

## CONTRACTUAL ASSENT AND ENFORCEABILITY IN CYBERSPACE

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Online vendors often seek to bind online consumers with contracts, frequently in the form of license agreements with standardized terms.<sup>1</sup> Importantly, online vendors differ in the manner in which they present their license agreements and consequently, in the amount of notice they provide their consumers. Some automatically splash their license on the screen and require consumers to click an “I agree” icon; others merely create a link to their license and do not require a clicking acceptance.<sup>2</sup> Courts have considered these various methods of online presentation, holding some licenses binding on consumers and others not.<sup>3</sup> Courts have begun to utilize

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1. Online contractual agreements—particularly between businesses and consumers—often take the form of license agreements. Vendors use license agreements to avoid the first sale doctrine. *See infra* note 135. The first sale doctrine gives buyers “first sale” rights to use and/or distribute their particular copy of a copyrighted work. Using licenses, vendors avoid the first sale doctrine because they are “licensing” their product. Accordingly, vendors can impose terms and restrictions on how buyers use their particular copy. Online license agreements often have standardized terms, which commonly represent a unilateral list of terms that the consumer accepts on a “take-it-or-leave-it” basis. Because they are used in mass-market transactions, vendors argue that the standard lists ease transaction costs.

2. Some vendors worry that traffic and revenue would decrease if a license splashes on the user’s screen and forces the user to click “I accept.” If the vendor merely creates a link to the license and disregards a clicking acceptance, this would speed-up the transaction, maintain consumer interest, and ultimately, increase revenue. *See* IAN BALLON, E-COMMERCE AND INTERNET LAW § 27.03[2] (2001) (explaining how online businesses have to make choices in weighing the legal risks and their business objections).

3. *See, e.g.,* *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (finding the online license unenforceable); *In re Realworks, Inc. Privacy Litig.*, No. 00C1366, 2000 WL 631341 (N.D. Ill. May 8, 2000) (enforcing online license); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (questioning the level of consumer assent in some online licenses); *Register.com, Inc., v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (enforcing the online license); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C 98-20064, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998) (affirming online license as binding); *Caspi v. Microsoft Network LLC*, 732 A.2d 528 (N.J. App. Div. 1999) (upholding online license with “I agree” icon); *Groff v. Am. Online Inc.*, No. PC 97-0331, 1998 WL 307001 (R.I. Super. May 27, 1998) (finding online license valid).

two broadly defined categories—clickwrap and browsewrap—in order to help characterize the various methods of presentation.<sup>4</sup>

A clickwrap license is an agreement in which the vendor requires the consumer to click an “I accept” icon or click-check an unchecked box for the agreement to take effect.<sup>5</sup> The vendor may place the icon at the conclusion of an agreement, where the consumer must scroll downward through the entire list of terms to click on it. Alternatively, a court will likely characterize an online license as a browsewrap if the vendor utilizes a small link to the license, instead of automatically presenting it.<sup>6</sup> Indeed, the vendor may even tuck the link in the corner of an interior webpage of the site so that consumers are unlikely to notice it. The characterization of an online license as either clickwrap or browsewrap is increasingly important because courts have found consumer assent to exist in the former, but not the latter.<sup>7</sup>

Beyond the recent cases dealing with online licenses, the case law surrounding shrinkwrap licenses is a useful guide to understanding what constitutes consumer assent in the online world.<sup>8</sup> Accordingly, Part I of this Note begins by analyzing the major cases surrounding shrinkwrap licenses and their relevance to licenses in cyberspace. Next, this Note discusses the recent decision in *Specht v. Netscape Communications Corp.*,<sup>9</sup> to understand how courts analyze what constitutes consumer assent online. Finally, this Note sets forth various methods courts may use to strike or modify terms of an online license, even where the court finds consumer assent to the overall agreement. These methods include the unconscionability doctrine, consumer protection statutes, and federal preemption. This Note contends that courts will likely continue to find consumer assent in clickwrap licenses, but should rely on methods for striking or modifying terms within an online license.

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4. See, e.g., *Netscape*, 150 F. Supp. 2d 585; *Pollstar*, 170 F. Supp. 2d 974.

5. See *supra* note 3.

6. See *supra* note 4.

7. See *id.*

8. A shrinkwrap license is similar to an online license, in that it is a standard, unilateral list of terms that the consumer accepts on a “take-it-or-leave-it” basis. Like online licenses, shrinkwrap licenses are ubiquitous, used in mass-market transactions between producers and consumers. Consumers encounter shrinkwrap licenses after they purchase software either at a store or over the phone. When the consumer brings the software home (or receives the software via delivery), the consumer tears open the plastic shrinkwrap around the box or package. Inside the shrinkwrap, the consumer will discover the “shrinkwrap license” and can finally read its terms.

9. 150 F. Supp. 2d 585.

## I. LEGAL BACKGROUND

Outside cyberspace, software vendors use shrinkwrap licenses. Like an online license, a shrinkwrap license represents a standard, unilateral list of terms the consumer accepts on a “take-it-or-leave-it” basis.<sup>10</sup> Software vendors typically enclose shrinkwrap licenses within the software packages consumers purchase.<sup>11</sup> Courts addressing consumer assent online have cited and relied upon the case law surrounding shrinkwrap licenses.<sup>12</sup>

### A. Early Law Surrounding Shrinkwrap Licenses

In the late 1980s and early 1990s, a few courts found shrinkwrap licenses unenforceable, based on a lack of consumer assent.<sup>13</sup> For example, in *Step-Saver Data Systems, Inc. v. Wyse Technology*,<sup>14</sup> the Third Circuit relied on section 2-207 of the Uniform Commercial Code (“UCC”) to hold that buyer Step-Saver failed to assent to seller The Software Link’s (“TSL”) shrinkwrap license.<sup>15</sup>

The court’s analysis turned on which party was the offeror and which was the offeree.<sup>16</sup> The court held that buyer Step-Saver was the offeror, and that seller TSL was the offeree.<sup>17</sup> Specifically, the court reasoned that Step-Saver made a telephone offer to buy the merchandise, and that vendor TSL accepted Step-Saver’s telephone offer when TSL initiated the software shipment.<sup>18</sup> At this point, Step-Saver and TSL had a contract,

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10. An important difference between a shrinkwrap license and an online license is that the online presentation gives the consumer the theoretical opportunity to read the license agreement *before* any exchange of money and product takes place.

