 (Colo. App. 2010)).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1144.

²⁹⁰ *Id.* at 1150.

²⁹¹ *Id.*

²⁹² *Id.* at 1150-1151.

²⁹³ *Id.* at 1152.

4 Analyzing the Enforceability of Clickwrap Agreements

4.1 The Enforceability of Online Contracts in General

With the emergence of the area of law that is online contracts various different courts have addressed and generally enforced these kinds of agreements. In doing so the courts have been known to still apply the traditional principles of contract law.²⁹⁴ In order to form a legally binding contract over the internet there has to be a manifestation of mutual assent.²⁹⁵ This manifestation of mutual assent can take the form of an offer followed by acceptance²⁹⁶, such as when accepting the terms of a clickwrap agreement, or through conduct²⁹⁷, by using a website governed by a browsewrap agreement, but also through silence or failure to act²⁹⁸, by not reviewing the terms of the agreement and returning the product in a shrinkwrap license when finding the terms unacceptable. By subscribing to the objective theory of contract law the circumstances surrounding the objective conduct of the parties of a contract and whether a reasonable person would conclude that the parties intended to be bound by a contract is the basis for determining the manifestation of mutual assent in online contracting.²⁹⁹ However, in regards to the classical provision of the meeting of the minds found in the subjective theory of contract law the courts seemingly have rather substituted the meeting of the minds for an objective test of reasonable notice.³⁰⁰

In the United States of America the duty to read the terms of a contract is a general principle of contract law.³⁰¹ This holds true as well in regards to contracts formed over the internet.³⁰² Browsewrap, clickwrap and modified clickwrap agreements are all held to this general principle and failure to read the contents of a contract is not an excuse to not adhere to the terms of the contract. The court in *ProCD, Inc. v. Zeidenberg* when ruling on the enforceability of shrinkwrap licenses, held that “pay now, terms later” or rolling contracts are enforceable and that they are a form of contract that can prove valuable to both buyers and sellers alike.³⁰³ By enforcing the contract the court relied on the U.C.C. and common law

²⁹⁴ See *supra* note 1.

²⁹⁵ See *supra* note 73.

²⁹⁶ See *supra* note 78 and accompanying text.

²⁹⁷ See *supra* note 82 and accompanying text.

²⁹⁸ See *supra* note 85 and accompanying text.

²⁹⁹ See *supra* note 74.

³⁰⁰ See *supra* note 142. *Contra supra* note 75 and accompanying text.

³⁰¹ See *supra* note 138.

³⁰² See *supra* note 139.

³⁰³ See *supra* note 105 and accompanying text.

principles that conduct or failure to act can constitute assent to an agreement.³⁰⁴ By not returning the product after having had an opportunity to read the terms governing the use of the software Zeidenberg had offered acceptance to the terms of the agreement.³⁰⁵ The court in *Hill v. Gateway 2000, Inc.* extended this line of precedent to cover not only software licenses but any contract formed under common law. These kinds of contracts are therefore enforceable as long as the customers has had an opportunity to review the terms and return the product if they disapprove of them.³⁰⁶ As standard form contracts formed over the internet are governed by the traditional principles of contract law they may also be challenged by claims of unconscionability. As shown in the case *Comb v. PayPal, Inc.* an unconscionable contract must show elements of both procedural and substantive unconscionability which operate on a sliding scale where the more significant the presence of one element is the less significant the other needs to be.³⁰⁷

4.2 Clickwrap Agreements

Clickwrap agreements are less problematic than their analogous namesake shrinkwrap agreements in that the terms of the agreement are displayed immediately to the customer as part of the process of purchase. By definition a clickwrap agreement is described as a message that is presented to the user on his or her computer screen that requires the user to assent to the terms of the agreement through the act of clicking a button or an icon.³⁰⁸ Therefore there is no delayed disclosure of terms if the review of these terms and the following assent by clicking on an “I Agree” icon is a prerequisite for completing the purchase. In order to find a clickwrap agreement enforceable the courts have in various decisions upheld the notion that the user must have had a reasonable notice of the terms of the agreement and as such had the opportunity to manifest assent to the terms.³⁰⁹ Generally this is satisfied by providing a button or icon that has to be clicked when placing the order or processing the transaction notifying the consumer that in order to complete the transaction he or she must adhere to the terms governing the agreement by taking affirmative action.³¹⁰ For clickwrap agreements this is accompanied by the immediate display of the contractual terms on the user’s computer screen where the “I Agree” button or icon is placed in the same box or in the near vicinity and a

³⁰⁴ See *supra* notes 103-108 and accompanying text.

³⁰⁵ See *supra* note 109.

³⁰⁶ See *supra* notes 111-114 and accompanying text.

³⁰⁷ See *supra* notes 121-125 and accompanying text.

³⁰⁸ See *supra* note 128.

³⁰⁹ See *supra* note 186.

