

FAIRNESS IN ELECTRONIC CONTRACTING: MINIMUM STANDARDS FOR NON- NEGOTIATED CONTRACTS

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ABSTRACT

Despite much discussion and controversy in the years since ProCD v. Zeidenberg was decided, there has been an increasing use and acceptance of shrinkwrap, clickwrap, and browsewrap contracts and licenses as a means of conducting modern-day commerce. Yet even the strongest proponents of electronic contracting agree that fundamental fairness requires some limits on the terms that will be enforced in such contracts of adhesion. This paper suggests that the usual U.S. standard of unconscionability is too high a bar to provide reasonable consumer protection in this context. The E.U. Directive on Unfair Contract Terms is a well-developed alternative to the U.S. approach that provides greater certainty for both parties, as well as greater protection for the customer. Less comprehensive, but still a useful starting point in thinking about a more pro-active U.S. approach is the "Stop Before You Click" campaign developed by a group concerned about fairness in electronic contracting. Terms that may surprise a customer, cause undue hardship, or override other important public policies should not be part of a non-negotiated contract. The twelve principles of "Stop Before You Click" form a good basis for either minimum contract standards for non-negotiated contracts or for a new series of consumer protection laws designed to prevent over-reaching in electronic contracts.

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I. INTRODUCTION

In the recent case of *Scarcella v. America Online*,¹ the Civil Court of the City of New York refused to enforce a forum-selection clause in a clickwrap license because it violated a state policy favoring the simplified proceedings of small-claims court for low-value disputes.² The clickwrap license provided for exclusive jurisdiction in Virginia.³ Although the court seemed troubled by some aspects of the agreement and the way it was presented to the customer, the court found that the contract itself was valid.⁴ Nonetheless, the court struck out the choice of forum clause because it said that the clause violated an important public policy of the state of New York, and that the defendant had not offered any evidence that Virginia would offer the same benefits as the small-claims court in New York.⁵ Moreover, the court noted that if required to go to Virginia, the defendant would lose one day of pay for each day a court appearance was required.⁶

In denying the motion to dismiss from America Online, the court found that the contract itself was valid but observed that it was difficult to read, taking some ninety-one screens to display in

1. *Scarcella v. Am. Online*, No. 1168/04, 2004 WL 2093429 (N.Y. Civ. Ct. Sept. 8, 2004).

2. *Id.* at *3-5.

3. *Id.* at *1.

4. *See id.* at *1-4 (explaining that “a signatory to [a] contract . . . is presumed to know the contents of the instrument she signed and to have assented to such terms” (internal quotation marks omitted)).

5. *Id.* at *3-5.

6. *Id.* at *4-5.

its entirety.⁷ Moreover, the court noted that the presentation of the agreement made it

easy to avoid going to the trouble of slogging through all of that text. The customer can bypass all that bother by simply pressing the “OK, I Agree” button. If the customer nonetheless bites the bullet and presses the “Read Now” button, Defendant affords him or her a *second* opportunity to skip over . . . the contract . . . showing the customer a screen that says, in pertinent part:

*Because TOS [Terms of Service] and ROR [Rules of the Road] are detailed, they are lengthy, and while we encourage you to take the time to read them now, we understand if you are eager to just go explore the service. That’s OK, but you agree to read these documents once online*⁸

On these facts, the court found it not “implausible” that the defendant was trying to encourage the customer not to bother to read the contract at all.⁹ But the court avoided the issue of deceptive practices by instead deciding the case based on public policy.¹⁰

This interesting case raises a number of important issues that come up frequently in the context of enforcement of end user licenses; issues that have been around since the earliest cases on the topic.¹¹ Among the most important theoretical issues, for example, are those related to contract formation. Because these agreements simply do not meet the classical paradigm of contracts, theoreticians have struggled with the issue of contract formation and criticized these agreements on that basis for many years.¹² Can there really be a valid contract when the process is

7. *Id.* at *1–2.

8. *Id.* at *2.

9. *Id.* at *3.

10. *Id.* (“Enforcement of the forum-selection clause in this case would contravene the strong public policy embodied in the small-claims provisions of the Civil Court Act.”).

11. *See, e.g.,* *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 761, 763–66 (D. Ariz. 1993) (holding that by adding warranty disclaimers, a shrinkwrap license agreement constituted a proposal for additional, and thus invalid, terms to a previously formed contract and therefore did not apply to all of the items sold); *see also* *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 100–04 (3d Cir. 1991) (considering the enforceability of shrinkwrap license agreements in terms of the basic formation of a contract including conditional acceptance, express agreement to contract terms, “course of dealing” or “course of performance” analysis, and the governance of the U.C.C. over end user license agreements (EULAs)); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268–70 (5th Cir. 1988) (discussing restrictions contained in shrinkwrap and clickwrap agreements when they appear contrary to federal copyright law).

12. *See, e.g.,* Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 627 (2002) (“There is a remarkable dissonance between contract theory and practice

so completely one-sided, and where the process of contract formation is seemingly designed to put the other party at a disadvantage?¹³ In *Scarcella*, as in other similar cases, the contract was drafted by one of the parties with no negotiation over its terms, it was presented on a take-it or leave-it basis, and it was lengthy and difficult to read. Moreover, the customer, if not impatient anyway, was actually encouraged to bypass the license by clicking “I accept” and go right online, promising to read the agreement later.¹⁴ Under these circumstances, it seems impossible to describe the agreement as a “meeting of the minds.” It is possible to legitimately infer agreement to a set of “core terms,”¹⁵ that is a right to use the service in return for payment of

on the subject of form contracts. In practice, form contracts are ubiquitous. From video rentals to the sale of automobiles, form contracts are everywhere. Yet contract theorists are nothing if not suspicious of such contracts, having long ago dubbed them pejoratively ‘contracts of adhesion.’”); *see also* Jean Braucher, Commentary, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 755 (analyzing the effect of amendments to U.C.C. section 2 on software and digital content transactions); Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, 15 ANGLO-AM. L. REV. 255 (1986) (critiquing the classical contract theory that adhesion contracts are unfair because they do not result from a true agreement between two parties and proposing that adhesion contracts are unfair when they fail to be reasonably in the public interest); Stephen Fraser, *Canada-United States Trade Issues: Back from Purgatory? Why Computer Software “Shrink-Wrap” Licenses Should Be Laid to Rest*, 6 TUL. J. INT’L & COMP. L. 183, 185 (1998) (comparing the U.S. treatment of copyright, contract, patent, and trade secret laws to that of Canada); Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687, 687 (2004) (claiming that “over a hundred scholarly articles have been written on the subject . . . [most of which] criticize EULAs and argue that courts should not enforce them”); *cf.* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 434 (2002) (arguing that “the existing law governing standard-form contracts adequately addresses the concerns that electronic standard-form contracts raise”).

13. *See Scarcella*, 2004 WL 2093429, at *2–3 (observing that the Membership Agreement grants the customer not one, but two opportunities to bypass the “detailed” and “lengthy” text, which when printed out, “runs 11 single-spaced pages and 11 double-spaced pages”). It seems highly unlikely that any consumer would click on the scroll bar ninety times to read the contract. If many consumers do not actually read the standard-form agreement when entering into a house purchase, they are much less likely to do so when they are only agreeing with AOL to gain access to the online service for \$23.95 per month. Under the circumstances, it ought to be possible for these consumer agreements to be formulated with less verbiage and less legalese.

14. *Compare id.* at *1–3 (detailing the lengthy process the customer must endure to gain access to the online service), *with* *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 21–22 (2d Cir. 2002) (illustrating the method in which customers must install the SmartDownload “plug-in” to operate the software program), *and* *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 329–30 (D. Mass. 2002) (identifying the familiar steps taken to install software replete with clickwrap license agreements).

15. *See infra* notes 63–67 and accompanying text (discussing Llewellyn’s related notion of “blanket assent”); *see also infra* notes 144–55 and accompanying text (considering the way in which the European Union has dealt with unfair contract terms).

an agreed upon price, but it is much harder to find any real consent to the thousands of additional words of legal boilerplate even though the customer clicked “I agree” in order to move on and try out the new service.¹⁶

In addition to questions of procedural fairness and contract formation, there is also a question of substantive fairness and policy limits on what terms might be included in such contracts. It is easy to imagine some things that might be included that no court would enforce. These would include terms that would “shock the conscience”—terms that would fall under the doctrine of unconscionability.¹⁷ But is unconscionability the only limit on what might be included in these contracts? In the *Scarcella* case, the court answered, “No.”¹⁸ Citing the legislative reasons for establishing the small-claims court in the first place, along with other New York court decisions that have denied motions to dismiss from small-claims court,¹⁹ the court found that in this case the choice of forum provision in the agreement violated the

“Core terms,” as used here, refers to the central part of the agreement, in this case, for example, an agreement on the part of the supplier to provide their service to the customer in return for the payment of a certain sum. This concept of “core terms” is introduced here in a general sense, because it is useful to distinguish these basic essential elements of an agreement that a reasonable customer would expect, from all of the other contractual boilerplate typically thrown into the contract which would almost certainly surprise the customer. While some of those additional terms might be perfectly fair and reasonable, some might not and are thus cause for concern.

16. See Barnett, *supra* note 12, at 628–29 (“Most people fail to read most terms most of the time and no person can credibly claim to read all of the terms in form contracts all of the time. Every contracts professor and law student knows this from personal experience. Everyone . . . has at one time clicked the ‘I agree’ box of a software license agreement without reading the terms in the scroll-down box.”). Although it is a thoroughly unscientific sampling, when the Author of this Article has given presentations over the past decade or so, he has frequently asked the audience if they read the terms of these license agreements before clicking on the “I agree” button. Even in a large room full of lawyers, there are never more than two or three people who raise their hands. Most people probably have no idea what they have agreed to.

17. See U.C.C. § 2-302 cmt. 1 (2005) (setting forth the test for determining unconscionable contracts or terms); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 151–58 (5th ed. 2000) (summarizing the concept of unconscionability as a means of “refus[ing] to enforce all the terms of a contract”); see also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448–50 (D.C. Cir. 1965) (adopting the rule of not enforcing unconscionable contracts or terms); Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 946–47 (1986) (noting that substantive unconscionability requires a party challenging a contract to prove that its terms “shock the conscience”).

18. See *Scarcella*, 2004 WL 2093429, at *3 (finding the forum-selection clause in the contract void because it violated state public policy).

19. *Id.* at *3–4; see, e.g., *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 394–96 (Civ. Ct. 2001) (denying a motion to dismiss a small-claims action based on an arbitration clause); *Oxman v. Amoroso*, 659 N.Y.S.2d 963, 967 (N.Y. City Ct. 1997) (denying a motion to dismiss a small-claims action based on a forum-selection clause).

clear public policy of the state of New York to facilitate the resolution of small claims through the simplified procedures and local availability of a small-claims court.²⁰ The court, therefore, declined to enforce the choice of forum clause in the agreement.²¹

Despite the issues and concerns about one-sided electronic contracts, over the past decade online licenses for information services, along with software and online contracting in general, have grown significantly.²² Indeed, they have become an important means by which commerce is done over the Internet.²³ Buy a book, join a video rental club, download or update some software, or buy an airline ticket. Do any of these things online, and you will undoubtedly be using and agreeing to an online contract.²⁴ Whether or not you actually see that agreement or have an opportunity to affirmatively manifest assent, you will, in all likelihood, be bound by its terms.²⁵ Although this Article will contend that such contracts should be subject to some reasonable procedural and substantive limits to protect customers, it is no exaggeration to say that the acceptance of online contracting has been important to the development of the commercial aspects of the Internet.²⁶

20. See *Scarcella*, 2004 WL 2093429, at *3–4 (recounting the New York State policies governing the decision whether a forum-selection clause should be held unenforceable).

21. *Id.* at *4.

22. See Hillman & Rachlinski, *supra* note 12, at 429–31 (explaining that “[m]ore and more, ordinary people enter into contracts electronically, over the Internet, through electronic mail, and by installing software” and that “with increasing alacrity, people agree to terms [in clickwrap contracts] by clicking away at electronic standard forms on web sites and while installing software”).

23. By way of example, in the time during which this Article was being written, the Author was asked to (and did) accept at least six such licenses in varying lengths and degrees of complexity. These included, for example, tax preparation software (EULA running forty-one screens and six printed pages), a contract agreement to sign up for an online movie rental service, a new front end to get work e-mail at home (only two printed pages), an agreement to buy airline tickets, updates for MSN Messenger (forty-one screens with no printable version available), and an updated version of Adobe Reader (twenty-eight screens, six printed pages). All of these agreements had some problematic terms, but some were at least trying to be more consumer-oriented. Drafting of such agreements clearly needs improvement. See Gomulkiewicz, *supra* note 12, at 694–96.

24. See Hillman & Rachlinski, *supra* note 12, at 463–65 (observing that “e-commerce [still] relies on methods developed in the *real world*,” namely, standard-form contracts, even with “new companies selling everything from software to golf clubs through the Internet” (emphasis added)).

25. See *id.* at 479–81 (comparing a customer’s signature—which to many “denotes a binding commitment and is the essence of a contract”—with clicking “I agree”).

26. See generally Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, § 301(a), 114 Stat. 464, 475 (2000) (directing the Secretary of Commerce to “eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, for the purpose of facilitating . . . commerce”); Uniform Electronic

This Article will not suggest that electronic contracts should not be allowed or even that standard-form electronic contracts should not be allowed. Such a conclusion could destroy a significant segment of today's online economy.²⁷ However, this Article will suggest that courts, legislatures, or both should begin drawing boundaries around how these contracts are formed and the substantive terms that may be included. In so doing, this Article will suggest that some forms of electronic contract formation are better than others and more likely to withstand scrutiny. It will also suggest some substantive clauses that, as a policy matter, might be over-reaching and problematic in the context of non-negotiated agreements. Avoiding such terms would help to equalize the balance between the drafting party and the customer and could give drafters the beginning of a roadmap of how to best avoid problems and litigation later on.

II. THE EVOLUTION OF THE TECHNOLOGY, THE LICENSE AGREEMENT, AND THE LAW

The issue of standard-form contracts is an old story by now, familiar in many contexts from the purchase of theater and cruise line tickets to contracts for car rentals. It has been said that most contracts today are standard-form contracts,²⁸ and that their development was an important part of the evolution toward the kind of mass-market economy we have today.²⁹

Standard-form contracts became an issue in the consumer technology context when computers evolved from being essentially a business commodity—where business-to-business contracts were negotiated between the parties for large-scale computers and software—to being a consumer commodity in which hardware and software were sold to customers,

Transactions Act (UETA), 7A U.L.A. 225 (1999), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf> (typifying legislation adopted by many states dealing with online contracting). For a list of state actions on UETA, see <http://www.ncsl.org/programs/lis/CIP/ueta-statutes.htm>.

27. See Leslie Walker, *E-Commerce's Growing Pains: Competition Intensifies as Industry Turns 10 Years Old*, WASH. POST, June 25, 2005, at A1 (reporting that total consumer spending on U.S. retail websites amounted to \$117.2 billion in 2004, not including an additional \$34.2 billion from eBay's gross merchandise sales worldwide).

28. See Hillman & Rachlinski, *supra* note 12, at 431 (suggesting that "[l]ikely ninety-nine percent of paper contracts consist of standard forms" and that increasingly, electronic contracts are following suit); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (stating over thirty years ago that "[s]tandard form contracts probably account for more than ninety-nine percent of all the contracts now made").

29. See Slawson, *supra* note 28, at 529–31 ("[Standard-form contracts] are characteristic of a mass production society and an integral part of it.").

prepackaged and off-the-shelf, in stores or by mail-order.³⁰ In such an environment, it was no longer possible to have a negotiated contract between the seller and each and every customer.³¹ There was also considerable uncertainty at the time about the scope of copyright protection for computer software.³² Worried, therefore, about protecting themselves from (a) unauthorized copying and distribution to others, (b) efforts to decompile the software and create a competing product, and (c) liability issues, software publishers attempted to find a way to use contracts to protect their interests.³³ But given the amount of software being sold in the mass-market environment, it seemed virtually impossible to secure a signature on a contract for each one.³⁴ In an innovative experiment, and with great uncertainty about their validity,³⁵ these contracts began to take the form of shrinkwrap licenses, a by-product of the fact that most consumer-software at the time was distributed on floppy disks that could be shrinkwrapped or enclosed in an envelope inside a box.³⁶ Over the years as the technology has evolved, the licenses have evolved along with it to include so-called clickwrap licenses.³⁷ Browsewrap licenses were added as the Internet developed with its ability to create hyperlinks that would take a customer to a license agreement at another location.³⁸

30. See Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 338–41 (1996) (chronicling the growth of standard-form contracts in response to the personal computer revolution).

31. See *id.* at 339 (“To be useful in the mass market, software license agreements could not be individually negotiated, and had to be standardized and concise.”).

32. See Fraser, *supra* note 12, at 189 (recounting the early history and concerns regarding the protection of computer software).

33. See *id.* at 189–99 (canvassing software publisher’s concerns regarding copyright protection over computer programs).