11. Transactions between merchants, however, may involve more negotiation over terms. For example, a party could bargain for a limited duration of use and installment payments covering the time and use of the product. Arguably, this type of transaction more accurately describes a “licensing” transaction. *See* *Microsoft Corp. v. DAK Indus.*, 66 F.3d 1091 (9th Cir. 1995); *Softman v. Abode*, No. CV 00-04161, 2001 WL 1343955 (C.D. Cal., Oct. 19, 2001).

12. *See, e.g., Netscape*, 150 F. Supp. 2d 585; *Pollstar*, 170 F. Supp. 2d 974.

13. *See, e.g., Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91 (3rd Cir. 1991); *Arizona Retail Sys., Inc v. Software Link Inc.*, 831 F. Supp. 759 (D. Ariz. 1993); *see also Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1998) (using federal law to preempt a state statute that allowed vendors to use shrinkwrap licenses with terms in direct conflict with federal policy).

14. 939 F.2d 91.

15. 939 F.2d at 94.

16. *Id.* at 98.

17. *Id.*

18. *Id.*

with both explicit and implicit terms.<sup>19</sup> Since the parties formed a contract during the telephone conversation, the court viewed the shrinkwrap license enclosed in the later shipment as an attempt to modify the terms of the existing contract.<sup>20</sup> Since the enclosed shrinkwrap license contained material terms to which the parties failed to agree, the court utilized UCC section 2-207(3) to strike the terms of the shrinkwrap license.<sup>21</sup> The court held that UCC “gap fillers” could replace the stricken terms.<sup>22</sup>

## B. A Change in the Shrinkwrap Debate

In *ProCD, Inc. v. Zeidenberg*,<sup>23</sup> the Seventh Circuit found consumer assent to a shrinkwrap license. The decision dramatically influenced the debate surrounding the enforceability of shrinkwrap licenses.<sup>24</sup> The court distinguished this case from prior decisions, including *Step-Saver*, by noting the presence of a consumer and a vendor in the transaction, rather than two merchants.<sup>25</sup> Refusing to apply UCC section 2-207 to a consumer-

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19. *Id.* The court used UCC section 2-207(3) to hold that the *conduct* of both parties indicated that a contract had been formed at the conclusion of the telephone conversation, even though there was a lack of detailed terms and extensive writing between the parties.

20. *Id.* Although the case involved only one standardized form, the court saw the case as a modified version of the classic “battle of the forms” situation. *Id.* at 99 (arguing that there is no reason that the spirit of UCC section 2-207 cannot apply in situations involving only one form).

21. UCC section 2-207(3) provides:

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

UCC § 2-207(3) (2000).

22. 939 F.2d at 99. “Gap fillers” are supplementary terms incorporated under other provisions of the UCC. In short, they are default rules that provide, for example, minimum warranties under sections 2.314 and 2.315. *See id.*

23. 86 F.3d 1447 (7th Cir. 1996).

24. *See, e.g., Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000), *aff’d*, 234 F.3d 1265 (3rd Cir. 2000); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash. 2d 568 (2000). *But see Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000). In *Klocek*, the court declined to enforce a shrinkwrap license, explicitly stating that it would not follow *ProCD*. The court employed a similar analysis to that in *Step-Saver*, and held that the offer and acceptance occurred at the moment the vendor initiated the shipment of the purchase. The court acknowledged that UCC section 2-207 generally applies to the “battle of the forms” situation, but then emphasized that “nothing in its language precludes application in a case which involves only one form.” *Klocek*, 104 F. Supp. 2d at 1339.

25. 86 F.3d at 1452 (stating that *ProCD* was the first case to address directly the issue of the enforceability of a shrinkwrap license in a consumer transaction). Accord-

vendor transaction, the court found consumer assent under Wisconsin's version of UCC section 2-204.<sup>26</sup>

The court emphasized that the offeror, as the master of the offer, had the ability to dictate how and when an offeree accepts the offer.<sup>27</sup> First, in contrast to *Step-Saver*, the court concluded the vendor was the offeror.<sup>28</sup> Then, the court explained that "a vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance."<sup>29</sup> Vendor ProCD could propose the method by which the buyer would accept his offer. Consequently, ProCD dictated that the buyer's acceptance occurred after the purchase, when the buyer had the opportunity to review the shrinkwrap terms and failed to return the merchandise for a refund.<sup>30</sup> In contrast to *Step-Saver*, contract formation extended after the purchase, such that the shrinkwrap license was not a modification of an existing agreement, but instead contained important terms that completed the contract.<sup>31</sup>

In *Hill v. Gateway 2000 Inc.*,<sup>32</sup> the Seventh Circuit extended its holding in *ProCD*. The court emphasized that parties may form a contract through a layered process.<sup>33</sup> The buyer orders the product and the vendor initiates its delivery. Then, the buyer receives the delivery and, within a certain time frame (e.g., 30 days), inspects the enclosed shrinkwrap license.<sup>34</sup> If the buyer does not return the product within the stated period, the buyer assents to the shrinkwrap license and the parties finally form a contract.<sup>35</sup>

Under Uniform Computer Information Transaction Act ("UCITA"),<sup>36</sup> courts would enforce layered shrinkwrap licenses as found in *ProCD* and

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ingly, the Seventh Circuit distinguished itself from the prior decisions of *Step-Saver*, *Arizona Retail Systems, Inc. v. Software Link Inc.*, 831 F. Supp. 759 (D. Ariz. 1993), and *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1998). *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1452-53.

31. *Id.*

32. 105 F.3d 1147 (7th Cir. 1997).

33. *Id.* at 1150.

34. *Id.*

35. *Id.* at 1148. See also *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 250-51 (N.Y.App. Div. 1998) (holding that shrinkwrap license terms delivered following a mail order are not modifications to the contract, but part of the original agreement between the parties still in the process of contract formation).