³¹⁰ See *supra* note 187 and accompanying text.

notice stating that consequences will flow from the assenting click.³¹¹ The courts have generally upheld that clicking an icon labeled “I Agree”, “I Accept” or something similar to that effect is admissible as a manifestation of assent. If the clicking of a button indicating assent is an integral part of completing the transaction, or otherwise to the registration or activation of an account on a website governed by a clickwrap agreement and the completion of said process is a mandatory step for the formation of a contract between the parties, the agreement will be considered enforceable.³¹² Therefore the courts have held that if the physical act of clicking through a notice of this sort can be proven the courts will accept this affirmative act as a manifestation of assent and enforce the contract at least in this respect.³¹³ Where these provisions have been satisfied the courts have generally found that the clickwrap agreements are enforceable as the user has had reasonable notice of the terms of the agreement and therefore had the opportunity to manifest assent to the terms.

4.3 Modified Clickwrap Agreements

By subscribing to this new theory of classifying some contracts as modified clickwrap agreements that has emerged in later case law we must question the earlier distinctions drawn between browsewrap and clickwrap agreements. In *Specht v. Netscape Communications Corp. CA* the nature of the license agreement governing the use of the SmartDownload software is not implicitly defined by the court however commentators have referred to this agreement as a browsewrap agreement.³¹⁴ By the description provided in the case this conclusion seems rather accurate as the hyperlink containing the TOS was visible only when scrolling down to the bottom of the page, the terms were not visible on the same web page and the terms were not referenced elsewhere.³¹⁵ The lines have been blurred however on the definitions in this area of contract law with the introduction of the hybrid arrangements. In regards to the SmartDownload license agreement in *Specht v. Netscape Communications Corp. CA*, Moringello has suggested that “Netscape’s mistake might have been remedied by the addition of words of assent above the ‘Download Now’ icon.”³¹⁶ In *Fteja v. Facebook, Inc.* the court found that a TOU was enforceable by clicking a “Sign Up” button where a

³¹¹ See *supra* notes 221-222 and accompanying text.

³¹² See *supra* note 223.

³¹³ See *supra* note 231.

³¹⁴ See, e.g., William J. Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U.L. REV. 433, 449 n. 146 (2003) (referring to the SmartDownload agreement as a browsewrap agreement.).

³¹⁵ See *supra* notes 158-160 and accompanying text.

³¹⁶ Juliet M. Moringiello, *Singals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1346 (2005).

notice located immediately below the button stating: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.” and the line “Terms of Service” was an underlined hyperlink leading to the TOU.³¹⁷ The court reasoned that this was neither a pure clickwrap nor browsewrap agreement as it contained elements of both. It required further action by the user both to assent by clicking on the button and to access the terms of the TOU located on another web page.³¹⁸ The circumstances in *Fteja v. Facebook, Inc.* and *Swift v. Zynga Game Network, Inc.* are very similar. In *Swift v. Zynga Game Network, Inc.* a hyperlink to the terms of the agreement was located directly below the “I Accept” button and the court categorized this as a modified clickwrap presentation.³¹⁹ The court found the modified clickwrap agreement enforceable as an affirmative action of assenting to the terms was required and the terms were given reasonable notice even though they were not displayed on the same web page and only referenced to through a hyperlink.³²⁰ By comparing these cases it is clear that the TOU in *Fteja v. Facebook, Inc.*, while not being a pure clickwrap or browsewrap agreement, must be categorized as a modified clickwrap agreement.

By contrast the court in *Major v. McCallister* explicitly defined the agreement as a browsewrap agreement.³²¹ This is questionable though in light of the newer case law as the agreement more closely resembles a modified clickwrap agreement than that of a browsewrap agreement. In *Major v. McCallister* the plaintiff was presented with a button labeled “Submit for Matching Pros” next to which was a blue hyperlink to the terms of the agreement accompanied by the notice “By submitting you agree to the Terms of Use.”³²² When considering the similar circumstances in *Fteja v. Facebook, Inc.* and *Swift v. Zynga Game Network, Inc.* it must be concluded that the agreement in *Major v. McCallister* is in fact a modified clickwrap agreement as well. The identifying characteristic of a modified clickwrap agreement is the requirement of an assenting click of a button where the terms of the agreement are located elsewhere but accessible through a hyperlink.³²³ This hyperlink is prompted with a message, such as “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.”, indicating its importance and that consequences will follow the assenting click. Since the courts have held that this sort of presentation puts the

³¹⁷ See *supra* notes 263-264.

³¹⁸ See *supra* notes 266-270 and accompanying text.

³¹⁹ See *supra* notes 250-251.

³²⁰ See *supra* note 259.

³²¹ See *supra* note 207.

³²² See *supra* notes 201-203.

³²³ See *supra* note 259.

user on reasonable notice of the terms and an assenting click consequently forms an enforceable contract between the parties it is my assertion that modified clickwrap agreements are in fact clickwrap agreements, albeit provided in a slightly different form. As with regular clickwrap agreements a user must have been give reasonable notice of the terms and manifested assent to them in order for the agreement to be enforceable.³²⁴

³²⁴ *See supra* note 186 and accompanying text.