34. See Gomulkiewicz & Williamson, *supra* note 30, at 342 (recognizing that due to distribution concerns “individually negotiated contracts are not feasible”).

35. See Fraser, *supra* note 12, at 184 (commenting that “from the start, questions have been raised as to the enforceability of shrink-wrap licenses”). However, *ProCD*, a landmark case, held that shrinkwrap licenses can be valid. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996). Although this case remains controversial, Judge Easterbrook’s holding paved the way for electronic contracting in general and the expansion of Internet commerce. And while heavily criticized by academia, it has often been followed by courts. See, e.g., Roger C. Bern, “*Terms Later*” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 641–43 (2004).

36. See Gomulkiewicz & Williamson, *supra* note 30, at 339–40 (describing the most commonly used EULAs).

37. See *id.* at 341 (illustrating a popular method of presenting EULAs which allows the user to accept the EULAs by taking some specified action within the program); see also Hillman & Rachlinski, *supra* note 12, at 431 (describing clickwrap contracts).

38. See Hillman & Rachlinski, *supra* note 12, at 431 (describing browsewrap

A. Shrinkwrap Licenses

Of the types of contracts mentioned above, shrinkwrap licenses were the first to develop, and the term is often used generically to mean any of the three forms of wrap agreements.³⁹ In the early days of personal computing, software was sold from the store in a box, and it was not typically “installed” on the computer, as it is today. Rather, it was run directly from the disk on which it came. These facts led to the development of the shrinkwrap or sealed-envelope license. After the software was purchased and the box was opened, the customer would find the software on one or more disks enclosed in a sealed envelope or wrapped in plastic.⁴⁰ The customer was then able to see through the plastic or on the outside of the envelope some of the terms of the agreement and was advised that by opening the envelope or the plastic wrap, he or she would be deemed to have accepted the contract inside and would be bound by its terms.⁴¹ Such a statement was perhaps wishful thinking, because there was little legal authority at the time on such matters. In fact, understood literally, this would mean that the contract was accepted upon the breaking of the seal or before it could have possibly been read (because the contract was inside). In those early days, this kind of analysis led to widespread doubt about the validity of such contracts.⁴² Many were troubled that the terms could not be seen until after the purchase was completed and the box and envelope were opened (perhaps making it nonreturnable) because there was no opportunity to negotiate over terms, and because there was obviously no actual manifestation of assent to the terms by the customer.⁴³ Under such circumstances, it is hard to find any objective agreement on anything. This approach to contract formation also seemed to set the stage for potential over-reaching on the part of the drafting party.

licenses).

39. See Gomulkiewicz & Williamson, *supra* note 30, at 339–41 (observing that users can enter into shrinkwrap license agreements by several means, including “tearing open the plastic wrapper covering the box” or “installing or using the software”).

40. See *id.* at 339–40.

41. In some cases, the terms of the agreement might not be visible at all before the seal was broken. Without providing an opportunity to return the software, such a unilateral agreement would probably not withstand judicial scrutiny today.

42. See Fraser, *supra* note 12, at 184 (recognizing that since the advent of shrinkwrap licenses, the judiciary has questioned their enforceability).

43. See Gomulkiewicz, *supra* note 12, at 691 (summarizing the objections academics lodge against EULAs).

B. Clickwrap Licenses

As the technology evolved, so too did the nature of the license agreement. Software grew larger, and individual computers began to come with hard disks onto which software was permanently installed.⁴⁴ These developments made it possible to present a license agreement during the installation process.⁴⁵ It also made it more important to the software creator to secure a binding agreement, because by copying the software to the computer, the original disks were potentially no longer needed and could be shared with others. As a consequence of this concern, presentation of the contract during installation became common, especially in the Microsoft Windows environment, where it was possible to have a visual “button” to click on that said “I agree.”⁴⁶ Such licenses are referred to as “clickwrap,” and typically, if the user does not click on the “I agree” button the software installation aborts unceremoniously.⁴⁷ The customer is then faced with a choice: either she can try again and click on the agreement whether she agrees or not, or she can repackage the software in the already opened box, return it to the store, and hope to get a refund.

Clickwrap licenses are ubiquitous today, and most people click to accept without reading the text. Nonetheless, clickwrap licenses are an improvement over shrinkwrap agreements, because they do at least require some affirmative action to indicate assent.⁴⁸ In other respects, though, they are no better, and may be worse. In most cases, the terms of the agreement are still not made available to the customer until after the software is paid for, taken home, and installation has begun. That, of course, is much too late. At that point, few customers are likely to decide to go back to the store just because of a contract they will not read and do not understand. Most will proceed with the installation. Further compounding the difficulty, as seen in some

44. See Gomulkiewicz & Williamson, *supra* note 30, at 340 (detailing the progression of EULAs in response to growing technological innovations).

45. See *id.* at 341.

46. See *id.* at 340–41.

47. See *id.* (examining the clickwrap installation process); Hillman & Rachlinski, *supra* note 12, at 431 (defining clickwrap contracts).

48. In most of the cases this Author has seen, the “I accept” button is presented when the first screen of the license appears. In a few cases, the button does not appear until the user has scrolled all the way to the bottom of the license. Although this may not change the reading behavior of the customer and may actually increase the annoyance factor, it nonetheless forces the customer to at least scroll through the entire agreement, creating an opportunity to review some of the clauses.

of the examples already cited in this Article,⁴⁹ the contracts are often lengthy, requiring anywhere from twenty-five to ninety mouse clicks to read the whole document, may not have a printable version available, and may contain one or more clauses that would surprise the legally unsophisticated consumer.

C. *Browsewrap Licenses*

As software distribution moved to the web, it became possible to make the license terms available before the purchase was completed by including a link to the license agreement on the website through which the order was placed.⁵⁰ Although this type of arrangement has the potential to provide the customer with advance notice of the terms of the agreement, unfortunately, the links to the contract are often easy to overlook, usually being at the bottom of a page in small print and without any of the graphics contained on the rest of the page.⁵¹ If they were placed more prominently on the page, such a link would allow the customer to make their purchase knowing what they would be required to agree to during the installation process. In a further refinement of the browsewrap concept, some publishers now require the customer to agree to the contract online *before* the purchase is completed.⁵² This addresses many of the problems first raised with shrinkwrap agreements, but it still leaves open some of the old issues related to the use of standard-form contracts in general, including the fact that the contracts are drafted by one party, are lengthy and difficult to understand, are presented on a take-it or leave-it basis, and usually favor the drafting party.⁵³ As will be shown later in this Article, these

49. See *supra* notes 22–26 and accompanying text (addressing the length and complexity of common EULAs).

50. See *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001) (describing a browsewrap license). It would be possible, of course, to print the license on the outside of the box, at least if it was kept to a reasonable length, but filling the box with legalese would not make for good marketing and would not look very attractive sitting on the shelf in the store. It might, however, induce software creators to make their licenses more readable and more customer friendly, thus creating at least the possibility of competition based on license terms.

51. In *Specht*, the court found that the browsewrap license did not create a binding agreement because the customer was not required to view the license and manifest assent to it before downloading the software. *Id.* at 595–96. This decision shows that while browsewrap might be useful, it is important to execute it in such a way that the customer will (a) actually see the license agreement and (b) manifest actual assent. *Id.* at 595.

52. See Hillman & Rachlinski, *supra* note 12, at 464 (describing the elements of clickwrap and browsewrap agreements).

53. See *infra* notes 55–56 and accompanying text (outlining the problems with traditional, standard-form contracts of adhesion).

factors have led European countries to find a way to equalize the balance by designating ahead of time certain terms as “unfair,” and therefore, unenforceable.⁵⁴

These general problems with standard-form contracts also make browsewrap license agreements contracts of adhesion, which the courts regularly enforce but tend to view with suspicion.⁵⁵ In general, the five characteristics of adhesion contracts are that they are:

- Presented on standard forms, pre-printed in the paper world, but included in the package or installation materials for software or licenses for information;
- Used primarily in consumer transactions to meet the demands of the mass market;
- Drafted in a generalized way to meet the needs of many people, not just an individual consumer;
- Reflective of the interests of the party with the superior bargaining power which is also likely to be the drafting party; and
- Presented on a take-it or leave-it basis with no negotiation of terms.⁵⁶

In general terms then, contracts of adhesion are contracts where the terms are defined by one party, largely in the interests of that party and where the other party has no real bargaining power. In most cases, they are consumer contracts.⁵⁷ In addition, with such contracts, the nondrafting party probably does not actually read the terms and would not understand the legalese even if the contract was read.⁵⁸ In such contracts, the risk of

54. See *infra* Part IV.

55. For a brief review of the history of the theory of adhesion contracts, see Burgess, *supra* note 12, at 255–60 (discussing RAYMOND SALEILLES, DE LA DÉCLARATION DE VOLONTÉ (1901), which introduced the term adhesion contract and suggested that such contracts should be interpreted “in the interests of the collectivity to which they are addressed . . . in the sense called for by both good faith and economic relations involved”). See also Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 638–39 (1943) (asserting that adhesion contracts do not fit within the framework of traditional contract doctrine); Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 & n.106 (1920) (suggesting the adoption of the term “adhesion contract” and applying it in the context of life insurance policies).

56. Burgess, *supra* note 12, at 256–57 (relying on Arthur Lenhoff, *Contracts of Adhesion and Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481, 481–82 (1962)).

57. See *id.* at 258–59 (describing adhesion contracts as public contracts typically occurring in consumer transactions).

58. See Hillman & Rachlinski, *supra* note 12, at 436–37 (suggesting that consumers do not read the terms of adhesion contracts because the costs of doing so outweigh the

needing to enforce the boilerplate is usually relatively low, comparable companies use comparable terms, and the company intends to be reputable and stand behind the terms of the product.⁵⁹ Furthermore, “the consumer expects the law to enforce the boilerplate, *with the exception of offensive terms.*”⁶⁰ It is important to observe here that, as Professors Hillman and Rachlinski note, most consumers expect the law to protect them from “offensive terms” in the contract.⁶¹ Part of the purpose of this Article is to ask whether or not the law, as it stands, does an adequate job of defining what terms are offensive and protecting consumers from them. If not, the next question follows: What is an appropriate remedy?

In general, “courts enforce boilerplate terms *except when they believe businesses have gone too far.*”⁶² The theory behind the willingness to enforce such terms is the concept of “blanket assent,” developed by Karl Llewellyn.⁶³ He indicated that in the case of standard-form contracts, the customer can clearly be deemed to have agreed to those terms that have been specifically discussed and negotiated and that they can only be deemed to have given a more general, blanket assent to other reasonable terms governing the agreement.⁶⁴

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.⁶⁵

This blanket assent theory provides both a rationale for upholding most standard-form contracts—at least insofar as they

benefits).

59. *Id.* at 435–36 (listing the “realities” facing the consumer presented with an adhesion contract).

60. *Id.* at 436 (emphasis added).

61. *Id.*

62. *Id.* at 455 (emphasis added).

63. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 (1960) (discussing problems with a statutory approach to boilerplate clauses and introducing the concept of blanket assent).

64. *Id.* (contending that boilerplate clauses receive assent subject to an “implicit assumption” that the clause will not “alter or impair the fair meaning of the [negotiations] when read alone, and . . . that its terms are neither in the particular nor in the net manifestly unreasonable and unfair”).

65. *Id.* at 370.

are not unreasonable or indecent—and also an understanding of what is actually going on in the customer’s mind. The customer pays attention to those things that are of greatest immediate concern⁶⁶—the general nature of the contract (who is getting what in return for what) and any other specific terms that have been negotiated.⁶⁷ With regard to the more general boilerplate in the agreement, most customers either do not read those clauses at all or at most glance over them quickly.⁶⁸ Under such circumstances, specific assent to the detailed terms is hard to find. Recognizing that key difference, it should be possible for courts to provide a different level of scrutiny to a given term, depending on which type it is. If the term is central to the agreement—a dickered or negotiated term in Llewellyn’s parlance—then it will be given wide deference.⁶⁹ On the other hand, where the terms are not negotiated and are peripheral to the basic agreement, then, in fairness, the court should take a closer look, if only because the imbalance of power between the parties means that the term will, in all likelihood, have been drafted in a manner most favorable to the drafting party.⁷⁰ If so, and the resulting term is either “unreasonable” or “indecent,” the court can find that there was no actual assent and refuse to enforce the term. The court, through this kind of scrutiny, can ensure that the overall contract remains balanced.

Interestingly, the distinction made by Llewellyn between “dickered terms” and the rest of the contract is similar to the notion of “core terms” introduced above.⁷¹ We will return to this

66. Professor Korobkin refers to this as “salience” and uses an analysis of the salience of a term as a part of the test to determine whether a particular term should be reviewed for unconscionability. “Sellers will foist on a large population of buyers for whom a term is non-salient a low-quality version of that term, even though doing so means risking the loss of Customer’s patronage.” Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1282 (2003).

67. See LLEWELLYN, *supra* note 63, at 370 (suggesting that only terms that are actually negotiated, or that are reasonable and do not alter the negotiated terms, should be enforced).

68. See Hillman & Rachlinski, *supra* note 12, at 436 (explaining that consumers typically do not carefully read standard-form contract terms or read them at all); see also LLEWELLYN, *supra* note 63, at 370 (noting that the purchaser’s failure to read the “fine print” should not alter the meaning of the bargained-for terms).

69. See LLEWELLYN, *supra* note 63, at 370.

70. See Burgess, *supra* note 12, at 257 (“The adhesion type standard form contract . . . is concluded between parties, of relatively unequal bargaining power . . . [and] produced by, or on behalf of, the party with the stronger bargaining position.”).

71. Compare LLEWELLYN, *supra* note 63, at 370 (defining “dickered terms” as those terms which represent the heart of the agreement), with *supra* note 15 and accompanying text (explaining the concept of “core terms”).

concept later in the context of the way in which the European Union has approached the issue, and suggest that this approach provides an important distinction that allows more refined scrutiny of contract terms than has been true in the past. Interestingly also, Llewellyn's formulation suggests some limits on what might be acceptable under such a blanket acceptance—certainly nothing that the court finds “unreasonable or indecent.”⁷²

In contrast to the Llewellyn formulation of unreasonable or indecent, as a general matter, courts in the United States have tended to enforce standard-form contracts unless the court finds that the terms are unconscionable, do not meet the reasonable expectations of the consumer, or where the seller has reason to know that the consumer would not have signed if they knew a particular clause was present.⁷³ Although these tests are used to invalidate contract terms in certain circumstances, in practice, courts apply the relatively high standard of unconscionability (rather than the Llewellyn standard of unreasonable or indecent), and the presumption is in favor of enforcement unless a term is so egregious that it “shock[s] the conscience.”⁷⁴

In the early days of shrinkwrap licenses, the courts struggled to find the principles to apply to deal with all these issues. They seemed troubled by the fact that the contract was hidden until the purchase was complete, and they seemed troubled by some of the terms contained in the contracts.⁷⁵ Was such a contract for a sale of goods under the U.C.C., or was it something else? If the contract came in the form of shrinkwrap, how, and when, did the buyer “sign” the contract? If they did not sign, where was the manifestation of assent to the terms? Or could the vendor put anything in the agreement as long as it did not shock the conscience? If the purchase had already taken place at the store before the contract was even presented, where was the consideration for the contract, which was completed later?

One of the early cases was *Step-Saver Data Systems, Inc. v. Wyse Technology*.⁷⁶ In that case, there was substantial contact

72. LLEWELLYN, *supra* note 63, at 370.

73. See Hillman & Rachlinski, *supra* note 12, at 456–60 (citing U.C.C. § 2-302 (1978) and RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979)) (outlining the doctrine of unconscionability).

74. *Id.* at 456–58, 461.

75. See *supra* note 11 and accompanying text (illustrating some of the issues courts have had to overcome when asked to enforce shrinkwrap licenses).

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

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between the parties prior to the placement of an order for software, including receipt of a test copy, phone calls, representations from sales representatives concerning compatibility among hardware platforms, and other representations concerning the capabilities of the software.⁷⁷ At no time during these conversations with the supplier's representatives was there any mention of an additional contract.⁷⁸ On the basis of its own investigations and these conversations with supplier's representatives, the plaintiff ordered copies of the software to place into service for its own customers.⁷⁹ When those customers began having problems, Step-Saver sought help from the creator of the software, but the creator was unable to resolve the problems.⁸⁰ Step-Saver's customers eventually sued for damages, and Step-Saver in turn sued the software developer.⁸¹ Unfortunately, when the software was delivered it came with a "box-top license" that disclaimed liability.⁸² Defendant contended that this later declaration governed the relationships between the parties and that none of the prior discussions were relevant.⁸³ Interpreting U.C.C. section 2-207, Judge Wisdom wrote:

[I]t would be unfair to bind the buyer of goods to the standard terms of the seller, when neither party cared sufficiently to establish expressly the terms of their agreement, simply because the seller sent the last form. Thus, UCC § 2-207 establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties's [sic] contract is not sufficient to establish the party's consent to the terms of the writing to the extent that the terms of the writing either add to, or differ from, the terms detailed in the parties's [sic] earlier writings or discussions. In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the UCC.⁸⁴

77. *Id.* at 95.