36. UNIF. COMPUTER INFO. TRANSACTIONS ACT, available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm> (Aug. 23, 2001) [hereinafter

*Hill*.<sup>37</sup> Courts would also enforce online licenses under UCITA, presuming the vendor had required the consumer to manifest assent to its terms.<sup>38</sup> The future influence of UCITA is questionable, however. Although two states have adopted this model statute,<sup>39</sup> the vast majority of states have refused to consider it or have postponed its enactment indefinitely.<sup>40</sup> Even if states were to enact UCITA, federal law and policy could preempt it.<sup>41</sup>

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UCITA]. UCITA, a model contract law statute promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), has sought to supplement Article 2 of the UCC. UCITA was promulgated to increase uniformity among the various jurisdictions, specifically in the context of transactions involving information technology. See Charles H. Fendell & Dennis M. Kennedy, *UCITA Is Coming!!! Part Two: Practical Analysis for Licensor's Counsel*, 17 *COMPUTER LAW* 3 (2000).

37. UCITA, *supra* note 36, § 208 cmt. 3 (supporting "layered contracting" as found in *ProCD* and *Hill*.)

38. Seemingly, a clickwrap license with an "I agree" icon or an unchecked box gives the consumer the opportunity to manifest assent under the statute. See UCITA *supra* note 36, § 208(1) ("A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.").

39. Virginia has almost fully adopted UCITA, while Maryland's adoption is qualified. For a concise history and analysis on state responses to UCITA, see Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 *BERKELEY TECH. L.J.* 461 (2001).

40. For a recent update on UCITA and its adoption, See Carol A. Kunze, *What's Happening to UCITA in the States*, at <http://www.ucitaonline.com/whathap.html> (last visited Jan. 25, 2002).

41. Some commentators believe that the Patent and Copyright Acts would preempt a state statute like UCITA. See, e.g., David Nimmer, *The Metamorphosis of Contract into Expand*, 87 *CAL. L. REV.* 17 (1999) [hereinafter Nimmer, *Metamorphosis*]. To be clear, the viability of preemption of private agreements (like a shrinkwrap agreements) is unclear because of the right to contract. See *infra* Part IV.C.1. But, the possibility of federal preemption of state statutes is clear, especially if a court views a state law as in direct conflict with federal policy. See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 695-96 (2d Cir. 1992); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988) (using the Copyright Act to preempt a state statute in conflict with an alleged reverse engineering policy surrounding section 117). *But see*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453-54 (7th Cir. 1996) (giving examples from criminal and trade secret law to assert that property rights can originate from both federal and state law); Raymond T. Nimmer, *Breaking Barriers: The Relations Between Contract and Intellectual Property Law*, 13 *BERKELEY TECH. L.J.* 827, 827-30 (1998) (viewing federal intellectual property as "default rules" working with and potentially altered by state contract law); Joel Rothstein Wolfson, *Contact and Copyright Are Not at War: a Reply to "The Metamorphosis of Contract into Expand"*, 87 *CALIF. L. REV.* 79 (1999).

### C. The Relevance of *ProCD* in Cyberspace

The *ProCD* decision is the nearest a federal appeals court has come to addressing consumer assent in clickwrap and browsewrap agreements.<sup>42</sup> Although not a clickwrap or browsewrap license, the shrinkwrap license in *ProCD* has characteristics similar to those in cyberspace. In *ProCD*, for instance, the shrinkwrap license automatically presented itself on the consumer's computer screen after the software was loaded, but before the software would run.<sup>43</sup> The consumer could not bypass the license and use the program without indicating his acceptance of the license terms.<sup>44</sup> Thus, the shrinkwrap license in *ProCD* shares important characteristics with on-line clickwrap licenses.<sup>45</sup> In contrast, the shrinkwrap license in *Step-Saver* was in hardcopy form, enclosed within the delivered package.<sup>46</sup> Consequently, the software program did not require an indication of assent to run.

Furthermore, the *ProCD* court addressed the enforceability of a license agreement between a software vendor and a consumer.<sup>47</sup> The use of an online license—whether clickwrap or browsewrap—often involves transactions between a vendor and a consumer. In contrast, the transaction in *Step-Saver* included a software producer and a value-added retailer that integrated the software into a product to sell to consumers.<sup>48</sup>

In *Specht v. Netscape Communications Corp.*, the court found that the decision in *ProCD* had important implications for online agreements.<sup>49</sup> Accordingly, the court relied on precedent from the Seventh Circuit in *ProCD* to address the issue of consumer assent in cyberspace.

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42. Other Circuits have not expressly adopted the Seventh Circuit position regarding shrinkwrap licenses.

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

44. *Id.*

45. See *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001) (noting that the shrinkwrap license in *ProCD* has similar characteristics to online licenses). See also *infra* Part III.A.

46. 939 F.2d at 95-96.

47. See *supra* note 25.

48. 939 F.2d at 95.

49. 150 F. Supp. 2d at 592.

## II. CASE SUMMARY

### A. Facts of the Case

Defendant Netscape provided free copies of the software program "SmartDownload" on its website.<sup>50</sup> Visitors clicked on a box indicating a desire to download the Netscape software.<sup>51</sup> The software program proceeded to download itself onto visitors' hard drives.<sup>52</sup> Netscape argued that downloading the software indicated assent to the license on Netscape's website.<sup>53</sup> Netscape did not require visitors to click on an "I accept" button or otherwise indicate their acceptance to the license agreement before they were able to download the "SmartDownload" software.<sup>54</sup> On the specific webpage where the downloading took place, the only reference to Netscape's license agreement appeared in the text of a link which read: "Please review and agree to the terms of the Netscape SmartDownload software license agreement."<sup>55</sup> This link was visible only if the visitor scrolled down the webpage.<sup>56</sup> The issue was whether there was consumer assent, given the link's placement and wording, and the general features of the website that might put the visitor on notice of such a license.<sup>57</sup>

### B. The District Court's Decision

Judge Hellerstein of the Southern District of New York held that Netscape failed to provide sufficient notice of its license and consequently, found that the plaintiffs did not assent to the browsewrap license.<sup>58</sup>

The court viewed *ProCD*, not *Step-Saver*, as the relevant authority in evaluating consumer assent online.<sup>59</sup> The court noted that the shrinkwrap agreement in *ProCD* had presentation characteristics similar to a typical clickwrap license.<sup>60</sup> Accordingly, the court found clickwrap licenses gen-

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50. *Id.* at 587.