5 A Survey of the Practices of Software Companies

5.1 *The Procedure and Definitions of the Survey*

The survey was based on PwC's 2012 year Global 100 Software Leaders by revenue and examined the top 50 software companies based in the United States of America.³²⁵ By visiting the website of each of these companies, selecting a product or service to purchase, registering whenever necessary, starting a process to purchase the product or service and ending this process when prompted to enter payment information or being notified by the terms of the agreement through either a clickwrap or modified clickwrap presentation. The main question of the survey was whether or not the company provided a clickwrap or modified clickwrap agreement on its website governing the terms of the transaction prior to or in conjunction with payment information having to be entered and the process of purchase was canceled before finalizing a transaction in order to avoid liability. The survey also examined whether a browsewrap agreement was provided somewhere on the website. In the following parts the procedure and the definitions used in the survey are described in detail.

5.1.1 **The Company Sells Products or Services Online?**

The first question was answered with either a "YES" or a "NO". The requirements for answering "YES" on this question were that the company had to sell products or services from its own website, in other words in situations where the products or services were sold online but by resellers on other websites it would net a "NO" as an answer. Solutions provided by companies where you leave your contact information and a representative of the company later contacts you regarding the sale or where the company provides price quotes of the product were also answered with a "NO". The scope of the survey was standard form contracts provided in widely applied purchase processes like for example adding an item to a cart that is later checked out and payment information is entered and those situations would net a "YES" in the survey.

5.1.2 **Purchase Requires Registration?**

The second question was answered with either a "YES", "NO" or "NOT VIEWED". Where the first question had been answered with a "NO" this question would automatically net a "NOT VIEWED" answer as it would provide no value to the survey to proceed any further. If registering an account was a necessary part of the process of purchase and this step was

³²⁵ See *supra* note 46.

required before being prompted to enter payment information this would net a “YES” answer in the survey. By contrast, if a payment information screen was displayed before requiring the user to register an account, even if registration would have been a necessary step to actually finalize the purchase, this would net a “NO” in the survey.

5.1.3 Terms Available on the Website in Browsewrap Form?

The third question was answered with either a “YES”, “NO” or “NOT VIEWED”. Where the first question had been answered with a “NO” this question would automatically net a “NOT VIEWED” answer as it would provide no value to the survey to proceed any further. If the company provided a browsewrap agreement containing the terms of the agreement located somewhere on its website where the product or service was available for purchase regardless of placement and size this would net a “YES” answer in the survey. If a browsewrap agreement could not be found anywhere on the website it would net a “NO” answer.

The definition of a browsewrap agreement used in this survey is more closely related to what has been described as a pure browsewrap agreement than that of borderline situations.³²⁶ A hyperlink to the terms of the agreement was displayed somewhere on the website and the terms of the agreement were not shown without clicking on this link, sometimes requiring the user to navigate through a series of hyperlinks. No affirmative action indicating assent to these terms, such as clicking an “I Accept” button or being forced to actually view the terms, were needed to proceed with the process of the transaction. Conversely, in borderline situations where the terms of the agreement were hyperlinked accompanied by a notice stating that proceeding would constitute assent to the terms or the requirement of some sort of click in order to proceed have been omitted from this definition in regards to the survey.

5.1.4 Notice of Terms Before Entering Payment Information?

The fourth question was answered with either a “YES”, “NO” or “NOT VIEWED”. Where the first question had been answered with a “NO” this question would automatically net a “NOT VIEWED” answer as it would provide no value to the survey to proceed any further. If the user of the website, under the process of purchasing a product or service, at any point during this process were confronted with a presentation that fall under the definitions of clickwrap or modified clickwrap agreements in this survey, prior to or at the screen prompting the user to enter payment information this would net a “YES” answer in the survey. If a user

³²⁶ See *supra* notes 266-267 and accompanying text.

was not confronted with terms that fall under the definition of a clickwrap or modified clickwrap agreement in this survey this would net a “NO” as a result.

Clickwrap agreements are defined in this survey as terms or provisions shown on the user’s screen that requires an affirmative click in order to proceed with the transaction.³²⁷ This is the traditional definition of a clickwrap agreement and differs from a modified clickwrap agreement in that the terms of the agreement are shown immediately on the web page that contains a button labeled “I Accept”, “I Agree” or something similar that is sometimes accompanied by a checked or un-checked radio button located next to it.³²⁸ By contrast, the definition of modified clickwrap agreements in this survey are presentations where the terms of the agreement are not immediately displayed on the same web page as the button the user is required to click in order to proceed with the purchase, but are located elsewhere and accessible through a hyperlink located in the near vicinity of the button.³²⁹ The presentation makes it clear to the user that an affirmative click on the button labeled something to the effect of “Sign Up”, that may or may not be accompanied by a checked or un-checked radio button, that consequences will follow the affirmative click of the user through a statement like or similar to: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.”