78. *Id.* at 96.

79. *Id.* at 95.

80. *Id.* at 94.

81. *Id.*

82. *Id.* at 96–97.

83. *Id.* at 94–95, 97.

84. *Id.* at 99 (footnotes omitted).

The court then held that “an additional term detailed in the box-top license will not be incorporated into the parties’s [sic] contract if the term’s addition to the contract would materially alter the parties’s [sic] agreement.”⁸⁵ By means of this analysis, the court invalidated the box-top or shrinkwrap agreement.⁸⁶

Throughout the early 1990s, this approach was followed by a number of courts, especially in the business-to-business context.⁸⁷ This gradually emerging body of law questioning shrinkwrap licenses, based largely on a lack of assent, was generally regarded as a positive sign by consumer groups who were already concerned about some of the terms being included in licenses and imposed on them in such shrinkwrap agreements—and as a cause for concern by the software industry, which saw these agreements as an essential means to limit their liability and protect their intellectual property rights, among other things.⁸⁸

This developing trend changed abruptly when the Seventh Circuit decided the case of *ProCD, Inc. v. Zeidenberg*.⁸⁹ In that case, Matthew Zeidenberg bought a disk containing software and phone directory listings from around the country.⁹⁰ ProCD marketed different versions of the program for commercial users and for individual consumers, who paid a lower price.⁹¹ Zeidenberg bought the lower-priced consumer version of the software and, through a business entity that he created, then made the information available on the Internet for a fee.⁹²

85. *Id.* at 105 (citing U.C.C. § 2-207(2)(b)).

86. *Id.*

87. *See, e.g.,* *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993). In a case very similar to *Step-Saver*, the district court followed much of the reasoning of the Third Circuit and concluded that

[b]y agreeing to ship the goods to ARS, or, at the latest, by shipping the goods, TSL entered into a contract with ARS. After entering into the contract, TSL was not free to treat the license agreement as a conditional acceptance, which is essentially a counter-offer. The license agreement thus is best seen as a proposal to modify the contract between the parties, which, as the court has discussed, was not effective because ARS never specifically assented to the proposed terms.

Id. at 765 (citations omitted).

88. *See* Hillman & Rachlinski, *supra* note 12, at 431 & n.7.

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

90. *Id.* at 1449–50.

91. *Id.* at 1449.

92. *Id.* at 1450. Although the court distinguished *ProCD* from the simple telephone listings at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 363 (1991) (holding that the white pages of a phone directory were not copyrightable because of a lack of originality), it nonetheless assumed that the telephone listings contained in the ProCD electronic database were not copyrightable. *See ProCD*, 86 F.3d at 1449. The software ProCD used to market its database, however, was clearly protected, according to the court. *Id.* (acknowledging the preexisting copyright on the software ProCD used to market the database to consumers).

According to the court, the information about the proposed license agreement appeared in three places: (1) on the outside of the package, where there was a statement that the sale of the software was subject to restrictions contained in the license that was inside the box; (2) the text of the license which was printed in the manual and included in the box; and (3) the text displayed each time the software was loaded.⁹³ This third display of the license suggests that the agreement may not actually be a classic shrinkwrap agreement (where agreement is assumed just from the breaking of a seal or opening a package) but is rather a clickwrap license where the party actually manifests assent by clicking on a statement saying that they agree.⁹⁴ That is actually a clearer case than where agreement must be inferred from action or inaction. Nonetheless, the opinion uses the term “shrinkwrap” throughout.⁹⁵

On these facts Judge Easterbrook concluded that Zeidenberg was bound by the terms of the license.⁹⁶ The court first observed that it was not at all unusual for consumers to pay their money and receive detailed terms later.⁹⁷ Such transactions occur frequently in the insurance industry⁹⁸ and with the sale of concert or travel tickets,⁹⁹ among others.¹⁰⁰ The court then turned to U.C.C. section 2-204, which says that a contract may be formed in any manner sufficient to show agreement, and that here agreement was shown by the fact that Zeidenberg actually used the software and indicated his acceptance each time he loaded the software.¹⁰¹ Moreover, the court noted that ProCD provided Zeidenberg with an opportunity to return the software if he found the terms of the license agreement unsatisfactory.¹⁰²

93. *ProCD*, 86 F.3d at 1450.

94. *Id.* at 1452 (pointing out that “the software splashed the license on the screen and would not let him proceed without indicating acceptance”).

95. *Id.* at 1448–49.

96. *Id.* at 1449.

97. *Id.* at 1451.

98. *Id.* However, such clauses have been the subject of frequent litigation. See Hillman & Rachlinski, *supra* note 12, at 459 & n.170. But the insurance industry is highly regulated, and an analogy to its contracts may be misplaced.

99. *ProCD*, 86 F.3d at 1451. But these practices are changing. See *infra* Part IV.

100. *ProCD*, 86 F.3d at 1451. The court noted especially the Supreme Court case of *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (upholding a forum-selection clause in the contract even though it meant that the consumer would have to travel from Washington to Florida to pursue the claim). But see *infra* text accompanying notes 193–97 (showing the ways in which the travel industry is changing their contracting practices).

101. *ProCD*, 86 F.3d at 1452 (citing U.C.C. § 2-204(1)).

102. *Id.* at 1452–53.

Under U.C.C. section 2-606, then, Zeidenberg's failure to reject implied acceptance.¹⁰³

As a general matter then, the court held that:

Shrinkwrap licenses are enforceable unless their terms *are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)*. Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.¹⁰⁴

Following this decision, *ProCD* became the leading case in the field, and other courts began to follow its reasoning.¹⁰⁵ The importance of the case, then, was that it validated the use of standard-form contracts in electronic transactions. *ProCD* opened the door, not only to contracts for the sale of software but also to other contracts formed in a similar manner. The court reasoned that the consumer accepted the terms by using the program, by not returning it, and by indicating his acceptance every time the software was loaded.¹⁰⁶ The clickwrap contract, if not really the shrinkwrap contract, was validated. In contrast, in the later case of *Specht v. Netscape Communications Corp.*, the Second Circuit held that a browserwrap license that did not actually require a manifestation of assent before downloading (and where the user did not, in fact, click on "I accept") was not binding on the customer.¹⁰⁷ Clearly, opportunity to review the document before being bound, opportunity to return if the terms are unacceptable, and some manifestation of assent are now important parts of finding a valid agreement.

By validating the use of standard-form contracts in the electronic environment, Judge Easterbrook arguably opened the door for Internet commerce.¹⁰⁸ Having validated the agreement in

103. *Id.* (citing U.C.C. § 2-606). The section says in part that "[a]cceptance of goods occurs when the buyer . . . fails to make an effective rejection . . . [by notifying the seller within a reasonable time after delivery of the goods], but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect [the goods]." U.C.C. § 2-606(1)(b) (2005).

104. *ProCD*, 86 F.3d at 1449 (emphasis added).

105. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (following the reasoning of *ProCD* to enforce an arbitration clause in contract shipped to buyer with computer); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337 (D. Mass. 2002) (stating that the leading case on shrinkwrap agreements is *ProCD*). *Contra Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (finding the reasoning in *ProCD* and *Hill* unpersuasive).

106. *ProCD*, 86 F.3d at 1452.

107. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 23, 25 (2d Cir. 2002).

108. See *supra* note 23 and accompanying text, for just a few of the many examples that exist today. As any regular Internet user is aware, it is impossible to conduct any

general, however, Judge Easterbrook left for another day the very question posed by this Article and alluded to by Karl Llewellyn¹⁰⁹ and others, of what limits there should be on contracts of this type. To emphasize the limits of his holding, Judge Easterbrook said: “Shrink wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”¹¹⁰

Since this decision, courts that are troubled by an agreement tend to find that some aspect of it is objectionable because it is either unconscionable or because it violates some public policy of the forum jurisdiction.¹¹¹ This brings us to the central question to be addressed here: Recognizing that these agreements are contracts of adhesion and that almost no one ever reads them, what policies and limits should there be on terms in order to strike a fair balance between the parties? And how should the law police these agreements?

III. CONTRACTUAL LIMITS IN AMERICAN LAW

Unfortunately, from the perspective of the consumer and other customers, American law does not now deal with these issues in a systematic way. The United States does not have a general law governing unfair contract terms with any specificity. Instead, using a few generally stated principles, it relies on the ad hoc decisions of individual courts in individual cases to review particular clauses.¹¹² This approach makes it hard to know ahead of time which terms will be found fair and which will be deemed unfair. It also encourages contract drafters to take advantage of the ambiguities. With no clear statement of what is allowed by way of included contract terms, and with the law of electronic contracting still developing, this situation leaves the law in a state of considerable uncertainty. This uncertainty is not good for the customer. But it is not good for business, either, because

kind of business on the Internet without running into these agreements.

109. See LLEWELLYN, *supra* note 63, at 370–71.

110. *ProCD*, 86 F.3d at 1449.

111. See, e.g., *Scarcella v. Am. Online*, No. 1168/04, 2004 WL 2093429, at *3–4 (N.Y. Civ. Ct. Sept. 8, 2004) (holding the forum-selection clause invalid due to public policy concerns).

112. See Eric Mills Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323, 324–26 (1987); James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 118 (2003).

manufacturers may be faced with frequent and unnecessary litigation to settle such ambiguities.

Professors Robert Hillman and Jeffrey Rachlinski review the three primary doctrines American courts use to review potential abuses in standard-form contracts.¹¹³ These include unconscionability; the *Restatement (Second) of Contracts*, section 211(3); and the doctrine of reasonable expectations.¹¹⁴ Taken altogether, these doctrines appear to give the courts some flexibility in dealing with unfair terms. That potential is not realized, however, because in most cases the courts look only at the issue of unconscionability,¹¹⁵ which has a high threshold—much higher than “unfair” or “indecent.”¹¹⁶ Some have said that the threshold is either such a high bar or so vague or both that it is relatively useless in achieving a fair result.¹¹⁷

The unconscionability doctrine appears in U.C.C. section 2-302 and is related to the sale of goods.¹¹⁸ Although the U.C.C. does not apply to licenses, as we have already seen, in the absence of a general law on the licensing of software, the courts frequently draw from the U.C.C. to interpret such agreements.¹¹⁹ Section 2-302 allows, but does not require, judges to invalidate a contract term that the court finds to be “unconscionable.”¹²⁰ Although unconscionability is not defined specifically, Official Comment 1 adds the following:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.¹²¹

In most (but not all) cases, a determination of unconscionability will be made only if the court finds both

113. Hillman & Rachlinski, *supra* note 12, at 454–63.

114. *Id.*

115. Korobkin, *supra* note 66, at 1256; Maxeiner, *supra* note 112, at 117 & n.43.

116. Maxeiner, *supra* note 112, at 119.

117. WHITE & SUMMERS, *supra* note 17, at 155–56 (“It is not possible to *define* unconscionability. It is *not a concept, but a determination* to be made in light of a variety of factors.”).

118. U.C.C. § 2-302 (2005).

119. *See supra* text accompanying notes 84, 101–04; *see also* Maxeiner, *supra* note 112, at 117 & n.43.

120. U.C.C. § 2-302(1) (“If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

121. *Id.* cmt. 1.

procedural and substantive unconscionability.¹²² Procedural unconscionability has largely to do with the way in which the contract was created.¹²³ Was the contract so long and incomprehensible as to be basically meaningless to the customer? Was there undue pressure? In finding procedural unfairness, some courts have said that standard-form contracts, or other contracts of adhesion, are presumptively procedurally unconscionable.¹²⁴

Substantive unconscionability looks to the terms of the contract itself.¹²⁵ In this case, the inquiry is whether or not the terms in question are egregious or manifestly unfair: Do they shock the conscience? By being reserved to only the most egregious cases, this doctrine intentionally sets a high bar. As Professor Korobkin notes: “Courts often state that a substantively unconscionable term is one that is ‘overly harsh’ or ‘one-sided,’ is ‘so one-sided as to be oppressive,’ is ‘unreasonably favorable to the drafter,’ or ‘shocks the conscience.’”¹²⁶ Although it is unusual for the courts to strike down contractual provisions because of unconscionability, in the case of *Comb v. Paypal, Inc.*,¹²⁷ the court explained the applicability of both the procedural and the substantive unconscionability standards when it invalidated a binding arbitration clause:

A contract or clause is procedurally unconscionable if it is a contract of adhesion. A contract of adhesion, in turn, is a “standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”

....

[But e]ven if instant agreement is procedurally unconscionable, it may nonetheless be enforceable if the substantive terms are reasonable.

122. Korobkin, *supra* note 66, at 1256; Maxeiner, *supra* note 112, at 118–19.

123. Maxeiner, *supra* note 112, at 118.

124. See, e.g., *Comb v. PayPal Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (stating that a contract of adhesion is procedurally unconscionable (citing *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Ct. App. 2002))). Given the amount of contracting that is done today by means of standard-form contracts, that seems to be a stretch. But it does suggest that the procedural unconscionability hurdle may be easier to get over in the case of standard-form contracts. It also suggests a greater willingness on the part of judges to look more closely at specific contract terms in standard-form contracts than in fully negotiated contracts.

125. Maxeiner, *supra* note 112, at 118.

126. Korobkin, *supra* note 66, at 1273 (citations omitted).

127. *Comb*, 218 F. Supp. 2d 1165.

....

Substantive unconscionability has been found in many cases based upon arbitration provisions requiring arbitration of the weaker party's claims but permitting a choice of forums for the stronger party.

....

Having considered the terms of the User Agreement generally and the arbitration clause in particular, as well as the totality of the circumstances, the Court concludes that the User Agreement and arbitration clause are substantively unconscionable under California law and that arbitration cannot be compelled herein.¹²⁸

Because of the combination of the unequal bargaining power and the fact that the contract favored the drafter in a number of respects, the court was willing and able to find unconscionability in this case and invalidated the offending clause.¹²⁹

This case, however, is the exception rather than the rule. Although unconscionability is an available doctrine and is occasionally used, in fact the number of cases in which it has actually been found is relatively small.¹³⁰ Moreover, it is an open question whether the issues raised in information contracts, for instance an asserted denial of a fair use, would shock the conscience, even though it is a fundamental principle of copyright law.¹³¹ As a consequence, where a contract of adhesion is involved—that is where blanket assent has been given to reasonable terms in a standard-form contract,¹³² and where the public expects the law to protect them from unreasonable terms¹³³—unconscionability may just be too high of a standard to do the job.

The American alternatives to unconscionability might hold more potential but have been even less effective in these kinds of cases. The *Restatement (Second) of Contracts*, section 211(3), would make a term invalid “[w]here the . . . [drafting] party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular

128. *Id.* at 1172–73, 1177 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000)) (other citations omitted).

129. *Id.* at 1177.

130. Maxeiner, *supra* note 112, at 121 n.69 (asserting that the number of cases “is in the tens or hundreds”).

131. Korobkin, *supra* note 66, at 1273 (citing various cases).

132. LLEWELLYN, *supra* note 63, at 370.

133. Hillman & Rachlinski, *supra* note 12, at 436.

term.”¹³⁴ This test clearly looks to the expectations of the nondrafting party and could potentially be useful when dealing with shrinkwrap and clickwrap licenses. However, it has almost exclusively been used in insurance cases and is limited in most cases to terms that would defeat the basic purpose of the deal, that are “bizarre or oppressive,” or that conflict with the bargained for terms.¹³⁵

The approach of the *Restatement* is also similar to the doctrine of reasonable expectations, which has also been used in insurance cases.¹³⁶ The reasonable expectations doctrine follows, in some ways, Llewellyn’s suggestion that reasonable terms in standard-form contracts should be enforced, but not those terms that are unreasonable or indecent.¹³⁷ The doctrine might also create an affirmative duty on the part of the drafting party to point out and explain unexpected and unreasonable terms in the agreement.¹³⁸ Unfortunately, this approach, too, has not been widely used except in insurance cases.

As a general matter then, under the doctrines of American law as they stand today, there is no good mechanism for protecting the customer against unfair or oppressive terms in end user license agreements (EULAs). There is no agreement on which terms might be presumptively unfair either in a statute or in a regulation; unconscionability is an unwieldy and uncertain standard; and the doctrine of reasonable expectations and the *Restatement* are largely used in other kinds of cases.

If this is an area where the law as it stands is presenting inadequate solutions, the question might reasonably be asked if there is an alternative approach.

IV. THE E.U. DIRECTIVE ON UNFAIR CONTRACT TERMS PROVIDES AN ALTERNATIVE APPROACH

In many other countries, there is already a substantial body of law that provides an alternative approach to unfair contract terms. This body of law supports contract formation by setting clear standards for the drafters, while at the same time better protecting consumer interests.¹³⁹ Already, due to the increasingly

134. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

135. Hillman & Rachlinski, *supra* note 12, at 458 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f).

136. *Id.* at 459 n.170.

137. *Id.* at 460.