51. *Id.* The clicking of this box had no connection to viewing or accepting the terms of the license agreement. *Id.*

52. *Id.*

53. *Id.* at 588.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 587.

58. *Id.* at 595-96.

59. *See id.* at 595.

60. *See id.*

erally enforceable.<sup>61</sup> The court did not question *ProCD*'s holding that consumers assent to the terms of shrinkwrap licenses.<sup>62</sup>

Because the court in *Netscape* viewed clickwrap agreements as valid, the court framed the law such that clickwrap presentation would equal assent, while browsewrap presentation would not.<sup>63</sup> Consequently, the court created a test for determining whether an online license represents a clickwrap or a browsewrap license.<sup>64</sup>

### III. DISCUSSION

In *Netscape*, the court recognized two procedural characteristics as important when characterizing an online agreement as a browsewrap or a clickwrap license.<sup>65</sup> The presence of both characteristics indicates a clickwrap license, their absence a browsewrap license.<sup>66</sup> The court derived the two characteristics from the shrinkwrap license in *ProCD*.<sup>67</sup> The shrinkwrap agreement in *ProCD* gave "[the consumer] no choice, because the software splashed the license on the screen and would not let [the consumer] proceed without indicating acceptance."<sup>68</sup> First, *ProCD* required the customer to affirmatively indicate acceptance of the license.<sup>69</sup> The software program needed this affirmative action before it could run.<sup>70</sup> Second, the software automatically presented the license.<sup>71</sup> The consumer did not need to click on a link to view the license.

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61. *See id.* at 595-96.

62. For arguments against the finding of assent in clickwrap and shrinkwrap agreements, see generally Zachary M. Harrison, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestion of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907 (1998); Jeffery A Moddisett & Cindy M. Lott, *Cyberlaw and E-Commerce: A State Attorney General's Perspective*, 94 NW. U. L. REV. 643 (2000) (emphasizing that click-through agreements remain a take-it-or-leave-it proposition without any satisfaction of a meeting of the minds test); and Roger E. Schechter, *The Unfairness of Click-On Software Licenses*, 46 WAYNE L. REV. 1735, 1742-43 ("The fine print, the legalese, and the keen desire to load the software and take it for a spin all tend to encourage the consumer to rip open the envelope or click on the 'I accept' button without giving much thought to the purported license at all.").

63. 150 F. Supp. 2d at 595.

64. *See id.* at 595-96. For a detailed discussion see *infra* Part III.

65. *See id.* at 595-96.

66. *See id.*

67. *See id.*

68. *Id.* at 592 (quoting *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996)).

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

70. *Id.*

71. *Id.*

In recent cases, other courts have suggested that the absence of one factor may not preclude the finding of consumer assent if other features of the website put the consumer on notice.

### A. An Affirmative Indication of Assent

Clicking an "I agree" icon or click-checking an unchecked box often represents consumer assent.<sup>72</sup> In *Netscape*, the court emphasized that defendant Netscape did not require its consumers to affirmatively indicate their acceptance of its online license.<sup>73</sup> Significantly, the court stressed that the "mere act of downloading . . . [was] hardly an unambiguous indication of assent. The primary purpose of downloading was to obtain a product, not to assent to an agreement."<sup>74</sup> Thus, the requisite affirmative act must be independent from an act indicating a desire for a product. The court found that clicking an "I agree" icon placed at the end of a license would have "no meaning or purpose other than to indicate assent"<sup>75</sup> to its terms.

However, in *Register.com v. Verio Inc.*,<sup>76</sup> the district court enforced an online license, even where the consumer did not click an icon or check a box to indicate acceptance of the terms.<sup>77</sup> The *Netscape* court would have viewed this license as a browsewrap license because the vendor did not require a separate, affirmative acceptance of the license terms.<sup>78</sup> The software vendor in *Verio* automatically presented the terms in clear view and in close proximity to its important query service.<sup>79</sup> Online consumers would easily notice the terms.<sup>80</sup> Accordingly, the court in *Verio* found that simply submitting a query constituted both a desire to use the service and an indication of the consumer's acceptance of its license terms.<sup>81</sup> Also, the court noted that a paragraph next to the query read: "[b]y submitting this query, you agree to abide by these terms."<sup>82</sup> The court found that this strong language left "no question that by proceeding to submit a WHOIS

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72. See *infra* note 97 (listing cases upholding online licenses with clicking requirement).

73. 150 F. Supp. 2d at 595.

74. *Id.*

75. *Id.*

76. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

77. *Id.* at 248.

78. 150 F. Supp. 2d at 594-95.

79. 126 F. Supp. 2d at 248. Consumers used the query function in order to check the availability of websites with their desired domain name. See *id.*

80. *Id.*

81. *Id.*

82. *Id.*

query, Verio manifested its assent to be bound by Register.com's terms of use . . . .<sup>83</sup> Thus, the clicking of an "I agree" icon was not an essential requirement, given the other features of the website that put the consumer on notice.

### B. The Automatic Presentation of the License

The *Netscape* court emphasized that ProCD's software program automatically "splashed" the license onto the consumer's computer screen.<sup>84</sup> In contrast, the consumers in *Netscape* needed to click on a link located within a "small box of text,"<sup>85</sup> in order to view the license. The small box of text read: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software."<sup>86</sup> The court criticized both the small size of the reference link and the mild request "please review."<sup>87</sup> These words suggested a mere invitation and did not "indicate that a user *must* agree to the license terms before downloading and using the software."<sup>88</sup> With stronger language and more prominent print, other courts may find that a link provides a level of notice tantamount to an automatic "splash."

In *Pollstar v. Gigmania*,<sup>89</sup> the online vendor utilized conditional language stating its online services and "uses [were] subject to the license agreement."<sup>90</sup> This language served as the textual link to the agreement.<sup>91</sup> The textual link was in small gray print on a gray background and the vendor failed to underline the text.<sup>92</sup> In addition, the court noted that some blue colored links failed to function, perhaps causing consumers to assume that all colored links would also fail.<sup>93</sup> In sum, the court found that the website did not put visitors on notice and termed the license a browsewrap license.<sup>94</sup> The court cited *ProCD* and noted that, "unlike the shrinkwrap license held enforceable in *ProCD v. Zeidenberg*, the license agreement at

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83. *Id.*

84. 150 F. Supp. 2d at 592.