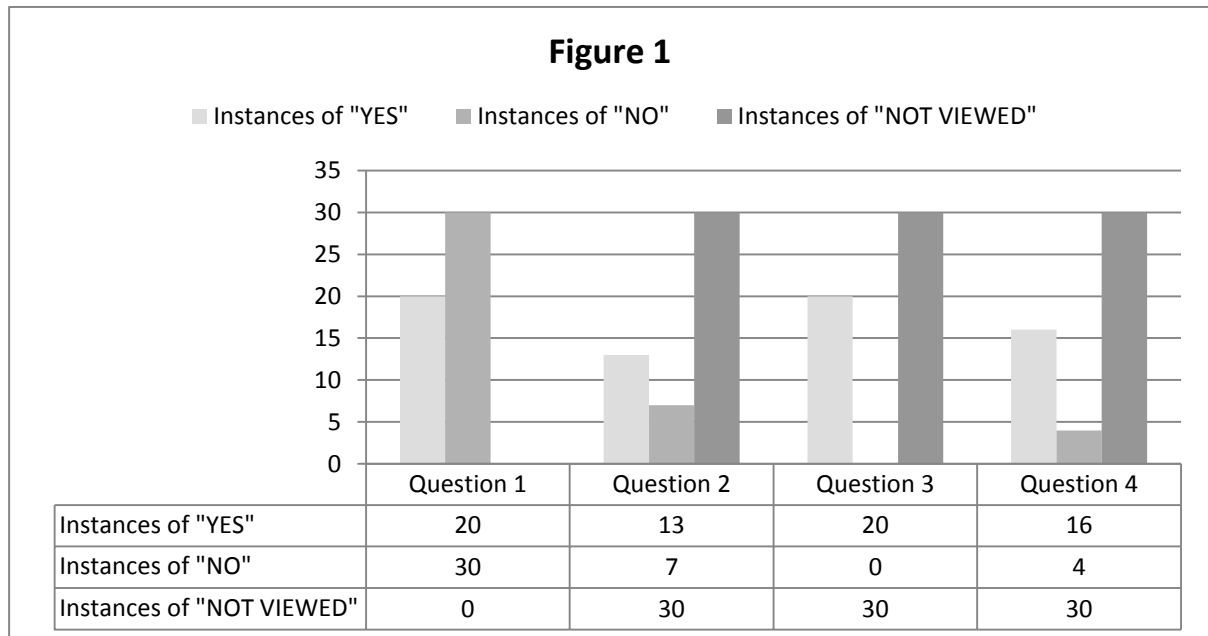
³²⁷ See *supra* note 186 and accompanying text.

³²⁸ See Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008) (In conducting a survey of the enforceability and presence of pro-seller contract terms in internet retail contracts the authors define the term radio button as a “...button that has to be checked to proceed.”).

³²⁹ See *supra* note 259 and accompanying text.

5.2 The Results of the Survey

In this part the results of the survey are presented. Figure 1 represents the results of the survey in number of instances the questions were answered with either a “YES”, “NO”, or “NOT VIEWED” for all of the questions answered in the survey.



Question 1: The company sells products or services online?

Question 2: Purchase requires registration?

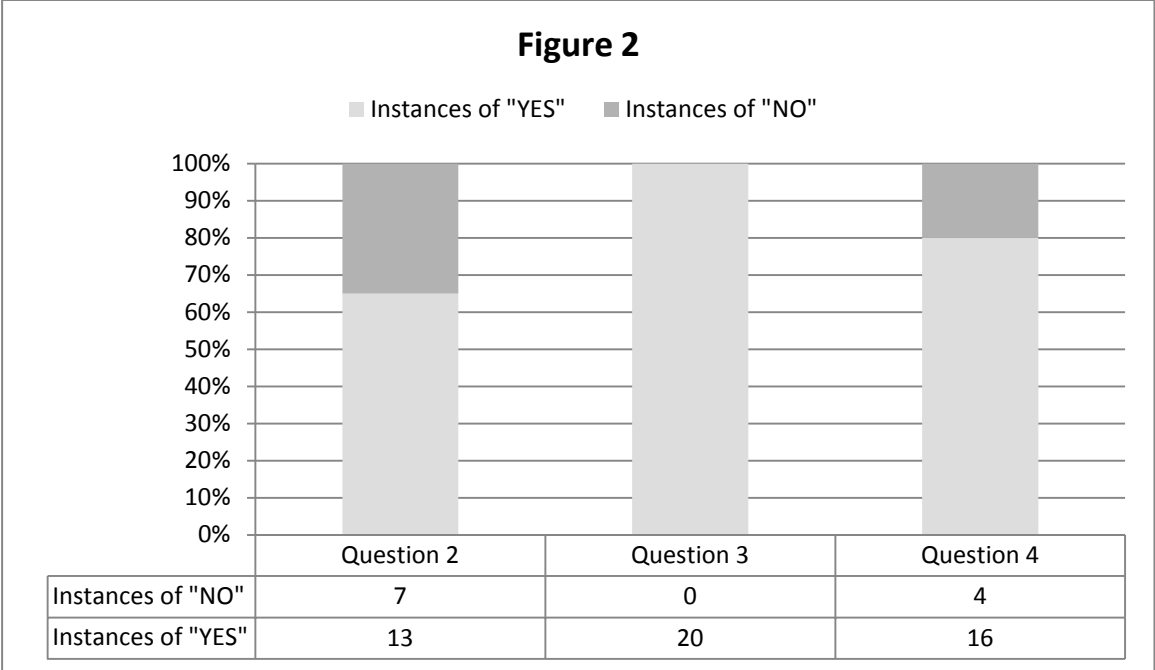
Question 3: Terms available on the website in browsewrap form?