138. *Id.*

139. See, e.g., Council Directive 93/13, art. 6, 1993 O.J. (L 95) 29, 31 (EC) [hereinafter E.U. Directive] (directing all member states of the European Union to

international nature of commerce, especially commerce involving the Internet, many American companies have been subject to this body of law, and some of the very kinds of contract terms under discussion in this Article have already been struck down.¹⁴⁰ In the international business environment, American companies must change their contracting practices in recognition of these different global standards.

The search for a different approach in Europe began to develop in the 1970s and grew both out of the need to harmonize the commercial laws in Europe and out of the desire to provide a higher level of consumer protection.¹⁴¹ In response to concerns about standard-form contracts—including lack of bargaining power, lack of negotiation over standard terms, and the inherent advantage held by the drafting party—the Council of Europe passed a resolution encouraging member states to adopt legislation protecting consumers against unfair terms in standard contracts.¹⁴² There was also recognition in Europe that the U.S. approach of litigation between two parties had a limited impact on overall consumer protection. Such an approach might, at best, resolve the issues between the parties, but it was not likely to result in the development of general rules that would help consumers in the future or change the behavior of those drafting standard-form contracts.¹⁴³ In the years that followed the adoption of the Council of Europe Resolution, several countries passed such legislation, and by the early 1990s, the European Union adopted a Directive on Unfair Contract Terms, directing all member states to develop such protection for consumers.¹⁴⁴

develop regulations on standard-form contracts); Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 1, 2002, Recht der Schuldverhältnisse [Schubert] Buch 2, §§ 305–310, available at <http://www.iuscomp.org/gla/statutes/BGB.htm> [hereinafter German Civil Code] (German statute on standard-form contracts, which predates the E.U. Directive); The Unfair Terms in Consumer Contracts Regulations, 1994, S.I. 1994/3159 (U.K.), available at http://www.opsi.gov.uk/si/si1994/Uksi_19943159_en_1.htm [hereinafter U.K. Regulations] (providing the regulations of the United Kingdom on standard-form contracts, created after the E.U. Directive).

140. See *infra* notes 172–75 and accompanying text (describing cases in a French court and a German court involving America Online, and a case in a German court involving CompuServe).

141. See Maxeiner, *supra* note 112, at 131 (observing that a loose collection of European states, known as the Council of Europe, began addressing unfair consumer contracts in 1973).

142. Comm. of Ministers, Council of Eur., *Unfair Terms in Consumer Contracts and an Appropriate Method of Control*, 262d Meet., Resolution (76) 47 (1977); see also Maxeiner, *supra* note 112, at 131–32.

143. Susan Bright, *Winning the Battle Against Unfair Contract Terms*, 20 LEGAL STUD. 331, 333 (2000).

144. See E.U. Directive, *supra* note 139.

There are several key aspects of the E.U. Directive that are particularly relevant to the discussion here.¹⁴⁵ First, it is important to realize that the Directive only applies to non-negotiated terms,¹⁴⁶ meaning it is largely limited to standard-form consumer contracts. Second, it specifically does not apply to core terms, including “neither . . . the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration.”¹⁴⁷ And third, the Directive also specifically provides that consumers in member states should not lose the protection of the Directive by virtue of a choice-of-law provision in a nonmember country.¹⁴⁸ That would make, for example, the choice of Virginia law in an AOL contract inapplicable within the European Union.

By way of explanation and definition, the Directive provides that a term will be regarded as not negotiated “where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”¹⁴⁹ Moreover, such a term will “be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights . . . to the detriment of the consumer.”¹⁵⁰

Member states are encouraged to take the necessary measures to ensure that unfair contract terms will not be binding on consumers¹⁵¹ and also to prevent the continued use of unfair terms.¹⁵² Finally, in an Annex, the Directive provides a list of terms that would be presumptively problematic.¹⁵³ One such provision is a term that would purport to bind the consumer to terms with which he had “no real opportunity of becoming acquainted.”¹⁵⁴ This is an important limitation on the ability to use shrinkwrap (as opposed to clickwrap) licenses. Another

145. It is beyond the scope of this Article to discuss the E.U. Directive in detail. Professor James R. Maxeiner has done a thorough job of that in his article. *See generally* Maxeiner, *supra* note 112. For anyone thinking seriously about alternative approaches to unfair contract terms, Maxeiner’s article is highly recommended.

146. *See* E.U. Directive, *supra* note 139, art. 3, §§ 1–2, at 31.

147. *Id.* art. 4, § 2, at 31.

148. *Id.* art. 6, § 2, at 31.

149. *Id.* art. 3, § 2, at 31.

150. *Id.* art. 3, § 1, at 31.

151. *Id.* art. 6, § 1, at 31.

152. *Id.* art. 7, § 1, at 32.

153. *Id.* annex, at 33.

154. *Id.* annex § 1(i), at 33.

presumptively problematic term is one that would exclude or limit the consumer's right to take legal action.¹⁵⁵

Germany adopted its Standard Terms Statute in 1977 following years of development in the courts, and because it provides a substantial measure of protection to German consumers, the law is widely regarded as a success.¹⁵⁶ It was easy, therefore, for Germany to come into compliance with the E.U. Directive, and Germany now has a largely legislative approach enforced by the courts. This approach provides a general provision against unfair contract terms as well as a list of both prohibited¹⁵⁷ and suspect¹⁵⁸ terms.¹⁵⁹ In addition, section 305c(1) specifically provides that surprising terms do not become part of the contract.¹⁶⁰ By this it is meant that the term is unusual, not necessarily unfair.¹⁶¹ Courts look first to the lists of prohibited and suspect terms, and if the issue is not covered there, they turn to the more general section. That section states that terms are invalid "if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage."¹⁶²

In contrast, the United Kingdom adopted a largely regulatory approach. Following the adoption of the E.U. Directive, the Office of Fair Trading issued its Unfair Terms in Consumer Contracts Regulations¹⁶³ to implement the Directive. Under these regulations, the Director General of Fair Trading is

155. *Id.* annex § 1(q), at 33.

156. Maxeiner, *supra* note 112, at 149–50. The German Standard Terms Statute was codified in the German Civil Code on January 1, 2002. German Civil Code, *supra* note 139, §§ 305–310.

157. Prohibited terms under section 309 include such things as the ability to increase prices on short notice and limitations of liability for death, bodily injury, or gross negligence. German Civil Code, *supra* note 139, § 309 (detailing thirteen enumerated terms that are invalid without review when included in standard business contracts); see Maxeiner, *supra* note 112, at 152–53, 179–82.

158. Examples of suspect terms in section 308 include a provision that provides for an unreasonably long period for performance or a right to depart unreasonably from the promised performance. One specific provision makes it suspect for the drafter to demand unreasonably high remuneration if the other party terminates the contract. German Civil Code, *supra* note 139, § 308; Maxeiner, *supra* note 112, at 178–79. Compare this with many of the contracts used in the United States for mobile phones, cable television, etc. Cingular Wireless, for example, has as much as a \$240 early termination fee associated with the Nation900 with rollover plan. Cingular Wireless Terms of Service, <http://www.cingular.com/download/Cingular%20Terms%20of%20Service.pdf> (last visited Nov. 12, 2005).

159. German Civil Code, *supra* note 139, § 305 (defining standard business terms).

160. *Id.* § 305c, ¶ 1.

161. *Id.*; Maxeiner, *supra* note 112, at 152.

162. German Civil Code, *supra* note 139, § 307, ¶ 1.

163. U.K. Regulations, *supra* note 139.

responsible for investigating complaints about unfair terms,¹⁶⁴ and the office has reportedly investigated thousands of complaints, securing amendments to the contract terms.¹⁶⁵ There has been significant success, for example, in dealing with mobile phone contracts, the industry that has had the largest number of complaints. As a result of the efforts of the Office of Fair Trading, mobile phone service providers have adjusted the notice requirement for termination, deleted a clause requiring a substantial disconnection charge, and reduced the level of compensation payable by a consumer who terminates early.¹⁶⁶ Rather than relying on litigation, the Office of Fair Trading has taken the approach of working with the industry to devise contract terms ahead of time that meet the tests of the Directive.¹⁶⁷ Such a proactive approach has not only protected consumers, it has also been generally accepted by the industries that wish to avoid the bad publicity that would come with continuing to use offensive terms.¹⁶⁸ They would rather work to get the contract right ahead of time than face governmental action later on.

There has been some litigation under the Directive and the various statutes of the countries implementing the Directive. In an important case, the European Court of Justice reviewed a dispute involving a term that limited the consumer's right to take legal action.¹⁶⁹ In that case,

[t]he court found that a [contract] clause that selected the seller's principal place of business which was far from the consumer's domicile (but in the consumer's home country) "must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."¹⁷⁰

164. Bright, *supra* note 143, at 332.

165. *See id.* at 334 & n.12 (noting, for example, that the Office of Fair Trading reported receiving an average of one hundred complaints a month in 1998).

166. *Id.* at 334.

167. *Id.* at 334–35.

168. *Id.* at 335.

169. Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Rocío Murciano Quintero*, 2000 E.C.R. I-4941; E.U. Directive, *supra* note 139, annex § 1(q), at 33.

170. Maxeiner, *supra* note 112, at 136 (quoting *Océano Grupo Editorial SA*, 2000 E.C.R. at I-4973, ¶ 24).

This case is obviously diametrically opposed to the *Carnival Cruise Lines* case in the United States.¹⁷¹

In June 2004, a French court, citing to the E.U. Directive, invalidated many of the terms used by AOL France in its online agreement.¹⁷² Among the clauses struck down by the court were ones related to contract acceptance by virtue of visiting a website, modifications of the contract, modifications of payment terms, disclaimers of liability, and many others.¹⁷³ The court also awarded damages against AOL and required it to remove the offending clauses from its contract within a month, and stipulated that there would be a further fine of 1000 Euros per day for failure to do so.¹⁷⁴

Cases in Germany against AOL and CompuServe reached much the same result. America Online agreed to cease and desist, and to pay a fine of about 1000 Euros each time it uses violating terms, up to a maximum of 10,000 Euros per contract. CompuServe received a default judgment including a fine of up to 250,000 Euros and a contempt of court judgment against the CEO if it should use any of the offending terms again.¹⁷⁵ Many of the terms involved in these cases are the same terms involved in similar contracts in the United States. Clearly, the courts in the European Union take the matter of consumer protection against unfair contract terms more seriously than do courts in the United States.

The legal system adopted by the European Union is very different from that in the United States. No doubt, in this country it would be difficult to adopt such an approach,¹⁷⁶ if only because there are so many vested interests that would resist. And yet, such an approach could go a very long way towards bringing some certainty and stability to the situation that exists

171. See *supra* note 100.

172. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nantere, 1e ch. A, June 2, 2004, Gaz. Pal. 2005, 2, pan. jurispr. 1334-35, Brigitte Misse & Celine Avignon (Fr.), available at <http://www.foruminternet.org/telechargement/documents/tgi-nan20040602.pdf>.

173. *Id.*; see also David Naylor & Cyril Ritter, *B2C in Europe and Avoiding Contractual Liability: Why Businesses with European Operations Should Review Their Customer Contracts Now*, LEGAL UPDATES & NEWS (Morrison & Foerster LLP), Aug. 2004, <http://www.mofo.com/news/updates/files/update1297.html> (providing an analysis of the suit against AOL, identifying the contract clauses the court invalidated, and discussing the "principal lessons" and implications of the ruling).

174. Naylor & Ritter, *supra* note 173.

175. Maxeiner, *supra* note 112, at 164.

176. For a proposed statutory approach see N.J. LAW REVISION COMM'N, FINAL REPORT RELATING TO STANDARD FORM CONTRACTS (Oct. 1998), available at <http://www.lawrev.state.nj.us/rpts/contract.pdf>.

today with respect to contract terms in end user licenses. Either as part of a more general law, or as a separate consumer protection law, this approach of more carefully defining some basic protections for the consumer could give both consumers and manufacturers some stability in what is now a very troubled area.

V. "STOP BEFORE YOU CLICK" IS A CAMPAIGN TO INCREASE AWARENESS THAT COULD PROVIDE A MODEST STARTING POINT FOR LAW REFORM

This brings us to the central question to be addressed: Recognizing that license agreements are contracts of adhesion that almost no one ever reads, what policies and limits should there be on terms in order to strike a fair balance between the parties? The U.S. common law can continue to work within the framework of the unconscionability doctrine and other legal principles, but if it were possible to agree on a set of principles that were reasonable, it would promote certainty, commerce, and fairness by removing the current unknowns, and, in many cases, the need for and expense of litigation. The European approach seems promising, but would face an uphill battle in the United States. A more modest approach is to focus on the kinds of included terms in one type of contract—the EULA for software or information products.

If we did want to develop some rules concerning fair contract terms in such an environment, what might they look like? One group that has been actively involved in trying to shape the nature of electronic contracting for software and information is the Americans for Fair Electronic Commerce Transactions (AFFECT).¹⁷⁷ Their primary goal in this effort is to develop a regime for contracting that protects consumers and prevents over-reaching by software and information providers.¹⁷⁸ AFFECT is a "coalition of consumers, retail and manufacturing businesses, financial services institutions, technology professionals and librarians" who are concerned about the lack of balance in non-negotiated electronic contracts and would like to establish some principles to help restore the balance.¹⁷⁹ AFFECT originally came together as an organization to seek changes in the Uniform

177. For more information about Americans for Fair Electronic Commerce Transactions (AFFECT), see <http://www.ucita.com> (last visited Nov. 12, 2005).

178. See AFFECT, Who We Are, <http://www.ucita.com/who.html> (last visited Nov. 12, 2005) (providing the mission statement of the coalition).

179. *Id.*

Computer Information Transactions Act (UCITA), a proposed uniform law attempting to take a comprehensive approach to software contracts and licenses for information.¹⁸⁰ UCITA has been passed in two states, Maryland and Virginia.¹⁸¹ It stumbled elsewhere largely because consumer groups and some industries (many of them affiliated with AFFECT) raised concerns not unlike the issues discussed here. The drafters of the UCITA contend that even though it has not been widely accepted, it has, at least, been influential.¹⁸² Elsewhere, though, it continues to be extremely controversial,¹⁸³ and at least one commentator associated with AFFECT has warned that UCITA should not be used as persuasive authority precisely because it failed to gain the support needed for adoption.¹⁸⁴

As the intensity of the UCITA discussion died down, it became possible to step back and look for the underlying principles that might provide fertile ground for future discussion and the development of a better understanding and a positive approach to law reform. In order to do that, AFFECT decided to move away from its largely critical campaign against UCITA and instead tried to state some positive principles that would make for better, more user-friendly contracts in the electronic environment. The goal of that effort was to educate consumers about end user licenses, businesses about how to write more consumer-friendly contracts, legislators trying to develop the next generation of contracts legislation, and courts seeking to

180. *Id.*; see also Uniform Computer Information Transactions Act (UCITA), 2 U.C.C. Rep. Serv. (CBC) 1 (2001).

181. MD. CODE ANN., [COM. LAW] §§ 22-101 to 22-816 (LexisNexis Supp. 2004); VA. CODE ANN. §§ 59.1-501.1 to 59.1-509.2 (2001 & Supp. 2005); see also Valerie Watnick, *The Electronic Formation of Contracts and the Common Law "Mailbox Rule,"* 56 BAYLOR L. REV. 175, 186 (2004); Laurie J. Flynn, *New Economy: The Battle Lines are Drawn in the Struggle for a Uniform Standard in Software Licensing for all 50 States*, N.Y. TIMES, Sept. 16, 2002, at C3.

182. Raymond T. Nimmer, *UCITA and the Continuing Evolution of Digital Licensing Law*, COMPUTER & INTERNET LAW., Feb. 2004, at 10, 10-11 (arguing, as the reporter for UCITA, that UCITA has been included and discussed in law school textbooks, treatises, commercial and contract law texts, and that courts in jurisdictions who have not adopted UCITA have used UCITA as a source of analysis or as a source of terminology).

183. See, e.g., Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 394 (2003) (arguing that UCITA is "controversial for a number of reasons, including its complex and opaque drafting and its over-ambitious attempt to codify the law of digital products and services before commercial practices are relatively settled").

184. See AFFECT, *Has UCITA Been Cited in a Brief or Other Writing?*, <http://www.ucita.com/pdf/HasUCITAbecited.pdf> (last visited Nov. 12, 2005) (asserting that UCITA should not be given legal weight because of its "controversial history" and the fact that four states have passed anti-UCITA legislation).

understand what is fair in this new world of electronic contracting.¹⁸⁵

This section of the Article discusses the twelve principles that AFFECT has developed in its so-called “Stop Before You Click” campaign.¹⁸⁶ In reality, the issues we have been discussing break down into three broad but interrelated categories: contract formation, disclosures and minimum standards of quality, and included terms. The principles that follow are similarly broken down into these three broad categories: principles one and two are concerned with formation; principles three and four are concerned with disclosure and product quality; the remainder are concerned with reasonable customer expectations and included terms.