85. *Id.* at 595.

86. *Id.*

87. *Id.* at 596.

88. *Id.*

89. 170 F. Supp. 2d 974 (E.D. Cal. 2000).

90. *Id.* at 981.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* But, the court hesitated to rule that browsewrap agreements are unenforceable. The court denied the motion to dismiss, preferring to defer its ruling on the enforceability issue, even though the court found that notice was questionable in browsewrap licenses. *Id.* at 982.

issue is a browsewrap license.”<sup>95</sup> The court also noted that the “shrinkwrap license [in *ProCD*] appears on the screen when the CD or diskette is inserted . . . .”<sup>96</sup> The license’s automatic presentation in *ProCD* contrasted starkly with the small gray link in *Pollstar*.

### C. The Two Characteristics Considered Together

If both characteristics are present, courts will likely find consumer assent. When the vendor automatically presents the license to the consumer and requires the clicking of an “I accept” icon, the vendor puts the consumer on notice of the standard terms of the license. Given such a presentation, courts have enforced the online license, often terming it a clickwrap agreement.<sup>97</sup>

Courts generally will not enforce a license when these two characteristics are absent. When the vendor does not require a clicking acceptance and provides an unnoticeable link to the license, courts find the level of notice minimal and consumer assent absent.<sup>98</sup> *Netscape* is one example of such a case.<sup>99</sup>

But, when one characteristic is present and the other absent, the outcome is less clear. Courts will likely consider enforcing a license with only one characteristic if other design elements of the website put the consumer on notice. For example, if a vendor creates a prominent link to the license and places the link directly adjacent to an “I accept” icon, a court may find an acceptable level of notice. Courts may consider whether the vendor has the link underlined or in a distinguishable color, or if condi-

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95. *Id.* at 981.

96. *Id.*

97. *See, e.g., Caspi v. Microsoft Network LLC*, 732 A.2d 528 (N.J. App. Div. 1999) (upholding clickwrap license when user was prompted by vendor to view license and had opportunity to click either “I Agree” or “I Don’t Agree”); *Groff v. Am. Online Inc.*, No. PC 97-0331, 1998 WL 307001 (R.I. Super. May 27, 1998) (validating a clickwrap license where user needed to click “I agree” at the conclusion of the agreement in order to proceed with the online service); *see also In re Realworks, Inc. Privacy Litig.*, No. 00C1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C 98-20064, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998).

98. An extreme example of an unnoticeable link to a license is in *Ticketmaster Corp. v. Tickets.com Inc.*, CV 99-76542000, 54 U.S.P.Q.2d (BNA) 1344 (C.D. Cal. Mar. 27, 2000). In this “deep-linking” case, the customer could hyperlink from a web page of Tickets.com directly to an interior web page of Ticketmaster, thereby bypassing the home page of Ticketmaster (where the vendor placed the link to the license agreement). On this interior page, the customer could proceed to buy tickets without ever noticing or viewing the link to license agreement. The court found no assent and held the license unenforceable. *Id.*

99. *See Netscape*, 150 F. Supp. 2d at 594; *see also Pollstar*, 170 F. Supp. 2d 974.

tional language occupies the text of the link. A prominent, colorful link next to an "I accept" icon may prove sufficient for a finding of consumer assent.

Courts may also find consumer assent in the absence of a clicking acceptance, if the consumer is somehow put on notice. For example, if the vendor automatically places the terms in plain view on the main webpage of the site, a consumer is arguably on notice of these terms and his use of the website may constitute assent. *Verio* is an example of a court finding assent in this type of situation.<sup>100</sup>

In sum, a clicking acceptance and automatic presentation prove to be the two fundamental characteristics in finding consumer assent in cyberspace. As noted above, however, courts may find assent if the overall website presentation still puts the consumer on notice of the binding license.

#### IV. THE ENFORCEABILITY OF TERMS

Where the court finds consumer assent, an enforceable agreement exists. Such a finding would not, however, preclude a court from striking or modifying particular terms within the agreement. The *Netscape* court did not address the issue of striking particular terms as illegal because it found the entire license agreement unenforceable. Assuming an enforceable agreement, however, courts might modify or eliminate terms by relying upon several legal doctrines: 1) the unconscionability doctrine, 2) state and federal consumer protection laws, or 3) copyright preemption.

##### A. The Unconscionability Doctrine

The courts may employ the unconscionability doctrine to strike terms from an online agreement. UCC section 2-302 codifies the traditional common law doctrine of unconscionability.<sup>101</sup> Generally, courts recognize

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100. Although plaintiff Register.com succeeded in its suit, the online vendor has changed its website to conform more closely to the ruling in *Netscape*. At the time of publication, the website utilizes an unchecked box that must be clicked-checked for the consumer to complete his online transaction. Interestingly, however, the license agreement is not longer in plain view, as it was previously. Instead, Register.com has placed a blue colored link to the license, and has placed the link adjacent to the unchecked box. Thus, a consumer could simply check the box without having read the license. See register.com, at <http://www.register.com> (last visited Jan. 25, 2002).

101. UCC section 2-302(1) states:

If the court as a matter of law finds the contract or any clause 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 clause, or it may so limit the

that both substantive and procedural unconscionability must be present for a court to alter the terms of an otherwise enforceable contract.<sup>102</sup> Substantive unconscionability exists when an agreement contains terms overly harsh and one-sided.<sup>103</sup> Procedural unconscionability occurs when a party lacks a meaningful choice in entering into the contract.<sup>104</sup> This could include a situation where the party lacks a reasonable opportunity to read and understand the terms of a contract due to time pressure and the vendor's intent to hide terms in a maze of legalese.<sup>105</sup>

Courts are unlikely to find an online license procedurally unconscionable. If the court finds consumer assent to the license as a whole, the website provides sufficient notice to the consumer. In short, the procedural or presentational characteristics of the website are reasonable. If the court then strikes terms for reasons of procedural unconscionability, the court would contradict its initial finding of sufficient notice and consumer assent. Indeed, the court's evaluation of whether the license is a clickwrap or a browsewrap license is already a quasi-procedural unconscionability analysis. Further, unlike shrinkwrap licenses where consumers read the license terms when they open the package, online licenses provide the opportunity to view terms before the consumer completes the purchase.