Question 4: Notice of terms before entering payment information?

- Question 1: The company sells products or services online?

As we can see in Figure 1 out of the 50 websites visited in the survey 20 of them sold products or services online to customers. This represents 40% of the total number of websites visited. This also means that the remaining 30 of the websites or, 60 % of them, were left out of the rest of the survey as they provided no value to the statistics.

Figure 2 represents the number of instances of “YES” and “NO” in questions 2-4 in the survey by percentages in regards to the 20 websites that sold products or services online. Any instances of “NOT VIEWED” are omitted as they provide nothing of value to the statistics.



Question 2: Purchase requires registration?
 Question 3: Terms available on the website in browsewrap form?
 Question 4: Notice of terms before entering payment information?

- Question 2: Purchase requires registration?

As we can see in Figure 1 of the 20 websites in the survey that sold products or services online a total of 13 of them required that the customer registered an account on their website prior to entering payment information whereas the remaining 7 did not. According to Figure 2 this means that a total of 65 % of the total 20 websites that sold products or services online required registration prior to entering payment information and 35 % did not.

- Question 3: Terms available on the website in browsewrap form?

As we can see in Figure 1 all 20 of the websites in the survey that sold products or services online provided a browsewrap agreement located somewhere on their website. According to Figure 2 this means 100 % of the total 20 websites that sold products or services online did provide a browsewrap agreement on their website and 0 % of the websites did not have a browsewrap agreement available.

- Question 4: Notice of terms before entering payment information?

As we can see in Figure 1 of the 20 websites in the survey that sold products or services online 16 provided disclosure during the process of purchase in the form of either a clickwrap agreement or a modified clickwrap agreement prior to or in conjunction with entering payment information and the remaining 4 did not. According to Figure 2 this means that 80% of the total 20 websites provided disclosure in the form of either a clickwrap agreement or a modified clickwrap agreement prior to or in conjunction with entering payment information and 20% did not.

6 Analyzing the Results of the Survey

6.1 *The Survey in General*

Since the survey examined a total of 50 websites and only 20 of those sold products or services online it must be recognized that it is a pretty small sample size of data that has been worked with. Given the small sample size the results of the survey might not be indicative of the practices of software companies in the industry as a whole. However, since the ranking was conducted by volume of revenue, it should at the very least reflect upon a large portion of all software being sold and as such give a reasonable representation of the practices of companies in this sector. By the sheer size of the economic market value these companies represent it should also reflect reasonably well on software being used by the average consumer.

At 40 % a surprisingly small portion of the companies in the survey sold products or services online in the manner described in the survey. This may depend on various reasons such as business decisions related to things like target audience, type of product or service being sold, the product or service might not be suitable to sell online using standardized contract terms as these contracts might be better served through individually negotiating each term in order to form a reasonably efficient business relationship. This is however a discussion beyond the scope of this essay and will as such be left to other commentators. It must also be pointed out that the smaller the sample size of data the less reliable it is as a statistic. A 100 % finding in a 20 company sample might be less indicative to the practices of software companies than a finding of 12.5 % from a sample of 64 companies. Therefore in comparing the survey conducted in this essay to the one conducted by Braucher and her research assistant it must be pointed out that there are some slight mathematical insufficiencies.

6.2 *Comparing the Results of the Two Surveys*

In the survey conducted by Braucher and her research assistant the type of terms the websites disclosed to their customers are not explicitly defined. When discussing the effectiveness of disclosure on the internet reference is however made to terms similar in description to that of a browsewrap agreement.³³⁰ The point of reference when comparing the survey conducted in

³³⁰ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1807 (2000).

this essay to that of Braucher's survey will therefore be any disclosure of terms regardless of the form they are presented in, which means clickwrap agreements, modified clickwrap agreements and browsewrap agreements are all included in this comparison. In this respect any notion of enforceability of these types of terms if challenged in a court of law will be disregarded for now.

In the survey conducted by Braucher 64 % of the 100 companies examined provided for ordering of products online.³³¹ Compared to the 40 % out of 50 companies in the survey conducted in this essay there is a 24 % differential. This may be due to any number of things such as previously discussed about target audience etc., or it may also be due to the fact that the samples were taken from slightly different rankings provided by different companies. In either case the importance of the results lies rather in the next question. In the survey conducted by Braucher only 12.5 % of the companies that provided for ordering of products online provided disclosure of their terms prior to the time that a customer must provide a credit card as part of the order procedure.³³² In the survey conducted in this essay all 100 % of the 20 companies that sold products or services online provided disclosure of their terms in the form of a browsewrap agreement. Out of these 20 another 80 % also provided disclosure in the form of either a clickwrap or a modified clickwrap agreement. The 87.5 % differential observed here is substantial, so is the fact that all of the companies examined in the survey conducted in this essay provided disclosure of their terms prior to or in conjunction with entering payment information which seems to indicate that the practice of delayed disclosure of terms seems not to be present anymore in this industry.