A. *Principle 1: Customers Are Entitled to Readily Find, Review, and Understand Proposed Terms When They Shop*

In the classic case of a paper contract of adhesion, customers are presented with a long unintelligible document, usually after all the discussions are finished and they are in a hurry to be done, but before any money is paid or they take possession of the item in question. As problematic as these contracts are, and as unlikely as it is that customers will read the document, nonetheless, customers do have the opportunity to read the agreement—or even just to glance down the terms to see if any seem like they might be problematic—before the deal is closed. Too often in the case of EULAs for software, just the opposite approach is taken. Customers buy the product, take it home (or, in the case of a business, gives it to the technical staff for installation), and only then, when they start to use the product, do they find a long document to which they must agree. Annoyed at the interruption in the installation process, the customers proceed to open the box, open the envelope, or click on the “I

185. See AFFECT, Stop Before You Click, <http://www.stopbeforeyouclick.org> (last visited Nov. 8, 2005) (noting the effort is “an educational campaign to promote more fair business practice in transactions for software and other types of digital products”).

186. *Id.* AFFECT’s “Stop Before You Click” campaign culminated in the “creation of the *12 Principles for Fair Commerce in Software and Other Digital Products*.” *Id.* (follow “12 Principles for Fair Commerce in Software and other Digital Products” hyperlink). The twelve principles are available in both a “general audience version” and a “technical version.” *Id.* (follow the “12 Principles for Fair Commerce in Software & Other Digital Products (general audience version)” or the “12 Principles for Fair Commerce in Software & Other Digital Products (technical version)” hyperlink). It should be noted here that the Author has worked with the AFFECT coalition in the past, and, as a general matter, agrees with many of their positions. For purposes of this Article, however, the Author is not intending to be an advocate; rather, he is intending to both report on and offer comments on the twelve principles.

accept” button. At that point, the consumer psychology is such that they just want to install the software and get it working. Moreover, to return it at this point requires the effort of going back to the store and waiting in a long line at the customer service counter, or packaging it up and driving to the post office to wait in another long line. Faced with these prospects about a product that has already been selected and paid for, many consumers and businesses will just opt to proceed. Although it is good to provide for the right of return in the event that contract terms are problematic, it is not sufficient. For these contracts to be meaningful, the basic terms need to be available and presented at a time when the customer is still deciding, that is, before the deal is done. This means companies must make some effort to have terms available for viewing ahead of time.

Apart from the issue of advance disclosure of initial terms, some online contracts purport to allow for a change of terms at any time and, apparently, without any limits. For example, the current agreement for online video rentals at www.blockbuster.com provides in relevant part:

Terms and Conditions

. . . By accessing this Site you (“you”) agree to be bound by these Terms and Conditions of Use whether or not you have read them. If you do not agree to these Terms and Conditions of Use, do not access this Site. **Blockbuster may at its sole discretion modify these Terms and Conditions of Use at any time and such modifications will be effective immediately upon being posted on this Site.** Your continued use of this Site will indicate your acceptance of these modified Terms and Conditions of Use.

Price and Availability

The products and services offered or referred to on this Site are subject to availability. **The prices stated for such products and services are subject to change without notice.**

. . . .

Changes to Terms and Conditions

Blockbuster may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice. Such modifications will be effective immediately upon posting. You agree to review these Terms and Condition of Use periodically and your continued use of this Site following such modifications will indicate your

acceptance of these modified Terms and Conditions of Use.¹⁸⁷

What have I just agreed to? In particular, even with respect to one of the core terms, price, what have I agreed to pay? The price that is splashed in a colorful graphic at the top of the web page is apparently subject to change without notice. As a result, it seems that I have agreed to pay anything short of the unconscionable. What might that be? Because most people do not actually read these agreements, and because even I (who apparently reads them as a hobby) do not usually check back to re-read them just for the fun of it, it seems that any change, particularly any large change to the price, would be facially valid under the terms of the contract, but would be a shock to most customers. Without some additional notice and opportunity to withdraw (or re-assent) to the core term, many consumers would find such a change to be unreasonable and indecent, even if it did not rise to the level of shocking the conscience.

Fundamental fairness requires that a customer be able to review the terms of an agreement before being bound by them.¹⁸⁸ Yet, software manufacturers continue to resist making this information available.¹⁸⁹ One can only assume that manufacturers do not want customers to have this information. Although it may have been hard to make licenses available in the early days of software distribution when shrinkwrap licenses originated as printed documents inside the box, it is not hard to do so now that the Internet is so widely available.¹⁹⁰ Given the

187. Blockbuster, Terms and Conditions, <http://www.blockbuster.com/corporate/displayTermsandConditions.action> (last visited Nov. 12, 2005) (emphasis added). It should be noted that these terms and conditions are “easy” to find from the front page of the website by following the link in fine print at the bottom of the page. They are there, but they could not be said to be “prominent” in any way.

188. Implicit in the concept of mutual assent is that the parties are aware of and are able to review the terms of a contract. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2.1 (4th ed. 1998) (“Usually an essential prerequisite to the formation of a contract is an agreement: a mutual manifestation of assent to the same terms.” (citation omitted)).

189. See James F. Rodriguez, *Software End User Licensing Agreements: A Survey of Industry Practices in the Summer of 2003*, at 1–2, http://www.ucita.com/pdf/EULA_Research_Final5.pdf (last visited Nov. 12, 2005) (“[N]one [of the 43 major software companies studied] seemed interested in making licensing terms readily available to consumers prior to software purchase. Only 12 of 43 companies (28%) provided EULAs on their web sites at all. No company had an easily identifiable link to product licensing agreements prior to software purchase.”). It should be noted that the study cited here is somewhat dated, and in light of the rapid changes in the use of the web, it would be good to update it. It might be that as industry practices change, the suggestions made here will become less controversial.

190. In these days of lengthy license agreements, it is no easier to print the terms on the outside of the box than it was in 1996, when Judge Easterbrook decided *ProCD, Inc. v.*

inordinate length of many of these contracts, it has always been difficult to put the complete contract on the outside of a box without interfering with the marketing potential of the packaging.¹⁹¹ However, the Internet now provides an ideal vehicle through which sellers can make this information known to a prospective customer. It would be an easy matter for every manufacturer's website to have an easy-to-find link that provides the entire text of the agreement, so that any interested customer could find it and read the proposed terms of agreement for the product before making the decision to buy.¹⁹²

Progress is being made in some areas. In the paper environment, travel tickets were one of the prime examples of contracts of adhesion where the purchase was made and the terms were supplied later.¹⁹³ Although that pattern may still be true where an intermediary is used, many travel companies are now making the effort to make their terms and conditions available on their websites.¹⁹⁴ Carnival Cruise Lines, for example, has a clear link at the bottom of their home page that says "Legal Notices."¹⁹⁵ From there, it takes you to the legal agreement.¹⁹⁶ Interestingly, not only does Carnival Cruise Lines provide the

Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), but it is now very easy to make the terms available on the company's website. Doing that would not address all the concerns (for instance for the customer who just buys off-the-shelf in the store), but it would make them available to those interested enough to do the research ahead of time. It would also demonstrate that the company is interested in providing the customer with a copy of the agreement prior to purchase, and not trying to "hide the ball." For example, the outside of the box could have a provision stating: "The sale of this product is subject to the license agreement enclosed. To view a copy of this license agreement, please go to our web site at <http://www.xyz.com> or ask at the Customer Service Desk of this store."

191. See *id.* at 1451 (recognizing that putting the terms on the outside of the box would interfere with making other useful information available, and concluding that "[n]otice on the outside, terms on the inside, and a right to return . . . may be a means of doing business valuable to buyers and sellers alike").

192. Such a link should not be hidden at the bottom of the page in tiny type. It should be prominent, though not necessarily flashing, saying for example: "The Legal Stuff You Need to Know." Cf. Blockbuster, *supra* note 187.

193. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88 (1991) (deciding the enforceability of a forum-selection clause on the face of a cruise ticket that was received after the purchase had been made).

194. For example, Southwest Airlines provides a link on its home page to the terms and conditions for use of the website. Southwest Airlines, Contract of Carriage–Passenger, <http://www.southwest.com> (last visited Nov. 12, 2005). Southwest also provides a copy of the contract of carriage on its website. Southwest Airlines, http://www.southwest.com/travel_center/coc.pdf (last visited Nov. 12, 2005). United Airlines also provides a summary of its agreement on its website. United Airlines, Contract of Carriage Summary, <http://www.united.com/page/article/0,6722,2671,00.html> (last visited Nov. 12, 2005).

195. Carnival Cruise Lines, <http://www.carnival.com> (last visited Nov. 12, 2005).

196. See Carnival Cruise Lines, Important Notice to Guests, http://www.carnival.com/CMS/Static_Templates/ticket_contract.aspx (last visited Nov. 12, 2005).

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full text of the contract, but in bold typeface at the top, it highlights certain terms to which it wishes to call the reader's attention:

NOTICE: THE ATTENTION OF GUEST IS ESPECIALLY DIRECTED TO CLAUSES 1 AND 13 THROUGH 17, WHICH CONTAIN IMPORTANT LIMITATIONS ON THE RIGHTS OF GUESTS TO ASSERT CLAIMS AGAINST CARNIVAL CRUISE LINES, THE VESSEL, THEIR AGENTS AND EMPLOYEES, AND OTHERS.¹⁹⁷

The Author of this Article has long thought that something similar should be done in non-negotiated end user licenses for software. There too, limitations on rights should not be buried in a lot of boilerplate provisions but should be highlighted clearly at the beginning of the agreement, perhaps even with a separate manifestation of assent. While the agreement may still be one which few customers will read, Carnival Cruise Lines has, nonetheless, taken the first step to provide a clearer statement of the legal contract ahead of time.

These notices do not make the agreements any less of a contract of adhesion, and there will likely be the same disagreements about the fairness of included terms, but at least the effort has been made to make terms known ahead of time. Such up-front highlighting of specific included terms may also follow from the doctrine of reasonable expectations. Professors Hillman and Rachlinski point out that this doctrine

allows courts to overturn express contract language if the term contradicts the consumer's reasonable expectations.

When applied, the doctrine of reasonable expectations thus creates an affirmative duty on the part of the business to point out and explain reasonably unexpected terms even if they clearly were stated in the contract. The doctrine reflects the reality that consumers fail to read their contracts and agree to be bound only to reasonable boilerplate.¹⁹⁸

This is a particularly important concept in the case of software licenses because many of the issues and contract terms to be discussed in the balance of this Article would be surprising to the ordinary customer.

Finally, in addition to fundamental fairness, the ready availability of contract terms will also provide a basis for

197. *Id.*

198. Hillman & Rachlinski, *supra* note 12, at 459–60 (citations omitted).

comparison shopping. Although customers may not be thinking about legal disputes ahead of time, they might, nonetheless, like to know that they will have to travel to Florida to bring a claim, should one arise. Similarly, in the software context, if there is a contract term that purports to take away a right to use small portions of a work under the fair use doctrine in copyright, then a prospective purchaser should know that ahead of time.¹⁹⁹ It remains true that most people will not read these agreements, and that contract terms are likely to be less important to the ordinary consumer than other aspects of the product;²⁰⁰ but, if they were more readily available, reviewers in magazines might make it their business to point out problematic terms so that customers could make informed decisions.

The opportunity to review contract terms is fundamental to contract formation. In Europe, where a much more consumer-protectionist approach has been taken toward unfair contract terms, the opportunity to review and understand standard terms is seen as one of the fundamental ways to avoid unfair surprise and achieve a fair result.²⁰¹ There is little reason for software manufacturers to continue hiding the ball. Putting a clear reference to the license (and its limitations) on the outside of the box, making terms available on the website for the benefit of those doing advance research or ordering online, and highlighting potentially problematic terms at the beginning of the formal notice, will provide opportunities to ensure that the customer is not unfairly surprised.

B. Principle 2: Customers Are Entitled to Actively Accept Proposed Terms Before They Make the Deal

Presentation of terms and manifestation of assent are the essence of contract formation. It shows an objective agreement between the parties. In the old days, the manifestation of assent might have been given through a handshake, a signature on a form, or an exchange of money. Today, however, it is not uncommon to claim the creation of a contract by other actions that can in no way indicate agreement with, or even knowledge

199. *But see infra* Parts V.E, V.H (discussing principles five and eight, which stand for the proposition that such clauses should not be permitted in a standard-form contract in any case).

200. Korobkin, *supra* note 66, at 1230.

201. *See, e.g.*, LAW COMM'N & SCOTTISH LAW COMM'N, UNFAIR TERMS IN CONTRACTS: A JOINT CONSULTATION PAPER ¶ 2.5 (2002), available at <http://www.lawcom.gov.uk/docs/cp166.pdf> ("Because the customer may not know of the terms, or may not understand their meaning or how they might impact on her, she may be taken by 'unfair surprise.'").

of, the proposed terms. This might include opening a box containing a software product or even merely visiting a website.²⁰² In these circumstances, the claim seems to be that even though almost no one actually reads these contracts of adhesion, even though there is no real notice because the terms are hidden in the fine print at the bottom of the page, and even though there is nothing that could reasonably be construed as a manifestation of assent, there is, nonetheless, a binding contract. With all due respect to those who would like to make it so, this seems to stretch the concept of a contract between the parties beyond recognition.

Real acceptance requires you to take an active step to indicate agreement to the terms that become part of the deal. You should not be bound by terms just because you visit a website, open a box containing a product or install a product that you already bought. Even if the terms are available somewhere on the website, inside the box, or on some file in the software, you should be bound by those terms only if you actively and unambiguously indicate your acceptance of them.²⁰³

Of course, any terms that are unfair, such as those discussed in this Article, should not become part of the agreement unless they have been negotiated or are part of the core terms.

In *Klocek v. Gateway, Inc.*, the court found that the mere retention of a computer beyond a five-day waiting period was not sufficient to demonstrate agreement to terms (requiring the settlement of disputes through arbitration) that had been enclosed in the box but for which there had been no prior notice.²⁰⁴ Clearly, the core terms of this agreement were for the

202. Blockbuster.com makes the following claim in its Terms and Conditions document:

This website ("Site") is provided to you by Blockbuster Inc. ("Blockbuster"). Your access to and use of this Site is subject to these Terms and Conditions of Use. By accessing this Site you ("you") agree to be bound by these Terms and Conditions of Use *whether or not you have read them*. If you do not agree to these Terms and Conditions of Use, do not access this Site.

Blockbuster, Terms and Conditions, <http://www.blockbuster.com/corporate/displayTermsandConditions.action> (last visited Nov. 12, 2005) (emphasis added). The TurboTax website has a similar provision. See TurboTax, Terms of Service, http://www.turbotax.com/terms_of_service.html?source=ttcom4home1&ttid=ttfooter (last visited Nov. 12, 2005).

203. AFFECT, Stop Before You Click: 12 Principles for Fair Commerce in Software and Other Digital Products, <http://www.stopbeforeyouclick.org/pdf/12PrincGeneral.pdf> (last visited Nov. 12, 2005).

204. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000). *But see* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (relying on *ProCD v. Zeidenberg*). In *ProCD*, Judge Easterbrook found that there was a notice on the outside of the box (thus

purchase and sale of the computer. Under U.C.C. section 2-204(1), “[a] contract for [the] sale of goods may be made in any manner sufficient to show agreement, including . . . conduct by both parties which recognizes the existence of a contract.”²⁰⁵ The transaction for the computer was already completed and the mere retention of the computer did not, on its face, appear to indicate an agreement with additional terms contained in the box. At best, the court found, looking to U.C.C. section 2-207, the additional terms might have been a counter-offer.²⁰⁶ But in that case Gateway needed to make known that its willingness to proceed with the transaction was conditioned on the customer’s acceptance of the additional terms.²⁰⁷ This it did not do, and the court was unwilling to infer an acceptance of terms from inaction.²⁰⁸

If manifestation of assent is not shown by inaction, what constitutes sufficient action to show agreement? U.C.C. section 2-204, as stated above, provides a reasonable guide. To find a valid agreement there must be some action, some conduct, some affirmative step sufficient to show agreement. Today, the most common way this is done is through the click-on agreement. Setting aside the question of what terms may be included in a contract of adhesion, the action of clicking on a button that is labeled with an indication of acceptance, and where the terms are conspicuously available for viewing, does seem to meet the conduct requirement. A browserwrap, which is merely informative but does not require assent, would not meet the requirement,²⁰⁹ nor would a traditional shrinkwrap agreement—because it is

constituting advance notification), terms on the inside, and manifestation of assent when the software was loaded. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450, 1452 (7th Cir. 1996). In *Hill*, however, there was no advance notification and no explicit manifestation of assent. *Hill*, 105 F.3d at 1150. There were terms on the inside of the box which, unlike the *Klocek* court, Judge Easterbrook held to be valid. *Id.*

205. U.C.C. § 2-204(1) (2005).

206. See *Klocek*, 104 F. Supp. 2d at 1340 (noting that Gateway accepted Klocek’s offer to purchase by shipping the computer and thus the additional terms could constitute a counter-offer as an expression of acceptance).