Courts have been reluctant to use this doctrine.<sup>106</sup> Even though UCC section 2-302 gives judges wide discretion to "police the bargain," commentators note that unconscionability is easy to assert but especially difficult to prove.<sup>107</sup> Even in noteworthy examples where significantly harsh

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application of any unconscionable clause as to avoid any unconscionable result.

UCC 2-302(1) (2000).

102. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

103. *Id.*; see also *Williams v. Walker Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965); *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568 (1999) (explaining that substantially unconscionable terms should be "shocking to the conscience" or "monstrously harsh").

104. See *supra* notes 102 and 103.

105. See *id.*

106. David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 534-37 (1988) (arguing that courts, absent legislative guidance, are unwilling to interfere with sales agreements that people entered into for their interests).

107. One commentator notes:

Despite the charter granted to courts by the Uniform Commercial Code's unconscionability provision [§ 2-302], such decisions remain especially rare in the realm of commercial and consumer sales. The landmark decisions declining enforcement of written provisions—decisions like *Henningsen v. Bloomfield Motors, Inc.*, and *Williams-*

terms and arguably unfair procedural elements exist, courts hesitate to modify an otherwise enforceable agreement. In *M. A. Mortenson Co. v. Timberline Software Corp.*,<sup>108</sup> the plaintiff lost two million dollars because his bid analysis software contained an "obscure bug."<sup>109</sup> The Washington Court of Appeals held the remedies limitation clause in the shrinkwrap license to be enforceable.<sup>110</sup> The court reasoned that the plaintiff was on notice because of the widespread industry practice of using shrinkwrap licenses to limit liability.<sup>111</sup> Although the parties never discussed the clause, the court cited Comment 3 to UCC section 2-719 to stress that limitations on consequential damages are "merely an allocation of unknown or undeterminable risks."<sup>112</sup> The court viewed risk allocation as essential to keeping companies in business and making software affordable.<sup>113</sup> With these economic issues in the background, courts prove even more reluctant to "police" the terms of an otherwise enforceable agreement.

## B. Unconscionability Revisited in Consumer Protection Statutes

Since the consumer movement of the 1960s and 1970s, federal and state governments have created numerous acts addressing unfair and deceptive trade practices, and consumer protection.<sup>114</sup> Although this legislation primarily addresses "fraudulent and illegal" activities, many acts explicitly address unconscionable contract provisions and unfair trade practices.<sup>115</sup> Some commentators argue that courts will use various types of

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Thomas Furniture Co.—are beginning to stand out in the casebooks as curiosities.

*Id.*; see also BALLON, *supra* note 2, at § 26-32.

108. 140 Wn.2d 568 (1999).

109. *Id.* at 576.

110. *Id.* at 589.

111. *Id.* at 587.

112. *Id.*

113. *Id.*

114. The Federal Trade Commission Act ("FTCA") inspired the creation of state acts which created a state agency with the power to enforce the states' laws on deceptive practices. Currently, every state has enacted state statutes directed at providing consumers with some degree of protection against a broad range of unscrupulous or misleading trade practices. In addition, the Federal Trade Commission ("FTC") has taken a greater role in regulating electronic commerce than any other governmental agency. See BALLON, *supra* note 2, at § 31.02[1] (2001) (discussing the FTC's preeminent role in shaping U.S. law on data privacy, unfair and deceptive advertising practices, the effect on competition from proposed mergers, and online fraud).

115. JOHN P. DAWSON ET AL., *CONTRACTS* 694-95 (1998) (estimating that 15 to 20 of these state acts have unconscionability provisions); see also Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices:*

consumer protection statutes, in place of the common law doctrine of unconscionability, to modify harsh and unfair terms in private agreements.<sup>116</sup> For example, the Magnuson-Moss Act mandates that vendors employ minimum standards for their warranty policies.<sup>117</sup> This federal act, along with state laws, applies in cyberspace.<sup>118</sup> Courts have emphasized that the Act functions as a supplement to state consumer protection laws,<sup>119</sup> finding that it “leaves room for further state regulation.”<sup>120</sup> The Magnuson-Moss Act enables consumers to require vendors to conspicuously disclose the terms of a written warranty (including terms regarding consequential damages) prior to the sale.<sup>121</sup> The Act also enables consumers to use the “unconscionability” language of state statutes to supplement their consumer protection.<sup>122</sup> Together, federal and state law provides consumers alternative methods for demonstrating procedural and substantive unfairness.

### C. Copyright Preemption

In the future, courts may also use the Copyright Act to preempt terms within online licenses.<sup>123</sup> However, the preemption of contractual terms

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*The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980) (listing numerous state acts that address unconscionable contract provisions); Anthony P. Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984).

116. See BALLON, *supra* note 2, at §§ 26.02[6], 31 (emphasizing that the scarce application of common law unconscionability should not mislead online vendors into thinking that this doctrine will not serve as a limitation in the future, given the increasing legislative attention to consumer protection issues in cyberspace); DAWSON, *supra* note 115, at 695 (“The main point here is that common law and UCC approaches to unconscionability have been expanded, and that, in general, much of the law of consumer protection is currently the work of statutes and not common law doctrines.”).

117. 15 U.S.C. §§ 2301-2312 (1994).

118. Since cyberspace defies state boundaries, online vendors of consumer goods or services must comply with both federal statutes and state laws of all states from which they accept orders. See generally, BALLON, *supra* note 2, at § 31 (2001). It should be noted that even if many states were to adopt UCITA, the model law provides that conflicting state consumer protection laws or regulations would supersede UCITA terms. Proposed UCC § 2B-105(d) (Aug. 1, 1998 Draft).

119. See *id.*; *Motor Vehicle Mfrs. Ass’n v. Abrams*, 899 F.2d 1315, 1319-21 (2d Cir. 1990); *Automobile Importers of Am., Inc. v. Minnesota*, 871 F.2d 717, 721 (8th Cir. 1989); *Chrysler Corp. v. Texas Motor Vehicle Comm’n*, 755 F.2d 1192, 1205-06 (5th Cir. 1985).