Now, the effectiveness of this disclosure of terms must be analyzed on its own merit. Braucher argues that timely, effective disclosure of the important terms of a deal is essential to create a working, competitive marketplace where customers have the ability to shop around before making the choice of purchasing a product or service.³³³ Shopping is the mechanic that provides market discipline in a mass market and delayed disclosure of terms inhibits shopping making it an anti-competitive practice as well as one that is deceptive and unfair even if the

³³¹ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1861 (2000).

³³² *Id.*

³³³ *Id.* at 1806.

customer has a return of return.³³⁴ In conducting the survey as presented in her paper she describes the process of stopping before being prompted to enter credit card information to be an approximation of what a web shopper would do to comparison shop.³³⁵ However, as other commentators have found in their survey of the practices of consumers regarding standard form contracts in an online environment the average customer does not read the terms of standard form contracts beyond price and description of goods when purchasing products or services online.³³⁶ This seems to indicate that shopping around in regards to the terms of an agreement is not something that the average customer does as the survey suggests that consumers rarely shop around for more advantageous terms.³³⁷ This calls into question whether pre-transaction disclosure of terms really serves an important function of protecting buyers in an online shopping environment. In fact, it has even been suggested that the opposite might be true. Hillman argues that mandatory pre-transaction disclosure of terms might backfire.³³⁸ The intent of forcing mandatory disclosure of terms on company websites prior to transaction is to influence businesses to write reasonable terms on the theory that consumers will read and shop around for terms.³³⁹ In an absence of consumers actually reading the terms the concept of mandatory disclosure might fail to increase shopping around for terms and as such fail in providing market discipline in a mass market.³⁴⁰ From a legal standpoint there is a possibility that mandatory disclosure of terms prior to transaction will create a safe haven for businesses looking to write marginal, but not outrageous terms, that might once have been targetable by the doctrine of unconscionability but might be enforceable because of their reasonable disclosure to the customer.³⁴¹ “Perhaps marginal terms, insufficiently outlandish to motivate a court to strike them on substantive unconscionability grounds alone, will be enforceable because of their early disclosure on the website.”³⁴² In conclusion though, Hillman seems to think that mandatory website disclosure of terms might be the best way to go when dealing with the problem of standard form

³³⁴ *Id.* at 1810.

³³⁵ *Id.* at 1861.

³³⁶ ROBERT A. HILLMAN, “ON-LINE CONSUMER STANDARD-FORM CONTRACTING PRACTICES: A SURVEY AND DISCUSSION OF LEGAL IMPLICATIONS, CORNELL LAW FACULTY PUBLICATIONS, PAPER 29, 14-15 (2005), available at http://scholarship.law.cornell.edu/lsrcp_papers/29.

³³⁷ *Id.* at 15.

³³⁸ Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

³³⁹ *Id.* at 849.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 853.

³⁴² *Id.* at 854.

contracts online.³⁴³ Furthermore, in a survey conducted by Marotta-Wurgler the conclusion was drawn that contracts displayed to customers pre-purchase are actually slightly more pro-seller than that of rolling contracts.³⁴⁴ An important note however is that the survey was conducted in a comparative manner between sellers that provided pre-transaction disclosure and those that did not and not whether the sellers on average offered poor-quality terms to their customers was not part of the scope of the survey.³⁴⁵ The importance of the survey is rather that delayed disclosure of terms does not necessarily come with more pro-seller contractual terms and that the discussion of standard form contracts should rather switch from the requirement and adequacy of pre-transaction disclosure to whether terms in standard form contracts is an appropriate outcome of competitive market forces.³⁴⁶

6.3 The Enforceability of Clickwrap or Modified Clickwrap Agreements

80 % of the companies that sold products or services online used a clickwrap or modified clickwrap presentation in order to disclose their terms before requiring the customer to provide payment information and they did so within the parameters set forth for the definition of these agreements in the survey. These definitions were based on the findings in the substantive law section regarding the enforceability of clickwrap and modified clickwrap agreements.³⁴⁷ It is therefore my assertion that these agreements have provided the customers with reasonable notice of the existence of the terms and have been given an opportunity to review them. In order to complete the transaction the customer was required to assent to the presented terms through clicking an “I Agree” button or something similar and this was a necessary step in order to proceed with the purchase process. The button was accompanied with a statement that the assenting click would bind the user to terms that were hyperlinked to in the vicinity of the acceptance button or otherwise the terms were displayed immediately to the user on the same screen. These contracts would therefore most likely be held enforceable if challenged in court unless the court would find the contracts or any contract term thereof unconscionable.

³⁴³ *Id.* at 855.

³⁴⁴ FLORENCIA MAROTTA-WURGLER, ARE “PAY NOW, TERMS LATER” CONTRACTS WORSE FOR BUYERS? EVIDENCE FROM SOFTWARE LICENSE AGREEMENTS, 38 J. LEGAL. STUD. 309, 341 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799282.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *See supra* Part 3.