207. *Id.* at 1340–41. This would not be hard to do. Either from the customer service representative on the phone or on the company website, there could be a statement that the “sale of this computer is conditional upon the customer’s express acceptance of license terms enclosed in the box. If the customer does not wish to accept the terms of that agreement, he or she may return the equipment to us in its original packaging for a full refund.” Consistent with Principle 1, see discussion *supra* Part V.A, there could then be a link on the website to the terms of the agreement; or, if the order was being taken on the phone, the customer service representative could refer the customer to the website or offer to mail a copy of the terms to the customer before the deal was closed.

208. *Klocek*, 104 F. Supp. 2d at 1341.

209. *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 594–96 (S.D.N.Y. 2001).

hard to infer agreement from opening a package that contains terms that have previously been hidden.

C. Principle 3: Customers Are Entitled to Information About All Known, Nontrivial Defects in a Product Before Committing to the Deal

Standard products liability law requires that manufacturers have an obligation to provide a product free from defects and fit for its intended use.²¹⁰ In the computer context, this should logically mean that no one should put out a spreadsheet program, for example, that has a known error in its calculation algorithm. Or if they do, the error should be disclosed, so that the customer may evaluate whether or not it would affect them.²¹¹ To do otherwise would border on fraudulent misrepresentation.

Unfortunately, although the U.C.C. provides an implied warranty of merchantability, which guarantees that a product will actually work when used in the way it is intended, the implied warranty may be avoided by a disclaimer;²¹² further, such disclaimers are commonplace in standard-form contracts. In *M.A. Mortenson Co. v. Timberline Software Corp.*, Mortenson, a general contractor, purchased from Timberline a bid preparation software package with a known defect that resulted in the submission of a bid approximately \$1.95 million too low.²¹³ Because Mortenson had no way of knowing of the defect ahead of time and had reasonably relied on the software to perform as it was supposed to, Mortenson sued. Unfortunately for Mortenson, the software came with a shrinkwrap agreement that disclaimed liability for consequential damages. Relying on the reasoning of *ProCD, Hill*, and other cases, the *Mortenson* court found that the shrinkwrap contract was valid (even though it could not be shown that the contract had ever been read) and the disclaimer of liability binding.²¹⁴ The decision effectively allowed a software

210. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 76 (N.J. 1960) (noting that an implied warranty “is an integral part of the transaction” and guarantees “that the [product] sold is reasonably fit for the general purpose for which it is manufactured and sold”); see also N.J. LAW REVISION COMM’N, *supra* note 176, § 11, cmt. (Oct. 1998), available at <http://www.lawrev.state.nj.us/rpts/contract.pdf> (same).

211. For example, the defect might occur only in the fifteenth decimal place of the square root function which the prospective consumer would never use.

212. See U.C.C. § 2-316(2) (2005) (addressing the requirements for a proper waiver of an implied warranty of merchantability).

213. *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 307–09 (Wash. 2000) (en banc).

214. *Id.* at 313–16.

developer to knowingly release a defective product into the market, leaving no legal recourse for the customer.²¹⁵

An alternative and better approach is shown by the TurboTax software. Their product comes with a “calculation guarantee” in the EULA that states:

Intuit diligently works to ensure the accuracy of the calculations on every form prepared using TurboTax tax preparation software. If you are a registered user . . . and you pay an IRS or state penalty and/or interest solely because of a calculation error on a form prepared using the Software . . . *then* Intuit will pay you in the amount of the IRS or state penalty and/or interest paid by you to the IRS or state.²¹⁶

No doubt this is a better business practice, and the law ought to encourage and support such a result. Such a term in the agreement gives the user increased confidence that the product will work as it is supposed to and assurance that if it does not, the individual will not be any worse off as a result. Without such a clause, if something like the *Mortensen* defect occurred, customers would be far less likely to purchase the product in the future. Similarly, several years ago, when it was discovered that the Intel Pentium personal computer chip had a minor calculation defect, Intel immediately disclosed the problem and, after completing a detailed study, offered replacements to any customer affected by the defect.²¹⁷

As a general matter, software creators should disclose any known, nontrivial defects in a digital product. In addition to flaws in the calculation algorithm, another example of a nontrivial defect would be the inclusion of spyware or other security vulnerabilities. Because such defects have appeared in the Windows operating system, Microsoft has worked to provide appropriate fixes to their software.²¹⁸ The law should affirmatively encourage the disclosure of such defects, as this will

215. Professors Hillman and Rachlinski note that “the [disclaimer] term in this example allows the business to exploit a gap in consumers’ knowledge about the product’s risks.” Hillman & Rachlinski, *supra* note 12, at 440 & n.60 (offering a hypothetical based on the facts of *Mortenson*).

216. TurboTax, License Agreements: End User License Agreement for Tax Year 2004 TurboTax Software and Services § 2 (emphasis added), <http://www.turbotax.com/softwarelicense.html> (last visited Nov. 12, 2005).

217. John Markoff, *In About-Face, Intel Will Swap Its Flawed Chip*, N.Y. TIMES, Dec. 21, 1994, at A1.

218. See, e.g., Microsoft Security Bulletin MS01-059, <http://www.microsoft.com/technet/security/bulletin/MS01-059.msp> (last visited Nov. 12, 2005) (addressing a defect in Windows operating systems and providing a patch to resolve it).

promote product quality improvement. It will also improve the customers' awareness of quality differences between competing products and help them choose the best products for their particular needs.

D. Principle 4: Customers Are Entitled to a Refund When the Product Is Not of Reasonable Quality

Although "let the buyer beware" is a good approach for the wary when buying software, there are, nonetheless, several reasons why a customer might legitimately wish to return it for a refund. If the program does not actually do what the advertising or the salesperson said it would do, then there may have been a material misrepresentation and the customer should be entitled to a refund.²¹⁹ Moreover, if the program will not load or is defective with bugs that impair its functioning, then again, a refund may be due.²²⁰ Or, if under section 2-606 of the U.C.C., the buyer has a reasonable chance to inspect the software, and decides it does not meet the buyer's reasonable expectations, then the buyer should be able to return the product for a refund.²²¹

Although the license agreement is not a contract for the sale of goods, as has already been seen, many courts do apply the U.C.C. to these cases either by analogy or because the parties have adopted it as the applicable law of their agreement.²²² As noted, under section 2-606 of the U.C.C. the buyer has the right to inspect the goods to make sure that they conform to the contract.²²³ Presumably in the case of software, that would mean that the software meets the buyer's reasonable expectations based on the advertising, packaging, and any representations of the manufacturer's representative.²²⁴ For this provision to have any meaning in this context, the buyer would need to be able to

219. See U.C.C. § 2-313 (2005) (stating that express warranties are created when "[a]ny affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain"); see also *id.* § 2-721 (allowing for "rejection or return of the goods" as remedies for material misrepresentation).

220. See *id.* § 2-608 ("A buyer may revoke acceptance of a [product] . . . whose nonconformity substantially impairs its value to the buyer.").

221. See *id.* § 2-606 (specifying that a buyer accepts the goods only "after a reasonable opportunity to inspect the goods").

222. Phillip Johnson, *All Wrapped Up? A Review of the Enforceability of "Shrink-wrap" and "Click-wrap" Licences in the United Kingdom and the United States*, 25 EUR. INTELL. PROP. REV. 98, 100 (2003) (concluding that "in the United States courts are accepting shrink-wrap licenses as a sale of goods" governed by the U.C.C.).

223. U.C.C. § 2-606; see also *id.* § 2-513 (providing for buyers' rights to inspect the goods prior to acceptance or payment).

224. *Id.* § 2-313.

bring the software home, open the package, install it, and test it. If after that the expectations are not met, the buyer must signal a desire to return the product in a timely manner.²²⁵

In *ProCD*, Judge Easterbrook stressed that the right to return the product was also central to the issue of whether or not the shrinkwrap license was valid, but he was careful to distinguish acceptance of the offer from acceptance of the goods.²²⁶ Nonetheless, his wording was instructive on the point:

Section 2-606, which defines “acceptance of goods,” reinforces this understanding. A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1). *ProCD* extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods . . . but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.²²⁷

In an unusually enlightened approach to the issue of refunds, TurboTax has adopted a straightforward solution. The outside of the box for the 2004 tax year software says “Satisfaction Guarantee.”²²⁸ The EULA displayed on the screen during installation reads in pertinent part:

Satisfaction Guaranteed. If you are not satisfied with the Software, you may uninstall all copies of the Software from your computer(s) and return it within 60 days of purchase to the store where you purchased your license with a dated receipt for a full refund.²²⁹

With this provision, TurboTax is modeling the kind of customer-friendly license agreement that more software vendors should be developing.²³⁰ Such provisions can come about either by

225. See *id.* § 2-602 (“Rejection of goods must be within a reasonable time after their delivery or tender.”).

226. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452–54 (7th Cir. 1996).

227. *Id.* This reasoning was also important in *Hill*. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (adopting the “accept-or-return offer” analysis from *ProCD*).

228. 2004 TurboTax Software Packaging (on file with the author).

229. TurboTax, *supra* note 216.

230. See Gomulkiewicz, *supra* note 12, at 688–89 (discussing the need for more user-friendly EULAs). Professor Gomulkiewicz advocates the creation of a nongovernmental organization that would, among other things, make information about EULAs available

action of law²³¹ or by voluntary inclusion in the license agreement.²³² Either way, they build customer goodwill and assure customers that the manufacturer will stand behind the product.

In general, the customer should be entitled to assume that a product will meet their reasonable expectations. If a product is not of reasonable quality, the customer should be entitled to return the product for a refund.²³³

E. Principle 5: Customers Are Entitled to Have Their Disputes Settled in a Local, Convenient Venue

In *ProCD*, Judge Easterbrook left open the specific policy questions raised by the actual terms of the contract.²³⁴ He said:

Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.²³⁵

Since this case was decided, when courts are called upon to review end user licenses as contracts of adhesion, they are more likely than not to find the contract itself valid.²³⁶ When, however, they are troubled by some aspect of the contract, they are likely to follow Judge Easterbrook's guidance and look at other policy considerations that may be involved.²³⁷ Next, this Article will deal with issues like choice of forum in non-negotiated contracts that raise such policy concerns.

for review pre-purchase, explain terminology in plain language, and recommend improvements. *Id.* at 713–15.

231. See *supra* Part IV (discussing the European approach to unfair terms in consumer contracts).

232. See, e.g., Rebekah O'Hara, *You Say You Want a Revolution: Music & Technology—Evolution or Destruction?*, 39 GONZ. L. REV. 247, 292–93 (2004) (concluding that “licenses can be as benevolent as the drafter chooses”).

233. See U.C.C. § 2-601 (2005) (noting that “if the goods . . . fail in any respect to conform to the contract, the buyer may” return those goods).

234. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (remanding the case without considering the unconscionability of the terms of the license at issue).

235. *Id.*

236. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150–51 (7th Cir. 1997) (finding that the contract and the later terms were binding on the buyer).

237. In the *Scarcella* case, with which this Article began, the court said that “[e]nforcement of the forum-selection clause in this case would contravene the strong public policy embodied in the small-claims provisions of the Civil Court Act.” *Scarcella v. Am. Online*, No. 1168/04, 2004 WL 2093429 at *3 (N.Y. Civ. Ct. Sept. 8, 2004).

In *Oxman v. Amoroso*, cited in the *Scarcella* case, for example, the court found that:

Forum selection clauses are among the most onerous and overreaching of all clauses that may appear in consumer contracts. The impact of these clauses is substantial and can effectively extinguish legitimate consumer claims . . . since the costs of retaining an attorney . . . and traveling . . . would far exceed recoverable damages.²³⁸

For obvious reasons, many EULAs include a choice of forum that is either convenient to the company or provides it with a more favorable legal environment.²³⁹ In *The Bremen v. Zapata Off-Shore Co.*, the Supreme Court held that “freely negotiated private . . . agreement[s], unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect”²⁴⁰ and that forum-selection clauses in such agreements “are prima facie valid . . . unless enforcement [would] be ‘unreasonable’ under the circumstances.”²⁴¹ That case left open the question of how the Court would approach a similar case where the contract was not freely negotiated.²⁴² But as seen in *Carnival Cruise Lines, Inc. v. Shute*, the Court extended the principle to non-negotiated agreements as well.²⁴³ The Court held that because respondents had notice of the forum clause, petitioner’s principal place of business was in Florida, and there was no bad faith motive for the choice of a Florida forum, Florida was not an inconvenient forum.²⁴⁴

Other courts are not so sure and, in many cases, are likely to find policies of the forum jurisdiction that outweigh a boilerplate contractual requirement that the case be brought elsewhere.²⁴⁵ In *America Online, Inc. v. Superior Court of Alameda County*, a

238. *Oxman v. Amoroso*, 659 N.Y.S.2d 963, 967 (N.Y. City Ct. 1997).

239. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1, 47–48 (2002) (discussing a case where the court enforced a forum-selection clause that was more favorable to the software company than to the consumers).

240. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972).

241. *Id.* at 10.

242. *See id.* at 17 (noting that the case involved a “freely negotiated” contract).

243. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (applying the analysis of *The Bremen* to include form contracts).

244. *Id.* at 595.

245. *See, e.g.*, *Am. Online, Inc. v. Superior Ct.*, 108 Cal. Rptr. 2d 699, 710 (Ct. App. 2001) (refusing to enforce the forum-selection clause for public policy reasons); *see also Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825 at *3 (Mass. Super. Ct. Feb. 8, 2001) (denying motion to dismiss from America Online because “[p]ublic policy suggests that Massachusetts consumers who individually have damages for only a few hundred dollars should not have to pursue AOL in Virginia”).

California appellate court found that enforcing the forum-selection clause would have violated California public policy by undermining legal rights provided to California consumers by statute.²⁴⁶ The California Consumers Legal Remedies Act provides, among other things, for a class action remedy which the plaintiffs sought to invoke in this case but which is not permitted in Virginia, the forum identified in the agreement.²⁴⁷ Moreover, the Act provides that the remedies provided for in the Act may not be waived by the consumer.²⁴⁸ The court felt that to enforce the choice of forum clause would be to give effect to a contractual waiver of remedies and thereby violate California public policy.²⁴⁹

Cases such as *Scarcella*, *America Online*, and *Oxman* show that some courts find that enforcement of the forum-selection clause puts the customer at a significant disadvantage.²⁵⁰ A dispute that might be worth bringing locally might be too costly and defeat the policies of the forum if it meant traveling across the country.²⁵¹ In general, the better policy is that if a customer has a dispute with the vendor of a digital product, that customer should be able to bring it in a convenient local jurisdiction.²⁵² In most cases, the cost of the product is relatively small and the product manufacturer is in a better position to travel—because it is doing business in those jurisdictions—than is the individual consumer.²⁵³ Similarly, consumers should not be forced to give up

246. *Am. Online*, 108 Cal. Rptr. 2d at 710.

247. See CAL. CIV. CODE § 1752 (West 1998).

248. *Id.* § 1751.

249. *Am. Online*, 108 Cal. Rptr. 2d at 710.

250. But of course there are also decisions going the other way. See, e.g., *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010–13 (D.C. 2002) (upholding the enforcement of a forum-selection clause because appellant had adequate notice, and finding that despite “the unavailability of a class action mechanism,” the clause was not unreasonable).

251. Some countries in Europe, for example, enforce a prohibition on contracting for a forum in another country. See *supra* notes 172–73 and accompanying text (enumerating clauses struck down by the court as unreasonable); see also Naylor & Ritter, *supra* note 173 (summarizing the judgment in *Union Fédérale des Consommateurs v. AOL France*, where the court concluded that “foreign businesses should not view choice of law or exclusive jurisdiction clauses as being a means to avoid the restrictive consumer laws in Europe”). Australian law permits judges to avoid enforcing such clauses on the grounds that a court’s jurisdiction cannot be taken away by a consumer agreement. See John Adams, *Digital Age Standard Form Contracts Under Australian Law: “Wrap” Agreements, Exclusive Jurisdiction, and Binding Arbitration Clauses*, 13 PAC. RIM L. & POL’Y J. 503, 531–52 (2004).

252. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947) (looking at policy considerations for the doctrine of forum non conveniens, such as cost, fairness, “access to sources of proof . . . and all other practical problems”).