120. *Automobile Importers*, 871 F.2d at 721.

121. 15 U.S.C. §§ 2302-2303 (1994).

122. See *supra* notes 114 and 115 and accompanying text.

123. Generally speaking, the United States Constitution mandates that federal law preempt state laws in direct conflict. U.S. CONST. art. VI, § 2.

faces important obstacles. First, courts and commentators disagree on whether federal law can preempt terms within a private contract, as compared to a state statute. Second, enforcement of the first sale doctrine and other provisions of the Copyright Act<sup>124</sup> demands that courts characterize the vendor as selling rather than “licensing” their software to the consumer. Given the widespread use of shrinkwrap and clickwrap agreements to “license” software, this characterization may prove difficult.

### *I. The Preemption of Private Agreements*

There is no consensus among courts and commentators as to whether federal law can or should preempt terms within private agreements, including online licenses. In a widely cited case regarding copyright preemption, *Vault Corp. v. Quaid Software Ltd.*, the court addressed the preemption of a state statute, not a private agreement between parties.<sup>125</sup> Some commentators argue that the case law and the preemption clause of the Copyright Act<sup>126</sup> support the reading that the Copyright Act cannot preempt the terms of a private contract.<sup>127</sup> Arguably, allowing parties to fashion the terms and conditions of their transactions is more efficient and desirable than using the government to estimate the expectations of the parties.

However, there are strong arguments that federal law can and should preempt the terms of a private agreement. First, courts may construe terms within private agreements by applying federal copyright law and policy.<sup>128</sup> These cases stress the importance of preventing parties from privately undoing the relative rights that Congress took pains to balance and allocate.<sup>129</sup> Commentators claim that the Copyright Act properly gives copyright owners, licensees, and the public at large the precise economic incen-

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124. See *infra* note 135.

125. 847 F.2d 255 (5th Cir. 1988).

126. Courts apply the preemption clause (Section 301) by using an “extra element” test. In short, if a state statute has an “extra element” not explicitly present in the Copyright Act, then such a statute survives preemption. See *id.*

127. Some courts have stated that the contract itself is an “extra element,” consequently holding that such “agreed-to” terms are immune from preemption. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *National Car Rental Sys. v. Computer Assocs. Int'l*, 991 F.2d 426, 431 (8th Cir. 1993). Citing these cases, some commentators conclude that “agreed-to” contract provisions escape federal preemption. See MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.01(B) (2001).

128. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1272 (1995) (collecting cases).

129. See *id.*

tives to innovate.<sup>130</sup> Because producers use shrinkwrap and clickwrap licenses in mass-market transactions,<sup>131</sup> courts would be giving producers the opportunity to re-write copyright law if federal law did not preempt private contracts.<sup>132</sup> Furthermore, the freedom to contract argument does not retain force in the context of shrinkwrap and clickwrap licenses.<sup>133</sup> These licenses are unilateral agreements that consumers accept on a take-it-or-leave-it basis. Although the freedom to contract has appeal where parties to commercial deals actually negotiate their use and terms, shrinkwrap licenses do not represent a meeting of the minds as is traditionally required by contract law. As such, courts are better left construing these unilateral terms with help from federal legislation that allocates incentives and liabilities in balance.

## 2. *Licensing Around the First Sale Doctrine*

Courts will likely refrain from striking an entire "license" as illegal under the first sale doctrine.<sup>134</sup> Rather, courts should use this doctrine to

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130. See, e.g., Thomas L. Irving et. al., *The Significant Federal Circuit Cases Interpreting Section 112*, 41 AM. U. L. REV. 621 (1992); Lemley, *supra* note 128.

131. See *infra* note 137.

132. See Nimmer, *Metamorphosis*, *supra* note 41, at 40 (arguing that the enforcement of shrinkwrap licenses would effectively change the federal law); see also Charles R. McManis, *The Privatization of American Copyright Law*, 87 CALIF. L. REV. 173 (1999) (stressing that if federal law failed to preempt these license agreements, a licensor could re-write federal copyright simply by drafting a license in the manner they found in their interests).

133. In *The Metamorphosis of Contract into Expand*, David Nimmer criticizes the argument that a shrinkwrap license is similar to a traditional, private agreement affecting only two parties. See Nimmer, *Metamorphosis*, *supra* note 41, at 40-41.

134. In most cases, a court would not disregard the entire "license agreement," if the court found a sale of goods rather than a "license" of goods. Congressional notes surrounding section 109(a) explicitly state that vendors can contract around the first sale doctrine. See Notes of Comm. on the Judiciary, H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659. However, the notes also state that if the intellectual property owner/vendor brings suit, the terms are enforceable only for a breach of contract claim, not for a copyright infringement claim. *Id.*; see also Lemley, *supra* 128, at 1273; David A. Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine*, 30 JURIMETRICS J. 157 (1990). For example, if Microsoft sold one million copies of Windows to distributor A and their contract limited distributor A from reselling the copies in their component parts, Microsoft could not claim infringement and enjoin distributor A from its actions. But, Microsoft could sue under a breach of contract theory and receive expectation damages for distributor A's actions. Consequently, courts would preempt terms within a license agreement that conflict with the first sale rights of buyers, but only if the seller's claim is for copyright infringement. In short, under the committee notes, buyers retain a property right to distribute and use their copy under the first sale doctrine, but could face liability in the form of expectation damages if they vio-

preempt certain terms within an online license. This preemption depends, however, on the court characterizing the producers as selling rather than “licensing” their products.