Out of the 20 companies that sold products or services online 65 % of them also included mandatory registration of accounts on their websites where the terms of the agreement were pushed on the customer early in the process of purchase through either a clickwrap or modified clickwrap presentation. When considering the importance of a mandatory registration step in the purchase process other commentators have, when ordering assent level required along an eight-point continuum drawn from relevant case law regarding confidence in enforceability the highest score was given “8) [d]ocuments pushed to user at time of entering site or when registering, with registration being a condition to entering the order placement process.”, when conducting a different survey concerning browsewrap and clickwrap agreements.³⁴⁸ This is also in line with the case law examined in this essay.³⁴⁹ This is indicative of the fact that companies seem concerned with making sure that the terms of the agreements are given sufficient notice and that they are assented to. In the case of a challenge in court these agreements would more likely be enforceable if mandatory registration is an important part of the purchase process.

Finally, in regards to the 20 % of the companies that sold products or services online and only provided disclosure in the form of a browsewrap agreement located somewhere on the website the enforceability of browsewrap agreements in general is beyond the scope of this essay. However, with the emergence of the definition of modified clickwrap agreements the lines distinguishing browsewrap agreements from clickwrap agreements have been significantly blurred and the enforceability of browsewrap agreements in this area of contract law is certainly an interesting discussion saved for another day.

³⁴⁸ Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 995 (2008).

³⁴⁹ See, e.g., *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002).

7 Summary and Conclusions

In the emerging area of contract law that is online agreements the courts have found that clickwrap agreements are generally valid and enforceable contracts as long as the consumer is provided reasonable notice of the terms of the agreement. In the traditional definition of a clickwrap agreement the terms of the contract are displayed immediately on the same web page as the “I Agree” button and if the companies can prove that in order to proceed with the transaction the customer was required to manifest assent to the terms of the agreement through affirmative action of clicking on the “I Agree” button the clickwrap agreement will generally be held enforceable. In terms of modified clickwrap agreements these are essentially just clickwrap agreements provided in a slightly different presentation. While the terms of a clickwrap agreement is displayed immediately on the customer's screen the contents of a modified clickwrap agreement are accessible through either a hyperlink or reference for the customer to learn how and where to view the contents of the agreement. This reference must be provided in the immediate vicinity of the button that has to be clicked in order to assent to the contractual terms accompanied by a notice stating that consequences will necessarily flow from the assenting click of the customer through a statement like: “By clicking ‘I Agree’ you are assenting to the terms of the agreement” or something similar.

Customers have a duty to read the terms of a contract however recent surveys show that the average customer does not read the terms of standard form contracts when shopping online and even fewer actually shop around for more advantageous terms. Even so the courts have found that even if the consumer does not actually read the contents of the contract in an online agreement they will consistently enforce these types of contracts. In the relatively small sample of companies examined in the survey conducted in this essay all 100 % of them provided the terms of their agreements online in either the form of a clickwrap, modified clickwrap or browsewrap agreement prior to or in conjunction with entering payment information. By contrast to the survey conducted in 2000 where only 12.5 % of the companies provided the terms of their agreements online the practice of delayed disclosure seems to be a relic of the past. Companies today seem rather willing to push the terms of their agreements on their customers as 80 % of them provided their terms in the form of either a clickwrap or modified clickwrap agreement as part of the transaction process. 65 % of these companies even made registration of accounts on their websites a mandatory requirement when

purchasing products or services online in order to push the terms of their agreements on the customers early in the process of purchase.

This calls into question the effectiveness of this disclosure. Most consumers don't read the terms and don't shop around for better terms and shopping around has been described as the mechanic that provides discipline in a mass market. The implications of the findings in this survey can be an indicator of software companies trying to enforce marginal terms since by following the necessary steps of providing reasonable notice and an opportunity to manifest assent they stand a good chance of actually enforcing these agreements. The requirement of mandatory registration on the website and providing clickwrap or modified clickwrap agreements early in the process of purchase may be employed as a strategy to ensure enforceability of terms that are of poor quality to start with. As another survey has indicated the pre-transaction disclosure of terms often comes with terms that are slightly more pro-seller than those that are not provided with pre-transaction disclosure. Given the abundance of case law in this area of contract law consumers must clearly have complaints about the provisions of these agreements. Since the case law concerning clickwrap and modified clickwrap agreements is relatively clear on what constitutes reasonable notice and manifestation of assent, by widely employing these types of terms in transactions software companies have an increased playing-field for "testing the waters" in attempting to enforce increasingly more onerous terms, however marginally. While this line of reasoning is merely speculation with no empirical evidence to support this basis whatsoever, if this were to become the development in this particular area of contract law it would be very worrying for the future of online contracting.

In conclusion though, as with any contract governed by the traditional principles of contract law, the enforceability of standard form contracts formed over the internet such as browsewrap, clickwrap and modified clickwrap agreements may be challenged by claims of unconscionability provided that there is a substantial presence of both procedural and substantive unconscionability regarding the terms of the agreement.

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Appendix A: A Survey of the Practices of Software Companies

The following is the results of a survey based on the Global 100 Software Leaders by revenue produced by PwC.