253. See Maxeiner, *supra* note 112, at 136 (“[A] clause that select[s] the seller’s principal place of business which [is] far from the consumer’s domicile . . . ‘must be

remedies and legal protections guaranteed by the laws of their home state in order to resolve a dispute.²⁵⁴ We have seen several instances of the courts giving effect to this principle, including in the E.U. Directive and related cases.²⁵⁵

F. Principle 6: Customers Are Entitled to Control Their Own Computer Systems

A software manufacturer should not be able to control or disable one's system or a piece of software solely in reliance on boilerplate contractual language. In the case of *Williams v. America Online, Inc.*, the plaintiff alleged that when he attempted to install "AOL Version 5.0 ('AOL 5.0')[, it] caused unauthorized changes to the configuration of [his] computer[] so [he] could no longer access non-AOL Internet service providers, [was] unable to run non-AOL e-mail programs and [was] unable to access personal information and files."²⁵⁶ Allegedly this problem occurred to many other users of AOL, as many claims were filed around the country raising similar issues.²⁵⁷ The response to this type of case shows that people react strongly when the software manufacturer, without authorization or specific permission, modifies the computer in a way that interferes with the customer's use of his machine.²⁵⁸ The strength of these reactions shows that this issue is clearly a "salient" matter to many customers, and that terms permitting such changes to one's computer should not be "hidden" away in the boilerplate of a standard-form contract.²⁵⁹

regarded as unfair" (quoting Case C-240/98, *Océano Grupo Editorial SA v. Rocío Murciano Quintero*, 2000 E.C.R. I-4941, I-4973)).

254. See *id.* ("[T]he Unfair Terms Directive calls for evaluating . . . a term 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.'" (quoting E.U. Directive, *supra* note 139)).

255. See E.U. Directive, *supra* note 139 (directing member states "to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract"); see also Maxeiner, *supra* note 112, at 136 (discussing how the European Court of Justice justified striking a forum-selection clause for being unfair).

256. *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825 at *1 (Mass. Super. Ct. Feb. 8, 2001).

257. *Id.* The Author of this Article confirms the problem, because the same thing occurred to him. He did not sue but was quite outraged at the time.

258. In this case, the plaintiff claimed that the change took place before he could agree to the terms of the new version of the software. *Id.* at *2.

259. Korobkin, *supra* note 66, at 1272-73. After this section of this Article was written, Microsoft provided an automatic update to the Author's machine. This particular update apparently required shutting down the computer and rebooting. When the Author got up the next morning and saw what had happened, he immediately wondered how

Similarly, one of the more controversial terms in UCITA is the so-called “self-help” provision.²⁶⁰ There, despite the best efforts of the authors to build in safeguards—including a separate manifestation of assent,²⁶¹ not permitting self-help in the mass-market (essentially consumer) context, elaborate notice provisions, and a 15-day waiting period—it remained true that, under certain circumstances, a software vendor would be allowed to exercise certain forms of self-help to prevent the customer from continuing to use the software.²⁶² This provision caused great concern among large businesses, ranging from the insurance industry to heavy machinery companies, and even a fast-food chain, who were afraid to allow someone else either a backdoor to their systems (for security reasons) or the ability to shut down their computers, and thus shut down their businesses for any period of time at all.²⁶³

Contract terms permitting an outsider to modify one’s system are presumptively unfair unless the product is clearly labeled as to what it does and under what circumstances.²⁶⁴ If the product only works for a limited period of time then that too should be clearly indicated.²⁶⁵

G. Principle 7: Customers Are Entitled to Control Their Own Data

This principle is actually a corollary to the previous one, resulting from an awareness that software manufacturers

much of what he had written had been lost, and when he had last saved his work.

260. Uniform Computer Information Transactions Act (UCITA) § 815 cmt. 3, 2 U.C.C. Rep. Serv. (CBC) 261 (2001) (“Self-help cannot be used unless there is a cancellation for breach and the self-help does not ‘breach the peace’ or create a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information.”).

261. Supported by this Author for any provision that affects a user’s rights as discussed in this Article.

262. See UCITA § 816, 2 U.C.C. Rep. Serv. (CBC) 261–66 (enumerating limitations on electronic self-help).

263. See Patrick Thibodeau, *UCITA Fix Won’t Help Big Firms: ‘Mass Market’ Gets Relief from Remote Disabling*, COMPUTERWORLD, Aug. 14, 2000, <http://www.computerworld.com/printthis/2000/0,4814,48513,00.html> (last visited Nov. 12, 2005) (addressing security concerns for large corporations raised by the UCITA self-help provision).

264. See Korobkin, *supra* note 66, at 1268–73 (discussing the concept of procedural unconscionability, which provides that form terms that are salient to the buyer but are not “reasonably communicated” are invalid).

265. See *id.* at 1270 (explaining that the “[t]he ‘reasonable expectations’ doctrine . . . permits courts to invalidate form terms that defeat the expectations of reasonable consumers”).

sometimes leave a backdoor way into the system.²⁶⁶ If done with authorization, the backdoor can allow Microsoft or McAfee to update the system and provide security fixes. On the other hand, such a backdoor can also be easily misused, or if compromised, could allow hackers, viruses, or others to destroy data, damage files, or corrupt the system.²⁶⁷

In all cases, the software vendor must not access, copy, or distribute the unique data on the customer's computer without specific authorization to do so.²⁶⁸ That is to say, it should not be seen to be authorized if only contained in contractual boilerplate.²⁶⁹ Moreover, if the customer is asked for access to their data, they should also be given enough information to understand the purpose for the access, how it will be used, and whether or not the vendor will retain or redistribute the information.²⁷⁰

It is fundamental that the customer must always be able to control his own data. In the course of using a computer, a customer often enters personal or business data, stores relevant information, or creates new documents. It must be solely up to the customer to be able to control the use and dissemination of his data. In addition, a customer should be entitled to access his own data even if the license for the digital product has expired or because self-help has been invoked.²⁷¹ It should be possible to convert any of the customer's unique information to a generic format that other programs can read.²⁷² Fair terms do not limit the customer's rights to use and control his own data.²⁷³

266. See CHARLES P. PFLEGER, SECURITY IN COMPUTING 179 (2d ed. 1997) (describing a "back door" or "trap door" as a program feature left by software developers that could be used for maintenance purposes or as an illicit entry way into the system).

267. *Id.*; see also DONALD L. PIPKIN, HALTING THE HACKER: A PRACTICAL GUIDE TO COMPUTER SECURITY 83, 86 (1997) (illustrating how malicious hackers often gain entry into computer systems through a back door threatening programs and data).

268. See AFFECT, Stop Before You Click: 12 Principles for Fair Commerce in Software and Other Digital Products; Technical Version 6 (2005), <http://www.stopbeforeyouclick.org/pdf/12PrincTechnical.pdf> (asserting that a software vendor must not access a customer's computer to use or disseminate data "without the customer's knowledge and active agreement").

269. *Id.* at 1, 3-4.

270. *Id.* at 6.

271. See *id.* at 5-6.

272. *Id.* at 6.

273. *Id.*

H. Principle 8: Customers Are Entitled to Fair Use, Including Library or Classroom Use, of Digital Products to the Extent Permitted by Federal Copyright Law

For nearly three-hundred years,²⁷⁴ many of the policies relating to the printing, copying, and distribution of information have been those established in the copyright law.²⁷⁵ In the United States, the purpose of the Copyright Act is not primarily to enrich creators; rather, it is to promote the progress of science and the useful arts.²⁷⁶ The limited monopolies granted under the intellectual property laws are a means to that end. Under the current law, then, the owner of a creative work is granted certain limited rights to make copies and distribute their creative work.²⁷⁷ But in return for those rights, Congress has also established a series of limits on those rights that provide information users with the privilege to use the information in reasonable ways that do not unreasonably prejudice the interests of the creator.²⁷⁸ These counter-balancing privileges are particularly strong where they support Constitutional purposes, for example, when they support education and learning or the creation of new works.²⁷⁹ This basic balance of rights between

274. The first copyright act was the British Statute of Anne, passed in 1710. The purpose of the Act was the “encouragement of learned men to compose and write useful books.” An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 1710, 8 Ann., c. 19 (Eng.). Although its purpose was to create a system that would reward authors for their writings by giving them the rights to print, reprint, and sell their books, it also contained an important limit on those rights. See Craig Joyce, “A Curious Chapter in the History of Judicature”: *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 330–31 (2005) (summarizing the effect of the Statute of Anne on the author’s right of exclusive publication for a period of years and subject to certain conditions). The length of the copyright term for new books was fourteen years. See 8 Ann., c. 19. At the expiration of that period, the work became part of the public domain. See Joyce, *supra*, at 331.

275. See I. Fred Koenigsberg, *Copyrights*, in UNDERSTANDING BASIC COPYRIGHT LAW 45, 59–60 (Katherine C. Spelman & I. Fred Koenigsberg eds., 2005) (detailing the rights protected by American copyright law as including reproduction, the right to prepare derivative works, distribution, public performance, and the right to display).

276. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

277. The period for which this grant of rights is given is now the life of the creator plus seventy years, far beyond the fourteen-year renewable term provided in the original U.S. Copyright Act and far beyond the useful life of any software or digital datafile. See 17 U.S.C. § 302 (2000); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

278. See, e.g., 17 U.S.C. §§ 107–110, 117 (discussing the various limitations on the owner of a copyright, ranging from fair use to limitations on restricting the copying of software).

279. See Koenigsberg, *supra* note 275, at 61 (noting that “Fair Use,” including criticism, teaching, scholarship, and research, is generally not considered copyright

creators and users creates an inherent tension in the copyright system,²⁸⁰ but has worked well in the paper environment.²⁸¹ Now, however, the copyright system is being tested in the digital environment, because technology makes it easy to copy and redistribute a work in its entirety.²⁸² It is important, however, for policy makers not to overreact. They should strive to prevent abuses of the system while still maintaining the fundamental principles that have worked so well.

During this period of testing old paradigms, copyright owners have sought to protect their rights—without any counterbalancing of user rights—by means of a variety of techniques. These include both technological protection measures and boilerplate language buried in the EULAs. It is not surprising that copyright owners would seek this extra protection—well beyond the provisions of the Copyright Act.²⁸³ But it is equally not surprising that consumers would try to push back and insist that there be some limits on what can be done to take away their rights by means of a non-negotiated contract of adhesion.²⁸⁴ While most users do not wish to be willful infringers, they have come to rely on some of the basic privileges granted to them under the Copyright Act. They would be surprised and maybe even outraged to find out that they had unknowingly signed away those basic rights.²⁸⁵

infringement).

280. See Jonathan Griffiths & Uma Suthersanen, *Introduction to COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 1* (Jonathan Griffiths & Uma Suthersanen eds., 2005) (discussing the tension between copyright and free expression).

281. See SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 13–15 (2001) (explaining that copyright law has worked well when applied to the written word but may stifle creativity as technology advances).

282. See Thomas Dreier, *Contracting out of Copyright in the Information Society: The Impact on Freedom of Expression*, in *COPYRIGHT AND FREE SPEECH*, *supra* note 280, at 385 (commenting on the challenges of regulating copyright in an increasingly digital world, specifically with regard to the ease of copying and disseminating copyrighted works).

283. See *supra* note 278 and accompanying text.

284. In a fully negotiated contract, much more is possible; the issue here is whether there ought to be some limits on what can be done in this environment by means of a non-negotiated agreement, where it is known, even expected, that the customer will not read or understand the terms. See *AFFECT*, *supra* note 268, at 1, 3–4 (explaining that terms are often disclosed only after the sale, and when the terms are read they are often extensive and hard to understand).

285. CRAIG JOYCE ET AL., *COPYRIGHT LAW* 813 (5th ed. 2000) (“[T]oday ‘fair use’ is most commonly defined as ‘a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by] the copyright.’” (quoting HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944))).

Perhaps the most basic of the user rights incorporated into the Copyright Act is the fair use doctrine.²⁸⁶ Originally developed in the courts, fair use was incorporated into § 107 of the Copyright Act when the law was overhauled in 1976.²⁸⁷ Stated most basically, § 107 provides that the fair use of a work is not an infringement.²⁸⁸ Fair use may be for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.²⁸⁹ These enumerated purposes for a finding of fair use implicate free speech, education, research, and scholarship.²⁹⁰ Education, research, and scholarship are plainly among the Constitutional purposes for establishing the copyright system in the first place (“Progress of Science and useful Arts”),²⁹¹ and free speech is a closely guarded right in America.²⁹²

These principles are fundamental to the copyright system because they encourage the production of new knowledge and permit the system to continue to grow. As Justice Sandra Day O’Connor explained:

The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” Art. I, § 8, cl. 8. . . . To this end, copyright assures authors the right to their original expression, but

286. 17 U.S.C. § 107 (2000).

287. *Id.*; see Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451, 2456.

288. 17 U.S.C. § 107.

289. Section 107 provides that:

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

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

Id.

290. See VAIDHYANATHAN, *supra* note 281, at 27 (discussing the concept of “fair use” within the context of copyright and its implication on scholarship, teaching, research, and free speech).

291. U.S. CONST. art. I, § 8, cl. 8.

292. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (recognizing protection of free speech in the United States as a “bedrock principle”).

encourages others to build freely upon the ideas and information conveyed by a work.²⁹³

In today's world, consumers often get their information from electronic products, rather than from a printed book. "Consumers, businesses, libraries and educational institutions rely on 'off-the-shelf' digital products," whether on a CD or online.²⁹⁴ As a result, they may wish to quote from the work, write a review, or use excerpts in a new work. They should not be prohibited from doing so by an obscure provision in an EULA.

The mere format of the work should not change these fundamental principles. Federal copyright law has carefully evolved with a balanced set of rules for the protection and use of copyrighted information.²⁹⁵ Non-negotiated terms in agreements for mass-market digital products should not be enforced so as to prohibit activities otherwise permitted under federal copyright law. Journalists and scholars should be able to quote small excerpts, and libraries should be able to lend this type of material, as permitted under §§ 107 and 108 of the Act.²⁹⁶

I. Principle 9: Customers Are Entitled to Take Apart and Study How a Product Works

End user license agreements often attempt to prohibit reverse engineering—described as “starting with the known product and working backward to divine the process which aided in its development or manufacture.”²⁹⁷ Such a process is often used to make a better product or to create other products that interface with the original. In fact, in the case of software, it may be necessary to take a product apart to adapt it to work with a particular computer system or to make it interoperable with other systems, to examine its security features, to repair it, or to study it. The Supreme Court speaks favorably about reverse engineering in a trade secret context,²⁹⁸ and several courts have

293. Feist Publ'ns, Inc. v. Rural Tel. Serv., Inc., 499 U.S. 340, 349–50 (1991).

294. See AFFECT, *supra* note 268, at 7 (noting that consumers often rely on digital rather than print media).

295. *Id.* (noting that “federal copyright law has carefully developed balanced rules for the use of copyrighted information”).

296. 17 U.S.C. §§ 107–108 (2000).

297. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

298. The Supreme Court explained:

The duplication of boat hulls and their component parts may be an essential part of innovation in the field of hydrodynamic design. Variations as to size and combination of various elements may lead to significant advances in the field. Reverse engineering of chemical and mechanical articles in the public domain often leads to significant advances in technology. If Florida may prohibit this

found the copying incidental to software reverse engineering to be a fair use.²⁹⁹ In *Sega Enterprises Ltd. v. Accolade, Inc.*, for example, the Ninth Circuit concluded that under certain circumstances reverse engineering is a fair use:

We conclude that where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law.³⁰⁰

Reverse engineering, then, is often crucial for the development of new products that will work well with the original, for finding security holes, for identifying and fixing software bugs, for evaluating the vendor's claims, and for developing new technologies and products. Recognizing the importance of these techniques for the development of new products, when Congress passed the Digital Millennium Copyright Act (DMCA), it included a provision authorizing the circumvention of technological protection measures under certain circumstances when necessary to achieve interoperability and to permit the exchange of information among programs.³⁰¹ The

particular method of study and recomposition of an unpatented article, we fail to see the principle that would prohibit a State from banning the use of chromatography in the reconstitution of unpatented chemical compounds, or the use of robotics in the duplication of machinery in the public domain.

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 160 (1989).

299. See, e.g., *Sony Computer Entm't v. Connectix Corp.*, 203 F.3d 596, 609–10 (9th Cir. 2000) (holding that the reverse engineering of the Sony BIOS software is protected as fair use); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 844 (Fed. Cir. 1992) (explaining that reverse engineering of software is not a violation of copyright and constitutes fair use when used to understand the copyrighted software).

300. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527–28 (9th Cir. 1993). It should be noted that in *Bowers v. Baystate Technologies, Inc.*, a case involving a falling out between business partners, the court upheld the shrinkwrap agreement prohibiting reverse engineering. *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323–26 (Fed. Cir. 2003). The court felt that the prohibition was not preempted by the fair use exemption of the Copyright Act because the defendants freely entered into the contract. *Id.* at 1325–26 (“[P]rivate parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act.”). In reaching its decision, the court did not address the *Atari* conclusion that reverse engineering is a fair use. *Id.* at 1325 (citing *Atari Games Corp.*, 975 F.2d 832). The dissent, however, reasoned that a shrinkwrap agreement should not be upheld when it limits the rights conferred under copyright law. *Id.* at 1335–38 (Dyk, J., concurring in part and dissenting in part). The dissent makes a distinction between using shrinkwrap licenses that restrict fair use and freely negotiated contracts that waive fair use defenses. *Id.* at 1336–37 (“I nonetheless agree with the majority opinion that a state can permit parties to contract away a fair use defense . . . if the contract is freely negotiated.” (emphasis added)).

301. See 17 U.S.C. § 1201(f) (2000) (allowing for certain limitations on copyright protections insofar as those limitations promote software interoperability).