When a buyer purchases a copy of a copyrighted product, the buyer attains certain “first sale” rights in their purchased copy.<sup>135</sup> Generally, the buyer can resell, dispose, or otherwise control the use of his copy. Of course, the producer can enjoin the buyer from reproducing his copy, but the producer lacks title to the tangible piece of property, which the buyer owns.<sup>136</sup>

Software vendors get around the first sale doctrine because they “license,” rather than sell, their products to consumers.<sup>137</sup> Consumers only attain their rights under the first sale doctrine when they purchase a copy of the software. For example, when a consumer buys Windows 2000 in the store, the consumer merely receives a license from Microsoft to use the product. Although this license is indefinite, Microsoft would claim no “first sale” occurs since the shrinkwrap license within the package fails to transfer ownership to the consumer.<sup>138</sup>

In a recent case, *Softman v. Adobe*,<sup>139</sup> the district court held that a commercial transaction between a software producer and a distributor was actually a disguised sale, rather than a purported “license” of goods.<sup>140</sup> The court cited the Ninth Circuit decision in *Microsoft v. DAK* to stress that “it is well-settled that in determining whether a transaction is a sale, a lease, or a license, courts look to the economic realities of the exchange.”<sup>141</sup> The court noted that distributor Softman paid for the merchandise in full and accepted the risk of any subsequent damage to the copies,

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late their contract. Courts would enforce the overall agreement, but preempt certain terms within it.

135. Section 109(a) states: “the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.” 17 U.S.C. § 109(a) (1994).

136. In *The Metamorphosis of Contract into Expand*, David Nimmer distinguishes between tangible and intangible property within a copyrighted product. He explains that while a software publisher that distributes its products does not part with their intangible property (copyright), the publisher does part with the tangible property of the copy. See Nimmer, *Metamorphosis*, *supra* note 41, at 36.

137. Whether in the form of shrinkwrap licenses, online licenses, or bargained-for licenses involved in business-to-business exchanges, licensing dominates the transactional practice of the software industry. See generally, BALLON, *supra* note 2, at § 21.

138. See *Microsoft Corp. v. DAK Indus.*, 66 F.3d 1091 (9th Cir. 1995)

139. 171 F. Supp. 2d 1075 (C.D. Cal. 2001).

140. *Id.* at 1086-87.

141. *Id.* at 1084 (citing *DAK*, 66 F.3d 1091, and *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1997)).

and any risk associated with their resale and marketing.<sup>142</sup> On this evidence, the court found that the “first sale” occurred and that the producer transferred ownership to the buyer.<sup>143</sup> Accordingly, Softman attained the first sale right to re-distribute the merchandise in the manner it desired, despite contradictory terms in the license.

While some courts have reached the conclusion that producers sell, rather than license their software,<sup>144</sup> other courts have held otherwise.<sup>145</sup> These courts relied on the fact that licensing was the standard practice of the software industry.<sup>146</sup> But, these cases are also distinguishable because the consumers either adulterated or counterfeited the product.<sup>147</sup>

In the future, courts may look beyond the industry practice of “licensing” and analyze the underlying facts of the transaction. If courts find that producers actually “sell” their software, buyers will own the software and courts may preempt terms in conflict with ownership rights under the Copyright Act.<sup>148</sup>

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142. *Id.*

143. *Id.* at 1086-87.

144. *See, e.g.,* RRX Indus., Inc v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985); Novell, Inc. v. CPU Distrib., Inc., No. H-97-2326, 2000 LEXIS 9975 (S.D. Tex. May 4, 2000); Applied Info. Mgmt., Inc. v. Icart, 976 F. Supp. 149, 155 (E.D.N.Y. 1997).

145. *See* Adobe Sys., Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1093 (N.D. Cal. 2000); Microsoft Corp. v. Harmony Computers & Elecs., Inc., 846 F. Supp. 208, 212 (E.D.N.Y. 1994).

146. Indeed, *One Stop* had extensive extrinsic evidence on the industry practice. *See One Stop*, 84 F. Supp. 2d 1086.

147. *See id.* at 1093 (noting that the consumer destroyed the bar code and serial numbers, peeled off “education version” stickers from the software, and admitted to trying to resell as retail the Adobe product at a price below market); *Harmony*, 846 F. Supp. at 212 (stating that defendants tried to sell counterfeit Microsoft products).

148. Importantly, consumers also receive user rights under section 117 of the Copyright Act. However, courts have held that in order to obtain rights under section 117 of the Copyright Act, the consumer must be the *owner* of the copy he possesses. *See* DSC Communications Corp. v. Pulse Communications, Inc., 170 F.3d 1354, 1359 (Fed. Cir. 1999). If the consumer is merely a “licensee,” this could jeopardize the finding of ownership. *But see id.* at 1360-61 (noting that if the transaction more accurately characterized a sale of goods, rather than a license of goods, ownership of title would transfer and the rights associated with section 117 should preempt the conflicting terms within the license). Section 117 gives the owner of a particular copy the right to make both archival copies and copies (in RAM) that are necessary in order for the program to run. 17 U.S.C. § 117 (1994). Also, some cases indicate that section 117 gives owners the right to reverse engineer or alternatively, modify their copy, to the extent necessary to run on their particular computer. *See, e.g., Applied Information Mgmt.*, 976 F. Supp. at 155 (E.D.N.Y. 1997).

## V. CONCLUSION

Courts possess effective methods for striking or modifying terms within online license agreements. These methods should prove increasingly important because courts will likely enforce clickwrap licenses. Even if the court finds that the consumer assents to the clickwrap agreement, the court should utilize the unconscionability doctrine, consumer protection statutes, and federal preemption to strike unfair terms of the license.

Many consumer protection statutes explicitly address “unconscionable” contract provisions, while others contain a range of mandatory standards for fair trade practices.<sup>149</sup> Courts may rely on such laws as alternatives or supplements to the common law unconscionability doctrine. In addition, courts may conclude that federal preemption of contractual terms is necessary, given the ubiquity of shrinkwrap and clickwrap licenses, and their potential to radically alter the balance of rights codified in federal intellectual property laws.<sup>150</sup> Finally, courts should increasingly find that a vendor’s “license” of goods actually represents a disguised sale of goods.<sup>151</sup> If vendors “sell” their products, courts will likely preempt terms that contradict “first sale” rights under the Copyright Act. The preemption and striking of terms within online licenses should maintain the integrity of federal intellectual property law, consumer protection law, and traditional ideals of good faith and fair dealing.

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149. *See supra* notes 115 and 116 and accompanying text.

150. *See id.*

151. *See* Microsoft Corp. v. DAK Indus., 66 F.3d 1091 (9th Cir. 1995); *Softman v. Adobe Sys. Inc.*, No. CV 00-04161, 2001 WL 1343955 (C.D. Cal. Oct. 19, 2001); *see also supra* note 139 to 144 and accompanying text.