1 Microsoft Corporation

<http://www.microsoft.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

2 International Business Machines Corporation (IBM)

<http://www.ibm.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

3 Oracle Corporation

<http://www.oracle.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

4 Symantec Corporation

<http://www.symantec.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

5 Hewlett-Packard (HP)

<http://www.hp.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **NO**

6 EMC Corporation

<http://www.emc.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

7 Adobe Systems Incorporated

<http://www.adobe.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

8 CA Technologies

<http://www.ca.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

9 VMware Incorporated

<http://www.vmware.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

10 **Salesforce Incorporated**

<http://www.salesforce.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

11 **SAS Institute**

<http://www.sas.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

12 **Intuit Incorporated**

<http://www.intuit.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

13 **Infor**

<http://www.infor.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

14 **Autodesk Incorporated**

<http://www.autodesk.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

15 Citrix Systems Incorporated

<http://www.citrix.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

16 Cisco Systems Incorporated

<http://www.cisco.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

17 Intel Corporation

<http://www.intel.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

18 Synopsys Incorporated

<http://www.synopsys.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

19 Apple Incorporated

<http://www.apple.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **NO**

20 **SunGard**

<http://www.sungard.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

21 **McKesson Corporation**

<http://www.mckesson.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

22 **ADP, LLC**

<http://www.adp.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

23 **NetApp Incorporated**

<http://www.netapp.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

24 **Cadence Design Systems**

<http://www.cadence.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

25 Micro Focus International

<http://www.microfocusinternational.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

26 Environmental Systems Research Institute

<http://www.esri.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

27 Teradata Corporation

<http://www.teradata.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

28 Red Hat Incorporated

<http://www.redhat.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

29 Nuance Communications

<http://www.nuance.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **NO**

30 PTC Incorporated

<http://www.ptc.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **NO**

31 Avaya Incorporated

<http://www.avaya.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

32 Mentor Graphics Incorporated

<http://www.mentor.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

33 TIBCO Software Incorporated

<http://www.tibco.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

34 Compuware Corporation

<http://www.compuware.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

35 **ANSYS Incorporated**

<http://www.ansys.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

36 **Google**

<http://www.google.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

37 **Informatica Corporation**

<http://www.informatica.com>

The company sells products or services online: **YES**

Purchase requires registration: **YES**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

38 **Kronos Incorporated**

<http://www.kronos.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

39 **NCR Corporation**

<http://www.ncr.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

40 **FICO**

<http://www.fico.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

41 **MICROS Systems Incorporated**

<http://www.micros.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

42 **Dell Incorporated**

<http://www.dell.com>

The company sells products or services online: **YES**

Purchase requires registration: **NO**

Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

43 **Fiserv Incorporated**

<http://www.fiserv.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

- 44** **Medical Information Technology Incorporated (MEDITECH)**
<http://www.meditech.com>
The company sells products or services online: **NO**
Purchase requires registration: **NOT VIEWED**
Terms available on the website in browsewrap form: **NOT VIEWED**
Notice of terms before entering payment information: **NOT VIEWED**
- 45** **Verint Systems Incorporated**
<http://www.verint.com>
The company sells products or services online: **NO**
Purchase requires registration: **NOT VIEWED**
Terms available on the website in browsewrap form: **NOT VIEWED**
Notice of terms before entering payment information: **NOT VIEWED**
- 46** **Bentley Systems Incorporated**
<http://www.bentley.com>
The company sells products or services online: **NO**
Purchase requires registration: **NOT VIEWED**
Terms available on the website in browsewrap form: **NOT VIEWED**
Notice of terms before entering payment information: **NOT VIEWED**
- 47** **JDA Software Group Incorporated**
<http://www.jda.com>
The company sells products or services online: **NO**
Purchase requires registration: **NOT VIEWED**
Terms available on the website in browsewrap form: **NOT VIEWED**
Notice of terms before entering payment information: **NOT VIEWED**
- 48** **Amazon.com Incorporated**
<http://www.amazon.com>
The company sells products or services online: **YES**
Purchase requires registration: **YES**
Terms available on the website in browsewrap form: **YES**

Notice of terms before entering payment information: **YES**

49 **Genesys Telecommunications Laboratories Incorporated**

<http://www.genesys.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

50 **Concur Technologies**

<http://www.concur.com>

The company sells products or services online: **NO**

Purchase requires registration: **NOT VIEWED**

Terms available on the website in browsewrap form: **NOT VIEWED**

Notice of terms before entering payment information: **NOT VIEWED**

Appendix B: By the Numbers - A Survey of the Practices of Software Companies

The following is a numerical consolidation of the findings in Appendix A: A survey of the practices of software companies.

1 The company sells products or services online

Instances of “YES”: **20**

Instances of “NO”: **30**

2 Purchase requires registration

Instances of “YES”: **13**

Instances of “NO”: **7**

Instances of “NOT VIEWED”: **30**

3 Terms available on the website in browsewrap form

Instances of “YES”: **20**

Instances of “NO”: **0**

Instances of “NOT VIEWED”: **30**

4 Notice of terms before entering payment information

Instances of “YES”: **16**

Instances of “NO”: **4**

Instances of “NOT VIEWED”: **30**