House Report cited the *Sega* case and indicated its approval of reverse engineering for legitimate software development:

Subsection (f) is intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter. The objective is to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. [Citing *Sega*]. The purpose of this subsection is to avoid hindering competition and innovation in the computer and software industry.³⁰²

By its inclusion of § 1201(f) in the Act, Congress indicated its intention to protect access to the functional elements of software and recognized the importance of this policy for the continued development of new software and for competition in the industry. This important policy should not be negated by means of a non-negotiated license agreement.

J. Principle 10: Customers Are Entitled to Express Opinions About Products and Report Their Experiences with Them

As discussed in the section on fair use, criticism, comment, and news reporting are among the fundamental reasons for a limit on the rights of copyright holders.³⁰³ This policy reflects both a congressional reluctance to interfere with free speech and also a recognition that progress of the science and useful arts depends fundamentally on a robust marketplace, including a marketplace of ideas, in which ideas, products, and software are introduced and where others are free to critique and build upon what has gone before.³⁰⁴

Competition depends on the availability of information about competing products.³⁰⁵ Book reviews are available in newspapers and magazines; consumers can read reviews on products ranging from cars to washing machines and from stereos to wine. Why should a software or digital information product be any different? Yet some license agreements purport to limit the user's right to

302. STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, at 14 (Comm. Print 1998).

303. See *supra* notes 286–89 and accompanying text.

304. *Id.*

305. See AFFECT, *supra* note 268, at 8 (stating that “[h]ealthy competition depends on dissemination of information about competing products”).

test or write about the software. Nonetheless, in order to make an informed choice, one must be able to compare products “both quantitatively and qualitatively.”³⁰⁶ Testing a product and reviewing it is an important part of that evaluation. One must, therefore, “be able to recommend and criticize products, legally reprint images and quote text to convey product limitations and help other purchasers make informed decisions.”³⁰⁷ In addition, as discussed above, the ready availability of contract terms will allow reviewers to comment on both the positive and the negative aspects of the EULA.³⁰⁸ Terms in non-negotiated licenses that purport to limit these free-speech-related rights should be unenforceable as against an important public policy.

K. Principle 11: Customers Are Entitled to the Free Use of Public Domain Information

Since the earliest days of copyright, one of the fundamental principles has been that some works either would not qualify for copyright protection or would not be protected once the limited period of protection had expired. These works are said to be in the “public domain” and are free for others to use.³⁰⁹ Thus in the United States works of the U.S. government,³¹⁰ or works wholly lacking in originality³¹¹ will not be protected. Similarly, works beyond the statutory copyright term (currently works published before 1923) are also in the public domain.³¹²

This policy has been of great benefit to the creative environment, as it has permitted important creative adaptations of older works. Walt Disney, for example, was a creative genius in the use of animation, but many of his most important works actually come from others, especially, for example, from *Grimm’s*

306. *Id.*

307. *Id.*

308. *Id.* at 1–2.

309. See Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 103 (2003) (“Once material reaches the public domain . . . the public domain acts as a bar to prevent the government from continued application of IP protection to [copyrighted] material.”).

310. 17 U.S.C. § 105 (2000) (stating that “[c]opyright protection . . . is not available for any work of the United States Government”).

311. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991) (“The *sine qua non* of copyright is originality.”).

312. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 395–98 (2003) (delineating the duration of copyright protection over the last century). For a table summarizing the copyright terms of works published in various periods see *Copyright Term and the Public Domain in the United States* (Jan. 1, 2005), http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

Fairy Tales, which, in turn, were collected from even older, often oral sources.³¹³ Such works as *Cinderella*, *Snow White and the Seven Dwarfs*, and *The Sleeping Beauty* were all from the Brothers Grimm.³¹⁴ *Hansel and Gretel* is also one of the Grimms' tales, and it was written into a well-known and much beloved opera by Engelbert Humperdinck.³¹⁵ There are many other examples of the enrichment of culture through the use of an older work to create a new one. Several Verdi operas, for example, borrow directly from the Shakespearean repertoire.³¹⁶ In the more modern era, the works of Jane Austen have been given new life by adaptations for the movies³¹⁷ and television.³¹⁸

In the case of these new works, there is no doubt, for example, that Disney is entitled to copyright protection on the animated version of *Cinderella*. But he cannot thereby secure a copyright on the underlying work. Other people are free to reprint the original or to use the *Cinderella* story in any way they wish. The same should be true for the use of other public domain information. Someone who creates a new work that qualifies for protection can obtain protection over that work, but they cannot thereby capture the older work as their own.

This principle—that public domain works are free for all to use and may not be appropriated by anyone else—has served society well.³¹⁹ Unfortunately, there are those who would use an EULA to defeat this important policy.³²⁰ If allowed to stand, such

313. See generally Louis Untermeyer, *Foreword* to GRIMM'S FAIRY TALES viii-ix (Louis Untermeyer ed., Easton Press 1980) (explaining that the Grimms "recorded the spoken tale in all its forthrightness without attempting to polish or improve it").

314. *Id.* at xiii-xiv.

315. GEORGE P. UPTON, *THE STANDARD OPERAS* 18-19 (1917).

316. See Roy E. Aycock, *Shakespeare, Boito, and Verdi*, 58 *MUSICAL Q.* 588, 588-90 (1972) (noting that Verdi composed three Shakespearean operas: *Macbeth*, *Othello*, and *Falstaff*).

317. For example, Jane Austen's novels *Emma*, *Persuasion*, and *Pride and Prejudice* have each been adapted for the movies. See, e.g., *PRIDE AND PREJUDICE* (Working Title Films 2005); *EMMA* (Miramax Films 1996); *PERSUASION* (BBC 1995). *Clueless* was a more satirical adaptation of *Emma* set in modern-day Hollywood. *CLUELESS* (Paramount Pictures 1995).

318. *Pride and Prejudice* was adapted for television by the BBC in a five-part series in 1980. See Herbert Mitgang, *Publishing: Giving Books New Life by a TV Tie-In*, N.Y. *TIMES*, Nov. 7, 1980, at C24 (listing several classic books being made into television programs). The BBC and A&E produced another television adaptation of *Pride and Prejudice* in 1995. See Harriet Winslow, *What's Next? Network Target: Arts, History, Entertainment, Growth*, WASH. *POST*, Jan. 14, 1996, Fairfax County Edition: TV Week, at 6. For a behind the scenes look at the production of the 1995 *Pride and Prejudice* series, see BBC, *Pride and Prejudice*, <http://www.bbc.co.uk/drama/prideandprej.shtml> (last visited Nov. 12, 2005).

319. Lee, *supra* note 309, at 102.

320. See *AFFECT*, *supra* note 268, at 1 (asserting that sellers often include terms

agreements would permit a manufacturer to lock up much of the public domain by wrapping it in a license agreement. No doubt, to most customers, it would be both surprising and unfair to include such a provision in the unread boilerplate of a standard-form contract. Such terms should be unenforceable. They are simply an effort to obtain something by contractual boilerplate that could not be obtained under other applicable policies.

L. Principle 12: Customers Are Entitled to Transfer Products As Long As They Do Not Retain Access to Them

In a real-world example, the Author of this Article undertook a project to compile a database of certain factual information related to published law books. For that purpose, he hired a freelancer to do the work and bought her a piece of software to compile, search, and access the information. Her job is now done, and it is now necessary to transfer the database—and the means of using it—to the Author’s computer. The piece of software in question cost in excess of \$500, so it would obviously be preferable not to have to buy a second copy when only one copy would ever be used. The freelancer has uninstalled everything from her computer and has not retained any copies on her machine. Can the software be transferred to the Author’s machine or not? Not if there is a technological protection measure preventing such a transfer and arguably not if there is a license term prohibiting the transfer.

In a similar case, one “egburr” purchased a used copy of the software for an online game, “World of Warcraft.”³²¹ According to a posting on *Slashdot*, before making the purchase, he read both the EULA and the Terms of Use to be sure that he would be able to use the software once he got it home.³²² Because the EULA “explicitly grants its users the ability to transfer the physical property and ‘all of your rights and obligations under the License Agreement,’” egburr thought he would have no problem.³²³ Unfortunately, when he tried to set up an account to play the game, he found out that since the “authentication key” had

depriving users of rights).

321. See Posting of Cliff to *Slashdot*, <http://ask.slashdot.org/article.pl?sid=05/02/16/1855214&tid=95&tid=209&tid=4> (Feb. 16, 2005, 5:55 PM) (discussion of “egburr’s” dispute with “World of Warcraft”).

322. *Id.*; see also World of Warcraft End User License Agreement, <http://www.worldofwarcraft.com/legal/eula.html> (last visited Nov. 12, 2005); World of Warcraft Terms of Use, <http://www.worldofwarcraft.com/legal/termsofuse.shtml> (last visited Nov. 12, 2005).

323. See Posting of Cliff to *Slashdot*, *supra* note 321.

already been used, he would not be allowed to sign on.³²⁴ In this case, although the EULA appears to permit the transfer, the technological protection measure does not.³²⁵ At the time of the posting, calls to the publisher had been to no avail.³²⁶

It is understandable that a software or game publisher would not want to sell one product only to have multiple users making use of it. On the other hand, with a book, you can lend the book to someone else or even give it to them. This privilege is explicitly protected under § 109 of the Copyright Act.³²⁷ Most people would expect to be able to do the same thing with an electronic information product, provided they do not retain a copy for their own use, and boilerplate terms that try to take away this right should not be enforced.

VI. CONCLUSION

The law related to wrap licenses for information and electronic contracts in general is in a state of confusion. The “Stop Before You Click” campaign identifies some of the concerns that consumer groups have had and some of the protections that consumers and others need and want when dealing with non-negotiated licenses in the electronic environment.³²⁸ From the customer’s perspective, contract terms contrary to the twelve principles developed by AFFECT—and undoubtedly others as well—are inappropriate to include in non-negotiated shrinkwrap agreements.³²⁹ They would be a surprise to many customers, and they take undue advantage of the drafting party’s superior position. AFFECT’s “Stop Before You Click” campaign is intended primarily to educate software consumers and encourage them to learn about these clauses before they click the “I accept” button.³³⁰ In addition, by educating consumers this way, and also perhaps by following Professor Gomulkiewicz’s suggestion of shining a spotlight on these contracts,³³¹ companies will be

324. *Id.*

325. *Id.*

326. *Id.*

327. *See* 17 U.S.C. § 109 (2000) (providing that “the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”).

328. *See* AFFECT, *supra* note 268, at 1 (describing the purposes of the “Stop Before You Click” campaign).

329. *Id.*

330. *Id.* at 1–2.

331. *See* Gomulkiewicz, *supra* note 12, at 702–05 (suggesting what can be done to improve the user-friendliness of EULAs).

encouraged to revise their contracts to simplify them and to include fewer (or none) of these onerous terms.

A parallel effort could be to get the law to recognize that even though the basic bargain (core terms) represented by the license might be valid with appropriate disclosure of terms and manifestation of assent, nonetheless, there ought to be some more carefully defined limits on what other terms may be included in the boilerplate. The E.U. approach provides a suggestion for one way to get there: a specific consumer-oriented set of protections against over-reaching by online marketers.³³² Other approaches are also certainly possible and would be more consistent with existing U.S. law. Jean Braucher, for example, has proposed the development of a Model EULA which could also provide a vehicle for basic consumer protections.³³³ Finally, of course, there is also much to be learned from the UCITA experience. I know personally that the discussions were seemingly endless, and that efforts were made to accommodate some concerns, but one still cannot help but wonder if UCITA would not have garnered more support than it did if it had done more to incorporate the concerns of consumers. Perhaps it's still possible—quietly, of course—to have such a conversation.

332. See E.U. Directive, *supra* note 139, arts. 1–5.

333. Jean Braucher, *New Basics: 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products* 18–19 (May 27, 2005) (unpublished manuscript, accessible at <http://ssrn.com/abstract=730907>).

APPENDIX

12 Principles for Fair Commerce in Software
And Other Digital Products³³⁴**1. Customers are entitled to readily find, review and understand proposed terms when they shop.**

In a healthy digital marketplace, it should be easy for you to find and read a product's proposed terms of agreement before making a decision to buy it. This is particularly important so that you can compare one product with another. You should be informed in plain and conspicuous language of all aspects of the proposed deal that might influence your purchase decision.

2. Customers are entitled to actively accept proposed terms before they make the deal.

Real acceptance requires you to take an active step to indicate agreement to the terms that become part of the deal. You should not be bound by terms just because you visit a website, open a box containing a product or install a product that you already bought. Even if the terms are available somewhere on the website, inside the box, or on some file in the software, you should be bound by those terms only if you actively and unambiguously indicate your acceptance of them. Of course, any terms that are unfair, including but not limited to those discussed in Principles 5–12 below, should not become part of the deal.

3. Customers are entitled to information about all known nontrivial defects in a product before committing to the deal.

You should have easy access to information in plain language about any known nontrivial defects in a digital product. An example of a nontrivial defect would be a flaw that prevents a spreadsheet from correctly calculating a certain type of formula or inclusion of spyware or security vulnerabilities. Improving your awareness of the quality differences between competing products will help you choose the best products for your particular needs.

334. The twelve principles were developed by Americans for Fair Electronic Commerce Transactions (AFFECT) and are available for download from the AFFECT website. See AFFECT, *supra* note 268. These principles are distributed under the terms of a Creative Commons License. See Creative Commons Legal Codes, <http://creativecommons.org/licenses/by/1.0/legalcode> (last visited Nov. 12, 2005). The entire Appendix is taken directly from AFFECT's twelve principles.

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4. Customers are entitled to a refund when the product is not of reasonable quality.

You are entitled to assume a product will meet or surpass reasonable customer expectations and the seller's claims. If a product is not of reasonable quality or does not measure up to the product's stated purpose, you should be entitled to return the product for a refund. That refund should be easily available from the point of purchase or by a reasonably convenient refund procedure.

5. Customers are entitled to have their disputes settled in a local, convenient venue.

If you have a dispute with the seller of a digital product, you should not be forced to go to an out-of-state court to resolve the dispute. Nor should you be forced to give up remedies and legal protections guaranteed by the laws of the state in which you live.

6. Customers are entitled to control their own computer systems.

A seller or third-party should not be able to control or disable your system or a digital product installed on it. Terms permitting such acts are unfair unless a digital product is clearly labeled as a product that will only operate for a fixed period of time. Sellers who implement electronic "self-help" or "repossession" by remotely disabling a digital product threaten disproportionate damage. In addition, sellers must take reasonable steps to ensure that a product is free of viruses, spyware, and other malicious code or security problems that will compromise your computer systems.

7. Customers are entitled to control their own data.

Since in the course of using a digital product, you may enter personal or mission-critical business data, store private information or create documents for future use, you must be able to control the dissemination of that data. A seller should clearly inform you before payment or installation about a product's principal and significant functions, including whether the seller will copy or distribute your data. In addition, you are entitled to be able to access data you have created even if you can no longer use the digital product used to create it, and you must be able to convert it to a format that other programs can read. Fair terms do not limit your rights to control your own data.

8. Customers are entitled to fair use, including library or classroom use, of digital products to the extent permitted by federal copyright law.

Consumers, businesses, libraries and educational institutions rely on “off-the-shelf” digital products. For 200 years, federal copyright law has carefully developed balanced rules for the use of copyrighted information. Terms in agreements for mass-market digital products should not attempt to prohibit activities otherwise permitted under federal copyright law. For example, journalists and scholars should be able to quote language in mass-market digital content products and libraries should be able to lend this type of material. To avoid inhibiting important fair uses, terms claiming to restrict them should not be used.

9. Customers are entitled to study how a product works.

Intellectual property law protects software vendors from theft of their work. We support the aggressive enforcement of those laws. However, it may be necessary for you to study a product so that you can adapt it to work with your own system or other systems, understand its security features, or repair it. This type of study is permitted under intellectual property law for traditional products available to the public and should be no different for digital products marketed to the general public.

10. Customers are entitled to express opinions about products and report their experiences with them.

Healthy competition depends on information about competing products in the marketplace. You must be able to compare product terms and the products themselves, both qualitatively and quantitatively. You must also be able to recommend and criticize products, legally reprint images and quote text to explain product limitations and help other purchasers make informed decisions.

11. Customers are entitled to the free use of public domain information.

Public domain information is free for anyone to use, either because the information inherently does not fall under copyright protection, because the copyright term has expired or because the copyright holder has allowed the information to fall into the public domain. Sellers, therefore, should not be able to take facts, ideas and other unprotected works from the public domain and claim property rights to them by limiting your use of these facts

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or ideas through an agreement. Such terms are unfair and should be unenforceable.

12. Customers are entitled to transfer products as long as they do not retain access to them.

You should have the right to transfer a mass-market digital product in the same way that you might legally sell your old television or lend your favorite book to a friend as long as you do not retain access to it and the new recipient agrees to observe the fair terms of the deal. Any terms that claim to take away this right are unfair and should not be enforced.